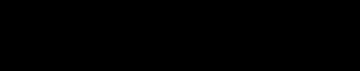
## Courage Links - what is really required?

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5 October 2010





## Today's talk

- Restrictions on amendment
- First, construe your restriction!
- The decision in Re Courage the salary link issue
- Can a restriction be removed?
- Do extrinsic contracts provide an answer?
- Summary



#### Restrictions on amendment

- Consider scheme amendment power
- What are its terms and restrictions?
  - Section 67
  - Broader restrictions?



#### Construction of restriction

- To give reasonable and practical effect to the scheme
- Construe each part
- Does restriction relate to:
  - past service benefits?
  - past service and future service benefits?
- Does restriction provide for amendments with member consent?



#### Future service restrictions

- Lloyds Bank restriction protected "pecuniary benefits secured .... under the Scheme" from being decreased without written consent
- Gas & Fuel restriction protected "any benefits then provided by or under the Trust Deed" from reduction without written consent
- Both protected future service benefits
- Restriction needs express limit to past service



## The decision in Re Courage

- Restriction prohibiting amendments which:
  - "vary or affect any benefits already secured by past contributions in respect of any Member without his consent in writing"
- "already secured" insufficient to limit to past service
- "by past contributions" clear direction to past service
- But past service benefits included final salary link in absence of express definition otherwise
- When is final pensionable salary to be calculated?



## Implications of Courage

- Changes to future service benefits
- Closure to accrual
- Anomaly
  - if rules provide for calculation of final pensionable salary when pensionable service ceases



## Is Courage right?

- Meaning of "benefits already secured"
  - should contingent rights be included?
  - not "secured" at date of amendment
- Why should protection differ if pensionable service ceases?



## **Application of Courage**

- Yes by UK Courts
  - HR Trustees Limited -v- German (The IMG case)
  - "no amendment shall have the effect of reducing the value of benefits secured by contributions already made"
  - See also case of *Barton* (Pensions Ombudsman)
  - no alteration to "reduce the ... value of ... benefits ... in respect of contributions already received ..."
- No by Canadian Courts



#### Other calculation dates

- Final pensionable salary calculated at retirement or on ceasing employment
- Final salary link survives cessation
  - Deferred member underpin (section 67 PA1995)?
- But not termination of scheme



#### Can a restriction be removed?

- The IMG Case
- Restriction in 1977 Deed (Old Power)
  - "no amendment shall have the effect of reducing the value of benefits secured by contributions already made"
- Restriction absent in 1981 Rules (New Power)
  - "except that no such alteration or addition shall operate so as to prejudice approval"
- Old Power prevailed



# Do extrinsic contracts provide an answer?

- To overcome restriction?
- Cf where restriction provides for member consent to permit the amendment



#### The IMG Case

- Conversion of defined benefits to defined contribution benefits
- Restriction on amendment power
  - required final salary underpin for service pre-amendment
  - made no provision for member consent
- But were members' defined benefit rights varied by extrinsic contract?
  - Members' application forms
  - Employer's memoranda to members
  - Scheme booklet



## Amendment by contract?

- Argument based on South West Trains Limited -v-Whiteman
  - Collective agreement to cap pensionable pay
  - Contract binding on individual members
  - Contract prevented members from claiming higher pensions from scheme
- But
  - no restriction on amendment power in scheme
  - prior to Section 67PA1995



#### *IMG* decision

- No contract between employer and members existed on facts
- Members' informed consent required to overcome scheme restriction
  - to preclude claims by members for breach of trust



#### Informed consent

- Not on facts of IMG
- Members
  - were unaware of the amendment restriction
  - received no advice
  - received no explanation about the loss of defined benefit rights
  - were not told how CETVs and contributions were to be calculated
  - were given no real choice
  - in some cases, received impression of no adverse effect



#### Practical Issues

- Full awareness by member of amendment's effects
- Consider agreement to cap pensionable salary
  - explain impact on past service benefits
  - how do any options given differ?
  - give relevant background information
- Independent Financial Advice?



## Can members waive pension rights?

- Compromise agreement in full and final settlement
  - unenforceable surrender under Section 91 PA1995
- Court to confirm extent of Section 91 and its application to Court approved settlements



### Questions?





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