





### A LEGAL UPDATE

For the Institute and Faculty of Actuaries KEITH BRYANT QC and SAUL MARGO 9 SEPTEMBER 2014



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#### Structure

- · Legislative changes in 2014
- Cases in past 12 months
- More detailed analysis of some key cases



Legislation

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Title	Main provisions	Date in force
Marriage (Same Sex Couples) Act 2013	Enables same sex couples to marry (in England and Wales) or convert civil partnership into marriage and amends Equality Act 2010 to give same sex spouses same rights as civil partners to survivor benefits under occupational pension schemes	Most provisions in force from 13 March 2014
Marriage (Same Sex Couples) Act 2013 (Consequential Provisions) Order 2014 (SI 2014/107)	Modifies Occupational Pension Schemes (Modification of Schemes) Regulations 2006 (SI 2006/759) to allow trustees to modify scheme by resolution to provide for payments to surviving same sex spouse	13 March 2014
Financial Assistance Scheme (Qualifying Pension Scheme Amendments) Regulations 2014 (SI 2014/837)	Amends eligibility criteria for the Financial Assistance Scheme	28 March 2014

#### Legislation



Title	Main provisions	Date in force
Regulations 2013 (SI 2013/2556)	Technical amendments to simplify auto-enrolment process; joining window also extended from one month to six weeks and period within which employer must register with tPR after staging date extended from four to five months	Most in force 1 November 2013 but extension of joining window and registration deadlines in force from 1 April 2014
Local Government Pension Scheme Regulations 2013 (SI 2013/2356)	Implements new CARE-based LGPS	1 April 2014
Local Government Pension Scheme (Transitional Provisions, Savings and Amendment) Regulations 2014 (SI 2014/525)	Transitional provisions concerning new LGPS	1 April 2014

#### Legislation



Title	Main provisions	Date in force
Occupational and Personal Pension Schemes (Automatic Enrolment) (Amendment) Regulations 2014 (SI 2014/715)	Amends criteria a CARE scheme must satisfy to be a qualifying scheme for auto- enrolment	1 April 2014
Civil Procedure (Amendment) Rules 2014 (SI 2014/407)	Brings in requirement to obtain permission from High Court for appeal against Pensions Ombudsman	6 April 2014
Occupational Pension Schemes (Miscellaneous Amendments) Regulations 2014 (SI 2014/540)	Various amendments to existing provisions, including changes to pension protection following TUPE transfer (transferee can now comply by matching employee contributions up to 6% <u>or</u> by matching transferor's contributions)	6 April 2014

#### Legislation



Title	Main provisions	Date in force
Automatic Enrolment (Earnings Trigger and Qualifying Earnings Band) Order 2014 (SI 2014/623)	Increase in earnings thresholds for auto-enrolment for 2014/15 tax year	6 April 2014
Pensions Act 2011 (Consequential and Supplementary Provisions) Regulations 2014 (SI 2014/1954) and Pensions Act 2011 (Transitional, Consequential and Supplementary Provisions) Regulations 2014 (SI 2014/1711)	Transitional provisions – intended effect is to prevent schemes affected by revised definition of money purchase benefits having to revisit past decisions made on the basis of trustees' understanding of the law at the time	24 July 2014





Title
Registered Pension Schemes and Relieved Non-UK Pension Schemes (Lifetime Allowance Transitional Protection) (Individual Protection 2014 Notification) Regulations 2014 (SI 2014/1842) and Registered Pension Schemes (Provision of Information) (Amendment) Regulations 2014 (SI 2014/1843)

#### Legislation

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Title	Main provisions	Date in force
Pensions Act 2014	Abolishes defined benefit contracting out, introduces new single-tier state pension and makes range of changes to existing pension provisions	Royal Assent 14 May 2014 Provisions come into force on various dates
Finance Act 2014	Transitional measures to allow interim flexibility for members of DC schemes, wider powers for HMRC to combat pension liberation and provisions relating to individual protection 2014	Royal Assent 17 July 2014 Provisions come into force on various dates







Arcadia Group Ltd v Arcadia Group Pension Trust Ltd [2014] EWHC 2683 (Ch)

- · DB scheme rules provided that increases should be in accordance with RPI
- But RPI defined as 'the Government's Index of Retail Prices or any similar index satisfactory for the purposes of [HMRC]'
- High Court held that this allowed use of CPI for revaluing and increasing benefits including those derived from past service
- And that this was not precluded by PA95 s67
- This approach is consistent with previous High Court judgment in *Qinetiq* [2012] EWHC 570 (Ch)



#### Cases – Fair Deal

Ellis v Cabinet Office [2014] EWHC 2049 (Ch)

- Appeal from Pensions Ombudsman re pre-October 2013 Fair Deal
- Member of PCSPS transferred to private contractor
- Because joined before 1 October 1987 had NRD from active service of 55 and double accrual after 20 years' accrual (Note that NRD from deferment would be 60)
- Chose to keep preserved pension in PCSPS (rather than transfer accrued rights to contractor's broadly comparable scheme)
- Complained that should still have right to take benefits at 55 and to accrue at more beneficial rate
- · Rejected by PO
- But overturned by High Court which held that she did not fall within definition of deferred member at all as had not 'resigned'
- Therefore retained right to take PCSPS benefits at 55
- · Unclear from judgment where this leaves her claim for enhanced accrual rate

Note that Cabinet Office has applied for permission to appeal

#### Cases – NHS Scheme



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NHS Business Services Authority v Leeks [2014] EWHC 1446 (Ch)

- Automated system failed to identify when member had reached maximum entitlement and could retire on unreduced pension
- Pensions Ombudsman held this to be maladministration even though inherent limitation in system
- Ordered Authority to pay compensation equivalent to instalments member would have received had she retired when she could have done – about £110k in total
- Upheld by High Court on appeal

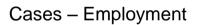
NHS Business Services Authority v Wheeler [2014] EWHC 2155 (Ch)

- · Another appeal from Pensions Ombudsman re NHS Scheme
- Death benefit paid on death of locum GP about £150k
- Months later Authority spotted mistake deceased was deferred member so entitlement only £19k
- · PO held that recovery of overpayment limited to residual assets in estate
- · Overturned by High Court Authority could recover full overpayment from estate

#### Cases - Employment

Clyde and Co LLP v Bates van Winkelhof [2014] UKSC 32

- · Former equity partner of law firm incorporated as LLP
- Supreme Court overturned Court of Appeal and found that she fell within definition of 'worker' in ERA96 s230(3):
  - She could not market her services to anyone else
  - She was an integral part of the LLP's business
  - It was not necessary for there also to be any element of subordination
- She could therefore pursue her whistleblowing complaint
- Note far-reaching implications, eg right of members of LLPs to statutory annual leave
   and to auto-enrolment





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Seldon v Clarkson Wright & Jakes UKEAT/0434/13

- Equity partner in firm of solicitors forced to retire at 65 in 2006
- Claimed direct age discrimination
- Employer argued compulsory retirement age was justified, ie a proportionate means of achieving a legitimate aim; legitimate aims relied on were:
  - Staff retention
  - Workforce planning
  - Avoiding need to dismiss partners by performance management
- Reached Supreme Court in 2012 which held ([2012] UKSC 16) that these could be legitimate aims remitted to employment tribunal to consider proportionality
- · ET found that was proportionate
- Now upheld by EAT

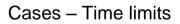


#### Cases – Employment

Innospec Ltd v Walker [2014] ICR 645, EAT

- Mr Walker, a pensioner member, challenged the temporal limitation on the rights of his civil partner to survivor's benefits in the event of his death
- EAT held that the law (both European and domestic) prohibiting discrimination on grounds of sexual orientation did not have retrospective effect
- There was therefore no requirement to pay benefits to a surviving civil partner in respect of accrual before 5 December 2005 (the date on which the Civil Partnership Act 2004 came into force)
- Given that Mr Walker had retired in 2003, his civil partner would have no right to a 2/3 spouse's pension

Note - leave to appeal granted and hearing listed for February 2015





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British Telecommunications plc v Luck [2014] EWHC 290 (QB)

- Employees transferred from BT to EPS in 2000
- Claimed that BT had represented that they would be able to participate in BT scheme indefinitely
- Participation ceased in 2002 when BT sold its shares in EPS
- · Employees were 'vulnerable' as soon as they transferred to EPS
- But time only started to run when there was actual damage
- · Which did not occur until they ceased to participate in BT scheme
- · Negligence claim was therefore in time



#### Cases – Time limits



Mercer Ltd v Ballinger [2014] EWCA Civ 996

- · Professional negligence claim concerning production of actuarial valuation reports
- Trustees alleged negligence re 1996, 1999 and 2001 reports
- · Then applied to amend to add 2002 report but after expiry of limitation period
- High Court allowed amendment arose from the same, or substantially the same, facts
- Overturned by Court of Appeal new claim related to separate facts 'each valuation is, or should be, an independent and freestanding exercise.'





Sarjeant v Rigid Group Ltd [2013] EWCA Civ 1714

- Trustees implemented partial buyout before fixing 'applicable time' for calculating s75 debt
- No express power in rules to do this
- But High Court willing to imply power into the rules
- Upheld by Court of Appeal

Vaitkus v Dresser-Rand UK Ltd [2014] EWHC 170 (Ch)

- Announcement issued to female members in 1991 found to be effective to equalise NRDs at 65
- · Even though in clear conflict with subsequent definitive deed and rules signed in 1992
- High Court held that 1991 announcement was effective to amend the 1992 deed and rules and did not amount to a 'rewriting of history'

#### Cases – Construction



Honda Motor Europe Ltd v Powell [2014] EWCA Civ 437

- · Deed of adherence could not also be construed as deed of amendment
- · Meaning of deed was reasonably clear no obvious mistake in language
- New members therefore joined scheme on basis of existing (more generous) benefit structure
- Employers sought to rely on equitable maxim 'equity regards that as done which ought to be done' for first time on appeal – permission to do so refused
- But could raise it (and also argue for rectification which the parties had agreed to 'park') in separate proceedings





Secretary of State for Culture, Media and Sport v BT Pension Scheme Trustees Ltd [2014] EWCA Civ 958

High Court held that:

- Crown guarantee given when BT privatised in 1984 covered post-transfer joiners

   'all the Corporation's pension obligations to the trustee present, future and
   contingent vested in BT'
- · BT obliged to meet any shortfall in cost of buying annuities on wind-up

Court of Appeal:

- Upheld decision on Crown guarantee
- But overturned decision on funding obligations BT obliged merely to make deficit reduction contributions



#### Cases – Formalities



Briggs v Gleeds [2014] EWHC 1178 (Ch)

- DB scheme principal employer was a partnership
- Purported amendments over more than 20 years, eg to equalise NRDs post-Barber, replace trustees, amend benefit structure (reduce accrual rate, increase contributions etc), add DC sections and close DB section to future accrual
- Partners' signatures on amending deeds (30 of them) not attested by witnesses
- Therefore none of amending deeds met requirements of Law of Property (Miscellaneous Provisions) Act 1989 and they were all invalid
- Employer also raised estoppel argument based on implied representation by consultants (Aon) that they could execute deeds in same way as limited company (eg documents provided by Aon had no space for witnesses to sign)
- · Argued that trustees and members estopped from denying validity of deeds
- High Court held that representation of law (as well as fact) could in principle give rise to estoppel (in light of *Kleinwort Benson* [1999] 2AC 349, HL confirming restitutionary remedy available for mistake of law as well as fact)
- · But no estoppel on the facts of this case since invalidity obvious on face of deeds
- · Arguments based on estoppel by convention and extrinsic contracts also failed





Citifinancial Europe plc v Davidson [2014] EWHC 1802 (Ch)

- Application for rectification of definition of salary in DC section of scheme
- Summary judgment application successful

CIT Group (UK) Ltd v Gazzard [2014] EWHC 2557 (Ch)

- · Rectification again granted on summary judgment application
- Error required annual revaluation of deferred benefits rather than at date benefits taken would have required further £1.1m in additional funding



#### Cases – Pension liberation



The Pensions Regulator v Dalriada Trustees Ltd [2013] EWHC 4346 (Ch)

- tPR obtained ex parte orders appointing Dalriada as trustee of 9 schemes and preventing original trustees from dealing with scheme assets
- Basis for application was that schemes were being used for pension liberation but, if it transpired that they were not occupational pension schemes, tPR could not exercise its statutory powers
- High Court subsequently ruled in *Pi Consulting* ([2013] EWHC 3181 (Ch)) that similar schemes were occupational pension schemes
- Court in this case refused to discharge orders even though had been change of circumstances in light of *Pi Consulting*, that change was not material

#### Cases – Pension liberation



The Pensions Regulator v A Admin Ltd [2014] EWHC 1378 (Ch)

- Alleged pension liberation schemes Lincoln Umbrella Pension Trust and others
- Purported to allow tax-free access to transferred funds by surrender of artificiallygenerated surplus
- Challenged by tPR
- · High Court held that:
  - Purported trusts void for uncertainty impossible to work out from deeds how benefits to be calculated
  - But even if were occupational pension schemes and not void for uncertainty, members' interests would be caught by PA95 s91(1), ie could not be forfeited save in prescribed circumstances
  - One of those prescribed circumstances, ie surrender to provide benefits for widow or surviving dependant (s91(5)(b)(i)), could not apply where benefits not be provided under same scheme

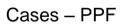


#### Cases - PPF



The Board of the PPF v Trustees of the West of England Ship Owners Insurance Services Retirement Benefits Scheme [2014] EWHC 20 (Ch)

- · The process of setting the PPF levy involves two stages
- At the first (discretionary) stage, where the overall levy determination for the year is set, the PPF is entitled to adopt 'hard-edged' rules for levy calculation (this stage would be susceptible to challenge by judicial review)
- At the second (non-discretionary) stage, where individual levies are calculated, those hard-edged rules must be strictly applied and a JR challenge at this stage is not available





FSS Pension Trustees Ltd v The Board of the PPF [2014] EWHC 1397 (Ch)

 A guarantee or assurance by a public authority must provide 'practical certainty' that members would be paid in full if it is to fall within the exclusion from PPF protection

TTG Pension Trustees Ltd v The Board of the PPF [2014] EWHC 174 (Ch)

- The PPF is entitled to use different dates for assessing insolvency risk on the one hand and assessing a contingent asset risk reduction measure on the other
- Therefore, where the identity of a scheme's employers had changed the PPF could base the risk-based levy on historic information but could also disregard a contingent asset agreement submitted on the basis of that same information because it did not reflect the reality of the situation



#### Cases – Moral hazard

Re Storm Funding Ltd [2013] EWHC 4019 (Ch)

- The latest (and, as it transpired, final) spat in the Lehman saga
- High Court held that following non-compliance with an FSD, tPR may issue CNs to more than one target which specify sums which, in aggregate, are more than the maximum identified shortfall
- · And the aggregate sum recovered from targets may also exceed the shortfall

Note the recent announcement by tPR (19 August 2014) that the Lehman FSD case has settled (after nearly 6 years) for an estimated £184m





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Granada UK Rental and Retail Ltd v The Pensions Regulator

- Re the Box Clever joint venture
- · Determinations Panel issued an FSD on a 'no fault' basis
- tPR sought to raise further fault-based allegations in its Reply in the Upper Tribunal
- The targets contended that it was common ground that they were not guilty of misconduct and that this was reflected in the DP's 'no fault' decision
- · But they failed to persuade the UT to strike out the further allegations
- The UT held that tPR was entitled to put forward a case based on any facts and circumstances that were within the scope of the allegations in the Warning Notice and that had been canvassed before the DP

Note - appeal due to be heard December 2014

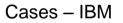


#### Cases – IBM



IBM UK Holdings Ktd v Dalgleish [2014] EWHC 980 (Ch)

- · Third main judgment in this case all judgments of Warren J
- First judgment Feb 12 concerned prospective costs orders (12 pages, 40-odd paras)
- Second judgment Oct 12 dealt with rectification issues (a mere 532 paras over 139 pages)
- Third judgment April 14 considered alleged breaches of duty of good faith / duty to maintain trust and confidence (a gargantuan 1596 paras over 435 pages)





#### Facts in brief:

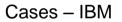
- Concerned package of changes to 2 UK pension schemes
- · Project Ocean (2004-2005): member contributions increased
- Project Soto (2005-2006): members had to choose between continuing defined benefit accrual but only based on 2/3 of any future salary increases or switching to enhanced DC scheme
- Project Waltz (2009):
  - closure to DB accrual from 6/4/11
  - non-pensionability agreements breaking final salary link for all DB accrual
  - restriction on early retirement terms
- Rectification judgment concerned early retirement provisions



#### Cases – IBM

#### Issues:

- Members argued that employer's conduct had led to 'reasonable expectation' as to future benefits, including that DB scheme would remain open in long term
- Employer argued (a) no reasonable expectation but (b) even if there was, its business interests outweighed those expectations
- Part of Project Waltz involved exercise of scheme powers, ie closure to DB accrual, early retirement terms
- · Other part did not, ie non-pensionability agreements
- So necessary to consider employer's duties both under pension scheme and employment contracts





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Duty under pension scheme (the 'Imperial duty'): Elements of the test (¶¶359-369):

- A discretion must be exercised in a 'genuine and rational' rather than 'empty or irrational' manner
- · The test is not one of fairness
- It is a severe test
- The test is objective
- · The employer's financial and other interests are relevant
- But 'subject to any constraint imposed by a requirement (if one exists) of consistency with any expectations on the part of the members'

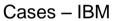
Reasonable expectations of members may be important:

- Must be more than expectations reasonably held (¶385)
- Must be engendered by employer (¶457)
- Can be as to future intention but no need to be a promise or guarantee (¶466)
- Formulation of the Imperial duty:
- In the context of a challenge to the exercise of powers under a pension scheme,
  - Warren J said that the test is one of *'irrationality or perversity'* in the Wednesbury sense (¶¶442-444)

#### Cases – IBM

Duty under employment contract:

- · Discussed (relatively) briefly in the judgment
- Warren J accepted that the contractual and Imperial duties arose from the same source
- And that they 'can be stated in the same language', ie the Malik formulation that an
  employer will not 'without reasonable and proper cause, conduct itself in a manner
  calculated [or] likely to destroy or seriously damage the relationship of confidence
  and trust between employer and employee'
- But then said that the content of the two duties could differ (¶397)
- And that when considering the Imperial duty 'One cannot blindly apply employment law principles or cases' (¶421)
- Warren J said that the contractual duty may be expressed as: 'an employer must treat his employees fairly in his conduct of his business, and in his treatment of his employees, an employer must act responsibly and in good faith; he must act with due regard to trust and confidence (or fairness)' (¶1507)
- · But on its face this seems inconsistent with previous (binding) authority, eg Malik





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- Where this leaves us in terms of the formulation of, and interaction between, the Imperial and contractual duties is not entirely clear
- It seems that there is a distinct possibility of an appeal which may resolve remaining uncertainty
- But a decision on whether to seek permission to appeal is, we understand, on hold pending judgment on remedy (following a remedy hearing in July 2014)



#### IBM in more detail

An industry view:

• "The case is an important one, but there are mutterings in the industry that it did not need 450 pages to determine the outcome. It may be that judges should be required to write out their judgments on parchment using a quill pen. It may not be very practical (for the judge) but it would encourage the report to focus on the principles, and save quite a few trees" (Perspective)

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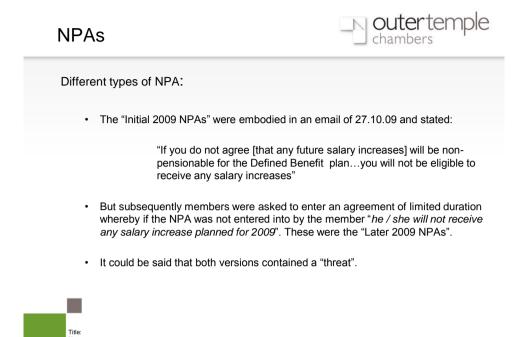


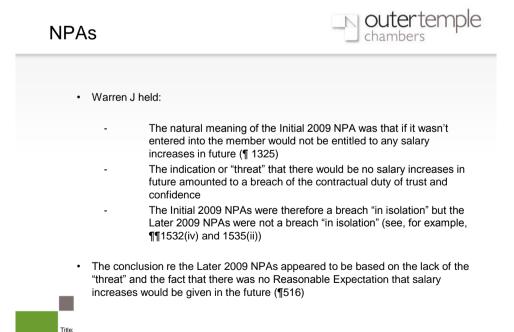
#### IBM in more detail

- Facts as summarised on earlier slides
- Overview of Project Waltz (2009):
  - closure to DB accrual from 6/4/11
  - non-pensionability agreements breaking final salary link for all DB accrual
  - restriction on early retirement terms.
- The focus of this talk is:
  - (a) Non-Pensionability Agreements ("NPAs")
  - (b) The exercise of the "Exclusion Power"



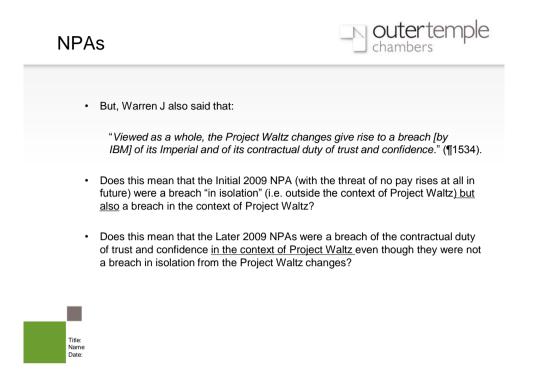
(c) The "Consultation Breach"





Name Date:









How does this fit with the orthodox position?

See:

- South West Trains v Wightman [1997] OPLR 249
- NUS Superannuation Scheme v Pensions Ombudsman [2002] PLR 93
- Bradbury v BBC [2012] EWHC 1369



#### NPAs



What does the future hold for NPAs?

- The remedies judgment in *IBM* is likely to contain further clarification as to what "in isolation" means and why a distinction was drawn between the different types of NPA.
- Warren J will also consider whether IBM should be able to achieve the same result by simply having new NPAs each year which on their face are time-limited.
- Arguable that if an employee has an accrued right to final salary linkage that withholding pay until that is given up is conduct that is calculated or likely to destroy trust and confidence (see also *Briggs v Gleeds* in the context of the final salary linkage).
- What remedies will flow for the breach of the contractual duty?



#### **The Exclusion Power**



- Concerned here not with the breach of the Imperial duty but with whether the
   "Exclusion Power" was validly introduced into the Main Plan
- The "Exclusion Power":

"The Principal Employer may by notice in writing to the Trustee direct that any specified person or class of persons shall not be eligible for membership, or shall cease to be a member or members. Such a notice shall override any provisions of the Plan that are inconsistent with it."

 One of the issues that arose was whether the Exclusion Power had been validly introduced by way of amendment in the Main Plan.



#### The Exclusion Power



Two restrictions on the amendment power were of particular relevance

• No amendment 'shall be made':

"(d) ....which in the opinion of the Actuary shall operate substantially to prejudice the interests under the Scheme of any [active/deferred] Member... in respect of contributions received by the Trustee prior to 1<sup>st</sup> January 1973 ...; (proviso (d))

(e) ...which in the opinion of the Actuary shall operate to reduce the aggregate value of the retirement benefits payable under the Scheme to any [active/deferred] Member... in respect of contributions already received by the Trustee ..." (proviso (e)).





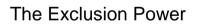


- · Members argued that the Exclusion Power breached the fetters in two ways:
  - The members lost the opportunity to benefit from augmentation out of the surplus on the partial or total winding-up of the Main Plan.
  - ii) The break in the final salary link (¶157)
- IBM accepted that the final salary link was protected by both provisos (¶170) and that the Exclusion Power did prima facie allow IBM to break the final salary link.



The Exclusion Power	outertemple	
As to the effect of a breach of the fetters     Members: Exclusion Power ca		
fetters. - IBM: To the extent that there i amendment was valid <i>pro tan</i>	<ul> <li>a scope / purpose that is consistent with the Main Plan Rules and the fetters.</li> <li>IBM: To the extent that there is a breach of the fetters the amendment was valid <i>pro tanto</i> so that service before the amendment retains a final salary link.</li> </ul>	





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- There remained a dispute between the parties as to whether the fetters protected access to surplus Warren J held that there was no such protection
  - Proviso (d) protects contingent benefits as it refers to "interests under the Scheme" rather than "benefits" ( $\P164$ )
  - But, the contingency of sharing in a surplus is too "uncertain" to be capable of protection (¶183)
- But, should the same conclusion have been reached in relation to the final salary link?



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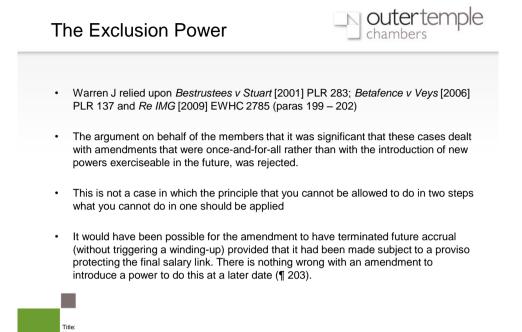


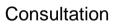
#### The Exclusion Power



- · Warren J's reasoning was as follows:
  - as a matter of construction there was no difference between the wording that no amendment "shall <u>be made</u> which shall operate" and no amendment "shall <u>operate</u>" (¶196)
  - Re Courage Group's Pension Schemes [1987] 1 WLR 495 did not address what happens if an amendment power has in fact been exercised (rather than its exercise being prospective) (¶197)
  - The Actuary would no doubt have given a negative opinion at the time if the true legal position had been known but it does not follow that the Exclusion Power was wholly invalid ¶199).









- Dealt with at the end of the Judgment ¶¶ 537 1593
- Held that a failure to consult properly can be a breach of the contractual duty as well as a breach of the Consultation Regulations (The Occupational and Personal Pension Scheme (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 (¶¶1554 – 1556]
- One example: the identification by IBM of 2010 as the date of the intended closure when by that time IBM had in fact settled on 2011. IBM described the identification of 2010 as an error.
- Warren J: "...to describe it as an error is only correct in the sense that it was, putting it at its most charitable, an error of judgment to have included the 2010 date in the consultation; it certainly was not an error in the sense that it was put in by mistake." (¶1549)



#### Consultation



- Warren J appeared to determine that the members were entitled to a remedy for the breach of the contractual duty that arose as a result of the improper consultation that goes beyond the remedies and penalties under Regulation 18 of the Consultation Regulations (¶1553)
- · This issue was a live one in the remedies hearing
- Further issues at the remedy stage included whether IBM must carry out a fresh consultation before implementing any element of Project Waltz.



#### Reliance on IBM



- IBM cited in recent case before the PO: Thomson (PO-1203)
- DPO held that no 'Reasonable Expectation' of discretionary increases in future.



#### Gleeds in more detail

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- 30 Deeds executed that failed to comply with the Law of Property (Miscellaneous Provisions) Act 1989
- Each partner's signature needed to be attested by a witness. This was not done for any of the 30 deeds.
- · As a result, the deeds were not properly executed and were prima facie invalid.



#### Estoppel



- Gleeds contended that the members were estopped from denying that the deeds were validly executed
- Newey J held:
  - A representation of law can in principle found an estoppel (¶¶ 33 35)
  - Estoppel may be available where there has been a failure to rely on statute (reliance placed upon Shah v Shah [2001] EWCA Civ 537)
  - But, estoppel cannot be invoked where a document does not even appear to comply with the 1989 Act.



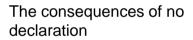
# The construction of the amendment power

Clause 12 of the 1993 Definitive Deed provided:

"The Principal Employer and the Trustees may...by Deed alter or add to the terms and provisions of the Rules...and this Deed....The Principal Employer and the Trustees shall forthwith declare such alteration or addition in writing and the Deed and/or Rules shall stand amended accordingly"

- · Gleeds argued that a declaration alone was sufficient the argument was rejected
- Both a deed and a separate declaration were required under the power (¶¶64 66 and 69)
- But, a failure to declare would not invalidate an amendment made by deed reliance placed upon *Betafence v Veys* [2006] PLR 137 (¶¶83 86).

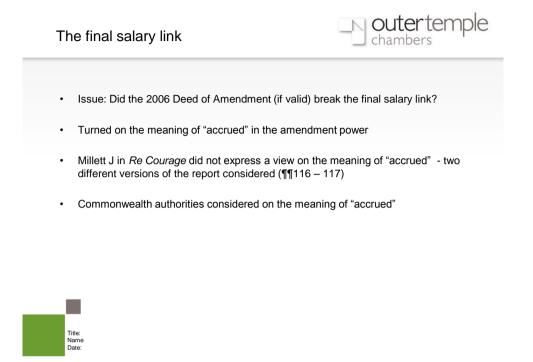




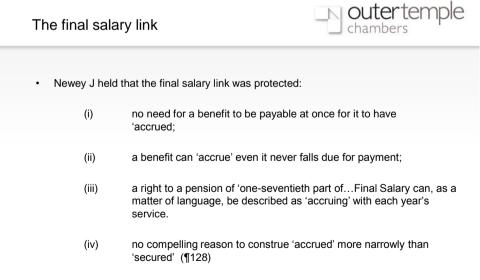


- Gleeds argued that the absence of a declaration was of no practical significance and that the equitable maxim that 'equity should look on as done that which ought to have been done', should be applied
- Newey J expressed doubts about the decision in HR Trustees Ltd v Wembley plc [2011] 097 PBLR (¶¶ 76 – 77)
- Held: pension trustees should not be taken to have made amendments against the interests of the scheme's members merely on the unrealistic basis that the members could have compelled them to do so.
- Arguable that Wembley is only now applicable to pro-member amendments.
- · Lack of pragmatism?





#### The final salary link







# THE END





## A LEGAL UPDATE

For the Institute and Faculty of Actuaries KEITH BRYANT QC and SAUL MARGO 9 SEPTEMBER 2014

