



A LEGAL UPDATE

For the Institute and Faculty of Actuaries
KEITH BRYANT QC and SAUL MARGO
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Structure



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



Legislation



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
Automatic Enrolment (Miscellaneous Amendments) 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



Legislation



Title	Main provisions	Date in force
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)	Establish framework for individual protection 2014 enabling individuals to reduce or eliminate lifetime allowance charge	18 August 2014



Legislation



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



Cases – RPI/CPI



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



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



Cases – Employment



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



Cases – Time limits



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.'*



Cases – Construction



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



Cases – Construction



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

Cases – Rectification



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 artificially-generated 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 to 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



Cases – PPF



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



Cases – Moral hazard



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 Dalglish [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)



Cases – IBM



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



Cases – IBM



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*



Cases – IBM



- 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)*



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”



NPA's



Different types of NPA:

- The "Initial 2009 NPAs" were embodied in an email of 27.10.09 and stated:

"If you do not agree [that any future salary increases] will be non-pensionable for the Defined Benefit plan...you will not be eligible to receive any salary increases"

- But subsequently members were asked to enter an agreement of limited duration whereby if the NPA was not entered into by the member "*he / she will not receive any salary increase planned for 2009*". These were the "Later 2009 NPAs".
- It could be said that both versions contained a "threat".



NPA's



- Warren J held:

- The natural meaning of the Initial 2009 NPA was that if it wasn't entered into the member would not be entitled to any salary increases in future (¶ 1325)
- The indication or "threat" that there would be no salary increases in future amounted to a breach of the contractual duty of trust and confidence
- The Initial 2009 NPAs were therefore a breach "in isolation" but the Later 2009 NPAs were not a breach "in isolation" (see, for example, ¶¶ 1532(iv) and 1535(ii))

- The conclusion re the Later 2009 NPAs appeared to be based on the lack of the "threat" and the fact that there was no Reasonable Expectation that salary increases would be given in the future (¶ 516)



NPAs



- But, Warren J also said that:

“Viewed as a whole, the Project Waltz changes give rise to a breach [by IBM] of its Imperial and of its contractual duty of trust and confidence.” (¶1534).

- Does this mean that the Initial 2009 NPA (with the threat of no pay rises at all in future) were a breach “in isolation” (i.e. outside the context of Project Waltz) but also a breach in the context of Project Waltz?
- Does this mean that the Later 2009 NPAs were a breach of the contractual duty of trust and confidence in the context of Project Waltz even though they were not a breach in isolation from the Project Waltz changes?



NPAs



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



NPA's



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 1st 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)).



The Exclusion Power



- Members argued that the Exclusion Power breached the fetters in two ways:
 - i) 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



- As to the effect of a breach of the fetters
 - Members: Exclusion Power can only be valid if it has a scope / purpose that is consistent with the Main Plan Rules and the fetters.
 - IBM: To the extent that there is a breach of the fetters the amendment was valid *pro tanto* so that service before the amendment retains a final salary link.



The Exclusion Power



- 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” (§164)
 - 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?



The Exclusion Power



- In relation to the breach of the fetter by breaking the final salary link Warren J held that the Exclusion Power was validly introduced but subject to a limitation that:

“...a member concerned should be entitled, if it produces a better result for him than statutory revaluation of his leaving service benefit, to a pension based on his period of service to the date of the exercise of the Exclusion Power and on his salary at the date when he actually ceases to be an employee.”

- i.e. an underpin protecting the final salary link in respect of benefits accrued up to the date of exercise of the Exclusion Power.



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 be made which shall operate” and no amendment “shall operate” (¶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).



The Exclusion Power



- Warren J relied upon *Besttrustees v Stuart* [2001] PLR 283; *Betafence v Veys* [2006] PLR 137 and *Re IMG* [2009] EWHC 2785 (paras 199 – 202)
- The argument on behalf of the members that it was significant that these cases dealt with amendments that were once-and-for-all rather than with the introduction of new powers exerciseable in the future, was rejected.
- This is not a case in which the principle that you cannot be allowed to do in two steps what you cannot do in one should be applied
- It would have been possible for the amendment to have terminated future accrual (without triggering a winding-up) provided that it had been made subject to a proviso protecting the final salary link. There is nothing wrong with an amendment to introduce a power to do this at a later date (¶ 203).



Consultation



- 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



- 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).



Title:
Name
Date:

The consequences of no declaration



- 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?



Title:
Name
Date:

The final salary link



- Issue: Did the 2006 Deed of Amendment (if valid) break the final salary link?
- Turned on the meaning of “accrued” in the amendment power
- Millett J in *Re Courage* did not express a view on the meaning of “accrued” - two different versions of the report considered (¶¶116 – 117)
- Commonwealth authorities considered on the meaning of “accrued”



The final salary link



- Newey J held that the final salary link was protected:
 - (i) no need for a benefit to be payable at once for it to have ‘accrued’;
 - (ii) a benefit can ‘accrue’ even it never falls due for payment;
 - (iii) a right to a pension of ‘one-seventieth part of...Final Salary can, as a matter of language, be described as ‘accruing’ with each year’s service.
 - (iv) no compelling reason to construe ‘accrued’ more narrowly than ‘secured’ (¶128)



THE END



A LEGAL UPDATE

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

