ESTOPPEL IN PENSION CASES

This note considers the principles governing estoppel in pensions cases and summarises the leading authorities in this area.

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SCOPE OF THIS NOTE

This note considers both "group" and "individual" estoppels in relation to pension schemes. It summarises the leading cases in this area and explains the reasons why the courts have generally been reluctant to uphold arguments based on estoppel. It provides an overview of the principles governing estoppel and the difficulties that arguments based on estoppel often face.

ESTOPPEL ARGUMENTS IN PENSIONS CASES: INTRODUCTION

Much of the litigation surrounding defined benefit occupational pension schemes over the past quarter century has arisen because there is some, often long-hidden, defect in the scheme's governing documentation which has caused a divergence between the parties' expectations and practice and the scheme's formal rules. Where the error has occurred in the process of drafting and executing documentation to give effect to decisions taken, rectification is typically the appropriate remedy. Here, the cases reflect a willingness on the part of the courts to adapt and mould the remedy to the special circumstances of pension schemes. (For more information, see *Practice note, Rectifying mistakes in pension scheme documents (www.practicallaw.com/0-232-1952)*.)

In other circumstances, however, rectification will have no obvious part to play, namely:

- Where the error consists of a lack or insufficiency of formal documentation (typically the failure to exercise an amendment power, or the defective exercise of these powers).

- Where documents circulated to members contain statements that are at variance with the scheme's governing documents.

In many areas of law the courts have (broadly speaking) been increasingly willing to have recourse to estoppel to achieve justice. However estoppel arguments in pensions litigation, while frequently advanced, have almost always foundered. Indeed, in the context of "group estoppels" (that is, estoppels binding large groups of members, up to and including the scheme's entire membership) there is only one case, *Icarus (Hertford) Ltd v Driscoll [1990] Pens LR 1*, from the early days of pensions litigation, in which an estoppel was upheld. While this is often cited, it has never been followed or applied. On the authorities as they stand, it is difficult to avoid the conclusion that most such arguments would be very unlikely to succeed.

There are several explanations as to why the arguments presented in the cases have not appeared particularly meritorious to the courts:

- Many of the cases, particularly the earlier cases that have shaped the courts' approach, have been cases of "booklet estoppel", where the estoppel contended for is based on statements in scheme booklets. However, those same booklets have often contained an express stipulation, fatal to the estoppel, that the booklet was subject to the trust deed and rules.

- Statements founding the alleged estoppel have often been ambiguous, rather than unequivocal (see *ITN v Ward: a practical approach to group estoppel* below).

- In the context of estoppel by representation, establishing detriment in addition to reliance is often a significant obstacle (see *Steria Ltd v Hutchison: scheme booklets: the death knell?* below).

- While the courts have paid lip service to the value of estoppel, including estoppel by convention, as a doctrine applicable to pension schemes, they have felt constrained in holding that the general body of members is bound. Specifically the courts have emphasised:

  - the need for clear evidence of positive conduct by members unequivocally evincing a clear intention, or informed consent to the scheme being administered on a basis that departs from the formal rules; in the nature of things, there is usually no such evidence, particularly in the case of deferred and pensioner members no longer contributing or in the employer's service; and

  - that trusts cannot be altered by estoppel to bind future members who were not privy to the course of dealing on which the estoppel was founded.

Apart from the legal difficulties, two points may be worth noting by way of further explanation. First, the estoppel has often been advanced by employers, rather than members. At the root of estoppel is unconscionability. The courts have not considered it unconscionable to hold employers bound by the strict terms of the scheme rules and to fund the scheme accordingly, even where the reality is that the scheme has long been administered on the basis of informal announcements or documents and the result is in truth to give members a scarcely merited windfall. Several of the equalisation cases may be seen in this light. Second, where satisfying the estoppel contended for by a group of members entails an additional strain on the trust fund, it is likely to operate adversely to the interests of other members, unless the employer is solvent and able to meet the additional funding obligation.

These issues will be considered further below.

ESTOPPEL AND EXTRINSIC CONTRACT

Estoppel arguments are not infrequently run in tandem with extrinsic contract arguments by reference to facts indicative of a consensual state of affairs. In such cases the factual and legal analysis is likely to be broadly similar: see for example *Capital ATL Pension Trustees Ltd v Gellately [2011] EWHC 485 (Ch), [2011] Pens LR 153, paras [76] and [85], at paragraphs 76 and 85*.

Looking at the requirements of estoppel and extrinsic contact side by side:

- A contract requires consideration, whereas the counterpart for estoppel requires only detrimental reliance. That said, consideration need not be adequate, whereas detriment must be real.

- A contract also requires intention to enter legal relations, and indeed in the pensions context it has been held that it is necessary to show an intention to enter contractual relations (see *Re IMG Pension Plan [2009] EWHC 2785 (Ch)*). No such requirement exists in the case of estoppel.

- There is also authority that, in order for a contract to arise binding members to accept less generous benefits than those provided for by the formal rules of the scheme, it is necessary to show not just consent on the part of the members, but informed consent (see *IMG*). Again, there is no such requirement in estoppel. The importance of this difference should not however be overstated. First, unconscionability is a necessary ingredient of estoppel: if members did not know that the true position was that they were entitled to insist on higher benefits, that may be relevant to whether that ingredient is present. Second, it is doubtful whether the requirement to show informed consent exists even in contract cases; in *Re Gleeds Retirement Benefit Scheme [2014] EWHC 1178 (Ch), Newey J refused to follow the analysis in IMG in this regard (see also Bradbury v BBC [2012] Pens LR 2893*).

For more information about extrinsic contracts in the context of pensions, see *Practice note, Pensions and extrinsic contracts (www.practicallaw.com/0-536-3726)*.

PRINCIPLES GOVERNING ESTOPPEL

The two types of estoppel that are usually relied on in pensions cases are estoppel by representation and estoppel by convention. In both cases, the principles governing estoppel are not contentious, and are clearly laid out in the leading judgments.

Estoppel by representation

The Court of Appeal has set out the following principles governing estoppel by representation:

- Claims are normally made in estoppel because it is impossible to make them in contract (due to the absence of some feature required by statute or common law). If a single factor had to be identified that a claimant must establish in an estoppel case, it would be unconscionability. (*Gillett v Holt [2000] Ch 198, Robert Walker LJ at paragraphs 225 and 232*.)

- Unconscionability is a useful guiding principle, but it is an issue on which reasonable people can very easily differ (both in terms of whether the claimant has a valid claim and how that claim should be satisfied). This means it is necessary to have some more specific principles. The danger of these however is that they can introduce a degree of rigidity into what is intended to be a flexible doctrine.

- It would be very unlikely that a claimant would be able to satisfy the test of unconscionability without also satisfying the three "classic" requirements:

  - a clear representation or promise made by the defendant on which it is reasonably foreseeable that the claimant will act;

  - an act on the part of the claimant that was reasonably taken in reliance on the representation or promise; and

  - the claimant being able to show that he will suffer detriment if the defendant is not held to the representation or promise.

The Court of Appeal has emphasised that this is a broad formulation and that many qualifications or refinements could be made to it: see *Steria Ltd v Hutchison [2006] EWCA Civ 1551, Neuberger LJ at paragraphs 91-93*.

Estoppel by convention

As to estoppel by convention, the basic position has been described as follows:

> "When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped against the other from questioning the truth of the statement of facts so assumed."

(Newey LJ in *Prudential Staff Pensions Ltd v The Prudential Assurance Company Ltd [2011] EWHC 960 (Ch) [2011] Pens LR 239* relying on *Amalgamated Investment & Property Co Ltd v Texas-Commerce International Bank Ltd [1982] QB 84*.)

In *Prudential Staff Pensions Ltd v The Prudential Assurance Company*, the following five requirements were applied:

- It is not enough that the common assumption on which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them. (This may consist either of words, or conduct from which the necessary sharing can properly be inferred, as recognised by Briggs J in the later case of *Stena Line Ltd v Merchant Navy Ratings Pension Fund Trustee Ltd [2010] EWHC 1805 (Ch)*.)

- The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely on it.

- The person alleging the estoppel must in fact have relied on the common assumption, to a sufficient extent, rather than merely on his own independent view of the matter.

- That reliance must have occurred in connection with some subsequent mutual dealing between the parties.

- As a result of the reliance, some detriment must have been suffered by the person alleging the estoppel, or some benefit must have been conferred on the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position.

(As identified by Briggs J in *Revenue and Customs Commissioners v Benchdollar Ltd [2009] EWHC 1310 (Ch)*.)

How does an estoppel bind the scheme?

Even when an estoppel is established as against a trustee, the particular context of pension schemes creates two further conceptual problems:

- It is unclear how successor trustees to the trustees who made the original representation are bound.

- Requiring the trustees to pay particular members (or strangers to the trust) more than they would be otherwise entitled to receive:

  - involves the trustees, strictly speaking, acting in breach of trust; and

  - could prejudice other members in underfunded schemes.

In relation to these issues, the High Court has held that an estoppel binding the trustees could bind the scheme (meaning members and other beneficiaries and successor trustees), but subject to certain limits:

- The estoppel can be excluded or qualified given the impact that it would have on the benefits of the members and other beneficiaries under the scheme.

- The estoppel could be excluded if to give rise to the right required by the estoppel would otherwise have required the trustees to exercise some discretion or power, in which case enforcing the estoppel would be to impute a decision to the trustees to exercise a discretion or a power when they had not done so.

(*Warren J in Catchpole v Alitalia Pension Trustees [2010] Pens LR 387*.)

GROUP ESTOPPELS

The most commonly invoked form of estoppel in pension cases (at least in High Court litigation) is the so-called "group estoppel", where an estoppel is asserted benefiting or binding large groups of members.

Circumstances often arise where there is some discrepancy between the communications between the trustees or the employer and members, and the scheme's formal provisions in relation to the benefits provided by the scheme. The types of communications that might give rise to such an argument include:

- Scheme booklets.

- An announcement of a change in scheme benefits (which later turns out to have been invalidly effected).

- The submission of an application form by an individual to join the scheme on particular terms.

- The submission of an application form by an existing member to choose one of a menu of different benefit options being offered.

In the first two examples, the statement founding the estoppel is made by the employer or trustees to the members. Where the statement purports to promise or announce some benefit or benefit improvement not reflected in the rules, members may argue for an estoppel (by convention or by representation) and it enures, if at all, for the class. Conversely where the statement relates to a reduction in benefits not given formal effect, the employer may argue for the estoppel. This is likely to be estoppel by convention, since an employer can hardly assert estoppel by representation founded on its own representation.

In the second two examples, an estoppel on the completion and submission of the application form and here again, depending on the facts, it may be the

applicant members or the employer that argues in favour of estoppel. Either way, the estoppel, if effective, should enure for, or bind, the class as a whole.

In either case, there may be other categories of member, such as deferred and pensioner members, who are affected by the outcome. Problems may arise where there has been no notification of these members and they would be adversely affected by an estoppel (for example, as in the case of an alleged benefit promise or improvement that would add to the strain on the fund).

Group estoppels: the authorities

Some of the leading authorities on group estoppels are considered below.

Icarus (Hertford) Ltd v Driscoll: an early victory

Icarus (Hertford) Ltd v Driscoll [1990] Pens LR 1 concerned a defined benefit scheme established in 1973 for staff employees (doing office work), works employees (engaged in manufacturing) and directors. It provided for accrual at 1/80th of final salary for each year of pensionable service and members' contributions based on 3% pensionable salary. Originally only directors and staff employees were admitted to the scheme. In 1976 works employees were admitted as members on the basis of an accrual rate of 1/270ths which they enjoyed without ever paying any contributions.

In 1978, when the state earnings scheme was introduced, the scheme did not contract out. It was decided to reduce accrual for staff members to 1/270th whilst also making the scheme non-contributory for them also. This change was announced to members, it was included in booklets subsequently issued to members, and the scheme was administered on the basis that it had been introduced. No formal documentation was executed to bring it into effect. The issue was therefore whether staff members could insist on an accrual rate of 1/80th since 1978.

In three short paragraphs, Aldous J applied Lord Denning MR's well-known description of estoppel by convention in *Amalgamated Property Co v Texas Bank [1982] 1 QB 84* and held as follows:

> "All the parties to the scheme, namely the plaintiff, the Prudential and the members, have since 1978 proceeded on the basis that the rate of accrual was 1/270 and they cannot now go back on it. Further I believe it would not be unjust or unfair to hold them to that. In fact it would be odd for me to decide that the rate was 1/60 or 1/80 when all the parties had accepted and worked on the basis that it was 1/270."

While Aldous J's conclusion was eminently sensible, there is a dearth of reasoning.

Three points in particular are worth noting:

- The change in 1978 had been acted on by the staff members in ceasing to pay member contributions, so there was clear evidence of positive conduct by the relevant members giving effect to the announced changes on the part of the members. That said, the decision is not based on this analysis.

- The estoppel contended for was to give effect to a benefit reduction announced and acted on.

- It appears to have benefited the members as a whole (including the members against whom the estoppel was raised vis-a-vis their service rights accrued down to 1978, and thereafter at 1/270ths) in preserving the surplus available for augmenting benefits.

ITN v Ward: a practical approach to group estoppel

In *ITN v Ward [1997] Pens LR 131*, the trustees had decided to grant 4% annual increases to pensions in payment. No amendment was made to the scheme rules, but an explanatory leaflet sent to members stated that their pensions would be increased by 4% a year. The leaflet began with a statement that it was a summary of improvements and amendments. It cross-referred to a 1976 booklet which expressly stated that amendments to the scheme may be made at any time.

In 1979 new rules were introduced, which gave the trustees discretion to determine the amount of annual increases. Members were not told of the new rules. Given the high rates of inflation prevailing, the possibility that the discretion might be used to grant increases of less than 4% at that stage no doubt appeared remote.

The members argued that the trustees and employer were estopped by convention from awarding increases at less than 4% a year for service up until the introduction of the new rules in 1979, an argument which the *Pensions Ombudsman (www.practicallaw.com/1-107-6989)* upheld.

Laddie J overturned the decision. The crux of his reasoning was that the correspondence with members, when read as a whole, was deliberately summary in nature, expressly referred to the possibility of changes being made to the scheme, and thus would not be read by the reasonable reader as guaranteeing an increase of 4% a year in perpetuity whatever the scheme's formal documentation said.

Laddie J considered that scheme booklets would normally have this limited function of summarizing the scheme's rules rather than overriding them, stating:

> "As Rimer J said in [*Lloyds Bank Pension Trust Corp Ltd v Lloyds Bank plc [1996] Pens LR 263*], the booklet is merely the employer's or trustee's attempt to summarise the meaning and effect of the Scheme and its rules. Prima facie it is not and would not be expected to override the trusts created by the Definitive Deed and the rules implemented under it."

Notwithstanding his conclusion, Laddie J took a broad approach to the evidential requirements for a group estoppel holding that evidence was not required of every members' thoughts:

> It appears to me that this issue must be approached in a practical and common sense way. For example I do not accept the suggestion ... that it is necessary to have evidence of what every member of the Scheme thought before an estoppel by convention can be invoked. If that was a requirement, as a practical matter the estoppel would never come into play in relation to any scheme with a sizeable membership no matter how unconscionable the trustees' actions.

That was, however, the high-water mark for group estoppel.

Redrow plc v Pedley: a restrictive approach

It was left to Sir Andrew Morritt V-C in *Redrow Plc v Pedley [2002] Pens LR 339* to deal what has turned out to be a decisive blow to group estoppels in pensions cases. In that case, employees of Redrow had been provided with various benefits in kind, such as company cars, health insurance, phones and share options. In the administration of the pension scheme these had never been included in their pensionable remuneration, but the scheme's governing documentation, which referred to Schedule E, provided scope for argument that it should be included. The employer argued:

- That as a matter of construction benefits in kind were not included.
- That the members were estopped by convention from arguing that benefits in kind were included, since the scheme booklets issued to members made clear that they were not.

The employers succeeded on the construction issue. Nevertheless, the Vice Chancellor went on to consider the alternative estoppel argument, and held that it would have failed, not least because the scheme booklets were expressly stated to be subject to the trust deed and rules.

The Vice Chancellor went on to say that principles of estoppel "must be applied with caution when seeking to establish an estoppel between the trustees and the general body of members so as to bind them all to an interpretation of the trust deed which it does not bear". This was for the following reasons:

- The pension scheme embodies not only the terms of a contract between individual members and the trustees but also a trust applicable to the fund comprising the contributions of members and surpluses derived from the past in which present and future members may be interested. These trusts cannot be altered by estoppel because there can be no such estoppel binding future members.
- It is necessary to show that the principle is applicable to all existing members. The judge agreed with Laddie J in *ITN v Ward* that it is not necessary for this purpose to call evidence relating to each and every member's intention. However this will not absolve a claimant from adducing evidence to show that the principle must be applicable to the general body of members.
- It must be proved that each and every member has by his course of dealing put a particular interpretation on the terms of the rules or acted on the agreed assumption that a given state of facts is to be accepted between them as true. This involves more than merely passive acceptance. The administration of a pension scheme on a particular assumption as to the basis on which contributions or benefits are to be calculated may well give rise to a relevant assumption on the part of the trustees. The Vice Chancellor suggested that it requires "clear evidence of intention or positive conduct" to bind the general body of members to such an assumption. Moreover he doubted whether receipt of the benefit or payment of the contribution,

without more, could be enough. Finally he warned that "if the principle is applicable, it may be used to increase the liability or reduce the benefit of a member as well as ... the opposite". The message conveyed by this statement is the court's distinct lack of enthusiasm for estoppel arguments advanced - most commonly by employers - which have the effect of putting the members, or a section of the members, in any worse financial position than they would be upon a strict interpretation of the scheme governing documents.

Trustee Solutions Ltd v Dubery: additional difficulties

The Vice Chancellor's observations – which unquestionably signify a distinctly restrictive approach to the role of estoppel in pension schemes – were strictly obiter dicta. Since *Redrow*, however, these dicta have time and again been relied on by judges in rejecting arguments based on estoppel. In *Trustee Solutions Ltd v Dubery [2006] EWHC 1426 (Ch),* Lewison J added further difficulties. That case concerned an attempted but invalid amendment to retirement ages to comply with the judgment in *Barber v Guardian Royal Exchange Assurance Group [1991] 1 QB 344*. An announcement was made to female members in July 1992 informing them that their retirement age would be 65 from 1 October 1991. It was accepted that the retrospective element of the amendment was bad in any event, and the court held that the announcement was not a valid amendment.

The employer argued in the alternative that the terms of the announcement, together with statements in the scheme booklets to similar effect, gave rise to an estoppel by convention. In rejecting that argument, Lewison J noted the following difficulties in addition to those found in *Redrow*:

- The estoppel was said to have bound former employees who had left the scheme before any of the events that were said to have created the erroneous assumption. Given that they had already left, such individuals could not realistically have shared the assumption.

- Estoppels against (or in favour of) individual members that relate to retirement ages may, if upheld in relation to some but not all members, result in unequal treatment of some members as compared with others. This may, potentially, put the trustees in conflict with the equal treatment rule enshrined in section 62 of the Pensions Act 1995. In general the court will not uphold an estoppel in conflict with statute or public policy.

- Since none of the documents relied on informed male members about their entitlement to pension accrued during a Barber window period of pensionable service, there was a possible conflict between the assumption relied on as constituting the convention, and European law (unless the assumption is modified to take account of the effects of the judgment in Barber). But if it is so modified, how can it be said that the members (or, for that matter, the trustees) had that modified assumption?

- If the shared assumption is anything other than that which was expressly stated to members of the scheme (that is, any retrospective element is stripped out of it), it is unrealistic to suggest that the members shared the altered assumption, unless they are to be endowed with unusual knowledge of pensions law or the detailed contents of the rules (or both). It also follows that they do not have the latter; since if they did there would be no estoppel at all.

Unsurprisingly, Lewison J also followed the earlier cases in holding that scheme booklets could not give rise to an estoppel where they contained disclaimers stating that in case of doubt or conflict the rules or deed would prevail.

Steria Ltd v Hutchison: scheme booklets: the death knell?

Steria Ltd v Hutchison [2006] EWCA Civ 1551 concerned an estoppel claim by a member that his normal retirement date was 62, despite the scheme's governing provisions, based on statements in scheme booklets and a letter sent to him as an employee. The Court of Appeal decided that there was no estoppel either by representation or convention. The decision is of significance as the first and principal appellate case on estoppels and pension schemes and it contains a number of interesting judicial observations.

The Court of Appeal unhesitatingly rejected any estoppel based on the scheme booklet. Mummery LJ pointed out that it precluded reliance on any representation.

Neuberger LJ stated that he found it "very hard to conceive of a case where an employee could rely simply on the terms of the booklet as founding a sufficient representation upon which to base an estoppel." He also approved the remarks of Laddie J and Lewison J in *ITN v Ward* and *Trustee Solutions Ltd v Dubery* (as well as comments to similar effect from Etherton J in *Hearn*

v Younger [2005] Pens LR 49 and *Pumfrey J in Hoover v Hetherington [2002] Pens LR 297*). Neuberger LJ held that those remarks undermined any attempt to rely on the contents of a booklet, at least if it contained a disclaimer stating that the trust deed prevailed in the case of doubt or conflict.

In relation to estoppel by representation, the Court of Appeal held that the onus was squarely on the person asserting estoppel to establish the three ingredients of representation, reliance and detriment. Reliance and detriment are distinct concepts and even in circumstances where a presumption of reliance might arise, detriment must clearly be proved.

In relation to estoppel by convention, Mummery LJ was prepared to accept that the principle was capable of applying to an occupational pension scheme, but on the facts there had been no mutual agreement, assent or course of dealing making it inequitable not to reduce the normal retirement date to 62. Neuberger LJ appeared to agree, stating that "convention" should be "widely or flexibly interpreted". However, far from proceeding to give any judicial blessing to group estoppel arguments, he went on to state (albeit in a different section of his judgment dealing with reliance) the following:

> "An additional reason why the court should lean against an estoppel in favour of one, or only some, of the members of a pension scheme, is that it involves favouring only one or some members of the scheme over the other members of the scheme."

Then, after citing Lewison J's statement in *Trustee Solutions v Dubery* that this might place trustees in breach of statutory duties, he continued:

> "However, if it is argued that the estoppel extends to all members of the scheme, then the problems identified by Sir Andrew Morritt VC in paragraph 6 of *Redrow plc v Pedley* .. would arise."

These passages were cited with approval by Warren J in *Catchpole*.

HR Trustee v German (IMG Pension Plan): amendment powers

A potentially more promising estoppel argument was run by the employer in *Re IMG Pension Plan [2009] EWHC 2785 (Ch)*. In this case, a defined benefit pension scheme was purportedly converted into a defined contribution scheme (including already accrued defined benefit rights). The conversion was undertaken under the amendment power believed then to be current, which allowed it to take place. However, the court considered that the amendment power remained subject to a restriction contained in an earlier power, and that restriction prevented the conversion. As a result, the purported amendment was invalid and members continued to be entitled to defined benefits in respect of pensionable service after the date of the purported amendment.

Members had been sent application forms inviting them to participate in the "as amended" defined contribution scheme, and all the existing members had completed and returned them.

The employer therefore argued that the members were estopped by representation from claiming benefits on any higher basis. Arnold J rejected that argument, for the following reasons:

- The application forms did not contain a clear and unequivocal representation on the part of the employer, as they did not state that the signatory consented to the conversion of the plan to a defined contribution scheme, still less that the signatory was giving up existing rights to final salary benefits. The judge considered it particularly significant that the employer had in effect presented members with a fait accompli: a decision it had unilaterally taken regardless of the employees' agreement.

- There had been no more than passive acceptance, which did not suffice (see *Redrow plc v Pedley: a restrictive approach* above). Even though signing and returning the application forms was a positive step, the judge considered that that was simply a passive acceptance of the fait accompli the employer had presented on the basis that it had already amended the scheme to convert final salary rights to money purchase rights.

- The application forms asked members to confirm that they had read the scheme's explanatory booklets, which stated that the deed and rules governed members' entitlements. The members could not therefore have been agreeing to accept benefits other than in accordance with the deed and rules.

The employer also argued that an estoppel by convention arose as a result of the members signalling their acceptance of the changes in signing the

application forms and the parties thereafter behaving as if the change had been validly introduced. Again, the judge rejected the argument on the grounds that members had done nothing more than accept the *fait accompli* presented by IMG.

A fundamental difficulty facing the employer in advancing the estoppel argument in *IMG* (leaving aside the scheme booklet point) was that the purported alteration to the scheme was one that - unbeknown to members - could not have been achieved by exercise of the amendment power but only with members' consent, whereas it was presented to members as a *fait accompli*, not as an option that they could accept or reject.

Re Gleeds Retirement Benefit Scheme: defective documentation

In *Re Gleeds Retirement Benefit Scheme [2014] EWHC 1178 (Ch) [2014] Pens LR 265*, the employer was a partnership. When in 1989 the law relating to the execution of deeds changed, its implications for a partnership were not fully understood, and for the next 20 years or so the signatures of the partners on "deeds" amending the scheme were not witnessed. The consequence was that the deeds were invalid, and the various intended amendments to the scheme had no effect.

In contrast to *IMG*, the trustees and employer had the power to make all the amendments they had tried to make without members' consent. Moreover there was no suggestion that they were not appropriate amendments to make; indeed, they were typical of the changes made to schemes at that stage, with final salary accrual curtailed and then stopped, contributions introduced, and money purchase accrual introduced. While members might have been presented with a fait accompli, the trustee and the employer had the power to make the change. The changes also benefited some employees: when the new money purchase section was introduced, employees who had not been permitted to join the final salary scheme were allowed to join (the non-chartered quantity surveyors).

The reason that the amendments in question were invalid was entirely technical; amendments had to be exercised by deed, the documents purporting to be deeds were signed but the employers' signatures were not witnessed, and accordingly as a result of the strict application of section 1 of the Law of Property (Miscellaneous Provisions) Act 1989 they were not deeds.

Two different estoppel arguments were run by the employer on those facts, each without success:

- The employer argued that the trustee was estopped from denying that the amending "deeds" had been duly executed and were deeds, and that the scheme was bound by that estoppel. This was not a group estoppel argument, but relied on the analysis in Catchpole (see *Principles governing estoppel* above and *Difficulties in group estoppel arguments* below).

- Newey J rejected this argument, on the basis that an estoppel could not be invoked to overcome the relevant statutory formality, and had not been established on the facts. The court did not consider whether the estoppel, if established, would have bound the scheme.

- Members joining the money purchase sections of the scheme had submitted application forms to do so, while members of the final salary section had, on the introduction of certain changes in 2003, returned forms indicating that they wished to continue as members of the final salary section and authorising the deduction of contributions. The employer relied on these forms, and the subsequent administration of members' benefits on the basis set out in them, as giving rise to an estoppel by convention.

This argument was rejected for the following reasons:

- Newey J considered that the case was like *IMG*, in that there was nothing more than passive acceptance by members, as existing members were simply told that the changes were taking place rather than being asked to agree them, and new members simply enrolled in the scheme in the form it was understood to be.

- He held that the employer had not relied on any assumption shared between themselves and the members, but on the view of their advisers that the scheme had been validly amended by the "deeds".

As the judge recognised, his conclusions had unpalatable results, both for the employers, the trustees responsible for administering the scheme and the membership. It greatly increased the liabilities that the employer had to fund. Some members had substantial and unexpected windfalls to their benefits, including some members who had optimistically opted to convert their final salary benefits to money purchase benefits in the late 1990s who found that they had fortunately been accruing final salary benefits

all along. Moreover, non-chartered quantity surveyors, who had applied to join the scheme, paid contributions to it, no doubt funded their retirement on the basis of it, and in some cases started actually taking pensions from it, suddenly discovered that in fact they had never been entitled to join the scheme, and were therefore not members of it. An appeal is due to be heard by the Court of Appeal in October 2015 (see *Pensions case tracker: Court of Appeal (www.practicallaw.com/6-206-3993)*).

As an aside, it may be noted that the employer in *Gleeds* did not run any estoppel argument based on the booklets issued to members, although they all recorded the changes that it was believed had been made to the scheme. An argument run by one of the members based on the booklets was not pursued at trial.

Difficulties in group estoppel arguments

Despite the initial success of the argument in *Icarus* and the practical approach signalled in *ITN v Ward*, the courts have given attempts to run group estoppel arguments decidedly short shrift. This may be seen as part and parcel of, or at the very least consistent with, the courts' black-letter approach to the exercise of amendment powers, in contrast to their willingness to rectify errors made in the process of preparing and executing scheme documentation (see *Estoppel arguments in pensions cases: introduction* above). Based on the authorities considered above, practitioners considering deploying a group estoppel argument would be advised to consider the following.

Alteration of trusts affecting future members

According to *Redrow*, the trust itself cannot be altered by estoppel, so as to bind future members. The following points can be made in relation to this:

- This obviously does not arise for a scheme already closed to new members.
- Subsequent joiners who are notified of the statement or announcement that is the genesis of the estoppel and join the scheme on that basis ought in principle to be capable of being bound.
- Once the matter has come to light, no doubt a relevant amendment will be made for future service so that subsequent joiners are unaffected. If the estoppel contended for is by the employer, it ought to enure for the subsequent joiner's benefit. If the estoppel is contended for by a group of members and there is a solvent employer able to fund the additional benefits, again the subsequent joiner is not necessarily adversely affected.

Note also that in *Catchpole v Alitalia [2010] EWHC 1809 (Ch)*, Warren J held that an estoppel binding the trustees to deliver a benefit not strictly available under the terms of the scheme could bind the scheme, a conclusion he regarded as "conceptually perfectly straightforward".

Scheme booklets

No estoppel can be based on the terms of a booklet, at least where that booklet contains a clear disclaimer to the effect that the scheme's formal governing documentation prevails in the event of any conflict (as well as the cases considered above, see *Lansing Linde Ltd v Alber [2000] Pens LR 15*, *Hoover Ltd v Hetherington [2002] Pens LR 297* and *Hearn v Younger [2005] Pens LR 49*). It remains to be seen whether the court would modify its approach in the exceptional circumstances of an unequivocal statement in a scheme booklet being wholly at odds with the scheme governing documents but on the basis of which all the members have worked and the scheme has been administered. However in these circumstances, the likelihood is that the error will have lain in the execution of the documentation and any solution will lie with rectification.

Conduct of members

Something more than "passive acceptance" is needed from members before they can be bound by the estoppel. Quite what is sufficient to satisfy this is increasingly uncertain. The judge in *Redrow* talked of "clear evidence of intention or positive conduct" by members. However, it has now been held in *IMG* and *Gleeds* that submission of an application form, which one might have thought was clear evidence of intention or positive conduct (or both), is not sufficient. A similar result was reached in *Gellately*, in which amendments had been announced but not validly implemented. Attached to the announcement was a form which members were asked to sign confirming that they had read it, understood the changes detailed in it, and consented to the deduction of contributions on the basis outlined in it. Those who replied were held not to be estopped from asserting the invalidity of the amendment, as they had done nothing more than passively accept what was presented as a *fait accompli*.

Adverse impact of benefit improvement on other members

As Neuberger LJ noted in *Steria v Hutchison*, difficulties may arise where a group of members assert an estoppel that may adversely affect another group of members. This is most obviously so where the claim is to a higher benefit or benefit improvement that will have to be met out of the trust fund. This should not cause problems if the employer is bound by the estoppel and able to fund the extra benefits. However, difficult questions might arise if that is not the case, as the trustees, in giving effect to the estoppel (technically in breach of trust), would be prejudicing the position of other members. The answer to this may lie in the analysis of Warren J in *Catchpole*, where he held that in deciding whether an estoppel binding the trustees bound the scheme as a whole (meaning members and other beneficiaries and successor trustees), it was relevant to ask whether the estoppel should be excluded or qualified, given the impact it would have on the benefits of other members and other beneficiaries under the scheme.

IMPLICATIONS FOR PENSIONS CASES

Prospects of group estoppel arguments

Group estoppel arguments have proved almost impossible to sustain in court. Booklet-based estoppels, save where the booklet contains no reference to the trust deed and rules and no reference to the scheme being subject to amendment, will be few and far between. Estoppels arising out of announcements of a scheme change by the managers of the scheme, or out of documentation completed by members agreeing to material changes, have a somewhat better, but still weak, prospect.

Icarus v Hertford remains an authority that can be relied on, though it has in effect been confined to its own particular facts in which:

- The estoppel was to give effect to a benefit reduction.
- It enured for the benefit of the general body of members (qualifying to participate in a scheme surplus available for distribution).
- The staff members who were estopped from claiming the higher rate of 1/80th had changed their position in reliance on the scheme announcement by ceasing to pay contributions.

Requirement to demonstrate more than "passive acceptance"

It is nonetheless arguable that the requirement that something more than "passive acceptance" be shown is wrong (though this is a bold argument in the face of all the cases, including *Steria* subsequently approving of Sir Andrew Morritt's dicta in *Redrow v Pedley*). More promisingly, it may be argued that it has been too restrictively applied in the recent first instance decisions:

- It is a basic principle in estoppel that the representation (in estoppel by representation) or the sharing of the common assumption (in estoppel by convention) can be inferred by conduct. To insist that that inference can only arise where members take some active step in response to communications to them overlooks the reality of the situation, which is that members are unlikely to do anything in response to such communications unless they disagree with them. Thus "passive acceptance" may be actually the best indication that members do not dispute a particular description of the scheme's benefits. If payment of a contribution (as in *Redrow*) or completion and return of an application of a benefit statement (as in *IMG* and *Gleeds*) represent passive conduct, it is quite difficult to envisage what constitutes positive conduct. Would changing one's position by ceasing to pay contributions (as in *Icarus*) be treated as passive (as it undoubtedly is) or as a positive change of conduct?
- In any event, it is hard to understand the basis for the extension of the principle, such that the members in *IMG* and *Gleeds* were held to have done nothing more than "passively accept" the changes to the scheme in circumstances where they applied for benefits on a particular basis.

  In *IMG* the merits underlying the decision are clear: it is easy to see why it might be thought objectionable for an estoppel to apply in a situation where the employer was telling the members that it had power to make the changes in question unilaterally, when in fact it did not and thus members' consent was required to make those changes. But it is not necessary to invoke the concept of passive acceptance to prevent that result from occurring: as the judge also found, in that situation it was not difficult to hold that members had not made any representation that they were willing to give up rights they were entitled to insist on. The same result could also have been achieved

by holding that it was not unconscionable for members to resile from representations made in such circumstances.

The same "merits" considerations do not apply to the decision in *Gleeds*, where it was always open to the employer to make the changes in question unilaterally. The judge in that case posited an example of one of the members who gave evidence that he thought that he could join only the money purchase section, not the final salary section, and concluded that had he known the true position, he would have joined the final salary section. That conclusion appears questionable on the facts of the case: had the member pointed out to the employer that he was entitled to join the final salary section because the changes made to the scheme were invalid, and thus asked to be admitted to it, the employer would not have acceded to that request, but would have immediately validly introduced the changes it had intended to the scheme.

It would be welcome if the courts would adopt a broader approach more readily consistent with the principle recognised by Briggs J in *Stena Line* that the "the crossing of the line between the parties may consist either of words, or conduct from which the necessary sharing can properly be inferred". Conduct may of course include silence in this context (see *The Indian Endurance (No 2) [1998] AC 878*).

Potential for estoppels to bind a scheme

Where it is possible to show that an estoppel subsists between the employer and the trustees as to the scheme's benefit structure, it might be open in future for employers to argue that that estoppel binds the scheme (meaning members and other beneficiaries and successor trustees) in accordance with the analysis of Warren J in *Catchpole*. That argument was run in *Gleeds*, although because of the judge's conclusions that no estoppel was established between the employer and the trustee, he did not have to and did not go on to consider whether such an estoppel would have bound the scheme.

INDIVIDUAL ESTOPPELS

Compared to group estoppels, individual estoppels in pensions cases are more straightforward. These apply where a particular individual member is able to show that the employer or trustee (or both) has acted in such a way that they are now estopped from asserting that member's true benefits. For example, if the member has repeatedly been sent incorrect benefit statements and retired on the basis that they are accurate, he or she may become entitled via estoppel to the higher benefits shown in those statements rather than merely to scale benefits under the scheme rules.

These cases will generally turn on the application of conventional principles of estoppel, and there is little that can be said about them generally that specifically relates to their "pensions" elements.

It is important to be clear as to the circumstances in which it is not appropriate to advance a case of individual, as opposed to group, estoppel. Thus if the statement or representation is made to a body of employees (for example as in an announcement of scheme change or a scheme booklet) it is unattractive and difficult to argue that estoppels arise on an individual basis, save perhaps in special circumstances (see *Hoover v Hetherington [2002] PLR 297*, approved in *Steria v Hutchison*). In principle such an estoppel should enure for the class or not at all.

Individual estoppels have a distinctly better track record of success than group estoppels. Estoppel by representation is likely to be the more straightforward route. To take two examples where the claim succeeded:

- In *Catchpole*, a member had asked the secretary of the pension scheme whether, if she died without having married her partner, he would be entitled to death benefits. She was told, incorrectly, that he would, and accordingly they did not marry. After she died, her partner was held to be entitled to spouse's death benefits as a result of an estoppel by representation. (Warren J declined to rule on estoppel by convention, merely noting that such a claim faced a number of difficulties, including proof of subsequent mutual dealing).

- In *Brand (P0-581) (12 April 2013) (www.practicallaw.com/7-530-6266*), the *Pensions Ombudsman (www.practicallaw.com/1-107-6989)* held that the trustees were estopped by representation from denying that a member's retirement age was 60 until 1996 and 62 thereafter, when the trustees wished to say that it had been 65 since 1993, and where she may have continued work beyond 60 had she known the true position. The trustee had over a period of time made a number of representations that her retirement age was 60 until 1996 and 62 thereafter, in scheme booklets (it is not clear if the booklets contained a disclaimer, although as the Ombudsman did refer to sections of *Steria*, albeit not those dealing with booklets, it would

be surprising if the point was overlooked), and in numerous benefit statements sent to her.

For more information about the Pensions Ombudsman, see *Practice note, Pensions Ombudsman: overview (www.practicallaw.com/5-203-2515)*. As to the Ombudsman's approach in cases similar to Brand, see our *Pensions Ombudsman tracker (www.practicallaw.com/5-366-8015)* in particular the determinations on the following types of complaint: *Benefit changes (www.practicallaw.com/5-366-8015)* , *Incorrect benefits calculations (www.practicallaw.com/5-366-8015)* and *Incorrect benefits quotations (www.practicallaw.com/5-366-8015)* .

ESTOPPEL ARGUMENTS IN PENSIONS CASES: CONCLUSION

Attempts to rely on group estoppels in pension cases have almost universally failed. This is in marked contrast to the readiness to order rectification to correct errors in the drafting and execution of scheme documentation. That said, it is entirely consistent with the rigorous, black-letter approach that the courts have adopted to compliance with amendment powers in cases where intended changes to scheme benefits have not been validly introduced; the courts have been very reluctant to shift from scheme's governing provisions as they stand, whatever the practical implications may be for scheme administration, scheme funding, or members' retirement plans. This has led in some cases to scarcely merited windfalls for members while imposing heavy costs on employers who are left with no recourse, other than the possibility of a negligence claim against professional advisers.

Estoppel arguments should not however be discarded out of hand where the facts potentially support them. They have had success in "individual estoppel" cases, they have a clear attraction on the merits more generally, and as indicated above there are arguments that can still be pursued on the authorities as they stand.