

Appeals against Ombudsman determinations

This factsheet has been produced for the Legal Forum held on 27 September 2017. It concerns the procedure for appeals to the High Court following an Ombudsman determination. It is intended as generic guidance for Legal Representatives acting for clients who are participating in an appeal against an Ombudsman determination. The Pensions Ombudsman does not accept any liability for reliance placed on its contents, it is does not amount to legal advice.

What is the time limit for an appeal?

- In England and Wales appeals from determinations or directions of the Pensions Ombudsman lie on a point of law to the High Court under section 151(4) of the Pension Schemes Act 1993.
- They are dealt with by the Chancery Division (see Civil Procedure Rules (CPR) PD 52D paragraph 5.1(8)).
- The permission of the High Court is required for such appeals under CPR rule 52.21 (this has been the case since 6 April 2014).
- The time limit in England and Wales for such appeals is 28 days after the date of an Ombudsman determination. The default time limit for filing an appellant's notice is 21 days from the date of the decision appealed against (CPR rule 52.12(2)(b)). However, the Ombudsman may direct a longer period (CPR rule 52.12(2)(a); and see CPR rule 52.1(3)(c) under which "lower court" includes the person from whose decision an appeal is brought). The Pensions Ombudsman has given a general direction for England and Wales that the person wishing to appeal must lodge the appeal within 28 days after the date of an Ombudsman determination.
- See the latest Chancery Guide (page 124 onwards) for more information on appeals from The Pensions Ombudsman. But please note that reference to the relevant CPR rules has been updated (see above).
- Note that different time limits apply in Northern Ireland and Scotland.

Is the Ombudsman a party to the appeal?

- The Pensions Ombudsman is not formally a respondent to the appeal, the respondent to the appeal will be the other party to the Ombudsman determination. This follows on from

the case of Moore's (Wallisdown) Ltd v Pensions Ombudsman and others [2001] 1 All ER 299.

- However, **The Pensions Ombudsman should always be served with a copy of the notice of appeal by the appellant see CPR PD 52D paragraph 3.4(1)**. This is particularly important because the Ombudsman may wish to intervene in an appeal. The Ombudsman cannot consider his position unless we are alerted to the appeal.

So what does the Ombudsman need to know in connection with an appeal?

- Ordinarily the Ombudsman will not apply to participate in an appeal unless there is a good reason for doing so (see below). Our role will simply be to monitor the appeal for a variety of reasons. Examples may be so that we are afforded the opportunity to change our view on participation if new issues arise during the proceedings, for learning purposes, and so that we know the necessary issues to address if the case is remitted back to us for reconsideration.
- Ordinarily after being sent a copy of the notice of appeal by the appellant we would write to the parties and ask to be updated as the appeal progresses and sent copies of any skeleton arguments, orders etc. We would also attend any full hearings in order to monitor the proceedings.
- It follows that not receiving notification of appeals or being kept updated by the parties (by way of skeleton arguments etc.) is troubling for our office as it means, for example, that there are occasions where we are not afforded the opportunity to participate in an appeal where we may have wished to.
- This is an issue which we took forward with the Chancellor of the High Court last year. As a consequence of this Sir Terence Etherton provided a standing instruction to the appeals office to send us a copy of the notice of appeal in every such appeal. It was hoped that this, along with the appellant's obligations under CPR PD 52D paragraph 3.4(1) would mean that we always receive the relevant appeal notice. Unfortunately, there still appear to be occasions where this doesn't always happen even where the parties are represented.

When will the Ombudsman participate in an appeal?

- In June last year the current Ombudsman, Anthony Arter, decided to review our policy on when the Ombudsman may apply to participate in an appeal. This was following the appeal case of Hughes v Royal London and its wider implications. Royal London did not wish to make representations on the statutory transfer point but did so simply because it was instructed by the court. Under our policy at the time, it was not an appeal which met our criteria to seek to participate in. Our current policy is to look to intervene where an appeal

raises questions affecting our legal jurisdiction and/or internal procedures (or to assist the court). In July 2016 the criteria for participating was extended (see below). However, the overarching position in relation to our extended participation should always be that our participation is intended to “seek to assist the court”.

- Our extended criteria marks a more pro-active role for the Ombudsman in appeals than has previously been the case. When changing our policy the Ombudsman highlighted that when the role of the Pensions Ombudsman was established by Parliament in 1990 the intention was for the Ombudsman to be an accessible alternative to the Courts.
- Examples of increased participation may include where the decision could have a wider impact on the pensions industry, such as pension liberation or auto-enrolment; or where The Pensions Ombudsman has a large number of cases accepted for investigation on the same issue; or where there is a significant concern over access to justice and participation is necessary to properly present and argue the points – the Principle of Equality of Arms.
- Each case will be considered on its own facts/circumstances at the time etc. It does not follow that if a criterion is met we will participate. The Pensions Ombudsman will not look to participate in all appeals or to set any precedent when making a decision about participating.

So what can Legal Representatives do?

- Ensure that they comply with PD 52D paragraph 3.4(1) of the Civil Procedure Rules and send The Pensions Ombudsman a copy of the notice of appeal.
- It is worth noting that where scheme members appeal, they are frequently unrepresented. In such a case the Chancery Guide makes clear that the respondent (trustees or employer or other as the case may be) should take it upon themselves to confirm both that the Ombudsman has been served with the appellant's notice and that the material put before the court includes all material that was before the Ombudsman and is potentially relevant to the appeal.
- It may be appropriate to draw the parties' attention to CPR 52.19 under which an application may be made to limit the recoverable costs of an appeal.
- Legal Representatives should ensure that we are kept updated as to the progress of the appeal, sent copies of any key documents and notified of any hearing dates.