Wilberforce CHAMBERS

Nugee Memorial Pensions Conference & Dinner 2024

WEDNESDAY 19TH JUNE 2024

Nugee Memorial Pensions Conference 2024

Talk papers

Wednesday 19th June 2024

Contents

Speakers

Baroness Ros Altmann CBE (Guest Speaker)
Baroness Altmann is one of the UK's leading pensions experts, with over 35 years' experience in all aspects of pensions, from state pension policy to investment management of pensions funds.
She has worked as an independent consultant for many years, advising governments, the pensions industry and pension funds on policy and investment strategy. Her policy advisory work specialises in pensions and investment-related issues, and her work has often focused on the consumer perspective, focusing on helping pensioners or older citizens enjoy better later life income.
She was a consultant to the UK Treasury on the Myners Review of Institutional Investment and has worked on pensions policy issues with the Number 10 Policy Unit. Ros successfully spearheaded a campaign, lasting over 5 years, to force the UK Government to compensate 150,000 workers who lost their final salary company pensions after being falsely assured by the Government that their pensions were completely safe.
Baroness Ros Altmann CBE was appointed to the House of Lords and became Minister of State for Pensions in the UK Government following the May 2015 General Election until July 2016.

Edward Sawyer (Chair)
Edward has extensive experience of pensions litigation and advisory work, having appeared in a number of high-profile cases such as *Railways Pensions Trustee v Atos*, *Mitchells & Butlers*, *Lloyds Bank Pension Scheme* (GMP equalisation), *Pensions Protection Fund v Dalriada*, *IBM*, *Nortel, Merchant Navy Ratings* and many others. He has often acted against silks on the other side. Edward deals with a broad spectrum of pensions issues, whether on the instructions of employers, trustees or representative beneficiaries. Chambers & Partners 2024 says Edward is *"An outstanding lawyer, who is exceptionally clever and an excellent advocate"*. Chambers and Partners 2023 says "*Edward is hugely experienced and has got amazing technical knowledge – what he doesn't know about pensions isn't worth knowing. He's the safest pair of hands in the Pensions Bar.*"

Michael Tennet KC
Michael's practice encompasses litigation and advice in the fields of pensions (including professional negligence), financial services and private trusts. Has appeared in many of the most high profile and complex pensions cases of recent years. He has a particular knowledge of the work of actuaries, both in relation to pension funds and life assurance funds and is co-author of the chapter on actuaries in Professional Negligence Law and Practice (LLP). Chambers & Partners 2024 says *"Michael is one of the outstanding barristers at the Bar."* The same edition praises Michael as *"incredibly clever. He's very commercial, hand-on and very easy to deal with, and he's very good with clients"*.

Paul Newman KC
Paul regularly acts for some of the largest UK pension schemes, FTSE 100 companies and regulatory bodies on various pensions and financial services issues, often of a highly technical nature. A seasoned advocate, he is consistently ranked in the legal directories as a leading practitioner: Chambers & Partners 2024 says Paul is *"hugely knowledgeable"*, displays *"innovative thinking"* and *"will defend client interests robustly"*, while The Legal 500 2024 notes that *"he is an extremely clear and precise advocate in court"*. Paul is the founder and general editor of the Pensions Barrister website. His book, A Practitioner's Guide to Correcting Mistakes in Pension Schemes, is published by Bloomsbury Professional.

Jonathan Hilliard KC
Jonathan advises regularly on pensions restructuring, other corporate pensions issues, moral hazard concerns, RPI and CPI issues and other similar points. He regularly acts in rectification claims and in the compromises of complex pensions disputes. Chambers and Partners 2024 describes Jonathan as *"a truly brilliant and rare KC"* and *"a superbly clever man; he's a go-to for large, complicated matters"*. The guide says *"Jonathan's mind works at an unbelievable pace and his analytical ability is incredible. He's a pleasure to work with, and an enormous support when he's in court"*.

David Pollard
David is a leading and highly experienced lawyer in the pensions field and related areas. He switched to practise as a barrister at the end of 2017, after 37 years practice as a solicitor. He was a chair of the Association of Pension Lawyers (APL). His practice has included advising employers and trustees on relation to pension law matters, including corporate transactions, scheme funding, scheme mergers, scheme changes, employer insolvency and Pensions Regulator issues. David has been involved in many noteworthy cases, including *Merchant Navy Ratings Trustee v Stena* [2022], where he acted for representative beneficiaries in relation to settlement of ill-health early retirement issues. He has published five books in the areas of pensions, insolvency and employment law. His latest book "Employment Law and Pensions" (2nd edition) was published in July 2023.

Sebastian Allen
Sebastian is a leading commercial chancery junior specialising in all aspects of pensions. He has a wide range of pensions experience, as both advisor and advocate, and is frequently instructed to act in many of the largest and most high-profile pensions cases (often involving highly technical or complicated actuarial issues) including for some of the largest UK pension schemes and FTSE 100 companies. Sebastian has extensive experience and expertise in the regulatory aspects of pensions law, acting for many years on a number of important regulatory matters, both for and against the Pensions Regulator and the Pension Protection Fund. He has appeared before the Determinations Panel, the Upper Tribunal, the High Court and the Court of Appeal. Chambers & Partners 2024 says *"Sebastian is well and truly a rising star. Technically gifted and wonderfully easy to work with"*.

James Walmsley
James has extensive experience in the pensions field, building on his financial and policy experience before joining the Bar. His expertise covers both regulatory (moral hazard powers, scheme funding, trustee appointments) and non-regulatory aspects, including construction, rectification and blessing claims, as well as professional liability actions. He is recommended in both Chambers & Partners and The Legal 500 for his pensions work. The Legal 500 2024 praises James as *"a brilliant strategist. His ability to absorb vast and complex fact patterns and apply acute legal analysis to them is peerless"*. Chambers & Partners 2024 says *"James' intellect is astonishing and his ability to retain huge volumes of information is phenomenal"*.

Jennifer Seaman
Jennifer is an established junior in the field of pensions and is recommended in both Chambers & Partners and The Legal 500 for her pensions experience. Her recent cases in this area have included *Virgin Media Ltd v NTL Pension Trustees II Ltd [2023] EWHC 1441 (Ch)* (acting for the Trustees); *Danapak Flexible Retirement Benefits Scheme* before the Determinations Panel in November 2023 (acting for a target facing a Contribution Notice); *Dean, Wellman & Borsley v The Commissioner of Police of the Metropolis* (acting for the Met Police in a test claim following McCloud). Jennifer's practice covers wide-ranging issues such as the professional negligence of actuaries and solicitors; the construction and rectification of pension deeds and rules (with experience of acting for the trustees and for the rep ben); the validity of deeds and estoppel and the proper exercise of pension trustee powers. Jennifer is on the AG's A Panel and advises government departments on pension matters. The 2024 edition of Chambers & Partners praises Jennifer as *"a very approachable and knowledgeable junior, who immerses herself in the detail of complex matters and delivers advice clearly and succinctly"*.

James McCreath
James is recognised as one of the leading pensions juniors at the Bar. The current edition of The Legal 500 describes him as *"A real team player, extremely bright with excellent drafting skills"* and *"a barrister with an impressive intellect and excellent intuition"*. He has extensive experience in pensions litigation, regulatory work (where he has acted in most of the high-profile regulatory actions in recent years) and advisory work. As well as work in his own right, he has juniored for most of the leading pensions silks, inside and outside of Chambers. He also acts in a variety of often very high-value professional negligence actions, both for and against professionals, trustees, and scheme consultants and administrators. In that context, he has acted (including acting unled) for some of the leading pensions solicitors' firms defending actions brought against them.

Jonathan Chew
Jonathan acts for and advises a range of institutional and pensions professional clients, and has been described in the directories as "a first-class advocate in terms of strategy and technical points". He has appeared in the hard-fought *Mitchells & Butlers* litigation on rectification and other matters and in the Court of Appeal in *Britvic v Britvic*, the leading case on "corrective construction". His current and recent work reflects relevant pensions issues: for occupational schemes: e.g. RPI/CPI switches and other issues relating to pension increases, rectification, scope of amendment power issues, and regulatory action; and for personal schemes/SIPPs: questions of interpretation, misselling, pensions liberation, and investment duties. The Legal 500 2024 describes him as providing "*brilliant support to his leaders before and during trial, as well as being assured on his own in the Court of Appeal*". Chambers & Partners 2024 describes him as "*excellent*" and "*a pleasure to work with*".

Ram Lakshman

Ram has a broad commercial chancery practice, spanning commercial disputes, civil fraud, insolvency, trusts and pensions. He regularly appears as sole counsel in both the High Court and the County Court and is equally comfortable being instructed in his own right or as part of a larger counsel team. A substantial proportion of Ram's practice relates to actual or contemplated pensions disputes. He has experience acting in cases involving errors in pension schemes (including absence of s.37 certificates, non-compliance with formalities, and rectification issues) as well as challenges by the Pensions Regulator. Ram is currently involved in a complex and high value compromise arising out of the potential invalidity of scheme documents across many decades. Feedback for Ram's pensions work includes: "*Ram provides an excellent service in a client-friendly way*".

Criminal and civil sanctions in the pensions context

David Pollard, Sebastian Allen and James McCreath

Introduction

1. The world of pensions has always stood out as a confluence of different areas of civil law; a legal fusion of trusts, equity, employment and company law, all underpinned by a vast array of statutory and regulatory provisions.

2. Since the Pension Schemes Act 2021 ("**PSA 2021**"), the more alien world of criminal law has been reinforced as part of this melting pot of legal principle and practice. Pensions practitioners throughout the industry have had to get to grips with a variety of criminal law issues, which most people will have thought they had safely left behind at law school.

3. In this paper we consider the ways in which the criminal world now interacts with our previously (predominantly) civil law existence and some of the more complicated issues that now need to be in the minds of all pensions practitioners in this area.

4. We cover the following specific topics:

    4.1. <u>What are the pensions crimes and fines?</u>
    We start by outlining the various ways in which previously civil law conduct has been criminalised and we consider the potential impact of the new and very broadly drafted criminal sanctions that have been introduced.

    4.2. <u>Whose criminal offence is it?</u>
    We then consider who it is that can commit these new criminal offences – not only in terms of those who are primarily responsible for particular conduct, but also in terms of when secondary person (eg a director or manager) can also have liability.

    4.3. <u>Whose mind in a company matters?</u>
    We finally explore where the law now lies on whose state of mind matters in order to establish the necessary *mens rea* for a company to be held primarily liable for a criminal act.

A. What are the pensions crimes and fines?

5. There are variety of different pensions crimes and fines now embedded in the pensions legislation.

6. The main relevant statutes are the Pensions Act 1995 ("**PA 1995**"), the Pensions Act 2004 ("**PA 2004**"), the Pensions Act 2008[1] ("**PA 2008**") and - in relation to the significant amendments and extensions made (from October 2021) by the inclusion of new crimes and an enhanced "financial penalty" regime in the PA 2004, s 88A - the PSA 2021.

7. There are now essentially three levels of penal provision in the pensions legislation:

   7.1. crimes

   7.2. financial penalties (of up to £1m) – PA 2004, s 88A[2].

   7.3. civil penalties – where the legislation cross-refers to PA 1995, s 10[3]. The maximum penalty is £5,000 for an individual or £50,000 for a company.

   7.4. There are also penalties under auto-enrolment legislation (Pensions Act 2008) and climate change regulations[4], sometimes following failure to comply with a compliance notice. The Pensions Regulator (***TPR***) also has power to issue fixed and escalating penalties in relation to failure to comply with the auto-enrolment legislation or a failure to comply with the information provisions.[5]

Pensions crimes

8. There were a number of well-known areas under pensions legislation where conduct could result in a criminal sanction even prior to the PA 2021.

---

1 PA 2008 mainly relates to the employer duties in relation to auto-enrolment.

2 Inserted by PSA 2021, s 115, with effect on and from 1 October 2021 and only in relation to acts or omissions after that date - the Pension Schemes Act 2021 (Commencement No 3 and Transitional and Saving Provisions) Regulations 2021 (SI 2021/950).

3 Slightly oddly, at least one of the civil penalty provisions is free-standing and does not just refer to s 10. The specific civil penalty in regulation 18A of the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 (SI 2006/349, as amended). This was added into the 2006 consultation regulations on and from 6 April 2009 by SI 2009/615. The penalty looks similar to that in PA 1995, s 10, but the regulations do not (unlike s 10) contain a secondary person extension.

4 The Occupational Pension Schemes (Climate Change Governance and Reporting) Regulations 2021 (SI 2021/839), reg 9.

5 PA 2008, ss 40 and 41 (auto-enrolment) and, inserted by PSA 2021, PA 2004, ss 77A and 77B (failure to comply with s 72 information requests). PA 2004 incorporates, in PA 2004, ss 77A(5) and 77B(7), the provisions dealing with auto-enrolment penalties in PA 2008, ss 42 to 44.

9. The main examples of these included:

   9.1. failing to provide information required by the Pensions Regulator (***TPR***) by a formal notice under PA 2004, s 72 (PA 2004, s 77);

   9.2. obstructing any inspector exercising powers under ss 73, 74 or 75 of the PA 2004 (PA 2004, s 77);

   9.3. knowingly or recklessly providing[6] false or misleading information to TPR – PA 2004, s 80 or the Pension Protection Fund (***PPF***) (PA 2004, s 195);

   9.4. wilfully failing to comply with the auto-enrolment duty (PA 2008, s 45);

   9.5. knowingly to be concerned in the fraudulent evasion of the duty on the employer to pay to the relevant scheme any employee contributions which have been deducted at source by the employer from pay (PA 1995, s 49(11)). A similar offence applies in relation to 'direct payment arrangements' (e.g. personal pensions) under the Pension Schemes Act 1993, s 111A(12);

   9.6. a trustee or manager agreeing in the determination to make an investment in breach of the restrictions on employer-related investments (PA 1995, s 40(5)).[7] There have been a number of criminal prosecutions under this provision[8], and also one where a professional adviser to a scheme had been charged with four counts of assisting or encouraging prohibited loans[9].

10. The PSA 2021, with effect on and from 1 October 2021, amended PA 2004 to add various new crimes in relation to pensions and added new powers for TPR to levy

---

6 These offences relate to "any person" providing false or misleading information. It is not clear whether the primary information offence (a) is incurred by the individual person who actually supplies the information or (b) is incurred by the relevant company for whom that individual is acting (using the usual attribution rules for corporate knowledge) or perhaps both. If (a), the potential for a secondary liability is reduced; if (b) then a secondary liability can arise.

7 A trustee who "fails to take all such steps as are reasonable to secure compliance" with the restrictions on employer-related investments can be liable to a civil penalty (under PA 1995, s 10) – PA 1995, s 40(4).

8 TPR's Compliance and enforcement bulletin July to December 2023 indicates 9 criminal cases under s 40 up to the end of 2023.

9 TPR press release: *Former trustees face crown court over illegal pension loan and investment offences* Ref: PN22-30 Issued Thursday 20 October 2022. https://www.thepensionsregulator.gov.uk/en/media-hub/press-releases/2022-press-releases/former-trustees-face-crown-court-over-illegal-pension-loan-and-investment-offences

(through a determination by its determinations panel) enhanced financial penalties (PA 2004, s 88A).

11. The new crimes[10] now in PA 2004 include:

    11.1. failure to pay a s 38 contribution notice (without reasonable excuse) – PA 2004, s 42A;

    11.2. avoidance of an employer debt under PA 1995, s 75 – PA 2004, s 58A; and

    11.3. conduct risking accrued scheme benefits – PA 2004, s 58B.

12. The first of these adds to what was previously just a civil law obligation to pay the statutory "debt" arising under a contribution notice into an obligation that has criminal sanctions attached to it if there is a failure to comply.

13. The second and third of these are entirely offences which were described as "revolutionary" by Guy Opperman, who was the Pensions Minister when the bill for the PSA 2021 was introduced.

14. The offence of "*avoidance of an employer debt*" is committed by engaging intentionally in a course of conduct (or an act or omission) that:

    14.1. prevents the recovery of the whole or any part of a s 75 debt due from the employer;

    14.2. prevents the debt becoming due;

    14.3. compromises or otherwise settles the debt; or

    14.4. reduces the amount of the debt which would otherwise become due,

    without a reasonable excuse.

15. The offence of "*conduct risking accrued scheme benefits*" is committed if a person:

    15.1. engages in a course of conduct (or an act or omission) that detrimentally affects in a material way the likelihood of accrued scheme benefits being

---

[10] There are broadly equivalent financial penalties as well – PA 2004, ss 42B, 58C and 58D.

received (whether the benefits are to be received as benefits under the scheme or otherwise);

15.2. knew or ought to have known that the course of conduct would have that effect; and

15.3. did so without a reasonable excuse.

16. The offences can be committed by any person, not just those who have responsibility for the pension scheme or are associated or connected with the scheme's employer/sponsor[11].

17. For the *avoidance of an employer debt* and *conduct risking accrued scheme benefits* offences, the sanctions are up to 7 years imprisonment and an unlimited fine.

18. TPR has highlighted the fact that advisers and others, who are not party to the relevant transactions, may commit the offences by aiding, abetting, counselling or procuring the relevant act or course of conduct if they do so without a reasonable excuse[12]. What that means in practice is that *all* advisers have to understand and be particularly wary of the sorts of situations that might give rise to these new criminal sanctions.

19. The problem is that the statutory language is very broadly drafted and may in principle catch any course of dealing that reduces the resources available to fund the scheme or the scheme's recoveries in a default scenario. They may consequently cover a wide range of ordinary business or other activities, subject to an overriding exemption where there is a "reasonable excuse" (which is a matter ultimately for a jury to decide).

20. Where is the line to be drawn as to what is permissible commercial conduct and what is criminal conduct?

---

[11] Unlike the targets for a contribution notice (CN) or financial support direction (FSD), which can only apply to someone who is or was so connected or associated with an employer.

[12] This sems to be a reference to the extended criminal liability under the Accessories and Abettors Act 1861, s 8.

21. TPR is the main prosecuting authority for these offences. There are two useful guidance notes that have been issued by TPR:

- a criminal offences policy for ss 58A and 58B of the PA 2004; and
- one outlining TPR's approach to overlapping powers.

22. The essential message from TPR's guidance is that it is currently not intending to target "ordinary commercial activity" but rather the most serious examples of intentional or reckless conduct that were already within the scope of their Contribution Notice power or would be in scope if the person were connected with the scheme employer. The guidance provides quite a lot of detail and some worked examples to assist advisers in this area.

23. There are, however, a number of obvious difficulties with a criminal sanctions regime which on its face captures an extensive range of ordinary commercial conduct and which leaves it to the prosecting entity to determine on a case by case basis which claims to pursue.

24. Whilst TPR has made it clear that their current policy is that prosecutions will target conduct that would previously have fallen within their Contribution Notice jurisdiction (but extended to apply to those who are outside that jurisdiction as not being connected or associated), the reality is that there has always been a great deal of uncertainty within the market as to what commercial conduct could legitimately trigger a Contribution Notice. There is still very little in the way of precedent in this area and so providing advice as to what conduct could or could not trigger a Contribution Notice being issued remains very difficult in practice.

25. The difficulties caused by that uncertainty are compounded by the fact that:

25.1. Just because something is "ordinary commercial conduct" in the market, does not mean that it will be considered by TPR to be acceptable where pension scheme rights have (in its view) been under prioritised within those ordinary commercial practices.

25.2. TPR has made it clear that criminal sanctions will not be limited (as Contribution Notices are) to those who are connected or associated with the employer of the scheme, so that criminal sanctions may lie against people even where no Contribution Notice would be available, such as against lenders, suppliers or insurance companies – and potentially others eg trade unions and contractors.

25.3. The "mental element" required for s 58A (avoidance of an employer debt) is "intention" but for s 58B (conduct risking accrued benefits) it is both intention and recklessness. This means that prosecution can lie against

people who are not connected or associated with the scheme even where they did not intend to risk accrued benefits but it is considered by TPR that they ought to have known that their conduct risked accrued benefits.

25.4. There is no s 42 equivalent clearance application that can be made to shield people from criminal sanctions under s 58A and 58B. Whilst it would be expected that a successful clearance application would count for something in any decision to be taken by TPR as to whether or not to prosecute, there are no guarantees.

26. It is likely in practice – given the breadth of the offences that have been drafted by the legislature – that considerable weight will have to be placed by TPR on what is a "reasonable excuse" for the purposes of delimiting the ambit of its prosecutions in the same way that a great deal of weight is put on the concept of "reasonableness" in the Contribution Notice jurisdiction to ascertain whether a Contribution Notice ought to be issued.

27. The guidance issued by TPR explains the sort of factors that TPR will take into account when considering what amounts to a "reasonable excuse". A clear focus in that guidance is the objective of the particular acts involved and the message being given is that the more disconnected or attenuated any potential damage to the scheme is from the "objectives" of those involved in the acts, the more likely it is that TPR will consider that there is a "reasonable excuse" for the purposes of the legislative framework and so may decide not to prosecute.

Pensions: financial penalties

28. Under the amendments to PA 2004 (made by PSA 2021 on and from 1 October 2021), the potential for financial penalties (under PA 2004, s 88A) of up to £1m on a person, including an employer.

29. These can arise in circumstances which include:

29.1. failure to pay a contribution notice under PA 2004, s 38 without reasonable excuse – PA 2004, s 40B;

29.2. avoidance of an employer debt under PA 1995, s 75 – PA 2004, s 58C;

29.3. conduct risking accrued scheme benefits – PA 2004, s 58D;

29.4. failure to notify TPR of a 'notifiable event' - PA 2004, ss 69[13] and 69A[14];

29.5. knowingly or recklessly providing false or misleading information to TPR – PA 2004, s 80A; and

29.6. knowingly or recklessly providing false or misleading information to pension scheme trustees - PA 2004, s 80B.

Pensions: civil penalties

30. The examples of potential pensions civil penalties (under PA 1995, s 10) on an employer include:

30.1. failing to pay across employee contributions within the required time without a reasonable excuse - PA 1995, s 49;

30.2. failing to report a breach of law to TPR – PA 2004, s 70; and

30.3. failing without reasonable excuse to pay contributions under the schedule of contributions – PA 2004, s 228(4)(b).

31. The Pensions Law Handbook[15] used to contain a useful list of potential criminal and civil penalties under the pensions legislation[16], but this has been dropped in recent editions.

Pensions fixed penalty and escalating penalties

32. TPR also has power to issue fixed penalty notices and escalating penalty notices.[17] The climate change regulations 2021[18] include penalty notice provisions.

---

13 Before 1 October 2021, failure to notify TPR of a notifiable event under s 69 could incur a civil penalty under PA 1995, s 10.

14 PA 2004, s 69A envisages extended notifiable events, but as at the date of writing is not yet in force.

15 Current edition is the 16th edition by CMS Pensions Team (Bloomsbury Professional, 2023).

16 For example, the 12th edition (2015), Appendix I.

17 PA 2008, ss 40 and 41 (auto-enrolment) and, inserted by PSA 2021, PA 2004, ss 77A and 77B (failure to comply with s 72 information requests). PA 2004 incorporates, in PA 2004, ss 77A(5) and 77B(7), the provisions dealing with auto-enrolment penalties in PA 2008, ss 42 to 44.

18 The Occupational Pension Schemes (Climate Change Governance and Reporting) Regulations 2021 (SI 2021/839), reg 9.

33. These are broadly for failure to comply with auto-enrolment requirements or information or investigation notices from TPR under PA 2004, ss 72–75. However, these provisions do not include any secondary party (e.g. director or officer) extensions, unlike those applicable to crimes, financial penalties or other civil penalties.

B. Whose criminal offence is it?

34. Where crimes or fines apply to a "body corporate" – eg an employer or a trustee company – various persons involved in the company can also be potentially guilty of a crime (or incur a financial or civil penalty) where they are involved in the relevant crime (or penalty action) committed by the company.

35. In common with much other legislation, the 'crimes and fines' provisions in the pensions legislation each usually contain an extension allowing a secondary party – **a "director, manager, secretary or other similar officer of the body corporate"** – to be guilty of the same offence as the company (or also liable for a penalty). This is subject to other conditions being satisfied, in particular the need for the offence (fine) to have involved the consent or connivance of, or (in most cases) neglect by, the secondary party.

36. This section of the paper looks at the position of such secondary parties under the extension provisions in the pensions crimes and fines legislation.

37. This is a fairly complex area – for example the issue of whether an insolvency practitioner is an "officer" of the company over which he or she has been appointed is the subject of the recent decision of the Supreme Court in *R (Palmer) v Northern Derbyshire*[19].

38. This section looks in more detail[20] at two areas:

    38.1. Who falls within the extended class - ie who is a director or officer or manager?; and

    38.2. For those who fall within the class, what more is needed for a liability?

---

[19] *R (on the application of Palmer) v Northern Derbyshire Magistrates' Court* [2023] UKSC 38, [2024] ICR 288.

[20] Drawing from, and updating extracts from the commentary in, David Pollard's books: '*Connected and Associated: Insolvency and Pensions Law*' (2021, Bloomsbury Professional) and '*Corporate Insolvency: Employment and Pension Rights*' (7th edn, 2022, Bloomsbury Professional).

Who falls within the extended class?

39. In the case of criminal offences, third parties (including directors etc) can also be guilty of a criminal offence under the general legal accessory provisions. These are not dealt with in this paper, but an outline is below:

Where a corporate entity is guilty of a crime (but not a financial or civil penalty), general legislation provides for involved third parties potentially also to incur a liability in some circumstances. This includes:

(a) **Accessories and Abettors Act 1861**: a person aiding, abetting, counselling or procuring the company in committing a criminal offence – the Accessories and Abettors Act 1861, s 8.

(b) **Serious Crime Act 2007**: under Part 2 of the Serious Crime Act 2007, third parties can be guilty of an offence if they intentionally encourage or assist a criminal offence (whether or not the offence is actually committed).

(c) **Direct criminal offence or civil penalty:** Third parties could incur direct criminal liability under the relevant provisions if they committed the offence themselves (even though they may be acting on behalf of the company). For example, if the crime involved the director or manager agreeing to it being carried out (eg the conspiracy offence under Criminal Law Act 1977, s 1). Usually this would require specific intent.

The potential secondary criminal liabilities under the Accessories and Abettors Act 1861 or the Serious Crime Act 2007 only apply to crimes (or potential crimes) of the company. They do not as such apply where the company is liable for civil penalties or financial penalties which are not crimes.

Using decisions on other statutes

40. There is little reported caselaw on the pensions crimes and fines provisions and even less on the secondary liability extensions in the pensions legislation. But the extension provisions follow a similar form to that used in many other statutes[21].

41. There is commentary in the caselaw generally on statutory interpretation that there is "danger" in construing words in one statute by reference to a decision on similar

[21] The England and Wales Law Commission commented in its 2022 paper '*Corporate Criminal Liability: an options paper*' (10 June 2022) that there seemed to be well over a thousand legislative instruments creating criminal liability on this basis. Irish legislation contains similar provisions – see *DPP v Hegarty* [2011] IESC 32, [2011] 4 IR 635.

words in another statute[22]. But other caselaw holds that decisions on other statutes can be considered where they are "instructive by analogy" and can be "strongly supportive"[23]. However, in practice the decisions on secondary party provisions in other legislation are, in our view, likely to be applied in relation to the pensions legislation as well – at least in the absence of a convincing reason why to distinguish a decision in a pensions context.

Pensions crimes and fines and secondary parties

42. Pensions legislation contains increasing numbers of criminal, financial penalty and civil penalty provisions. To date, these have been seemingly little used (aside from the auto-enrolment penalty provisions and prosecutions for failure to provide information to TPR[24]), but they have potentially wide effect. Part A of this paper gives a general outline of the pensions crimes and fines regime.

43. The primary target for a criminal or penalty process is usually a trustee or employer who fails to comply with some requirement[25]. But where the relevant target is a body

---

22 See eg *Hastie & Jenkinson v McMahon* [1991] 1 All ER 255, CA per Woolf LJ at p261g: "There is always danger in seeking to apply decisions on specific statutory provisions to different situations…."; and *Stephens v Cuckfield RDC* [1960] 2 All ER 716, CA per Upjohn LJ at p719G: "Authorities on rather similar words in other Acts passed for entirely different purposes … do not assist us."

23 For example, Lord Lloyd-Jones in *R (KBR Inc) v SFO* [2021] UKSC 35, [2022] AC 519 at [46] and [53].

24 See eg TPR press release "Former sports centre director fined for withholding information in pensions probe" (31 May 2024) https://www.thepensionsregulator.gov.uk/en/media-hub/press-releases/2024-press-releases/former-sports-centre-director-fined-for-withholding-information-in-pensions-probe. Stated to be a prosecution under s77(5), Pensions Act 2004. It is not clear from the press release whether the prosecution was based on a direct request for information served by TPR on the director or whether the request was made to the company and the director was being prosecuted under the secondary liability provisions discussed in this paper.

Dominic Chappell was convicted in 2018 of failing to comply with s72 information requests served on him personally – see *The Pensions Regulator v Chappell* [2018] EW Misc B1 (MagC) see https://www.bailii.org/ew/cases/Misc/2018/B1.html. An appeal was reported as dismissed (The Times 15 December 2018). See TPR press release: Dominic Chappell ordered to pay more than £124,000 for failing to reveal information about the sale of BHS (Ref: PN18-67: 14 December 2018). https://webarchive.nationalarchives.gov.uk/ukgwa/20190701111603/https://www.thepensionsregulator.gov.uk/en/media-hub/press-releases/chappell-ordered-to-pay-124000-for-failing-to-reveal-information-about-bhs

25 In some cases the primary target can be an individual, without any need for the secondary party provisions to apply. For example:

corporate (ie a company incorporated under the Companies Acts, but also other corporate bodies and foreign corporations), the pensions legislation, in common with much other legislation[26], also usually provides that a secondary class of persons - a "*director, manager, secretary or other similar officer of the body corporate*" - can also be guilty of the offence (or incur a penalty). This secondary liability is subject to some other conditions, in particular that the relevant offence/penalty was incurred by the relevant offending company[27] due to the consent, connivance or (in most cases) neglect of the secondary party[28].

44. There seems to be no requirement in these types of secondary offences for the offending company actually to have been convicted of the relevant offence[29], but it will be necessary to show that the company has committed the offence. It seems likely that the same analysis will apply to pensions criminal offences and civil and financial penalties.

45. This is an important area for such secondary parties. They may well not be able to shelter behind the corporate nature of the offending company. It is easy to surmise that the intention of Parliament is to catch potential secondary parties who were

---

- TPR's powers to request information from a wide category of persons (PA 2004, s72(2)(d): "any other person appearing to the Regulator to be a person who holds or is likely to hold information relevant to the exercise of the Regulator's functions"), with offences under s 77(1) for neglecting or refusing to comply (without reasonable excuse) and s 77(5) for intentional destruction of a document which he is liable to produce under s 72.
- Knowingly or recklessly providing TPR with false or misleading information in a material particular is an offence for "any person" – PA 2004, s 80(1)(a).

26 The England and Wales Law Commission commented in its 2022 paper '*Corporate Criminal Liability: an options paper*' (10 June 2022) that there seemed to be well over a thousand legislative instruments creating criminal liability on this basis. Irish legislation contains similar provisions – see *DPP v Hegarty* [2011] IESC 32, [2011] 4 IR 635.

27 This paper uses the term "offending company' to refer to the primary body corporate target. The secondary parties listed must be within the relevant class (director, manager, secretary, officer) and "of the body corporate", meaning of the offending company.

28 For an example of a director being fined for a failure by a company to provide information to TPR, see TPR's press release: *Brewery and its chairman admit failing to hand over information to The Pensions Regulator* (Ref: PN18-25, 15 May 2018), which states that [The director] "was charged on the basis that he consented to or connived in the offence by the company, or caused it by his neglect." - see https://webarchive.nationalarchives.gov.uk/ukgwa/20180702133219/http://www.thepensionsregulator.gov.uk/press/brewery-and-its-chairman-admit-failing-to-hand-over-information-to-the-pensions-regulator.aspx

29 *R v Dickson* (1992) 94 Cr App R 7, [1991] BCC 719 per Leggatt LJ at 722G (a case relating to convictions for supplying goods to which a false trade description was applied); and in Ireland: *DPP v Hegarty* [2011] IESC 32, [2011] 4 IR 635.

involved in the commission of the offence (or fine), perhaps particularly where the offending company is insolvent and so cannot meet the relevant fine or penalty.

46. As outlined in Part A of this paper, there are now four levels of penal provision in the pensions legislation:

    - **crimes**

    - **financial penalties** (of up to £1m) – PA 2004, s 88A[30].

    - **civil penalties** – where the legislation cross-refers to PA 1995, s 10[31]. The maximum penalty is £5,000 for an individual or £50,000 for a company. The civil penalty provisions are scattered liberally throughout the pensions legislation.

    - **Fixed and escalating penalties** – TPR can issue fixed and escalating penalties in relation to failure to comply with the auto-enrolment legislation or a failure to comply with the information provisions[32].

Director, manager and officer, etc extension wording

47. Where the offending company has committed an offence then the relevant legislation creating the offence often[33] includes extension wording providing that a "director, manager, secretary and other similar officer" of the offending company can also be guilty of that offence.
    The pensions legislation includes an extension provision in relation to financial penalties (although not including the "neglect" limb) and civil penalties as well. But an extension provision does not apply to fixed or escalating penalties.

48. This section of this paper focuses on the phrase defining the class at risk. This looks quite simple, "*director, manager, secretary or other similar officer of the body*

---

30 Inserted by PSA 2021, s 115, with effect on and from 1 October 2021 and only in relation to acts or omissions after that date - the Pension Schemes Act 2021 (Commencement No 3 and Transitional and Saving Provisions) Regulations 2021 (SI 2021/950).

31 Slightly oddly, at least one of the civil penalty provisions is free-standing and does not just refer to s 10. The specific civil penalty in regulation 18A of the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 (SI 2006/349, as amended). This was added into the 2006 consultation regulations on and from 6 April 2009 by SI 2009/615. The penalty looks similar to that in PA 1995, s 10, but the regulations do not (unlike s 10) contain a secondary person extension.

32 PA 2008, ss 40 and 41 (auto-enrolment) and, inserted by PSA 2021, PA 2004, ss 77A and 77B (failure to comply with s 72 information requests).

33 See, eg in the employment and pensions statutes, TULRCA 1992, s 194(3); Social Security Administration Act 1992; s 115; PSA 1993, ss 157, 168, 169; PA 1995, s 115; Employment Rights Act 1996, ss 180 and 190; PA 2004, s 309; and PA 2008, s 47.

corporate", but its interpretation is complex. Who is a "manager"? Who is a "similar officer"?

49. If the offence was committed by the offending company "with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in such capacity", that person is also guilty of that offence.[34]

Pensions legislation: crimes

50. PA 1995 includes a general extension provision.

> **Pensions Act 1995**
> **115.— Offences by bodies corporate and partnerships.**
> (1) Where an offence under this Part committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a director, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity, he as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly.
> (2) Where the affairs of a body corporate are managed by its members, subsection (1) applies in relation to the acts and defaults of a member in connection with his functions of management as to a director of a body corporate.
> (3) Where an offence under this Part committed by a Scottish partnership is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a partner, he as well as the partnership is guilty of the offence and liable to be proceeded against and punished accordingly.

51. Other pensions legislation has substantially identical criminal extensions to secondary parties, in particular: PSA 1993, s 169; PA 2004, s 309 and PA 2008, s 46.

Pensions: financial penalties (PA 2004, s 88A, inserted by PSA 2021)

52. TPR (acting through its determinations panel) also has power to require the payment of civil penalties and (from October 2021 under PSA 2021) financial penalties.[35] These can be levied by TPR against employers and others under the pensions legislation.

---

[34] Similar provisions appear in other statutes such as the Fire Precautions Act 1971, s 23(1); the Health and Safety at Work etc Act 1974, s 37(1); and the Environmental Protection Act 1990, s 157(1).

[35] The power in PA 2004, s 88A for TPR to impose financial penalties (initially of up to £1m) for breach of specified provisions in PA 2004 was inserted by PSA 2021 with effect on and from 1 October 2021 - the Pension Schemes Act 2021 (Commencement No 3 and Transitional and Saving Provisions) Regulations 2021 (SI 2021/950).

53. The financial and civil penalty provisions contain a similar extension[36] to directors, managers and officers etc as applies to crimes. These provisions render a director, manager, secretary or other similar officer of a company potentially individually liable for any civil penalties levied under the relevant pension legislation by TPR on the company for failure to comply with a relevant provision of PSA 1993, PA 1995, PA 2004, PA 2008, PSA 2021 and any relevant regulations.

54. In relation to financial penalties under PA 2004, s 88A the extension to secondary parties only applies to cases of consent or connivance and does not refer to 'neglect'[37]. The exclusion of "neglect" from s 88A(6) may perhaps reflect that the financial penalties under s 88A can be much larger in amount that those for the civil penalties in PA 1995, s 10. Section 88A(6) to (8) provides:

Pensions Act 2004, s 88A

(6) Where—

(a) a penalty under this section may, apart from this subsection, be imposed on a body corporate, and

(b) the act in question was done with the consent or connivance of a director, manager, secretary or other similar officer of the body or a person purporting to act in any such capacity,

this section applies to that person.

(7). Where the affairs of a body corporate are managed by its members, subsection (6) applies in relation to the acts of a member in connection with the member's functions of management as to a director of a body corporate.

(8) Where

(a) a penalty under this section may, apart from this subsection, be imposed on a Scottish partnership, and

(b) the act in question was does with the consent or connivance of a partner,

this section applies to that person.

---

[36] PSA 1993, s 168(6) and (7); PA 1995, s 10(5) and (6); PA 2004, s 88A(6) and (7); and PA 2008, s 46.

[37] This omission of 'neglect' occurs in other legislation as well, for example: Bribery Act 2010, s 14; Theft Act 1968, s 18; Public Order Act 1986, s 28; and Copyright Designs and Patents Act 1988, s 110 (the last three cited in *Blackstone's Criminal Practice 2021* at A6.25). Blackstone comments that the offence still remains wider than aiding or abetting in that a positive act is not required. 'A conscious failure to prevent or report a fellow director committing an offence would seem to be enough, even though there is not a sufficiently clear or immediate right of control over the fellow director to give rise to liability as an accessory'.

Pensions: civil penalties (PA 1995, s 10)

55. TPR[38] (acting through its determinations panel) also has power to require the payment of civil penalties under PA 1995, s 10. These civil penalties have a smaller maximum than the new financial penalties under PA 2004, s 88A. The smaller civil penalties are of up to £50,000 for a company and £5,000 for an individual[39].

56. The secondary party extensions under PA 1995, s 10(5) to (6) are very similarly expressed to those in PA 2004, s 88A, save that the extensions in s 10 apply to 'neglect', as well as to consent or connivance.

Pensions Act 1995, s 10

(5) Where

(a) apart from this subsection, a penalty under this section is recoverable from a body corporate or Scottish partnership by reason of any act or omission of the body or partnership [...] 1 , and

(b) the act or omission was done with the consent or connivance of, or is attributable to any neglect on the part of, any persons mentioned in subsection (6), this section applies to each of those persons who consented to or connived in the act or omission or to whose neglect the act or omission was attributable.

(6) The persons referred to in subsection (5)(b)—

(a) in relation to a body corporate, are—

(i) any director, manager, secretary, or other similar officer of the body, or a person purporting to act in any such capacity, and

(ii) where the affairs of a body corporate are managed by its members, any member in connection with his functions of management, and

(b) in relation to a Scottish partnership, are the partners.

(7) Where the Authority requires any person to pay a penalty by virtue of subsection (5), they may not also require the body corporate, or Scottish partnership, in question to pay a penalty in respect of the same act or omission.

38 Before 2005, the Occupational Pensions Regulatory Authority (OPRA).

39 These maximum figures can be increased by an order by the Secretary of State under PA 1995, s 10(2), but no such order has been made to date and the maxima have not increased since enacted in 1995.

57. Similar secondary person extensions apply to the criminal provisions under the auto enrolment[40] and to the climate change penalty provisions[41].

58. But a secondary person extension is not universal in relation to penalties. There is no secondary person extension in the fixed penalty and escalating penalty notices provisions:

- applicable to auto-enrolment (PA 2008, s 40 and 41); nor
- those applicable in relation to failure to comply with TPR's information gathering powers under PA 2004, ss 72 to 75 (PA 2004, ss 77A and 77B, inserted by PSA 2021).

Penalties against the company and the secondary party?

59. Both the financial penalty in s 88A and the civil penalty provisions in s 10 state that the relevant penalties cannot be charged against the company if they have already been charged against a director or officer, etc in respect of the same act or omission[42]. This provision strictly does not seem to prevent the converse, i.e. TPR could conceivably require a director or officer to pay a penalty even after the company has been so required.

60. For example PA 2004, s 88A(9):

> *If the Regulator requires a person to pay a penalty by virtue of subsection (6) …, it may not also require the body corporate … in question to pay a penalty under this section in respect of the same act.*[43]

Who receives any fines or penalties paid?

61. Financial penalties and civil penalties are recoverable by TPR[44]. Once received by TPR, the amount recovered must be paid to the Secretary of State[45] or into the consolidated

---

40 PA 2008, s 46 (Offences by bodies corporate) contains the common secondary person extension wording in relation to offences under s 45 (Offences of failing to comply).

41 The Occupational Pension Schemes (Climate Change Governance and Reporting) Regulations 2021 (SI 2021/839), reg 11 (Penalty notices: recovery from bodies corporate and Scottish partnerships) contains the common secondary person extension wording in relation to penalties under reg 9.

42 PA 2004, s 88A(9) and PA 1995, s 10(7)

43 In PA 2004, s 88A, the term 'act' includes omission – s 88A(12).

44 PA 1995, s 10(8) and PA 2004, s 88C(1).

45 PA 1995, s 10(9).

fund[46]. The amount of the penalty does not therefore help TPR's funding or the relevant pension scheme.

Consent/connivance/neglect liability: requirements for a secondary party to be criminally liable or fined

62. In order for a secondary party (eg a director) also potentially to be liable, under a consent, connivance or neglect provision, whether for civil penalties, financial penalties or crimes, three tests need to be established:

1) There must have been an offence committed by the company. So if there are any defences available to the company (eg that it was not reasonably practicable for the company to avoid the offence), then the secondary party may seek to rely on these too. But the company does not have to have been convicted of the offence – see below.

2) The secondary party must be within the class of being 'any director, manager, secretary or other similar officer of the body corporate' or 'a person purporting to act in any such capacity' – see below.

3) Although the underlying offence by the company may be absolute or have its own knowledge or intention requirements, the secondary liability provision generally imposes additional requirements as to the state of mind of the secondary party in order to show their 'consent' or 'connivance' or (save in the case of financial penalties) 'neglect' – see below.

(1) Offence by the company

63. In relation to the first element, the need for the company to have committed the relevant offence, there is no need for the company actually to have been convicted, but it is obviously more difficult for the prosecution to succeed in a prosecution of an officer if there has been no underlying conviction against the company.

[46] PA 2004, s 88C(4).

64. Where the company is in court liquidation or administration the stay on court proceedings (without leave of the court or the liquidator or administrator) applies to criminal proceedings against the company - see *In re Rhondda Waste Disposal Ltd*[47].

65. In suitable cases this may not matter as the secondary party can still be convicted even if the company has not. But the onus will be on the prosecution to show that the company would have been convicted. In *R v Dickson*[48], Leggatt LJ commented:

> *'We however accept Mr Dagg's [counsel for the Crown] submission that the appellants could, even in the absence of the company, have been found guilty of the relevant offences upon proof that the company had committed the substantive offences. In many cases, if not most, that would be an undesirable course for the prosecution to adopt, because it would involve proof of the commission of an offence by what, on that footing, would be an absent party.'*

66. In *DPP v Hegarty*[49], the Irish Supreme Court considered *R v Dickson* and held similarly that the company does not have to be convicted first before a senior officer can be convicted (in that case of authorising or consenting to the company acting in an anti-competitive manner).

67. Under the common law on accessory liability, an acquittal of an alleged principal at an earlier trial is no bar to the subsequent conviction of an accessory and is even inadmissible as merely being evidence of the opinion of the first jury and so irrelevant – *Hui Chi-Ming v R*[50].

(2) Who is within the secondary party class?

68. This section of this paper focuses on the phrase defining the class at risk. This looks quite simple: "*director, manager, secretary or other similar officer of the body corporate*", but its interpretation is complex. Who is a "manager"? Who is a "similar officer"?

---

47 *In re Rhondda Waste Disposal Ltd* [2001] Ch 57, CA.

48 *R v Dickson* [1991] BCC 719, CA per Leggatt LJ at p 722G.

49 *DPP v Hegarty* [2011] IESC 32, [2011] 4 IR 635 Irish Supreme Court.

50 [1992] 1 AC 34, PC.

69. The extension wording in the pensions crimes and fines provisions each refer to a secondary party as only being someone who is a:

- director;
- manager;
- secretary;
- other similar officer, or
- a person purporting to act in any such capacity

in each case "of the body corporate".

70. In some cases, the provisions also extend the secondary class to include:

70.1. **Managed by the members**: a member of a body corporate, where "the affairs of a body corporate are managed by its members" ; and

70.2. **Scottish partnership**: partners of a Scottish partnership[51].

71. The use of the term "body corporate" indicates that the provisions will apply where the offending company is not incorporated in the UK or is not incorporated under the UK Companies Acts.

72. In practice most cases will involve the offending company being a UK incorporated company, so these further classes are not discussed further.

73. The issue of whether an insolvency practitioner (IP) administrator could be a secondary party in relation to a criminal offence (failing to notify the secretary of state of proposed redundancies) was considered by the Supreme Court last year in *R (Palmer)*. The position of IPs is discussed in more depth in a paper by David Pollard on the Wilberforce and Pensions Barrister websites[52] – see also Appendix 1 to this note.

---

[51] A Scottish partnership (unlike an English partnership) is a "legal person distinct from the partners of whom it is composed" – Partnership Act 1890, s 4(2).

[52] David Pollard '*Pensions Crimes and Fines and Insolvency Practitioners: The impact of the Supreme Court decision in R (Palmer)*' (April 2024) Pensions Barrister. https://www.wilberforce.co.uk/article/pension-crimes-fines-and-insolvency-practitioners/

Director or secretary

74. The terms 'director' and 'secretary' are not specifically defined in the pensions legislation. In practice, in relation to a company incorporated under the UK companies legislation, they are likely to have their usual meanings as under the companies legislation[53]. For example, in *R (Palmer)*[54], the Supreme Court looked to the meaning of 'officer' in the insolvency legislation in deciding whether or not an administrator was an 'officer" of the company under employment legislation (TULRCA 1992)[55], although there the insolvency legislation is "the statute which created and governs the process of administration and the position of an administrator".

75. Someone having the title of "director", but not actually on the board of directors is unlikely to be a "director" within the secondary class. But they could still be a manager or officer- see for example *Armour v Skeen*[56] where a "Director of Roads" for a Scottish local authority was prosecuted and found guilty of an offence under the secondary extension provision in s 37 of the Health and Safety at Work etc Act 1974. The Lord Justice-Clerk held that he was not a "director", but was within the secondary class, holding:

> "*It was then argued that the appellant was not within the purview of s37. There is no question of equiparating a Director of Roads with the term 'director' as used in that section. It was said, however, that the appellant did not fall within the class of*

---

53 See *DPP v TN* [2020] IESC 26 at [20]:

54 *R (on the application of Palmer) v Northern Derbyshire Magistrates' Court* [2023] UKSC 38, [2024] ICR 288.

55 *R (Palmer)* [2023] UKSC 38 per Lord Richards at [20]:

> "Neither TULRCA nor any other enactment defines "officer" for the purposes of section 194(3), nor is there any clear statement in any authority of which I am aware which can be taken as a definition of what is generally understood to be an officer. I will return to that question, but in those circumstances the first recourse must be to the IA 1986, as the statute which created and governs the process of administration and the position of an administrator, to determine whether, as a matter of statutory interpretation, an administrator of a company should be classified as an officer of that company."

56 1977 SLT 71, [1977] IRLR 310 (High Court of Justiciary) at[10] (p312). In *Woodhouse v Walsall MBC* [1994] 1 BCLC 435, DC, McCowan LJ did not find *Armour v Skeen* "to be of any assistance", stating "It was clearly a question of fact" (at p442g). However, *Armour v Skeen* was cited in *R (Palmer)* [2023] UKSC 38 by Lord Richards at [20] and quoted by the Irish Supreme Court in *DPP v TN* [2020] IESC 26 at [76].

'manager, secretary or other similar officer of the body corporate, or a person who was purporting to act in any such capacity.' Reference was made to Tesco (Supermarkets) Ltd. v. Natrass [1972] AC 153. It was held in that case that the manager of one of many stores within a large organisation was not a 'manager' within a similar provision to s.37(1) in the Trades Descriptions Act 1968. Each case will depend on its particular facts, and on this issue will turn on the actual part played in the organisation. Having regard to the position of the appellant in the organisation of the council and the duty which was imposed on him in connection with the provision of a general safety policy in respect of the work of his department I have no difficulty in holding that he came within the ambit of the class of persons referred to in s.37(1)."

76. Under the UK companies legislation[57], in particular the Companies Act 2006 (***CA 2006***):

(a) A 'director' "includes any person occupying the position of director, by whatever name called" (CA 2006, s 250).

- This will include a 'de facto' director, even though not formally appointed as a director.

- In the UK directors are usually individuals, but it is currently possible for a company or other corporation to itself be appointed a director[58].

(b) A 'shadow director' means "a person in accordance with whose directions or instructions the directors are accustomed to act", with some specific exclusions for (i) professional advice, (ii) instructions etc given in the exercise of a function under an enactment and (iii) guidance or advice given by a Minister of the Crown (CA 2006, s 251).

(c) the term 'secretary' is not defined. A public company is required to have one (CA 2006, s 271) and they need to appear to have the requisite knowledge and

---

[57] Also the Insolvency Act 1986, s 251.

[58] For an example, see *Re Paycheck Services 3 Limited* [2010] UKSC 51, [2011] 1 All ER 430. Companies Act 2006, s 156A will, when it comes into force under the Small Business, Enterprise and Employment Act 2015, s 87, prohibit corporate directors of a company incorporated in Great Britain, but subject to exceptions in regulations.

experience and a relevant qualification (CA 2006, s 273). Private companies are no longer required to have a secretary (CA 2006, s 270).

(d) An 'officer' is defined in CA 2006 as including a director, manager or secretary - CA 2006, s 1173(1).

(e) The term "manager" is not expressly defined further.

77. Caselaw generally makes it clear that terms such as 'director' and 'officer' take colour from their context. In *Allianz Global Investors GmbH v G4S Ltd*[59] Miles J held that for the purposes of assessing whether there had been a breach of the Financial Services and Markets Act 2000 s 90A in relation to the publication of information, the "persons discharging managerial responsibility" within an issuer of publicly traded securities included de facto and shadow directors as well as de jure directors of the issuer. Miles J held:

> *"132. Sixthly, it is irrelevant that the definition in paragraph 8(5) of Schedule 10A is exhaustive. Terms such as "director" and "officer" take colour from their context: see Revenue and Customs Comrs v Holland [2011] Bus LR 111, para 103 and Secretary of State for Trade and Industry v Deverell [2001] Ch 340, para 35 . Under section 90A there is no personal liability. There is thus no call for a predisposition towards a narrow or technical approach to "director" in paragraph 8(5) . Rather, the court should step back and consider the purpose of the section and how its contours can fairly be drawn so as to further that purpose.*

See also the Irish Supreme Court in *DPP v TN*[60] [2020] IESC 26 at [106]:

> *106. "Officer" is given a non-exhaustive definition within the Companies Act 2014: "'officer', in relation to a body corporate, includes a director or secretary" (section 2(1)). "Director" and "secretary" are of course official positions within a company, mandated by statute (see sections 128 and 129 of the Act of 2014, previously sections 174 and 175 of the Companies Act 1963). These positions may also*

---

[59] [2022] EWHC 1081 (Ch), [2022] Bus LR 566 (Miles J) at [132], citing *Re Paycheck Services 3 Limited* [2010] UKSC 51, [2011] 1 All ER 430 at [103] and *Secretary of State v Deverell* [2001] Ch 340, CA at [35].

[60] *DPP v TN* [2020] IESC 26 per McKechnie J (O'Donnell, Dunne, Charleton and O'Malley JJ agreeing). at [106].

be created under the constitution of the company; further offices formed in such manner may include a treasurer or president, although such are infrequently found within a limited company. Whilst one may ask why the company law definitions should necessarily apply to section 9, the answer is I think twofold. First, the very essence of the section relates to the commission of an offence by a "body corporate", which in the vast majority of cases will now be one of the eight companies provided for under the 2014 Act, or a company under its predecessors. Secondly, the individual intended to be captured by the section will be inextricably linked to the body corporate. Accordingly, in the absence of any contrary argument, I am satisfied that, in principle, such an approach is justified. That being so, as the office of "director" and "secretary" are statutory positions with statutory functions; they should be given the definitions as provided for in the Companies Acts; there seems to be very little scope for departing from such meaning."

78. Looking further at the application of the criminal (and penalty) extension provisions in the pensions legislation in relation to directors, it seems likely to catch a de facto director but not a shadow director (unless also a de facto director or a manager):

    78.1. **De facto director**: The criminal (and penalty) extension provisions in the pensions legislation also include "a person purporting to act in any such capacity". Although the language is different to the wording in CA 2006, s 250, it seems likely that a s 250 de facto director will in practice be caught by this wording in the criminal extension provisions.

    78.2. **Shadow director**: The criminal (and penalty) extension provisions in the pensions legislation do not expressly cover a shadow director of the offending company. Such a person could (depending on the facts) perhaps fall within the "person purporting to act in any such capacity" limb or be considered to be a "manager' of the company.

Officer

79. It may not be obvious whether or not a particular person is an officer or manager of a company. The identity of current and former directors (and secretaries) should be simpler to determine (at least for a company incorporated in part of the UK), given that their details should have been registered at the companies registry.

80. There can be some difficulty with the meaning of the term "officer" as used in CA 2006, s 251. The definition is inclusive and not exclusive and leaves it open as to who is a

"manager" (which is not a defined term). This is a general problem arising in many statutes[61].

81. In *R (Palmer)*[62], the Supreme Court considered whether an administrator (appointed under the Insolvency Act 1986) fell within the class of secondary parties under the Trade Union and Labour Relations (Consolidation) Act 1992 (**TULRCA 1992**), s 194 as being an "other similar officer of the body corporate". Lord Richards gave the sole judgment, reversing the decision of the divisional court.

82. Lord Richards held that the meaning of "officer" (at least for the purposes of TULRCA 1992, s 194) was "essentially a constitutional test". Does "the person hold an office within the constitutional structure of the body corporate, as is the case with directors, manager and secretaries?". Lord Richards held (at [55]):

> *55. What then is meant by an "officer" of the body corporate in the context of a provision such as section 194? In my judgment, the answer is tolerably clear. It is essentially a constitutional test. Does the person hold an office within the constitutional structure of the body corporate, as is the case with directors, managers and secretaries? That is the normal meaning of an officer of a company or other institution, and the normal meaning is emphasised by the prior reference to directors, managers and secretaries, all of whom are officers in the conventional sense, together for good measure with the words "other similar" before "officers". It is possible, but generally unlikely that registered companies will have other types of officer, but a "body corporate" may take many forms – statutory companies, bodies incorporated by royal charter (which include a wide variety of educational, charitable and other not for profit organisations, as well as a small number of older commercial concerns) and foreign bodies corporate. The officers of these bodies will have a wide variety of titles and functions, and those who are similar to directors, managers and secretaries will be potentially liable under section 194(3). The director of roads of a local authority has been held to be an officer for the purposes of a similar provision in the Health and Safety at Work etc Act 1974: Armour v Skeen 1977 SLT 71.*

---

61 For discussion of 'officer' or 'manager', before the decision in *R(Palmer)*, see Chapter 25 in David Pollard '*Connected and Associated: Insolvency and Pensions Law*' (2021, Bloomsbury Professional). See also Hofler '*Elephants and officers: problems of definition*' (1996) 17 Company Lawyer 258.

62 *R (on the application of Palmer) v Northern Derbyshire Magistrates' Court* [2023] UKSC 38, [2024] ICR 288. Lord Richards gave the only judgment. Lord Reed, Lord Hodge, Lord Burrows and Lady Rose agreed.

83. The reference by Lord Richards to "managers" as "holding office within the corporate structure" is less easy to follow than directors or secretaries. In practice it is usual for company constitutions to provide for the board of directors to manage the business of the company[63]. It is much less common for a specific role of "manager" to be found in a company's constitution (save perhaps for a managing director).

84. A constitutional test, at least in relation to officers, seems to be consistent with the earlier cases. In *DPP v TN*, the Irish Supreme Court referred to this test at [106] (quoted above), referring to offices of "a treasurer or president".

85. In *Re Western Counties Steam Bakeries and Milling Company*[64], a case dealing with whether a firm of accountants fell within a class of "any director, manager, liquidator or other officer", Lindley LJ held (at p627) that:

> *"to be an officer there must be an office, and an office imports a recognised position with rights and duties annexed to it... it would be an abuse of words to call a person an officer who fills no such position either de jure or de facto, but who happens to do some of the work which he would have to do if he were an officer in the proper sense of the word".*

86. The expressions "officer" and "manager" were considered in *Re Racal Communications; Re a Company No 009966 of 1979*[65], a case about the obtaining of evidence from an officer (defined in the same way as in IA 1986, s251 to include a 'manager') under the Companies Act 1948. In an unreserved judgment, Lord Denning MR noted (at p144) that, in relation to an officer:

> *"Its meaning may depend on the context in which it is used"*[66].

---

63 For example article 3 of Table A: "the directors are responsible for the management of the company's business..." – Schedule 1 in the Companies (Model Articles) Regulations 2008 (SI 2008/3229). See the discussion in *DPP v TN* [2020] IESC 26 at [146].

64 [1897] 1 Ch 617, CA. See also *Re London and General Bank* [1895] 2 Ch 166, CA and *Mutual Reinsurance Co Ltd v Peat Marwick Mitchell* [1997] 1 BCLC 1, CA.

65 [1980] Ch 138, CA.

66 Other cases make it clear that terms such as 'director' and 'officer' take colour from their context: see *Allianz Global Investors GmbH v G4S Ltd* [2022] EWHC 1081 (Ch) (Miles J) at [132], citing *Re Paycheck Services 3 Limited* [2010] UKSC 51, [2011] 1 All ER 430 and *Secretary of State v Deverell* [2001] Ch 340, CA.

Shaw LJ commented (at p144) that the term 'manager' should not be too narrowly construed as being limited to a director or general manager, but includes someone who "exercises a supervisory control which reflects the general policy of the company or which is "related to the general administration of the company".

87. **Examples of officers:**

- Auditors once appointed are generally officers: *Re London and General Bank*[67] and *Re Western Counties Steam Bakeries and Milling Company*[68], unless appointed on an ad hoc basis for a limited period – *R v Shacter*[69]. However, it is more doubtful that auditors are a "similar" officer within the standard extension wording. They do not look "similar" to a "director, manager or secretary".

- The company secretary is likely to be an officer, being expressly within the definition in CA 2006, IA 1986, s 251 – although this does not in fact matter given that the secretary is expressly within the secondary liability class anyway.

- The administrators of a company appointed under IA 1986 are probably not officers of the company, following the decision of the Supreme Court in *R (Palmer)*[70]. Although strictly only a binding authority in relation to administrators (and not other insolvency practitioners) and to TULRCA 1992 (and not other statutes), in practice it is difficult to see a future court distinguishing the pensions legislation on this point.

- Bankers, solicitors and other professional advisers are not, as such, officers (unless appointed to an office under the company): *Re Imperial Land Co of Marseilles, Re National Bank*[71] and *Re Western Counties Steam Bakeries and Milling Company*[72].

---

67 *Re London and General Bank* [1895] 2 Ch 166, CA. Also *Re Kingston Cotton Mill Co* [1896] 1 Ch 6, CA and *Mutual Reinsurance Co Ltd v Peat Marwick Mitchell* [1997] 1 BCLC 1, CA.

68 [1897] 1 Ch 617.

69 [1960] 2 QB, 252, CCA.

70 *R (on the application of Palmer) v Northern Derbyshire Magistrates' Court* [2023] UKSC 38, [2024] ICR 288.

71 (1870) LR Eq 298.

72 [1897] 1 Ch 617 at p627.

- An agent is not, as such, an officer. An example (albeit for another statute) is s 219(3) of IA 1986, which refers to "every officer and agent of the company" being obliged to give reasonable assistance to a prosecutor, drawing a distinction, at least for that provision, between an officer and an agent.

- It seems likely that a director (Mr A) of a company (B Co) which is itself a director of another company (C Co) is not, just by acting as a director of B Co, also an officer of that other company. That is, Mr A is not an officer of C Co: *Masri v Consolidated Contractors International Co SAL (No 4)*[73] discussing the meaning of "officer" in the context of examination of an officer of a company.

Manager

88. The term 'manager' means someone who manages: *Gibson v Barton*[74] and *Re Western Counties Steam Bakeries and Milling Company*[75]. This is not hugely helpful in working out the meaning of the expression.

[73] [2008] EWCA Civ 876, [2009] 2 WLR 699 at [19] and [20]. The decision of the Court of Appeal was overturned on appeal, but this point was not discussed.

[74] (1875) LR 10 QB 329 (Blackburn J). Discussed by the Irish Supreme Court in *DPP v TN* [2020] IESC 26 at [53] and [129] where McKechnie J commented:

> "129. For these reasons, I do not think that any great reliance can be put on the older authorities. It is fair to point out that some of them, such as *Boal* and *Woodhouse*, are not exactly pieces of antiquity; they hail from the 1990s. Companies then already looked markedly different to the *Gibson*-era entities of the 1870s. However, the line of authority running through these cases undoubtedly starts with *Gibson*, a decision which, in my respectful view, has been over-read in some of the subsequent judgments. But even if it once represented a fair reflection of corporate management, I do not think that that is still the case today."

[75] [1992] QB 591, CA at 597E.

89. However the term "manager' is vague and must be construed in context: *R v Boal*[76] and *DPP v TN*[77]. It may be that the term "manager' is given a wider view for cases where the end result is not a criminal conviction on the manager[78] – contrast:

- *In re A Company*[79] (wide view - judge power to require documents to be produced); with

- *Registrar of Restrictive Trading Agreements v W H Smith & Son Ltd*[80] (narrow view: order for attendance) or *R v Boal*[81] (narrow view: criminal conviction).

90. By analogy with those cases, it could be argued that the UK cases point to a narrow test that in order to be a "manager", for the criminal (and penal) secondary extension purposes, a person must actually be involved in running substantially all of the company[82].

91. In *R v Boal*[83] the Court of Appeal held that the deputy manager of a bookshop was not a manager for these purposes as he "could well have been regarded as responsible only for the day to day running of the bookshop rather than enjoying any sort of governing role in respect of the affairs of the company itself".

---

[76] [1897] 1 Ch 617 per Rigby LJ at p632.

[77] [2020] IESC 26 at [144].

[78] In *DPP v TN* [2020] IESC 26, following an extensive discussion of the Irish and UK cases, the Irish Supreme Court made this point at [80].

[79] [1980] Ch 138, CA.

[80] [1969] 1 WLR 1460, CA.

[81] [1992] QB 591, CA at 596 to 598.

[82] See eg *R v Boal* [1992] QB 591 (Fire Precautions Act 1971), *Armour v Skeen* [1977] IRLR 310 (Health and Safety at Work etc Act 1974) and *Woodhouse v Walsall MBC* [1994] 1 BCLC 435 (Control of Pollution Act 1974). See "*Corporate Criminal Liability: an options paper*" (Law Commission. June 2022) at 9.10.

[83] [1992] QB 591, CA at 596 to 598.

92. In *Woodhouse v Walsall MBC*[84] McCowan LJ (in the Divisional Court) discussed *Boal* and *Armour v Skeen*[85], but restricted the term "manager" to someone who "was a decision-maker within the company having both the power and responsibility to decide corporate policy and strategy." (at p443h).

93. In 2022 in its paper "Corporate Criminal Liability: an options paper"[86] the Law Commission commented at 9.10:

> *"Director, manager, secretary or other similar officer" has been said to include people who have "the management of the whole affairs of the company"265 and "real authority, the decision-makers".266 In R v Boal, it was held that the deputy manager of a bookstore was not a manager for these purposes as he "could well have been regarded as responsible only for the day to day running of the bookshop rather than enjoying any sort of governing role in respect of the affairs of the company itself". Lord Denning said the term "officer of the company" can be used "whenever anyone in a superior position in a company encourages, directs or acquiesces"267 in fraudulent activity. "Secretary" is understood to refer narrowly to the Company Secretary.268.*
>
> *265 Gibson v Barton (1875) LR 10 QB 329.*
>
> *266 R v Boal [1992] QB 591, [1992] 2 WLR 890.*
>
> *267 Re A Company [1980] 2 WLR 241, [1980] Ch 138.*
>
> *268 In the Irish case of DPP v TN [2020] IESC 26, it was held ""Director" and "secretary" are of course official positions within a company, mandated by statute … as the office of "director" and "secretary" are statutory positions with statutory functions; they should be given the definition as provided for by the Companies Acts". This was based on Denning MR's analysis in Registrar of Restrictive Practices v WH Smith [1969] 1 WLR 1460, which had held that the terms "officer", "manager", "director" and "secretary" should be interpreted in line with their interpretation for the purposes of the Companies Acts. However, the Irish Supreme Court noted that while "director", "secretary" are statutory officers and "officer" is defined in the Companies Act, "manager" is not. This is also true for the UK, where Part 12 of the Companies Act 2006 deals with company secretaries.*

---

[84] *Woodhouse v Walsall MBC* [1994] 1 BCLC 435, DC a case on the Control of Pollution Act 1974.

[85] *Armour v Skeen* [1977] IRLR 310 (Health and Safety at Work etc Act 1974).

[86] "*Corporate Criminal Liability: an options paper*" (Law Commission of England and Wales. 10 June 2022).

94. In *DPP v TN*[87] having considered the UK cases in detail, the Irish Supreme Court doubted the narrow test in *Boal* and *Woodhouse* in relation to a "manager" and referred back to the criminal court whether an individual described as a facility manager or environmental consultant could be a 'manager' within the Waste Management Act 1996. In *TN*, McKechnie J considered the narrow approach in *Boal*, *Woodhouse* and other UK cases as being outdated. He held:

> *"28. Boal is the most far reaching of the authorities relied upon by the Appellant, it being a Court of Appeal decision, whereas Woodhouse is a High Court decision. In the former, Simon Brown J., who gave the court's judgment, spoke of the intended scope of the section in question being "to fix with criminal liability only those who are in a position of real authority"; continuing, he said this meant "[t]he decision makers within the company who have both the power and the responsibility to decide corporate policy and strategy". It was on this precise basis that the appeal in Woodhouse was allowed: whilst the accused person may well have been in a position of real authority, he had no power or responsibility to decide corporate policy or strategy. It is difficult to see how this requirement can be justified. Later in his judgment, the learned judge spoke of the purpose of the section in question being "to catch those responsible for putting proper procedures in place"; this, it seems to me, may be entirely apt to describe a fire safety manager, or a health and safety officer, or an environmental compliance manager. To suggest that such persons do not have real authority simply because they do not run "the whole affairs of the company", does not represent a realistic assessment of how such entities operate. In my view, therefore, any approach which views only the very uppermost management level of a company as having "real authority" or the power to "put proper procedures in place" does not comport with the modern reality of such bodies, nor is it warranted by the proper interpretation of the section itself."*

McKechnie J continued that to set the test as excluding a mid-level manager was not appropriate:

> *[129] …Therefore, with the greatest of respect to those decisions, I do not consider that, in interpreting section 9(1), it is correct to construe "manager" as meaning only a person with responsibility for running the whole affairs of the company, or for overall management of the corporate entity as a whole. To my mind, confining "manager" only to those at the very tip of the pyramid is not what the ordinary and natural meaning of the word, viewed in its statutory*

[87] *DPP v TN* [2020] IESC 26.

context, conveys. Moreover, when contemporary organisational structures are borne in mind, it seems to me that adopting the narrower interpretation of "manager" favoured in the older authorities would not accord with the purpose of the 1996 Act in reducing, controlling and preventing waste, this for the simple reason that in many organisations the person with primary responsibility to that end may be a mid-level manager rather than one at the highest level of the hierarchy. It would seem a most bizarre situation if a manager with overall responsibility for waste management could not be held liable under the Waste Management Act merely because he or she was not in charge of the overall running of the company; I am convinced that this could not have been the intention of the Oireachtas in using the word "manager".

McKechnie J concluded:

"135. In my view, the diversity of organisational structures within entities the subject of section 9(1) is such that it would be foolish to attempt to define the word "manager" too rigidly. The trial court, when dealing with such issue, must be alive to the actual, practical state of affairs within the company. Formal titles may be relevant, even highly relevant, but it is the person's real-world function and role which will be decisive, not their nominal job title. It is not necessary, to be a "manager" within the meaning of the section, that the person manages "the whole affairs of the company". They must, however, have real authority and responsibility over the area in question. Express delegation of such responsibility would be highly relevant, though such delegation may not need to be express if it is clear that in practice the person possessed responsibility for that area. What, then, is meant by "responsibility"? The individual's authority to make relevant decisions should be considered. The court should have regard to whether he or she is the person responsible for putting relevant procedures and policies in place, or similarly whether such task is performed by staff under his/her direction and control and in respect of which he/she has the final word. The person's role in the hierarchical chain may be important: the more senior, the more likely to he or she is to come within the meaning of "manager" as used in the section. However, if he or she has no true authority for that aspect of company's affairs, and does no more than report to a more senior member on his activities of overseeing staff in implementing the policies devised higher up the chain, that would tend to suggest that he does not have the level of responsibility required."

95. Examples from other jurisdictions are that the term "manager" has been held not to include:

- a hotel front desk employee in Hong Kong who "carries out essentially non-discretionary functions under the direct supervision of another on the premises" - *HKSAR v Chui Shu Shing*[88]; nor

- an outback station manager in Australia - *Windbox Pty Ltd v Daguragu Aboriginal Land Trust (No 3)* 89.

---

[88] [2017] HKCFA 43, dealing with a criminal provision that stated:

> "(1) Any person who on any occasion operates, keeps, manages or otherwise has control of a hotel or a guesthouse in respect of which neither of the conditions indicated in subsection (2) has been satisfied commits an offence …."

French NPJ, with whom the other justices agreed, held:

> 44. Beginning with the text, the word "manage", according to the Oxford English Dictionary, relevantly means "to conduct or carry on (a war, a business, an undertaking, an operation) …". It may also mean "to control and direct the affairs of (a household, institution, state etc)". It appears in a particular context, namely the collocation "operates, keeps, manages or otherwise has control of". The words "otherwise has control of" suggests that the other terms in the collocation are used as species of the genus "has control of". A wider context is provided by those provisions of the HGAO previously mentioned which contemplate management as conduct of a kind done by the person to whom a certificate of exemption or a licence is issued, or a person doing similar things under the continuous and personal supervision of a licence holder.
>
> 45. The concept of "manage" according to its ordinary meaning read in the context of the HGAO and having regard to its purpose does not extend to a person who carries out essentially non-discretionary functions under the direct supervision of another on the premises. Like each of the terms in the collocation, it incorporates the idea of authority over that which is managed. The precise nature and content of that authority will vary according to the circumstances of the case. As a general proposition, a person manages a hotel or a guesthouse when he or she, in the exercise of an authority assumed by or conferred upon them, carries out the business or undertaking of the hotel. In the case of a small guesthouse that criterion may be satisfied by a single person who operates the checking in and checking out of guests, the receipt and recording of their payments and the maintenance of the accommodation at the appropriate standard. It does not matter whether that person is full-time, part-time, temporary, or a relief manager for the purposes of section 5 so long as they are exercising a degree of managerial authority in relation to the conduct of the hotel or guesthouse. In a colloquial sense, a manager is a person who can answer "yes" to the question "are you in charge here?".

[89] [2020] NTSC 21 (Hiley J). There was an appeal against Hiley J's decision to the Court of Appeal of the Northern Territory, but Hiley J's decision on this point was upheld - *Windbox Pty Ltd v JACT Pastoral Pty Ltd* [2022] NTCA 2 at [66] to [89].

The Australian caselaw generally flows from differently framed statutes[90], but focuses (in relation to both the term "manager" and "officer") to those involved in the policy formation and decision making for the whole company.

(3) Directors and officers: Consent, connivance or neglect

Chart on consent, requirement or neglect limb

Pensions Crime/fine	**Director/manager/officer etc liable if:**		
	Consent?	Connivance?	Neglect?
Crime	Yes	Yes	Yes
Financial penalty	Yes	Yes	No
Civil penalty	Yes	Yes	Yes

Knowledge

96. In deciding whether or not a person has consented to the commission of an offence, it is unclear whether knowledge of the relevant act that constitutes the offence is needed (compare *Re Caughey, ex p Ford*[91] and *Lamb v Wright & Co*[92] with *James & Son Ltd v Smee*[93] and *Mallon v Allon*[94]).[95]

[90] The different approach is noted in *R (Palmer)* [2023] UKSC 38 at [52].

[91] (1876) 1 ChD 521, CA.
[92] [1924] 1 KB 857 (McCardie J).
[93] [1955] 1 QB 78, DC.
[94] [1964] 1 QB 385, DC.
[95] There is a good discussion of this area in Matthews and Ageros *Health and Safety Enforcement* (3rd edn, OUP, 2010), Chapter 5 at paras 5.46ff.

97. In *R v Hutchins*[96] it was held that there was no need for the prosecution to prove specific knowledge of each individual offence. Rix LJ commented:

> *'25. In our judgment, the nature of these regulatory statutes with their provisions for secondary liability by directors and managers in accordance with their consent, connivance or neglect is to ensure that they are held to proper standards of supervision and that the size of the company and the distance of directors and managers from the coal face of individual acts should not, where there is consent, connivance or neglect, afford directors or managers with the necessary knowledge a defence.*
>
> *26. In our judgment, that Mr Hardy's alleged need for specific knowledge of each individual offence is not required is, in our judgment, shown by the broadness of the terms connivance and neglect.'*

98. Separately to this, knowledge that the relevant facts constitute an offence is not needed – see 'Ignorance of the law' below.

99. It has been commented[97] that:

- consent requires both knowledge and positive approval;
- connivance requires knowledge (including wilful blindness) and negligent failure to prevent; and
- neglect is wider and requires a failure to perform a duty that the person knows or ought to know.

[96] [2011] EWCA Crim 1056 per Rix LJ at [25].

[97] *Tolley's Insolvency Law*, chapter on Environmental law at E5016. See also the summary in the Irish Law Reform Commission issues paper on 'Regulatory Enforcement and Corporate Offences (LRC IP8, 2016) on Issue 8 'Liability of Corporate Officers'.

Law Commission

100. The Law Commission commented in its 2010 consultation paper (No 195) on '*Criminal Liability in Regulatory Contexts*' at para 7.31 that (footnotes included):

> *'We have explored what may be quite subtle differences between consent and connivance and complicity (though aiding, abetting, counselling or procuring) elsewhere.*[98] *In essence, consent and connivance provisions ensure that individual directors who are fully aware of, and approve of (or, for example, sign papers consenting to) criminal wrongdoing can themselves be convicted of the crime, even though their approval or consent does not as such encourage or assist the commission of the crime committed, assisted or instigated by other directors or equivalent persons.'*[99]

101. The Law Commission 2007 consultation paper (No 185) on *Reforming Bribery* commented (at para 9.35):

> *'9.35 The key differences between the modes of liability are thus that:*
>
> *(i) Like complicity, the consent and connivance doctrine involves liability for the offence itself, and hence such liability cannot arise unless the offence has been committed by the company. Liability for assisting and encouraging crime involves freestanding inchoate liability, and hence does not require the principal offence to have been committed.*
>
> *(ii) The consent and connivance doctrine is restricted in its application to high-ranking members of an organisation whereas, by virtue of the doctrines of complicity and of assisting and encouraging, criminal liability can attach to any person.*
>
> *(iii) 'Connivance' provides a wider basis for imposing individual liability than complicity. Connivance at the culpable actions of the corporate perpetrator may be reckless on the part of a high-ranking member of an organisation, as well as intentional or knowing. Complicity requires intention or knowledge that the perpetrator will act with the fault element.*

---

[98] 'Reforming Bribery' (2007) Law Commission Consultation Paper No 185, at para 9.35.

[99] Although the position is complicated by the fact that there can at common law be duties to intervene to prevent offending, in circumstances where non-intervention will result in a finding that the party who failed to intervene was complicit in the offence: *Tuck v Robson* [1970] 1 WLR 741.

(iv) It is possible to connive at offending without assisting or encouraging it, making it easier to prove the former as opposed to the latter. Accordingly, it is also easier to prove connivance at offending as opposed to complicity in offending.

(v) The consent and connivance doctrine makes high-ranking members of an organisation liable only for the offence committed by the company, not for an offence committed by individual employees. Complicity and assisting or encouraging crime cover both possibilities, although the latter imposes liability only for a separate inchoate offence.'

102. The Law Commission discussion paper on 'Corporate Criminal Liability' (issued in June 2021) discusses these consent, connivance or neglect provisions at 8.5 to 8.18, commenting:

'8.10 "Consent or connivance" goes further than encouragement. While "consent" requires proof of both awareness and a positive action, connivance (from the Latin "to close the eyes") can include circumstances where the director is "well aware of what is going on but his agreement is tacit, not actively encouraging what happens but letting it continue and saying nothing about it"8 and "wilful blindness" (where the person has suspicion but deliberately avoids acquiring positive knowledge.)9

8.11 Blackstone's Criminal Practice suggests that liability under these provisions:

Is potentially wider than that of an accessory since a positive act of aiding and abetting is not necessarily required.10 A conscious failure to prevent or report a director committing an offence would seem to be enough even though there is not a sufficiently clear or immediate right of control over the fellow director to give rise to liability as an accessory.11

8.12 For some offences, the provision extends to liability on the basis of consent, connivance or neglect.12 In most cases, the choice of whether to extend the individual liability of directors and similar officers to include neglect would appear to reflect the fault element of the underlying offence. Where the offence is one which the company may commit by negligence or on the basis of strict liability, it might not seem inappropriate that a director could be found individually liable on the basis that their neglect caused or contributed to the commission of the offence.

8. Huckerby v Elliott [1970] 1 All ER 189, p194.

9. Robin Charlow, "Wilful Ignorance and Criminal Culpability" (1992) 70 (6) Texas Law Review 1361, fn 6.

10 There are some circumstances where wilful omission might constitute a positive act of encouragement, and thereby make the superior liable as an accessory. In R v Gaunt [2003] EWCA Crim 3925, the Court of Appeal considered the case of a Managing Director who had pleaded guilty to a charge of racial harassment on the basis that he was (indirectly) aware

of harassment by his employees and that "by reason of his inaction those responsible may have taken the inaction as encouragement of his conduct". The Court of Appeal reduced the sentence to reflect his lesser culpability than the main offenders, but did not interfere with his guilty plea. However, this was only capable of amounting to encouragement of the harassers because those staff knew that the Managing Director knew of their harassment and knew he was taking no action. Connivance could potentially cover a situation in which the MD wilfully refrained from taking no action but, because the staff were unaware of his knowledge, this did not amount to encouragement.

11 Blackstone's Criminal Practice 2020, A6.26.

12 In our report on Criminal Liability in Regulatory Contexts, we noted that this wider basis of liability could be found in offences created in legislation including s 18(1) of the Safeguarding Vulnerable Groups Act 2006; s 110 of the Agriculture Act 1970; s 9 of the Knives Act 1997; s 400(1) of the Financial Services and Markets Act 2000; and s 20 of the Gangmasters (Licensing) Act 2004. See Criminal Liability in Regulatory Contexts (2010) Law Commission Consultation Paper 195, paras. 7.35-7.52.'

Connivance

103. Connivance is defined in the Oxford English Dictionary as:

'The action of conniving; the action of winking at, overlooking or ignoring (an offence, fault, etc); often implying secret sympathy or approval; tacit permission or sanction; encouragement by forbearing to condemn.'

104. In practice connivance means encouragement or consent. The House of Lords discussed connivance (in a matrimonial context) in *Godfrey v Godfrey*.[100] Also in a matrimonial context, the Court of Appeal in *Churchman v Churchman*[101] held that:

'Connivance implies that the husband has been accessory to the very offence on which his petition is founded, or at the least has corruptly acquiesced in its commission'.

[100] [1965] AC 444, HL. See also *Gipps v Gipps and Hume* (1861) 11 HL Cas 1 at 14; and *Manning v Manning* [1950] 1 All ER 602, CA

[101] [1945] P 44, CA, at p 51.

105. In *R v Waters*[102] the Court of Appeal held that connivance can occur where a director personally sends a letter to a customer as part of an aggressive commercial practice which is criminal under the Consumer Protection from Unfair Trading Regulations 2008.

Neglect

106. Neglect implies a failure to perform a duty. The person concerned must know (or ought to know) of the duty – see (in a different context) the discussion of 'neglect' in *Re Hughes*, *Rea v Black*.[103]

107. Examples of cases discussing offences attributable to a director's neglect, see *Crickitt v Kursaal Casino Ltd (No 2)*[104] and contrast *Huckerby v Elliot*.[105]

In 1968 in *Kursall*, the House of Lords upheld the director's conviction on an extended liability provision based on their neglect: Lord Pearson held (at p 68):

> *"The other director charged under this section 32(4) was convicted under it by virtue of section 53 (1). The prosecution argument before the magistrates was that, since there had been systematic gaming for at least the three months covered by the summonses and this accused person had been a director of the company which owned the club in which the gaming was carried on, such systematic gaming could only have been carried on as a result of some neglect of duty on her part. The magistrates accepted this argument and held there was a case to answer and ultimately convicted. In my opinion, there was good ground for the inference that was drawn, and the conviction was right and should be restored."*
>
> *By contrast, in 1970 in Huckerby the Divisional Court was considering a standard extended liability provision. The company was convicted of an offence of being a provider of premises used for the purpose of gaming without a licence. A director, Ms Huckerby, was also convicted on the basis of her neglect. The evidence was that she knew little of the conduct of the premises in question but left this in the hands of her fellow director and the manager. Although she was aware that a gaming licence was*

---

[102] *R v Waters and Westminster Recliners Ltd* [2016] EWCA Crim 1112, [2017] ECC 5 per Lord Thomas LCJ at [35]: 'The director himself sent the letter. In this case there can be little doubt, as the jury concluded that the letter was an aggressive commercial practice, that the director had connived in that practice.'

[103] [1943] Ch 296 (Simonds J). See also *R v R McMillan Aviation Ltd and McMillan* [1981] Crim LR 785.

[104] [1968] 1 All ER 139, HL.

[105] [1970] 1 All ER 189, DC.

required she had no knowledge of whether or not the relevant gaming licence had been obtained. Her conviction was overturned by the DC on appeal. It was held that a director could properly leave matters to another and she could not be said to have neglected her duty merely because she failed to make a specific enquiry as to whether a gaming licence had been obtained.

108. It may be that there is no duty to check the conduct of an experienced member of staff whom the officer should be able to expect to act in accordance with his instructions, unless there is something to prompt him to check.[106]

109. More recently, in 2008 in *R v Chargot Ltd (t/a Contract Services)*[107] the House of Lords held that the test (in a health and safety context):

'in the end of the day, will always be whether the officer in question should have been put on inquiry so as to have taken steps to determine whether or not the appropriate safety procedures were in place.'

110. *R v Chargot Ltd* was a case on s 37 of the Health and Safety at Work, etc Act 1974. Lord Hope (with whom the other members of the House of Lords agreed) followed the Court of Appeal decision in *R v P*[108] and held:

'Liability of officers

32. The prosecution of a director, manager, secretary or other similar officer under section 37 requires it first to be established that a body corporate of which he is an officer has committed an offence under one of the other provisions in that Part of the Act. Where the offence that is alleged against it is a breach of section 2(1) or section 3(1) the considerations mentioned above will, of course, all apply. So he can say in his defence that there was no breach of that provision by the body corporate or, if there was, that it was not reasonably practicable for the body corporate to avoid it. It is only when it is proved that an offence under one of those provisions has been committed that the question can arise [as] to whether the breach was something for which the officer too can be held criminally responsible. Then there are some additional facts and circumstances that must be established. The offence which

---

[106] *Lewin v Bland* [1985] RTR 171 (D), cited in Card, Cross and Jones, *Criminal Law* (14th edn, 1998) at p 697.

[107] [2008] UKHL 73; [2009] 1 WLR 1, [2009] 2 All ER 645, HL. Discussed by Victoria Howes in 'Duties and Liabilities under the Health and Safety at Work Act 1974: A Step Forward?' (2009) 38 ILJ 306.

[108] [2007] EWCA Crim 1937, [2008] ICR 96, [2007] All ER (D) 173 (Jul), CA.

section 37 creates is not an absolute offence. The officer commits an offence under this section only if the body corporate committed it with his consent or connivance or its commission was attributable to any neglect on his part. These are things relating to his state of mind that must be proved against him.

33. Here too the circumstances will vary from case to case. So no fixed rule can be laid down as to what the prosecution must identify and prove in order to establish that the officer's state of mind was such as to amount to consent, connivance or neglect. In some cases, as where the officer's place of activity was remote from the work place or what was done there was not under his immediate direction and control, this may require the leading of quite detailed evidence of which fair notice may have to be given. In others, where the officer was in day to day contact with what was done there, very little more may be needed. In Wotherspoon v HM Advocate 1978 JC 74, 78 Lord Justice General Emslie said the section is concerned primarily to provide a penal sanction against those persons charged with functions of management who can be shown to have been responsible for the commission of the offence by a body corporate, and that the functions of the office which he holds will be a highly relevant consideration. In R v P Ltd [2008] ICR 96 Latham LJ endorsed the Lord Justice General's observation that the question, in the end of the day, will always be whether the officer in question should have been put on inquiry so as to have taken steps to determine whether or not the appropriate safety procedures were in place. I would too. The fact that the penalties that may be imposed for a breach of this section have been increased does not require any alteration in this test. On the contrary, it emphasises the importance that is attached, in the public interest, to the performance of the duty that section 37 imposes on the officer.

34. … The offences that are created by sections 2(1) and 3(1) are directed to the result that must be achieved by the body corporate. Where it is shown that the body corporate failed to achieve or prevent the result that those sections contemplate, it will be a relatively short step for the inference to be drawn that there was connivance or neglect on his part if the circumstances under which the risk arose were under the direction or control of the officer. The more remote his area of responsibility is from those circumstances, the harder it will be to draw that inference.'

Ignorance of the law

111. It is clear that an officer will be liable under these extended director and officer provisions if he or she consents to (or perhaps or connives in) a particular action, whether or not he or she was aware that the action was a breach of the relevant legislation. In effect ignorance of the law is not a defence here – see the decision of

the Court of Appeal in *Attorney-General's Reference (No 1 of 1995)*[109] and similarly the House of Lords (in relation to a different offence) in *Grant v Borg*.[110]

112. In *R v Chargot Ltd (t/a Contract Services)*,[111] Lord Hope approved this point, commenting (at [34]):

'34. In Attorney-General's Reference (No 1 of 1995) [1996] 1 WLR 970 the questions were directed to the effect of section 96(1) of the Banking Act 1987 which is in identical terms to section 37 of the 1974 Act. Lord Taylor of Gosforth CJ said at p 980 that where "consent" is alleged against him, a defendant has to be proved to know the material facts which constitute the offence by the body corporate and to have agreed to its conduct of the business on the basis of those facts. I agree, although I would add that consent can be established by inference as well as by proof of an express agreement. The state of mind that the words "connivance" and "neglect" contemplate is one that may also be established by inference.'

113. It is unclear if the relevant knowledge extends to any mental element applicable to the company. Taking an examples from the pensions legislation, if the primary offence was one of avoiding employer debt (PA 2004, s 58A) or conduct risking accrued scheme benefits (PA 2004, s 58B) then in both cases the primary offence would require the company both:

- to intend the relevant act to have the prohibited effect (s 58A); or know (or ought to have known) that the relevant act would have the prohibited effect (s 58B); and

- for there to be no reasonable excuse.

114. It is unclear if the relevant director or officer knowledge in a consent or connivance case has to extend beyond the relevant act to include all the relevant facts (including the presence of intent and absence of a reasonable excuse).

---

[109] [1996] 1 WLR 970, CA, discussed by Joanna Gray in B Rider (Ed), *The Corporate Dimension* (Jordan Publishing, 1998). Followed in *R v P* [2007] EWCA Crim 1937, [2008] ICR 96 and *R v Waters* [2016] EWCA Crim 1112.

[110] [1982] 2 All ER 257, HL.

[111] [2008] UKHL 73, [2009] 1 WLR 1.

115. In practice, it may be that this issue has not arisen in many cases in the past, given that the relevant director or officer is likely to be a senior decision maker and to have the same degree of knowledge as the company.

C. Whose mind in a company matters?

116. The converse of the question 'when can an officer be liable?' is 'when can the state of mind of an officer, employee etc be attributed to the company?' This is potentially a crucial question for our clients in future if they find themselves faced with prosecution in particular under the "revolutionary" new offences: there will potentially be a disconnect between the particular employees who committed the conduct in question and the far more attractive corporate target of a prosecution.

117. Approaching this question requires us to make three distinctions at the outset.

118. First, and crucially, the distinction between strict liability offences and offences requiring a particular state of mind. In the case of the former, this issue does not arise: there is no need to attribute a guilty state of mind to the company as state of mind is not a constituent part of the offence. The issue only arises in respect of the latter question.

119. Secondly, between the position at common law and the position in statute. As we will see, the common law test is fairly restrictive, and in its application a long way from a model of clarity. A new statutory provision in the Economic Crime and Corporate Transparency Act 2023 has sought – in particular circumstances – to put the test on a more solid statutory footing.

120. Thirdly, between the present and the future. That statutory test at the moment does not apply to crimes under the pensions legislation. At least before the recent decision to call a general election, the winds of change however were forecast to blow….

121. The principle at common law is that where a mental element forms part of a criminal offence, a body corporate may only be convicted where a natural person representing that body's "*directing mind and will*" possessed the necessary mental element. This is known as the "identification principle."

122. The principle was established authoritatively by a decision of the House of Lords in 1972, called *Tesco v Nattrass*[112]. Tesco was accused of a criminal offence under the

[112] [1972] AC 153.

Trade Descriptions Act 1968, advertising a special offer when it was not available. Tesco sought to rely on a defence provided under the statute where another person was to blame, saying that person was its store manager. Tesco's state of mind was in issue because it was a defence to the prosecution to show that, as well as someone else being to blame, Tesco had exercised reasonable precautions and due diligence.

123. The House of Lords held that Tesco was not liable, as the state of mind of the store manager could not be attributed to it. They based this on the identification principle, and held that the store manager was not the *"directing mind and will"*. There are two key points that for our purposes emerge from the speeches in that case.

124. First, the concept of *"directing mind and will"* is a narrow one. One can see that from what it does not cover: one might have thought in *Tesco* itself that the store manager, having had responsibility for managing the store delegated to him, was someone whose state of mind in undertaking those tasks could readily have been attributed to Tesco. But that was not the case. It is clear as well (despite some suggestions in the speeches to the contrary) that it is a narrower concept than those who can 'consent or connive' in the way explained above.

125. Rather, the persons who are the *"directing mind and will"* of the company are, normally, the board of directors of that company, collectively, and potentially individual senior directors. In large companies, this effectively removes vast swathes of corporate activity from potential criminal liability for the corporation, because the board of directors' only mental state in respect of that activity will be ignorance.

126. Secondly, the extent to which further individuals might, in particular circumstances, also be identified with the company for the purposes of criminal liability is uncertain, but narrow. Lords Morris and Pearson suggested that it might extend to a similar reach of the consent and connivance clause. However, the other speeches suggest a more restricted approach. Both Lord Reid and Viscount Dilhorne appear to have regarded the key as being whether someone other than a director as being whether they had been granted full discretion in the relevant activity such that they were not answerable to the board of directors for what they were doing (se at p171 and p187). Lord Diplock took an even narrower view, looking at the memorandum and articles of association to identify those who could exercise powers of the company (see p200). The better view emerging from these speeches is that for a prosecution to succeed, the person in question had to have *"the status and authority*

which in law makes their acts in the matter under consideration the acts of the company"[113], that is either be directors or someone with a full delegation.

127. The upshot of this in practice was that attempts to prosecute companies in respect of the actions of non-directors where the crime involved a mental element were very rare indeed. Identification in the case of directors however appeared to be much clearer.

128. That however was dealt a blow – and the scope of the identification principle further limited – by the decision of the High Court in *Serious Fraud Office v Barclays*[114].

129. In that case, individuals including two directors, the CEO and the CFO, were alleged to have conspired to commit fraud in connection with the raising of capital before the financial crisis. It was said that various prospectuses were knowingly misleading. It is important to say that the individuals were subsequently acquitted, but the Court's decision about whether a prosecution potentially could be brought against Barclays proceeded on the basis (akin to a strike-out application) that they were true. The prosecution was dismissed by the Judge sitting in the Crown Court, and the SFO then went to the High Court for a voluntary bill of indictment.

130. The issue was whether the individuals in question could be said to be the directing mind and will for the purpose of the capital raisings in question. It was not suggested that the board of directors, or its committees set up in respect of the capital raisings, knew of what was going on: on the contrary, it was alleged that what was happening was concealed from them.

131. The High Court held that Barclays was not liable. While the judgment is lengthy and elaborate, as Davies LJ (sitting as a Judge of the High Court) himself said, the ultimate decision was fairly. The individuals in question had authority to negotiate the deals, but not to complete them. He said as follows at [119]:

> *"On that basis, derived from the prosecution's own case, those individuals did not with regard to these transactions have "full discretion" to act independently and they were "responsible to another person [viz the BFC] for the manner in which they discharged their duties" (reflecting the words of Lord Reid and Lord Pearson in Tesco v Nattrass). It follows that, by reference to the pleaded particulars on the indictment, they could not be regarded as the directing mind and will for the purpose of performing the functions in question. That in essence, in my view, is the long and the short of it."*

---

113 *R v Andrews Weatherfoil* [1972] 1 WLR 118

114 [2018] EWHC 3055 (QB).

132. At [122], he stressed the necessary formality in this approach:

> *"It simply is not acceptable, in my opinion, for the SFO to regard the various resolutions of the Board and of the BFC as, in effect, mere pieces of paper. They are not: they reflect the level of delegation sanctioned by the appropriate organs of the company. Broad appeals to "the realities" and to the "de facto" position cannot overcome that in this case. This is not a matter of form over substance. Rather, in this case, the form is the substance. That the individuals had some degree of autonomy is not enough. It had to be shown, if criminal culpability was capable of being attributed to Barclays, that they had entire autonomy to do the deal in question; and that is not the case here. Moreover, powerfully though Sir James advanced his arguments on the asserted "de facto" position those arguments in any event also seem to me to collide with the factual evaluation of Jay J: an evaluation from which it is not open to me to depart and from which I am not prepared to depart."*

133. Thus this case set the bar extremely high. Even though the alleged activities involved two very senior directors, who had a degree of autonomy, that was not enough. They had to have "full discretion" and "entire autonomy."

134. The Law Commission was in November 2020 asked to review the law on corporate criminal liability, and reported in June 2022.

135. As a result of their proposals, reforms were introduced in the Economic Crime and Corporate Transparency Act 2023. Section 196 of that provided that if a "senior manager" committed a crime, the company was guilty of that offence. "Senior manager" was defined in terms intended to be much broader than the decision in *Barclays*:

> *"senior manager", in relation to a body corporate or partnership, means an individual who plays a significant role in—*
>
> *(a) the making of decisions about how the whole or a substantial part of the activities of the body corporate or (as the case may be) partnership are to be managed or organised, or*
>
> *(b) the actual managing or organising of the whole or a substantial part of those activities.*

136. This therefore would be sufficient to capture the activities of a single director, or a person below directorial level who nonetheless had a significant role in the operation of the business.

137. However, and crucially for our purposes, this definition does not (yet) extend to pensions offences. It is limited in its application at the moment to those offences

set out in Schedule 12 of the 2023 Act, and pensions offences are not one of them. The good news for corporate clients is that – for now – the rigours of *Barclays* remain the law in respect of pensions offences.

138. However, change is in the air. The Law Commission's proposals were quite genuine, and in announcing the 2023 Act the then Government made clear that its then intention was to apply the reformed identification doctrine to all criminal offences.[115] The reason this was not done in the 2023 Act was because it was not regarded as a suitable legislative vehicle for the purpose. Indeed, the 2023 Act contains in s 197 a regulation-making power for the Secretary of State to expand the list of crimes to which the reformed identification principle applies. So watch this space....

[115] https://www.gov.uk/government/publications/economic-crime-and-corporate-transparency-act-2023-factsheets/economic-crime-and-corporate-transparency-act-identification-principle-for-economic-crime-offences

Appendix 1: Position of Insolvency Practitioners

This appendix looks at the position of IPs under the pensions crimes and fines legislation following the decision in 2023 of the Supreme Court in ***R (Palmer***): *R (on the application of Palmer) v Northern Derbyshire Magistrates' Court* [2023] UKSC 38, [2024] ICR 288.

R (Palmer)

In *R (Palmer)* the Supreme Court unanimously held that an administrator (appointed to a company under the Insolvency Act 1986) was not a "similar officer of the body corporate" and so did not fall within the secondary class and could not be prosecuted under the Trade Union and Labour Relations (Consolidation) Act 1992 (**TULRCA 1992**), s 194 for the (alleged) failure of the company to give notice to the Secretary of State of proposed collective redundancies.

The primary offence in TULRCA 1992 is in s 194(1), with s 194(3) providing for the secondary offence in the following terms:

> *Where an offence under this section committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person purporting to act in any such capacity, he as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly.*

This appendix considers how far the decision in *R (Palmer)* affects the position in relation to the various crimes and fines in the pensions legislation, in particular whether IPs can rely on the decision in *R (Palmer)* to assume they have no potential for committing a crime or incur a fine under the similar secondary provisions in the pensions legislation where they are appointed over a company.

Insolvency Practitioners?

The issue arises, in particular, whether insolvency practitioners (IPs) appointed over the company are within the secondary party category in relation to the company. IPs, in practice mainly liquidators or administrators[116], on appointment, tend to take control of the company to the exclusion of its directors (save in some limited respects). If at the time of appointment the company is already committing or starts later to potentially commit an offence (or incur a penalty), can the IP end up as a secondary party also

[116] Administrative receivers must also be IPs, but from September 2003 appointments have been restricted by the Enterprise Act 2002, broadly to appointments under charges created before 15 September 2003 or in certain capital market arrangements (see Insolvency Act 1986 (**IA 1986**), ss 72A to 72H).

committing an offence (or incurring a penalty)? This is likely to be a serious issue for the IP, particularly if the company continues to trade. Although a successful prosecution (or fine) would still require the further elements to be shown on the part of the IP – e.g. consent, connivance or (usually) neglect.

This potential for a criminal offence (or penalty) on the IP personally would add a significant complication to the IP's decisions – for example whether or not to continue to operate the company's business - if this could give rise to a potential personal liability on the IP. This is to be compared with a triggering of a money claim (for a fine or penalty) against the company itself – which from the IP's perspective may impact the company and the recovery by creditors in the insolvency, but could rank as an unsecured debt (or might in some cases be preferential) or could in some cases be an insolvency expense[117] (and so be usually payable in advance of most other claims on the company).

IP express exemptions

IPs do have some express exemptions[118] from the moral hazard provisions in PA 2004, and from some (but not all) the primary crimes and fines in the pensions legislation. However these exemptions are from the primary liability and do not expressly exclude IPs from any potential secondary liability, where the primary liability falls on a company.

A table with some of the more important pensions provisions, and whether they have an express IP exemption, is below:

Provision	**IP exemption?**
Moral hazard powers (CNs and FSDs)	
FSD: PA 2004, s 43	No (but not needed as FSD cannot apply to an individual, if a corporate employer)
CN: PA 2004, s 38	Yes Exemption only if the Pensions Regulator (**TPR**) is of the opinion that IP is acting in accordance with his or her functions

117 Claims against a company under a pensions moral hazard order for a contribution notice (**CN**) or financial support direction (**FSD**) under the Pensions Act 2004 (**PA 2004**) are unlikely to be an insolvency expense, at least where the relevant order is based on pre-insolvency facts: see *Re Nortel GmbH* [2013] UKSC 52, [2014] AC 209; and Pollard '*Corporate Insolvency: Employment and Pension Rights*' (7th edn, 2022, Bloomsbury Professional) at ch 36 (Categorising claims: Re Nortel).

118 See *Corporate Insolvency: Employment and Pension Rights* at ch 20 (IPs and Pensions Liability).

Provision	IP exemption?
Enforcement CN (re FSD): PA 2004, s 45	No (but not needed as can only apply to the target of an FSD)
Crimes	
PA 2004,s 40A: Failing to comply with a s 38 CN[119]	No express exclusion
PA 2004, s 58A: Avoidance of employer debt	Yes
PA 2004, s 58B: Conduct risking scheme benefits	Yes
PA 2004, s 80: providing false or misleading information to TPR	No
Pensions Act 1995 (**PA 1995**), s 49(8) and (11) and Pension Schemes Act 1993 (**PSA 1993**), s 111A: knowingly to be concerned in the fraudulent evasion of the obligation on an employer to pay contributions within a period after deduction from pay[120]	No
Pensions Act 2008 (**PA 2008**), s 45: deliberate failure to comply with AE requirements	No but AE duties broadly cease if relevant scheme enters a PPF assessment period (PA 2008, s 31)
Financial Penalties – PA 2004, s 88A	

119 Note not an FSD enforcement CN under PA 2004, s 47.

120 PA 1995, s 49(8): Contributions deducted from pay must be paid to the scheme within 19 days (22 days if paid by electronic communication) of the end of the month in which they are deducted: reg 16 of the Occupational Pension Schemes (Scheme Administration) Regulations 1996 (SI 1996/1715). An employer failing to pay members' contributions within the prescribed time may be subject to a civil penalty under PA 1995, s 10 – PA 1995, s 49(9)(a).

Provision	IP exemption?
PA 2004, s 40B: Failing to comply with a s 38 CN[121]	No express exclusion
PA 2004, s 58C: Avoidance of employer debt	Yes Exemption only if TPR is of the opinion that IP is acting in accordance with his or her functions
PA 2004, s 58D: Conduct risking scheme benefits	Yes Exemption only if TPR is of the opinion that IP is acting in accordance with his or her functions
PA 2004, s 80A: providing false or misleading information to TPR	No
PA 2004, s 80B: providing false or misleading information to trustees	No Specified provisions within the sanction include PA 1995, s 26 (IP to give information to trustees)
PA 2004, s 69/69A: failure to notify TPR	No

Does the decision in *R (Palmer)* mean that IPs do not now have to worry about secondary crimes or fines under the pensions legislation?

Broadly the answer is probably a qualified yes. Strictly the decision of the Supreme Court in *R (Palmer)* is only a binding authority in relation to cases where both:

> (a) the potential offences are under the collective redundancy provisions in TULRCA 1992, s 194(3); and
> (b) the IPs concerned are administrators.

These two issues are discussed further below.

Application to other legislation?

In relation to (a), strictly the decision in *R (Palmer)* was only dealing with interpretation of the secondary class language in TULRCA 1992. There is commentary in the caselaw that there is "danger" in construing words in one statute by reference to a decision on similar

[121] NB not an FSD enforcement CN under PA 2004, s 47.

words in another statute[122]. But decisions on other statutes can be considered where they are "instructive by analogy" and can be "strongly supportive" [123].

In practice where there is such statutory wording dealing with a secondary criminal liability and it has been construed (as in *R (Palmer)*) in a very similar context in relation to another statute, it seems likely that it will be very difficult to distinguish the result.

Conceivably the result in a case construing the secondary criminal (and penalty provisions) in another statute, for example the pensions legislation, could differ from that in *R (Palmer)*, but some fairly compelling distinguishing factor is likely to be needed. It seems much more likely that courts will consider that secondary criminal (and civil penalty) liability provisions with the same (or similar) wording to that in TULRCA 1992 are all intended to be penal and should have the same meaning.

Application to other IPs?

R (Palmer) is a decision in relation to administrators appointed under IA 1986. The decision needs to be examined in some detail in order to decide whether a similar result should apply to a different IP, for example a court-appointed liquidator, a voluntary liquidator or an administrative receiver.

All three categories have similarities with administrators – for example, they take over control of the company in place of its directors[124] and they need to be licensed IPs[125]. But there are differences: administrators are officers of the court[126], as are court-appointed liquidators; but voluntary liquidators and administrative receivers are not. Administrators and administrative receivers have many similar powers[127], including that they can arrange for the company to continue to trade. Liquidators have different powers and their power to arrange for a company to continue to trade is much more limited.[128]

---

122 See e.g. *Hastie & Jenkinson v McMahon* [1991] 1 All ER 255, CA per Woolf LJ at p261g: "There is always danger in seeking to apply decisions on specific statutory provisions to different situations…."; and *Stephens v Cuckfield RDC* [1960] 2 All ER 716, CA per Upjohn LJ at p719G: "Authorities on rather similar words in other Acts passed for entirely different purposes … do not assist us."

123 Lord Lloyd-Jones in *R (KBR Inc) v SFO* [2021] UKSC 35, [2022] AC 519 at [46] and [53].

124 IA 1986, s 87 (voluntary liquidations) and s 167 and Sch 4, para 5 (court liquidations).

125 IA 1986, ss 230 and 388.

126 IA 1986, Sch B1, para 5.

127 IA 1986, Sch 1.

128 This may be a reason why liquidators may in practical terms be less likely to be caught up in a secondary liability as they may be less likely to be within the "consent, connive or neglect" test.

Lord Richards, who gave the only judgment in *R (Palmer)*, considered that it was appropriate in relation to administrators to follow an earlier (unreserved) Court of Appeal decision, *Re B Johnson & Co (Builders) Ltd* [1955] Ch 634, to the effect that receivers are not "officers of the company" for the purposes of the then Companies Act 1948, s 333. He held that this was appropriate on the basis that administrators were much more similar to receivers.

Ultimately the analysis of Lord Richards in *R (Palmer)*, based on the treatment under various provisions of IA 1986 of IPs as contrasting with officers of the company, is likely to be held to apply to other IPs as well as to administrators.

Why are administrators (and other IPs) not "managers"?

One notable aspect of the Supreme Court's decision in *R (Palmer)* is that it does not deal with the potential issue of why an administrator is not a 'manager' of the company , so falling within the secondary category class, regardless of whether or not an administrator also falls within the "other similar officer of the body corporate" category. It may be that this point was not argued, although the Divisional Court in the decision under appeal (and overturned) in *R (Palmer)* had discussed the manager/officer distinction[129].

Conclusion

Lord Richards in the Supreme Court in *R (Palmer)* acknowledged that the effect of the decision was to exclude administrators from the secondary liability under TULCRA 1992 despite the administrator being the person in control of the company at the relevant time. He held that the secondary class wording was not clear enough to cover administrators – there was "no scope for such an extended reading" (at [42]). Lord Richards held that Parliament could easily have adopted a more functional test (at [51]).

Lord Richards held that the term "officer" (at least in TULRCA 1992) is "essentially a constitutional test. Does the person hold an office within the constitutional structure of the body corporate as is the case with directors, managers and secretaries?" (at [55]). The reference to "managers" as holding office within a corporate structure is perhaps less easy to follow than directors or secretaries.

Given the large number of legislative provisions using similar secondary wording, it may be that future legislation seeks to clarify that IPs are included within the secondary class – on the basis that once in office they are the real managers and decision-makers within the company. This remains to be seen.

---

129 *R (Palmer) v Northern Derbyshire Magistrates Court* [2021] EWHC 3013 (Admin), [2022] ICR 531, DC at [106] to [112].

Automatic Enrolment – a selection of topical issues

Paul Newman KC, Jennifer Seaman and Ram Lakshman

THE DEFINITION OF 'WORKER'

Introduction

This paper considers how the courts and tribunals define the concept of 'worker' for the purposes of the auto-enrolment regime, with particular emphasis on its application to persons involved in the gig economy.

The context

To put the concept of worker in its proper context:

(i) s.3(2) of the Pensions Act 2008 (**PA 08**) requires an employer to make prescribed arrangements by which a *jobholder* who satisfies the age and earnings requirements in s.3(1) becomes an active member of an automatic enrolment scheme by a prescribed date;[130]

(ii) *jobholder* is defined in s.1(1) PA 08 as a *worker*:

(a) who is working or ordinarily works in Great Britain under the worker's contract;

(b) who is aged between 16 and 75; and

(c) to whom *qualifying earnings* are paid.

(iii) *worker* is defined in s.88(3) PA 08 as follows:

> *… an individual who has entered into or works under—*
>
> *(a) a contract of employment, or*
>
> *(b) any other contract by which the individual undertakes to do work or perform services personally for another party to the contract.*

[130] Unless they are already such a member: s.3(3) PA 08.

(iv) As to the contract referred to in (iii)(b) above:

(a) it will not qualify as a contract *if the status of the other party is by virtue of the contract that of a client or customer of a profession or business undertaking carried on by the individual concerned*;

(b) it can be express or implied or, if it is express, oral or in writing.[131]

The definition of worker in PA 08 is intended broadly to align with the concept as used in employment legislation. So, for example:

(i) some of the rights covered by the Employment Rights Act 1996 (**ERA 96**), such as protection from unlawful deductions from wages, apply to *workers*, which is defined in s.230(3) ERA 96 as follows:

> *an individual who has entered into or works under (or, where the employment has ceased, worked under)—*
>
> *(a) a contract of employment, or*
>
> *(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual*;

(ii) workers are also entitled to holiday pay and the national minimum wage, and that concept is defined in the relevant legislation in the same terms as in ERA 96.

Accordingly, the concept of worker includes employees under sub-sub section (a) of those definitions, and employees are at the top of the tree in that all employment rights apply to them. Those workers who are not employees are those that fall under sub-sub-s section (b) and are therefore often known as 'limb (b) workers': they are entitled to some employment rights but not all of them: they do not qualify, for example, for maternity leave or protection against unfair dismissal. They are, however, in a better position than those with the third type of employment status, the self-employed, who are not entitled to any employment rights.

---

[131] Section 88(4)(5) PA 08. There are a number of provisions relating to particular types of workers: ss.88-97 PA 08.

This paper will focus on the limb (b) definition as it has caused the most problems in practice, in particular for persons working in the gig economy, where there has been a game of "cat and mouse" between the courts identifying the criteria which cause these persons to come within the limb (b) definition, and companies seeking to structure the working practices of those persons so they do not fall within that definition.

Before looking at the relevant legal principles, two introductory points need to be made.

Caselaw

When considering the definition of worker in the context of a company's auto-enrolment obligations, the cases on the definition used in the general employment context will be relevant.

The intention to align the definition of worker in PA 08 with the existing definitions in the employment legislation is confirmed by a number of sources:

(i) in the DWP's Impact Assessment of the Bill that became PA 08, it is stated that the definition of worker *will align the eligibility for automatic enrolment into private pension saving with coverage of … the National Minimum Wage Act*;[132]

(ii) in *The Pensions Regulator v Hermes Parcelnet Ltd*,[133] Judge Jacobs said that the same or similar definitions of worker in s.88 PA 08 apply in other legislation, including s.230(3) ERA 96;

(iii) in its auto-enrolment guidance, the Pensions Regulator (**TPR**), when discussing the potential application of a case decided under ERA 96 to auto-enrolment obligations, said that:

> *Given the similarity in the definition of worker in the ERA* [96] *and the Pensions Act 2008, the regulator's view is that … the Supreme Court's decision* [in the relevant case] *is equally applicable to the Pensions Act 2008 for automatic enrolment purposes.*[134]

[132] *Pensions Bill 2007 – Impact Assessment*, para 2.10. Impact assessments are admissible aids to the construction of legislation: *Energy Solutions EU Ltd v Nuclear Decommissioning Authority* [2017] 1 WLR 1373 at [35] per Lord Mance JSC.

[133] [2021] UKUT 20 (AAC) at [1].

[134] TPR Detailed Guidance Note 1: *Employer duties and defining the workforce: An introduction to the employer duties*, para.108.

TPR

The other preliminary point to make is that, in addition to the caselaw, it is necessary to consider the approach of TPR, which is the body charged with the enforcement of the auto-enrolment regime and which has issued detailed guidance on the matter: I return to this below.

The limb (b) definition

The starting point in the analysis is to note that the limb (b) definition has two elements:

(i) a contract by which the individual undertakes to do work or perform services for the other party; and

(ii) an undertaking to work or perform the services personally.[135]

That first element can be further broken down into two separate elements:

(i) the bilateral nature of the contract requires mutual obligations on the parties, which constitutes the consideration from each party which creates the contract;[136]

(ii) that contract must include a certain type of obligation – to work or perform the services.[137]

In summary, the statutory requirements for a limb (b) worker are:

(i) the existence of a bilateral agreement whereby the parties undertake mutual obligations;

(ii) the individual becoming obliged under the agreement to work or perform services; and

(iii) the individual undertaking to work or to perform those services personally.

The proper approach is therefore first to determine whether there was a contract between the individual and other party, and then to assess the other features of the definition of

[135] *Uber BV v Aslam* [2021] ICR 657 at [41] per Lord Leggatt.

[136] *Quashie v Stringfellow Restaurants Ltd* [2013] IRLR 99 at [10] per Elias LJ.

[137] *Nursing and Midwifery Council v Somerville* [2022] ICR 755 at [45] per Lewis LJ.

worker, most notably whether the individual undertakes to do work or perform services personally for the other party.[138]

Contract

Relevance of contractual terms

At first glance, the requirement for there to be a contract suggests that the question of whether the person concerned is a worker will turn on the true construction of the contract. However, this is subject to the general employment law principle that, where the terms of the contract do not accurately reflect the true agreement of the parties, the employment tribunal may disregard those terms, and instead focus on the reality of their relationship.

The leading case in this respect is *Autoclenz Ltd v Belcher*.[139] A car valeting company hired individuals to provide their services, and they were provided with written agreements declaring that they were sub-contractors, that they were entitled to provide a substitute to carry out the work, that the company was not required to provide them with work, and that they were not required to accept work. These provisions, however, did not reflect the reality of their work, as the company told them how to carry out the work, provided the cleaning materials, determined the rate of pay, prepared their invoices and required them to give prior notification if they were unable to work. The individuals claimed to be workers and therefore entitled to the national minimum wage and holiday pay.

The Supreme Court agreed with claimants, holding that the contracts could be disregarded where they did not reflect the parties' true intentions, for which the relative bargaining power of the parties had to be taken into account. The court held that the true agreement would often have to be gleaned from all the circumstances of the case, of which the written agreement was only a part, and that the facts on the ground established that the claimants were employed under a contract of employment, and so were workers.

Thus, in the particular context of a person's rights under employment legislation, the issue of whether a person is a worker will not be determined purely by reference to principles of contract law: it is primarily a question of statutory interpretation.[140] In other words, the terms of the contract will not be allowed to detract from the statutory test and purpose.[141] This is necessary to prevent the company from seeking to subvert the true nature of the

---

[138] *Sejpal v Rodericks Dental Ltd* [2022] ICR 1339 at [44] and [47] per HHJ Tayler.

[139] [2011] ICR 1157.

[140] *Uber*, supra, at [69].

[141] *Sejpal*, supra, at [17] per HHJ Tayler.

services provided by the individual by drafting the contract in a way that does not match what they are actually doing for the company.

Accordingly, when determining the true nature of the contract, its written terms are not the sole determining factor: indeed, they are not even the starting point.[142] The issue will be determined from all the circumstances of the case, of which the written agreement is only a part:[143] also of relevance is the way in which the relationship has operated, and evidence of the parties as to their understanding of it.[144]

However, this does not mean that there is no role for the contract, given that the requirement for a contract is written into the statutory provisions: a recent EAT decision held that an employment tribunal did not fall into error by starting its analysis of the employment status of the claimant by looking at the terms of a document said to amount to a written contract, provided that the tribunal did not confine its consideration to those terms or otherwise treat them as conclusive.[145]

Mutuality of obligation

As stated earlier, the requirement for there to be a contract between the individual and the company requires a mutuality of obligation between them: there must be obligations on both sides in order to provide the consideration of the kind necessary to create any form of bilateral contract.

This requirement has caused considerable confusion in the case of persons undertaking multiple short-term jobs for a single organization, which will include gig economy workers, where the contract between the person and the organization does not provide for a minimum level of work. This came to a head in *Nursing and Midwifery Council v Somerville*,[146] which involved a member of the Council's Fitness to Practise Committee, who was appointed for a four-year term governed by a services agreement. In order to undertake work, the claimant offered his available dates, was offered a hearing appointment which he was free to accept or reject. There was no obligation on the Council to provide work and no obligation on the claimant to accept it.

The claimant claimed worker status, and it was argued by the Council that the absence of any obligation in the service agreement to provide or perform work meant that the

[142] *Uber,* supra, at [77]

[143] *Autoclenz*, supra, at [35].

[144] *Carmichael v National Power plc* [1999] 1 WLR 2042 , 2050-2051.

[145] *Ter-Berg v Simply Smile Manor House Ltd* [2023] EAT 2.

[146] Supra.

mutuality of obligation required for worker status was not present. This argument was rejected by the Court of Appeal, which identified two relevant types of contract for this purpose.

(i) the overarching service agreement which governed the claimant's appointment as a panel member; and

(ii) the series of individual contracts that the claimant entered into each time the Council offered him a hearing and he accepted it in return for being paid a fee.

The court accepted that the first contract did not impose any obligation on the Council to offer or pay for work or any obligation on the claimant to provide any services, and so was not a contract for the purposes of worker status. However, the court went on to hold that *the fact that an overarching contract does not impose an obligation to work does not preclude a finding that the individual is a worker when he is in fact working*,[147] and the individual agreements arising during the period of work contained the relevant mutuality of obligations and so gave rise to worker status on the part of the claimant.

Similarly, in the case of gig economy workers, where the work comes through the offer of individual jobs often through an app, a separate contract will arise each time the person accepts the offer and performs the service, and the freedom of the person to accept or reject work as they wish will not preclude a worker contract from arising while they work.

Other relevant features

Once a contract is established, it is necessary to assess the other features of the definition of worker, in particular the undertaking to personally perform the work or services.

Whilst particular features and relevant categories of principles have been identified and are discussed below, the courts have stressed that it is usually unhelpful to apply categories too rigidly to the particular facts of a case and to treat that as dispositive of the issue of personal performance. Instead, each case should be examined on its individual facts, which is a matter for the first instance tribunal rather than the appellate courts.[148]

Statutory purpose

When considering the relevant features, it is necessary to keep in mind the statutory purpose of the worker definition, which was described by the Supreme Court in the *Uber*

[147] Ibid at [54]. See also *Addison Lee Ltd v Lange* [2021] EWCA Civ 594 at [14] per Bean LJ.

[148] *Stuart Delivery Ltd v Augustine* [2022] ICR 511 at [34], [41] and [46] per Lewis LJ.

case[149] as the need to protect workers because of their subordination to and dependence upon another person in relation to the work done. The court said that a touchstone of this subordination and dependence is the degree of control exercised by the company over the work or services performed by the individual concerned: the greater the extent of such control, the stronger the case for classifying the individual as a worker.[150]

The concepts of control, dependance and subordination are therefore of particular importance in this respect, although these concepts should be seen as tools that can sometimes help in applying the statutory test: they are not, in themselves, tests.[151] In *Pimlico Plumbers Ltd v Smith*,[152] the Supreme Court held that it was helpful to ask whether the dominant feature of the contract remained personal performance on the individual's part, although it stressed that this did not supplant the statutory test.[153]

Right of substitution

A common practical manifestation of those concepts, which is of particular relevance to gig economy workers, is the extent to which they have a right to insist on a substitute to perform the contracted service.

It is clear that an unfettered right to substitute another to do the work or perform the person's services is inconsistent with an undertaking to do so personally, and so will be fatal to the person's status as a worker.[154]

However, where conditions are placed on the right to substitute, it is necessary to consider the nature and degree of those conditions to determine whether the conditional right is consistent with personal performance. For example, and subject to exceptional facts, a right to substitute:

(i) only when the contractor is unable to carry out the work is consistent with personal performance;

---

[149] At [87].

[150] Ibid.

[151] *Sejpal* at [7].

[152] [2018] ICR 1511 at [32] per Lord Wilson JSC.

[153] In *Stuart*, supra, Lewis LJ (at [58]) queried (without deciding) whether the relevant feature needed to be a term of the contract, or whether it was sufficient that it was a practice permitted by the company.

[154] See *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, 515 per MacKenna J; *Community Dental Centres Ltd v Sultan-Darmon* [2010] IRLR 1024 at [32] per Silber J.

(ii) only with the consent of another person who has an absolute and unqualified discretion to withhold consent is consistent with personal performance;

(iii) limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, is inconsistent with personal performance.[155]

Accordingly, a requirement that any substitute put forward by the individual was to be drawn from the company's workforce who were also subject to the same obligations did not mean that the individual was not a worker, as the company remained interested in the identity of the substitute.[156] By contrast, if the pool of persons who could perform as a substitute was very wide, that would negative the personal element of the contract.[157]

Other relevant features

In addition to the right of substitution, the courts in three of the leading cases considered the following features to be relevant to whether persons involved in the gig economy were workers for the purposes of the employment legislation.[158]

(i) the extent to which the persons' remuneration and any service fees were fixed by the company;

(ii) whether the persons were required to accept the standard service contract;

(iii) the freedom the persons had to choose whether, where and when to work;

(iv) the extent to which the company controlled the information provided to the persons, directed and monitored their performance, and penalised poor performance;

(v) the extent to which the working system and business model had been designed to ensure that the persons turned up to perform the service they had accepted;

---

[155] *Pimlico Plumbers Ltd v Smith* [2017] ICR 657 at [84] per Sir Terence Etherton MR.

[156] *Pimlico Plumbers*, supra.

[157] See *Stojsavljevic v DPD Group UK Ltd* (EA-2019-000259, 2 December 2021) at [80] per Ellenbogen J.

[158] *Uber,* supra; *Stuart Delivery Ltd v Augustine,* supra; *Independent Workers Union of Great Britain v Central Arbitration Committee* [2023] UKSC 43. Whilst the last of these cases focussed on whether the claimants were in an employment relationship within Article 11 of the European Convention on Human Rights, the Supreme Court (at [71]) listed factors which are relevant to domestic employment legislation.

(vi) whether the persons provided work equipment at their own expense;

(vii) whether the work in question was the person's sole or principal source of income or whether a proportion of their income was earned from the company's direct competitors, potentially by undertaking the competitor's work in preference;

(viii) whether there was any payment in kind or reimbursement for the cost of travel;

(ix) whether there was any protection from financial risk for the persons, in the form of insurance, guaranteed earnings or otherwise.

TPR's approach

As stated above, the auto-enrolment regime is operated by TPR, who has the power to impose penalty notices and criminal sanctions for failure to comply with auto-enrolment obligations.[159]

Whilst there is as yet no caselaw relating to the definition of worker in the specific context of auto-enrolment,[160] in its guidance TPR has set out a non-exhaustive list of factors that, in its view, indicate worker status:[161]

(i) where the company relied on the individual's expertise and expected them to perform the work themselves;

(ii) where there was an element of subordination between the company and individual, for example the individual reports to the company's managers or directors in respect of the specific operation or project on which they are contracted to work;

(iii) where the contractual provisions stated that the contract was not a contract for services between the company and the individual's own business;

---

[159] Sections 35-44 PA 08.

[160] The only auto-enrolment case which, as far as I know, has got anywhere near the courts concerned the parcel delivery company Hermes, which settled after an Upper Tribunal hearing on a preliminary issue as to whether findings made in an earlier employment tribunal case involving Hermes were admissible in the first-tier tribunal considering the auto-enrolment issues: *The Pensions Regulator v Hermes Parcelnet Ltd*, supra.

[161] TPR Detailed Guidance Note 1, supra, para.18. These factors are relevant to the initial decision that TPR will make, both initially and on a review by the determinations panel: they are not, however, required to be taken account by a court or tribunal, unlike formal Codes of Practice.

(iv) where the contract provided for employee benefits such as holiday pay, sick pay, notice, fees, expenses, etc.;

(v) where there was a mutual obligation set down in the contract to provide or do the work;

(vi) where the individual did not incur any financial risk in carrying out the work; and

(vii) whether the company provided tools, equipment and other requirements to the individual to carry out the work.

As the guidance states, no single factor by itself is capable of being conclusive in determining whether an individual is a worker, and all relevant circumstances must be taken into account. In my experience, TPR does not feel particularly attached to this list when undertaking its own investigations and is prepared to focus on particular matters such as the extent of any substitution rights.

Conclusion

Following a widescale independent review of UK employment practices in 2017,[162] the DWP promised to consider whether further legislation and guidance was necessary to bring greater clarity to the question of whether atypical workers, such as those in the gig economy, were eligible for auto-enrolment.[163] However, nothing further has been forthcoming from government on this issue, and it has been left to the courts and TPR to construe the existing legislation, without any strategic policy consideration of the balance that needs to be struck between protecting vulnerable workers and stifling the types of flexible working practices that suit both companies and workers in this post-COVID age.

[162] *Good work: the Taylor review of modern working practices* (July 2017).

[163] *Automatic Enrolment Review 2017: Maintaining the Momentum* (Cm 9546), p.66.

ANALYSIS OF AUTO-ENROLLMENT BREACHES

Introduction

In the second half of 2023, the Pensions Regulator (the **"Regulator"**) issued 19,538 fixed penalty notices and 8,400 escalating penalty notices against employers who it concluded had acted in breach of their obligations under the auto-enrolment regime[164]. In total, 235,662 fixed penalty notices and 82,712 escalating penalty notices have been issued since the regime was introduced[165].

Where such a notice is issued, an employer who has exhausted the Regulator's own internal review process is entitled as of right to refer the matter to the First-tier Tribunal and thereafter the matter may be referred to the Upper Tribunal. There have been a very large number of referrals of fixed penalty notices and escalating penalty notices- in the second half of 2023 there were a total of 155 referrals and there have been 2,886 referrals since the regime was introduced[166].

This paper analyses the caselaw that has emerged from the First-tier Tribunal and the Upper Tribunal. In particular, it looks at the excuses that employers have raised for failing to comply and considers whether the Tribunal has regarded these excuses as reasonable.

Sanctions for breaching auto-enrolment obligations

The responsibility for enforcing compliance with the auto-enrolment regime lies with the Regulator. It is not open to individual workers to make claims for breach of statutory duty in relation to a failure of an employer to comply[167].

Where the Regulator concludes that an employer has not complied with its obligations under the auto-enrolment regime, the first step is typically to issue a compliance notice and/or an unpaid contributions notice. A compliance notice is a notice which requires an employer to take (or refrain from taking) certain specified steps by a specified date in order to remedy the breach[168]. An unpaid contributions notice is a notice which directs an employer to pay into a pension scheme by a specified date an amount in respect of relevant contributions which have not been paid[169].

---

[164] Compliance and enforcement bulletin July to December 2023 | The Pensions Regulator

[165] ibid

[166] ibid

[167] Pensions Act 2008 (**"PA 2008"**) s34(1)

[168] PA 2008 s35(2)

[169] PA 2008 s37(2)

Compliance notices and unpaid contributions notices are by far the most common form of notice issued by the Regulator in response to a breach. In the second half of 2023, the Regulator issued 29,489 compliance notices and 17,451 unpaid contributions notices[170].

If the employer fails to comply with a compliance notice or unpaid contributions notice, the Regulator may issue a fixed penalty notice[171] and/or an escalating penalty notice[172]. A fixed penalty notice requires the employer to pay a fixed sum of £400[173] by the date specified in the notice, which must be at least 4 weeks after the date on which the notice is issued.

An escalating penalty notice requires the employer to pay an escalating penalty based on a prescribed daily rate if the breach (of the compliance notice, unpaid contributions notice, information notice or third party compliance notice) is not remedied by a particular date[174]. The prescribed daily rate depends on the size of the employer, as follows[175]:

a. 1-4 workers: £50 per day
b. 5-49 workers: £500 per day
c. 20-249 workers: £2500 per day
d. 250-499 workers: £5000 per day
e. 500 or more workers: 10,000 per day

The nature of an escalating penalty notice means that substantial liabilities can accrue quickly. In August 2019 the Regulator reported that one London-based services company with 5,000 employees had been issued with fixed and escalating penalty notices totalling £350,000[176]. As at December 2023 there were two employers owing more than £50,000 in escalating penalty notices, a further three owing more than £20,000, and a further seventeen owing more than £10,000[177].

---

[170] Compliance and enforcement bulletin July to December 2023 | The Pensions Regulator

[171] PA 2008 s40(1)

[172] PA 2008 s41(1)

[173] Employers' Duties (Registration and Compliance) Regulations 2010/5 (**"Compliance Regulations"**) regulation 12

[174] PA 2008 s41(3)

[175] Compliance Regulations regulation 13(3)

[176] Employer fined for workplace pension failures (workerspensiontrust.co.uk)

[177] Penalty notices | fines | The Pensions Regulator

Right to review and make a reference to the tribunal

Where an employer wishes to challenge a fixed penalty notice or an escalating penalty notice, the first step is to make a written application to the Regulator to review the notice[178]. The Regulator may also decide to review a notice of its own motion[179].

If the Regulator decides to review a notice, the effect of the notice is suspended until the review is completed[180]. At the conclusion of the review, the Regulator may confirm, vary or revoke the notice, or substitute a different notice[181].

If the Regulator decides not to review a notice, or completes its review, the employer is entitled as of right to refer the matter to the General Regulatory Chamber of the First-tier tribunal, and thereafter to the Tax and Chancery Chamber of the Upper Tribunal (collectively the **"Tribunal"**)[182]. The reference can be in relation to either the issue of the notice or the amount of the penalty payable under the notice[183].

Where a reference is made, the effect of the notice is suspended from the period beginning when the Tribunal receives notice of the reference and ending when the reference is withdrawn or completed[184].

The role of the Tribunal is to make its own determination as to the appropriate action for the Regulator to take, based on the evidence before it[185], which can include evidence that was not before the Regulator[186]. A reference therefore amounts to a complete redetermination, rather than merely a review or appeal of the Regulator's decision. Thus, it is not necessary to show that the Regulator was in error. The Tribunal can reach a different decision to that of the Regulator even if it thinks that the Regulator's decision fell within a range of reasonable decisions[187].

---

[178] PA 2008 s43(1)(a)

[179] PA 2008 s43(1)(b)

[180] PA 2008 s43(4)

[181] PA 2008 s43(5)

[182] PA 2008 s44(2)

[183] PA 2008 s44(1)

[184] PA 2008 s44(3)

[185] PA 2004 s103(4)

[186] PA 2004 s103(3)

[187] *Kingswear Gallery Limited v Pensions Regulator* [2022] UKFTT PEN/2021/0257 at [9]

Outcome of Tribunal referrals

The vast majority of referrals that reach the Tribunal are unsuccessful. Thus, for example, of the 64 referrals that were determined in the second half of 2023, 62 resulted in the decision of the Regulator being confirmed, and only 2 resulted in the penalty notice being revoked, substituted or varied[188].

However, it is also important to note that over half of the referrals to the Tribunal are not defended. It may be therefore that the low numbers of successful referrals are a consequence of the Regulator adopting a pragmatic approach and only defending those notices that it is confident the Tribunal will uphold.

The concept of reasonable excuse

In the vast majority of referrals, the employer has sought to argue that it had a "*reasonable excuse*" for failing to comply with the compliance notice or the unpaid contributions notice (as the case may be). This concept does not form part of the statutory framework but rather has developed through the Tribunal's caselaw.

The leading case is *Pensions Regulator v Strathmore Medical Practice* [2018] UKUT 103 (AAC). In that case, the Upper Tribunal held (at [16]) that:

"Although the legislation says nothing about reasonable excuse, it does not prevent the Regulator (or the First-tier Tribunal) from having regard to it. I do not go so far as to say that they must always have regard to it – there might well be a case where that would not be appropriate – but it is certainly proper to take reasonable excuse into account."

Consequently, where the employer is able to show that it has a reasonable excuse for failing to comply, this is a matter which the Tribunal is likely to take into account. In practice, where an employer has been able to show a reasonable excuse, this has almost invariably resulted in the fixed or escalating penalty notice being set aside[189].

Analysis of reasonable excuse in the Tribunal caselaw

The question is therefore when an excuse will be regarded by the Tribunal as being "*reasonable*". Whilst each case will undoubtedly turn on its own facts, the volume of

---

[188] Compliance and enforcement bulletin July to December 2023 | The Pensions Regulator

[189] See eg: *Neasden Car Care Ltd v Pensions Regulator* (2017) PEN/2017/0113; *A&P Trading Solutions Ltd v Pensions Regulator* [2023] UKFTT 772 (GRC); *DNS Retail Management Ltd v Pensions Regulator* [2022] UKFTT 363 (GRC)

caselaw emerging from the Tribunal means that it is possible to predict with reasonable certainty how the Tribunal will react to certain common excuses raised by employers.

This papers sets out ten of the most common excuses and the circumstances (if any) in which they will be regarded as a reasonable excuse by the Tribunal.

Excuse 1: *"I didn't receive the notice"*

Employers often assert that they did not receive the compliance notice or the unpaid contributions notice. It is clear that not receiving the notice can amount to a reasonable excuse for failing to comply[190].

However, the main difficulty for employers who wish to raise this excuse is regulation 15(4)(c) of the Compliance Regulations, which provides that "*it is presumed that…a notice was received by the person to whom it was addressed*". Thus, provided the notice is correctly addressed to the employer at its registered office address or principal business address, it will be presumed to have been received.

The presumption can be rebutted with evidence that the notice was not received[191]. However, the Tribunal has held that merely asserting that the notice was not received is insufficient to rebut the presumption[192]. That can place employers in the difficult position of having to prove a negative. There are many cases in which employers have been held to have provided insufficient evidence to rebut the presumption[193].

A further difficulty for employers is that the fact of the referral will necessarily mean that the employer has received the fixed penalty notice or the escalating penalty notice. The employer will generally be expected to provide an explanation as to why they received the penalty notice but not the compliance notice or the unpaid contributions notice[194]. That may be difficult in a case where the employer does not know why the compliance notice or the unpaid contributions notice were not received, as may be the case where the notices were lost in the mail.

---

[190] *A&P Trading Solutions Ltd v Pensions Regulator* [2023] UKFTT 772 (GRC)

[191] *Philip Freeman Mobile Welders Ltd v The Pensions Regulator* [2022] UKUT 62 (AAC) at [44]

[192] *London Borough of Southwark v (1) Runa Akhter & (2) Stel LLC* [2017] UKUT 0150 at [82]

[193] See eg: *London City Housing Ltd v Pensions Regulator* [2023] UKFTT 262 (GRC); *Bunting and Green Building Contractors Ltd v Pensions Regulator* [2023] UKFTT 734 (GRC); *Finishing Touches Cheltenham Ltd v The Pensions Regulator* [2023] UKFTT 457 *The Healthy Kitchen Ltd v Pensions Regulator* [2022] UKFTT 316 (GRC)

[194] *Monika Palka Hospitality Ltd v Pensions Regulator* [2023] UKFTT 767 (GRC)

Cases where employers have successfully rebutted the presumption include:

a. where the employer could show that the notice had been delivered to a locked mailbox that was no longer in use[195];
b. where the employer could show that the notice had mistakenly been delivered to a residential flat with an address that was identical to the employer's registered office address[196]; and
c. where the employer's address on companies house was confusingly presented and its accountant gave evidence that mail had commonly gone astray[197].

Excuse 2: *"I complied, but just didn't tell the Regulator"*

Another excuse that some employers have raised is that they have complied with the automatic enrolment regime, but simply failed to file the declaration of compliance. That is unlikely to be regarded by the Tribunal as reasonable.

The Tribunal has stated that the declaration of compliance is a central part of the Regulator's compliance and enforcement approach. It is necessary so that the Regulator can ensure that employers are complying with their automatic enrolment duties, and this is why it is a mandatory part of the system[198]. The penalty is not issued for failing to set up the pension automatic enrolment correctly, but for failing to issue the mandatory declaration of compliance[199].

Excuse 3: *"I only just missed the deadline"*

Similarly, the Tribunal has taken a strict approach to employers who comply late. The Tribunal has emphasised that the purpose of fixed and escalating penalty notices is to incentivise compliance with the automatic enrolment regime within the deadlines prescribed by statute. Consequently, there is a significant public interest in upholding fixed penalty notices where there has been late compliance[200].

[195] *Bolton Gate Farm Ltd v Pensions Regulator* [2023] UKFTT 36 (GRC)

[196] *A&P Trading Solutions Ltd v Pensions Regulator* [2023] UKFTT 772 (GRC)

[197] *DNS Retail Management Ltd v Pensions Regulator* [2022] UKFTT 363 (GRC)

[198] *Quelink Ltd v Pensions Regulator* [2024] UKFTT 267 (GRC)

[199] *A Greener London Ltd v Pensions Regulator* [2023] UKFTT 11 (GRC)

[200] *Global Wine Mart Ltd v The Pensions Regulator* [2022] UKFTT 317 (GRC) at [21]

Late compliance will therefore not constitute a reasonable excuse for failure to comply, even where it is only shortly after the relevant deadline[201].

Excuse 4: *"The regime is too complicated"*

The Tribunal has acknowledged that the automatic enrolment scheme can appear both complex and burdensome for small businesses[202]. However, it has consistently held the fact that an employer is not fully aware of its obligations is not a reasonable excuse for failing to comply.

In *Taz Furnishing Ltd v The Pensions Regulator* [2023] UKFTT 4 (GRC) the employer raised a number of excuses for failing to comply, including the fact that the sole director was an immigrant, was not well educated, was running his own business for the first time, and was not fully aware of his obligations. The Tribunal had sympathy with the employer's position, but nevertheless concluded that there was no reasonable excuse. In particular, whilst the regime itself was complicated, the unpaid contribution notice was clear about what needed to be done and when[203]. Furthermore, if the employer's direction did not understand what needed to be done, he could and should have contacted the Regulator[204].

Excuse 5: *"It was my accountant's fault"*

There are a number of cases where an employer has explained that the reason they failed to comply is that they were let down by their accountants[205]. The position of the Tribunal in response has been to state that the responsibility for compliance with the auto enrolment regime is on the employer. Consequently, whilst delegation to a third party accountant is permissible, the employer is responsible for ensuring that the delegation is to someone competent to carry out their duties[206].

---

[201] See eg: *Quelink Ltd v Pensions Regulator* [2024] UKFTT 267 (GRC); *People's Care Ltd v Pensions Regulator* [2023] UKFTT 769 (GRC); *Grassroots Sports Academy Ltd v Pensions Regulator* [2023] UKFTT 768 (GRC)

[202] *Wine-Boutique Frinton Limited v The Pensions Regulator* [2023] UKFTT 00440 (GRC)

[203] *Taz Furnishing Ltd v The Pensions Regulator* [2023] UKFTT 4 (GRC) at [25]

[204] Ibid at [25]

[205] *Sure Services Group Ltd v Pension Regulator* [2024] UKFTT 134 (GRC); *Café Piano Radcliffe on Trent Ltd v The Pensions Regulator* [2023] UKFTT 84 (GRC); *Flair Sport and Leisure Ltd v Pensions Regulator* [2023] UKFTT 112 (GRC)

[206] *Café Piano Radcliffe on Trent Ltd v The Pensions Regulator* [2023] UKFTT 84 (GRC)

An employer who fails to comply with its duties as a result of failures by its accountants therefore will not have a reasonable excuse, particularly if it was aware that there were problems with its accountants at the time of delegation[207].

Excuse 6: *"My business is struggling financially"*

In *Neasden Car Care Ltd v Pensions Regulator* (2017) PEN/2017/0113, the employer (which was a small business with only one director and three employees) cited extreme financial hardship as the excuse for its late compliance. At the time of the deadline for compliance the business was in negative equity, had been denied access to overdraft facilities, and was suffering from cash flow difficulties. Given the size of the business and the financial hardship, it was not realistic to employ an accountant to resolve the issues.

The Tribunal noted that HMRC had made a specific exception and granted the employer additional time to pay. There was no reason why the Regulator could not have done the same. Consequently, the employer was held to have had a reasonable excuse for its failure to comply.

It is somewhat difficult to reconcile this decision with the strict approach that has been taken in some of the more recent cases, particularly in response to employers who have argued that they suffered financial hardship as a result of the COVID 19 pandemic (as to which see below). The answer may be that in recent times the Regulator has been more proactive in granting employers time to comply when they are facing financial hardship, such that by the time the matter reaches the Tribunal it cannot realistically constitute a reasonable excuse.

Excuse 7: *"I was ill"*

Illness of the director or accountant who is responsible for complying with the auto enrolment legislation can amount to a reasonable excuse. However, it will need to be shown that the illness was sufficiently serious and lasted long enough to explain the non-compliance[208]. Furthermore, the employer will also need to show that the could not reasonably have been delegated to another director or accountant[209].

Excuse 8: *"Blame it on the pandemic"*

---

[207] *Café Piano Radcliffe on Trent Ltd v The Pensions Regulator* [2023] UKFTT 84 (GRC)

[208] *Sashca Lejune Hair Ltd v Pensions Regulator* [2023] UKFTT 261 (GRC) at [23]

[209] *Sure Services Group Ltd v Pensions Regulator* [2024] UKFTT 134 (GRC)

Similarly, it is not sufficient for an employer to point to the Covid 19 pandemic, without explaining why it resulted in the failure to comply. There are a large number of cases in which employers have sought, unsuccessfully, to rely on the pandemic as giving rise to a reasonable excuse[210]. In practice, reliance on the pandemic is only likely to assist where an employer can show either serious financial hardship or illness that explains its failure to comply by the specified deadline.

Excuse 9: *"My employees don't want to be part of a pension scheme"*

An interesting scenario is one where the employer's workers express that they do not wish to participate in the pension scheme. Whilst instinctively that might appear to constitute a reasonable excuse, the Tribunal has taken a strict approach in these cases.

In particular, the Tribunal has emphasised that the essence of the auto enrolment regime is that employees are automatically enrolled[211]. There is a formal process for opting out of the regime and if a worker has not gone through that process then the duties of the employer under the auto enrolment regime apply[212]. Consequently, the fact that the relevant workers may have communicated to the employer that they do not wish to participate in the scheme (in the absence of a formal opt-out) does not constitute a reasonable excuse for failing to comply.

Excuse 10: *"The penalty is too high"*

Finally, a number of employers have challenged the size of the penalty that the Regulator has imposed. These challenges have universally been unsuccessful[213]. The Tribunal has noted that the fixed penalty notices and escalating penalty notices are intended to incentivise compliance, and to that extent are (as the name suggests) penal. Furthermore, the Regulator has no discretion as to the size of the penalty, which is prescribed by regulations 12 and 13 of the Compliance Regulations. Where an employer would struggle to pay, the Tribunal has encouraged them to contact the Regulator to discuss a payment plan[214].

---

[210] See eg: *London City Housing v Pensions Regulator* [2023] UKFTT 262 (GRC)

[211] *Quelink Ltd v Pensions Regulator* [2024] UKFTT 267 (GRC)

[212] *MA Health Ltd v Pensions Regulator* [2022] UKFTT 318 (GRC)

[213] See eg: *CPC (Worcester) Ltd v Pensions Regulator* [2024] UKFTT 133 (GRC); *Wine- Boutique Frinton Ltd v Pensions Regulator* [2023] UKFTT 440 (GRC); *Pelaw MOT Ltd v Pension Regulator* (11 January 2022)

[214] *Bunting and Green Building Contractors Ltd v Pensions Regulator* [2023] UKFTT 734 (GRC); *A Greener London Ltd v Pensions Regulator* [2023] UKFTT 111 (GRC)

It is not entirely clear how the approach which the Tribunal has taken fits with s44(1)(b) of the PA 2008, which suggests that an employer should be able to make a reference to the tribunal in respect of the amount of penalty payable under the notice.

Conclusion

A consequence of the very large number of referrals that have been made is that there is a vast and rapidly growing body of Tribunal caselaw. It is hoped that the above analysis of that caselaw will assist practitioners in advising their clients about when such a referral is likely to be successful.

Amendment power fetters: is the law now in disarray?

Edward Sawyer and James Walmsley

Paper 1: *Avon Cosmetics* and *Newell Rubbermaid*

Edward Sawyer

1. This paper considers two recent cases about fetters on amendment powers:

   1.1. *Avon Cosmetics v Dalriada Trustees* [2024] EWHC 34 (Ch), dealing with what is traditionally known as "severance" of a partly excessive execution in breach of a fetter protecting accrued rights;

   1.2. *Newell Trustees v Newell Rubbermaid UK Services* [2024] EWHC 48 (Ch), dealing with (among other things) whether a DB to DC conversion breached a fetter protecting accrued benefits.

2. As the Judges in both cases were non-"pensions specialist judges", the judgments provide a refreshing insight into how familiar pensions issues might appear to a Judge coming to this field of the law for the first time.

3. Both judgments are important and thought-provoking contributions to the case-law on fetters. However, this paper identifies aspects of both judgments which might respectfully be said to be controversial and/or at variance with previous decided cases, not all of which were addressed in the judgments.

***Avon Cosmetics* – introduction**

4. At the heart of the *Avon Cosmetics* decision[215] is whether an amendment which is partly within the terms of the amendment power, and partly an excessive execution of it, can be saved to the extent that it was an *intra vires* execution of the power, or

[215] [2024] EWHC 34 (Ch), not the later decision on compromise, [2024] EWHC 317 (Ch).

whether the whole of the execution is invalid. This has traditionally been regarded as a question of "severance" (severing the good from the bad).

5. The Avon Cosmetics Pension Plan had been amended in 2006 to convert it from providing final salary benefits to career average revalued earnings ("CARE") benefits. In relation to their accrued benefits earned up to the amendment date, the 2006 amendment purported to provide that the members would be treated as early leavers, with future benefits to be accrued on a CARE basis. Thus the 2006 amendment purported to break the final salary linkage of the accrued final salary benefits, and replace it with revaluation: see [37]-[38].

6. The Judge (HHJ Davis-White KC, sitting as a Judge of the Chancery Division) accepted that it was unclear whether members were better off, in terms of their accrued benefits, with final salary linkage or revaluation; it depended on whether salary increase outstripped inflation: see the judgment at [8]. The affected members were referred to in the proceedings as "Revaluation Winners" and "FS Winners" depending on whether they were better off with revaluation or final salary linkage. But it would not be known whether any given member was a Revaluation Winner or an FS Winner until the point when their benefits crystallised: see [9].

7. The purported breaking of the final salary linkage of accrued benefits posed a problem, because the fetter on the Plan's amendment power provided [33]:

"*The power of amendment … may not be exercised in any way which affects prejudicially … benefits accrued or secured up to the date on which the amendment takes effect.*"

8. The parties asked the Judge to assume that the fetter precluded the breaking of final salary linkage, so that the 2006 amendment was invalid as against FS Winners who would continue to receive final salary linkage: see [19]-[20].[216] The Judge was asked to rule, on this assumption, on whether the Revaluation Winners were entitled to the intended revaluation as provided for in the 2006 amendment, or whether that amendment was invalid against them too so that they could only

[216] The intention was that the question whether the FS Winners were actually entitled to continuing final salary linkage would be compromised in due course, with the compromise reflecting the potential doubts about the correctness of the *Courage* line of authority (as to which, see the discussion of *Newell Rubbermaid* below): this is dealt with in the second *Avon* compromise judgment.

receive final salary linkage (which, for Revaluation Winners, was less generous than the rate of revaluation).

9. Thus the issue was – assuming that the fetter was breached and that the purported breaking of final salary linkage was invalid as regards FS Winners – whether the remainder of the amendment was valid as regards Revaluation Winners. Or was the amendment wholly invalid, so that all affected members would receive final salary linkage not revaluation? In traditional terms, could the amendment be severed so that non-excessive execution (giving revaluation to Revaluation Winners) took effect?

10. A number of unusual features of the case can immediately be noted:

10.1. The Judge found it "somewhat unsatisfactory" that the position of FS Winners was excluded from consideration, as this prevented him considering the issues "holistically" and allowed only a "partial analytical process": [18]-[19].

10.2. This difficulty was compounded by the fact that, unusually, the Plan's employer was arguing for the *more generous* outcome for members, namely that Revaluation Winners should receive revaluation: [22]. Given the assumption that FS Winners would receive a final salary underpin, the employer's argument would lead to a "best of both worlds" outcome for its employees: the FS Winners would get final salary linkage (subject to a discount in an envisaged compromise) and the Revaluation Winners would get revaluation.

10.3. In the background, there was a negligence claim against the advisers who had advised on the amendment. They strongly rejected the "best of both worlds" solution. They said that if the fetter was breached, so that FS Winners received final salary linkage, the whole amendment was invalid as regards accrued rights, so the Revaluation Winners should receive final salary linkage too: see [13]-[15]. In essence, they were saying that the good could not be severed from the bad.

10.4. But the allegedly-negligent advisers were not parties to the *Avon Cosmetics* proceedings, so there was no-one before the Judge with a compelling interest in arguing this point. Instead, it seems that a representative

beneficiary was prevailed upon to take the point, namely an FS Winner: see [190].

10.5. So the Judge was faced with an employer (who was prima facie liable to bear the funding cost) urging that the Court should *uphold* the validity of the amendment to the advantage of the Revaluation Winners, opposed by a representative beneficiary who apparently had no real interest in doing down the Revaluation Winners. No doubt counsel appearing before the Judge properly performed their roles, but the way the issue came before the Court certainly lent attraction to the arguments of the Revaluation Winners.

10.6. The other unusual feature of the judgment is that the parties and the Judge analysed the issue in terms of whether the amendment was valid or invalid as against the Revaluation Winners. Normally, cases on excessive execution and severance look at the amendment in terms of whether particular provisions are valid or invalid and can be separated from each other, rather than asking whether the whole amendment is valid against some beneficiaries and not others. The conventional approach appropriately places the focus on whether, once the infringing parts of the amendment have been struck down, what is left ought to be regarded as a valid exercise of the power *notwithstanding the absence of the excessive elements*. It may be that greater focus on this latter point would have led to a different outcome in *Avon Cosmetics*: see below.

***Avon Cosmetics* – overview of the Judge's decision**

11. HHJ Davis-White KC started his analysis at [54]-[67] with an interesting comparative study of different techniques for severing an excessive (or *ultra vires*) exercise of a power from the non-excessive (or *intra vires*) elements in contract law and public law.

12. The Judge then moved at [68]-[93] to *Pitt v Holt*, both the Court of Appeal and Supreme Court judgments ([2012] Ch 132 and [2013] 2 AC 108). This is an illuminating discussion, illustrating how traditional trust law principles still play an important part in deciding pensions cases. The Judge paid particular attention to the Court of Appeal's analysis of the earlier cases of *Re Abraham's Will Trusts* [1969] 1 Ch 463 and *Re Hastings-Bass* [1975] Ch 25. Those cases were concerned with the excessive exercises of powers of advancement where the sub-settlement was partly perpetuitous, so that only the main interest survived but not the successive interests. The Judge noted that (as analysed by the Court of Appeal in *Pitt v Holt*) this line of cases simply struck down the excessive executions of the power (the successive interests) and asked whether what was left could be *objectively*

regarded as an exercise of the power of advancement. That meant asking whether the exercise could fairly be regarded as being of "benefit" to the advanced beneficiary, as required by the statutory power of advancement in s 32 Trustee Act 1925. The Judge emphasised that Lloyd LJ said in the Court of Appeal in *Pitt v Holt* at [66]:

"*… it is not useful to ask what the trustees would have thought and done if they had known about the problem. The answer to that question is almost certainly that they would have done something different … . It is for that reason that the test has to be objective, by reference to whether that which was done, with all its defects and consequent limitations, is capable of being regarded as beneficial to the intended object* [of the power of advancement]*, or not*".

13. From [94]-[162], the Judge considered various pensions cases in which issues of severance had arisen, most relevantly *Bestrustees v Stuart* [2001] Pens LR 283, *Betafence v Veys* [2006] Pens LR 137, *Re IMG Pension Plan* [2010] Pens LR 23, *IBM v Dalgleish* [2018] ICR 1681, CA, and *Wedgwood v Salt* [2018] Pens LR 9.

14. The following is apparent from the Judge's survey of the pensions case-law:

14.1. As is well-known, in *Bestrustees v Stuart*, Neuberger J said at [48] that, where an amendment power had been exercised in a way that was partly permitted and partly impermissible, the correct approach was not one of language but one of concept; it was necessary to ask (a) if the valid exercise and the invalid exercise were separable from each other as a matter of concept (such as, in that case, the prospective and retrospective exercises), and (b) if so, "*whether there is anything in the exercise of the power which leads one to believe that, had the trustee been told that it was not entitled to exercise the power retrospectively, it would not have exercised the power as it purported to do prospectively at all, or, in the alternative, in the way that it did*". Neuberger J said that that approach was consistent with the *Hastings-Bass* principle as then understood.

14.2. However, in some subsequent pensions cases, the suggested limb (b) test was not applied, e.g. in *Betafence* and *Re IMG*. *Betafence* at [69] suggested that the correct approach was not one of severance at all, but rather that one should *construe* the amendment "*as having effect subject to the overriding limitation on the power of amendment contained in the proviso*".

14.3. In *IBM v Dalgleish* at first instance ([2014] EWHC 980 (Ch)), Warren J had at [208]-[209] similarly applied the overriding limitation / construction approach, again without applying Neuberger J's limb (b) test. However, in the Court of Appeal in *IBM*, the Court appeared to apply the equivalent of the limb (b) test in the context of the employer's decision to exercise its power to exclude members

from membership notwithstanding that doing so had the purported (but in fact excessive and invalid) effect of breaking final salary linkage. At [174]-[175], the Court of Appeal asked whether the employer would have given the same exclusion notices had it been aware it could not break the final salary link, and answered that it would, the intention of breaking the final salary link being "*incidental*" to the main intention of excluding members from membership.

14.4. In *Wedgwood v Salt* at [65]-[70], the Deputy Judge sought to reconcile these strands of authority and concluded, broadly in line with *Bestrustees*, that (a) one looks first at the issue of conceptual separation of the valid from the invalid, and then (b) (at least in the case of trustees and other fiduciaries) one goes on to consider whether the trustees would not have exercised the power or would have exercised it differently, had they known of the limits of their power. The Deputy Judge considered that this had been the approach of the Court of Appeal in *IBM*. She also said that the limb (b) test applied whether the Court applies a test of severance of the invalid from the good, or regards the exercise of the power as taking place subject to an implied limitation to keep it within the scope of the power.

14.5. (As a post-script to this, it is notable that in the *Newell Rubbermaid* case considered below, Michael Green J said he did not understand the juridical basis for recognising a final salary underpin where final salary linkage was protected by a fetter: see [201], [236]. The above cases do at least provide plenty of authority for the recognition of such an underpin, even if the analytical basis for doing so might be said to be somewhat unclear.)

15. Having analysed the case-law, the Judge set out his conclusions at [163] onwards of *Avon Cosmetics*, attempting to synthesise the earlier cases. The main points were as follows.

16. The Judge held that where there is an excessive execution of an amendment power, and where what has been done can be conceptually separated into a valid exercise and an invalid exercise, then it is possible to save the valid part as a matter of <u>construction</u> by implying a limitation on the terms of the exercise of the power so that it is read as only effecting the valid part of the exercise: see [164]. An alternative way of looking at the matter is to apply a <u>severance</u> test, which involves broadly the same conceptual separation test used in the "*construction route*": see [165]. Therefore, in the Judge's view, it seems that the construction and severance approaches come to much the same thing: see [174]. That chimes with the observation in *Wedgwood* at [61] that the *Bestrustees* severance approach and the *Betafence* construction approach were not operating in different jurisdictions.

17. The Judge next considered whether the limb (b) test also applied, that is, whether it was necessary to be satisfied that the person exercising the power, had they properly appreciated its limits, would have exercised it in the same way or at least as regards the valid part. As to this "would still have exercised" test (as the Judge called it):

17.1. The Judge considered that the "would still have exercised" test was not limited to fiduciaries as part of the *Pitt v Holt* "adequate deliberation" duty: see [167].

17.2. In the light of the approach to severance adopted in *Hastings-Bass* and *Re Abrahams*, as considered in *Pitt v Holt*, the Judge considered that the "would still have exercised" test is an objective one, not dependent on evidence of the decision-maker's (subjective) intention or state of mind (which would be wholly speculative: see [173]).

17.3. The "would still have exercised test" involved asking "*whether the power, so far as otherwise validly exercised, was being objectively exercised to effect the change in question, within the scope of the power or not*": see [169]. The Judge put the criterion this way at [170]: "*the objective ascertained intention was to effect the valid part of the exercise of the power, the intention to effect the invalid part was but incidental*". He considered this comparable to the public law severance test (whether the severed legislative instrument would be a substantially different law) and the contractual severance test (whether the contract remains of the same character): see [170]-[173], also [54]-[67].

18. Applying his synthesis to the facts of *Avon Cosmetics*, the Judge found that the concepts of FS Winners and Revaluation Winners and a final salary underpin were sufficiently different and identifiable: see [175]. Accordingly, the Judge considered that the conceptual separability test was satisfied.

19. As for the "would still have exercised" test, the Judge regarded the "*substantial purpose*" of the relevant CARE amendment as being to remove the final salary link by moving those with accrued rights to a revaluation basis. If the trustees were unable to do that for all members (the FS Winners), then, so said the Judge, what objectively remained as regards the Revaluation Winners was "*precisely within the overall objective intention*" and involved no change in the substantial purpose of the impugned provision: see [176]. Therefore the requisite tests were satisfied and the amendment validly gave revaluation to the Revaluation Winners.

Discussion of *Avon Cosmetics*

20. Perhaps the most surprising aspect of the judgment is the Judge's conclusion, in a single paragraph at [176], that the "would have exercised" test was satisfied. This gave members the "best of both worlds".

21. However, the amendment was made as part of a cost saving exercise: see [40]. The trustees were trying to *replace* benefit A (final salary linkage) with benefit B (revaluation), presumably because benefit B was perceived to be likely to cost less. With respect, it is hard (at least for an outside commentator not steeped in the facts of the case) to see how responsible trustees trying to replace benefit A with less expensive benefit B could have been happy to proceed if told that they would in fact be conferring *the better of* (i.e. the more expensive of) A and B.

22. As noted above, by looking at the effect of the amendment on Revaluation Winners and FS Winners, rather than focusing on whether it was appropriate to give effect to some terms of the amendment in the absence of other terms, the Judge was able to say that giving Revaluation Winners revaluation was "*precisely within the overall objective intention*". But this attaches no weight to the fact that (I assume) the trustees intended members to get revaluation *only because* they thought they had broken final salary linkage. Even on the Judge's test, it is not at all easy to see how the intention of breaking final salary linkage was merely "*incidental*" to the intention to move members to a revaluation basis.

23. This perhaps illustrates the risks of re-casting Neuberger J's limb (b) test (asking what the trustees would have done) into the question whether "*the objective ascertained intention was to effect the valid part of the exercise of the power*". One would generally expect there to be an objective intention to effect the valid part of the exercise of the power, otherwise the power would not have been exercised. The key issue is whether that would still have been the intention *in circumstances where it was understood that the invalid part of the exercise could not take effect.*

24. This brings us to the question whether the Judge was right to re-cast Neuberger J's limb (b) test, notwithstanding it had recently been affirmed in *Wedgwood* following its application in an analogous situation by the Court of Appeal in *IBM*. I will not express a definitive view on this, but I observe that:

    24.1. On the one hand, it does seem that Neuberger J's limb (b) was something of an innovation not mentioned in previous trusts cases, based on the now-rejected so-called "rule in *Re Hastings-Bass*". As noted above, the limb (b) test was not applied in pensions cases like *Betafence* and *Re IMG*. The Judge in *Avon*

Cosmetics could also have referred (but did not) to *FDR v Dutton* [2017] Pens LR 14, CA, at [14], where Lewison LJ said, in another case dealing with the partial effect of an excessive execution of a pension scheme amendment power, "*I do not find it profitable to speculate on how the trustees might have exercised the power of amendment if, contrary to the facts, they had appreciated that the proviso prevent them to some extent from doing what they purported to do*." And no-one asked what the trustees would have done in the earlier private trusts severance cases like *Re Hastings-Bass* and *Re Abrahams* discussed by the Court of Appeal in *Pitt v Holt*.

24.2. But on the other hand, it may be that the reason no-one asked that question in the earlier private trusts severance cases is that they were concerned with s 32 Trustee Act 1925, where it is a condition of the statutory power of advancement that the exercise of the power be for the advancee's "advancement or benefit". The purpose of the exercise is manifest from the statutory context. In that context, it is easy to see why the Court's reaction in cases like *Hastings-Bass* and *Abrahams* was: was the good part of the advancement (disregarding the excessive elements) still objectively for the advancee's "benefit"?

24.3. In contrast, in the context of a pension scheme amendment power, the purpose of the exercise is not obviously spelled out in the terms of the power itself. So, it could be argued, it makes perfect sense to enquire what the decision-makers were trying to achieve by the amendment and whether they would still have made the amendment had they known the limited effect it would have. If the effect would be significantly different from what they intended, then (whether the test is objective or subjective) one could say that the attenuated exercise of the power, with the excessive elements stripped out, is a different exercise altogether and should not be given effect, whether by means of severance or construction.

24.4. Some further support for enquiring into what the decision-maker would have intended can also be drawn from another authority not mentioned by the Judge in *Avon Cosmetics*: the case of *Briggs v Gleeds* [2015] 1 Ch 212. When considering the *Davis v Richards & Wallington* principle, Newey J said that the Court should beware of deeming trustees to have exercised a power that they did not in fact have in mind if the exercise of that power required examination of materially different considerations from those relevant to the power that the trustees saw themselves as exercising; otherwise they risked attack for *Pitt v Holt*-style "inadequate deliberation": see *Briggs v Gleeds* at [95]. This observation is arguably apt in severance cases. If giving effect to the non-excessive element without the excessive element would result in the trustees

being deemed to have exercised the power in a way that they did not in fact have in mind (e.g. conferring the better of benefit A and B, instead of, as intended, replacing A with B), then it might be said that the trustees would be guilty of "inadequate deliberation" unless the Court is satisfied that they would have wished to proceed with the non-excessive elements even without the excessive elements.

***Newell Trustees v Newell Rubbermaid UK Services* [2024] EWHC 48 (Ch)**

25. I turn now to the *Newell* case, in which the Court had to consider the impact of a *Courage*-style accrued rights fetter on the purported conversion of accrued DB benefits to DC benefits. Unsurprisingly, given that the *Newell* judgment was handed down only a few working days after the *Avon Cosmetics* judgment, *Newell* does not refer to or comment on *Avon*.

26. The *Newell* judgment also addressed many issues unrelated to the fetter, which are beyond the scope of this paper. I have commented on the judgment in a previous article which sets out the background to the case and the issues it considered, which I will not detail again here.[217] It suffices to say, by way of brief summary of the fetter issue, that:

26.1. In 1992, the Parker Pension Plan (a predecessor of the Newell scheme) was purportedly amended to introduce a DC section, to which DB members were either automatically transferred or elected to transfer. Their accrued DB benefits were converted into cash amounts that were credited to their DC accounts.

26.2. The relevant power of amendment (which was in very similar form to that considered in *Briggs v Gleeds*, cited above) provided that the Principal Employer and trustees could jointly amend the Plan "*provided that no such alteration cancellation modification or addition shall be such as would prejudice or impair the benefits accrued in respect of membership up to that time*".

[217] See https://www.wilberforce.co.uk/article/newell-trustees-ltd-v-newell-rubbermaid-uk-services-ltd/ ; https://www.pensionsbarrister.com/post/newell-trustees-ltd-v-newell-rubbermaid-uk-services-ltd .

26.3. In a Part 8 claim brought by the trustees, the representative beneficiary challenged the validity of the conversion of accrued benefits, arguing that it was precluded by the underlined words of the above fetter.

26.4. The Judge, Michael Green J, rejected the representative beneficiary's argument that the fetter prevented the conversion of accrued benefits from DB to DC. The representative beneficiary contended that the fetter protected not merely the value of the accrued benefits, but the benefits themselves calculated according to the final salary formula: see [203]. The Judge was unpersuaded, holding that the fetter protected the <u>amount</u> of a member's benefits rather than the method of its calculation. In the Judge's view, the DB formula was an "*amorphous concept*": see the judgment at [209]-[210].

26.5. The Judge also relied on the fact that the fetter referred to an amendment that "*<u>would</u> prejudice or impair the benefits accrued*" (emphasis added). The Judge considered that it must be possible to judge with some certainty, at the date of the amendment, that prejudice "*would*" be suffered: see [219]. It was not enough to say that prejudice would "probably" be suffered. On the facts of the case, it was not possible to say, as at the amendment date, that prejudice "*would*" be suffered. Whether a member was better or worse off as a result of the conversion from DB to DC would depend on matters such as the performance of the DC investments, and this could not be known at the amendment date: see [211]. For this reason also, the conversion of accrued benefits from DB to DC was not a breach of the fetter. This point is discussed further below.

26.6. However, the Judge regarded himself as obliged to follow *Re Courage Group's Pension Schemes* [1987] 1 All ER 528 in holding that the fetter protected the final salary link: see the *Newell* judgment at [23], [200] and [226]. He therefore felt compelled to say that the inevitable effect of the fetter was that it did not permit the final salary link to be broken for members transferring to the DC section: see [226].

26.7. The representative beneficiary argued that, as had happened in *Re IMG* (cited above, another case on conversion from DB to DC in breach of a fetter protecting final salary linkage), a final salary underpin should be implied into the amended DC benefit, thus giving members a minimum of their final salary benefits: see [234].

26.8. While accepting that there should be an "implied limitation" in the 1992 amendment to preserve the final salary link, the Judge concluded that the implied limitation could be given effect by ensuring that the DC cash sum was appropriately calculated to recognise the assessed value of final salary linkage as at the amendment date: see [237], [245]. This meant, in the Judge's view, recalculating the original 1992 transfer sums on the (much less costly) 1992 actuarial basis: see [241]-[247]. In effect, therefore, the Judge gave effect to the final salary linkage protected by the fetter by awarding only its actuarial value calculated as at a historical date.

Potentially controversial aspects of *Newell*

27. In my earlier article,[218] I have already commented on a number of aspects of the Judge's reasoning which may prove controversial, such as (in brief):

27.1. *The Judge's dismissal of the DB formula as an "amorphous concept".* This might respectfully be said to give insufficient weight to the importance to members of having defined pension benefits, free of investment risk. In *Edge v Pensions Ombudsman* [2000] Ch 602, the Court of Appeal described the fixed nature of DB benefits as one of the concepts "*fundamental to a pension scheme of this nature*", and in *G4S Trustees v G4S*, Nugee J described the accrual formula as being the "*essence of a final salary scheme such as an n/60 scheme*".

27.2. *The Judge's view that protection of final salary linkage required no more than preservation of its (historical) actuarial value.* Again, it could respectfully be said that this fails to give sufficient weight to the importance of defined pension benefits, responsive to actual experience such as salary increases. In *Re IMG*, Arnold J had specifically rejected the suggestion that the fetter in that case (which expressly protected only "*value*") merely required protection of the actuarially assessed value of members' accrued benefits (*IMG* at [140]). But that is precisely the conclusion reached by the Judge in *Newell*, in a case where the fetter was less obviously limited to preserving only value. The Judge's conclusion is also at odds with the way fetter-protected benefits have been preserved in other cases:

(a) In *IBM v Dalgleish* [2014] EWHC 980 (Ch), where there was an amendment in breach of a fetter protecting final salary linkage, Warren J had

[218] See previous footnote.

determined that members were entitled to an actual salary link: see [289](iii).

(b) In *FDR v Dutton*, cited above (a case on pension increases rather than final salary linkage), the actual DB right was preserved, not its actuarial equivalent.

(c) In *Lloyds Banking Group Pensions Trustees v Lloyds Bank* [2018] EWHC 2839 (Ch), Morgan J rejected a GMP equalisation method which only gave members the actuarially assessed value of their benefits, which he said was "*an impermissible interference with their rights*" to a pension calculated by reference to their actual experience.[219]

It may be that the Judge in *Newell* was influenced by the fact that he regarded the historical conversion from DB to DC as generally valid, so in that particular context he felt it was appropriate to protect final salary linkage by recognising its historical actuarial value. Thus *Newell* might arguably be confined to its own facts in this regard.

<u>*Newell* – the "would prejudice" issue</u>

28. There is one point in *Newell* that this paper will examine more closely, namely the Judge's view that the fetter was not infringed by the DB-DC conversion because it could not be said, with some certainty at the amendment date, that the amendment "would prejudice" or impair accrued benefits. This issue is of potentially wide importance, because many amendment power fetters speak in terms of amendments that "would", "will" or "shall" etc. cause prejudice. If these fetters do not catch amendments that only "probably" or "might" cause prejudice, member protection is lessened and there is greater scope for cost-reducing amendments (though the restrictions in s 67 Pensions Act 1995 would still apply).

29. The Judge dealt with the "would prejudice" issue at [211]-[219] of *Newell*. His reasoning includes the following points:

29.1. The *Newell* fetter says "would prejudice", which is clearly different from "would probably" prejudice: see [219].

[219] But for a case going the other way, where provision of an actuarial equivalent was regarded as an adequate way of protecting pension benefits, see *SoS for Work and Pensions v Hughes* [2021] EWCA Civ 1093.

29.2. This language can be contrasted with s 67 Pensions Act 1995 as originally enacted, which referred to an alteration which "would or might affect any entitlement or accrued right" (emphasis added): see [213]. The *Newell* fetter does not say "might prejudice".

29.3. In *Punter Southall v Hazlett* [2022] Pens LR 1, Ch D, where the fetter said "would diminish" accrued benefits, Morgan J drew the distinction with s 67, and distinguished between events which "would" happen and those which "might" happen.

29.4. In *Mettoy Pension Trustees v Evans* [1990] 1 WLR 1587, Ch D, the fetter precluded amendments that "shall" lead to a payment or transfer of the pension fund to the employer. Warner J said that merely "possible consequences" were not within the prohibition of the fetter.

Discussion of the "would prejudice" issue

30. I am not going to express any definitive views about whether the Judge was right or wrong in his "would prejudice" analysis, but it can fairly be observed that this passage of his judgment did not fully explore all the authorities on the subject.

31. The authority most extensively relied on by the Judge was *Mettoy v Evans*, where Warner J dealt with the "shall lead" fetter point at 1630-1631. The issue in *Mettoy* was that the scheme had been amended to transfer the power to dispose of surplus from the trustees to the employer. Importantly, Warner J said at 1631 that if he had found that the employer's power over surplus was non-fiduciary:

"*I might have held that the substitution of [the new surplus power] for the discretion conferred on the trustees by [the old surplus power] did infringe the provisos, because there would then have been an event in which it could be said that the alteration would lead to a payment or transfer to the company, namely the insolvency of the company. In that event any part of the surplus that the trustees under [the old rule] would have applied in augmenting benefits would inevitably be paid or transferred to the company instead.*"

32. The significance of this is that it shows that, notwithstanding the "shall lead" wording of the fetter, Warner J thought the fetter might have been breached by an amendment which would have led to a payment to the employer *in circumstances that (at the amendment date) were uncertain to occur*, i.e. the company's insolvency and the presence of a surplus. Thus Warner J did not think that the "shall" wording of the fetter was only engaged if a payment to the employer was certain to occur.

The passage quoted by the Judge in *Newell* was the next paragraph of Warner J's judgment, where he considered the situation where (as he found) the employer's power over surplus was fiduciary. In that situation, Warner J said, the consequences of the amendment were "*imponderable*", because all that had happened was that the power over surplus had been transferred from one fiduciary (the trustees) to another (the employer), which could result in more, as well as less, surplus being allocated for the members' benefit. It was in that context that Warner J said that "*Such possible consequences are not in my opinion within the prohibition in the provisos*".

33. So, on one reading, all Warner J was saying was that there was no particular reason to think that the amendment would make it more likely that surplus would be paid to the employer (this being an "*imponderable*"), hence the fetter was not infringed.

34. If this is the correct interpretation of *Mettoy*, it is open to question whether the Judge in *Newell* was right to think *Mettoy* provided significant support for his analysis of the "would prejudice" point.

35. Furthermore, neither the Judge in *Newell*, nor Morgan J in *Punter Southall v Hazlett*, referred in the relevant parts of their judgments to other pensions cases which have regarded uncertain effects as breaching similarly-worded fetters. For example:

35.1. In *Courage* itself, there was no certainty that the final salary link would actually be broken as a result of the proposed amendment. Several contingencies would have had to be fulfilled before final salary linkage was broken.

35.2. In *IBM v Dalgleish* [2014] EWHC 980 (Ch), Warren J considered that the accrued rights fetter was breached by the introduction of an employer power that would purportedly have the effect, if exercised, of breaking final salary linkage. There was no certainty the power would be exercised (indeed, it was not exercised until about two decades after it was introduced). Warren J specifically had in mind the fact that the introduction of the power had no immediate adverse effect on benefits: see [163].

35.3. In *Mitchells & Butlers Pensions v Mitchells & Butler*s [2021] EWHC 3017 (Ch), Trower J considered an amendment which introduced a power for the employer to reduce the rate of increases on accrued pensions. As it was only

a power, there was no certainty that it would be exercised (and it was not in fact purportedly exercised for two decades). The fetter on the amendment power precluded amendments that, in the actuary's opinion, "shall operate substantially to prejudice" accrued rights or interests (emphasis added). Trower J considered it to be plan that the new power "was capable of" operating substantially to prejudice accrued rights or interests: [356]. He found (in the alternative to his decision on rectification) that the amendment was void because the parties had not drawn the actuary's attention to the new power. He considered it entirely possible that the actuary would opine that the addition of the new power (even though there was no certainty it would be used to reduce pension increases) would cause substantial prejudice, and he accepted the actuary's evidence that he would have so opined: see [356], also [112] and [326].

36. Moreover, the "would prejudice" analysis in *Newell* is difficult to square with the principle that an amendment power cannot be exercised to achieve in two steps that which is prohibited in one step (see *Air Jamaica v Charlton* [1999] 1 WLR 1399, PC, at 1411G). Applying the *Newell* "would prejudice" analysis leads to the conclusion that adding a power to reduce accrued benefits is not a breach of the fetter, because there is no certainty that the power will be exercised; and once added the power can be exercised free of the effect of the fetter. Yet that would be inconsistent with two steps / one step principle.

37. Thus, with all due respect to the Judge in *Newell*, it could reasonably be argued that his "would prejudice" analysis (a) places weight on *Mettoy* that Warner J's judgment does not bear, (b) does not deal with various contrary cases, and (c) relies on *Punter Southall v Hazlett*, in which the reasoning is very brief and the above cases were not considered.

38. Finally, it may be observed that there is an inherent tension in the *Newell* judgment between its "would prejudice" analysis and its acceptance of the *Courage* line of cases. If the "would prejudice" point is correct, it would seem that some of the *Courage* cases should have been decided differently. The Judge in *Newell* did not attempt to reconcile this tension, merely noting that the "would" vs. "might" point had not in his view been properly considered in the *Courage* line of authority: see [226].

Conclusion

39. It is understood that there will be no appeal in either *Avon Cosmetics* or *Newell*. It will be interesting to see what future cases make of the judgments and to what extent they are followed.

Paper 2: *BBC*

James Walmsley

1. The 28 July 2023 decision of Adam Johnson J in ***BBC v BBC Pension Trust Ltd*** [2023] EWHC 1965 (Ch); [2023] Pens LR 14 concerned the meaning of an amendment power which provided (amongst other things) that amendments may be made "*[p]rovided that that no such alteration or modification shall… take effect as regards the Active Members whose interests are certified by the Actuary to be affected thereby unless- (a) the Actuary certifies that the alteration or modification does not substantially prejudice the interests of such Members; or (b) the Actuary certifies that to the extent to which the interests of such Members are so prejudiced, substantially equivalent benefits are provided or paid for by the BBC or the Trustees or provided under any legislation; or (c) the alteration or modification is approved by resolution adopted at a meeting of such Members convened by the Trustees…*".

2. More particularly, Question 1 in the case, addressed in the Judgment at [11] to [88], was concerned with what the term '*interests*' refers to in the proviso quoted above. Does it include reference to future service benefits – that is, benefits referable to service which, as of the time of the amendment, has not yet taken place? Does it include reference, in relation to past service benefits – that is, benefits referable to service which, as of the time of the amendment, has been provided – to the final salary link?

3. The Judge concluded that the term 'interests' included reference to future service benefits, meaning that amendments in respect of the terms on which future service benefits would be earned would themselves only be able to take effect if one of the mechanisms referred to in the proviso are used. That is to say, only if the Actuary certifies that there is no substantial prejudice, or if substantially equivalent benefits are provided for, or if the amendments is approved by Members' resolution.

4. The case is of some interest given that it is the first time since the decision of Rimer J in ***Lloyds Bank Pension Trust Corporation v Lloyds Bank plc*** [1996] Pens LR 263 that an amendment power fetter has been interpreted as protecting future service benefits. It is also at least in some tension with the decision in ***Wedgwood Pension Plan Trustee v Salt*** [2018] EWHC 79 (Ch) where a fetter referring to "the rights of any Member" was found not to protect future service benefits.

5. The decision has been appealed and indeed at the time of this year's Nugee Lectures the hearing of that appeal is imminent. This paper which accompanies the talk offers some personal perspectives on the first instance decision from someone not involved. The focus initially, then, will be on the question of whether the fetter is properly to be construed as protecting future service benefits (and in that context to save on quoting the note is approached on the basis that the reader

has a copy of ***BBC*** to hand). However, having gone through that analysis, I will then briefly broaden the matter out to make a few observations on *Courage*.

*The Analysis in **BBC***

6. The Judge's discussion of and decision in relation the meaning of the 'interests' is set out in the Judgment at [39] to [88]. The discussion of the Judge is structured so as to cover six topics under the following headings:
    a. "Natural reading of the Amendment Power and 3rd Proviso" ([39] to [49])
    b. "The Contrary case" ([50] to [52])
    c. "The Representative Beneficiary's View of the 1949 Deed" ([53] to [55])
    d. "The scheme of the 3rd Proviso" ([56] to [57])
    e. "The 5th Proviso" ([58])
    f. "Bradbury v BBC" ([59]-[81])

7. I comment on each of these six sections below.

The "natural" reading

8. The first of these six sections is absolutely key to the Judge's analysis, since by the end of this section the Judge has landed on a view as to the "natural" meaning of the words, and the question then is whether any of the other matters not already by the end of that section considered justifies shifting him from that view. Approaching the matter in the way the Judge does, however, invites careful scrutiny of the basis on which he reaches, in that first section, the view that he reaches on the "natural" meaning of the provision.

9. In that first section, the Judge makes the following observations (with some emphasis in bold added by me):

    a. "Given the wording, the question which arises in any given case is a straightforward one: does the proposed alteration or modification to the Deed or Rules *affect* the *interests* of the Active Members? **That is on the face of it, a broad test,** not limited by reference to any particular time period or other temporal restriction." ([40])

    b. "As a matter of **ordinary language**, the concept of *interests* **does not seem to me apt** to suggest that the intended division between matters which are protected and matters which are not is marked by the fault line between benefits already earned by past service and those which are yet to be earned in the future." ([41])

    c. "... it seems to me **a natural focus** of the inquiry is on the **position** the Active Members have under the terms of the Deed and Rules as they presently stand, prior to the proposed amendment, compared to their intended

position if the proposed amendment or modification comes into effect. The question to ask is: are **their positions** going to be different under the proposed amendment or modification? If they are different then it seems to me that their *interests* are *affected*…" ([42])

d. "**I do not see why** these protections should be restricted so as to apply only to benefits which have already been earned…" ([43])

e. Of the example of a change of accrual rate for a member's future service benefits, "I think it clear that the change would therefore *affect* his *interests*, **because he has an interest in the Rules which govern his rate of accrual remaining the same** and not changing in a way which disadvantages him if he remains in service." ([44])

f. Again of that example, "His interests are affected because **the rules of the game will have changed part-way through in a manner that will leave him worse off it he stays the course to the end of the match**" ([45]).

g. Again of that example, "I think it **quite artificial** to say that his *interests* are not *affected*. If the terms which will define the value of a future, but uncertain event are amended or modified in a manner which means that the value, if the event does eventually crystallise, **will be less than originally promised**, then **it seems to me plain** that the *interests* of the party with the benefit of those terms are affected." ([46])

h. "As well as a hope of accruing benefits, an Active Member also has a present right not to be subject to any change in the terms of the Deed or Rules which affect **his position**, otherwise than subject to the procedures contained in, and protections afforded by, the 3rd Proviso. Those procedures and protections, it seems to me, are designed precisely to ensure that such terms are not amended in a manner **which affects him**, unless [the relevant mechanisms are satisfied]" ([47]

i. "I see the force of [Mr Tennet KC's points about giving the Scheme reasonable and practical effect]" but that "rather begs the question how the Scheme is intended to work. Here it seems to me **clear as a matter of language**… that as far as amendments are concerned, it is intended to work as I have suggested." ([49])

j. As for the reliance of ***Wedgwood v Salt***, "I agree that [interests] and [rights] are different and that the former **suggests** a broader scope of protection than the latter, *interests* **more naturally** including a reference to the effects of an intended change to the terms on which benefits can be earned in the future".

10. Eight comments might be made:

a. First, there is a significant emphasis in this section of the Judgment on what seems to the Judge to be the "natural" and "ordinary" and not "artificial" reading of the words. The difficulty with that mode of reasoning is that it does not offer much assistance to those who do not share the Judge's intuitions and impressionistic reactions to the wording. If this first instance decision survives appeal, what is a future first instance judge to do if faced with similar wording that uses the term 'interests' but if that second judge does not share the intuitions as to 'natural' meaning shared by the Judge in ***BBC***?

b. Secondly, such arguments as are put forward by way of analogy, such as the argument from "the rules of the game" at [45], are circular. An amendment only involves a change to the rules of the game if it is not part of the rules of the game that the rules can be changed in the relevant respect.

c. Thirdly, there are places where the Judge's reasoning appears to be informed or influenced by a connotation of the term "interests" which is, I would respectfully submit (and come to explain in the context of the fourth comment immediately below), plainly inapplicable in the circumstances. Thus, at [42] and [47] the Judge replaces talk of the Active Members' interests with talk of their "position". At [44] the Judge replaces talk of the Active Members' interests with talk of the Member having "an interest in the Rules remaining the same". And at [47] again the Judge refers to the proviso being engaged by amendments that affect "*him*" (i.e. an Active Member, dropping the reference to interests or positions altogether). In this regard, the point is made even clearer in a later section (at [51]) where the Judge refers to the meaning of the term 'interests' being simply "to refer to matters of relevant concern".

d. Fourthly, if one takes that broader meaning or connotation seriously, it would have the rather surprising result that *any* prejudice to Active Members might serve to invalidate an amendment as regards them, even if the amendment leaves entirely intact the terms of Active Members' benefits. Thus, for example, an amendment in respect of pension increases for pensioners that potentially affects the *security* of benefits for Active Members, but does not change the terms of them at all, would potentially be captured on the Judge's interpretation of the proviso. That does not seem very likely to have been intended.

e. Fifthly, a yet further way of making this point may be to say that what the Judge appears to have done is equate the question "are Active Members' interests affected by this (proposed) amendment?" with the (different) question "do Active Members have an interest in whether or not this

(proposed) amendment is made and takes effect?" If that is what he has done, it is a plain mistake.

f. Sixthly, once one strips out what appears to be some inapplicable connotation, it is far from clear what is said to be the relevant content of the term 'interests' that differentiates it from the term 'rights'. And if that is the case, it is difficult to see how the difference between ***Wedgwood*** and ***BBC*** is to be rationalised save – rather unsatisfactorily – as a reflection of two different judges having two different intuitive reactions to the provisions which were before each of them, respectively.

g. Seventhly, the significance of the Judge's slide from on the one hand (i) the question of what affects Members' interests to on the other hand (ii) the question of what is in or not in Members' interests, and of the Judge's reliance on some connotation associated with the term 'interests', is particularly remarkable at the end of the section when the Judge in effect rejects the arguments from reasonable and practical effect on the basis of what he has by then decided is supposedly "*clear as a matter of language*".

h. Eighthly, of some additional significance is the fact that the Judge does not then recognise this slide and reliance on connotation when addressing the textual arguments brought by the BBC (and that is what I turn to next).

<u>The Judge's comments on the Contrary Case</u>

11. The second section of the Judge's discussion relates to BBC's arguments as to how the term 'interests' is used elsewhere in the Deed and Rules. In particular it was noted by Counsel for the BBC that the term "interests" is elsewhere used in the sense of "interests in the Fund".

12. The Judge's short response to those arguments was to say that the fact that elsewhere in the Deed the term 'interests' is used in way that clearly only relates to past service benefits does not mean that the term must be used in the same way where the relevant class of members also have or have the prospect of earning future service benefits.

13. However, the Judge fails to note that those arguments are strong indicators against some broader more amorphous reading of "interests" in the fetter pursuant to which the concern is with what is or is not in Members' interests, rather than whether the amendment would affect Members' interests in the Fund.

<u>The Judge's reliance on the 1949 Deed</u>

14. In this section of the Judgment ([53] to [55]) the Judge considers the position under the 1949 Deed when the relevant proviso was in substantially the same form but

there were no leaving service benefits, such that if a Member left before retirement their entitlement was only to have a return of their contributions plus interest.

15. There is nothing illegitimate in itself in informing the interpretation of the Deed and Rules as they now are by consideration of the meaning and effect of the 1949 Deed, as the authorities cited by the Judge at [28] to [30] make clear.

16. However, that does not mean that every mode of reasoning by reference to the 1949 Deed is legitimate.

17. What the Judge says is this (at [55]): "To put it colloquially, an Active Member in 1949, with his eyes fixed on the far horizon of reaching NRA, would naturally have an *interest* in the rules of the game not changing in a substantially prejudicial way before he got there, and would be surprised to be told that his interests were confined to benefits already earned which had no immediate value to him and which he could never realise if he left employment before NRA."

18. One might note that here again is an example of reasoning that trades on a slide from the question of whether a member's interests are affected by an event to the (different) question of whether a member has an interest in whether or not an event takes place.

19. But the main point to be made is that it appears that the Judge put weight, for the purposes of the interpretative exercise, on speculation as to what a member at some long since passed time would or would not have found surprising if told at that time what the effect of an amendment could be. It is respectfully suggested that that is not legitimate as a matter of method and furthermore that there was no proper basis for any finding being made as to what a member at that time would or would not have found surprising.

20. In this regard there is a stark contrast to be drawn between the speculation of the Judge at [55] of his Judgment, and the careful approach of Neuberger J in ***Mock v The Pensions Ombudsman*** [2000] OPLR 331 at [24]-[26].

21. Furthermore, the reasoning of the Judge ignores the possibility that as of 1947 there was an 'interest' that an Active Member could be considered as having before retirement and which would have been protected by the fetter – whether that 'interest' be the entitlement to a return of contributions plus interest on early leaving or such part of the ultimate pension conditionally available on retirement in the future properly regarded as referable to service prior to the amendment.

<u>The scheme of the 3rd proviso</u>

22. The next matter that the Judge considered at [56]-[57] was the difference between the terms of the third proviso (concerned with Active Members) and those of the fourth proviso (concerned with Deferreds and Pensioners). The Judge noted that

the mechanisms for avoiding the effect of the fetter are stricter in relation to the fourth proviso than they are in relation to the third. In particular, he noted firstly that within the fourth mechanism there was no provision for the prejudice to be found to have been addressed through the provision of equivalent benefits and secondly that within the fourth proviso the written consent mechanism operated on an individual basis rather than by means of a resolution binding the class.

23. It is very difficult to understand, however, on what basis these differences are said to suggest (as the Judge says they do) that the interests protected are of a fundamentally different nature in the case of Active Members as compared with Deferreds and Pensioners. The differences could just as well reflect the practical differences as to the levers available where one is dealing with Active Members – both in terms of the ability to compensate for changes to past benefits through changes to future accrual arrangements, and in terms of the practical ability to convene a meeting (much easier for Active Members than with Deferreds or Pensioners).

24. Indeed, if the difference in mechanisms were driven by the difference between future service benefits and past service benefits, one would expect the fourth proviso mechanisms to apply in respect of Active Members also, insofar as the relevant proposed amendment was concerned with the past service benefits of Active Members.

<u>The 5th Proviso</u>

25. The Judge stated that his conclusion is "reinforced" ([58]) by the fact that the avoidance of breach of section 67 is expressly provided for as a fifth proviso, which, it is said, by an argument from non-redundancy, suggests that the proviso concerned with 'interests' must go wider than past service benefits. However, it is respectfully suggested that if the Judge had not already reached the conclusion that he had, the presence of the fifth proviso in the amendment power could hardly have been argued to tip the balance towards the broad reading of 'interests' that the Judge adopted.

<u>Bradbury v BBC</u>

26. In a lengthy section at [59] to [81] the Judge had to contend with arguments presented on behalf of the BBC that the Judgments in ***Bradbury v BBC*** were at least highly persuasive, and possibly determinative, of the issues before him, in a way directionally favourable to BBC.

27. ***Bradbury v BBC*** concerned, amongst other things, the question whether, following an amendment to the Rules in 2000, the BBC had the power under the Rules to impose a cap on pensionable pay – in particular by virtue of the revised definition of "Basic Salary" which was "the amount determined by the BBC as being an

Employee's basic salary or wages payable under the terms of his or her Continuing or Fixed Term Contract".

28. The point made by the BBC at the 2023 hearing was that the approach to this question both at first instance and in the Court of Appeal showed that 'interests' in the relevant proviso could not encompass future service benefits. In the case of Warren J's reasoning at first instance this was argued to be because, in rejecting the construction of the 2000 amendment on which the BBC relied, Warren J focused on the fact that any such construction would mean that the 2000 amendment would have offended against the proviso because of its impact on past service benefits (and such reasoning would be very odd if future service benefits were protected by the fetter). In the case of the Court of Appeal's reasoning, this was argued to be because, in endorsing the construction of the 2000 amendment on which the BBC relied, the Court of Appeal endorsed the position that the 2000 amendment was unobjectionable, and that could only be on the basis of an interpretation of the proviso which permitted changes in respect of future service benefits (and indeed in respect of the final salary link).

29. The Judge rejected those arguments for a number of reasons. For immediate purposes the key point is that the Judge did not accept that the Court of Appeal found the 2000 amendment to have been unobjectionable – the Judge considered that the matter before the Court of Appeal had been the interpretation of the relevant rule following the 2000 amendment, there being no challenge to the amendment's validity, meaning that nothing in the Court of Appeal's judgment could bear on the question of the meaning of the proviso on the power of amendment.

30. It is notable, however, that the Judge in his judgment does not deal with [42] of the Court of Appeal's judgment, in which Gloster LJ said this:

"42. But the critical point is that the exercise of the power of determination contended for by the respondent does not have any reductive effect on an employee's existing pension entitlement, as at the date an increase in salary. A determination by the respondent as to what proportion of a future *increase* in salary was pensionable could never operate to *reduce* the total quantum of the anticipated pension based on the existing Basic Salary. For the above reasons, I reject the appellant's arguments in relation to issue 1 and would dismiss the appeal on this point."

31. It is not readily understandable what the force of this "critical point" is supposed to be if it were not dealing with the suggestion that the 2000 amendment was potentially involving, on the BBC's construction, a violation of the proviso to the amendment power. And since it is labelled by the Court of Appeal as "the critical point", nor is it readily understandable how it could be regarded as anything other than part of the ratio of this part of the Court of Appeal's judgment.

What about the final salary link?

32. If the Judgment of Adam Johnson J is reversed, that will open the question whether (even if 'interests' does not encompass future service benefits) 'interests' in the fetter at least includes reference to the final salary link.

33. It is beyond the scope of this paper to go into that topic at any length.

34. But I offer three brief observations.

35. First, it is intriguing that ***Bradbury v BBC*** also included (at [43] to [48]) a further discussion of whether the pensionable salary cap breached section 91 of the 1995 Act, by virtue of involving a surrender to a right to a future pension. The Court of Appeal rejected the idea that the pensionable salary cap involved any surrender of pension rights. As argued in, for example, the 2018 update to the paper 'Battling with Courage'[220] that reasoning might well be thought to have read across to the position in respect of fetters on amendment powers and in particular whether a final salary link forms part of what there is a right to / interest in / has been earned / has accrued (etc) by the date of any amendment.

36. Secondly, if the decision in ***Courage*** itself does fall to be considered, it is to be hoped that careful consideration will be given to what weight the reasoning in ***Courage*** can sensibly bear. It is one of the oddities of the history in respect of ***Courage*** that Millett J is regularly referred to as having made a decision on the meaning of 'benefits secured by past contributions in respect of any member' as those words appeared in one of the three pension deeds before him. Indeed, in the ***BBC*** Judgment at [34] the Judge says that Millett J "*held*" that those words "*preserve[d] the final salary link*", and referred to this as having been, in ***Courage***, "*the central question of construction*". However, it might be argued that, on a precise reading, the relevant and oft-cited paragraph of Millett J's judgment is not to be considered as part of the ratio of the decision at all:

    a. The matter came up in the context of considering the last three of nine amendment deeds (one for each of the three schemes under consideration), which concerned how the last stage of Hanson's proposals were to be carried into effect. The deeds substitute a new provision in the event of a company ceasing to be an associated company or ceasing for any reason to be a participating company. Instead of the secession of a company causing a partial dissolution of the scheme, the proposed new clause required the trustees to set aside a portion of the fund, and either set up a new scheme or transfer the separated portion to an existing

[220] By Ian Gordon with assistance from Colin Browning, Pinsent Masons LLP; available on PLC.

scheme or hold the separated portion and deal with it as if the scheme were being dissolved. Furthermore, the trustees were not to deal with the separated portion in either of the first two ways unless satisfied after considering the advice of the actuary that the benefits in the new or other schemes are "equitable having regard to the extent and amount of the separated portion".

b. Millett J considered that this amendment infringed the fetter on the amendment power in all three of the Courage schemes. It was not good enough for the benefits to be "equitable having regard to the extent and amount of the separated portion" – because the proposed new clause did not contain the provisions and restrictions necessary to ensure that the powers conferred thereby cannot be exercised in a manner which would reduce the benefits currently secured by past contributions.

c. The Judge held on this basis that all three of the relevant amendment deeds are outside the power to amend the trust deeds and rules.

d. But none of that reasoning had, on the face of it, anything to do with the famed observation he made along the way in relation to one of the three amending deeds to the effect that in the case of that deed the wording of the amendment fetter protected the final salary link. If the protection of the final salary link played any part in the reasoning, then the outcome (or at least the reasoning) would have been different in respect of the two of the three Courage schemes in respect of which the relevant fetter expressly excluded the final salary link.

e. All this, then, is an argument that would serve to emphasise what a very slender basis the – on analysis, *obiter* – comment in ***Courage*** has been for the development of an assumption that the final salary link is protected by such a fetter.

37. Thirdly, it is also striking that in ***Courage*** there was no discussion of what the effect would be of the violation of the relevant fetter (and nor indeed are the relevant power of amendment provisions for the three schemes even set out). The reasoning apparently proceeded on the basis that insofar as the fetter would be infringed by the proposed amendments, the proposed amendments were outside the power. But that need not always be the case, and it might be thought that one of the matters that might bear quite significantly on the identification of the interests/rights properly protected by an amendment power fetter in a given case is what is the effect of violating the so-called fetter. Put another way there may be a question in a given case as to whether the relevant proviso/fetter operates, as a matter of construction (and before considering any application of e.g. severance principles enabling an exercise of a power of amendment to be partially saved), as (i) an invalidator or as (ii) an effect qualifier. And the answer to that question might

affect the view to be formed on the class of amendments that engage the proviso/fetter in the first place.

Discretion Issues when dealing with surplus

Michael Tennet KC, Jonathan Hilliard KC and Jonathan Chew

I. Different Types of Discretion

1. A helpful starting point is to consider different types of discretions and judgments that trustees, employers and others involved with pension schemes have to form.

2. The pension context throws up a number of subtly different ones given the number of benefit features and administrative provisions of a typical occupational scheme.

3. Often they give rise to no difficulty on a day to day level. But where a decision is a controversial or difficult one or the nature of the discretion becomes important at a particular juncture. For example, a proposal is made to modify it by amendment or it becomes necessary to consider it on a wind up or transfer out, then it becomes critical to classify correctly the discretion as a first step. The purpose of classifying it in these contexts is to find out what rights if any it gives members so that one can understand what one is seeking to change or take away by modifying, removing or codifying in some way the discretion.

4. The types I shall go through briefly today are as follows. I shall take them at a level of principle and then Jonathan and Michael will bring out some specific examples.

    (a) The first are discretions in the hands of fiduciaries, such as a pension scheme trustee. Therefore, the trustee is subject to the ordinary duties in exercising a discretion. These are primarily exercising the power for a proper purpose taking into account relevant considerations and no irrelevant one, and balancing the considerations in a way that is rational. Therefore, where a fiduciary comes to exercise a discretion, a beneficiary such as a member will have the correlative right to have the trustees consider properly in accordance with the above duties whether and how to exercise the discretion. Under a pension scheme, the discretions in question typically relate to whether to award particular benefits for members. Therefore, we can loosely encapsulate the above by saying that a member has a right to be considered for such benefits when the fiduciary comes to exercise a discretion.

(b) One question to consider in the pension scheme context is what the default position is if the discretion is not exercised. A particular provision of the trust can create a default position which can be departed from if a discretion is exercised. In the private client context, a good example of this is an overriding power of appointment. In the pension scheme context, an example is a default benefit under a pension scheme like increases of X% a year or such higher / lower sum decided on by the trustee. If there is a default position, obviously the the members' rights must include the right to the default position unless it is departed from by the fiduciary in the proper exercise of its discretion.

(c) This takes us into a related question, which is whether and if so when the trustee or other fiduciary must consider whether and how to exercise the discretion. The possibilities include the following:

(1) The trustee must consider the matter periodically.

(2) A decision must be taken each year but the member has no right unless and until the discretion is exercised, so that there is no default position.

(3) A decision must be taken each year and if the decision is not to exercise the discretion there is a default position e.g. the member gets a certain level of baseline increases or other benefits if the trustees do not decide to award anything more.

(4) The trustee need not consider the matter periodically but if it chooses to consider exercising its discretion is subject to the duties in (a) above. Lewin on Trusts refers to this as a "limited power" to distinguish it from the case in (c)(1) above where the person has to consider periodically whether to exercise the power.

(d) A closely related question is whether the fiduciary has to exercise the discretion in a positive way and the choice relates to how to exercise it, or whether the fiduciary has the ability to decide to do nothing. For example, a fiduciary who has the power to decide to award extra increases might decide – depending on the rule - to award no extra increases. In contrast, if a fiduciary is placed under a duty to pay to at least one of a fixed class, then the fiduciary's discretion is which of the member(s) of the class should receive the benefit.

(e) Another subtly different situation is whether a fiduciary is asked to form a judgment on *whether a state of affairs exist* e.g. whether someone is incapacitated. It is tempting to treat the duties attaching to a fiduciary in such a situation as the same as when a fiduciary is exercising a discretion, because there is a ready toolkit of duties to reach for, namely those in (a) above. However, a little care is needed, because instinctively one feels that the fiduciary has slightly more limited room for manoeuvre because one is judging whether a particular state of facts exists or a particular situation obtains. For example, a fiduciary judging whether someone is incapacitated will need to understand what it means for someone to be incapacitated. Therefore, one sees in some of the authorities, like *Harris v Lord Shuttleworth* [1994] PLR 47, statements that the fiduciary must ask itself the right question and direct itself correctly in law. Therefore, whether or not one regards that as part of taking into account relevant considerations or something slightly separate, the nature of the task - judging whether a state of affairs exists - has an impact on the exercise that needs to be conducted.

(f) This leads one into the treatment of discretions and powers in the hands of non-fiduciary. There the key question is whether the duties identified in *Braganza* - namely those borrowed from (a) above of taking into account relevant considerations and forming a non-perverse view - apply despite the person not being a fiduciary.

(g) Finally, whatever the nature of the discretion, some are vested in a trustee with employer consent or vice versa. In the private client, third party consents have caused difficulties of interpretation (in the X Trust litigation in Bermuda), in particular as to whether the third party is meant to form his own view. However, no equivalent difficulty has cropped up in the pensions context, largely I think because it has been assumed that the employer is meant to be able to form its own view given that the scheme is a remuneration tool and it is the provider of the remuneration and employment relationship.

II. Discretions and Surplus: What might be different this time?

1. The question I want to explore is how the legal approach to the exercise of discretions in relation to surplus has developed or changed since the last period of sustained surplus: "what might be different this time?"[221]

2. While the law and principles have not changed, I suggest there have been two significant changes in context that I think should give pause for thought in how we approach it:

    1. Most obviously, the economic/commercial factual context. Then, schemes in surplus were generally open to new members and accrual, the preponderance of the membership were often employees of the sponsor, and the workforce was often unionised. Surpluses were theoretical given the schemes were ongoing. Within the pensions landscape, DB reigned supreme. Having passed through the valley of deficit for two decades, we re-emerge blinking into the sunlit uplands of surplus once again. Many DB schemes did not survive the journey. Of those that did, only 4% are open, and over three quarters are in winding up or closed to new accrual.[222] Outside of some industry wide schemes, unionisation is rare, and the member profile is such that the interests of the members is now often significantly different to that of the employees.[223] On wind up or other securing of the liabilities the surplus becomes real – and so more tantalising.

    2. Equally as true, but perhaps hiding in plain sight, the legal context has changed. We have a lot more pensions decisions, they are (for better or

---

[221] It is a question I approach with some trepidation – while (with due apologies to *Gestmin* and the witness statement PD) I think I remember "Gordon Brown's pension raid" at the time, my schoolboy interests in the 90s did not extend to the state of pension funds and their litigation. Unlike some members of the audience, and indeed Mike speaking next, I was not there.

[222] https://www.thepensionsregulator.gov.uk/en/document-library/research-and-analysis/occupational-defined-benefit-landscape-in-the-uk-2023#c6bf49a6718b4705af9c78859d0bd18a

[223] The classic simplification of employer/trustee/member relations as a triangle is thus in my view out of date (see E. Nugee "The Duties of Pension Scheme Trustees to the Employer" (APL 22.9.98) and C. Nugee "The Duties of Pension Scheme Trustees to the Employer – revisited" (APL 2015, (2015) Tru L I 29(2) 59)). I am not an interior designer, but it may now be more like a table, with "legs" from trustee to member and separately from employer to non-member employees, as well as a cross-strut from employer to members.

worse) generally longer and more specialised. Anyone advising on or arguing out a point has a much greater corpus of pensions law to apply now. Separately, in the context of the exercise of powers, not only has there been a boom in the analysis of contractual powers (culminating in *Braganza* [2015] 1 WLR 1661 but really starting in the *Paragon* cases[224] in the early 2000s); even in the trusts context, the first edition of Thomas on Powers came out in 1998.

3. As a result, on the law, we need to consider the non-pensions or pensions-deficit context of the more modern cases, and apply them to our new pensions surplus factual setting.

4. While these issues arise generally in relation to surplus issues, I want to focus on two potential aspects in respect of the exercise of discretions where the reasoning or outcome may be different:

    1. Surplus extraction; and

    2. The duty of good faith on wind up contrasted with *Braganza*.

A. "Extraction" of Surplus?

5. The specific rules of any given scheme, and its financial position, will of course always be paramount; the points raised here are necessarily generalisations. The relevant powers in this context could include, most obviously, the exercise of powers in relation to the destination of a surplus on winding up or proposed amendments to the scheme to deal with surplus. At a high level of generality, the purpose of the power will be key.

6. Modern pensions law is largely the creation of corporate raiders trying to extract surplus:

    1. in *Courage* [1987] 1 WLR 495, the substitution of Hanson as the principal employer was *ultra vires* and contrary to the purposes of the scheme, so Hanson would not benefit from the surplus;

    2. in *Imperial* [1991] 1 WLR 589, the relevant power was a company consent power to inflationary increases in the existing scheme, which consent was not forthcoming because the company was keen to move members to a new

[224] *Paragon Finance v Nash* [2001] 1 WLR 685 and later *Paragon Finance v Pender* [2005] 1 WLR 3412. The relevant powers were those of mortgagee's to set the interest rate the borrower would pay. Abstracting only slightly, the situation where A holds a power that if exercised would affect B's financial obligations or financial position is commonplace in the pensions context: think of contribution rules, or pension increases.

scheme where (unlike in the old scheme), the company would benefit from any ultimate surplus: the duty of trust and confidence/good faith;

3. in *Air Jamaica* [1999] 1 WLR 1399, certain amendments permitting return of surplus were invalidated (the power to amend failing for perpetuity, but also contrary to good faith/proper purposes);

4. the earliest leading interpretation case *Stevens v Bell* [2002] Pens LR 247 turned on whether the scheme allowed amongst other things a return of surplus.

5. See also, *Hillsdown Holdings* [1996] Pens LR 427, *Davis v Richards & Wallington* [1990] 1 WLR 1511, *Edge* [1998] Ch 512.

7. The astute amongst you will note (or remember) that on the attempt to extract surplus (perhaps these days we should call it corporate pensions liberation) usually failed. Might it be different this time? Perhaps.

8. Three potential changes to the legal context:

    1. **Interpretation**: the classical view was that the scheme should be construed "without any predisposition as to the correct philosophical approach" (*Stevens v Bell* at [31], expanding and applying Brooke LJ in *National Grid v Mays* [2000] ICR 174, 193.) But we do now have a "correct philosophical approach" to the construction of pension schemes: see *Barnardo's* at [13]-[15]. [225] Take two of the Barnardo's factors.

        i. If a more textual approach to the construction of powers is appropriate[226], then why should any surplus proposal that is not expressly prohibited be struck down? There are plenty of reported cases where a return of surplus was expressly excluded by the scheme; if it is not under the scheme and it is not precluded by s76 PA95, why should the Courts strain to exclude any such return? Can

[225] This may have always been true: the first two (at least) of the *Stevens* interpretative "characteristics" themselves of an OPS (members are not volunteers; give practical effect to the scheme) do take a view as to the correct philosophical approach: (1) legal philosophical concepts that arise out of beneficiaries as volunteers are not to be applied, and (2) for the deprecation of legal formalism/technicality to mean anything, it must be that the "correct philosophical approach" is one that gives practical effect. Maybe my epistemology is not good enough to distinguish the application of legal doctrine from philosophy.

[226] And see in this regard *Britvic* [2021] Pens LR 16: the use of clear words to give a power a broad meaning should be given effect to, even if there are "obvious advantages" (Vos MR at [30]) to other meanings.

the doctrine of proper purpose really be used to smuggle in an implied restriction that would not be implied as a term?

ii. Similarly, if the trusts are intended to last for the long term, if the default would be a resulting trust based on contributions, which would be an administrative nightmare attempting to reconstruct decades of contributions, is it really contrary to the scheme to construe the relevant powers as precluding a return of surplus (or an amendment to introduce such a power)? In fairness, the thrust of this argument is not new: it was recognised in *Davis v Richards & Wallington* [1990] 1 WLR 1511 and considered in *Air Jamaica* at 1412.

2. **Meaning of Scheme design**. While the concept was deployed expressly purely in the context of deficit, in my view the notion of "scheme design" accepted by the majority of the Court of Appeal in *British Airways* [2018] Pens LR 19 is something which could escape the deficit context and inform surplus thinking. The Court drew a distinction between (i) scheme design, which is the purview of the employer, and (ii) the trustees were doing no more than managing assets under their control. Trustee benefit design in deficit was precluded. If general design of the benefit structure is the purview of the employer, and accrued benefits are satisfied, why is it improper for the employer to return surplus to it? Obviously, where there is a surplus, the interrelation between benefit design for the employer and asset management for the trustee no doubt raises complex issues. It may well be said that surplus assets held by trustees are something they do need to "manage". Nevertheless, it seems to me well arguable that if the key split involves "benefit design" and not, once the designed benefits has been met that satisfies the members' entitlements. Working out where assets go when they are not needed to discharge the scheme's liabilities is not obviously "managing" those assets within the scheme.

3. **Resulting trust backdrop**. North of the border, in *Re abrdn* [2023] CSIH 31, the Court approved the exercise of a power to de-risk a DB scheme through buy-in buy-out in circumstances where the surplus went to the employer. The analysis (admittedly without contrary argument) was that a resulting trust of surplus went wholly to the employer in circumstances where the scheme was very largely (but not fully) non-contributory. The reasoning was that the members only contributed to obtain augmented benefits whereas the employers' obligations were to fund the scheme from time to time (at [35]). How far this reasoning would extend to more orthodox contributory schemes may be open to question, but:

iii. If the default position on wind up absent the exercise of any power would be a resulting trust, and

iv. The beneficiary under the resulting trust would be wholly or substantially the employer(s),

v. it is difficult to see how that would not be a relevant consideration in the exercise of any relevant powers. It is not obvious how it would be objectionable to give the employer through the exercise of a power what it would get by default on wind up.

9. Possibly more so than the legal context, the factual context in my view substantially favours the return of surplus to employers:

    1. The understanding of the complexities around surplus arising is more involved.

    2. Where a scheme is winding up/securing benefits, surpluses are actual and not merely theoretical. Concerns about the scheme ending up being underfunded in the future do not therefore arise.

    3. As a result of (a) historical actuarial deficits and (b) the introduction and intensification of scheme funding regimes, the accounting reality for most schemes will be that the employer has funded an awful lot more of the scheme than the members. Any ultimate resulting trust analysis will more likely strongly favour the employer. Even if there is no resulting trust because e.g. there is a trustee duty to dispose of surplus (and a power as to between whom to appoint it), then the financial sources of that surplus will be relevant to the exercise of the discretion. One may respond that the surplus could be said to have resulted from wise trustee decision-making: closing the scheme to new members or accrual at the relevant time, or investment performance, such that it was not "caused" by the employer's over-contribution.

    4. Even on a non-mathematical calculation, given the employer has borne the risk of shortfall, should it not benefit from the "risk" of surplus? Even in that context of the wise trustee, the employer still bears the risk.

    5. Given the longer lives of schemes, the administrative difficulties which were theoretical in *Air Jamaica* are much more likely to be real for schemes now (a trustee decision to seek a *Re Benjamin* order permitting distribution on a particular basis combined with a blessing order would be a further exercise of discretion in this area). What of multi-employer schemes with dissolved employers? In principle (a) they would have a share of the default resulting trust analysis/it is hard to see their payment in should be ignored; and (b) their assets would vest *bona vacantia* in the Crown. Ironically, this was what the resulting trust in *Air Jamaica* avoided. Surely it is proper to say dissolved employers' "share" should go to the employer rather than the Crown? (Conversely, should trustees really take into account the Crown's *bona vacantia* interest?)

B. Good Faith on Winding Up?

10. The duty of good faith/trust and confidence is notoriously nebulous. We certainly like to use *Braganza* as a guide (whether as a limit on the power as a matter of construction, or on how the duty of good faith applies to the relevant power).

11. However, there is an important limit on *Braganza* duties in contract: they do not apply to what are called "absolute" or "unqualified" rights.[227] While the boundaries of this category may be fuzzy, it is relatively settled in the law of contract that a contractual power for one party to terminate the contract is not one to which *Braganza* duties apply: see *TSG Building Services v South Anglia Housing* [2013] EWHC 1151 (TCC) esp at [42] and [51] and *TAQA Bratani v Rockrose UKCS8 LLC* [2020] 2 Ll R 64 at [46].

12. How does that translate to the winding-up context? It seems to me that where a power to wind up is vested in the employer alone, a duty of good faith may not apply at all to limit the employer's exercise of that power. This would be consistent not only with the line of *Braganza* termination cases, but also, perhaps, with the principle that benefit design is for the employer. The freedom to design benefits includes the freedom not to continue designing benefits.

13. The argument to the contrary would be by analogy with a lender's power to call in a loan, was not qualified by *Braganza* duties but because it was nevertheless subject to the duty of good faith between mortgagor and mortgagee (*UBS v Rose Capital Ventures* [2018] EWHC 3137 (Ch) at [55]). It could be said that given pensions law has its own duty of good faith/trust and confidence, it would be wrong to import *Braganza* contractual duties – particularly the finer points of to which contractual terms they do or do not apply.

14. In contrast, powers as to e.g. what to do with surplus are clearly powers in the ongoing scheme to which the duty would apply. This may be a further argument as to why the duty does apply: the decision to wind up does not (in contrast to contractual termination) bring the relationship to which trust and confidence applies to an immediate end, so the duty should continue to apply. That seems hard to justify analytically: it is a decision that will bring the relationship of trust and confidence to an end at some point; the fact that date is deferred for practical reasons should not mean the decision to end has the duties applied to it.

---

[227] This is a very confused use of "rights": really it is an absolute power. For the classic analytical explanation of the types of "rights" (claim-rights, powers, immunities and privileges) see W.N. Hohfeld's magisterial "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23(1) Yale LJ 16 especially 28-30. My (hypothetical) "right" to be paid £5 by Jonathan Hilliard is fundamentally different in its legal character to my "right" (really a "power") to terminate my contract with Michael Tennet.

15. Even if the duty does apply to a decision to wind up, it will be difficult in the normal run to impugn that decision: if future benefits are within the employer's discretion and it funds the scheme, it is difficult to imagine how a decision can be in bad faith. Although there have always been unscrupulous employers looking for leverage – maybe one will use winding up the scheme to do so.

III. Dealing with discretions on winding up

1. The basic obligation under the winding-up rules of almost all OPSs is to buy-out the Scheme's liabilities to members. Such liabilities are correlative to the rights vested in the members to have particular benefits paid. The position is the same under s.73 of the Pensions Act 1995 ("the PA 1995") which governs the position when there is a deficiency of assets compared to liabilities.

2. Members' rights (and the correlative obligations of the Scheme) can either be fully vested (such as a right to a pension already in payment) or contingent – e.g. the right of an active or deferred member to a pension on reaching NRD. These are the same sort of rights / liabilities as would be protected under s.67 of the PA 1995.

3. Conventional thinking is that so-called discretionary "rights" are not in the same category. A discretionary right is not a right to a benefit (even a benefit contingent on a future event). A discretionary right is merely a right to be considered for the grant of a benefit. The member has nothing unless and until the discretionary power is exercised in his or her favour.

4. So on this basis, one might think that discretionary rights would not give rise to any problems on a winding up. Trustees can simply ignore them.

5. Take, for example, a simple power for Trustees to pay an annual discretionary increase of up to 5% on pre-1997 pensions.

6. On the traditional analysis, the Trustee doesn't have to buy-out pre 1997 pensions with any increases, because unless and until the discretion is exercised there is no right to any increase. So there is no right to any increase at the point of winding up and of course the power will not be exercised once the scheme has been wound up.
7. There has been support for this approach in the form of the *Pension Ombudsman's decision CAS-93708-Q1W7 (Mr Y and the Sotheby's Pension Scheme).* In that case, the PO decided that, on a winding up, the trustee did not have to secure annuities reflecting the fact that the trustee had a discretionary power to grant increases to pensions with employer consent. The PO's reasoning was that, at the point of winding up, the member had no "right" to such increases in future. Such reasoning is also capable of applying to a situation in which the discretionary power is not subject to employer consent, although that point was not specifically addressed.

8. Of course, the fact that discretionary increases do not have to be bought out as a liability on winding up does not mean that trustees could not offer increases if there were a surplus and the trustees had a discretionary power over that surplus on a winding up. But that is a different matter. That would be an augmentation of benefits.

9. So far so easy. But things are about to get a bit more complicated.

10. Consider now a right to annual increases of "5% or such lesser percentage as the trustees shall in their discretion decide". What, if any, increases have to be bought out on winding up?

11. If one takes the view that the default position under the scheme is that members get 5% increases unless and until the trustees exercise a discretionary power to reduce the increase to less than 5%, it can be argued that, just as one should ignore a discretionary power to add to benefits, one should ignore the discretionary power to modify an existing right to 5% increases by reducing that entitlement. Thus, it can be argued, the members should get pensions with 5% annual increases on a winding up.

12. This however seems a very generous result, particularly if, while the scheme was ongoing, the trustees have generally not awarded any discretionary increases because there have not been sufficient funds.

13. So how does one get round this "problem"?

14. One way is to challenge the assumption that the right to 5% increases is a default right under the scheme which is subject to a discretionary modification. Instead one might argue that on the true construction of the increase rule there was no entitlement to any increase unless and until the Trustees have exercised their discretion to decide what increase between 5% and 0% the members should be paid.

15. This is consistent with the construction of powers to change the rate of indexation under certain occupational pension schemes. See for example *Danks v QinetiQ Holdings Ltd* [2012] EWHC 570 (Ch) and *Barnados v Buckinghamshire* in the *CA* [2016] EWCA Civ 1064 [228]

[228] The case went to the Supreme Court but not on this point.

16. In *QinetiQ*, Vos J had to consider a discretionary power vested in trustees to select the index by which inflation was measured, for the purposes of awarding inflation-linked increases to pensions in payment under that scheme. The issue was whether the trustees could select CPI in place of RPI without affecting the members' existing entitlements and accrued (past service) rights. Had they been affected, it would have engaged section 67 of the PA 1995. The Court thus had to grapple with the question of what the members' existing entitlements and accrued rights were, prior to the exercise of the power to switch index.

17. The definition of "Index" which contained the power to switch was drafted in a way that might have suggested that the "default" entitlement was to RPI-linked increases:

> *'Index' means the Index of Retail Prices published by the Office of National Statistics or any other suitable cost-of-living index selected by the Trustees.*

Nevertheless, and although the index currently in use was RPI, Vos J held members did not have an existing right to an increase at RPI, rather they had only an existing right to have increases paid by reference to "RPI or any other suitable cost of living index to be selected by the trustees". Vos J held that:

> *".. in advance of the next Rule 49.1 increase date (1 April 2012), the member has no entitlement to an increase at any specific rate, since the Trustees always retain a power to change the Index by which the increases are to be calculated."*

The exercise of the trustees' discretion over the index quantified the entitlement, rather than defeating the entitlement.

18. It is worth noting that in cases concerning other discretionary powers over benefits, the courts have not adopted the same analysis. Thus in *Aon v KMPG* [2005] EWCA Civ 1004, the CA held that a discretionary power to adjust formulaic benefits depending on whether there was a surplus or deficiency in the scheme, was a power to modify liabilities and therefore subject to s.67. However in my view the critical difference between that case and QinetiQ was that in KPMG the downwards adjustment could be made even after the benefit had come into payment.

19. The great advantage of adopting the approach in QinetiQ is that it avoids the conclusion that each and every exercise of the power to reduce 5% increases to less than 5% should be treated as the exercise of a power to modify the scheme and therefore subject to s.67 of the Pensions Act 1995. This would be a very unattractive result and would make the power difficult if not impossible to exercise in practice.

20. I therefore consider that faced with the choice between paying 5% increases and 0% increases in a winding up, a court would adopt the QinetiQ analysis and decide that no increases are payable.

21. However, this too seems a less than perfect solution, particularly in a situation in which, while the scheme was ongoing, the trustees have habitually paid increases, even if not always at 5%.

22. It is also worth digressing for a moment to consider the implications of this analysis for schemes like QinetiQ when they are wound up. In QinetiQ Vos J held that, members did not have an existing right to an increase at any particular rate pending a decision by the trustee to select the index. On that logic, members might be said to have no right to any increases on winding up because the members are dependent on an exercise of the trustees' discretion to give rise to an entitlement to a particular rate of indexation. As Lewison LJ accepted in Barnados:

    "…. the trustees have a choice [of index]; and until that choice has been exercised, it is not possible to say that the member has a right to an increase measured in any particular way."

23. However I think this rather arresting conclusion can be avoided. As Lewison LJ made clear in Barnados, members still had what he described as a "subsisting right". That subsisting right might be defined as a right to indexation by reference to an appropriate measure of inflation selected by the Trustees. On this basis there would be a right which needs to be secured on winding up, the issue would simply be how to quantify that right. As to this, most winding up powers do give a measure of flexibility as to how benefits are secured, so this might allow the selection of a particular rate to be justified, even though there was strictly speaking no entitlement to that rate while the scheme was ongoing.

24. So it should be possible to justify increases above 0% on winding up in cases where there was a discretionary index selection power, along the lines of those in QinetiQ and Barnados.

25. However, we are in uncharted territory. Outside the pensions context, corporate and personal insolvency law allows the quantification of contingent liabilities in an insolvency where the creditor has the benefit of a contractual right to something, but its future value is unknown (such as a future claim on an insurance policy): see generally *Gleave v PPF* [2008] EWHC 1099 (Ch). However the analogy is far from exact because the contingency in commercial insolvencies is not usually dependent on the future exercise of a discretion by the debtor.

26. Could the same sort of analysis be applied in the case of a right to annual increases at 5% or such other rate as the trustees shall decide, so as to confer a right to higher than 0% increases on members in a winding up? Could the members be

offered annuities which increase at (say) 5%LPI on the basis that the trustees are quantifying an existing but future liability?

27. Alternatively, could increases above 0% be achieved by the Trustees prior to winding up, the trustees purported to exercise their future discretion(s)to confer (say) 5%LPI increases for all future years?

28. Unfortunately, there are problems with both these suggestions.

29. As to the first (quantifying an existing but future liability), this argument might work in relation to a case like QinetiQ, because it can be said that members are definitely entitled to <u>something</u> (i.e. indexation) – its just that one does not yet know the exact liability. However, in the case of a right to 5% increase or such other rate as the trustees may decide, the member may have no entitlement at all because the Trustee could decide on 0% increases.

30. As to the second suggestion (exercising a discretion to confer 5%LPI increases in future and then winding up on that basis) there are two potential problems:
    1. First exercising a discretion in advance of the time at which it naturally arises *could* be regarded as improperly fettering that discretion. That said, the decision of the Court of Appeal in *Britvic v Britvic Pensions* [2021] EWCA Civ 867 suggests that unless there is particular wording which indicates that a power to set or change the rate of increases only arises, and has to be exercised, on a year- by-year basis, it should be possible to exercise a power to change the rate of increase until further notice, so as to avoid an annual decision.

    2. However, the second, and bigger, problem is that a decision to pay 5%LPI increases going forward and then winding up on that basis, would not change the fact that either 5% is the default position, or it is not:

        a. If 5% is the default rate of increase, it could be argued that it is not possible to reduce that rate of increase without a section 67 certificate (or by asking the Pensions Regulator not to invalidate a decision to this effect, under section 67I of the Pensions Act 1995);

        b. In contrast if one adopts the 'QinetiQ' analysis it could be argued that (even after the trustees' decision to pay 5%LPI increases has been made) the members would still have no "right" to 5%LPI increases because the Trustees would still retain a discretion, exercisable at any time before an increase is paid, to reduce the rate to 0%.

31. In summary, dealing with discretions in a winding up may be more complex and difficult than might at first be assumed, and a critical first step in any winding up

process is to carefully analyse the nature of the apparently discretionary powers under the scheme, and not to assume that they can all be treated the same on a winding up.

Wilberforce contacts

Michael Tennet KC
Silk: 2006
Email: mtennet@wilberforce.co.uk

Jonathan Hilliard KC
Silk: 2016
Email: jhilliard@wilberforce.co.uk

Edward Sawyer
Call: 2001
Email: esawyer@wilberforce.co.uk

James Walmsley
Call: 2007
Email: jwalmsley@wilberforce.co.uk

James McCreath
Call: 2009
Email: jmccreath@wilberforce.co.uk

Ram Lakshman
Call: 2020
Email: rlakshman@wilberforce.co.uk

Paul Newman KC
Silk: 2009
Email: pnewman@wilberforce.co.uk

David Pollard
Silk: 2017 (Solicitor: 1980)
Email: dpollard@wilberforce.co.uk

Sebastian Allen
Call: 2006
Email: sallen@wilberforce.co.uk

Jennifer Seaman
Call: 2007
Email: jseaman@wilberforce.co.uk

Jonathan Chew
Call: 2010
Email: jchew@wilberforce.co.uk

For information about Wilberforce Chambers and our services please contact:

Nicholas Luckman (Practice Director)
Direct: +44 (0) 20 7304 2856
Mobile: +44 (0) 7964 101 636
Email: nluckman@wilberforce.co.uk

Harry Nichol
(Marketing Manager)
Direct: +44 (0)20 7304 2912
Email: hnichol@wilberforce.co.uk

Wilberforce Chambers
8 New Square
Lincoln's Inn
London, UK
WC2A 3QP

Tel: +44 (0) 20 7306 0102
Fax: +44 (0) 20 7306 0095
wilberforce.co.uk

Members of Chambers

Brian Green KC Head of Chambers	KC 1997	Call 1980
Jonathan Seitler KC Deputy Head of Chambers	KC 2003	Call 1985
John Martin KC	KC 1991	Call 1972
Stuart Isaacs KC	KC 1991	Call 1975
Lawrence Cohen KC	KC 1993	Call 1974
Ian Croxford KC	KC 1993	Call 1976
Robert Ham KC	KC 1994	Call 1973
Terence Mowschenson KC	KC 1995	Call 1977
David Phillips KC	KC 1997	Call 1976
Michael Furness KC	KC 2000	Call 1982
John Wardell KC	KC 2002	Call 1979
Alan Gourgey KC	KC 2003	Call 1984
John McGhee KC	KC 2003	Call 1984
Gilead Cooper KC	KC 2006	Call 1983
Michael Tennet KC	KC 2006	Call 1985
Thomas Lowe KC	KC 2008	Call 1985
James Ayliffe KC	KC 2008	Call 1987
Lexa Hilliard KC	KC 2009	Call 1987
Paul Newman KC	KC 2009	Call 1991
Joanne Wicks KC	KC 2010	Call 1990
Martin Hutchings KC	KC 2011	Call 1986
Mark Wonnacott KC	KC 2013	Call 1989
Thomas Grant KC	KC 2013	Call 1993
Fenner Moeran KC	KC 2014	Call 1996
Marcia Shekerdemian KC	KC 2015	Call 1987
Clare Stanley KC	KC 2015	Call 1994
Tim Penny KC	KC 2016	Call 1998
Jonathan Davey KC	KC 2016	Call 2003
Jonathan Hilliard KC	KC 2016	Call 2003
Max Mallin KC	KC 2017	Call 1993
Julian Greenhill KC	KC 2018	Call 1997
Tiffany Scott KC	KC 2018	Call 1998
Nikki Singla KC	KC 2018	Call 2000
James Bailey KC	KC 2019	Call 1999
Zoë Barton KC	KC 2020	Call 2003
Andrew Mold KC	KC 2020	Call 2003

Full-time arbitrators:

Jules Sher KC	KC 1981	Call 1968
Sir Paul Morgan	KC 1992	Call 1975

John Child		Call 1966
Thomas Seymour		Call 1975
David Pollard	Solicitor 1980	Call 2017
Gabriel Fadipe		Call 1991
Graeme Halkerston		Call 1994
Andrew Child		Call 1997
Edward Sawyer		Call 2001
Stephen Brown	Solicitor 1991	Call 2013
Thomas Robinson		Call 2003
Daniel Lewis		Call 2003
Emily McKechnie		Call 2005
Sebastian Allen		Call 2006
James Walmsley		Call 2007
Jennifer Seaman		Call 2007
Benjamin Faulkner		Call 2008
Anna Littler		Call 2008
James McCreath		Call 2009
Emer Murphy		Call 2009
Tom Roscoe		Call 2010
Jonathan Chew		Call 2010
Harriet Holmes		Call 2011
Alice Hawker		Call 2011
Bobby Friedman		Call 2011
Simon Atkinson		Call 2011
Sri Carmichael		Call 2012
Jack Watson		Call 2012
Jessica Brooke		Call 2012
Michael Ashdown		Call 2013
James Goodwin		Call 2013
Rachael Earle		Call 2013
Elizabeth Houghton		Call 2014
Tim Matthewson		Call 2014
Jamie Holmes		Call 2014
Joseph Steadman		Call 2015
Tara Taylor		Call 2016
Daniel Scott		Call 2016
Jia Wei Lee		Call 2017
Francesca Mitchell		Call 2017
Daniel Petrides		Call 2018
Lemuel Lucan-Wilson		Call 2018
Caspar Bartscherer		Call 2019
Ram Lakshman		Call 2020
Benjamin Slingo		Call 2020
John Grocott-Barrett		Call 2021
Samuel Cathro		Call 2021
Theo Dixon		Call 2021
Ernest Leung		Call 2022
James Man	(HK Bar: 2014)	Call 2023

Caroline Furze (unregistered barrister) Call 1992
Door Tenant

+44 (0)20 7306 0102
wilberforce.co.uk
Find us on LinkedIn, Twitter and YouTube