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Case Review | January 12, 2023

Change to Allow Use of Pensions to Purchase Homes Quashed

A recent High Court decision[1] barred the withdrawal of pensions for purchasing residential houses. This had been introduced by the Tax Laws (Amendment) Act, 2020 which amended Section 38 (1A) of the Retirement Benefits Act (the **RBA Act**). These changes were made operational through the Retirement Benefits (Mortgage Loans) (Amendment) Regulations, 2020 (the **Regulations**).

Section 38 (1A) of the RBA Act allows scheme members to use their pension benefits to acquire a residential house. The 2020 changes specifically allowed use of part of pension funds to purchase a residential house in addition to using the pension to secure a mortgage for a residential house.

For a better understanding of the Regulations, please see our detailed analysis in the Institute of Pension Management's Pension Horizon Magazine. Here we focus on the decision's impact on schemes and their members.

What happened?

The 2007 Finance Act introduced Section 38 (1A) into the RBA Act. Thereafter in 2009, the then Minister for Finance published the Retirement Benefits (Mortgage Loans) Regulations to operationalize the mortgage loan framework. At the time, the legal framework only contemplated members using their pensions to secure mortgages. This could be in the form of additional or primary security for a mortgage.

Fast forward to 2020, in line with the Affordable Housing Pillar of the previous Administration's Big Four Agenda, the government made changes to the legal framework by amending the Act and the Regulations to allow members to use their benefits to purchase a home. These changes allowed members to withdraw part of their benefits to purchase residential homes.

The Regulations required all schemes to update their scheme trust deed and rules within 12-months to comply.

Subsequently, a court case was filed seeking to prohibit implementation of the amendments introduced by the Regulations and the Act. The case argued the change was illegal as it did not follow the proper process of law-making, including public participation.

The court agreed, and found the process did not comply with the National Assembly's Standing Orders. The introduction and passing of the changes to Section 38 (1A) of the RBA Act also did not comply with the constitutional requirement for public participation. The court specifically observed the change was introduced at a late stage of the legislative process in a bill that dealt with a different subject matter (tax laws).

The memorandum of objects and reasons included in the bill did not list the RBA Act as one of the laws being amended. The court held that the change heavily impacted on utilization of pensions, and therefore required robust stakeholder engagement and public participation before it was passed.

Impact of the decision?

We are not aware of any appeal against the decision. We therefore expect the RBA to give guidance on the way forward. If the decision is not successfully appealed, trustees will need to amend scheme rules to comply. The decision did not affect use of pension benefits as mortgage security.

Meanwhile, any scheme member who had used pension funds to purchase a home need not worry. Such purchases are safe as the decision did not undo past transactions. However, parties with ongoing transactions or pending approval applications should seek legal advice.

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[1] Judicial Review Application No. 95 of 2020 – Republic v the National Assembly & 2 Others Ex parte Okiya Omtatah Okoiti

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