Neutral Citation Number: [2024] EWHC 34 (Ch)

Case No: PE-2019-000003

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
PENSIONS

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 17/01/2024

Before :

HH JUDGE DAVIS-WHITE KC
(SITTING AS A JUDGE OF THE CHANCERY DIVISION)

- -

Between :

AVON COSMETICS LIMITED	**Claimant**
- and -	
(1) DALRIADA TRUSTEES LIMITED	
(2) MICHELLE PARCZUK	
(3) KAROL LEWANDOWSKI	
(4) ANNA TOLLEY	
(5) NEREU DALTIN NETO	
(6) JOHN PAUL WATSON	
(together the present Trustees of the Avon Cosmetics Pension Plan)	
(7) RICHARD PINNOCK	
(as Representative Beneficiary)	**Defendants**

- -
- -

Mr Richard Hitchcock KC and Ms Lydia Seymour (instructed by **Eversheds Sutherland (International) LLP**) for the **Claimant**

Mr Paul Newman KC (instructed by **Blake Morgan LLP**) for the **First to Sixth Defendants**

Mr Keith Bryant KC and Ms Naomi Ling (instructed by **Pennington Manches Cooper LLP**) for the **Seventh Defendant**

Hearing dates: 5-6 December 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.00am on 17 January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

.....

HH JUDGE DAVIS-WHITE KC

HH Judge Davis-White KC :

Introduction

1. This judgment is given in proceedings which raise questions as to the validity of one of a number of amendments made to a pension scheme referred to as the Avon Cosmetics Pension Plan (the "Plan").

2. In short, the trust documents under which the Plan operated contained a power of amendment (the "Power of Amendment"). That Power of Amendment was subject to a proviso or fetter (the "Fetter"). The Fetter prevented any amendment which, at the date it was made, affected prejudicially (a) any pension in payment at that date or (b) any rights accrued or secured up to the date on which the amendment was made.

3. There is a point regarding the proper effective date from which the amendments took effect but I need not go into that point of detail in this judgment.

4. The relevant amendment that I was asked to consider comprised but one part of a series of amendments going well beyond simply affecting accrued rights falling within paragraph (b) of the Fetter. I am asked to assume that one part of that series of amendments (the "relevant CARE amendment") did however prejudicially affect rights falling within paragraph (b) of the Fetter.

5. The change in question affected (or purported to affect) the accrued benefit rights of certain persons who, at the date of amendment, were continuing in service (i.e. employment). By "accrued rights" I mean pension rights that had already been acquired, though not then in payment. Such entitlements arose in respect of the relevant members' service before the date of amendment.

6. At the time of the amendments, the accrued benefit rights of the relevant persons were measured by reference to (eventual) final salary. The change made by the relevant CARE amendment was to sever this link to final salary. Instead, under the amendment, the relevant member was treated as having retired at or about the date of the amendments. For these purposes, that employee's then salary was taken as being their "final salary". That benefit, that is, the amount to which the member would have been entitled if they had then retired, with his or her then (frozen) final pay, was to be valued and thereafter treated like a deferred benefit, being made subject to statutory revaluation each year by the applicable rate of the Retail Price Index (the "RPI") (subject to the maxima set by the Pensions Schemes Act 1993). I refer to this ongoing changed position as involving benefits being determined on the "Revaluation Basis" and the position prior to amendment as being that benefits were determined on the final salary basis or "FS Basis".

7. As I have said, the amendments as a whole affected more than the accrued rights, as at the date of the amendments, of those in continuing service and whose benefits had, prior to such amendment, been linked to final salary. As regards what had been the Final Pay Section of the Plan, that part of the Plan was closed, and so, as regards the future, benefits in respect of future service were also no longer based upon final salary but upon Career Average Revalued Earnings ("CARE"). The amendments as a whole have been referred to before me as the "CARE Amendments".

8. More recently, it has been identified that, as regards accrued benefits as at the date of amendment for those whose accrued benefits were, prior to the amendment, to be valued on an (eventual) FS Basis, the CARE Amendments are capable of prejudicing some of these members. In the case of each relevant member, the precise effect on that member's accrued benefits of the CARE Amendments (if valid) can only be assessed when their benefits crystallise on retirement or other leaving of employment. Nevertheless, the current actuarial assessment is that, in financial terms, certain persons will be better off under the CARE Amendments and that others will be worse off. In the first case, this will be a result of, during the relevant period of service after the date of the amendments, the rate of inflation being higher than the increases in salary of the relevant persons. In the latter case, it is the result of the member's salary increases being greater than the rate of inflation.

9. The first category of members, that is those who are better off under the relevant CARE amendment, has been referred to before me as "Revaluation Winners" . The second category of members, that is those who are worse off under the relevant CARE amendment, has been referred to before me as "FS Winners". As I have said, it is only possible to know precisely what the financial effect of the relevant CARE amendment (if valid) will have been on any particular individual member when their rights crystallise. That is because it is only at that point that the precise applicable RPI position will be known and the relevant final salary will be known.

10. In the case of FS Winners, it appears that the CARE Amendments are ones that, on the face of things, have or may have prejudiced the relevant members' accrued rights in a manner that is not permitted by the Fetter. The ultimate question raised by the proceedings is therefore what the consequence is of the Power of Amendment being exercised in such a way as results in a situation that may not have been permitted by the Fetter.

11. As originally conceived, the proceedings were to answer the question of whether or not the CARE Amendments were invalid such that members' rights in respect of the relevant accrued benefits could not be determined in all cases on the Revaluation Basis. If the Fetter had that effect then it was considered (on advice) that the consequence would be that the relevant accrued rights would be calculated on the Revaluation Basis (as per the CARE Amendments) but with what was called an "Underpin", namely that if a calculation based on the unamended FS Basis yielded a greater value that would be substituted for the value achieved by applying the Revaluation Basis. Put another way, members' entitlements in respect of the relevant accrued benefits would be provided by way of an underpin entitling them to benefits calculated on the basis of the better of the FS or the Revaluation Bases. Thus, it was considered that the court would be deciding whether the relevant amendment was in breach of the Fetter and, if it was, precisely how the FS Winners' accrued entitlements as a consequence should be dealt with.

12. The broad basis for the assumption that the Underpin would apply if the Fetter operated to prevent the CARE Amendments taking effect, as regards relevant accrued rights at the date of amendment, in full was as follows:
(1) If the CARE Amendments prejudiced FS Winners, that was prevented by the Fetter. To that extent, under the Underpin, such persons would receive, as regards their accrued rights as at the date of amendment, the higher value by reference to the FS Basis;

(2) However, to the extent that the CARE Amendments resulted in members receiving a higher value in respect of their accrued rights as at the date of amendment as a result of the application of the Revaluation Basis as applied by the CARE Amendments, then such persons were not prejudiced, the Fetter did not apply, and they did not need to rely upon the Underpin, which had no application with regard to such persons.

13. However, in circumstances that I shall go on to explain, proceedings were intimated against various professionals which had been involved in advising the Trustees and the employer at the time of the CARE Amendments (the "Potential Part 7 Defendants"). They were defined in this way because proceedings in negligence under Part 7 CPR may be brought against such persons. In effect, by claim letter it has been said that the professionals in question failed to identify the potential problem, caused by the existence of the Fetter, in validly effecting the CARE Amendments.

14. The lawyers acting for one of the professionals noted that there was a duty to mitigate loss. At that stage, it had been estimated (as set out in a Watson Wyatt Report dated 25 September 2019, and taking a calculation date of 1 January 2018), that the extra costs of benefits, were a FS Basis to be applied to all relevant members' relevant accrued rights, would be in the order of £12.3 million whereas if the Underpin applied, the extra costs would be in the region of £17.8 million. Those figures have since been updated to deal with the assessment of the position on the basis of the membership position as at 1 January 2021 and the financial conditions as at 31 December 2022. Approximate liabilities at that stage were assessed as being in the region of £6.7m with a reinstated final salary link and £12 million to provide members with either a final salary link or benefits on a Revaluation Basis, depending on which was higher. Although the extra costs of providing an underpin therefore remain in the order of over £5 million, the actual estimates of costs have changed quite significantly from the calculated position using members' details as at 1 January 2018.

15. The Potential Part 7 Defendants noted that the claim form now before me, in its then form, theoretically raised the issue of whether an Underpin should apply or not, if the CARE Amendments were found to be invalid but that, looking at the representation orders sought, it did not appear that any person was going to be appointed on behalf of those interested to argue either for or against the Underpin. Put more precisely, the claim form, it was said, did not clearly envisage an argument as to whether or not the effect of the invalidity of the amendment as regards FS Winners (if established) was that the amendment was (i) totally ineffective to effect changes to the calculations of accrued benefits of both FS Winners and Revaluation Winners or (2) only invalid as regards FS Winners, the amendment being effective in respect of Revaluation Winners.

16. The claim form was accordingly amended to raise that issue, or raise it more clearly.

17. As I shall explain, various representation orders were also sought. I deal with those at the end of this judgment. Although put in terms of arguing "for or against" the Underpin, I find it helpful to unpack that description a little more. For the FS Winners, their interest is to argue that they are entitled to have the FS Basis applied to the valuation of their accrued benefits arising from pre-amendment service. It is also in their interest to argue that the Revaluation Winners should have their like accrued benefits valued on the FS Basis. This is because the application of the Revaluation Basis to Revaluation Winners would result in a much larger payment out from the Plan and thus, at least potentially, create strain as regards available assets of the Plan to meet such liabilities. The relevant argument for the FS Winners is that, if the relevant CARE amendments are invalid as against FS Winners' relevant accrued rights then they also should not apply to anyone else (i.e. the Revaluation Winners) and the relevant CARE amendment is wholly invalid in its effect.

18. One could be forgiven for thinking that the validity of the CARE Amendments on the relevant accrued rights and their effect was a question that would most naturally be answered holistically by considering the position of each of the identified categories of persons with relevant accrued rights and, further, that the logical starting position might

be to consider the effect and validity of the amendments on the FS Winners and, in light of that, to consider the position of the Revaluation Winners. That, however, is not the way in which the proceedings have developed.

19. It was, I am told, always envisaged that the position of the FS Winners would be capable of being resolved by a process of compromise, sanctioned by the Court. I am told that that compromise has been reached (or is largely agreed). The matter is envisaged as coming before the Court in February 2024 for the Court to give any necessary sanctions. In those circumstances, and because, in addition, it is not thought appropriate for the Court's approach to be tainted by the disclosure to it of the compromise and its basis, nor any basis upon which such compromise is considered to be beneficial to particular persons including classes of member, I am invited to deal with the question of the effect of the relevant CARE amendment on the Revaluation Winners, assuming, but without determining its effect on FS Winners. The result is, in my view, somewhat unsatisfactory in the sense that the process I have to engage upon is a somewhat artificial or partial analytical process.

20. I made clear that I could only proceed to determine the rights of the Revaluation Winners if I were to make certain legal/factual assumptions about the rights of the FS Winners. The precise factual/legal basis upon which I act and the precise questions asked of me, as set out in the (already amended) claim form, can be formulated in the light of this judgment. For present purposes, however, it is agreed that I should assume that the effect of the Fetter on the position of the FS Winners is that they are entitled to be treated on a Final Salary Basis and the relevant Care amendment as affects them transgresses the Fetter and is thus invalid as against them.

21. For present purposes, it suffices to say that (on the assumption that appropriate representation orders would be granted), Mr Keith Bryant KC leading Ms Naomi Ling, argued that the effect of the Fetter was to invalidate the CARE Amendments, so far as they purport to affect relevant accrued rights, across the board. In particular, they submitted that it was not possible to sever the effect of such amendments as regards different categories of member. This was on two main bases, first that the two groups identified by the concepts of Revaluation Winners and FS Winners are not sufficiently discrete and secondly that an element of the test for severance in this context is whether or not the same decision would have been taken had the decision maker known of the legal invalidity, flowing from the Fetter, of what was purportedly effected by the CARE Amendments and that that test is not met.

22. Mr Hitchcock KC leading Ms Seymour, on the other hand, argued that the Fetter only potentially invalidates the Care Amendments as regards FS Winners and that the Care Amendments are valid so far as they affect the rights of Revaluation Winners.

23. Mr Newman KC for the trustees took a neutral stance, though assisting with the law. An important potential role for him will be in identifying practical problems from certain conclusions that the Court may otherwise reach.

24. I am grateful to all Counsel for their helpful and focussed submissions, both oral and written and to the solicitors involved, not least for their preparation of the helpful evidence and bundles.

25. As I shall explain, this judgment deals primarily with the legal issue of what, assuming the relevant CARE amendment involves what is often referred to as an "excessive exercise" of power, is the consequence for Revaluation Winners. That is, on the assumption that the power to make the relevant CARE amendment has been exceeded by purportedly moving FS Winners to the Revaluation Basis. For these purposes, the concept of an "excessive exercise" is that the relevant power (of amendment in this case) has been exercised in a manner that was not conferred by the power in a jurisdictional sense. In other words, the arguments focus on the scope of the power and the jurisdiction it grants to make the CARE Amendments so far as affects relevant accrued rights or, looked at another way, the *vires* to make the relevant amendment.

26. Although not arising in this case, at least as argued before me, it is also necessary to consider and distinguish two other principles which may result in an exercise of a power being open to challenge. This is because some of the cases in question raise these heads of potential challenge and discuss them. The two principles in question are the "inadequate reasoning" basis of challenge (labelled as such by Lord Walker in *Pitt v Holt* and referring to the principle that if a power is exercised by a fiduciary and the fiduciary fails to take into account a relevant consideration or takes into account an irrelevant consideration, the exercise will be liable to be avoided as an abuse of power and breach of fiduciary duty) and the proper purposes doctrine (or "fraud on a power" as it is sometimes referred to) dealing with the concept that a power must be exercised for the purposes for which it is conferred and not a collateral purpose.

27. At this point I should also clarify two further points.

    (1) It is not suggested by anyone that the entirety of the CARE Amendments will in any circumstances be void. The only question is the effect of the relevant CARE amendment and as regards that, this judgment is only to determine, assuming it is invalid as regards FS Winners, whether or not it is totally void and inapplicable to Revaluation Winners as well.

    (2) Nothing in this judgment is dealing with or affecting any rights of relevant members that may have arisen by way of, for example, estoppel or change of position.

The Facts

28. The Claimant, Avon Cosmetics Limited ("Avon") is the current Principal Employer under the Plan. It is proposed that a representation order is made under CPR r19.9 so that Avon acts as representative of the Revaluation Winners. The interest of the Revaluation Winners on this first hearing before me is to argue in favour of the validity of the Care Amendments in relation to them. More particularly, in relation to their pre-amendment service, it is to argue that the relevant accrued rights as at the amendment date should be calculated on the basis of their final salary at that date and thereafter revalued on the Revaluation Basis.

29. Mr Hitchcock KC leading Ms Seymour acts for the Claimant but it is proposed that a representation order be made so that the Claimant represents the interests of the Revaluation Winners.

30. The first to sixth defendants (as they currently are) are the current trustees of the Plan and are strictly neutral subject to pointing out any practical difficulties of particular rulings by the Court and assisting the Court.

31. The seventh defendant, Mr Richard Pinnock, is a former member of the Plan and is represented by Mr Bryant KC and Ms Ling. It is proposed that he be appointed to represent the position of the FS Winners. I will deal with his personal position in a little more detail when considering representation orders.

The Plan

32. The Plan was established from 1 January 1960 by an Interim Trust Deed dated 23 December 1959.

33. At the time relevant to these proceedings the power of amendment applicable to the Plan was contained in a Definitive Deed and Rules dated 29 November 1999. Clause 22 of the Definitive Deed provided (so far as relevant) as follows:

> *'22. **Alterations***
> *(1) Subject to subclauses (2), (3) and (4), the Trustees may from time to time amend this deed or the Rules with the consent of the Principal Employer. An amendment must be made by a deed executed by the Principal Employer and the Trustees. An amendment may be made even after termination of the Plan or after it is has started to be wound up.*
> *…*
> *(4) The power of amendment in subclause (1) is subject to section 67 of the Pensions Act 1995 (which restricts the making of changes affecting entitlements or accrued rights) and to the following restrictions*
> *(a) it may not be exercised in any way which affects prejudicially*
> *(i) any pension in payment at the date on which the amendment takes effect, or*
> *(ii) benefits accrued or secured up to the date on which the amendment takes effect…."*

34. As I have said, the Fetter for present purposes is that in clause 22(4)(a)(ii).

35. I have already explained, in broad terms, the manner in which the Definitive Deed operated as regards relevant accrued rights and how the relevant CARE amendment affected their position.

36. At the time of the CARE Amendments the Plan had three sections: a "Final Pay" section (a defined benefit section in which pension benefits were calculated by reference to final salary (the "FS Section")), a "money purchase" section (a defined contribution section) and a "Career Average" section (a defined benefit section in which pension benefits was calculated by reference to pensionable pay in each year of pensionable service, revalued to the date of retirement). This last section was introduced, with effect from 1 April 2003, for new "joiners" by an interim Amending Deed dated 27 March 2003. That Deed also closed the FS Section to new members.

37. The CARE Amendments were contained in a Deed of Amendment dated 3 October 2006. By clause 3 of that Deed it was provided (so far as relevant for present purposes):

> *'3 With effect from 30 September 2006 Rule 2 shall be deleted in its entirety and replaced with the following:*
> *"2.* ***Membership***
> ***Closure of entry to Career Average section and closure of accrual under the Final Pay section and the establishment of the New Money Purchase section***
> *(1) With effect from 30 September 2006:*
> *(a) The Final Pay Section shall be closed to further benefit accrual;*
>
> *…*
> *2) Any member of the Plan who was in Pensionable Employment in the Final Pay section on 29 September 2006 and who remained in Pensionable Employment on 30 September 2006, either in the Career Average Section or the New Money Purchase section shall have their benefits accrued in the Final Pay Section treated, for the purposes of Rule 18, as if they became an Early Leaver whose Pensionable Employment ceased on 30 September 2006 ….*
> *…*
> *(4) All members of the Final Pay Section who are in Pensionable Employment on 29 September 2006 will automatically become Members of the Career Average Section with effect from 30 September 2006 in respect of Pensionable Employment accrued from 30 September 2006.*
>
> *…"'*

38. As later summarised by the Watson Wyatt Report of 25 September 2019:

> *"The Final Pay section of the Plan closed to future accrual on 30 September 2006. Active members at this date became deferred pensioner members of this section and benefits accrued up to 30 September 2006 were treated as if the member had opted to the leave the Plan at that date with accrued benefits receiving statutory revaluation (linked to either the Retail Prices Index or Consumer Prices Index, as appropriate) to their retirement date. From 1 October 2006, all active members joined either the Career Average section of the Plan or the New Money Purchase section."*

39. As regards the circumstances in which the CARE Amendments came to be made, they are as follows.

40. In February 2006, the well-known firm of Watson Wyatt Limited produced a paper looking at the advantages and disadvantages to a number of different possible changes to the Plan. In the same month they also produced an estimate of the cost effect of 5 different changes to the Plan. They then made a presentation to the Avon Board in March 2006. The urgent need for change is explained on page 7 of the slide presentation. Leaving aside urgency, the need for change was to reduce current levels of pension cost to previous (sustainable) levels. The preceding slide referred to significant company contributions (some £13m in 2005) and the increased accounting pension cost between 2004 and 2005 and its projected increase in 2006 to more than double what it had been in 2004 because of lower discount rates and a historic deficit

position. As part of the proposals it was recommended that the timetable for changes should allow for the clarification of any legal constraints.

41. As regards legal constraints on change, the Trustees sought legal advice from Baker & McKenzie on whether four potential options for change to the Plan could be introduced and attached an "Options for the future plan design". In March 2006 as regards "Option 2" (which is in effect what became the relevant CARE amendment), it was said that a Plan amendment would be needed but that "Mechanically there is nothing to prevent such an amendment being made". However employment law considerations would have to be taken into account.

42. Also in March 2006, DLA Piper were asked to advise the Company as regards a number of options including what became the change effected by the relevant CARE amendment. The advice given was that the changes could be made but that an amendment to the governing plan documentation would be needed (as well as regards certain matters, employee consultation to take place).

43. At a meeting of the Trustees on 26 April 2006, one of the points raised by Baker & McKenzie was the need to ensure that members' accrued rights were not adversely affected by the proposed changes. The trustees, having discussed the proposals, are noted as having requested assurance that there was no adverse affect to [sic] accrued benefits.

44. A Watson Wyatt Note of June 2006 regarding Trustees' responsibilities in relation to the plan changes noted (among other things), under the heading "Are the proposed changes permitted?"

> "*Essentially, by law, amendments which would reduce any pension already in payment or would adversely affect benefits earned to the date of change are not permitted.*
> *The Trustees have received advice from their legal advisers, Baker & McKenzie, that neither the restrictions set out in the Plan's trust deed nor those imposed by UK legislation would prevent the exercise of the power of amendment to make the proposed changes to the Plan benefits."*

45. At a Trustees' meeting on 24 July 2006, Baker & McKenzie's advice that the proposed changes were acceptable is recorded but various other assurances from Baker & McKenzie were sought.

46. Ultimately, Baker & McKenzie were instructed to and did draft the Deed which contained the relevant CARE amendment.

47. There is witness evidence further confirming that positive advice was given that the proposed changes were lawful and that relevant amendments that were made to the Plan could be made.

48. Mr Ibbotson, a trustee of the Plan at the time, made a witness statement dated 26 July 2023 which also gave evidence about what "hypothetically" might have happened if advice had been received that the option adopted might not be or would not be legally effective. He said:

> "*16. If the advice from Baker McKenzie had been that the option being proposed to amend the Plan might or would not be legally effective, we would not have gone ahead with the amendments. We would have had to find an alternative that would be legally effective.*
> *17. I have been asked, hypothetically, what I think Avon might have done if it had been advised that the proposed amendment might or would not be effective. I think that Avon might have seen if there was a way of safely making it work, to eliminate any chance of it not working. If we had been advised that it was risky, we would not have gone ahead. I am struggling to answer as to what Avon would have done instead as it did not happen, but I think we may have gone back to look at other options or gone for the fall back - to make the Plan a defined contribution plan - which we were trying to avoid. It would have been unsustainable to go forward as it was."*

THE LAW

49. I turn now to consider the following topics:

(1) Construction of pension trust deeds and pension trust instruments;

(2) Severance;

(3) Scope of powers; inadequate deliberation; improper purposes;

(4) The Authorities.

Construction of pension trust deeds and pension trust instruments

50. I understood the general principles to be agreed.

51. First, the general law as to construction of documents applies in the field of trust law as much as in, for example, contract law or conveyancing law (see *Re Courage Group's Pension Schemes* [1987] 1 ALL ER 528 at 537f-g; *Barnardo's v Buckinghamshire & ors* [2018] UKSC 55*;* [2019] Pens. L.R. 4 at [13].)

52. A short-hand summary of the principles revisited in recent years by a number of House of Lords and Supreme Court cases has helpfully been set out by Carr LJ (as she then was) in *Network Rail Infrastructure Ltd v ABC Electrification Ltd* [2020] EWCA Civ 1645 ("Network Rail") at [18] and [19], which I gratefully adopt:

> "*[18] A simple distillation, so far as material for present purposes, can be set out uncontroversially as follows:*
>
> *(1) When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. It does so by focussing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and*

ordinary meaning of the clause, (ii) any other relevant provisions of the contract, (iii) the overall purpose of the clause and the contract, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions;

(2) *The reliance placed in some cases on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision;*

(3) *When it comes to considering the centrally relevant words to be interpreted, the clearer the natural meaning, the more difficult it is to justify departing from it. The less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning;*

(4) *Commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made;*

(5) *While commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party;*

(6) *When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time the contract*

> *was made, and which were known or reasonably available to both parties.*
>
> *[19] Thus the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. This is not a literalist exercise; the court must consider the contract as a whole and, depending on the nature, formality, and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. The interpretative exercise is a unitary one involving an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences investigated*."

53. In the field of Pensions law, the general rules of construction are applied taking into account the relevant context and the following factors have to be borne in mind:

(1) "*First, there are no special rules of construction applicable to a pension scheme; nevertheless, its provisions should wherever possible be construed to give reasonable and practical effect to the scheme, bearing in mind that it has to be operated against a constantly changing commercial background. It is important to avoid unduly fettering the power to amend the provisions of the scheme, thereby preventing the parties from making those changes which may be required by the exigencies of commercial life."* (*Re Courage Group's Pension Schemes* (supra) at 537f-h); see also *British Airways Pension Trustees v British Airways plc* [2002] EWCA Civ 672 at [28]; *Barnardo's* (supra) at [16];

(2) *"Second, in the case of an institution of long duration and gradually changing membership like a club or pension scheme, each alteration in the rules must be tested by reference to the situation at the time of the proposed alteration, and not by reference to the original rules at its inception*." (*Re Courage Group's Pension Schemes* (supra) at 537h-i); see also *British Airways Pension Trustees* (supra) at [29], [30]);

(3) Thirdly, it will often be the case that the relevant pension document will be a formal legal document, prepared by skilled and specialist legal draftsmen (*Barnardo's* (supra) at [14]);

(4) Fourthly, unlike many commercial documents, it will usually not be the product of commercial negotiation between parties who may have conflicting interests and who may conclude their agreement under considerable time pressure, leaving loose ends to be sorted out in the future (*Barnardo's* (supra) at [14]);

(5) Fifthly, it is designed to operate in the long term, defining rights long after the economic and other circumstances existing at the time when it was entered into may have ceased to exist (*Barnardo's* (supra) at [14]);

(6) Sixthly, it may confer important rights on members who were not parties to the instrument and may have joined the scheme many years after it was initiated (*Barnardo's* (supra) at [14]);

(7) Seventhly, members of a pension scheme may not have ready access to expert legal advice or be able readily to ascertain the circumstances when the scheme was established (*Barnardo's* (supra) at [14]);

(8) Factors 3 to 7 above have tended to lead the court to give greater weight to textual analysis and to attach less weight to the background factual matrix than might be appropriate in more commercial contracts (*Barnardo's* at [15]);
(9) Pension schemes are drafted to comply with tax rules so as to preserve the considerable benefits which the United Kingdom's tax regime confers on such schemes and must be construed "against their fiscal backgrounds" but also the then factual background which may include common practice amongst practitioners in the field as evidenced by the works of practitioners at that time (*Barnardo's* at [17]; *British Airways Pension Trustees* at [30]);
(10) A focus on textual analysis must not prevent the court being alive to the possibility of a drafting mistake in the use of language or grammar which can be corrected by construction (*Barnardo's* at [18]);
(11) Members of a scheme are not volunteers and the benefits which they receive are part of the remuneration for their services, moreover the relationship of members to the employer runs in parallel with their employment relationship which can, in appropriate circumstances have an effect on the interpretation of a scheme (*British Airways Pension Trustees v British Airways plc* [2002] EWCA Civ 672, [2002] PLR 247 at [27]).

Severance

54. As Lord Walker put it in *Pitt* v *Holt*, one of the strands of legal doctrine that was plaited together so as to produce the rule which was for long known as the rule in *Hastings-Bass*, named after the case of that name, was:

> "*concerned with the partial invalidity of an instrument which cannot be entirely valid because it infringes some general rule of law. It is an issue which arises, often under the rubric of severance, in many different areas of law. One example is contract law, especially in the context of illegal restraints on trade: see the judgment of Jonathan Sumption QC in Marshall v NM Financial Management Ltd [1995] 1 WLR 1461, upheld by the Court of Appeal [1997] 1 WLR 1527. Another example is byelaws held to be partly ultra vires: see the speech of Lord Bridge of Harwich in Director of Public Prosecutions v Hutchinson [1990] 2 AC 783.*"

55. As will become clearer when I consider the pension cases in the context of excess of jurisdiction in more detail, the courts have reached for the concept of severance when deciding whether an exercise of a power of amendment under a Pension Plan which is not permitted by the power of amendment may result in only a partial invalidity of the amendment in question. As will be clear from the short summary of the arguments before me that I have adverted to, Mr Bryant and Ms Ling rely upon relevant principles of severance to say that in this case, it is not possible to sever the exercise of the power of amendment so that, as regards Revaluation Winners, the relevant CARE amendment will be valid. It is therefore necessary to consider the applicable principles of severance.

56. Although, in the particular context of Pension Plan amendments, it is clear that the courts have not applied a full contractual analysis of severance as it applies in, for example, the context of illegal restraints of trade, it is helpful briefly to set out that position so that the discussion in the pension cases makes more sense.

57. The general position as regards covenants in restraint of trade is helpfully summarised by *Chitty on Contracts* (35th Edn, 2023) at paragraph 19-203 (leaving out the footnotes):

> "***General rule*** *All covenants in restraint of trade are prima facie unenforceable at common law and are enforceable only if they are reasonable with reference to the interests of the parties concerned and of the public. Although contracts in restraint of trade are against public policy and in a sense illegal, it has been held that it is:*
>
> > *"…preferable…to treat the law of the enforceability of contracts in restraint of trade as being separate from, albeit similar to, the law on the enforceability of contracts."*
>
> *Unless the reasonable term can be severed from the rest of the contract to protect the contract from failing as a whole or the objectional parts of the clause can be severed from the rest of the clause, the entire contract is unenforceable…."*

58. As regards severance, in paragraph 19-264, *Chitty on Contracts* commences a detailed discussion on severance in this context as follows (again omitting footnotes):

> **"*Introductory*** *Where all the terms of a contract are illegal or against public policy or where the whole contract is prohibited by statute, clearly no action can be brought by the guilty party on the contract; but sometimes, although parts of a contract are unenforceable for such reasons, other parts, were they to stand alone, would be unobjectionable. The question then arises whether the unobjectionable may be enforced and the objectionable disregarded or "severed". The same question arises in relation to bonds where the condition is partly against the law."*

59. After the decision of the Supreme Court in *Egon Zehnder Limited v Tillman* [2019] UKSC 32; [2020] AC 254, the issue of severance in the contractual context depends upon the application of three criteria: (a) the "blue pencil test"; (b) the "remaining adequate consideration" test and (c) that the contract remains of the same character.

60. Of these three criteria, Lord Wilson (with whose speech the other Justices agreed) said the following:

> " *[85] The first is that the unenforceable provision is capable of being removed without the necessity of adding to or modifying the wording of what remains. This is the so-called blue pencil test. Unfortunately it can work capriciously and, if the aspiration of our judgments today had been to discern in the common law a principle which can always be applied so as to produce a sensible outcome, we would have laboured in vain. In his judgment in the Divisional Court in the Attwood case, cited in para 61 above, Bailhache J said at p 155: the courts will sever in a proper case where the severance can be performed by a blue pencil but not otherwise. To give an illustration, a covenant not to carry on business in Birmingham or within 100 miles may be severed so as to reduce the area to Birmingham, but a covenant not to carry on business within 100 miles of Birmingham will not be severed so as to read will not carry on business in*

Birmingham. The distinction seems artificial, but is I think settled. The distinction is indeed settled. It is inherent in the word severance itself, which means cutting things up and does not extend to adding things in. The blue pencil criterion is a significant brake on application of the principle; and, although it can work arbitrarily, it is in my view an appropriate brake on the ability of employers to secure severance of an unreasonable restraint customarily devised by themselves. Were it ever to be thought appropriate to confer on the court a power to rewrite a restraint so as to make it reasonable, it would surely have to be achieved by legislation along the lines of that in New Zealand which has been noticed in para 79 above.

[86] The second criterion is that the remaining terms continue to be supported by adequate consideration. It goes without saying that an employer who sues on a covenant made otherwise than under seal must show that he provided consideration for it. But why is it said to be a prerequisite of his ability to sever? The answer is surely to be found in the unusual circumstances of the Sadler and Marshall cases, which generated the criteria adopted in the Beckett case. In those two cases it was the claimant employee who secured severance of unreasonable obligations cast by the contract upon himself. In that situation the court needed to satisfy itself (and in each case it did so) that, were his unreasonable obligation to be removed, there would nevertheless remain consideration passing from him under the contract such as would support the obligation which he was seeking to enforce. In the usual post-employment situation, however, the need to do so does not arise. A claimant employer who asks the court to sever and remove part of a covenant made by the defendant employee is in no way proposing to diminish the consideration passing from himself under the contract such as is necessary to support the obligation which he seeks to enforce. In the usual situation the second requirement can be ignored.

[87] The third criterion is that the removal of the unenforceable provision does not so change the character of the contract that it becomes not the sort of contract that the parties entered into at all . This is the crucial criterion and I find it impossible to equate it with the Attwood requirement, as suggested by the Court of Appeal. In my view this third criterion was rightly imported into the general jurisprudence by the Beckett case and has rightly been applied by our courts ever since then, otherwise than in the decision under appeal. But I suggest, with respect, that the criterion would better be expressed as being whether removal of the provision would not generate any major change in the overall effect of all the post-employment restraints in the contract. It is for the employer to establish that its removal would not do so. The focus is on the legal effect of the restraints, which will remain constant, not on their perhaps changing significance for the parties and in particular for the employee."

61. Lord Wilson also made clear that two other criteria which earlier cases had identified were not part of the relevant test for severance. The two elements were, first that the covenant should in effect be a combination of different covenants and secondly, that the part proposed to be removed should be no more than trivial or technical. These criteria had been identified in *Attwood v Lamont* [1920] 3 KB 571, but largely been abandoned in recent years. However, the first requirement had been resurrected as part

of the third criterion (identified in paragraph 33 above) by the Court of Appeal in the *Egon Zehnder* case. Of these two elements, Lord Wilson said:

> "*[83] ....both of the requirements which were shoe-horned into the law by the Attwood case [1920] 3 KB 571 were, as we have seen, to prove both instantly controversial and ultimately unsatisfactory. An inquiry whether the covenant proposed to be severed was indeed one covenant or whether in effect it was more than one covenant proved to be of elusive application, largely dependent on the eye of the beholder. Why was the list of prohibited trades in the Attwood case one covenant but the list of prohibited areas in each of the Putsman and Scorer cases in effect more than one covenant? And, being a question noted in para 78(e) above, why should an unreasonable restraint of insignificant proportions fail to qualify for severance just because of its place in a single covenant? The second requirement of triviality or technicality reflected an attempt to sideline application of the entire severance principle to post-employment restraints. It is far from clear that, even in 1913 and 1920, public policy demanded it; and in 1972 in the T Lucas case, it was rightly criticised in the strongest possible terms, following which it fell away."*

62. I turn to the issue of severability in the context of the exercise of powers to legislate which are exceeded. For present purposes I can concentrate on *DPP v Hutchinson* [1990] 2 AC 783. In that case Lord Bridge (with whom the majority agreed) considered that there were traditionally two tests that applied to the question of severability. First, there was the "blue pencil" test of "textual severability" and secondly there was the test of "substantial severability". As regards these tests:

> "*A legislative instrument is textually severable if a clause, a sentence, a phrase or a single word may be disregarded, as exceeding the law-maker's power, and what remains of the text is still grammatical and coherent. A legislative instrument is substantially severable if the substance of what remains after severance is essentially unchanged in its legislative purpose, operation and effect*" (*DPP v Hutchinson* at 804F).

63. Lord Lowry, in the minority, considered that the two tests, of textual severability and substantial severability had both to be satisfied before severability was possible. (Subject to this he agreed with Lord Bridge). Lord Bridge (and the majority) disagreed on there necessarily being two tests, both of which had to be met:

> *"The test of textual severability has the great merit of simplicity and certainty. When it is satisfied the court can readily see whether the omission from the legislative text of so much as exceeds the law-maker's power leaves in place a valid text which is capable of operating and was evidently intended to operate independently of the invalid text. But I have reached the conclusion, though not without hesitation, that a rigid insistence that the test of textual severability must always be satisfied if a provision is to be upheld and enforced as partially valid will in some cases, of which Dunkley v. Evans and Daymond v. Plymouth City Council are good examples, have the unreasonable consequence of defeating subordinate legislation of which the substantial purpose and effect was clearly within the law-maker's power when, by some oversight or misapprehension of the*

> *scope of that power, the text, as written, has a range of application which exceeds that scope. It is important, however, that in all cases an appropriate test of substantial severability should be applied. When textual severance is possible, the test of substantial severability will be satisfied when the valid text is unaffected by, and independent of, the invalid. The law which the court may then uphold and enforce is the very law which the legislator has enacted, not a different law. But when the court must modify the text in order to achieve severance, this can only be done when the court is satisfied that it is effecting no change in the substantial purpose and effect of the impugned provision*."

64. In considering the test for substantial severability, Lord Bridge noted that in some jurisdictions the test had been put in terms of the intentions of the persons exercising the lawmaking power and whether they would have had an intention to make the law in its proposed severed form. Thus in the United States, in the *Employers Liability Cases* (1908) 207 U.S. 463 the Supreme Court judgment of White J talked in terms of:

> "*Moreover, even in a case where legal provisions may be severed from those which are illegal, in order to save the rule applies only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated. All these principles are so clearly settled as not to be open to controversy. "*
> (see discussion in *DPP v Hutchinson* at 806B-F).

65. However, in Australia the test had been expressed in a slightly different form:

> "*In Rex v. Commonwealth Court of r Conciliation and Arbitration, Ex parte Whybrow & Co. (1910) 11 C.L.R. 1, 26-27, Griffith C.J. said:*
>
> > *"It is contended, on that authority of decisions of the Supreme Court of the United States, which are entitled to the greatest respect, that the test is this, that if the court, on a consideration of the whole statute, and rejecting the parts held to be ultra vires, is unable to say that the legislature would have adopted the rest without them, the whole statute must be held invalid. With profound deference I venture to doubt the accuracy of this test. What a man would have done in a state of facts which never existed is a matter of mere speculation, which a man cannot certainly answer for himself, much less for another. I venture to think that a safer test is whether the statute with the invalid portions omitted would be substantially a different law as to the subject matter dealt with by what remains from what it would be with the omitted portions forming part of it."*
>
> (see *DPP v Hutchinson* at 806G-807B).

66. As I read it, Lord Bridge adopted the objective approach to substantial severance. That is, the court should not ask the hypothetical question of what the person exercising the power actually would have done in the situation where they had known that they could not validly exercise the power in the manner that they had done (because of the fetter on them so doing), and in particular whether they would have exercised the power so as to create the proposed severed valid provision. Rather, the court should consider whether or not the proposed severed valid part of the provision would be a substantially

different law. It might be said that the objective intention of the exerciser of the power is ascertained in this way, rather than there being some investigation into their subjective intention. As Lord Bridge put it more elegantly:

> "*I think the proper test to be applied when textual severance is impossible, following in this respect the Australian authorities, is to abjure speculation as to what the maker of the law might have done if he had applied his mind to the relevant limitation on his powers and to ask whether the legislative instrument*
>
> > *"with the invalid portions omitted would be substantially a different law as to the subject matter dealt with by what remains from what it would be with the omitted portions forming part of it:" Rex v. Commonwealth Court of Conciliation and Arbitration, Ex parte Whybrow & Co., 11 C.L.R. 1, 27.*
>
> *In applying this test the purpose of the legislation can only be inferred from the text as applied to the factual situation to which its provisions relate*."

67. In the *Hutchinson* case, the relevant legislator had power to make bye-laws regulating the use of land appropriated for military purpose, including the power to prohibit intrusion on and obstruction of such land. However, the power was subject to the proviso or fetter that the lawmaker could not take away or prejudice rights of common. Bye-laws were made making it a criminal offence to enter or remain in an area of Greenham Common set aside for military purposes without authority. Non-commoners were convicted for breach of the bye-laws. The question was whether the bye-laws could be severed such that they were invalid as regards commoners exercising common rights but valid as regards others. The House of Lords determined that severance was not possible, applying the principles that I have outlined:

> "*In applying this test the purpose of the legislation can only be inferred from the text as applied to the factual situation to which its provisions relate. Considering the Greenham byelaws as a whole it is clear that the absolute prohibition which they impose upon all unauthorised access to the protected area is no less than is required to maintain the security of an establishment operated as a military airbase and wholly enclosed by a perimeter fence. Byelaws drawn in such a way as to permit free access to all parts of the base to persons exercising rights of common and their animals would be byelaws of a totally different character. They might serve some different legislative purpose in a different factual situation, as do some other byelaws to which our attention has been drawn relating to areas used as military exercise grounds or as military firing ranges. But they would be quite incapable of serving the legislative purpose which the Greenham byelaws, as drawn, are intended to serve.*
> *For these reasons I conclude that the invalidity of byelaw 2(b) cannot be cured by severance."*

Scope of powers; inadequate deliberation; improper purposes

68. It is first necessary to construe any power to decide what jurisdiction is thereby conferred. The principles of construction that I have referred to will apply.

69. Once the jurisdiction to exercise the power is identified and delimited, the next question is whether or not a particular exercise is or was within the terms or scope of the power, as a matter of jurisdiction or *vires*. If the person with the power errs by going beyond the scope of the power given to them, the error has commonly been referred to by lawyers as a case of "excessive execution of the power". The scope of a power can be exceeded where, for example, its terms themselves are exceeded but also where, for example, a rule of law prohibits the or a particular end result flowing from the exercise in question. These are but examples. As Lloyd LJ put it in *Pitt v Holt*:

> *"[96] The purported exercise of a discretionary power on the part of trustees will be void if what is done is not within the scope of the power. There may be a procedural defect, such as the use of the wrong kind of document, or the failure to obtain a necessary prior consent. There may be a substantive defect, such as an unauthorised delegation or an appointment to someone who is not within the class of objects. Cases of a fraud on the power are similar to the latter, since the true intended beneficiary, who is not an object of the power, is someone other than the nominal appointee. There may also be a defect under the general law, such as the rule against perpetuities, whose impact and significance will depend on the extent of the invalidity."*

70. In this case it is assumed that the Fetter applies to prevent relevant accrued rights based on final salary being altered to the Revaluation Basis where the existing rights confer greater economic benefit and thus the rights would be prejudiced by the amendment.

71. Further questions may then arise, such as whether the manner in which the power has come to be exercised, will affect the validity of the exercise. One example, is where the trustee fails to give proper consideration to relevant matters in making a decision which is within the scope of the relevant power. This was labelled by Lord Walker, in *Pitt v Holt*, as a case of "inadequate deliberation".

72. A third relevant category of invalidity may flow from an exercise of a power which is ostensibly within the scope of a power but made for an improper purpose. This is, in trusts law, often referred to, somewhat inappropriately, as a "fraudulent exercise" of a power. In the Company law context of breaches of fiduciary duty by directors, it is usually referred to as a breach of the proper purpose rule (see e.g. *Eclairs Group Ltd v JKX Oil & Gas Plc* [2015] UKSC 71; [2016] 3 All E.R. 641). In that case, Lord Sumption pointed out at paragraph [15]:

> *"… The principle has nothing to do with fraud. As Lord Parker of Waddington observed in delivering the advice of the Privy Council in Vatcher v Paull [1915] AC 372, 378, it "does not necessarily denote any conduct on the part of the appointor amounting to fraud in the common law meaning of the term or any conduct which could be properly termed dishonest or immoral. It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power." The important point for present purposes is that the proper purpose rule is not concerned with excess of power by doing an act which is beyond the scope of the instrument creating it as a matter of construction or implication. It is concerned with abuse of power, by*

doing acts which are within its scope but done for an improper reason. It follows that the test is necessarily subjective. "Where the question is one of abuse of powers," said Viscount Finlay in Hindle v John Cotton Ltd (1919) 56 Sc LR 625, 630, "the state of mind of those who acted, and the motive on which they acted, are all important".

73. What was left open by the Supreme Court in the *Eclairs* case was whether or not, in a case of multiple purposes of which only one or some were improper, the search is for the primary or dominant purpose or some other test is to b applied. Lord Sumption (with whom Lord Hodge agreed) advocated a test based on causation:

"[19] Once one accepts the need to compare the relative significance of different considerations which influenced the directors, the question inevitably arises what is the "primary" or "dominant" purpose, and how is it to be identified. One possibility is that it is the "weightiest" purpose, i.e. the one about which the directors felt most strongly. The other is that it is the purpose which caused the decision to be made as it was. Of course, the two things are connected. The ordinary inference is that the "weightiest" purpose (in this sense) will also have been causative, and that minor purposes will not have been. In most cases the two tests will in practice lead to the same result. But that will not always be so and, as will be seen, it is not necessarily the case here.

…

[21] The fundamental point, however, is one of principle. The statutory duty of the directors is to exercise their powers "only" for the purposes for which they are conferred. That duty is broken if they allow themselves to be influenced by any improper purpose. If equity nevertheless allows the decision to stand in some cases, it is not because it condones a minor improper purpose where it would condemn a major one. It is because the law distinguishes between some consequences of a breach of duty and others. The only rational basis for such a distinction is that some improprieties may not have resulted in an injustice to the interests which equity seeks to protect. Here, we are necessarily in the realm of causation. The question is which considerations led the directors to act as they did. In Hindle v John Cotton Ltd (1919) 56 Sc LR 625, 631, Lord Shaw referred to the "moving cause" of the decision, a phrase taken up by Latham CJ in Mills v Mills, supra, at p 165. But this cryptic formula does not help much in a case where the board was concurrently moved by multiple causes, some proper and some improper. One has to focus on the improper purpose and ask whether the decision would have been made if the directors had not been moved by it. If the answer is that without the improper purpose(s) the decision impugned would never have been made, then it would be irrational to allow it to stand simply because the directors had other, proper considerations in mind as well, to which perhaps they attached greater importance.

…

[22]. … As the majority (Mason, Deane and Dawson JJ) pointed out in the High Court of Australia in Whitehouse v Carlton House Pty (1987) 162 CLR 285, 294:

> *"As a matter of logic and principle, the preferable view would seem to be that, regardless of whether the impermissible purpose was the dominant one or but one of a number of significantly contributing causes, the allotment will be invalidated if the impermissible purpose was causative in the sense that, but for its presence, 'the power would not have been exercised'."*
>
> *I think that this is right. It is consistent with the rationale of the proper purpose rule."*

74. The majority of the Justices left the issue open as there had not been full argument on the point and the case could be decided on the basis that, on the facts, there was but one improper purpose in mind.

75. I should also note that the question of the purpose for which a power was exercised may raise both questions of a possible excess of power and also a breach of duty in exercising powers for an improper purpose (see e.g. *British Airways plc v Airways Pension Scheme Trustee* [2018] EWCA Civ 1533; [2018] Pens. L.R. 19).

The Authorities

76. I turn to the main authorities to which I was referred.

(1) *re Hastings Bass*

77. The simplified facts in *re Hastings-Bass* [1975] Ch 25 were as follows. In March 1958, in purported exercise of their powers of advancement under s32 of the Trustee Act 1925, trustees of a 1947 trust transferred funds out of that settlement to the trustees of a 1957 settlement, to be held on the trusts of the 1957 settlement.

78. Subject to a proviso regarding the maximum amount of the sums that could be advanced (calculated by reference to the presumptive or vested share or interest of the relevant person in the trust property to whom or for whose benefit the advancement was being made), s32 of the Trustee Act 1925 permitted trustees to pay or apply capital monies in such manner as they in their absolute discretion thought fit for the advancement or benefit of any person entitled to the capital of the trust property.

79. On the facts of the case, although the advancement was valid as regards a life interest taken in relation to such funds (under the 1957 Settlement) by a family member of the Hastings-Bass family called William, it was otherwise void (regarding other interests) as infringing the rule of law known as the rule against perpetuities. The Inland Revenue asserted that the effect of the transaction was not to create any new beneficial interests in the fund in question with the result that a large sum in tax fell due upon the death of another Hastings-Bass family member (William's father).

80. A number of propositions can be identified from the judgment of Buckley LJ in the Court of Appeal, as explained in *Pitt v Holt* at both Court of Appeal and Supreme Court level.

81. A large part of the understanding revolves around what has been identified as a fourth reported proposition of the Inland Revenue in the *Hastings-Bass* case. That "Fourth Proposition" was that to validly exercise a power of advancement the trustees must

weigh the benefits to the advancee under the sub-settlement against the other interests affected and for that purpose must have a proper understanding of the effect of the sub-settlement. If they do not, they have not validly exercised the power at all. Unless the conglomerate benefit to the advancee is found, the weighing operation cannot be carried out. (See generally *Pitt v Holt* [2012] Ch 132 at paragraphs [50] and [52] for full text of the Fourth Proposition and its further explanation.) In *Hastings-Bass*, it was submitted by the Inland Revenue, the trustees exercising the power of appointment had not appreciated that the exercise would only be valid as regards the creation of the life interest in favour of William. Hence, they did not have a proper understanding of the exercise of the power and hence the exercise was (wholly) invalid.

82. As Lloyd LJ pointed out in *Pitt v Holt* in the Court of Appeal, the fourth proposition of the Inland Revenue was rejected by Buckley LJ in *Re Hastings-Bass*. Lloyd LJ identified the ratio of Hastings-Bass being as follows (see paragraph [64]):

> *" [64] Trustees considering an advancement by way of sub-settlement must apply their minds to the question whether the sub-settlement as a whole will operate for the benefit of the person to be advanced. If one or more aspects of the provisions intended to be created cannot take effect, it does not follow that those which can take effect should not be regarded as having been brought into being by an exercise of the discretion. That fact, and the misapprehension on the part of the trustees as to the effect that it would have, is not by itself fatal to the effectiveness of the advancement. (That involves the rejection of the revenue's fourth submission.) If the provisions that can and would take effect cannot reasonably be regarded as being for the benefit of the person to be advanced, then the exercise fails as not being within the scope of the power of advancement. Otherwise it takes effect to the extent that it can."*(emphasis supplied)

83. It is important to note that the reason that the question of intention to benefit entered into the question of the validity of the exercise of the power was because the power, in *vires* terms, could only be exercised with the intention of benefitting the advancee, as set out in s32 of the Trustee Act 1925. As such, *Hastings-Bass* was about whether or not a power of advancement had been exercised as a matter of *vires* or jurisdiction. It was not about whether or not there had been an abuse of power or breach of duty by the trustees in the manner in which they had exercised a power that there was jurisdiction to exercise.

84. The judgment of Lloyd LJ in the Court of Appeal in *Pitt v Holt* was confirmed by the judgment of Lord Walker on further appeal ([2013] UKSC 26;[2013] 2 AC 108).

85. Lord Walker also helpfully identified what Hastings-Bass did not decide. At paragraph [23] he pointed out that *Hastings-Bass*:

(1) was not about mistake (not least because that would merely make the decision voidable and the Inland Revenue had to show that the decision was void);

(2) did not involve any inquiry into what was actually in the minds of the trustees when exercising the power of advancement;

(3) did not overrule an earlier case, *Abraham's* case (*In re Abraham's Will Trusts* [1969] 1 Ch 463) (which had some similarity in the facts to the Hastings-Bass case).

In the *Abraham's* case, the rule against perpetuities again operated to invalidate certain effects of an exercise of a power of advancement. Cross J held that the entire purported exercise was invalid. This was explained by Buckley LJ in *Hastings-Bass* as possibly being on the basis that the "*attenuated residue of the sub-settlement not struck down by the rule against perpetuities may not have been for the benefit of the beneficiary in question*" (as required by s32 of the Trustee Act 1925) (see Lord Walker in *Pitt v Holt* at paragraph [23]);

(4) unlike the view taken by the Court in the *Abrahams* case, considered that the benefit conferred by an advance by way of resettlement was not of a "*monolithic character*" but rather a "*bundle of rights of different characters*". As Lord Walker pointed out "*if and so far as it is an issue of severability, it is obviously easier to sever part of a bundle than part of a monolith*".

86. In development of the point that *Hastings-Bass* did not involve any inquiry into what was actually in the minds of the trustees when exercising the power of advancement, Lord Walker pointed out (see paragraph [24], *Pitt v Holt*) that, as Lloyd LJ had explained it, the Court of Appeal in *Hastings-Bass* had decided that case:

> *"[24]….on the ground that the advancement, so far as not struck down by the rule against perpetuities, must stand unless it could not, in that attenuated form, reasonably be regarded as beneficial to the advancee. That is an objective test which does not call for an inquiry into the actual states of mind of the trustees.*
>
> *[25] Lloyd LJ expanded this line of thought in para 66*:
>
> > *"If the problem to be resolved is what is the effect on an operation such as an advancement of the failure of some of the intended provisions, because of external factors such as perpetuity, 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, which would not have run into the perpetuity or other difficulty. 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, or not. If it is so capable, then it satisfies the requirement of the power that it should be for that person's benefit. Otherwise it does not satisfy that requirement. In the latter case it would follow that it is outside the scope of the power, it is not an exercise of the power at all, and it cannot take effect under that power.*"

87. In *Hastings-Bass* itself, Buckley LJ set out a statement of principle described by Lord Walker as follows (see *Pitt v Holt* paragraph [24]):

> *"[24] Buckley LJ's own statement of the principle of the decision in Hastings-Bass seems to be the passage at p 41 which has often been cited in later cases:*
>
> > *"To sum up the preceding observations, in our judgment, where by the terms of a trust (as under section 32) a trustee is given a discretion as to some matter under which he acts in good faith, the court should not*

> *interfere with his action notwithstanding that it does not have the full effect which he intended, unless (1) what he has achieved is unauthorised by the power conferred upon him, or (2) it is clear that he would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account."*

88. As regards this statement (which I shall refer to as the "Buckley LJ formulation"), Lord Walker agreed with Lloyd LJ that limb (1) covered the whole ground and that limb (2) added nothing (see *Pitt v Holt* paragraph [25]). He added:

> *"I think it* [the Buckley LJ formulation] *is also open to criticism for the generality of its reference to unintended consequences (notwithstanding that it does not have the full effect which he intended). That is a far-reaching extrapolation from one case about section 31 of the Trustee Act 1925 and two cases about the rule against perpetuities. It set ajar a door that was pushed wide open in Mettoy Pension Trustees Ltd v Evans [1990]1 WLR 1587* and other later cases."

89. Indeed, as Lloyd LJ pointed out in the Court of Appeal in *Pitt v Holt*, the *Hastings-Bass* case was later developed by a line of authority to extend well beyond the actual decision in *Hastings-Bass*. As Lloyd LJ explained the way in which *Hastings-Bass* was later developed:

> *[29] In Sieff v Fox [2005] 1 WLR 3811, para 119(i) I set out what then seemed to me to be the best formulation of the Hastings-Bass rule, on the basis of the first instance decisions:*
>
> *"Where trustees act under a discretion given to them by the terms of the trust, in circumstances in which they are free to decide whether or not to exercise that discretion, but the effect of the exercise is different from that which they intended, the court will interfere with their action if it is clear that they would not have acted as they did had they not failed to take into account considerations which they ought to have taken into account, or taken into account considerations which they ought not to have taken into account."*

90. Lloyd LJ also considered the "inadequate consideration" breach of trustees' duties. As regards this he said (see paragraph [131]) that the correct principle was not that developed from *Hastings-Bass* through *Mettoy* and later cases, but rather that set out by him in paragraph [127] of his judgment:

> *"[127] The cases which I am now considering concern acts which are within the powers of the trustees but are said to be vitiated by the failure of the trustees to take into account a relevant factor to which they should have had regard, usually tax consequences, or by their taking into account some irrelevant matter. It seems to me that the principled and correct approach to these cases is, first, that the trustees' act is not void, but that it may be voidable. It will be voidable if, and only if, it can be shown to have been done in breach of fiduciary duty on the part of the trustees. If it is voidable, then it may be capable of being set aside at the suit of a beneficiary, but this would be subject to equitable defences and to the*

> *court's discretion. The trustees' duty to take relevant matters into account is a fiduciary duty, so an act done as a result of a breach of that duty is voidable. Fiscal considerations will often be among the relevant matters which ought to be taken into account. However, if the trustees seek advice (in general or in specific terms) from apparently competent advisers as to the implications of the course they are considering taking, and follow the advice so obtained, then, in the absence of any other basis for a challenge, I would hold that the trustees are not in breach of their fiduciary duty for failure to have regard to relevant matters if the failure occurs because it turns out that the advice given to them was materially wrong. Accordingly, in such a case I would not regard the trustees' act, done in reliance on that advice, as being vitiated by the error and therefore voidable."*

91. Part of this statement of principle repeated what he had already said at paragraphs [124] and [125]. In the latter he said:

> *" [125] Accordingly, in my judgment, in a case where the trustees' act is within their powers, but is said to be vitiated by a breach of trust so as to be voidable, if the breach of trust asserted is that the trustees failed to have regard to a relevant matter, and if the reason that they did not have regard to it is that they obtained and acted on advice from apparently competent advisers, which turned out to be incorrect, then the charge of breach of trust cannot be made out."*

92. These views were confirmed by Lord Walker on appeal (see e.g. paragraphs [43], [80] –[83] and [93]-[94]), who also drew the important distinction between professional advice which will not affect the validity of a decision made in excess of power (where the professional advice may, at the most, be relevant to relief under s61 of the Trustee Act) and that which may prevent there being a breach of fiduciary duty in the context of a claim of breach of fiduciary duty by reason of inadequate deliberation.

93. Lord Walker also discussed whether a breach of fiduciary duty under the "inadequate deliberation" principle would only come into play if the trustees "would" have made a different decision or whether it was enough that, if properly advised, they "might have" done so (see paragraphs [56], [91] and [92]). He pointed out that Lloyd LJ had not resolved this issue. Lord Walker considered that the Buckley formulation (of "would not" have made a different decision) could not be regarded as clear and definitive guidance. It might be that in practice the court may sometimes think it appropriate to proceed on the basis that for family trusts "would not" would be the appropriate test and "might not" would be the appropriate test for pension trusts:

> *" But as a matter of principle there must be a high degree of flexibility in the range of the court's possible responses. It is common ground that relief can be granted on terms. In some cases the court may wish to know what further disposition the trustees would be minded to make, if relief is granted, and to require an undertaking to that effect: see In re Baden's Deed Trusts [1971] AC 424, referred to in para 63 above. To lay down a rigid rule of either "would not" or "might not" would inhibit the court in seeking the best practical solution in the application of the Hastings-Bass rule in a variety of different factual situations."*

(2) Courage Group's Pension Schemes

94. The next case, chronologically, to which I was referred is that of re *Courage Group's Pension Schemes.* I have already referred to the rules of construction iterated by Millett J (as he then was) which were adopted by him in deciding a question as to whether, on the facts in that case, trustees had a discretion or not as to concur in relevant deeds altering the schemes, assuming such amendments could otherwise be made.

95. He also decided that proposed amendments (regarding substitution of another company as "the company" under the schemes) were ultra vires as manifestly altering the main purpose of the scheme on two slightly different bases. The committee of management was, therefore, not at liberty to execute the proposed amending deeds substituting a different company as "the company".

96. He also decided that the proposed deeds could not be executed as they would involve a breach of relevant provisos to the powers of amendment in the relevant trust deeds. Such provisos were in terms of (in the case of two pension funds) not reducing accrued pensions of employed members, except in certain circumstances, and, as regards one pension scheme, not to vary or affect relevant secured benefits without the member's consent in writing. However, under the proposed amending deeds there was no guarantee of the benefits to be provided under the transferee scheme and the amendments did not carry with them the provisos and restrictions necessary to ensure that the powers conferred could not be exercised in a manner which would reduce the benefits secured by past contributions.

97. In those circumstances, there was no question of severance or partial validity of the proposed amendments. *Hastings-Bass* does not seem to have been cited to the Judge according to the law report in the All England Law Reports.

(3) Doyle v Manchester Evening News Ltd

98. In *Doyle v Manchester Evening News Limited* [1989] Pens LR 47, *Hastings Bass* was referred to. The case concerned a representative action by which (in effect) journalists sought to establish first that certain payments made by Manchester Evening News Ltd were part of their salary for the purposes of the relevant group pension scheme and secondly that any amendment of the scheme to exclude those payments from the definition of salary with retrospective effect would be invalid.

99. The Vice-Chancellor of the County Palatine of Lancaster (Blackett-Ord V-C), first determined that the payments in question were "salary" for the purpose of the relevant pension scheme (see paragraph [63]) and rejected arguments that relevant agreements in this respect were to be relieved in equity on the grounds of mistake, that there should be rectification or that the payment could in effect be excluded from the definition of "salary" in the scheme by a certification process under the scheme (see paragraphs [64]-[69]).

100. He then went on to consider the question of whether a retrospective amendment of the pension scheme rules could be made to like effect. He noted that there were five heads of attack put forward by the journalists, of which the fifth was that such a change would

be precluded by article 15.02(iii) of the relevant trust deed which prevented any amendment which would "*affect or prejudice any pension already being provided to a member at the date of such alteration or qualification taking effect".* The relevant amendment would, it was said, affect pensions already being paid. The factual position was that the amendment was to have retrospective effect (the relevant amending resolution to effect the change was passed on 16 November 1983 and was expressed to take effect from 1 April 1983). Retrospective amendments were permitted under the relevant trust deed. Between April and November 1983 two journalists retired who were entitled to a pension based on salary which included the specific payments that the Vice-Chancellor had held were to be treated as "salary" for the purposes of the pension scheme in question.

101. The Vice-Chancellor noted the submission of the journalists that the rule change was invalid. However, in his judgment the effect of the relevant provisions of the Trust Deed was simply:

> "*to exclude from their effect pensions already being paid. The proposed amendment is valid in general, but does not affect the two pensioners whose interests are already vested*" (see paragraph [84] and also [85]).

102. As regards the reference to *Hasting-Bass*, that was made by the Vice-Chancellor earlier in his judgment and not in connection with the question of the jurisdiction to amend and the limit placed upon such power by article 15.02.

103. The first four heads of attack by the journalists had attacked the exercise of a power of amendment and/or the way in which the trustees had promulgated the same showing that they were (it was said) themselves mistaken as to the position.

104. As regards this, the Vice-Chancellor considered that, in the absence of fraud, the reasons for the exercise by a trustee or his or her discretion in any particular case cannot be gone into but that <u>if</u> their motives could be analysed, the Buckley Formulation applied (see paragraph [70]). He went on, in paragraph [71]:

> *"…Here the question is not that considered by the court in <u>Re Hastings-Bass</u> but I think that the principle in the passage which I have read applies. The change of rule was authorised by the power. The question is whether the trustees would have made it had they not considered factors which they should not have considered, or omitted factors which they should have taken into account."*

105. He then went on to consider the evidence and what it was the trustees had taken into account.

106. As regards the first two heads of attack of the journalists, that the amendments were discriminatory and unfair and that they sought to overturn an agreement reached between the journalists and the relevant company, he held that whilst factually this was to some extent true it was not unfair and it did not involve an improper exercise of the trustees' powers under the deed (see paragraph [79]).

107. He then turned to the third head of attack, which was that the notice of the resolution gave a misleading impression of the effect of the change and that the trustees were

themselves mistaken as to the position. Having considered the notice in the factual context he held that objections based on the wording of the notice failed. Although it was "confused", no-one was misled and the trustees were well aware of the nature of the journalists' case (see paragraph 80).

108. He then turned to the fourth head of attack, that the rule change was considered as a package with other changes rather than separately and rejected that complaint (see paragraph [81]).

(4) Mettoy Pension Trustees Ltd v Evans

109. *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587, has since been fully explained in *Pitt v Holt*. In the Court of Appeal, Lloyd LJ dealt with the case at paragraphs [68] to [72]. The question was as to the validity or otherwise of a deed made in 1983 by the company and the relevant pension trustees.

> *"[69] ....In favour of the invalidity of the deed, at least in part, it was argued that the trustees act in executing the deed was vitiated because they had failed to take into account considerations which they ought to have taken into account, and that but for that failure they would have acted differently. The judge said, at p 1624:*
>
> > *"I have come to the conclusion that there is a principle which may be labelled the rule in Hastings-Bass. I do not think that the application of that principle is confined, as Mr Nugee suggested, to cases where an exercise by trustees of a discretion vested in them is partially ineffective because of some rule of law or because of some limit on their discretion which they overlooked. If, as I believe, the reason for the application of the principle is the failure by the trustees to take into account considerations that they ought to have taken into account, it cannot matter whether that failure is due to their having overlooked (or to their legal advisers having overlooked) some relevant rule of law or limit on their discretion, or is due to some other cause. For the principle to apply however, it is not enough that it should be shown that the trustees did not have a proper understanding of the effect of their act. It must also be clear that, had they had a proper understanding of it, they would not have acted as they did. That is apparent from In re Hastings-Bass [1975] Ch 25 itself, where the Court of Appeal, at p 36, rejected what it referred to as the fourth contention of the Inland Revenue Commissioners."*
>
> ....
>
> *[71] He then proceeded to ask himself, first, what the trustees were under a duty to consider, secondly whether they failed to consider it, and thirdly what they would have done if they had not so failed. On the first point, pressed with the submission that it was not necessary for trustees to consider every detail of a complex deed such as that made in 1983, and with their dependence on professional advice, he said that although in practice they had to rely on professional advice, the duty to take into account all material considerations is that of the trustees: see p 1626A. It was not affected by the amount or quality of the professional advice sought or given. He then held that they had not taken all matters into account, as regards the effect of the deed in changing the current provisions of the rules, that they ought to have done. The critical difference was the change as regards the exercise of the power to augment out of a surplus. He*

> *held that if the company's power had been an unfettered discretion, the trustees would have objected to the change, and would not have executed the deed in that form. Since, however, he had held that it was a fiduciary power, he held that they might well have decided to execute the deed despite the change. On that basis, the principle which he had identified was not satisfied and the deed was not in any respect invalid.*
>
> *[72] The principle on the basis of which the judge decided this aspect of the case cannot, in my judgment, be found in the decision in In re Hastings-Bass, decd [1975] Ch 25 itself. What the trustees did in relation to the Mettoy pension scheme was within their powers, on any basis. The challenge was to the propriety of their exercise of the power. To use an analogy with corporate law, the execution of the deed could not be said to have been ultra vires, which is what the revenue argued in In re Hastings-Bass, decd; rather it was an exercise of a power which might have been vitiated by a breach of duty on the part of the trustees in deciding whether or not to enter into the deed, as some acts by a company within its powers are (potentially) vitiated by a breach of duty on the part of the directors. As it seems to me, the breach of duty by the trustees of the Mettoy pension scheme (if it had been established) would have rendered the deed, at most, voidable, and certainly not void. If it had been void, I do not see how there could have been any question of it being partly valid and partly void, as the judge contemplated in the passage cited at para 70 above. Either it was void, in which case the whole deed would have failed, or it was not, in which case no part of it would have failed. Whether partial invalidity is a possible consequence if an exercise of trustees_ power is vitiated by breach of duty so as to be voidable, though not void, is a question which may need to be addressed on another occasion. It does not arise in the present cases. Sir Andrew Park had something to say on this topic in Smithson v Hamilton [2008] 1 WLR 1453, paras 68—72."*

110. In the Supreme Court, Lord Walker agreed that *Hastings-Bass* and *Mettoy* were about two different legal principles:

> *"[60] In the core of his judgment Lloyd LJ correctly spelled out the very important distinction between an error by trustees in going beyond the scope of a power (for which I shall use the traditional term "excessive execution") and an error in failing to give proper consideration to relevant matters in making a decision which is within the scope of the relevant power (which I shall term "inadequate deliberation"). Hastings-Bass and Mettoy were, as he rightly observed, cases in quite different categories. The former was a case of excessive execution and the latter might have been, but in the end was not, a case of inadequate deliberation."*

111. I have dealt with other points arising from the consideration of this case in *Pitt v Holt.*

(5) AMP (UK) Plc v Barker

112. In *AMP (UK) plc v Barker* [2001] Pens. L.R. 77, Lawrence Collins J (as he then was) had to consider an amendment made to a pension scheme which had introduced

substantial new benefits for early leavers where no such effect had been intended. The court granted relief by way of rectification but would also have been prepared to set aside the amendments for mistake and would also have held the amendments void on the basis that the trustees failed to give adequate consideration to the consequence of the amendments and would not have passed the resolution they did if they had.

113. As regards the inadequate deliberation ground of attack on the alteration, the Judge referred to *Hastings-Bass* and *Mettoy* as well as subsequent cases. He considered that the authorities were to "strongly suggest" that the application of the rule in *Hastings-Bass* led to the act being void rather than voidable (which has since been shown in *Pitt v Holt* not to be the position in law) but that resolution of the issue did not matter on the facts of the case. He also held that it did not matter whether the test required the person seeking to set aside the trustees' act to show that the trustees *would* have acted otherwise or simply *might* have acted otherwise had they been properly informed. On the facts it did not matter which formulation applied. The resolution would not have been passed if the relevant matters had been taken into account.

(6) National Grid Co plc v Mayes

114. In *National Grid Co plc v Mayes* [2001] UKHL 20; [2001] 1 WLR 864, one issue was whether arrangements made by the principal employer (as defined in a pension scheme) with regard to an actuarial surplus were within the terms of the power (under clause 14(5)) to make arrangements conferred by the relevant pension scheme. The arrangements involved payment of some sums to employees (and members) but also a reduction in the payments into the plans in question by the principal employer. The House of Lords were of the view that although the power under clause 14(5) was on its face in unrestricted terms, it was to be construed in accordance with clause 41(2) which prohibited certain amendments. As construed the House did not consider that the effect of the relevant exercise did fall within the clause 41(2) prohibition or fetter. Mr Newman submitted that in this case the rules as construed together resulted in a limitation in one rule being read into another. He submitted that it is a short step to imply a limitation from the rules into the terms of an amendment to the rules.

115. I agree that this technique is available but it seems to me that the issue is when is it appropriate to deploy it. In my judgment, and as I go on to explain, it seems to me that it is not simply a question of looking at the wording but also a question of the substantive effect on the amendment.

(7) Bestrustees v Stuart

116. *Bestrustees v Stuart* [2001] Pens. L.R. 283, was a case about the validity of attempted pension scheme changes to equalise benefits to provide for sex equality following the European Court of Justice's decision in *Barber v Guardian Royal Exchange* [1991]1 QB 340.

117. In that case, the then trustee of a pension scheme and the principal employer issued an announcement on 26 April 1994 which purported to change Normal Retirement Date (NRD) under the Scheme to age 65 for men and women. Previously it had been age 65 for men and age 60 for women. In May 1996, new rules were brought in force to give

effect to the changes in the announcement. One of the limits on the power of amendment under the scheme trust deed was that no amendment could be made which would affect in any way prejudicially the accrued rights in respect of pension benefits accrued to any prospective beneficiary (the proviso to clause 16, the "Proviso"). I focus on the effect that such a fetter was alleged to have and do not deal with other issues that arose.

118. The case raised various issues regarding the effect of the proposed alterations as between certain dates. The first relevant one for my purposes is the period between 26 April 1994 to 22 May 1996, which, in the Judgment of Neuberger J (as he then was) is referred to as the "Third Period". The relevant legal problem was that the alteration was said to take effect from 6 April 1994 whereas, if made, it was only made on 26 April 1994. Neuberger J found that the relevant purported change in this respect was ineffective for a number of other reasons. He went on to say that if otherwise effective, the alteration would have fallen foul of the Proviso. This was because the change for women to 65 years would have affected those who had been in employment earning salary in the period between 6 and 26 April 1994. If the change had not been invalid for other reasons, he would have held that the Proviso did not prevent the change taking effect, but only prospectively from 26 April 1994.

119. As regards this, he considered the issue of whether the "excessive execution" of the power to amend was, in this case, good in part or bad in part or whether it did not amount to an execution at all. Neuberger J then applied two tests: first, was the valid part of the exercise and the invalid part of the exercise of the power separable, as a matter of concept rather than language, and secondly whether there was anything which leads one to believe that had the trustee been told it could not exercise the power retrospectively, it would not have exercised the power prospectively at all:

> *"[48] To my mind, the correct approach is not one of language – it is one of concept. One is, after all, here concerned with equity. I consider, therefore, that one looks to see what is the valid exercise of the power and what is the invalid exercise. The valid exercise, if there was an exercise of the power, was to effect a variation with effect from 26 April prospectively. The invalid attempted exercise was to effect a variation retrospectively to 6 April 1994. To my mind, conceptually those two components of the single exercise are easily separable one from the other. It seems to me, however, that one must not only ask oneself whether they are easily severable conceptually, but also 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. In that connection, it seems to me that that approach is consistent with the approach of the Court of Appeal in Re Hastings-Bass [1975] Ch 25, to which I shall refer in a little more detail shortly."*

120. He applied the same analysis to the Fourth Period identified in the judgment, that from 23 May 1996 onwards. The relevant rule change purported to be retrospective to 1994 and therefore fell foul of the Proviso, in the same way that the relevant change effected by an announcement as regards the Third Period was also ineffective: *"The invalid part of the Rule is excisable, and I am satisfied that it should be excised"*.

121. However, there was also an issue because the rule change as made by a 1996 Deed, did not fully remove discrimination. Under the rule change women were given a penalty-free opportunity for retirement between the ages of 60-65 with the consent of the principal employer only, whereas men seeking to retire between these ages also required the consent of the trustee as well as the principal employer. Neuberger J dealt with this problem by treating the rules as removing the discriminatory provision applying to men in accordance with the principles which he derived from case law as to how equal pay was to be effected.

122. In this context, he also referred to an argument on behalf of the Second Defendant in the case that a change effected by a 1996 Deed was ineffective so far as it required men (but not women) to obtain the consent of the trustee for retirement between the ages of 60 and 65. The argument was based on *Hastings-Bass* but apparently as developed in *Mettoy*. Neuberger J considered that his decision as to how the rules were to be read meant that the *Hastings-Bass* principle had no operation but, if the 1996 Deed would otherwise be ineffective, he would have reached the same result on the basis of the reasoning in *Hastings-Bass* (see paragraphs [58]-[60]). In this context *Hastings Bass* was apparently being called in aid to excise the offending part of the rule change (see discussion after judgment at paragraphs [73]-[74]).

123. I find the reasoning on this point to be difficult to understand, as it appears to be compressed. As I read it, the argument for the second defendant was not that the trustee in amending the rules had wrongly acted on the assumption that the requirement for men to obtain the consent of the trustee to retire between the ages of 60-65 would be valid (whereas it was not) and had thereby taken into account irrelevant considerations. Rather, it seems to have been an argument that the power had been exercised unlawfully as regards imposing a discriminatory condition that men of the relevant age had to obtain the consent of the trustee as well as the principal employer to retire. That (unlawful) condition could be severed following the *Hastings-Bass* rule. Neuberger J said that he did not need to resort to *Hastings-Bass* to sever the unlawful part of the rule change, as he had already achieved the same result through his application of Equal Pay principles. However, if the relevant rule change regarding men was otherwise invalid, he would have severed the change and left the rest of the change as valid (so that the same provision applied to men and women). My interpretation seems to fit in with Neuberger J's earlier reliance on *Hastings Bass* as regards the retrospectivity points that had arisen and his reference in paragraph [48] to the fact that he would be dealing with the case in more detail later in the judgment.

124. The confusion stems from the reference to *Mettoy* which is now seen as an invocation of the inadequate deliberation principles rather than excess of jurisdiction principles.

(8) Betafence Ltd v Veys

125. *Betafence v Veys* [2006] Pens. L.R. 137 was another case following changes to a pension scheme which attempted to equalise benefits to provide for sex equality following the decision in the *Barber* case (supra).

126. In 1991 (as held by the Judge) the pension scheme had been altered so that between the ages of 60 and 65 men and women were entitled to retire without any reduction of pension benefit. Previously there had been a condition applicable only to male members of the scheme, namely that employer consent was first necessary.

127. In 1993, amendments were made to the pension scheme rules. Rule 23 allowed for amendments but, unless a Member had consented to the amendment, contained a proviso that "*no amendment shall be made so as to affect prejudicially the benefit secured in respect of any Member up to the date of the amendment*".

128. The 1993 amendment expressly imposed a requirement of employer consent to a retirement between the ages of 60 and 65 if there was to be no deduction from the Member's entitlement. When executed, the 1993 amendment was intended to do no more than formalise what was understood (wrongly) to have been the position following the 1991 amendment that I have referred to. There was no intention to change the 1991 rules.

129. The 1993 amendments imposing consent requirements for retirement between the ages of 60 and 65 were invalid by reason of the proviso to the amending power as regards any period prior the date of amendment, which was 17 November 1993, the date of the relevant amending deed. In this context the issue was whether the consent requirements were valid as regards benefits accruing after this date or whether the consent requirements were incapable of severance and so wholly invalid. As regards this, Lightman J said:

> *"[69] The 1993 Amendment must be construed as having effect subject to the overriding limitation on the power of amendment contained in the proviso. Questions of severance do not arise, but if they did the principles governing severance in a case such as the present (as the cited authorities establish) lead to the same conclusion. There is no requirement or scope for application of the 'blue pencil' test deleting what is objectionable and leaving standing what is unobjectionable. All that is required is that the distinction between what is and what is not objectionable is clear and that the meaning and application of what is unobjectionable is clear."*

130. The next issue he considered was the fact that the trustees had made a mistake in thinking that in respect of the 1993 amendment they were merely formalising the 1991 amendment, whereas the 1993 amendment in fact substantively altered the position brought about by the 1991 amendment. Having decided that the discretion had been exercised, Lightman J considered that the *Hastings Bass* rule (regarding inadequate deliberation) applied. Although questioning whether it was correct to apply the same rule to pensions as in private family trusts he felt bound to follow the guidance of Lloyd LJ in *Sieff v Fox.* Accordingly, (a) if the trustees were free whether or not to exercise their discretion, their exercise could only be challenged if the trustees but for the mistake would have acted differently and (b) if the trustees were bound to exercise their discretion, the exercise could be challenged if the trustees but for the mistake might have acted differently. In the instant case, (a) applied. On the evidence it could not be said that, but for the mistake the trustees would have acted differently. The amendment was therefore upheld.

(9) *IMG Pension Plan HR Trustees Ltd v German*

131. The facts in *IMG Pension Plan HR Trustees Ltd v German* [2010] Pens.L.R. 23 were similar to those in this case insofar as the case concerned a conversion of rights under a pension plan from a defined benefit scheme or final salary scheme to a defined

contribution or money purchase scheme. The change involved (as here) the conversion of accrued rights from defined benefit to defined contribution. The relevant conversion had purportedly been made from 1 January 1992 by a Deed dated 3 March 1992. The power of amendment under the governing documentation had been changed so as to remove a restriction initially contained within it. For present purposes the relevant restriction was that no amendment should have the effect of reducing the value of the benefit secured by contributions already made. Among other issues in the case were (a) was the effect of the amendment to the power of amendment (removing the previous fetter regarding reduction in value of benefit) valid; (b) if the fetter still applied, did that mean no conversion of defined benefits at the date of conversion could be effected and that the benefits could not be decoupled from any increases linked to final salary?

132. For present purposes the first relevant issue was whether the amendment to the power of amendment to remove the fetter was in excess of power. Arnold J considered that it was. He accepted the Existing Members' contention that the original power of amendment could not be construed as permitting an amendment to remove the fetter which was part of the terms of the power, limiting its scope. Otherwise, the fetter could be circumvented by first amending the power to amend by removing the fetter and then exercising the amended power to amend in a manner not permitted by the fetter. The newly stated, revised power of amendment was wholly invalid. Unlike the position in *Bestrustees* (supra) the amendment to the power of amendment could not be partially valid because it was not possible to distinguish conceptually between the valid part of the exercise of the power and the invalid part. It was not therefore necessary for the Judge (Arnold J as he then was) to consider a further argument that the exercise of the power to amend was invalid as a "fraud on the power".

133. Having determined the terms of the applicable power of amendment, Arnold J went on to consider what was the effect of the amendment regarding conversion of accrued rights in terms of (a) the proposed conversion and (b) the date at which any conversion took effect (i.e. was the amendment retrospective in effect). Leaving aside the issue of retrospectivity, he identified four different possibilities:

(1) Were the amendments effective (even without payment of special employer contributions) to amend a member's accrued "final salary" rights so as to convert such rights into an actuarially determined sum in an exclusively "money purchase" Individual Member's Account?;

(2) Were the amendments effective, as in (1) but in conjunction with a statement that special employer contributions would be paid whilst the members remained in pensionable service?;

(3) Were the amendments effective to amend a member's accrued final salary rights so as to convert such rights into a sum within a money purchase Individual Member's Account but subject to an underpin, whereby the value of benefits ultimately secured by the funds derived from that sum should be not less than the value of those accrued final salary rights calculated by reference to final salary (at various alternative dates)? or

(4) Were the amendments wholly ineffective to amend a member's accrued final salary rights at two alternative dates so as to convert such rights into a sum within a

"money purchase" Individual Member's Account, but effective in respect of accrual after that date.

134. For present purposes the issue that I have to determine is akin to the distinction between the third and fourth possibilities canvassed by Arnold J, it being assumed for present purposes that the amendment to accrued benefits from FS basis to Revaluation Basis is not valid insofar as that would prejudice members with such rights by reason of the value of such benefits being less.

135. The broad issue that I have to assume was decided by Arnold J on the basis that the answer to the first two alternatives was in the negative. However, he concluded that the effect of the fetter was to render ineffective amendments which reduced the value of benefits, and in particular future final salary benefits, which had accrued to members by virtue of their service down to the date of amendment. An amendment to convert such benefits from a final salary entitlement to a money purchase entitlement was possible but only subject to an underpin which preserved the future monetary value of the proportion of final pensionable pay which the member had accrued in respect of pre-amendment service. He thus concluded that the third alternative applied and not the fourth (see paragraph [141] and [149]). In reaching this conclusion, he accepted that (as in this case) the value of a member's benefit could not be determined at the date of the amendment but that this was the inevitable consequence of protecting the value of a benefit, such as a final salary benefit, which is inherently prospective in nature (see paragraph [140]).

(10) *IBM United Kingdom Holdings Ltd v Dalgleish*

136. This case follows, in time, the decision in the Supreme Court in *Pitt v Holt*. The first instance decision of Warren J (4 April 2014) is reported at [2014] Pens. L.R. 335; the Court of Appeal decision of 3 August 2017 ([2017] EWCA Civ 1212) is reported at [2018] ICR 1681. The decision again concerns pension schemes. Its key importance for present purposes is that Mr Bryant and Ms Ling, submit that the Court of Appeal lay down a rule that when considering a valid severance of an amendment which has been effected in excess of power, it is necessary for the court to be satisfied that the person exercising that power would have made the same decision to amend had it known and appreciated the fetter on its power of amendment.

137. The case concerned two pension schemes of UK IBM businesses. These provided either final salary, defined benefit ("DB") or defined contribution ("DC") benefits. The DB parts of the schemes had been closed to new members for years but still had about 4,000 employee members, IBM decided to close the DB parts of the schemes altogether, except for some employees who had a contractual entitlement to such benefits. The exercise was known as Project Waltz. It involved three essential elements: (a) excluding members from the DB parts of the schemes as regards future service from April 2011; (b) bringing an end to a long-standing policy of allowing early retirement from age 50, on beneficial terms for employees, as from April 2010 and (c) ensuring that future increases in salary would not count towards the employees' final pensionable salary for the purposes of DB rights referable to past service up to April 2011. The last point was to be implemented by asking employee who were members of the DB sections to sign non-pensionability agreements (NPAs), expressed to agree that future increase in their pay would not count towards their pensionable salaries for the purposes of the plans. The reason for this was that the termination of DB accrual would mean

that future service would not count for the calculation of a member's DB pension but, without more, the pension attributable to past service would be calculated by reference to a member's final salary and would therefore be affected by pay rises (the final salary link).

138. One major area of contention and submission was the scope and effect of any duty of trust and confidence implied into employment contracts and the similar duty of good faith imposed on a party such as the principal employer under a pension scheme which has a non-fiduciary discretionary power under an occupational pension scheme (referred to in the case as the *Imperial* duty after the decision in *Imperial Group Pension Trust Limited v Imperial Tobacco Limited* [1991] ICR 524, 531-535). That area I need not consider.

139. For present purposes, the issues relevant to the proceedings before me were two-fold. First, the scope of a power (conferred on the principal employer) to direct that any specified person or class of person should cease to be a member (referred to for convenience as the "exclusion power") and whether or not this power was validly introduced by way of amendment into one of the schemes, the Main Scheme, and secondly, whether on the facts the power to exclude members in reliance on such power was exercised for an improper purpose.

140. In the judgment of Warren J that I have referred to (there were in fact several judgments which ultimately were the subject of or relevant to appeals) he identified Issue 1 before him as being whether or not the relevant Exclusion Power had been validly introduced.

141. In that context, one sub-issue was: if the Exclusion Power could be exercised in a manner that would infringe one or more fetters on the then power to amend set out in 1983 documents (the "1983 Amendment Power"), was the Exclusion Power void *in toto* or should it be construed as subject to an overriding limitation to protect the relevant beneficiaries from two identified adverse effects of the relevant amendment (see paragraph [143]).

142. The relevant power of alteration in the 1983 Trust Deed and Rules allowed the Trustee to make amendments to the trusts powers or provisions of the deed or the rules and with retrospective effect but subject to a number of provisos.

(1) Proviso (d) prevented any alteration or modification which, in the opinion of the Actuary, would operate substantially to prejudice the pension payable to any member or other person who at the effective date of the amendment/modification was entitled to a pension under the scheme or a pension contingently payable to any person on the death in the lifetime of such person of a member who at the effective date of the amendment/modification was entitled to a pension under the scheme.

(2) Proviso (e) prevented any alteration or modification which, in the opinion of the Actuary, would operate to reduce the aggregate value of the retirement benefits payable under the scheme to any member not being at the effective date of such alteration/modification entitled to a pension under the scheme in respect of contributions already received by the trustee, except with the consent of the member affected (see paragraph [78]).

143. Although there was a suggestion that the Trustee was acting under a fundamental mistake as to the legal effect of the relevant amended Trust Deed and Rules conferring the Exclusion Power, because the Trustee did not appreciate such a significant new power was being introduced, it was accepted that such a mistake would not render the decision void or voidable under the then current law, following the Court of Appeal decision in *Pitt v Holt*, and no further submissions were made following the Supreme Court decision in that case (see paragraph [153]).

144. One element of the Exclusion Power that was identified as breaching the fetter identified in the provisos that I have referred to, was a break in a final-salary link between accrued service and future salary increases. The question was whether the introduction of the Exclusion Power was for this reason wholly invalid or valid pro tanto and to be given effect to in relation to service after the date of the amendment whilst preserving the final salary link in relation to service prior to the amendment (see paragraph [158]).

145. Having decided that the interests and retirement benefits protected under the provisos under (d) and (e) included the final salary link (see paragraph [184]) and that the Exclusion Power prima facie prejudiced those rights, as was conceded (see paragraph [186]), although the power could prima facie be exercised in a manner that would be valid as only affecting future accrual (see paragraphs [189]-[190]), Warren J went on to consider the question of whether the change made was wholly invalid or could be saved in part (see paragraph [192]). The principal employer, arguing for partial validity, relied on *Bestrustees, Betafence* and *HR Trustees Ltd* (see paragraphs [199]). Warren J accepted that conclusion (see paragraphs [208]-[209]). In his summary at paragraph 289(iii) he refers to the limitation on the validity of the introduction of the Exclusion Power as being one that is implied:

> "*289*
>
> *(i)….*
>
> *(ii)…*
>
> *(iii) In the Main Plan, however, the Exclusion Power was subject to an implied limitation to preserve the final salary link. I perceive that limitation as one to be implied into the 1990 Trust Deed and Rules (and subsequent iterations) so that the benefits applicable on the exercise of the Exclusion Power are the greater of (i) the ordinary leaving service benefits (based on salary at the date of exercise of the Exclusion Power and carrying statutory or scheme revaluation) and (ii) an underpin based on salary at the date when the Member concerned actually leaves service or reaches NRD but not carrying revaluation between the time of the exercise of the Exclusion Power and the date just referred to."*

146. It is to be noted that in discussing *Bestrustees*, Warren J referred simply to the conclusion of Neuberger J and not the reasoning, whereas in referring to *Betafence*, he referred to both the dicta regarding how the amendment was to be "construed" and the "only requirement" being the need for clarity as regards the distinction between what was and was not objectionable and the meaning and application of what was unobjectionable was clear.

147. I can ignore Issue 2 for present purposes.

148. Issue 3 was identified as being whether the purported exercise of the Exclusion Power in the manner envisaged in the relevant notices involved the exercise of the Exclusion Power (and/or other relevant powers) for an improper purpose (see heading above paragraph [274] and that paragraph itself).

149. At the risk of oversimplification, it was submitted that the Exclusion Power (assuming it to have been properly introduced) was actually exercised for an improper purpose, not to bring an end to the membership of the plans but only of certain sections of the plans in order to force members into different sections of the plans (see paragraphs [282], [284]) and to close relevant plans to defined benefit accrual without triggering a winding up (see paragraph [286]). Warren J concluded that no improper purpose was involved (see paragraphs [285], [286] and 289(iv)).

150. In the Court of Appeal, the Court's judgment was delivered by Sir Timothy Lloyd. Two elements of alleged improper purpose were relied upon on the cross-appeal. The first arose from the notice exercising the Exclusion Power. It was said that the notice which on the one hand excluded members of the plan but on the other hand also offered the possibility of re-joining a different part of the scheme was a contradiction in terms and shows on its face that the power was sought to be exercised for a purpose for which it was not conferred (see paragraph [165]). The second was the intention to break the final salary link which, it was said, was evinced by the notices and which the Judge had held could not be done by reason of the relevant proviso to the amendment power. Therefore, it was said, the power was sought to be used for a power beyond its ambit.

151. The Court of Appeal rejected the ground of appeal that there was an alleged improper purpose of excluding members but at the same time inviting them back in. The statement in the notices about the ability to re-join (a different part of) the plan was collateral to the function of the notices, which was to exclude from membership of the plan and the notices were neither self-contradictory nor internally inconsistent. The Judge's conclusion was upheld (see paragraphs [171]-[172]).

152. As regards the intention (which could not be given effect to) to break the final salary link, the Court of Appeal characterised this argument as being one of excessive execution of the power rather than improper purpose. This, the Court said, was quite unlike classic cases of improper purpose where the defect lies not in the terms of the execution of the power but in the motive lying behind it. In other words, motive was (and is) irrelevant to excessive execution questions. As the Court pointed out, the Judge had considered the relevant authorities on excessive execution when considering the question of whether the Exclusion Power had been validly introduced into the Main Scheme trust deed and had referred to the authorities including *Bestrustees*. The Judge had held that the exclusion power had been validly introduced but was subject to the implied limitation that it could not be used to break the final salary link (see paragraph [173] of the Court of Appeal judgment).

153. The Court of Appeal considered that by the same reasoning, there was no reason why exercise of the power should not be held valid to the extent permitted by the implicit limitation on the powers (see paragraph [174]). The Court went on however to consider the "object" and "principal reason" and the "intention" of the person exercising the power:

> *"[174].....If one were to ask whether Holdings would have given the same notices if it had been aware that it would not be able thereby to break the final salary link, the answer would have to be that it would. The object of terminating DB accrual was the principal reason for using the power. That it could not break the final salary link would perhaps have been seen as a disadvantage, but not at all as a reason for not exercising the power to the full extent available, not least because that feature was also to be dealt with by the NPAs as a separate element of Project Waltz.*
>
> *[175] ... in the present case it seems to us that Holdings's intention was to use the power to exclude DB members from their membership of the scheme, which is within the scope of the power. The fact that IBM also hoped, but failed, thereby to break the final salary link was incidental."*

154. *Pitt v Holt* is not noted in the ICR report as having been referred to. However, as I understood it, all Counsel were agreed that Sir Timothy Lloyd would have been well aware of the case and had it in mind. Mr Hitchcock essentially relied on this factor as meaning that the judgment of the Court of Appeal in IBM should be read consistently with *Pitt v Holt*. Mr Bryant relied on this factor as being a reason why the IBM judgment is to be read as imposing on lower courts at least a requirement to consider intention and the like. I will come back to this issue later in this judgment.

(11) Wedgwood Pension Plan Trustee Limited v Salt

155. In *Wedgwood Pension Plan Trustee Limited v Salt* [2018] EWHC 79 (Ch); [2018] Pens. L.R. 9, an attempt to break a final salary link was also in issue. Notices had been given to the trustee by the participating companies in a pension plan terminating their liability to contribute to the plan and the question was whether these were effective to close the plan to future accrual and break the final salary link with effect from 30 June 2006. The notices were given pursuant to a provision, rule 62, of some 2001 rules which permitted a participating company to stop contribution in respect of one or all employees by notice given to the trustee. However, the 2001 rules had replaced some 1995 rules in their entirety. The power of amendment in the 1995 rules (rule 48) contained a proviso prohibiting any alteration which "shall prejudice or adversely affect any pension or annuity then payable or the rights of any member". The then equivalent of rule 62 was rule 45 which permitted any participating company (other than the principal company) to retire from the plan if from any cause it found it "impracticable or inexpedient" to continue to participate. The Trustee contended that rule 62 had been validly introduced and the notices were effective to close the plan to future accrual and to break the final salary link. A representative beneficiary argued that the fetter in the power of amendment had been breached and that the fetter protected future as well as accrued rights.

156. The Judge, Ms Penelope Reed QC sitting as a Deputy Judge of the Chancery Division, decided first the construction of the fetter established by the proviso to rule 45 of the 1995 rules. She determined that the proviso protected accrued rights but not benefits which might be obtained in the future as a result of future service with the employer. The proviso did not protect therefore "rights" to future accruals from further service (see paragraph [44]). The power introduced by rule 62 also, as a matter of construction,

engaged the fetter that protected the final salary link for existing members (see paragraph [55]).

157. The next question was whether the exercise of the power of amendment, falling outside of the scope of the rule 48 power, resulted in the total invalidity of the introduction of rule 62 or whether the amendment should be held to be valid insofar as it did not infringe the fetter on the power of amendment. That would result in a requirement to show that the bar in rule 45 was met (see paragraph [56]).

158. The argument put forward by the trustee was that the 2nd limb of the test set out by Neuberger J in the *Bestrustees* case did not have to be satisfied and that the question was not one of severance but of construction, implying into the exercise of the power a limitation in order to give it effect. It will be recalled that the Neuberger J test had two parts. First, the question had to be asked whether the invalid part of the exercise of the power could be separated conceptually from the valid part of the exercise. Secondly, the question had to be asked whether there was anything in the exercise of the power which leads one to believe that, had the trustee been told it was not entitled to exercise the power in the way it had done invalidly (in that case retrospectively) then it would not have exercised the power as it purported to do prospectively (the valid part of the exercise) or, in the alternative, in the way that it did.

159. As regards this, the Judge considered that Neuberger J in *Bestrustees*, was applying a test of excessive exercise first and that he then went on to consider the inadequate reasoning head of attack on trustees' decisions. If the trustee would have exercised their power in any event (albeit with the excessive part of the exercise ineffective) then the rule in *Hastings Bass* would not apply (see paragraph [66]).

160. As I read it, the Judge considered that on the question of severance one looks first at the issue of conceptual separation of the valid from the invalid. However, in the case of trustees (but apparently not powers exercised by non-fiduciaries) she would say that one then goes on to consider the fiduciary duty to consider relevant factors before exercising the power and it is then material to ask whether the trustees would not have exercised the power at all, or would have exercised it differently, if they had been properly instructed as to the limits on the power. As I read it, the Judge was therefore considering first, excessive power and then the fiduciary duty of adequate reasoning. She considered that this was what the Court of Appeal had been doing in the *IBM* case. The "material to ask" question (whether the trustee would have acted differently) was then elevated into a requirement (see paragraphs [69] and [70] which I set out in full but with emphasis supplied by me):

> "*[69] Therefore, where the Court is considering whether the invalid part of the excessive exercise of a power can be severed from the good, or (to use the language of cases such as Betafence [2006] Pens. L.R. 137 and IBM [2018] Pens. L.R. 1) the exercise of the power takes place subject to a limitation to keep it within the scope of the power, this factor does have to be taken into account. As the authors of Lewin on Trusts, 19th edn say at para.29-241:*
>
> > *"Where there is an excessive execution, it is plain that such part of the exercise as is not warranted by the terms of the power or infringes some rule of law cannot stand. The principal question which then arises is whether the whole exercise is vitiated or whether it is*

> *possible to sever the invalid part from the remainder of the exercise and so allow the latter to take effect. That question will ordinarily arise in connection with dispositive powers. Severance is possible if, as a conceptual matter, it is possible to distinguish the boundary between the valid and the invalid; but in the case of a fiduciary power it is then material to enquire also whether the trustees would not have exercised the power at all, or would have exercised it differently, if they had been properly instructed as to the limits on the power, for otherwise, though the exercise will not be void, the so-called principle in Re Hastings-Bass may make it liable to challenge."*
>
> *[70] BESTrustees [2001] Pens. L.R. 283 is referred to in a footnote to the above passage. There is a similar view expressed in Thomas on Powers at para.8-04. When looked at in this way, it seems to me that this was the approach taken by the Court of Appeal in IBM [2018] Pens. L.R. 1. The Court first considered whether it was possible to import a limitation into the power which had been introduced by amendment into the scheme in order to save the valid parts and then, asked itself the question whether Holdings, if it knew that the exercise of the new power could not break the final salary link, would have gone ahead in any event and exercised the power. It concluded that Holdings would have done so on the facts of that case. I do not accept Mr Spink's argument that this part of Sir Timothy Lloyd's judgment was obiter. It seems to me that he was dealing with an issue, which, if not dealt with, would have left the exercise of the power open to attack. I therefore consider that it is a requirement to show that the trustees would have exercised the power notwithstanding the limitations on the scope of their power. It may be that in Betafence [2006] Pens. L.R. 137 and IMG [2010] Pens. L.R. 23 there was no argument but that the power would have been exercised notwithstanding the implied limitation."*

161. The Judge therefore first considered the question of conceptual distinction:

> *"[71].....As set out above, the way it is suggested that it can be saved is by the implication of a limitation which means that the Participating Companies can only serve notice that they intend to stop contributing in respect of all or some of their members if it can be shown from any cause they have found it inexpedient or impracticable to participate in the Plan.*
> *...*
> *[73].... The thrust of the decided cases is that if a limitation can be implied [which] prevents the members being prejudiced, then the Court should not be slow to make that implication."*

162. She then went on to consider whether the trustees would have acted in the same way had they been aware of the limit on their powers. Here she looked at the evidence which did not focus on that question. Factors were identified which were said to militate against the Principal Company wishing to include such a limited power (see paragraph [75]) but the Judge concluded:

> *" [77] On balance, I consider that the Principal Company would have included the Rule 62(a) power if told of the necessary limitation because of the flexibility it would have afforded them compared to the Rule 45 power. While the Plan was in surplus in 2001, the amended rules were designed to govern the Plan on a long term basis."*

Discussion: the law

163. I consider first excessive execution of a power.

164. Where there is an excessive execution of a power by reason of the exercise, on its face, falling foul of a rule of law or the exercise going beyond the limits or jurisdiction of the power (e.g. because it ignores some limitation on the power) then, at least in the pension context, the court will naturally incline to uphold the validity of the exercise so far as it can. Where what has been done can be conceptually separated into a valid exercise and an invalid exercise and the two are in substance conceptually different then it is possible to save the valid part of the exercise of the power as a matter of construction by implication of 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. This requirement is one that is mentioned, in slightly different terms, in most of the cases that I have considered. My description in this paragraph is an attempt at summarising and referring back to the earlier cases I have mentioned. It is a brief description not some definition.

165. As a matter of jurisprudential rationale, unless the valid and invalid parts of the exercise of the power can be clearly delineated then no construction to save an "unclear" valid part can be applied. An alternative way of looking at the matter is as a matter of severance of the valid from the invalid so that the valid survives. If that is the test then the cases that consider severance apply a specific severance test in this context which is not a blue pencil test and which is broadly the same as that which applies to what I have called the "construction route" as considered by me in the immediately preceding paragraph above.

166. The next question however is whether to save the valid part of an excessive exercise of a power, there is a further condition which is that the court must be satisfied that the person exercising the power, had they properly appreciated the true limits on the power, would have exercised it in the same way or at least as regards that part of the actual exercise which would otherwise be separable as valid from the invalid part. I refer to this as the "would still have exercised" test.

167. Whilst, the Neuberger J judgment in *Bestrustees* might be said to have been dealing with breach of fiduciary duty by reason of inadequate reasoning, that is not how I read his judgment. Further, it is not how the Court of Appeal considered his judgment or dealt with the "would still have exercised" test in *IBM*. Neuberger J treated his test as a composite test for severance of which the "would still have exercised test" was the second limb. Further in *IBM*, the Court of Appeal applied this test to the exercise of the exclusion power (though not its adoption, where they simply accepted Warren J's reasoning, based solely on conceptual separation and construction). The application of the "would still have exercised" test was fairly and squarely said to be not as regards any breach of fiduciary duty regarding proper purposes but as being part of a consideration of excessive execution or exercise. In short, if Ms Reed QC in *Wedgwood* was saying that the "would still have exercised test" was being considered

in the relevant cases as part of a consideration of the application of the "inadequate reasoning" breach of fiduciary test (or, I would add, if it is suggested that it is only relevant to a breach of the fiduciary duty relating to proper purposes or fraud on a power) then I would disagree.

168. In my judgment, it is necessary to go back to the cases prior to *Hastings-Bass*, as well as *Hastings-Bass*, as explained in *Pitt v Holt*. In summary:

(1) In the context of powers of advancement and a failure of some of the intended provisions of the exercise of the power, the test is an objective one: whether that which was done, with all its defects and consequent limitations, is capable of being regarded as beneficial to the intended object, or not. If it is so capable then it satisfied the requirement of the power that it be for the person's benefit. It is not useful to ask what the trustees would have thought and done if they had known about the problem (see Lloyd LJ at paragraph [66] in *Pitt v Holt*).

"If the provisions that can and would take effect cannot reasonably be regarded as being for the benefit of the person to be advanced, then the exercise fails as not being within the scope of the power of advancement. Otherwise it takes effect to the extent that it can (see paragraph [64])."

(2) As Lord Walker pointed out:

"*That is an objective test which does not call for an inquiry into*

the actual states of mind of the trustees."

(3) In *Abrahams' Will Trusts* the general factual position had been similar to that in *Hastings-Bass* where the rule against perpetuities had invalidated certain aspects of a purported exercise of a power of advancement by way of sub-settlement. Unlike *Hastings-Bass*, the decision was that the entire exercise was invalid. The justification for the different result was explained in *Hastings-Bass* as being:

"on the basis (and only on this basis) that, because of the limited extent to which the sub-settlement could take effect, the advancement was one which, as properly understood, could not reasonably be regarded as being for the benefit of the advancee. It was therefore not within the scope of the power."(Pitt v Holt, Lloyd LJ at paragraph [58])."

(4) The decision in *Hastings-Bass* itself, although about the scope of the power in that case and whether it had been exceeded, did not turn on an inquiry:

*"into what was actually in the minds of the trustees in exercising the power of advancement. There seems to have been no evidence of this, and in Buckley LJ's discussion at pp 39—41 (extensively quoted by Lloyd LJ at paras 53—56) the recurrent theme is what the trustees, as reasonable trustees, "should" or "would" have considered or intended." (*Lord Walker in *Pitt v Holt* at paragraph [23] of his judgment.)

169. Turning to the *IBM* case, the Court of Appeal was considering a breach of fiduciary duty not by reason of inadequate reasoning but in exercising the power in question for

improper purposes. The Court, however, considered this aspect of the arguments from the perspective of excessive execution (see paragraph [173]) rather than breach of duty with regard to the proper purposes rule. (In any case, it is unclear that the giver of the notice in that case owed a relevant fiduciary duty in this respect). The court drew the distinction between examining "motive" (on a breach of duty case but not as regards excess of power) on the one hand, and "intention" and "object". As in *Hastings-Bass* itself, the focus was what the exerciser of the power "would have done" but there was no discussion by either Warren J or the Court of Appeal of actual evidence of (subjective) intention or state of mind. In my judgment the court was considering the matter from an objective view point and, in effect, asking whether the power, so far as it was otherwise validly exercised, was being objectively exercised to effect the change in question, within the scope of the power or not. Looking at the various surrounding facts and documents, it was able to say that it was:

"[174]…. The object of terminating DB accrual was the principal reason for using the power….."

[175]…. The fact that IBM also hoped, but failed, thereby to break the final salary link was incidental…."

170. The way that I would put it, is that 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. The "would still have exercised" test is a way of showing the invalid exercise was but incidental. Looked at from the perspective of the public law cases on severance, it is akin to the need for the severing court to be satisfied that the part that is severed and survives would not result in a substantially different exercise of the power than the unsevered exercise.

171. From the perspective of contractual severance, the concept is that:

> "*the removal of the unenforceable provision does not so change the character of the contract that it becomes not the sort of contract that the parties entered into at all" (*see *Egon Zehnder Limited v Tillman* [2019] UKSC 32; [2020] AC 254 paragraph [87] discussed above in the part of this judgment under the heading "severance").

172. From the perspective of public law, the test of substantial severance requires the court to be satisfied that severance would be "*effecting no change in the substantial purpose and effect of the impugned provision*" (see *DPP v Hutchinson* [1990] 2 AC 783).

173. The evidence of Mr Ibbotson demonstrates the very problems of asking for factual evidence from a witness, after the event, of their answer to a hypothetical question. That problem is as identified in the cases that I have discussed with regard to statutory severance and is entirely consistent with the dicta in *Pitt v Holt* that actual intention is not what the court is looking to investigate. Indeed, if it was necessary to examine with witnesses what on the balance of probabilities they would have done, that itself may turn on the need to carry out a huge investigation as to what evidence would then have been available to the decision maker, if asked for (which might also involve what others would have recommended). It seems to me unlikely that a question of *vires* should turn

on such an inquiry. In Mr Ibbotson's case, it is of course a truism that the Trustees would not have carried out the amendments in the form they were made to the extent that they were if there was a relevant risk that they were invalid. To speculate as to what decision the trustees actually would have reached in that scenario would involve, no doubt, actuarial and business/economy projections not just of the effect of the Underpin but of wholly different options as well as a consideration of what was thought to be acceptable to employees and so on. It does not seem to me right that question of severability of the sort I am dealing with would necessitate a complete re-running of an options exercise carried out some years earlier. The (partial) validity of an amendment in this context should be capable of being determined from the context and the relevant instrument itself. As it has been put in the context of legislative severance, but changing the wording to the Trust context: *the purpose of the amendment can only be inferred from the text of the amendments as a whole as applied to the factual situation to which their provisions relate.* This assists in identifying a single approach whether it is looked ta through the lens of construction or the lens of severability.

174. Ultimately, I consider that whether the matter is viewed as one of construction or one of severability the same answer will apply (and at least does apply in this case). Even in the context of textual severability in the legislative field, the issue of construction requires not only the valid to be clearly separate from the invalid as a matter of concept but for the overall purpose of the legislation (as it remains) to be considered:

> " *When it* [textual severability] *is satisfied the court can readily see whether the omission from the legislative text of so much as exceeds the law-maker's power leaves in place a valid text which is capable of operating* <u>*and was evidently intended to operate independently of the invalid text"*</u> (See *DPP v Hutchinson* [1990] 2 AC 783 discussed above) (emphasis supplied).

The law applied to the facts

175. It seems to me that the concepts of FS Winners and Revaluation Winners and the "underpin" are clearly sufficiently different and identifiable, even if there may be a timing issue as to when categorisation of an individual relevant member into the relevant category is possible. Other cases have followed this course. The Trustees, through Mr Newman, have not identified any difficulty in this respect. Whether viewed as a question of construction or severance, there is no problem in this respect. Mr Bryant submitted that the concepts were not sufficiently different and identifiable but this seemed to me largely an assertion rather than being based upon any concrete factors.

176. Turning to the question of substantial purpose, looking the CARE Amendments as a whole, their substantial purpose was to remove the final salary link by closing the FS Section to future accruals and to move those with accrued rights to a FS link to the Revaluation Basis. If, as I am to assume, the Trustees were not able, because of limitation on the amendment power, fully to sever the FS link for one category, namely FS Winners, it seems to me objectively that what remains (as regards Revaluation Winners) was precisely within the overall objective intention. What is left, assuming one removes simply the FS Winners from the relevant CARE amendment is, in my judgment, a situation which "*effect[s] no change in the substantial purpose and effect of the impugned provision".*

177. I turn briefly to consider "inadequate reasoning". I can be brief. On the basis of the evidence it does not seem to me that there is any issue of possible breach of fiduciary duty in relation to inadequate reasoning based on the Trustees having (on the assumed basis) misunderstood the legal effectiveness of the relevant CARE amendment. Quite simply, they considered the relevant issue of jurisdiction and prejudice and acted on proper legal advice. In the light of *Pitt v Holt*, there is no question of breach. It seems to me that a test of "would they have still exercised the power" simply does not arise.

178. Finally I turn to improper purpose or fraud on the power. Again, as in *IBM*, it seems to me that there is no question of any improper motive. The motives were entirely proper. The fact that what was intended was (on the assumed facts) in part legally not possible is a question going to jurisdiction and excessive exercise not to proper purposes or fraud on the power.

Conclusion

179. Accordingly, on the assumption that the relevant CARE amendment is invalid as regards the accrued rights at the relevant time of FS Winners, it seems to me that it is nevertheless valid as regards Revaluation Winners.

Representation orders

180. I was asked to make representation orders with regard to the live issue before me in this case, and appointing:

(1) the claimant as representative of the Revaluation Winners, arguing the validity of the Care Amendments so far as they affect the accrued rights of members in service with a then accrued right to a pension on a FS Basis of assessment;

(2) the seventh defendant as representative of the FS Winners, arguing against the validity of the CARE Amendments so far as they affect such accrued rights referred to in (1).

181. For reasons that I go on to explain I decided to make such representation orders prior to handing down this judgment.

182. The application was made pursuant to CPR r19.9 which, so far as relevant, provides:

> "*Representation of interested persons who cannot be ascertained etc. 19.9—(1) This rule applies to claims about–*
>
> *(a) …*
>
> *(b) property subject to a trust; or*
>
> *(c) …..*
>
> *(2) The court may make an order appointing a person to represent any other person or persons in the claim where the person or persons to be represented–*
>
> *(a) …*
>
> *(b) …*
>
> *(c) … or*
>
> *(d) are a class of persons who have the same interest in a claim and–*
>
> *(i)….;or*

(ii) to appoint a representative would further the overriding objective."

183. In each case it seems to me that the two classes in respect of whom the representation order should be made, FS Winners and Revaluation Winners each form a class of persons who have the same interest in the claim (at least as regards the issue in question), that the claim is about property subject to a trust and that to appoint a representative for each class would further the overriding objective. I am also satisfied that the requirements of CPR r19.9 are met as regards the applicant for the orders and service of the same.

184. I had two main concerns or issues that I considered I need to deal with in a little more detail.

185. The first concern was the late stage at which the application was sought to be dealt with, effectively as part of the substantive consideration of the relevant issue and under the same judgment. As a practical matter, it might be viewed as holding a gun (or perhaps a carrot) to the court's head. If the court decides that a representation order is not appropriate or that there is no jurisdiction to make it, then a full hearing will have been wasted. This however is simply a practical objection. In response, it may be said that the Court will act correctly and not be (improperly) swayed by the gun (or carrot). I should add that I am told (and the reported cases show) that it is quite common in pension cases at least to make the representation order(s) at the very end of the relevant proceedings or part thereof.

186. Further in this context, I note that CPR r19.9(7) provides that a judgment or order will, subject to certain conditions, be binding on all persons represented in the claim, but only where the judgment or order is given in a claim in which a party is acting as a representative under the rule. However, had no representation orders been made before judgment was handed down, this judgment would have been given before any person was acting as an appointed representative. There might be a question whether the desired effect of CPR r19.9(7) will apply (a) because only with retrospective effect will the relevant party (assuming a representation order is made) at the relevant time have been acting as a representative appointed under CPR r19.9 and/or (b) the substantive Order giving effect to this judgment on the claim can be made immediately after the making of the representation orders. This was a point that I raised in the draft judgment as circulated prior to formal hand down. In that draft I invited the parties to consider whether they wished to present further argument before I handed down judgment on the substantive issue or whether they were content to address me after hand down with regard to the form of order. I should add that I have not been shown any case raising the issue that I now raise. Ultimately it is for the parties to be satisfied that there is not a problem about late (as I would put it) representation orders being made.

187. I received a very helpful note from Mr Newman on behalf of all parties. In brief, it was submitted that the position was covered by CPR r19.10(2) and that all the members and beneficiaries of the Plan (apart from the Seventh Defendant, who has been separately joined) are bound by the final judgment, unless and until the representation orders sought in these proceedings are made. Alternatively, it was suggested that I could make the representation orders prior to formally handing down judgment.

188. I do not consider that it is appropriate for me to make any determination on this point and as regards the further submissions made to me. However, it seemed to me sensible to make the representation orders, as suggested, prior to handing down judgment on a "belt and braces" basis. Accordingly, I made such an order the day before the hand down of this judgment, which can be treated on this point as setting out my reasons for deciding such orders were themselves appropriate.

189. The second concern that I had was that of "interest". As regards the FS Winners, there are two sub-issues, first the personal position of the seventh defendant and secondly the relevant interests of the FS Winners. As regards the Revaluation Winners, the question is the position of the claimant.

190. As regards Mr Pinnock, he is an FS Winner who was a member in service at the date of the amendments. Although he has left the scheme he still has a real interest as a FS Winner. He has been advised and represented by well-known and extremely competent solicitors and counsel. I have no difficulty in making a representation order in relation to him.

191. As regards the claimant, it might be said that the claimant's interest is in minimising any costs to the Plan flowing from the CARE Amendments. I am asked to assume that the relevant CARE amendment is invalid as regards the FS Winners. If the relevant CARE amendment is valid as regards Revaluation Winners, then, as I have indicated, the extra costs to the Plan have been estimated to be £5.5 million (the difference between the £12.3 and the £17.8 million figures that I mentioned earlier) or £5.3 million (on the updated figures).

192. Ultimately, this consideration did not cause me to refuse to make the representation orders sought in relation to the claimant and the Revaluation Winners. First, the figures I have given are only an estimate. They may turn out to be completely wrong in the light of the way in which the economy develops and the way in which final salaries in practice change. Further, and in any event, the application is under CPR r19.9 not 19.8 (where a "same interest" test applies). As the cases make clear (see e.g. *Thompson v Fresenius Kabi Ltd* [2013] Pens L.R. 158 esp. at paragraphs [14]- [16]; *Punter Southall Governance Services Ltd (as Trustee of the Axminister Carpets Group Retirement Benefits Plan) v Hazlett* [2022] Pens, L.R. 1)), the test is whether the court is satisfied that the represented class will be properly represented.

193. Again, the employer is advised by and represented by extremely well known and extremely competent solicitors and counsel. The Trustees (likewise advised) are satisfied that all members and beneficiaries are properly represented and that all arguments that can be put before the court will be advanced by legal teams and, the hearing now being complete, the Trustees have not suggested that their assessment has been disappointed or has changed. Further, I am satisfied that that assessment has proved to be correct. On that basis and in line with the authorities shown to me I was content to make the representation orders as regards the claimant and the Revaluation Winners for the purposes of this hearing.

194. It follows that I made the representation orders as sought.

195. I invite the parties to agree a form of order to give effect to this judgment. If the parties can agree such an order then there need be no further hearing regarding this judgment. Otherwise a short remote hearing should be capable of being arranged.