

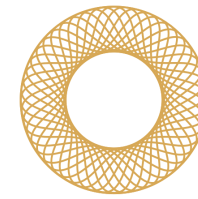
# Outer Temple

***Courage fetters, construction, severance  
and compromise – where are we now?***

**(in light of Avon Cosmetics v Dalriada Trustees)**

Keith Bryant KC, Naomi Ling

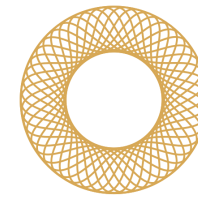
## Avon Cosmetics Ltd v Dalriada Trustees Ltd



**Outer Temple**

- Two judgments:
  - [2024] EWHC 34 (Ch) – 17 January 2024 (hearing 5-6 December 2023)
    - The Revaluation Winners judgment
  - [2024] EWHC 317 (Ch) – 19 February 2024 (hearing 15 February 2024)
    - The Final Salary Winners judgment
- KB: Introduction / Summary of facts / Revaluation Winners judgment
- NL: Rep Ben Comment on Revaluation Winners / Where does that leave us?

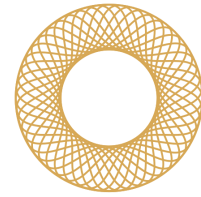
## Introduction



**Outer Temple**

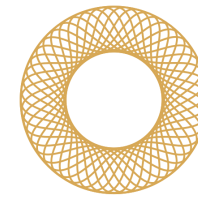
- The Scheme: The Avon Cosmetics Pension Plan
- The Parties: Avon Cosmetics Ltd – sponsoring employer / C  
Dalriada Trustees Ltd and ors – current trustees / D1-6  
Richard Pinnock – rep ben / D7

## A minor digression – Final salary links / Courage fetters

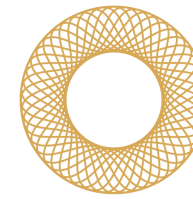


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- Final salary link:
  - DB (final salary) scheme
  - Benefits calculated by reference to 'Final Pensionable Salary' or similar
  - Which defined not as salary at time cease pensionable service
  - But as salary at time take benefits (or, eg, earlier voluntary deferment)
  - So even if scheme closes to future accrual
  - Members still benefit from future salary increases in benefit calculation



- Courage fetter:
  - After *Re Courage Group's Pension Schemes* [1987] 1 ALL ER 528
  - Amendment proviso prohibiting amendments which '*vary or affect any benefits already secured by past contributions ...*' (as in *Courage*)
  - Other formulations, eg '*affects prejudicially benefits accrued or secured up to the date the amendment takes effect*' (as in *Avon*)
  - *Courage* and later cases held that such provisos protect prospective entitlement to future increases in salary if would affect benefits accrued pre-amendment (ie where scheme has a final salary link)



## Summary of facts of Avon

- Plan established in 1960
- At material time governed by 1999 D&R
- Power of amendment (clause 22):

### **'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 has started to be wound up.*

...

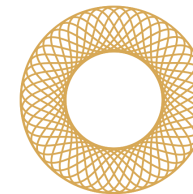
(4) *The power of amendment in subclause (1) is subject to section 67 of the Pensions Act 1995 (which restricts the making of changes affecting entitlements or accrued rights) and to the following restrictions*

(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,*

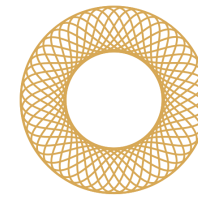
...'



## Summary of facts of Avon

- Up to 2006, Plan included final salary section
  - (as well as CARE and DC sections)
- Deed of Amendment 3 October 2006; on its face:
  - Closed FS section to future accrual
  - Accrued FS benefits would be calculated on basis of:
    - Pensionable salary at closure date
    - Revalued up to retirement

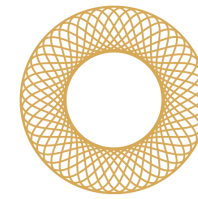
## Context and key questions



**Outer Temple**

- Context:
  - some members better off as result of 2006 Amendment
    - ie Revaluation Winners
  - but others worse off
    - ie Final Salary Winners
- Key questions:
  - Did the 2006 amendment engage the fetter on the amendment power?
    - and was it therefore invalid for FS Winners?
  - If so, was it nevertheless valid in respect of Revaluation Winners?





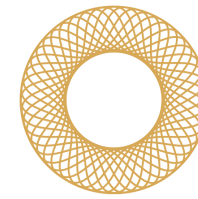
# Revaluation Winners and FS Winners

- Revaluation Winners:

- Payrises hadn't exceeded inflation;
- Told they would receive benefits calculated on a revaluation basis;
- Fetter could not have been engaged if the whole class had been Revaluation Winners – they have done better.
- BUT, FS being imposed would mean that they lost out – an ER headache as well as a potential legal one.

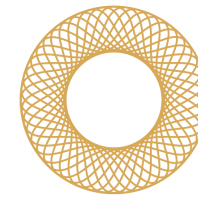
- FS Winners:

- Payrises had exceeded inflation;
- Told they would receive benefits calculated on a revaluation basis;
- Clear risk fetter engaged – they have done worse.
- Imposing FS means that they get more than their current expectations.



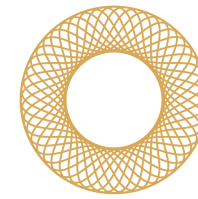
## **Revaluation Winners and FS Winners (continued)**

- Cohorts fluid
- Ultimately identified at date of retirement/taking of benefits



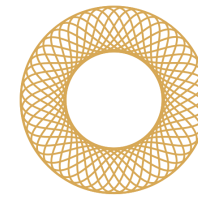
# Case Management

- The original claim
  - FS Winners only
  - Assumption that no impact on Revaluation Winners
- Raising of the issue of the impact on Revaluation Winners
- The two hearing approach
  - Adding the Revaluation Winners Issue
  - Procedural issues:
    - One compromise
    - One contested hearing
  - Which order?



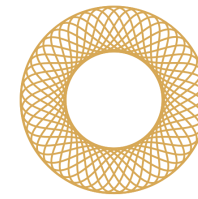
# The Arguments

- Construction:
  - The 'magic wand' approach;
    - Doyle v Manchester Evening News Limited [1989] Pens LR 47;
    - IMG Pension Plan HR Trustees Ltd v German [2010] Pens LR 23
- Severance:
  - Same context, different approach;
    - Bestrustees v Stuart [2001] Pens LR 283/Wedgwood v Salt [2018] Pens LR 9 /IBM in CoA [2018] Pens LR 1
  - versus
    - Pitt v Holt [2013] 2 AC 108



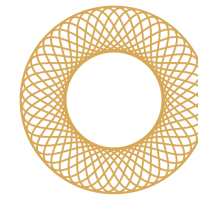
# Bestrustees/Wedgwood

- Test for severance in Bestrustees:
  - can the valid part of the exercise of the power be separated from the invalid part?
  - would the power have been exercised differently, or not at all, if the trustee had known that it could not be validly exercised as it was (the “would still have exercised” test).
- Key question in Avon was second limb – did C have to show that the Trustees would have introduced revaluation for the Revaluation Winners had they known they couldn’t introduce it for FS Winners?



# Bestrustees/Wedgwood

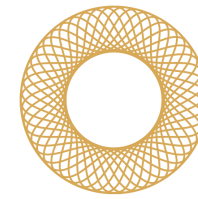
- Some support for that approach in Wedgwood and IBM in the CoA.
- But can see straight away that taking this approach turns a simple construction exercise into a question of fact/subjective intention of the Trustees.
- Would also have meant in Avon that a fetter designed to protect benefits would have the effect of depriving one group of benefits they had been promised.



# Pitt v Holt

- C argued that Bestrustees needs to be re-considered in the light of Pitt v Holt.
- Not in the pensions context, but SC authority that where there has been an excessive exercise of a power the Court is not investigating actual intention of the Trustees, but the objective question of whether the exercise falls within the purpose of the trust.

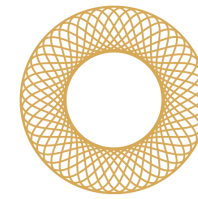
*"If the provisions that can and would take effect cannot reasonably be regarded as being for the benefit of the person to be advanced, then the exercise fails as not being within the scope of the power of advancement. Otherwise it takes effect to the extent that it can." (Lloyd LJ [64])*



# The Judgment

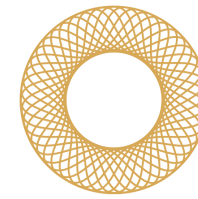
- Relatively lengthy Judgment, draws significantly from:
  - Contract;
  - Public law
- Conclusion:
  - Construction available to 'rescue' the amendment in relation to Revaluation Winners;
  - If not severance also works.
- Key point:
  - Court accepted that where a trustee's exercise of a power partially fails, the question of whether the Court will intervene is an objective one in accordance with Pitt v Holt.





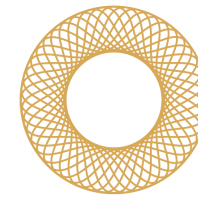
# Implications

- Massively simplifies task of advising on severance issues:
  - Necessary implication of RB argument re severance was focus on subjective intention of trustees;
  - Inevitable problem in pensions context of obtaining evidence on a hypothetical question many years later from trustees who may not have been strongly engaged in the first place;
  - Question of what you would have done if had known amendment partially invalid is not always going to be straightforward.
  - Honest answer will often be no more helpful than “I’m not sure. I would probably have had another think/taken some advice.”



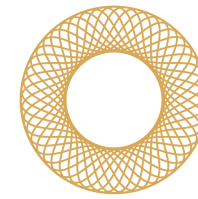
# Implications (continued)

- Beyond evidence, subjective approach more difficult in terms of advice;
  - Inherently less certain;
  - Risked creating a separate line of pensions authorities.
- And if the subjective test cannot be met:
  - Employee Relations headaches;
  - Unattractive outcomes – could 1 FS winner be enough the void the whole amendment?
  - Risk of rogues charter?



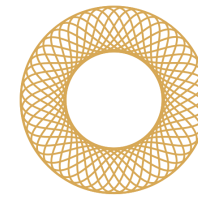
## On the other hand...

- Question is whether the proposed exercise was 'a substantially different exercise of the power'.
- In drawing on contract/public law, the judge ignored the comment in *Pitt v Holt* that analogies with public law were 'unhelpful and unnecessary'.
- Public law: control by the courts is for the purpose of ensuring that public authorities are acting within the limits of a power set by statute (*Pitt v Holt* at [11]).
- Contract law: what elements of a bargain can be saved?
- Trusts law: controls exercise of fiduciary power entrusted to fiduciary who exercises them for the benefit of a members within a designated class.



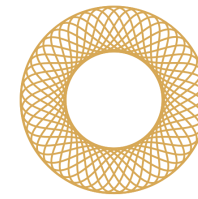
# What do these distinctions mean?

- The exercise of dispositive powers by a fiduciary entails choosing between different interests. Different classes of member/the employer. Who does the fiduciary choose to favour by making a disposition and why?
- Public law – it's in the interests of good administration to uphold the acts of public bodies because people rely on them. Estoppel has no place in public law but it does have a role in private law
- Contract law – no choice to be made between different interests. Does the bargain stand or not? The court is not interested in whether it is a bad bargain or a good bargain or party it favours.



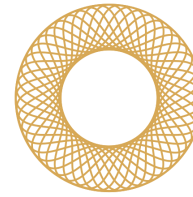
# What would the trustees have done?

- This question can be framed as an objective question focussing on what the trustees, as reasonable trustees, 'should', or 'would' have intended.
- Following *Pitt v Holt* this remains the relevant question to ask where the trustees have failed adequately to perform the decision-making function in breach of fiduciary duty.
- This permits drawing on extrinsic evidence to identify the purpose for which trustees were acting and the interests which they intended to advance.



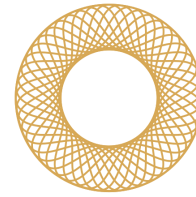
# The benefit of the person to be advanced

- In the current context, the purpose of the amendment was to reduce the costs of the scheme for the company.
- The impact of the judgment is that the company not only has to fund more expensive benefits for FS Winners, but also for Revaluation Winners. Most expensive option and worst of both worlds.
- Judge concluded that the 'substantial purpose' of the original amendment was to remove FS link and link pensions to revaluation. That was what was done rather than why it was done.
- Reversal of what Trustees had been trying to achieve.



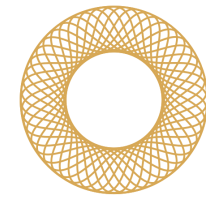
- **Revaluation Winners Hearing**
- Why did it happen in the first place?
  - C did not originally intend to raise this issue at all
  - P7 Defendants wished the issue to be included
  - Accordingly the Claim Form was amended to facilitate this
- Has it resulted in a valuable clarification of the law?
- Where do Bestrustees / Wedgwood stand after Avon?
- Does the CA decision in Pitt v Holt best sum up the current position?

*"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." (Lloyd LJ [64])*



- **Final Salary Winners Hearing**
- Why did it happen in the first place?
- What is the benefit of compromising?
- Are Courage type fetters still a 'thing' after the decision in Newell?





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**Questions?**