



The Actuarial Profession
making financial sense of the future

Case Law Update

Actuaries and the Law 2012

© 2010 The Actuarial Profession • www.actuaries.org.uk

The Actuarial Profession
making financial sense of the future

Case Law Update

James Rickards
Outer Temple Chambers

The Cases

- Industrial Acoustics Company Ltd v Crowhurst & Others [2012] EWHC 1614 (Ch) – Showcase of current approach to rectification – practice and principles
- Dalriada Trustees Ltd v Faulds [2012] EWHC 3391 (Ch) Pens.L.R.15 – Pensions Liberation Warfare
- Danks v Qinetiq Holdings Ltd v Pocock [2012] EWHC 570 (Ch) – Switch from RPI to CPI
- Bradbury v British Broadcasting Corporation [2012] 1369 (Ch) – Modifying pensionable pay through contract

Industrial Acoustics Company Ltd v Crowhurst & Others

Rectification – Recap of principles

- Equitable remedy that can only be granted by the court
- Used to correct situations in which the parties incorrectly record their intentions in a written document – not concerned with mistakes as to the consequences of the document
- Widely used in a pensions context and likely to become more popular given the recent restriction to the rule in Hastings Bass [1975] Ch 75 given the COA judgment in Pitt v Holt [2011] EWCA Civ 197

Industrial Acoustics Company Ltd v Crowhurst & Others

The facts (1)

- Summary Judgment application heard by Vos J in May 2012
- Company applied for Summary Judgment that was unopposed by an appointed Rep Ben (on behalf of all affected members) and the Trustees
- Broadly speaking rules were introduced in 1998 and 1999 that unwound the effect of an equalising resolution in 1995
- This was an unintended mistake = > liability of £millions

Industrial Acoustics Company Ltd v Crowhurst & Others

The facts (2)

- Scheme governed by rules dated 1978. Typical NRD definition of 60/65 for females and males
- 1992 Resolution closed the Barber Window for joiners post 17.05.90 but kept it open for pre 17.05.90 joiners
- At the time of the 1992 Resolution a new consolidated deed and rules was provided to the Company that incorporated the terms of the 1992 Resolution (eventually executed in 1998)

Industrial Acoustics Company Ltd v Crowhurst & Others

The facts (3)

- 1995 Resolution completed a 2 stage equalisation by amending NRD to 65 for pre 17.05.90 joiners. So all members' NRD was 65 from the date of the 1995 Resolution
- Happy state of affairs continued until 1998 when the rules originally provided in 1992 were executed (the "1998 Rules")
- 1998 Rules defined NRD in the same terms as the 1992 Resolution but not the 1995 Resolution. Therefore Barber Window re-opened for pre 17.05.90 members. Mistake repeated in 1999

Industrial Acoustics Company Ltd v Crowhurst & Others

Summary Judgment – Procedure

- Company sought rectification of the 1998 Rules and the 1999 Resolution so that they incorporated the effect of the 1995 Resolution (that the Company/ Trustee had not intended to undo)
- Summary judgment Principles – Avoids a full trial providing applicant can demonstrate that there is "no reasonable prospect" of successfully defending the claim
- Here the Trustees were neutral and the Rep Ben consented to the application (Vos J pre-read a confidential opinion prepared by the Rep Bens' counsel)

Industrial Acoustics Company Ltd v Crowhurst & Others

Rectification – The Law (i)

- Law of rectification in a state of uncertainty – Vos J was not about to decide a novel point but provided a useful summary of the law as it stands
- Vos J applied the principles as set out in *Swainland Builders v Freehold Properties Limited* [2002] namely:
- Parties must have had a continuing common intention
- There was an outward expression of accord
- Intention continued at the time the document was executed
- By mistake the document did not reflect that intention

Industrial Acoustics Company Ltd v Crowhurst & Others

Rectification – The Law (ii)

- The *Swainland* formulation was approved by Hoffmann LJ in *Chartbrook v Persimmon Homes* [2009]
- However the uncertain aspect of the law is the requirement for “an outward expression of accord” – i.e. is the parties subjective belief enough or do you need objective proof of intention?

Industrial Acoustics Company Ltd v Crowhurst & Others

Rectification – The Law (iii)

- In *Daventry District Council v Daventry District Housing Limited* [2011] 1 WLR 1154, the Court of Appeal reformulated *Chartbrook* to clarify that the requirement for the continuing common intention and an outward expression of accord are “two sides of the same coin” – Therefore the parties must be judged objectively i.e. what would an objective observer would have thought the parties to have understood?

Industrial Acoustics Company Ltd v Crowhurst & Others

Other points

- IAC unusual because the mistake was spotted in November 2011 and by May 2012 rectification had been granted
- Moved very quickly – primarily because the Company sought expedition of the application and got it granted
- Also note the comments of Vos J about granting a representation order – he held that there was no legal requirement to inform the membership but that it was preferable to do so

Dalriada Trustees Ltd v Faulds & Others

Outline

- Part 8 Claim heard by Bean J in November 2011
- Dalriada (an independent trustee appointed by tPR) applied for directions in respect of six pension schemes
- The defendants were (a) a rep ben who was a member of one of the schemes and (b) the former trustees of the scheme
- The schemes had assets of £25 million and 487 members

Dalriada Trustees Ltd v Faulds & Others

Outline (ii)

- Schemes all operated a “pensions reciprocation plan” (“PRP”)
- PRP was conceived to allow members access to their pension capital without breaching HMRC rules
- The PRP model was built around a structure called a “Maximising pension value arrangement” (“MPVA”)
- Principal issue was whether the MPVA loans were made improperly and therefore void

Dalriada Trustees Ltd v Faulds & Others

Facts

- Dalriada is an IT (the “IT”) and was appointed by tPR on 31 May 2011
- Appointment arose by virtue of tPR’s concern about the operation of the PRP
- Appointment of ITs governed by S.7 of PA95
- Application to the Determinations Panel of tPR
- In this case the IT was appointed with exclusive powers but the original trustees remained in situ

Dalriada Trustees Ltd v Faulds & Others

Operation of the PRP

- Member A transfers his assets into Scheme Y
- Member A pays a 5% transfer fee leaving 95% of his assets in Scheme Y
- Scheme Y then “loans” up to 50% of Member A’s fund to Member B who is a member of Scheme Z
- Under the terms of the MPVA Scheme Z makes a reciprocal loan of equal value to Member A of Scheme Y using Member B’s funds

Dalriada Trustees Ltd v Faulds & Others

Operation of the PRP (ii)

- In the example Member A's "loan" would attract a return of 3% to the Scheme Y and the remainder invested in orthodox investments such as property
- Importantly the schemes were not sectionalised and therefore a default/death by Member B would fall on all the members of Scheme Y
- Idea was the the loan received by the member would be repayable (typically on a 25 year term) from the investment yield on the remaining 50% – this assumed a return in excess of 8%

Dalriada Trustees Ltd v Faulds & Others

Investment Power

- "The trustees shall, subject to complying with any statutory restrictions on the investment of pension scheme assets, have power to invest, apply or transact with the whole or part of the fund in their absolute discretion and as though they were beneficially entitled. Without restricting that general power, the investments may be of any kind in the world, whether tangible or intangible and whether or not producing income....."
- The Schemes were all limited to fewer than 100 members in order to avoid the Occupational Pension Schemes (Investment) Regulations 2005

Dalriada Trustees Ltd v Faulds & Others

Finance Act 2004

- The rules of the Schemes were subject to the overriding requirements of FA04 with the consequence that any payment that was unauthorised would be void.
- Key issue was therefore whether the MPVA was an authorised payment

Dalriada Trustees Ltd v Faulds & Others

Finance Act 2004 (ii)

- S.160 (2) of FA04 defines unauthorised member payments as “a payment by a registered pension scheme to or in respect of a person who is or has been a member of the pension scheme which is not authorised by S.164”
- S.164 (1) states that the payments that a scheme is permitted to make to its members are those permitted by the rules, lump sum payments and transfers ect.
- Accordingly any payment (including a loan) by the scheme to one its members not listed in S.164 would be unauthorised

Dalriada Trustees Ltd v Faulds & Others

Finance Act 2004 (iii)

- PRP tried to side step this because the MPVA is not paid by the scheme to its member but rather from a different scheme.
- However, the architects of the PRP didn't have regard to S.173 that states that a scheme "is to be treated as having made an unauthorised payment to a person who is or has been a member of the [scheme] if an asset held is used to provide a benefit (other than a payment) to the member"

Dalriada Trustees Ltd v Faulds & Others

Were the loans unauthorised?

- Bean J agreed that on the face of S.164 the MPVA was not an unauthorised payment by the Scheme to the member since it came from another Scheme
- Bean J looked at the substance of the transaction – MPVA's from Scheme Y were made in the expectation that a corresponding payment would be made by Scheme Z for member A and member B respectively

Dalriada Trustees Ltd v Faulds & Others

Fraud on the power

- In addition Bean J held that the MPVAs were a fraud on the power of investment
- Here the MPVAs were not made as “investments” rather they were made to secure an incoming MPVA as an unsecured loan for a member. This was not the purpose of the power of investment.

Dalriada Trustees Ltd v Faulds & Others

Whistle blowing

- S.70 of PA04 imposes a duty on all professional advisers to report breaches of the law to tPR
- Section 47 PA95 defines professional advisers as including the Scheme Actuary
- The Scheme Actuary must inform tPR where there is reasonable cause to believe that:
- A duty relevant to the administration of a scheme imposed by law is not being complied with AND such a failure is likely to be of material significance
- Failure to comply can lead to S.10 PA95 penalties (£5k fine)

Danks v Qinetiq Holdings Ltd v Pocock

Outline

- Part 8 Claim; Vos J; judgment in March 2012
- Revaluation and escalation rules in fairly common form so relevant to many other pension schemes;
- The Trustees were proposing to switch from RPI to CPI and Vos J had to consider whether the switch would offend S.67 PA95

Danks v Qinetiq Holdings Ltd v Pocock

Rules

- Rules provided that (a) pensions in payment would be increased on 1 April each year by the lesser of 5% or the annual rate of the increase in the Index and (b) deferred pensions would be revalued at the date of retirement in line with the Index
- Index was defined as:
“the Index of Retail Prices published by the Office of National Statistics or any other suitable cost-of-living index selected by the trustees”

Danks v Qinetiq Holdings Ltd v Pocock

Section 67

- Would switch from RPI to CPI adversely affect the members subsisting rights? (as defined by S.67A (6) PA95):

“Subsisting right” means:

- (i) Any right which at that time has accrued to or in respect of him to future benefits under the scheme rules; or
 - (ii) Any entitlement to the present payment of a pension or other benefit which he has at that time, under the scheme rules”
- **KPMG v Aon**: “accrued rights” = member’s present right to a future pension / “entitlement” = pensions in payment

Danks v Qinetiq Holdings Ltd v Pocock

Did the members have an entitlement or right to RPI?

- Vos J had to consider whether:
“the member with a pension in payment has a present entitlement to a pension that will be increased in line with RPI every year, and whether the member with a deferred pension now has an accrued right to revaluation on the basis of RPI, when he takes his pension in the future.”
- Essentially a timing point
- Each scheme turns on the true construction of the rules, not only as to any definition of the Index but also as to when any increase is conferred

Danks v Qinetiq Holdings Ltd v Pocock

Pensions in payment

- Held: during pensionable service members accrued a right not to any particular rate but to an escalation each April in accordance with the Index (whatever that might be)
- The right to a particular rate only crystallises and accrues when the escalation calculation actually takes place
- Prior to that calculation the member only has a right to an increase in line with the Index
- Therefore the Trustees were able to select CPI for future escalation and S.67 would not be engaged

Danks v Qinetiq Holdings Ltd v Pocock

Deferred Pensions

- Held: applying the same logic, during pensionable service members did not accrue a right to revaluation in line with RPI
- Members accrued a right to have their pensions revalued when they took their pension (i.e. at retirement)
- If at that time the Trustees determined to use CPI rather than RPI then this was permissible

Bradbury v British Broadcasting Corporation

Outline

- Appeal from the Office of the Pensions Ombudsman on a point of law
- Judgment given by Warren J in May 2012
- Upholds the effectiveness of modifying what constitutes pensionable pay through contractual non-pensionability agreements re: pay rises

Bradbury v British Broadcasting Corporation

Facts

- B was an employee of the BBC and a member of its pension scheme. BBC proposed a number of changes
- to remain in the DB section but with future increases to pensionable pay capped at 1%
- to opt out of the DB section and join a CARE section
- to leave the scheme and join a new DC Scheme
- B chose option 2 after having complained to the PO about the BBC's conduct

Bradbury v British Broadcasting Corporation

Issues

- Was the BBC in breach of the deed and rules in seeking to enforce the agreed 1% cap on increases to pensionable pay?
- Did the non-pensionability agreements engage S.91 PA95?
- Was the BBC in breach of its implied duties of trust and confidence and good faith?

Bradbury v British Broadcasting Corporation

Breach of the deed and rules?

- No amendments were made to the scheme in order to effect the cap. BBC argued that they were not necessary because:
- the salary increases were offered on terms that increases in pensionable pay were limited to 1% and that applying SWT and NUS Superannuation Fund such an offer would be binding on the member and the Trustee would have to give effect to it
- the rules defined “pensionable salary” by reference to “basic salary” as an amount determined by the BBC and therefore limiting pensionable pay was within the BBC’s discretion

Bradbury v British Broadcasting Corporation

Introducing a cap by way of contact

- Warren J held that the use of a contract was permissible. In his view the offer contained two integral and interdependent terms *“namely an increase in salary and the provision about pension entitlement. The terms cannot be served. It was not open to him to accept one and not the other. He could not accept the increase without agreeing the terms as to its treatment for pension purposes.”*

Bradbury v British Broadcasting Corporation

Section 91

- Recap: S.91 provides that any assignment or surrender of a right or entitlement is void (unless certain specific requirements are met)
- Warren J held that S.91 was not engaged by the cap because B had no right to future pay increases. He stated that *“members have no right to a salary increase. Accepting a salary increase on terms that part only is pensionable does not...involve a surrender of anything: the member becomes entitled to a greater future pension, albeit one that is smaller than if the whole increase were pensionable”*

Bradbury v British Broadcasting Corporation

Trust and confidence

- Given that the PO had not determined this issue Warren J did not have to decide it but nonetheless gave some obiter views:
- Argued that the pensionability agreement breached the imperial duty not to undermine trust and confidence because the members had in reality no option but to accept it (otherwise they would receive no pay at all)
- Held: facts “far away” from Imperial Tobacco where in order to obtain a surplus the employer was seeking to enforce members giving up their accrued rights. Here the BBC was attempting to make the scheme sustainable

Questions or comments or Coffee?

