

# Courage Links – what is really required?

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# 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?

Courage Links – what is really required?





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