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and Faculty
of Actuaries

Professional Negligence – Will it get any easier?

Pensions and the Law
2013

17 September 2013



Professional Negligence

Will it get any easier?

Chris Netiatis, Partner

Julian Richards, Senior Solicitor

Julian Prentice, Solicitor

Pitmans LLP



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Timetable

- The Parties
- Common, undisputed facts of the matter
- Areas where the Parties differ
- Debate between the Parties
- Jury Deliberations and questions to the Claimant and Defendant
- Jury Findings
- Closing
- Questions or Comments



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The Parties

- For the Claimants (Julian Richards):
 - Large Pension Trustees
 - Greedy Corporate Limited
- For the Defendant (Julian Prentice):
 - RedHot Actuaries
- Judge (Chris Netiatis)
- The Jury (You)



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Facts

- Large Pension Scheme (the “Large Scheme”) is a final salary scheme. Accrual of final salary benefits for existing members continues, albeit the scheme is closed to new entrants.
- Large Scheme was created by deed in the 1970s with successive deeds and rules in 1985, 1995 and 2004.
- Pension is calculated as $n/60\text{ths} \times \text{Final Pensionable Salary (FPS)}$ (where “n” is the duration of pensionable service). FPS is calculated by reference to “Pensionable Salary” (PS).
- The definition of “PS” in the Scheme’s rules (both historic and current) includes fluctuating emoluments (bonuses and commissions).



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Facts Continued

- Large Pension Trustees and Greedy Corporate Limited decided in 1988 to remove fluctuating emoluments from the definition of PS. RedHot Actuaries agreed to implement any necessary changes to effect this.
- RedHot Actuaries have at all material times provided actuarial and administration services for Large Scheme. They have also prepared documentation including scheme rules and member explanatory booklets.
- Since 1985 Large Scheme has been (and continues to be) administered on a basis consistent with a narrow definition of “Pensionable Salary” i.e. excluding fluctuating emoluments.
- Since 1988 the Employer and Trustees both understood that only basic annual salary was pensionable.



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Facts Continued

- Actuarial valuations were prepared by RedHot Actuaries based on the incorrect definition of Pensionable Salary; i.e. the valuation did not include additional liabilities presented by the inclusion of bonus as a pensionable element.
- Nonetheless, RedHot did prepare member explanatory booklets on the correct basis after 1988; i.e. to exclude bonus.



Document History

- Scheme established by deed in 1977
- First definitive deed executed in May 1985 (“1st DD”)
 - fluctuating emoluments included
- Second definitive deed executed in March 1995 (“2nd DD”)
 - no change despite decision in 1988 i.e. fluctuating emoluments still included
- Third definitive deed executed in May 2004 (“3rd DD”)
 - error compounded



Where the Parties Differ:

- **Duty of Care**
- **Breach of Duty**
- **Causation**
- **Loss**
- **Any Defences???**



Duty of care:

1. **Contractual:** Terms of Business; letter of appointment/ retainer letter; oral / written instructions and agreements etc.
2. **Negligence (TORT):** Reasonable care and skill?



Breaches of Duty

1. Failure to carry out instructions / do what was agreed.
2. Failure to do what is expected of Actuaries / spotting and dealing with potential issues and;
3. Carrying out instructions / doing the job without the care and skill expected of Actuaries.



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Causation: (Has the causal link been broken?)

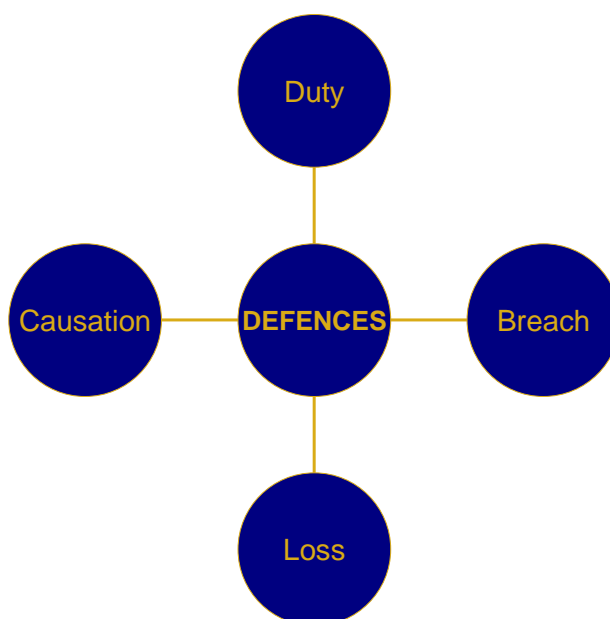
1. Actuaries: did any of the previous breaches cause the loss?
2. Was the loss actually caused by someone else?
 1. Trustees?
 2. Lawyers?
 3. Company?



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Loss

1. What is the maximum potential loss to the Scheme / Company?
2. What is the minimum potential loss to the Scheme / Company?



Over to You!

Can you be persuaded?



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What do you think?



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Conclusion

- Out of Court settlement
- Is there really a case against the Actuary?
- Rectification
- Compromise



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Do YOU really want to be that guy?



Questions or comments?



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