APL Annual Conference 2024

Employer discretions about surplus: Employer's powers and discretions on scheme winding-up

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MARCH 2025

APL Conference, Brussels, November 2024

Dealing with Surplus - and looking at discretions
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Part 3 (David Pollard)

Employer discretions about surplus: Employer's powers and discretions on winding-up

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Employer discretions about surplus: Employer's powers and discretions on winding-up

1. Setting the scene

1.1 This paper is based on the talk given at the APL Conference in November 2024 in Brussels, forming the third part of a session on aspects of surplus with (1) Lauren Jackson on "*Options for using surplus*" and (2) Dawn Heath on "*Case studies using surplus in on-going schemes*". This paper deals with *Employer powers and discretions in relation to surplus*.

1.2 Surplus in occupational pension schemes is a big topic. There are several helpful legal papers – a list is in Appendix 1 to this paper.

1.3 When analysing the legal issues arising on a use of surplus, many different legal issues can arise. This paper limits its scope by digging deeper into the issues of employer powers and discretions arising on the winding-up of a scheme.

1.4 It is helpful to nail down what schemes are being considered in this paper:

1 **Tax registered**: A defined benefit occupational pension scheme which is tax registered under Part 3 of the Finance Act 2004.

2 **The position on winding-up**: The position for a scheme if it were to start winding-up. Ie not dealing with a surplus refund from an on-going scheme (such an on-going surplus payment was more usual in the 80s and 90s.)

3. **Surplus:** Assume the scheme has (or may get) a surplus on an insurance buy-out/s75 basis. The amount of surplus may vary, for example by:

- which insurer is chosen (trustee decision?).
- Assets/buy-out rates may go up or down.
- What allowance is made for winding-up expenses/ trustee insurance?

The terms of the scheme

1.5 As to what can happen with a surplus, the actual terms of the governing rules of the scheme will be crucial.

1.6 It may be necessary to consider the impact of past changes to the scheme too. Were the changes made properly?

(a) For example, in *Harwood-Smart v Caws*[1] the question was whether any part of a winding-up surplus could be paid to an employer. Earlier changes allowing such a refund were held invalid as being contrary to a limitation in the amendment power prohibiting amendments having the effect of permitting payments to the employer.

(b) Issues may also arise as to past benefit changes – eg if contracted-out compliance with PSA 1993, s37 and its predecessors – see *Virgin Media*[2]

1.7 When looking at the terms of a scheme for this purpose, a preliminary checklist is set out in Appendix 2 to this paper.

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1 *Harwood-Smart v Caws* [2000] OPLR 227 (Rimer J).

2 *Virgin Media Ltd v NTL Pension Trustees II Ltd* [2024] EWCA Civ 843, [2024] Pens LR 14. On this case, see the various APL seminars and the paper by Sebastian Allen (2024) APL Conference.

1.8 This paper digs deeper into the issues of employer discretions.

1.9 Inevitably dealing with a surplus will involve looking at:

- What happens if the scheme is wound-up?; and
- What happens if the scheme is not wound-up?

Employer/ principal employer / principal company

1.10 In practice in a multi-employer scheme this paper is looking at the position of the "principal employer" or "principal company" as defined under the scheme. Sometimes the principal company will not be an employer or former employer (eg a holding company with no employees). This may impact on employer duties (see 11 (Braganza duties) below).

2. Introduction to surpluses

2.1 I spoke (with Sara Chambers) to the APL on surpluses last in 2013[3]. Timing is crucial – we anticipated that they would return! Quite a lot has been written recently about surpluses and the legal issues that arise, particularly where a surplus is to be used or proposed to be used to give a make a payment to an employer. A list of papers is attached in Appendix 1 to this paper.

2.2 It is probably easier, or at least more fun, dealing with pension fund surpluses compared with pension fund deficits. The increase in discount rates over the past few years has resulted in what seems to be a switch across from significant deficits in defined benefit pension schemes over to significant potential surpluses.

2.3 It is important to realise that any surplus prior to a winding up of a defined benefit scheme is purely an estimate or notional until the scheme is wound up and the benefits bought out with matching insurance policies. The value of the scheme assets will go up and down with the relevant market and the estimated value of the benefit liabilities well change to reflect changes in the relevant factors. These factors include;

- the relevant discount rate applied (the higher the rate the lower the current estimated present value of the benefit liabilities);
- mortality changes (how long are members and other beneficiaries going to live?);
- what options members take (eg commutation, early retirement) and what factors then apply;
- transfers in and transfers out by members;
- the contributions paid and the actual performance of the assets; and
- other relevant factors.

2.4 When we (as pension lawyers) last advised in relation to surpluses – probably 20 or more years ago - it was generally in the context of how to use a surplus in an ongoing scheme Ie one open to future accrual and to new members. In practice many (most?) schemes are now closed to new entrants (or at least DB entrants) and frozen to future DB accrual.

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[3] See David Pollard and Sara Chambers '*Surpluses*' (APL summer conf 2013). This was updated slightly to become chapter 20 on 'Employers and surpluses' in my book '*The Law of Pension Trusts*' (2013, OUP).
There is also an analysis of the position on relation to surpluses on insolvency of the employer in chapter 76 '*Winding up the scheme: surpluses*' of my book '*Corporate Insolvency: employment and pension rights*' (7th edn, 2023, Bloomsbury Professional).

3. On-going schemes

3.1 For pension schemes which continue to have benefit accrual, it will often be possible for the employer to take advantage of any surplus[4] by agreement with the trustee board[5]:

(a) reducing ongoing employer contributions for DB members; or
(b) reducing ongoing employer contributions for DC members; or
(c) paying expenses (instead of the employer paying); or
(d) agreeing to benefit increases (without additional funding); or
(e) paying a surplus to the employer (subject to Pensions Act 1995, s37).

It will depend on the terms of the scheme whether or not the employer can insist on such uses unilaterally or whether agreement with the trustee board is required.

3.2 In practice today it is much less common for an ongoing scheme to seek to make a surplus payment refund to an employer. There are statutory limits in Pensions Act 1995, s37[6] on such a surplus refund. Although s37 is headed 'Payment of surplus to employer', in practice s37 is framed as relating to any payment to an employer unless this is exempt. Such payments to an employer from an on-going scheme[7] are (unless exempt) only allowed if the trustee agrees (s37(3)) and subject to various conditions being satisfied (s37(5)[8]).

Funding DC contributions

3.3 The use of DB surplus to fund future DC accrual is discussed in more depth in my paper '*Pension scheme surpluses: Cross funding money purchase accrual in the same scheme*' (2024) 38 Tru LI 124.

Trapped surplus

3.4 This lack of future DB accrual means that in practice today the ability of an employer to use a surplus to meet future DB contributions is much more limited than it was 20 years ago. This means that from an employer perspective there is much more of a risk of there being a potential for a "trapped surplus" within a DB pension scheme, that it is more difficult to use.

3.5 There are various ways of dealing with this, including escrow accounts, reservoir trusts, security as a means of reducing contributions ahead of a surplus arising. These are quite complicated and have differing tax effects.

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4 See the slides by Lauren Jackson and Dawn Heath for sections 1 and 2 of this APL talk "Options for using surplus" and "Case studies using surplus in on-going schemes".

5 I use the term "trustee board" to mean the trustees (if more than one) or the board of directors of a trustee company. a similar terminology was adopted by the Goode Report (The Pension Law Review Committee Report, Cm2342, September 1993, chaired by Professor Goode).

6 As substituted from 6 April 2006 by Pensions Act 2004, s250.

7 Section 37 does not apply to a scheme which is being wound-up – see s37(1)(b).

8 See also the Occupational Pension Schemes (Payments to Employer) Regulations 2006 (SI 2006/802).

4. Surplus refunds on a scheme winding-up

4.1 All this means that in practice it is currently much more likely that the prospect of a payment to an employer out of surplus is more likely where the scheme is winding up with sufficient funds to be able to secure to secure benefits with an insurance company[9] in full. This means it would not at that stage be a notional surplus at all but an actual surplus. Even where scheme winding-up does not result, the parties will usually in practice want to consider what would be the position if a suitable agreement is not reached.

4.2 Using surpluses gives rise to complex questions. And a number of different possibilities. The rest of this paper will focus on the issues relating to a surplus refund to an employer on a scheme winding-up.

4.3 We often refer to "refunds" of funds to an employer as though it is a repayment of money that the employer has previously contributed. To a degree this terminology be pre judging the question as to whether such a payment can be made or not[10].

4.4 In order for an employer or trustee to agree or work out whether or not such a surplus payment to an employer was in fact possible or likely or whether instead members could benefit through some degree of increased benefits, will need an analysis of the terms of the individual scheme.

4.5 In practice, there are various different scenarios applicable to surplus arising following the trigger of a winding up. This leads to two particular issues:

- Who can trigger a winding up (and who can defer); and
- What discretions then arise in relation to surplus following such a winding up being triggered?

4.6 These are issues that have been discussed in several papers[11]. They will be looked at by employers and trustees when considering how to act to questions concerning funding and can be an issue in relation to the relevant accounting standards showing how an employer would show a deficit or surplus (on the corporate accounting basis) in the company's accounts under the relevant accounting standard.

4.7 For pension schemes which continue to have benefit accrual, it will often be possible for the employer to take advantage of any surplus[12] by agreement with the trustee board[13]:

4.8 This paper looks at how to analyse discretions or powers possessed by the employer or principal company. Powers and discretions held by the trustee board will usually require a separate analysis[14].

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9 See Pensions Act 1995, s74 (Discharge of liabilities by insurance) and s76 (Excess assets on winding-up).

10 As Michael Tennet pointed out in his talk on "Surpluses on Winding-up" to the NEAPL (Oct 2024).

11 See in particular Michael Tennet '*Surpluses on Winding-up*' (NEAPL, Oct 2024) and Catrin Young and Emma Game '*How do you solve a problem like a surplus*' (APL summer conf 2024).

12 See the slides by Lauren Jackson and Dawn Heath for sections 1 and 2 of this APL talk "Options for using surplus" and "Case studies using surplus in on-going schemes".

13 I use the term "trustee board" to mean the trustees (if more than one) or the board of directors of a trustee company. a similar terminology was adopted by the Goode Report (The Pension Law Review Committee Report, Cm2342, September 1993, chaired by Professor Goode).

14 See eg the talk '*Should trustees ever agree to scheme wind-up?*' by Keith Webster and Natalie Mee (APL Conference, November 2024).

4.9 This can raise some difficult issues in relation to the powers and discretions held by the employer. Discussed in the rest of this paper are examples:

- are the powers fiduciary or not? ;
- how relevant is it to call a power fiduciary or not;
- do other constraints apply, such as proper purposes, mutual duty of trust and confidence, Braganza duties etc?

5. Terms of the trust instrument

5.1 Ultimately the terms of the relevant scheme and its trust instrument will be highly relevant to such an analysis. There may well be situations where there are different constraints or issues depending on the wording of the scheme.

5.2 This paper aims to give more explanation of these areas in relation to employer powers and discretions. In particular more of the legal background as to how particular provisions are in my view, likely to be interpreted.

5.3 I should emphasise that these are tricky areas and that all I can do is give my view of the issues. I am tempted to say that other opinions may well be available. This uncertainty can give rise to a risk analysis as to whether relevant parties wish to go ahead, even on the basis of a positive counsel's opinion, knowing that there is a risk that the legal analysis can ultimately prove wrong.

5.4 Given that there can be a large sum at stake here, it can be a tricky issue as to whether or not it is worth applying to court to get a definitive ruling on a particular issue. This is briefly discussed in 12 below.

6. Who has the discretion?

6.1 Employer access to all (or part of) the surplus on a winding-up depends[15] on:

- Who can trigger a scheme winding-up?; and
- Who decides on what happens to any winding-up surplus?

Who can trigger a winding-up power?

6.2 Who can trigger a winding-up of the scheme usually depends on terms of the scheme. There are various major options:

1. Employer/Principal Company sole discretion
2. Principal Company discretion but need consent of trustee (Similar: Trustee discretion, but need consent of Principal Company)
3. Trustee discretion if event occurs (eg Principal Company "going into liquidation" or actuary certifies that scheme is insolvent or Principal Company fails to comply with scheme obligations)
4. Trustee sole discretion
5. Someone else has discretion (unusual)
6. TPR/court power to order? For TPR power, see PA 1995, s11. For a Court power? – unclear, although it may be able to direct the trustee to exercise its powers.

Consent provisions:

6.3 Some rules envisage an employer power but with the consent of the trustee board. In my view, this is similar in effect to a provision envisaging a trustee discretion, but needing the consent of employer. Both parties need to agree. Note however:

- There may be some cases where silence is treated as consent (or waiver or estoppel etc)
- There are some recent cases dealing with a wealth trust, where the scope of a protector consent has been limited to a narrow role so that it can only be refused if the trustee is acting irrationally[16]. The powers of a pension scheme employer look very similar to the powers/discretions given to a protector, these cases look tricky. The wealth trust cases tend not to refer to the pension cases

Run on as a closed scheme?

6.4 Is there a power to defer winding-up if it is triggered? Does the trustee board get enhanced powers during closed scheme period?

1. Scheme provision: Trustee sole power
2. Scheme provision: Trustee power with consent of employer? Does trustee board get enhanced powers during closed scheme period?
3. Statutory deferral power – PA 1995, s38 (power to defer winding-up)

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15 See Michael Tennet's talk to NEAPL on "Surpluses on Winding-up" (Oct 2024).

16 *Re X Trusts* [2023] CA (Bda) 4 Civ. Other cases go a different way eg *PTNZ v AS* [2020] EWHC 3114 (Ch) and *Re Piedmont and Riviera Trusts* [2021] JRC 249.

6.5 Section 38 only applies if both (a) a "relevant employer debt event" has occurred[17] – ie a "relevant event" under PA 1995, s75(6A) for an employer and (b) the rules of the scheme require the scheme to be wound-up.

What happens during winding-up

6.6 Usually the trustees need to secure all the benefits – eg by a transfer-out (to another scheme) or a buy-out with an insurance company[18].

6.7 Here a surplus, so the priority order in PA 1995, s73 does not matter.

6.8 No more benefit accrual after winding-up starts – s73A(3). No new members admitted – s73A(3)(b). This is subject to exceptions – eg s73A(4) to (6A) and regs SI 2005/706.

Who has the discretion over remaining surplus?

6.9 Who has the discretion as to how a surplus is used after standard benefits are secured? This depends on terms of the scheme. Usually a provision allowing increases to some or all member benefits up to the old IR limits[19] at:

1. Employer sole discretion
2. Employer discretion but need consent of trustee. Similar: Trustee discretion, but need consent of employer
3. Trustee sole discretion
4. Someone else has discretion (unusual)

6.10 Here we have assumed a surplus, so the priority order in PA 1995, s73 for securing standard accrued rights does not matter.

6.11 Some schemes contain no express provision in the scheme rules about how to use all of the surplus (eg excess over IR limits) at all. In such a case, resulting trust issues can arise: *Air Jamaica v Charlton*[20] and the Scottish case *Re Abrdn Pension Trustee*[21].

6.12 Boiling these down:

A Employer has power – both to wind-up and distribute surplus

- In theory no need for trustee consent
- If benefit augmentations require employer consent, can employer withhold consent, leading to surplus passing to employer, even if trustee does not consent?

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17 The Occupational Pension Schemes (Winding Up) Regulations 1996 (SI 1996/3126), reg 10.

18 For a scheme in winding-up, there is an implied power to buy-out under Pensions Act 1995, s74 (Discharge of liabilities by insurance).

19 IR limits are the limits (set out in the Revenue Practice Notes, IR12) that were imposed by the Inland Revenue as part of its discretion in deciding whether or not to grant tax exempt approved status for occupational pension schemes before 6 April 2006 (when the changes to the tax regime came into force under the Finance Act 2004.
What were IR limits remained in force after 5 April 2006 as part of transitional arrangements - see the Registered Pension Schemes (Modification of the Rules of Existing Schemes) Regulations 2006 (SI 2006/364), regs 3 to 8. These transitional arrangements ceased to apply at the latest on 5 April 2011 (Finance Act 2004, Sch 36, para 3(2) as amended by Finance Act 2005, Sch.10, para 51), but many schemes continued with the same limits by amending their rules before then (a statutory power to make such amendments applied before 6 April 2011 under the statutory amendment power in Pensions Act 1995, s68 – see the Occupational Pension Schemes (Modification of Schemes) Regulations 2006 (SI 2006/759), reg 6).

20 *Air Jamaica Ltd v Charlton* [1999] 1 WLR 1399, PC.

21 *Re Abrdn (SLSPS) Pension Trustee Co Ltd* [2023] CSIH 31, 2023 SLT 791, [2024] Pens LR 2.

B Employer and Trustee need to agree (in practice) – eg:

- Trustee cannot trigger winding-up without employer consent
- Employer will not agree to fund to buy-out or trigger winding-up without trustee agreeing on surplus split

C Trustee has unilateral discretions – to trigger winding-up and then use of surplus:

- Mainly a trustee discretion issue
- But note that the employer is almost certainly a beneficiary: See Pollard 'Trustees' Duties to Employers'[22] and eg *East India Company v Robertson*[23]

6.13 Later talks at the 2024 APL conference are relevant here:

(a) on discretions in relation to pensions increases, see David E Grant's talk "*Pensions increases – the Law of Diminishing Returns and/or Unintended consequences?*"; and

(b) on Trustee discretion, see Keith Webster and Natalie Mee "*Should trustees ever agree to scheme winding-up*".

22 David Pollard '*The Law of Pension Trusts*' (2013, OUP) at ch 10.

23 *East India Company v Robertson* (1859) 14 ER 963, (1859) 12 Moo PC 400 (PC) at p458. Case discussed by Sinead Agnew in her chapter 'Trusts as Pensions Pots: A Legal-Historical Perspective c 1800-1925' in '*Pensions: Law, Policy and Practice*' (eds S Agnew, P S Davies and C Mitchell, 2020, Hart Publishing).

7. Constraints on employer:

7.1 This paper will now focus on the potential legal restrains to an employer

A. Employment contracts
    a. unusual to deal with surplus
B. Trade union/ consumer pressure?
C. Political issues – eg proposed Mineworkers legislation
D. Legal issues?
    1. Fiduciary?
    2. Proper purposes?
    3. Braganza duties/ mutual duty of trust and confidence (MDTC)?

7.2 This paper will now focus on the potential legal restraints on an employer mentioned at D above.

8. Employer powers not fiduciary

8.1 The employer in relation to an occupational pension scheme is almost always not a fiduciary and its powers are not fiduciary.

8.2 Most powers and discretions of an employer or principal company in relation to a pension trust are beneficial. Thus, an employer power to direct, or agree with the trustee, augmentations of benefits or to amendments to a scheme will almost always be a beneficial power – see *Imperial Tobacco*[24]*, Mettoy Pension Trustees Ltd v Evans*[25] and *Re Courage Group's Pension Schemes*.[26] Similarly in Australia – see *Lock v Westpac Banking Corpn*[27] and *Ansett Australia Ground Staff*[28].

8.3 More recently see comments to the same effect in *UC Rusal* [2014] UKPC 39 at [54] "the employer is not acting as a fiduciary"; and *BBC* [2024] EWCA Civ 767 at [63] "not of course a fiduciary power". There are many cases that make this point[29].

8.4 An employer's powers may be considered fiduciary in extreme cases – eg if the employer is also a trustee or on the facts of *Mettoy v Evans* (based on former change in winding-up rule). This depends on the circumstances.

8.5 In 1991 in *Mettoy v Evans*[30] for example, a power of the company to consent to augmentations in a winding-up was held by Warner J to be fiduciary. However, this was in the unusual circumstances that the previous provisions had vested this augmentation power in the trustees and there was no evidence that the trustees had considered the implications of the change when agreeing to amend the scheme.

8.6 However, in my view, *Mettoy* is unlikely to be followed now on that point. In 1997 in *National Grid v Laws*[31] Robert Walker J (who had been one of the counsel involved in *Mettoy*) commented that:

> 'Had *Imperial Tobacco*[32] been decided earlier and been cited in *Mettoy*, Warner J might possibly have come to a different conclusion as to whether the employer's power should be classified as fiduciary.'

8.7 There are some odd comments on employer role in *Bridge Trustees* v *Noel Penny*[33] and *Scully v Coley*[34].

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24 *Imperial Group Pensions Trust Ltd v Imperial Tobacco Ltd* [1991] 2 All ER 597 (Browne-Wilkinson V-C) at 604.

25 *Mettoy Pension Trustees Ltd v Evans* [1991] 2 All ER 513 at 551 (Warner J).

26 *Re Courage Group's Pension Schemes* [1987] 1 All ER 528 at 544 (Millett J).

27 *Lock v Westpac Banking Corpn* (1991) 25 NSWLR 593, [1991] Pens LR 167 (Waddell CJ in Eq).

28 *Ansett Australia Ground Staff Superannuation Plan Pty Ltd v Ansett Australia Ltd* [2002] VSC 576, (2002) 174 FLR 1, [2002] 97 PBLR (Warren J).

29 For example: *Imperial Tobacco*; *National Grid v Mayes* [2001] UKHL 20 per Lord Hoffmann at [11]; *British Coal* [1995] 1 All ER 912 (Vinelott J) at 926; *Hillsdown*; *Prudential Staff Pensions v Prudential Assurance* [2011] EWHC 960 (Ch) (Newey J) at [140] and [146]. See also Pollard '*The Law of Pension Trusts*' ch 11.

30 *Mettoy Pension Trustees Ltd v Evans* [1991] 2 All ER 513 (Warner J).

31 *National Grid v Laws* [1997] Pens LR 157, [1997] OPLR 161 (Robert Walker J) at p 177.

32 See *Imperial Group Pensions Trust Ltd v Imperial Tobacco Ltd* [1991] 2 All ER 597 (Browne-Wilkinson V-C).

33 *Bridge Trustees Ltd v Noel Penny (Turbines) Ltd* [2008] EWHC 2054 (Ch) (Judge Purle QC sitting as an additional Judge of the High Court).

34 See Pollard '*Corporate Insolvency: Employment and Pension Rights*' at 53.5 and 76.27; and Catrin Young and Emma Game '*How do you solve a problem like a surplus*' (APL summer conf 2024) at 6.7 to 6.16.

8.8 In 2008 in *Bridge Trustees v Noel Penny*[35] Judge Purle QC followed *Mettoy* and held that a power to distribute surplus held by the employer was a fiduciary power. This meant that the court could appoint a new trustee to exercise the power (the company had ceased to be in receivership, so the obligation then applicable under the Pensions Act 1995 to have an independent trustee[36] had ended). HHJ Purle considered (at [15]) that:

> 'It is evident that the statutory policy is to remove from an insolvent company the power to determine the destination of a pension surplus, once an insolvency practitioner has been appointed.'

The company did not appear in the relevant hearing and it does not seem that the judge was pointed to the cases (eg *National Grid*) doubting the decision in *Mettoy* on this point. Accordingly the decision in *Bridge Trustees* must be regarded as wrong on this point.

8.9 In *Scully v Coley*[37] the Privy Council dealt with an appeal from the courts in Jamaica concerning the destination of a surplus on the winding-up of a pension scheme that had been established by Gillette. The main thrust of the decision concerns the meaning of who is a member of the scheme, but the Privy Council also briefly commented on the nature of employer's powers. Lord Collins gave the judgment and commented:

> '47. The final question is whether the provision that the allocation by the Administrator under Rule 12(c) is "subject to the approval of [Gillette]" gives Gillette a fiduciary power to withhold approval, with the consequence (say the respondents) that the trustees could make no allocation, which would then be left to the court: *McPhail v Doulton* [1971] AC 424 at 457.
>
> 48. This question was raised in argument before Brooks J and the Court of Appeal, but was not the subject of decision. On this point the Board is satisfied that the appellants are right. The argument between the parties was centred on the question whether the power was a fiduciary power, and their Lordships were referred to several cases on the distinction between a power in relation to which the duty of the employer was limited to a duty of good faith and a power in respect of which the employer was a fiduciary and which was to be exercised solely in the interests of the objects of the power: *Icarus (Hertford) Ltd v Driscoll* [1990] Pens LR 1; *Mettoy Pension Trustees Ltd v. Evans* [1990] 1 WLR 1587; *Imperial Group Pension Trust Ltd. v. Imperial Tobacco Ltd*. [1991] 1 WLR 589; *Re William Makin & Son Ltd* [1992] Pens LR 177; *British Coal Corp v British Coal Staff Superannuation Scheme Trustees* [1994] ICR 537 (overruled on other grounds in *National Grid Co plc v Mayes* [2001] UKHL 20, [2001] 1 WLR 864 (HL)).
>
> 49. The question is not primarily whether the power is a fiduciary power (as the respondents say) or an administrative power (as the appellants say), since there is no necessary contrast between the two. In *Weinberger v Inglis* [1919] AC 606 (a decision which it would now be impossible to justify on the facts: the General Purposes Committee of the Stock Exchange was held entitled to exclude British naturalised subjects of German origin from membership) the power to admit persons to membership was held (at 640) to be both an administrative power and a fiduciary power. The real question is what is the purpose for which the power was granted. It is not necessary to decide in what circumstances Gillette could withhold approval of allocation under Rule 12(c). The reason is that their Lordships are satisfied that the power to withhold approval could not be used to alter the allocation to the "then Members" and thereby to vary the Rules. There is already an express power in Rule 12(a) to change, modify or discontinue the Plan at any time. Gillette has not done so, and their Lordships consider it difficult (as the Board did in *Air Jamaica Ltd v Charlton* [1999] 1 WLR 1399, at 1411) to see how the Plan could lawfully be amended once it had been discontinued. Gillette has been kept informed at all times of the intentions of the Administrator and of the trustees, and is a party to these proceedings. Gillette's failure to withhold approval cannot be regarded as a refusal to exercise a trust power so as to give the court the power to vary the provisions for allocation.'

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35 *Bridge Trustees Ltd v Noel Penny (Turbines) Ltd* [2008] EWHC 2054 (Ch) (HHJ Purle QC sitting as an additional Judge of the High Court).

36 On independent trustees on an insolvency, see Pollard '*Corporate Insolvency: Employment and Pension Rights*' at ch 59 (Independent Trustee Obligations).

37 *Scully v Coley* [2009] UKPC 29, [2010] 2 LRC 736, [2009] All ER (D) 10 (Nov)..

(a) Unfortunately, the decision of the Privy Council does not give much guidance as to the reason why the employer in that case (Gillette) could not withhold its consent to the use of the surplus to increase benefits for members.

(b) The reference to *Air Jamaica*[38] is unhelpful as that was a case where the employer was seeking to exercise an amendment power after a winding-up had started.

(c) The distinction between 'administrative' and 'fiduciary' powers seems odd as well – the real difference is between fiduciary and non-fiduciary (ie personal or beneficial) powers (regardless of whether they are being used for 'dispositive' or 'administrative' purposes – this seems to be the rationale for the decision in the 1919 *Weinberger*[39] case that the power to remove a member was both administrative and fiduciary).

(d) Here the distribution of surplus for benefit increases for the members depended on Gillette giving its consent. Absent consent, the trust instrument envisaged no increase in member benefits (and so the surplus would presumably go somewhere else or perhaps move to a resulting trust?).

(e) The distinction between fiduciary and administrative powers is also rather difficult to understand.

(f) The essential reasoning seems to be in the last part cited above, that Gillette had not become involved in the proceedings and so may be taken to have implied consent? The final comment cited above confirms (if anything) that the employer power (to give or withhold consent) was not fiduciary – 'Gillette's failure to withhold approval cannot be regarded as a refusal to exercise a trust power so as to give the court the power to vary the provisions for allocation.'

8.10 Some powers and discretions will always be fiduciary; for example:

(a) Powers vested in the company in its capacity as trustee of the scheme – see *Icarus* (*Hertford) Ltd v Driscoll*[40] and *Re William Makin*.[41]

(b) The power to appoint or remove a trustee has been held to be a fiduciary power in relation to a private non-commercial trust in some rather old cases – see *Re Skeats' Settlement*[42] and *Re Shortridge*.[43] However, the better view is that these cases will not be followed in relation to commercial trusts such as pension schemes (despite (obiter) comments to the effect that the power will be fiduciary in *IRC v Schroder*[44] and *Mettoy Pension Trustees Ltd v Evans*).[45] The view that the power of appointment and removal of pension scheme trustees is not fiduciary is supported by the decision of Judge O'Donoghue, (sitting as a deputy High Court judge) in *Simpson Curtis Pension Trustees Ltd v Readson Ltd*[46] and the Australian case, *Fitzwood Pty Ltd v Unique*

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38 *Air Jamaica Ltd v Charlton* [1999] 1 WLR 1399, PC.
39 *Weinberger v Inglis* [1919] AC 606, HL.
40 [1989] Pens LR 1 (Aldous J).
41 *Re William Makin & Sons Ltd* [1993] OPLR 171 (Vinelott J).
42 (1889) 42 ChD 522 (Kay J).
43 [1895] 1 Ch 278, CA.
44 [1983] STC 480 at 500 (Vinelott J).
45 [1991] 2 All ER 513 at 551 (Warner J).
46 [1994] OPLR 231 (Judge O'Donoghue, sitting as a deputy High Court judge). See the author's casenote in (1994) 8 TLI 84.

Goal.[47] For a detailed analysis, see the article, 'The power of employers to appoint or remove trustees of occupational pension schemes: is it fiduciary?'.[48]

8.11 The determination of who is and who is not a fiduciary can be difficult – and there have been some recent court shifts – eg:

- *Lehtimaki*[49] (shareholder in a charity trust company is a fiduciary);
- *Johnson v FirstRand Bank*[50] (car dealer a fiduciary in relation to purchase finance);
- *Tulip Trading*[51] (fiduciary position arguable re Bitcoin operator, so no strike out).

8.12 In *Lehtimäki v Cooper*[52] the Supreme Court (and all the lower courts) held that a member (shareholder) of a charitable company was a fiduciary. This was a decision relating to charities, but included a wide conception of fiduciary duties and on whom they could apply. Partly this was based on a "reasonable expectation" of such direct duty arising through various statements and publications issued by the Charities Commission. The judgments in the Supreme Court addressed the position by reference to the general law for fiduciaries. At the very least *Lehtimäki* is likely in future to be cited in support of arguments in relation to powers under a trust (including a pension scheme).

Does fiduciary categorisation matter?

8.13 In many cases it may not matter whether or not an employer power or discretion is categorised as fiduciary or not.

- Being a 'peculiarly' fiduciary power[53] probably only means must not take an unauthorized benefit. Here employer benefit is authorized.
- Being a fiduciary or not may well not alter the legal review position here:
    - proper purposes/ Braganza etc will apply whether or not a fiduciary;
    - being a fiduciary may make it easier to review/increase review intensity.

8.14 The term "fiduciary" is not a very clear (or often helpful) description to apply. It can be a description of a person as being a fiduciary or in a particular power or discretion or duty being termed a "fiduciary power" or "fiduciary duty". It is very context specific. Often it does not help much in explaining matters – but still it is often used in judgments and by commentators (including me[54]).

A more detailed discussion (but still an overview[55]) is set out in section 9 below.

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47 [2001] FCA 1628, (2001) 188 ALR 566 (Finkelstein J). See also Buss P in *Mercanti v Mercanti* [2016] WASCA 206 at [316] to [321].

48 (2011) 25 TLI 184 (David Pollard and Dawn Heath) and ch 19 in David Pollard, *The Law of Pension Trusts* (OUP, 2013).

49 *Children's Investment Fund Foundation (UK) v Attorney General* [2020] UKSC 33, [2022] AC 155. See discussion by Robert Ham and David Pollard '*Pension trustee companies: an update after Lehtimaki [2020] UKSC 33*' (2022) 36 Tru LI 69.

50 *Johnson v FirstRand Bank Ltd* [2024] EWCA Civ 1282. Leave to appeal to the Supreme Court has been given and the appeal is currently scheduled to be heard in early April 2025.

51 *Tulip Trading Ltd v Bitcoin Association for BSV* [2023] EWCA Civ 83, [2023] 4 WLR 16, [2023] 2 All ER (Comm) 479 (allowing an appeal from Falk J).

52 [2020] UKSC 33, [2021] 1 All ER 809.

53 See eg David Pollard '*Pensions, Contracts and Trusts: Legal Issues on decision making*' at ch 62.

54 See eg '*The Law of Pension Trusts*' (OUP, 2013) at chapter 11 (Employer powers – Non-fiduciary) and chapter 12 (Employer powers to appoint or remove trustees). See also David Pollard and Dawn Heath '*The power of employers to appoint or remove trustees of occupational pension schemes: is it fiduciary?*' (2011) 25 Tru LI 184.

55 Adapted from David Pollard '*Pensions Contracts and Trusts: Legal Issues on decision making*' (2020, Bloomsbury Professional) at ch 62 (Fiduciary duties).

9. Fiduciary Duties - overview

9.1 Does a decision made contrary to one of three main tests for review of discretions[56] namely

- proper purposes,
- Braganza 1 (due consideration of relevant factors) and
- Braganza 2 (irrational or perverse outcome)

categorise as a breach of fiduciary duty or not? What difference does this make to any remedies?

9.2 In practice this can only be an issue where the relevant decision maker is acting in a fiduciary capacity (eg a trustee, director or other fiduciary). It can be a difficult issue as to whether or not a person is a fiduciary (or acting in a fiduciary capacity) outside these categories (eg an agent or a joint venture party). An employer or employee is not usually a fiduciary (but can be in some circumstances).

9.3 As outlined above, the proper purposes[57] and Braganza 2 (irrationality or perversity)[58] often tests apply to non-fiduciaries as well as fiduciaries. Braganza 1 (due consideration) can apply to non-fiduciaries as well (*Braganza* itself is an example). This supports the conclusion that the need for a breach of fiduciary duty is not relevant in those tests, but instead the potential issue is limited to a Braganza 1 (due consideration) claim against a fiduciary.

Decisions by fiduciaries: *Pitt v Holt*

9.4 The judgments in *Pitt v Holt* are clear about the need for a breach of "duty" in order for a trustee (or other fiduciary) decision to be overturned[59]. Conversely, of course, in *Braganza* there is no suggestion of any need for a breach of duty (let alone a fiduciary duty).

9.5 To repeat what was said above, the limit on overturning a decision was imposed in *Pitt v Holt* to reduce the scope of the "get out of jail free"[60] aspect of the decision in *Re Hastings-Bass*[61] – namely that trustees (and other fiduciaries) were able to reverse their decision because the ultimate outcome turned out to be not what was intended.

9.6 It may be that, in context, this requirement in *Pitt v Holt* for a breach of fiduciary duty:

(a) only applies where a decision is being sought to be overturned (rather than, say, where damages or compensation are being sought); or

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56 See David Pollard '*Pensions Contracts and Trusts: Legal Issues on Decision Making*' (2020, Bloomsbury Professional) at ch 2 and ch 3.

57 Eg for some powers of contracting parties: *British Telecommunications plc v Telefonica O2 UK Ltd* [2014] UKSC 42 at [37] and mortgage lenders: *Paragon Finance plc v Nash* [2001] EWCA Civ 1466. In '*Stewardship of property and liability to account*' (2014) Conv 215 Charles Mitchell comments (at 218) that "it is misleading to say that the duty to act for a proper purpose is a "fiduciary duty", although the courts very often do say this", citing *Bishopsgate Investment Management Ltd (In Liquidation) v Maxwell (No.1)* [1994] 1 All ER 261, CA at 265 and *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) at [1292]–[1295].

58 Eg *Braganza* v *BP Shipping Ltd* [2015] UKSC 17 itself, involving a contractual claim against an employer.

59 *Pitt v Holt* [2013] UKSC 26 at [73]. The need for a breach of "fiduciary duty" is repeated in the Privy Council's summary of the principles in *Pitt v Holt* in *Gany Holdings (PTC) SA v Khan* [2018] UKPC 21 per Lord Briggs at [54].

60 See Richard Nolan '*Controlling Fiduciary Power*' [1993] CLJ 293 at 307.

61 [1975] Ch 25, CA.

(b) is using the term "fiduciary duty" in a wide sense (not the narrow or "peculiarly fiduciary" sense envisaged by Millett LJ in *Mothew*[62]).

This is not at all clear from the judgments in *Pitt v Holt*[63].

9.7 On (a), whether the *Pitt v Holt* principles only apply to a claim to overturn the relevant decision, the context of the claims in *Pitt v Holt* was just such a claim. They were not claims against fiduciaries for (say) damages (or equitable compensation) for breach of duty (or for an account). And the language of the judgments in *Pitt v Holt* is often clear that the judges concerned are looking at the position on an overturning of a decision.

(i) It could well be that the references in *Pitt v Holt* to a need for a breach of fiduciary duty are doing nothing more that emphasising that overturning a decision needs to be on the basis of a material (and not minor) breach of a relevant duty (or test) by the trustees concerned.

(ii) It can perhaps be seen as similar to the test in contract law allowing a contract to be terminated for breach only if there is a substantial breach (ie a breach of a condition), leaving damages claims available for lesser breaches (eg a breach of warranty).

9.8 On (b) above, the nature of the fiduciary duty involved, the term "fiduciary duty" is giving rise to many problems, owing to a difficulty in working out what is a fiduciary duty and what is not. The Law Commission commented in 2014[64]:

> "… the term "fiduciary duty" means different things to lawyers and non-lawyers. Even lawyers use the term in different ways. In part, this reflects changes in judicial thinking about what the term means.[65]"

9.9 In *Mothew*[66], Millett LJ (as he then was) famously held that fiduciaries will owe both fiduciary duties and non-fiduciary duties and that only those duties that are peculiar to fiduciaries are properly termed fiduciary duties. It follows that not every breach of duty by a fiduciary is a breach of fiduciary duty. Millett LJ noted (at p16):

> 'This branch of the law has been bedevilled by unthinking resort to verbal formulae. It is therefore necessary to begin by defining one's terms. The expression "fiduciary duty" is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal consequences differing from those consequent upon the breach of other duties. Unless the expression is so limited it is lacking in practical utility.'

9.10 The due consideration of the relevant factors rule does not look to be "peculiarly fiduciary" under this test[67]. But the duty of due consideration was itself described as fiduciary by the Court of Appeal in *Pitt v Holt*[68]. The Law Commission commented[69] in 2014 on this point in *Pitt v Holt*:

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62 *Bristol and West Building Society v Mothew* [1998] Ch 1, CA per Millett LJ at 17.
63 *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108
64 *Fiduciary duties of investment intermediaries* (Law Com No 350) at 3.11.
65 *Aequitas v AEFC* [2001] NSWSC 14 at [283].
66 *Bristol and West Building Society v Mothew* [1998] Ch 1, CA per Millett LJ at 16. See Sarah Worthington '*Four Fiduciary Duties*' (2018) 32 TLI 22 at 28 to 32, Matthew Conaglen '*Fiduciary Loyalty*' at ch 3 and Peter Birks '*The Content of Fiduciary Obligation*' (2002) 16 TLI 34 at 35.
67 Before *Pitt v Holt*, see Richard Nolan '*Controlling fiduciary power*' [2009] CLJ 293 at 309, citing *Permanent Building Society v Wheeler* (1994) 14 ACSR 109 (Ipp J) at 157-158; *Colin Gwyer & Associates Ltd v London Wharf* [2002] EWHC 2748 (Ch) (Leslie Kosmin QC) at [83] and *Extrasure Travel v Scattergood* [2002] EWHC 3093 (Ch) (Jonathan Crow QC) at [87] – [90].
68 *Pitt v Holt* [2011] EWCA Civ 197 at [127].
69 *Fiduciary duties of investment intermediaries* (Law Com No 350) at 3.64, fn127.

> "In this context, however, the term is being used broadly and encompasses duties other than those which are "peculiarly fiduciary", such as the rules prohibiting unauthorised conflicts of duty and interest and the rule prohibiting unauthorised profits. Here the term means "the duties incumbent on a fiduciary to perform his office": R Nolan and A Cloherty, "The rule in Pitt v Holt?" (2011) 127 Law Quarterly Review 499 at 501."

9.11 Later commentators (including Lord Walker himself[70]) have taken a similar view that a breach of the full "peculiarly" fiduciary duty[71] (as defined in *Mothew*) is not needed[72].

9.12 Lord Walker commented[73] (extra-judicially) after *Pitt v Holt*:

> "…. in *Pitt v Holt* 39 I expressed the view, without elaboration, that a trustee's duty to inform himself properly, and to deliberate carefully on the exercise of his fiduciary powers, was itself a fiduciary obligation. It seemed -- and it still seems -- to me that it is a duty so inextricably linked to the exercise of what are undoubtedly fiduciary powers, that it would be absurd to treat it as anything less. I was therefore surprised, when *Pitt v Holt* was discussed at two seminars, one at Cambridge40 and one at Oxford,41 that this view did not commend itself to most of the participants, who (at Cambridge) included William Gummow and Dyson Haydon, both recently retired from the High Court of Australia, and both closely involved with the Australian textbook on equity. Indeed my only firm supporter at Cambridge was Professor Langbein from Yale, and at Oxford was Joshua Getzler. But the new edition of Meagher, Gummow and Lehane 42 cites *Pitt v Holt* as "wholly inconsistent' with *Bristol & West Building Society v Mothew*. This debate seems likely to continue for some time.
>
> [40] The '*Equity and Administration*' conference organised by Peter Turner held on 7-8 January 2014 (now recorded in the book published by Cambridge University Press).
>
> [41] Seminar on Pitt v Holt held on 27 January 2014 at the Oxford Law faculty building at St Cross.
>
> [42] J Heydon; M Leeming and P Turner, *Meagher, Gummow and Lehane's Equity: Doctrines & Remedies* (5th ed, 2014, LexisNexis).

9.13 This leaves the badging unclear in the caselaw:

(a) It is unclear what the term "fiduciary duty" means in the context of powers of a trustee board. Sometimes the courts categorise duties as being fiduciary, but the Court of Appeal in *Mothew*[74] made the point that not all powers owed by a fiduciary (such as a trustee) are fiduciary powers.

(b) A breach of fiduciary duty presumably includes acting where there is a conflict of interest, but it is not clear if it includes (say) acting without due care. In some

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70 Lord Walker '*The changing face of trust law*' (2017) 31 Tru LI 19 at 25; Lord Walker '*When will the Court grant relief for trustee's mistakes?*' (2014) 44 HKLJ 760 at 765.

71 This terminology is used in Matthew Conaglen '*Fiduciary Loyalty*' at ch 3.

72 See eg Dyson Heydon '*Modern fiduciary liability: the sick man of equity?*' (2014) 20 Trusts & Trustees 1006; Kelvin Low '*Fiduciary duties: the case for prescription*' (2016) 30 TLI 3, (extra judicially) in *Constraints on the exercise of trustees' powers*, chapter 2 in '*Equity and Administration'* (P G Turner ed, 2016, CUP) at p55 (note that the Supreme Court decision in *Braganza* was given after this chapter was written) and Michael Ashdown '*Trustee Decision Making*' (OUP, 2015) at ch4 'The nature of the *Hastings-Bass* duty'.
For a discussion of the fiduciary duty concept in relation to making third parties liable, see P S Davies '*Accessory Liability*' (2015, Hart Publishing) at p99 and J Heydon, M Leeming and P Turner, *Meagher, Gummow and Lehane's Equity: Doctrines & Remedies* (5th ed, 2014, LexisNexis) at [5-355] to [5-430] (discussing in particular *Bell Group v Westpac (No 9)* (2012) 270 FLR 1).

73 Lord Walker '*The changing face of trust law*' (2017) 31 Tru LI 19 at 25.

74 *Bristol & West Building Society v Mothew* [1998] Ch 1, per Millett LJ at 16, 18.

categorisations a duty of skill and care (including a duty of due consideration) would not be considered to be a fiduciary duty in the full "peculiarly" fiduciary sense[75].

(c) But it seems likely that *Pitt v Holt*[76] allows a trustee decision to be overturned even if it is not a full "peculiarly" fiduciary duty that has been breached[77].

(d) It may be relevant that the claim in *Pitt v Holt* was for reversal of the decision, and not for another remedy (eg damages). The logic here could be that overturning a decision involves a higher hurdle to be reached (so that the references in *Pitt v Holt* to the need for a breach of fiduciary duty[78] should be read with this in mind). This is not a point that is expressly made in the judgments in *Pitt v Holt*, but the whole context[79] of the case is a claim to reverse the relevant decision.

Need for a breach of "fiduciary duty"?

9.14 Lord Walker's judgment in *Pitt v Holt* was clear about the need for a breach of duty in order for a trustee (or other fiduciary) decision to be overturned, effectively on a Braganza 1 (due consideration) basis. Lord Walker also referred in various places to the need for a breach of "fiduciary duty"[80]. But in other places he just referred to a need for a breach of "duty"[81]. Conversely, in *Braganza* there is no suggestion of any need for a breach of duty or fiduciary duty.

9.15 The limit on overturning a decision was imposed in *Pitt v Holt* to reduce the scope of the "get out of jail free"[82] aspect of the decision in *Re Hastings-Bass*[83] – namely that trustees (or other fiduciaries) were able to reverse a decision that had proved to be mistaken.

9.16 In context, any requirement in *Pitt v Holt* for a breach of fiduciary duty:

(a) Arguably only applies where a decision is being sought to be overturned (rather than, say, where damages or compensation are being sought); or

(b) More likely, is using the term "fiduciary duty" in a wide sense (not the narrow or "peculiarly fiduciary" sense envisaged by Millett LJ in *Mothew*[84]).

9.17 On (a), whether the *Pitt v Holt* principles only apply to a claim to overturn the relevant decision, the context of the claims in *Pitt v Holt* was just such a claim. They were not claims

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75 *Mothew* [1998] Ch 1 at 16, *Breen v Williams* (1996) 186 CLR 71 at 137, *Permanent Building Society v Wheeler* (1994) 11 WAR 187 (Ipp J) at 237, cited in Conaglen '*Fiduciary Loyalty*' at 35

76 *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108.

77 Lord Walker, '*The changing face of trust law'* (2017) 31 TLI 19, the annual lecture given in November 2016 to ACTAPS (the Association of Contentious Trust and Probate Specialists).

78 See eg the discussion in Michael Ashdown '*Trustee Decision Making: The rule in Re Hastings-Bass*' (2015, OUP) at 4.04 and by Newey J (extra judicially) in chapter 2 '*Constraints on the exercise of trustees' powers*', at p54, in '*Equity and Administration*' (P G Turner ed, 2016, CUP).

79 On context being important, see Lord Steyn in *R v Secretary of State for the Home Office, ex p Daly* [2011] UKSC 42 at [59] "In law, context is everything" and Lord Walker in *Bridge Trustees v Houldsworth* [2011] UKSC 26 at [32] "…. apparently wide propositions may have to be read in the context of the particular facts of the case to which they related".

80 *Pitt v Holt* [2013] UKSC 26 at [70], [73]. The need for a breach of "fiduciary duty" is repeated in the Privy Council's summary of the principles in *Pitt v Holt* in *Gany Holdings (PTC) SA v Khan* [2018] UKPC 21 per Lord Briggs at [54].

81 *Pitt v Holt* [2013] UKSC 26 at [68], [73], [78], [80], [88].

82 See Richard Nolan '*Controlling Fiduciary Power*' [1993] CLJ 293 at 307. See also Adam Hofri-Winogradow and Gadi Weiss '*Trust Parties' Uniquely Easy Access to Rescission: Analysis, Critique and Reform*' (2019) 82 MLR 777.

83 [1975] Ch 25, CA.

84 *Bristol and West Building Society v Mothew* [1998] Ch 1, CA per Millett LJ at 17.

against the relevant fiduciaries for damages (or equitable compensation) for breach of duty (or for an account). And the language of the judgments in *Pitt v Holt* is often clear that the judges concerned were looking at the position on an overturning of a decision.

(i) It could well be that the references in *Pitt v Holt* to a need for a breach of fiduciary duty are doing nothing more that emphasising that overturning a decision needs to be on the basis of a material (and not minor) breach of a relevant duty (or test) by the trustees concerned.

(ii) It can perhaps be seen as similar to the test in contract law allowing a contract to be terminated for breach only if there is a substantial breach (ie a breach of a condition), leaving damages claims available for lesser breaches (eg a breach of warranty).

Categorisations of duties

9.18 Duties owed by decision makers can be categorised in various ways[85], that may overlap:

(a) Statutory duties (eg the general duties on directors under CA 2006 or on pension trustees under PA 1995 and PA 2004);

(b) Equitable or trust duties (eg the duties owed by trustees and, by analogy, directors);

(c) Contractual or common law (eg under a contract or statute);

(d) Fiduciary duties (either as duties owed by a fiduciary or in a fiduciary capacity or limited to those which are "peculiarly" fiduciary)

9.19 In 2016 in *ASIC v Cassimatis (No 8)*[86] Edelman J referred to the 1899 decision of the Court of Appeal in *Lagunas Nitrate Company v Lagunas Syndicate*[87] and commented that the duties of directors are a combination of both common law and equitable (references add to footnotes):

> [427] At the turn of the century when *Lagunas Nitrate Company v Lagunas Syndicate* was decided, all of the cases concerning the duties of directors had been Chancery decisions. However, an important aspect of the decision of Lindley MR was that his Lordship spoke of directors' duties as being owed *both* at common law and in equity. This conclusion was later supported by the majority in *Daniels v Anderson*[88] who regarded as "outdated" the suggestion that the duties of a director were limited to equity. Some doubt has been expressed about this conclusion[89]. However, perhaps as a consequence of the common law retreat in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[90] from the absolutism of *Derry v Peek*[91], the dominant position is now that directors owe a single general law duty, recognised by both common law and equity, to take reasonable care[92].

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85 Eg Peter Birks '*The Content of Fiduciary Obligation*' (2002) 16 TLI 34 at 35.

86 *Australian Securities and Investments Commission v Cassimatis (No 8)* [2016] FCA 1023, 336 ALR 209 (Edelman J) at [427].

87 [1899] 2 Ch 392, CA.

88 (1995) 37 NSWLR 438, 492.

89 See Heydon JD, "*Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?"* in Degeling S and Edelman J (eds), *Equity in Commercial Law* (Thomson, Sydney, 2006) 196-197.

90 [1964] AC 465.

91 (1889) LR 14 App Cas 337.

92 See *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187, 237-239 (Ipp J); *Bristol and West Building Society v Mothew* [1998] Ch 1, 17 (Millett LJ) and the comprehensive discussion in Heath W, "The Director's "*Fiduciary" Duty of Care and Skill: A Misnomer*" (2007) 25 C & S LJ 370.

What is a "fiduciary duty"?

9.20 On the use of the term "fiduciary duty" in *Pitt v Holt*, and the point made in 9.16(b) above, the nature of the fiduciary duty involved, the term "fiduciary duty" is not used in a consistent manner in caselaw. Paul Finn commented in 1977[93] that:

> "the term "fiduciary" is itself one of the most ill-defined, if not altogether misleading terms in our law."

9.21 This can give rise to problems, owing to a difficulty in working out what is a fiduciary duty and what is not. The Law Commission commented in 2014[94]:

> "… the term "fiduciary duty" means different things to lawyers and non-lawyers. Even lawyers use the term in different ways. In part, this reflects changes in judicial thinking about what the term means.[95]"

9.22 In 1998 in *Mothew*[96], Millett LJ famously held that fiduciaries will owe both fiduciary duties and non-fiduciary duties and that only those duties that are peculiar to fiduciaries are properly termed fiduciary duties. It follows that not every breach of duty by a fiduciary is a breach of fiduciary duty. Millett LJ noted (at p16):

> 'This branch of the law has been bedevilled by unthinking resort to verbal formulae. It is therefore necessary to begin by defining one's terms. The expression "fiduciary duty" is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal consequences differing from those consequent upon the breach of other duties. Unless the expression is so limited it is lacking in practical utility.'

9.23 The due consideration of the relevant factors rule does not look to be "peculiarly" fiduciary under the *Mothew* categorisation[97]. But the duty of due consideration was itself described as fiduciary by the Court of Appeal in *Pitt v Holt*[98]. The Law Commission commented[99] in 2014 on this point in *Pitt v Holt*:

> "In this context, however, the term is being used broadly and encompasses duties other than those which are "peculiarly fiduciary", such as the rules prohibiting unauthorised conflicts of duty and interest and the rule prohibiting unauthorised profits. Here the term means "the duties incumbent on a fiduciary to perform his office": R Nolan and A Cloherty, "The rule in Pitt v Holt?" (2011) 127 Law Quarterly Review 499 at 501."

9.24 Later commentators (including Lord Walker himself[100]) have taken a similar view that a breach of the full "peculiarly" fiduciary duty (as defined in *Mothew*) is not needed[101].

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93 Finn 'Fiduciary Obligations' at [1].

94 *Fiduciary duties of investment intermediaries* (Law Com No 350) at 3.11.

95 *Aequitas v AEFC* [2001] NSWSC 14 at [283]

96 *Bristol and West Building Society v Mothew* [1998] Ch 1, CA per Millett LJ at 16. See Sarah Worthington '*Four Fiduciary Duties*' (2018) 32 Tru LI 22 at 28 to 32 and Peter Birks '*The Content of Fiduciary Obligation*' (2002) 16 Tru LI 34 at 35.

97 Before *Pitt v Holt*, see Richard Nolan '*Controlling fiduciary power*' [2009] CLJ 293 at 309, citing *Permanent Building Society v Wheeler* (1994) 14 ACSR 109 (Ipp J) at 157-158; *Colin Gwyer & Associates Ltd v London Wharf* [2002] EWHC 2748 (Ch) (Leslie Kosmin QC) at [83] and *Extrasure Travel v Scattergood* [2002] EWHC 3093 (Ch) (Jonathan Crow QC) at [87] – [90].

98 *Pitt v Holt* [2011] EWCA Civ 197 at [127]. Confirmed as "the correct principle" by Lord Walker in the Supreme Court at [70].

99 *Fiduciary duties of investment intermediaries* (Law Com No 350) at 3.64, fn127.

100 Lord Walker '*The changing face of trust law*' (2017) 31 Tru LI 19 at 25; Lord Walker '*When will the Court grant relief for trustee's mistakes?*' (2014) 44 HKLJ 760 at 765.

101 See eg Dyson Heydon '*Modern fiduciary liability: the sick man of equity?*' (2014) 20 Trusts & Trustees 1006; Kelvin Low '*Fiduciary duties: the case for prescription*' (2016) 30 Tru LI 3, (extra judicially) in *Constraints on the exercise of trustees' powers*, chapter 2 in '*Equity and Administration'* (P G Turner ed, 2016, CUP) at p55 (note that the Supreme Court decision in *Braganza* was given after Newey J's

(a) It is unclear what the term "fiduciary duty" means in the context of powers of a trustee board. Sometimes the courts categorise duties as being fiduciary, but the Court of Appeal in *Mothew*[102] made the point that not all powers owed by a fiduciary (such as a trustee) are fiduciary powers (in its "peculiarly fiduciary" categorisation.

(b) It presumably includes acting where there is a conflict of interest, but it is not clear if it includes (say) acting without due care. In some categorisations a duty of skill and care (presumably including a duty of due consideration) would not be considered to be a fiduciary duty in the full "peculiarly" fiduciary sense.

(c) But it seems likely that *Pitt v Holt*[103] allows a trustee decision to be overturned even if it is not a full "peculiarly" fiduciary duty that has been breached[104].

(d) It may be relevant that the claim in *Pitt v Holt* was for reversal of the decision, and not for another remedy (eg compensation or damages). The logic here could be that overturning a decision involves a higher hurdle to be reached (so that the references in *Pitt v Holt* to the need for a breach of fiduciary duty[105] should be read with this in mind). This is not a point that is expressly made in the judgments in *Pitt v Holt*, but the whole context[106] of the case is a claim to reverse the relevant decision.

Prescriptive or proscriptive?

9.25 There is some debate in the caselaw (particularly in Australia[107]) and commentary[108] about whether a fiduciary duty can only be proscriptive (ie forbidding actions) and can never

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chapter was written) and Michael Ashdown '*Trustee Decision Making*' at ch4 'The nature of the *Hastings-Bass* duty'.
For a discussion of the fiduciary duty concept in relation to making third parties liable, see P S Davies '*Accessory Liability*' (2015, Hart Publishing) at p99 and J Heydon, M Leeming and P Turner, *Meagher, Gummow and Lehane's Equity: Doctrines & Remedies* (5th ed, 2014, LexisNexis) at [5-355] to [5-430] (discussing in particular *Bell Group v Westpac (No 9)* (2012) 270 FLR 1).

102 *Bristol & West Building Society v Mothew* [1998] Ch 1, per Millett LJ at 16, 18.

103 [2013] UKSC 26, [2013] 2 AC 108.

104 Lord Walker, '*The changing face of trust law'* (2017) 31 Tru LI 19, the annual lecture given in November 2016 to ACTAPS (the Association of Contentious Trust and Probate Specialists).

105 See eg the discussion in Michael Ashdown '*Trustee Decision Making: The rule in Re Hastings-Bass*' at 4.04 and by (extra judicially) in chapter 2 '*Constraints on the exercise of trustees' powers*', at p54, in the book '*Equity and Administration*' (P G Turner ed, 2016, CUP).

106 On context being important, see Lord Steyn in *R v Secretary of State for the Home Office, ex p Daly* [2011] UKSC 42 at [59] "In law, context is everything" and Lord Walker in *Bridge Trustees v Houldsworth* [2011] UKSC 26 at [32] "…. apparently wide propositions may have to be read in the context of the particular facts of the case to which they related".

107 *Breen v Williams* (1996) 186 CLR 71; *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165 at 197–8, [2001] 2 BCLC 773 at [69]-[83]. See also *Netglory Pty Ltd v Caratti* [2013] WASC 364 (Edelman J) at [345]ff,

108 There is significant controversy as to the limits of this proposition: see Matthew Conaglen '*Fiduciary Loyalty*' (Hart Publishing, 2010) at 56, Lionel Smith '*Prescriptive Fiduciary Duties*' (2018) 37 University of Queensland Law Journal 261-287G and Roger Derrington '*Commentary on Professor Lionel D Smith's Paper, 'Prescriptive Fiduciary Duties*'' (2018) 37(2) University of Queensland Law Journal 289; Dyson Heydon '*Modern fiduciary liability: the sick man of equity?*' (2014) 20 Trusts & Trustees 1006; Kelvin Low '*Fiduciary duties: the case for prescription*' (2016) 30 TLI 3; Dempsey & A Greinke, '*Prescriptive fiduciary duties in Australia*' (2004) 25 ABR 1; F Gleeson, '*Proscriptive and prescriptive duties: is the distinction helpful and sustainable, and if so, what are the practical consequences?*', Paper presented at 2017 Corporate and Commercial Law Conference, Supreme Court of New South Wales.
Also discussed by Black J in his papers '*Conflict of interest regulation after the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*' (presentation to

be prescriptive (imposing a positive duty to act). The proscriptive fiduciary duties would be limited to an obligation on the fiduciary not to obtain an unauthorised profit or to be in an unauthorised position of conflict.

9.26 Describing duties owed by trustees and others as fiduciary would mean that they would arguably always be proscriptive on this basis[109]. But this cannot be the case, as (for example) trustees owe positive duties to act in some circumstances[110]. It is less confusing to refer to all duties of a fiduciary as fiduciary duties[111] in the wide sense and reserve the term "peculiarly fiduciary duties" for cases where this matters (for example in relation to some remedies for breach[112]).

9.27 More recently, see also the Singapore case, *Credit Suisse Trust Ltd v Ivanishvili*[113].

Toongabbie Legal Centre on 29 March 2019) and '*Some parallel duties and remedies in equity and corporations law*' (given to the NSW Bar Assn in March 2017).

109 Compare *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244, [2005] 2 BCLC 91, CA with *P&V Industries Pty Ltd v Porto* [2006] VSC 131 (Hollingsworth J). Discussed in the UK in *Brandeaux Advisers (UK) Ltd v Chadwick* [2010] EWHC 3241 (QB), [2011] IRLR 224 at [47] (Jack J) and *GHLM Trading Ltd v Maroo* [2012] EWHC 61 (Ch), [2012] 2 BCLC 369 at [193] (Newey J). See Ho and Lee '*A Director's Duty to Confess: A Matter of Good Faith?*' [2007] CLJ 348 and Matthew Conaglen '*Fiduciary Loyalty*' (Hart Publishing, 2010) at 56.

110 For example the comments of Nugee J in *Sharp v Blank* [2015] EWHC 3220 (Ch) at [23](2).

111 As suggested by Lionel Smith '*Prescriptive Fiduciary Duties*' (2018) 37 University of Queensland Law Journal 261.

112 For example disgorgement of profits or more flexible causation rules: *Parr v Keystone Healthcare* [2019] EWCA Civ 1246, [2019] 4 WLR 99 at [18]. Or forfeiture of remuneration, see *Staechelin v ACLBDD Holdings Ltd* [2019] EWCA Civ 817, [2019] 3 All ER 429 discussed in Pollard '*Pensions Contracts and Trusts*' at ch 64.

113 [2024] SGCA(I) 5, discussed by Weiming Tan in 'Fiduciary good faith and reparative claims for breach of trust' [2024] Conv 412.

10. Proper purposes

10.1 The general requirement that a power or discretion must, in many cases, be exercised for a proper purpose is a powerful tool for judges to use[114]. It is not necessary to prove that the decision maker was dishonest nor that they knew that they were pursuing an improper (collateral) purpose[115].

10.2 It is pretty clear that the "proper purposes" test applies to the exercise of powers or discretion by an employer (or principal company) in relation to a pension scheme (as well as a trustee[116]). See eg *IBM UK Holdings v Dalgleish*[117].

10.3 Broadly, applying the proper purposes test involves[118] working out:

- what are the decision maker's purpose(s)? (subjective test); and
- are those purposes all proper? (objective test) – for the power and the scheme

10.4 The proper purposes test is pretty powerful. It does not require proof of intentional breach (it does not require that the decision makers knew that their decision was improper), nor proof of dishonesty or fraud.

10.5 It can be tricky to:

- work out whether a purpose is proper - or not; and
- work out what the employer's purposes are.

10.6 Some pensions caselaw on proper purposes:

- *National Grid*[119] – not improper to amend scheme to provide for surplus refund
- *Thrells*[120] and *Alexander Forbes*[121] – not improper to allow refund to employer instead of increasing member benefits
- *IBM*[122] - not improper for employer to use exclusion power to close scheme;
- *Courage*[123] – improper to amend to detach scheme from active members;

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114 For the proper purposes test generally, see relatively recently *Eclairs Group Ltd v JKX Oil & Gas plc* [2015] UKSC 71, [2016] 3 All ER 641 (director powers); *IBM UK Holdings Ltd v Dalgleish* [2017] EWCA Civ 1212, [2018] ICR 1681 (pension trustee powers) and *Grand View Private Trust Co Ltd v Wong* [2022] UKPC 47, (2022) 25 ITELR 630, [2023] 1 P& CR DG23 (wealth trust trustee powers). For more detail on proper purposes, see David Pollard '*Pensions Contracts and Trusts: Legal Issues on decision making*' (2020) Bloomsbury Professional) and David Pollard *The "proper purposes" test for the exercise of discretions: Fiduciaries, Eclairs and Pensions* (Paper for an APL South West Region Talk, Nov 2016).

115 See *Extrasure Travel Insurances v Scattergood* [2002] EWHC 3093 (Ch), [2003] 1 BCLC 598 (Jonathan Crow sitting as a Deputy Judge of the High Court) at [92].

116 Eg *British Airways plc v Airways Pension Scheme Trustee Ltd* [2018] EWCA Civ 1533, [2018] Pens LR 19.

117 *IBM UK Holdings Ltd v Dalgleish* [2017] EWCA Civ 1212, [2018] ICR 1681 at [45].

118 See eg David Pollard '*Pensions Contracts and Trusts: Legal Issues on decision making*' and Michael Tennet, Jonathan Hilliard and Jonathan Chew '*Discretion issues when dealing with surplus*' (Nugee Memorial Lectures, June 2024).

119 *National Grid Co plc v Laws* [2001] UKHL 20, [2001] 1 WLR 864.

120 *Thrells Ltd v Lomas* [1993] 1 WLR 456, [1993] 2 All ER 546 (Nicholls V-C).

121 *Alexander Forbes Trustee Services Ltd v Halliwell* [2003] EWHC 1685, [2003] OPLR 355 (Hart J) at [22] and [23]. See David Pollard '*The Law of Pension Trusts*' (2013, OUP) at 10.60.

122 *IBM UK Holdings Ltd v Dalgleish* [2014] EWHC 980 (Ch) (Warren J) at [285]. Upheld on appeal *IBM UK Holdings Ltd v Dalgleish* [2017] EWCA Civ 1212, [2018] ICR 1681 at [167] to [172].

123 *Re Courage Groups' Pension Schemes* [1987] 1 WLR 495 (Millett J).

- *Hillsdown*[124] – improper to use transfer-out power to get round restriction in amendment power;
- *ITS v Hope*[125] – improper to "game" the PPF; or to transfer less than "fair" share;
- *Brass*[126] – not improper to take account of PPF when deciding to seek to place employer in insolvency process;
- *BA*[127] - improper for trustees to amend increase benefits contrary to employer wishes;
- *Arcadia Group Pension Trust Ltd v Smith*[128] - can be proper to transfer surplus to another related occupational pension scheme.

Failure to exercise a power

10.7 It seems likely that the proper purpose rule only applies only to the exercise of a power; it does not apply to the failure to exercise a power[129]. But it could be a breach of some other duty? This means that a failure by an employer to consent to a matter (eg to winding-up a scheme or agreeing to use of surplus) is unlikely to be challengeable as being a breach of a proper purpose test.

Proper purposes and termination?

10.8 It can be argued that a proper purposes test does not apply to a decision to terminate an arrangement, including a pension scheme. This is on the basis that termination (ie in a pension scheme context, winding-up) involves the exercise of an express power (eg see the employment case, *Reda v Flag*[130]). This is a difficult area (see the discussion below about termination and *Braganza* duties), but seems less relevant here given that proper purposes is unlikely (for the reasons discussed above) to apply to use of an employer power for the purpose of receiving surplus in accordance with the scheme terms.

Surplus extraction and proper purposes

10.9 The ultimate position is fact dependent, but in my view: triggering or failure to exercise (or consent to) a winding-up power or distribution power, is unlikely to be a breach of the proper purpose rule.

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124 *Hillsdown Holdings Ltd v Pensions Ombudsman* [1997] 1 All ER 862 (Knox J).
125 *Independent Trustee Services Ltd v Hope* [2009] EWHC 2810 (Ch), [2010] ICR 553 (Henderson J).
126 *Brass Trustees Ltd v Goldstone* [2023] EWHC 1978 (Ch), [2024] Pens LR 1 (Richard Smith J).
127 *British Airways plc v Airways Pension Scheme Trustee Ltd* [2018] EWCA Civ 1533, [2018] Pens LR 19.
128 *Arcadia Group Pension Trust Ltd v Smith* [2025] EWHC 11 (Ch) (Master Marsh).
129 See David Pollard '*Pensions, Contracts and Trusts: Legal issues on decision making'* at ch 15.
130 *Reda v Flag Ltd* [2002] UKPC 38, [2002] IRLR 747.

11. Braganza duties /mutual duty of trust and confidence (MDTC)

11.1 Employers and principal companies[131] are likely to be held to be subject to various implied duties in relation to the exercise of powers and discretions, in particular:

(a) **Employers:** the implied contractual duty owed by an employer of mutual duty of trust and confidence[132]; and

(b) **Employers and principal companies:** the Braganza duties summarised in *Braganza v BP Shipping*[133].

MDTC

11.2 I use the shortform MDTC to describe the implied duty owed by an employer (and employee) of mutual duty of trust and confidence[134]. This is also sometimes called the "Imperial duty"[135]. MDTC has been held by the House of Lords in *Malik v BCCI*[136] to mean:

> "the employer shall not, without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of trust and confidence between employer and employee".

11.3 The MDTC duty is difficult to apply[137], but briefly the MDTC duty can be summarised as:

- being an objective test (motive irrelevant)
- not a reasonableness test
- must be a major breach – eg irrational or perverse (*Prudential*)

11.4 As a contractual duty, implied into the employment contract between an employer and employee, the MDTC duty is likely only to apply to an employer (or former employer) and not to a "principal company" or "principal employer", who may not be (and may never have been) an employer of members of the scheme[138].

11.5 I use the term "Principal Company' to refer to scheme sponsors (however named) in relation to the occupational pension scheme. Other names used include "Principal Employer". This entity usually retains various powers under the scheme, with other employers joining the scheme from time to time and usually leaving the relevant discretions to the Principal Company. The Principal Company may often not be an actual "employer" under the pensions

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131 I use the term "Principal Company' to refer to scheme sponsors (however named) in relation to the occupational pension scheme. Other names used include "Principal Employer".

132 For more detail on MDTC in a pension context, see David Pollard '*The Law of Pension Trusts*' (2013, OUP) at ch13 (Employers' Powers: The Implied Duty of Trust and Confidence) and David Pollard '*Employment Law and Pensions*'(2nd edn, 2023, Bloomsbury) at chapters 35 to 38.

133 *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661.

134 For more detail on MDTC in a pension context, see David Pollard '*The Law of Pension Trusts*' (2013, OUP) at ch13 (Employers' Powers: The Implied Duty of Trust and Confidence) and David Pollard '*Employment Law and Pensions*'(2nd edn, 2023, Bloomsbury) at chapters 35 to 38.

135 Following the decision in *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 2 All ER 597 (Browne-Wilkinson V-C).

136 *Malik v Bank of Credit and Commerce International SA* [1997] 3 All ER 1, HL per Lord Steyn at p15.

137 See *IBM* [2014] EWHC 980 (Ch), per Warren J at [354}: "it is easy to state but often difficult to apply in practice".

138 See *IBM UK Holdings Ltd v Dalgleish* [2017] EWCA Civ 1212, [2018] ICR 1681 at [9] and [367] to [370]. See also Pollard '*Employment Law and Pensions*' (2nd edn, 2023, Bloomsbury Professional) at 37.52 to 37.54.

legislation (defined as someone who currently or previously employed members in pensionable service under the scheme).

11.6 In my view, even for an employer it is likely that in practice MDTC does not add much to *Braganza* in the current context[139].

Braganza duties

11.7 Braganza duties will almost certainly apply to an employer exercising a power of discretion (or indeed determination). *Braganza v BP Shipping* was itself a case on review of a decision of an employer about whether or not a lump sum death benefit was payable.

11.8 The Braganza duties[140] borrow from the implied public law duties under the Wednesbury caselaw, in both limbs. They can be summarised as involving two limbs:

Wednesbury/Braganza 1:

due consideration: consider the relevant factors that ought to be considered
(NB: Not all the relevant factors)
Weight to be given to factors is for the decision maker.

Wednesbury/Braganza 2:

Not perverse, arbitrary, capricious or fully irrational. - "no reasonable decision maker"

Braganza duties on termination?

11.9 There are sometimes arguments that the *Braganza* / MDTC duties do not apply to a termination of a scheme (or contract)[141] as they are based on a continuing relational status. But this seems illogical to apply a termination limit where post termination benefits are concerned[142].

11.10 But on a scheme winding-up, the trust still continues (while in winding-up) and the termination exception (if it exists) seems unlikely to apply. For example see the comments in two Privy Council decisions on plan winding-up:

- *Scully v Coley*[143] - proper purposes at [49]
- *UC Rusal Alumina*[144]– irrationality, perversity or arbitrariness at [55].

Threats and negotiations:

11.11 Never say never?

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139 See eg *Prudential* and *IBM*. MDTC does not in recent years feature greatly even in mainstream employment cases. On benefit cases, see eg *Gupta v DB Group Services Ltd* [2024] EWHC 2297 (KB), *Faieta v ICAP* [2017] EWHC 2995 (QB) and *Braganza* [2015] UKSC 17 per Lord Neuberger (dissenting) at [104].

140 For more detail on *Braganza*, see David Pollard: '*Pensions Contracts and Trusts: Legal Issues on Decision Making: Applying Braganza*' (2020, Bloomsbury Professional).

141 eg *Reda v Flag Ltd* [2002] UKPC 38, [2002] IRLR 747 at [52]; *UBS v Rose* [2018] EWHC 3137 (Ch); *TAQA Bratani* [2020] EWHC 58 (Comm) at [46].
But more recently see *Tesco Stores v USDAW* [2024] UKSC 28 per Lord Leggatt at [119] (but disagreed by Lord Reed at [149]).

142 See *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661 at [54] per Lord Hodge (compare the doubt at [109], per Lord Neuberger on the survival of a duty of trust and confidence).

143 *Scully v Coley* [2009] UKPC 29 at [49]

144 *UC Rusal Alumina Jamaica Ltd v Miller* [2014] UKPC 39, [2015] Pens LR 15 at [55].

11.12 There are comments in *Imperial Tobacco*[145] that an employer saying it will never agree to grant future discretionary increases to pensions was in breach of the relevant duty of good faith/MDTC. But this seems unlikely to survive the comments of the Court of Appeal in *IBM v Dalgleish*[146]:

> "not a breach of the contractual duty for the employer to say that it did not intend to award pay increases in future except on a non-pensionable basis"

11.13 Employers should beware of making anything that could be considered to be a "threat". Eg *Hillsdown*[147]. Or at least "improper threats? But in practice, one person's 'threat' can be seen as another's bargaining position. It is prudent for an employer to make it clear that it is its current intention not to take a relevant course.

Can trustee and employer agree deal in advance?

11.14 *Courage*[148] envisages a "deal" - But probably dealing with an on-going scheme): Millett J stated:

> "Repayment will, however, still normally require amendment to the scheme, and thus co-operation between the employer and the trustees or committee of management. Where the employer seeks repayment, the trustees or committee can be expected to press for generous treatment of employees and pensioners, and the employer to be influenced by the desire to maintain good industrial relations with its workforce."

11.15 Is it arguable that such an agreement could be challengeable as a fetter on discretion/wrong time/wrong factors? Statutory s75 debt in This seems unlikely. The Trustee Board is exercising the power to agree at (broadly) the right time[149] (see eg s75 debt case – *Bradstock)*. To say otherwise would forego prospect now of benefits for members?

11.16 Any fetter principle does not apply to scheme amendments[150]. So safest to incorporate deal in an amendment. But amendment problematic if there is a "no payment to employer" fetter in the amendment power. Agreement outside an amendment seems (at least) arguable to be upheld. This will be fact specific.

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145 *Imperial Group Pensions Trust Ltd v Imperial Tobacco Ltd* [1991] 1 WLR 589, [1991] ICR 524, [1991] 2 All ER 597 (Browne-Wilkinson V-C) at p607.

146 *IBM UK Holdings Ltd v Dalgleish* [2017] EWCA Civ 1212 at [421]. See David Pollard '*Employment Law and Pensions*' (2nd edn, 2023) at ch 37, esp 37.88 to 37.105.

147 *Hillsdown Holdings Ltd v Pensions Ombudsman* [1997] 1 All ER 862, [1996] Pens LR 427 (Knox J). at [102].

148 *Re Courage Group's Pension Schemes* [1987] 1 All ER 528 at 544 (Millett J) at 515E.

149 See eg the decision on compromise of a statutory s75 debt in *Bradstock Group Pension Scheme Trustees Ltd v Bradstock Group plc* [2002] EWHC 651 (Ch), [2002] ICR 1427.

150 *Mettoy* [1991] 2 All ER 513 (Warner J) at 561 and *Stena Line Ltd v Merchant Navy Ratings Pension Fund Trustees Ltd* [2010] EWHC 1805 (Ch), [2010] Pens LR 411 (Briggs J) at [131]. See further David Pollard '*Pensions, Contracts and Trusts: Legal Issues on Decision Making'* at ch80.

12. Risk of a later challenge to a surplus payment to an employer?

12.1 Broadly it seems that it may often be easier to get a court to approve a deal in advance – rather than afterwards.

- Sometimes the courts cancel a part of a deal – the employer payment, but uphold the benefit improvements – eg *Hillsdown*[151], *National Bus*[152]
- Sometimes Parliament says it will re-write a prior surplus deal – eg proposed Mineworkers legislation (confirmed in the recent 2024 budget).

The risk issue for the employer and the trustee board as to whether they want to go to court to bless a proposal in advance (this was pretty unusual in the 1980's and 1990's).

12.2 There have been a number of cases where decisions are being taken on a particular basis only to be overturned by the courts later. Examples of this are: *Hillsdown*[153] (transfer to another scheme) and *National Bus*[154].

12.3 The courts have often not been helpful in this area. They have in the past overturned what seemed to be perfectly acceptable agreements on the basis of a lack of power. But even though the relevant "deal" seemed to have involved two elements (a) a payment to the employer and (b) an increase in member benefits, sometimes the repayment of surplus has been invalidated but the increase in benefits has been left in place. See eg *Hillsdown*[155].This seems to be a strange result.

Political risk?

12.4 Political risk also needs to be considered. There may be the prospect of a change in legislation reversing a previous agreement relating to surplus.

12.5 A recent example is the recent statement by the current government (in the 2024 budget) that it is intended for the government to give up the benefits of surplus payments to the State under an agreement[156] reached with the trustees of the Mineworkers Pension Scheme. But the government guarantee of benefits will presumably remain.

12.6 The Mineworkers Pension Scheme has been the subject of sustained political campaign in relation to a deal done about surplus some years ago. The Labour Party manifesto for the recent 2024 election (which they won) indicated that they proposed (presumably by statute) to change the previous deal give up the State's claim to a share of future surplus. But the government guarantee of benefits (given as part of the agreement) will presumably remain.

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151 *Hillsdown Holdings Ltd v Pensions Ombudsman* [1997] 1 All ER 862 (Knox J).

152 *Re National Bus Company* [1997] Pens LR 1 (PO Farrand), *NBPF Pension Trustees Ltd v Warnock-Smith* [2001] 11 WLUK 66 (Lloyd J).

153 *Hillsdown Holdings Ltd v Pensions Ombudsman* [1997] 1 All ER 862 (Knox J).

154 *Re National Bus Company* [1997] Pens LR 1 (PO Farrand), *NBPF Pension Trustees Ltd v Warnock-Smith* [2001] 11 WLUK 66 (Lloyd J).

155 *Hillsdown Holdings Ltd v Pensions Ombudsman* [1997] 1 All ER 862 (Knox J).

156 For background, see
(a) Mineworkers' Pension Scheme (House of Commons Library, Research Briefing, 31 January 2025) https://researchbriefings.files.parliament.uk/documents/SN01189/SN01189.pdf ; and
(b) Mineworkers' Pension Scheme (Business, Energy and Industrial Strategy Committee report, 29 April 2021) https://committees.parliament.uk/work/1114/mineworkers-pension-scheme/publications/ .

4 March 2025

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Appendix 1: Legal papers on surpluses

Since 2012

1. David Pollard '*The Law of Pension Trusts'* (2013, OUP) ch 20 '*Employers and surpluses*'.
2. David Pollard '*Corporate Insolvency: Employment and Pension Rights'* (7th ed, 2022, Bloomsbury Professional) ch 76 '*Winding-up the Scheme: Surpluses*'.
3. David Pollard '*Pension Scheme Surpluses: Cross funding money purchase accrual in the same scheme*' (2024) 38 Tru LI 124.
4. APL L+P submission (18 Apr 2024): APL L&P Committee to DWP re Options for Defined Benefit schemes.
    a. Response (Oct 2008) of APL Legislative and Parliamentary Sub-Committee to DWP Paper dated September 2008 entitled "Payments to the Employer (the "Surplus" Rules)"
5. Dawn Heath '*Dealing with Surplus'* slides for IFoA (March 2024).
6. Nugee Memorial lectures 2023: Aspects of DB surpluses
    a. *Refunds and benefit improvements* (Robert Ham KC and Michael Tennet KC);
    b. *Transfers out and cross funding DC sections* (David Pollard, Joseph Steadman and John Grocott-Barrett).
7. Nugee Memorial Lectures 2024: *Discretion issues when dealing with surplus* (Michael Tennet KC, Jonathan Hilliard KC and Jonathan Chew).
8. Catrin Young and Emma Game *How do you solve a problem like a surplus?* (APL Summer conf, June 2024).
9. Anna Rogers '*Managing post-termination exposure in an uncertain world'* (APL Conference, Nov 2023).
10. Sheamal Samarasekera and Gaurav Srivastava '*Surpluses: Principles and Practice*' (APL junior workshop, May 2023).
11. Kris Weber: ch G2A '*Pension Scheme Surpluses'* in *Tolley's Pensions Law*.
12. Water Companies letter to Work and Pensions Select committee (May 2022, House of Commons). https://committees.parliament.uk/publications/22292/documents/164918/default/

Before 2013

1. Tim Cox '*Case Studies on Winding-Up Occupational Pension Schemes'* (APL Conference, 1999).
2. David Pollard and Sara Chambers '*Surpluses'* (APL summer conf 2013) citing the papers below.
3. Kris Weber and Sian Williams '*Pension scheme surpluses'*, chapter G2A in *Tolley's Pensions Law*.
4. Richard Nobles '*Pensions Employment and the Law'* (Clarendon Press, 1993), particularly chapter 7.
5. Lord Browne-Wilkinson, '*Equity and its relevance to superannuation today*' (1992) 6 Tru LI 119.
6. Philip Bennett '*Pension Fund Surpluses'* (Sweet & Maxwell, 1994).
7. Lord Millett '*Pension funds and the law of trusts: the tail wagging the dog?'* (2000) 14 Tru LI 66.
8. David Pollard: '*Pensions law and surpluses: a fair balance between employer and members?'* (2003) 17 Tru LI 2;
9. Noel Davis '*Surpluses in superannuation funds – where are we now?*' (2001) 15 Tru LI 130.

10. Nigel Inglis-Jones '*Surplus: where are we now?'* (APL conference 1998).
11. Mark Greenlees '*The treatment of surpluses: an exercise in horsetrading?*' (APL conference 1991).
12. From Canada:
    a. Douglas Rienzo '*Trust law and access to pension surplus*' (2005) 25 Estates Trusts & Pensions Journal 14; and
    b. Mary Louise Dickson QC '*Pension surplus'* in book 'Equity, fiduciaries and trusts' (TG Youdan ed, Toronto, Carswell, 1989).
13. From Australia:
    a. Anthea Nolan '*The role of the employment contract in superannuation; an analysis focusing on surplus repatriation powers conferred on employers'* (1996) 24 ABLR 341.

Appendix 2: Checklist for a review of a winding-up provision:

A preliminary checklist of items to consider when reviewing a winding-up provision is below:

1. What does the winding-up power say?
2. Has it been amended in the past – did any amendment comply with limits on amendments (eg limits in the amendment power, s37 limits etc). ? Harwood-Smart case?
3. Who has the power to trigger a winding-up?
4. Is there a power to defer a winding-up if it is triggered?
5. What powers do the parties have during such a deferral –
    a. eg does the trustee get a unilateral amendment power during such a deferral? Could it use this to give benefit improvements to the members? –
    b. ? limits on the power; ? proper purpose after the British Airways case? – see Tim Cox's talk 'Case Studies on Winding-Up Occupational Pension Schemes' (APL Conference, 1999) and *Arcadia Group Pension Trust Ltd v Smith* [2025] EWHC 11 (Ch) (Master Marsh).
6. Can anyone else trigger a winding-up? – eg the courts or TPR?
7. Can an employer or trustee decision NOT to wind-up (or consent to winding-up) be challenged? – NB private trust protector cases.
8. If trustee consent for a winding up of the scheme is needed, should the trustee board agree? – see the talk by Keith Webster and Natalie Mee "*Should trustees ever agree to scheme wind-up*" later at this conference.
9. Who has the discretion over surplus after a winding-up has been triggered?
    a. Employer alone
    b. Trustee alone
    c. Employer and trustee agree
10. How to deal with run-off risk? (see Anna Rogers paper at the 2023 APL conference).
11. Can the employer and trustee agree a split/payment action in advance? Is an amendment necessary? Is an amendment allowed? Fetter on discretion?
12. Discretions or powers?
    a. Fiduciary or not?
    b. Braganza or not? (see DNP paper)
    c. Proper purposes (see DNP paper)
    d. Employer or principal company (not an employer?).