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Edward Nugee Memorial Lectures

Lecture Notes June 2022

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The Edward Nugee Memorial Lectures

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Foreword

This is a book with the full text papers from the Edward Nugee Memorial Lectures given in June 2022. We were delighted to be able to revert to "in person" lectures this year (except where prevented by strike action!) and to welcome attendees to the new lecture facilities in Lincoln's Inn; and we were equally pleased that many more attendees were able to participate virtually via the live-streaming of the lectures.

Edward Nugee KC, who died in 2014, was the head of our chambers for over 30 years until 2006. He was a pre-eminent trusts lawyer who helped shape the modern law of pensions in seminal cases such as *Re Courage, Imperial Foods* and *Mettoy v Evans*. Under his leadership, Wilberforce Chambers became the leading set of pensions barristers with a strong tradition of expertise and specialisation in pensions law that continues and thrives today. This series of lectures is dedicated to his memory.

The Edward Nugee Memorial Lectures have now been running annually, together with the publication of an accompanying book of full text papers, since 2015. We are very pleased that they have maintained their popularity and contributed to knowledge and understanding of pensions law.

As with previous years, we have attempted to focus not only on issues arising in contentious disputes but also on issues of interest to those working on non-contentious matters. This means that, though the talks are up to date with the latest relevant developments, we try to include technical issues of pensions law that are of interest to those working on non-contentious matters as well as to litigators.

There were four lectures given in 2022.

1. The first lecture was given by David Pollard and Joseph Steadman on *Pensions and Personal Bankruptcy: Recent Developments*. They considered the impact of bankruptcy on pension savings, both UK and overseas schemes, looking at the statutory structure and the recent decision in *Wilson v McNamara*. Second, they looked at a creditor's ability to access pension savings, before, during and after bankruptcy, considering the impact of the recent decision *in Bacci v Green*. Third, they looked at when the pension asset might prevent a debtor from declaring bankruptcy, in the light of *Office of the Bankruptcy Adjudicator v Shaw*. Finally, they looked at how pension trustees should respond to bankruptcy and enforcement actions.

2. The second lecture was given by Edward Sawyer and Jennifer Seaman on interpreting pension scheme documentation. They considered the modern approach to interpretation, in particular the relevance of the "factual matrix" following the Supreme Court's decision in *Barnardo's*. The lecture looked at the rather inconsistent approach to the factual matrix taken in case-law, and at the scope of "correction by construction" as recently explained in *Britvic* and *Monsolar IQ Ltd v Woden Park*. Finally, the lecture considered reliance on legal advice and the limited circumstances in which section 48 of the Administration of Justice Act 1985 might assist pension scheme trustees.

3. In the third lecture, Jonathan Hilliard KC, Sebastian Allen and Tom Robinson looked at various tools available when resolving pension scheme disputes. They focussed on the "3 Bs": Blessings, *Beddo*e orders and *Re Benjamin* orders. The talk stressed how each of these jurisdictions had evolved, and was still evolving, from roots well over a hundred years old. For each of these three jurisdictions the talk considered which parties can apply, what test the court will use when deciding whether to grant relief, and how much protection they provide to pension scheme trustees.

4. The fourth lecture included a talk by Emily Campbell and Caspar Bartscherer. Caspar considered forms of occupational pension provision in Germany and an instance where a German pension scheme came before the ECJ following a scheme solvency issue. Emily considered a FTT tax case about a Bavarian scheme for doctors, dentists and vets and the situation of EEA schemes who wish to become UK registered schemes for tax purposes. The other talk in the lecture was given by Michael Furness KC and Michael Ashdown. It considered the obligations under the Equalities Act 2010 to provide Sharia compliant pension arrangements, and what they might involve for trustees and employers.

We hope the lectures were of interest and that this booklet, with the full texts, will be of continuing use.

If you have any questions arising out of the lectures or these papers, please do feel free to get in touch. We would be very pleased to discuss them further with you.

Andrew Mold KC and Edward Sawyer

Speakers

Michael Furness KC
Michael is highly experienced silk whose practice covers contentious trusts and estates litigation, advice and litigation concerning occupational pension schemes and tax litigation. He also undertakes pensions and tax-related professional negligence cases. Michael has experience advising The Pensions Regulator, The Pension Protection Fund and the FCA on technical pensions issues, as well as a wide range of employers, trustees and insurance companies. Michael has appeared several times in the House of Lords and in the Supreme Court. His appearances include the significant pensions case of *National Grid v Mayes*. More recently, Michael appeared on behalf of the employer company in a three-week rectification action – the first fully contested claim for many years – *Univar v Smith*. The Legal 500 2022 describes him as an "*outstanding technician – absolutely unparalleled technical knowledge he is someone Judges listen to. One of the most highly respected individuals in this area".* Chambers and Partners 2022 praises Michael as, "*thoughtful, intelligent, user-friendly and particularly strong on technical matters".*

Jonathan Hilliard KC
Jonathan is a successful silk in the pensions field and related area and has previously been shortlisted for the 'Chancery Silk of the Year' at the Chambers & Partners UK Bar Awards. He is ranked in the directories for pensions, trusts and related work. He has been credited a *"superstar"* and *"engaging, naturally curious, passionate about his subject and forensic in his examination of the facts. He is also clearly team-focused"* by Chambers & Partners 2022. The Legal 500 2022 describes Jonathan to be *"bright and insightful. A good communicator and makes himself available".*

Andrew Mold KC
Andrew has been instructed in many of the leading pension cases, particularly those considering the use of The Pensions Regulator's powers. He has extensive experience in pensions law covering all sizes of matters including proceedings before the Pensions Ombudsman, The Pensions Regulator, the High Court, Court of Appeal and Supreme Court. He regularly acts for trustees, members, sponsoring companies, professional advisors and the regulatory bodies. His broader practice covers commercial and traditional chancery work. Chambers & Partners 2022 recognises Andrew as *"A seriously impressive performer who's always been way ahead of his year of call in terms of ability."* The Legal 500 2022 notes that *"Andrew goes from strength to strength. He is a highly regarded and very well-liked member of the pensions bar. Easy to work with and technically excellent".*

David Pollard
David is a leading and highly experienced lawyer in the pensions field and related areas. He switched to practice as a barrister at the end of 2017, after 37 years practice as a solicitor. His practice has included advising employers and trustees on relation to pension law matters, including corporate transactions, scheme funding, scheme mergers, scheme changes, employer insolvency and Pensions Regulator issues. David has experience advising employers and trustees on issues arising from scheme changes including equalisation and discrimination issues. Along with employer consultation obligations (Tupe and Pensions Act 2004); and the implications of changes to taxation. David has been involved in many noteworthy cases, including *Merchant Navy Ratings Trustee v Stena* [2022] where he acted for representative beneficiaries in relation to settlement of ill-health early retirement issues. He was chair of the Association of Pension Lawyers (APL) from 2001 to 2003 and has published five books in the areas of pensions, insolvency and employment law. He has been described as *"a complete guru in the pensions world".*

Emily Campbell
Emily's practice encompasses a wide range of chancery and commercial work. She has distinct experience in litigation and advisory sides of law relating to pension schemes, trusts estates and taxation. She has particular expertise in claims relating to mistakes in pension scheme documentation, disputes between trustees and employers as to the funding of defined benefit schemes, proceedings before the Pensions Regulator, Pensions Ombudsman complaints and appeals, disputes as to the interpretation of pension scheme documents, and proceedings relating to pensions liberation. She regularly advises trustees, employers and members of occupational pension schemes, and advises in relation to personal pension arrangements, and arrangements which are not registered pension schemes.

Edward Sawyer
Edward has a commercial and chancery practice, with specific experience in the fields of pensions. Edward is regularly involved in matters involving large-scale litigation pension schemes, regulatory work, trust disputes, business disputes and professional liability, regularly with an international or offshore element. He has appeared in numerous high-profile cases such as *Mitchells & Butlers* and *Lloyds Bank Pension Scheme* (GMP equalisation). He has been recommended in Chambers & Partners and The Legal 500 for pensions, commercial: chancery, professional negligence and civil fraud for many years. Recent comments from the directories include: *"he has a fantastic eye for detail and a Trojan work ethic"* and *"he is an exceedingly good draftsman who is very thoughtful and has a keen eye for detail. He's brilliant at memorising facts which he can then pull out of a hat when he needs them."* Edward has also been described as *"one of the cleverest members of the junior Bar".*

Thomas Robinson
Thomas has a strong commercial and chancery practice with particular emphasis on pensions, insolvency and commercial litigation and arbitration. Thomas has advised on matters from the operation of section 67 of the Pensions Act 1995 and section 37 of the Pension Schemes Act 1993 to trustees' duties and the PPF Levy. He has a particular interest in the interplay between pensions and insolvency law and has written on this topic for pensions and insolvency publications. Thomas has been 'highly commended' at the Chambers UK Bar Awards in Legal Week's "Stars at the Bar". Thomas has been recommended as a leading junior by The Legal 500 and Chambers UK for several years. In 2022's edition of Chambers & Partners, he is described as *"a great strategist and very hard-working",* he *"has a good court manner"* and *"his advocacy is fantastic".*

Sebastian Allen
Sebastian has a wide range of pensions experience, as both advisor and advocate, and is frequently instructed to act in many of the largest and most high-profile pensions cases (often involving highly technical or complicated actuarial issues), including for some of the largest UK pension schemes and FTSE 100 companies. Sebastian has extensive experience and expertise in the regulatory aspects of pensions law, acting for many years on a number of important regulatory matters, both for and against the Pensions Regulator and the Pension Protection Fund. He has appeared before the Determinations Panel, the Upper Tribunal, the High Court and the Court of Appeal. The Legal 500 describes Sebastian as "*bright, astute, calm and unflappable. He is personable, easy to deal with and an excellent strategic thinker".* Chambers & Partners explains Sebastian, *"he is dynamic, incisive and inspires confidence in client".*

Jennifer Seaman

Jennifer practices in chancery and commercial litigation, with an emphasis on pensions, trusts, probate and estates, and professional negligence litigation. For several years, Jennifer has been recommended as a Leading Junior in the field of Pensions in Chambers & Partners and in The Legal 500. She has been described in the 2022 editions as: *"Simply excellent. Very thorough, approachable and has excellent technical knowledge."* Jennifer is appointed to the Attorney General's B Panel. Through this appointment, she advises a number of government departments and agencies (including the Ministry of Justice, the Ministry of Defence, the Home Office and the Department of Work and Pensions) on issues concerning trusts, pensions and commercial litigation. Jennifer also acts for the Pensions Regulator, including in an oral hearing before the Determinations Panel in a Master Trust case.

Michael Ashdown

Michael has diverse chancery practice, with a particular focus on all aspects of litigation, advice and drafting relating to trusts and pensions, together with professional negligence in those fields. Michael's pensions practice including acting for both trustees and employers, as well as the Pensions Regulator and the Pensions Ombudsman. He has appeared in important cases including *British Airways v Airways Pension Scheme Trustee Ltd*, and is ranked as a Leading Junior for Pensions in both The Legal 500 and Chambers and Partners 2022. Michael is also lecturer in law at Somerville College, University of Oxford, where he teaches and writes on the law of trusts and property.

Joseph Steadman

Joseph has a very busy and diverse commercial chancery practice, spanning all of Chambers' practice areas. He is regularly instructed to appear as sole counsel in High Court, County Court and Tribunal litigation, as well being led as part of a larger counsel team. A substantial part of Joseph's practice consists of contentious and non-contentious pensions work, for which he is recognised as a "Rising Star" by The Legal 500. He has experience of acting for trustees, employers, members and the Regulator. Since 2017, Joseph has combined his practice in Chambers with a consultancy role in the pensions, incentives and employment team at a Magic Circle law firm. Through that role, he has gained extensive expertise and experience across the spectrum of pensions work, which he brings to bear in his own advice and advocacy. The Legal 500 2022 describes Joseph as *"extremely intelligent, he knows the law backwards, gives very practical advice. He is an ideal person to have on the team".*

Caspar Bartscherer

Caspar has a busy commercial chancery practice, encompassing commercial, insolvency, trusts and pensions work. A significant part of Caspar's practice consists of pensions work, and he has been instructed in a number of pensions matters – both contentious and non-contentious – since joining Chambers as a tenant upon completion of his pupillage in September 2020. Prior to joining Chambers, Caspar completed a PhD in private law theory under the supervision of Prof Charles Mitchell FBA KC (Hon).

Pensions and personal bankruptcy: recent developments

David Pollard and Joseph Steadman

1. Savings within pension schemes (whether personal pensions or occupational pension schemes) often constitute a significant asset of an individual and hence a potential target for creditors or, following a bankruptcy, a trustee-in-bankruptcy, seeking to be able to pay off liabilities incurred by the individual.

2. As such, significant protections have been included in UK legislation for pension assets, in particular where the pension scheme is "approved" and where the bankruptcy is in England and Wales[1]. Even here, the inter-relation between the pensions protections and the general insolvency provisions in the Insolvency Act 1986 (***IA 1986***) can give rise to difficult issues. These can increase if there are overseas elements or if the pension arrangement is not an "approved" scheme.

3. With that in mind, in this paper we discuss the overlaps between pensions and personal bankruptcy, with particular reference to three recent cases decided in the past two years:
   - *Wilson v McNamara* [2020] EWHC 98 (Ch) and [2022] EWHC 98 (Ch);
   - *Bacci v Green* [2022] EWHC 486 (Ch); and
   - *Office of the Bankruptcy Adjudicator v Shaw* [2021] EWHC 3140 (Ch).

4. There are four main areas covered below:

   I What impact does bankruptcy have on (UK and overseas) pension savings?
   II Can creditors enforce against pension savings (before, during and after bankruptcy)?
   III When might pension savings prevent a debtor from declaring bankruptcy?
   IV How should pension trustees respond to bankruptcy and enforcement actions?

5. We conclude that – notwithstanding the legislative protections applicable to most UK pension savings on the member's bankruptcy – pension savings are now increasingly vulnerable to enforcement actions by creditors.

I What impact does bankruptcy have on (UK and overseas) pension savings?

6. If an individual is declared bankrupt in England and Wales, the general rule is:
   (a) all of the individual's property and assets at the commencement of the bankruptcy form part of the bankrupt's estate (with some limited exceptions) and are transferred by statute to, and fall under the control of, the trustee-in-bankruptcy (IA 1986, s 306) and would be realised to attempt to meet the claims of relevant creditors;
   (b) any after-acquired property (defined in IA 1986, s 307) can be claimed by the trustee-in-bankruptcy for the creditors;

[1] This paper does not consider the issues that arise if the bankruptcy is outside England and Wales.

(c) the trustee-in-bankruptcy is able to require the bankrupt to assist in carrying out its functions, including realising assets (IA 1986, s 333); and

(d) the trustee-in-bankruptcy can apply to court for an income payments order (***IPO***) claiming future income of the bankrupt (received during the period of the IPO, which can extend after the discharge of the bankruptcy) for the benefit of the bankruptcy estate (IA 1986, s 310).

7. The relevant property of a bankrupt falling within his or her estate is widely defined (IA 1986, ss 283 and 436). Over the years there has been discussion in the courts as to whether it can include pension assets (within either personal or occupational pension schemes), particularly given the terms of most occupational schemes dealing with both bankruptcy and limits on assignment.

WRPA 1999, section 11

8. This position has, since 2000, been clarified by the Welfare Reform and Pensions Act 1999 (***WRPA 1999***), s 11 in relation to (broadly) UK tax registered pension schemes. The legislation states that any rights of the bankrupt "under an approved pension arrangement" are excluded from the bankrupt's estate - WRPA 1999, s 11(1). This currently provides:

> (1) Where a bankruptcy order is made against a person on a bankruptcy application made or petition presented after the coming into force of this section[2], any rights of his under an approved pension arrangement are excluded from his estate.

9. The term "***approved pension arrangement***" is defined in s 11(2) (as amended) as:

> (a) a pension scheme[3] registered under section 153 of the Finance Act 2004;
>
> ...
>
> (c) an occupational pension scheme[4] set up by a government outside the United Kingdom for the benefit, or primarily for the benefit, of its employees;
>
> ...
>
> (g) an annuity purchased for the purpose of giving effect to rights under a scheme falling within paragraph (a), including an annuity in payment before 6th April 2006, giving effect to rights under any scheme approved—
>
> (i) before that date under Chapters I, III or IV of Part XIV of the Taxes Act[5]; or
>
> (ii) any relevant statutory scheme, as defined in section 611 of that Act;

[2] Ie 29 May 2000 – Welfare Reform and Pensions Act 1999 (Commencement No. 7) Order 2000 (SI 2000/1382), art 2(a).
[3] "*pension scheme*" has the meaning given in section 150(1) of the Finance Act 2004 – s 11(11)(b).
[4] "*occupational pension scheme*" has the meaning given in section 150(5) of the Finance Act 2004 – s 11(11)(a).
[5] "*Taxes Act*" means the Income and Corporation Taxes Act 1988 – s 11(11)(d).

(h) any pension arrangements of any description which may be prescribed by regulations[6] made by the Secretary of State.

10. The 2002 regulations[7], made under WRPA 1999, s 11(2)(h), prescribe, under reg 2, the various other arrangements as being approved for the purposes of s 11 as well. These are discussed further below.

11. More limited protections apply under WRPA 1999, s 12 in relation to unapproved arrangements[8]. The s 12 protections are discussed in more detail below.

After-acquired property: s 307

12. Section 307, allowing the trustee-in-bankruptcy to claim after-acquired property, does not apply to "property which by virtue of any other enactment is excluded from the bankrupt's estate" – IA 1986, s 307(2)(b).

13. This means that the exclusion by WRPA 1999, s 11 of pensions and other rights under an approved pension arrangement has the effect that the after-acquired property provision in s 307 does not apply to the rights under an approved pension arrangement[9].

Exclusions from s 11 protection

14. But this protection following bankruptcy for an approved pension arrangement and its assets is subject to some exceptions:

    (i) The trustee-in-bankruptcy can apply for an IPO in relation to income payments actually made out of the approved pension arrangement during a period named in the IPO (which can extend after the bankruptcy is discharged). This applies notwithstanding the exclusions in WRPA 1999, s 11 or s 12 – IA 1986, s 310(7). However, the bankrupt cannot be forced to exercise any rights to draw benefits from an approved pension arrangement (see *Horton v Henry*, discussed below).

    (ii) Contributions previously paid into the approved pension arrangement (or assets in the approved pension arrangement) may be recoverable by third parties (or the trustee-in-bankruptcy) under:

        (a) the general rules for reversing transactions or claiming assets (eg if paid in breach of trust); or

        (b) the specific clawback provisions applicable to a bankruptcy under IA 1986, s 339 (Transaction at an undervalue) or s 340 (Preferences). These provisions have a specific time period before the start of bankruptcy to which they can apply; or

        (c) the clawback provision dealing with transactions defrauding creditors (IA 1986, s 423).

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[6] See reg 2 in the Occupational and Personal Pension Schemes (Bankruptcy) (No 2) Regulations 2002 (SI 2002/836).
[7] The Occupational and Personal Pension Schemes (Bankruptcy) (No 2) Regulations 2002 (SI 2002/836).
[8] See regs 3 to 6 in the Occupational and Personal Pension Schemes (Bankruptcy) (No 2) Regulations 2002 (SI 2002/836).
[9] See eg Gloster LJ in *Horton v Henry* [2016] EWCA Civ 989, [2017] 3 All ER 735 at [26].

(iii) The court has a specific power to order recovery if "excessive" pension contributions have been made (IA 1986, ss 342A to 342C, added by WRPA 1999) – see further below.

15. The position on a bankruptcy may be affected by whether or not the pension arrangements (occupational pension or personal pension) includes a non-assignment or a forfeiture provision.
    - Generally for occupational pension schemes, forfeiture of benefits is limited by the overriding provisions of s 92, Pensions Act 1995 (***PA 1995***). This allows a forfeiture provision to apply only in the cases specified in that section. The exempted cases (where forfeiture was still allowed) used to include on the bankruptcy of the member – PA 1995, s 92(2)(b) – but this was deleted by WRPA 1999.
    - Personal pensions are not within PA 1995, s 92, but for personal pensions a specific provision prohibiting forfeiture "by reference to" bankruptcy was inserted (from 6 April 2002) into the Pension Schemes Act 1993 (***PSA 1993***) by WRPA 1999 – PSA 1993, s159A.

Trustee-in-bankruptcy cannot force member/bankrupt to draw benefits: *Horton v Henry*

16. WRPA 1999, s 11 does not specifically deal with two potential rights of the trustee-in-bankruptcy, where the bankrupt pension scheme member had a right to draw benefits from the approved pension arrangement (eg was over age 55), to require the bankrupt to exercise those rights and draw some or all of the relevant benefits (less tax which would be deducted at source). IA 1986, s 310(7) expressly allows an IPO to be made in relation to any payments actually received from the approved pension arrangement after the IPO is made, ie after the start of the bankruptcy.

17. Caselaw was confused on whether the trustee-in-bankruptcy could require the bankrupt to exercise any right to draw benefits. But since October 2016 this has been resolved by the decision of the Court of Appeal in *Horton v Henry* [2016] EWCA Civ 989, [2017] 3 All ER 735. The Court of Appeal held that the effect of the statutory exclusion in s 11 was wide enough to mean that the trustee-in-bankruptcy could not obtain an IPO against the benefits emerging from an "approved pension arrangement" until they were actually paid, nor force the bankrupt to cooperate in drawing any benefits under an approved pension arrangement.

18. In *Henry*, the bankrupt, who was 59 when the application was issued, had a pension fund which he had not yet accessed and – for obvious reasons – did not wish to access during his bankruptcy. His trustee-in-bankruptcy sought an order from the court that Mr Henry elect to draw down his pension so that it could be the subject of an income payments order under IA 1986, s 310. In the Court of Appeal, the judge's decision to refuse the application was upheld, and earlier authority to the contrary overruled. Gloster LJ held that the trustee-in-bankruptcy's functions do not include seeking to recover for creditors property which has been expressly excluded from the estate by statute.

19. The result of this is that in some cases debtors with significant pension funds might be well advised to make themselves bankrupt in order to protect the fund. However, as we discuss below, the existence of the assets in the pension fund may mean that this is no longer a possibility for debtors over the minimum pension age (currently age 55).

Income payment orders (IPO): s310

20. As mentioned above, IA 1986, s 310(7) expressly allows an IPO to be made in relation to any payments actually received from the approved pension arrangement after the making of the IPO, ie after the start of the bankruptcy. This applies notwithstanding the exclusions from the bankrupt's estate in WRPA 1999, s 11 or s 12[10].

21. IPOs are also expressly exempted from the restrictions from assignment or charge over pension rights under an occupational pension scheme – PA 1995, s 91(4)(b).

22. An IPO requires a court order[11] on the application of the trustee-in-bankruptcy made before the discharge of the bankrupt – IA 1986, s 310(1A). The court cannot make an order if the effect would be to reduce the bankrupt's income (together with any rights to guaranteed minimum pensions[12]) "below what appears to the court to be necessary for meeting the reasonable domestic needs of the bankrupt and his family[13]" – IA 1986, s 310(2).

23. An IPO must state for how long it lasts. This period can end after the discharge of the bankruptcy, but may not last for more than three years after the order is made – s 310(6).

24. An IPO only applies to payments made after the IPO starts. Payments made from an approved pension arrangement before an IPO order are:

    a. not caught by the s306 vesting, nor the s307 after-acquired property provision; and
    b. are not within the scope of a later IPO order.

25. Following *Horton v Henry*, it is clear that in relation to an "approved pension arrangement" the trustee-in-bankruptcy cannot force the member to start drawing his or her benefits. In relation to a pension arrangement that is not within WRPA 1999, s 11 (ie not "approved"), this seems to leave it open for a trustee-in-bankruptcy to be able to force a member to draw benefits or exercise elections.

26. It seems that a bankrupt who could draw benefits and is concerned about the potential for an IPO being made, could decide (depending on his or her financial situation):

    a. Not to draw any benefits until the time for a potential IPO has passed; or

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[10] Section 310(7) expressly refers to WRPA 1999, ss 11 and 12. Conversely it does not expressly refer to other exclusions – eg the exclusion of state benefits under Social Security Administration Act 1992, s 187 (see 30 below).
It may well be that in practice whether or not state benefits could be included within an IPO is not material, given that they are unlikely to be large and an IPO cannot be made if the Court considers that if the effect would be to reduce the bankrupt's income (together with any rights to guaranteed minimum pensions) "below what appears to the court to be necessary for meeting the reasonable domestic needs of the bankrupt and his family" – IA 1986, s 310(2).

[11] An income payments agreement (***IPA***) under s 310A does not need a court order, but is treated as enforceable as if it were an IPO – IA 1986, s 310A(2). It therefore seems that an IPA is also allowed despite the exclusions under WRPA 1999, s 11 and s 12.

[12] Ie GMPs. See 33 below.

[13] On the meaning of 'family', see *Fowlds v Bucknall* [2020] EWHC 329 (Ch) (Marcus Smith J).

b. Perhaps seek to draw benefits (perhaps all as a lump sum), after the bankruptcy has started, but before an IPO is made – in which case the amount received before an IPO started would seem to be outside the bankruptcy[14].

27. It is still slightly unclear whether any lump sum drawing (or flexible drawdown) from an approved pension arrangement could still be claimed by the trustee-in-bankruptcy under an IPO (as being income). IA 1986, s 310(7) defines income to include "all payments from a pension scheme", but despite this it is not absolutely clear whether a lump sum payment (or drawdown payment) from a pension scheme automatically falls within s 310(7) as a result of the words quoted or whether such a payment still needs to qualify as a "payment in the nature of income" within the preliminary words of s 310(7).

> (7) For the purposes of this section the income of the bankrupt comprises every payment in the nature of income which is from time to time made to him or to which he from time to time becomes entitled, including any payment in respect of the carrying on of any business or in respect of any office or employment and (despite anything in section 11 or 12 of the Welfare Reform and Pensions Act 1999) any payment under a pension scheme but excluding any payment to which subsection (8) applies.

28. In *Raithatha v Williamson* [2012] EWHC 909 (Ch), Bernard Livesey QC (sitting as a Deputy Judge of the Chancery Division) held at [29]:

> "I reject the submission that the payment of a 'lump sum' does not constitute a 'payment in the nature of income'. The suggestion that it could not be income begs the question what it might be called if it were not income. I do not accept that the words 'which is from time to time made to him' means that the payments must be periodical or regular to qualify as a payment in the nature of income. There is nothing to prevent a one-off payment, or a number of one-off payments on different occasions from different sources as a result of different entitlements, being regarded as payments in the nature of income from time to time made to him. This was the view of Evans-Lombe J in *Supperstone v Lloyd's Names Association Working Party* [1999] BPIR 832 [esp. at 840H to 841A] and it is clearly correct."

29. *Raithatha v Williamson* was later overruled by *Horton v Henry*, but not on this point[15]. In Scotland in *Cook v Accountant in Bankruptcy*[16], the Sheriff Court referred (at [66] to [71]) to *Raithatha v*

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[14] The bankrupt is obliged to give the trustee-in-bankruptcy notice "within the prescribed period" of any increase in his or her income – IA 1986, s 333(2). The prescribed period is 21 days from the bankrupt becoming aware of the relevant facts relating to such increase – Insolvency (England and Wales) Rules 2016, rule 10.125(1).
This notice requirement seems to apply even where the relevant income etc is from an approved pension arrangement within s 11 and so does not form part of the bankrupt's estate, nor can be within the after-acquired property provision in s 307.

[15] See the agreement on this point (but criticism of election issues) by John Briggs '*The recent court decision of Raithatha v Williamson: creditors' right to an IPO/IPA over more than the debtor's "pension in payment"*' (2012) 25 Insolv Int 65. John Briggs noted that the argument as to income or not was raised in *Krasner v Dennison* [2001] 1 Ch 76 at 86H, but was not dealt with in the judgment (as Chadwick LJ dealing with the pre WRPA 1999 position did not deal with s 310 issues, instead deciding that the pension vested in the trustee-in-bankruptcy under IA 1986, s 306).

[16] [2019] Sc GLA 82, [2019] 9 WLUK 419, 2020 S.L.T. (Sh Ct) 1, 2019 G.W.D. 33-523.

Williamson and *Horton v Henry* and held that they demonstrated that in England a lump sum payable out of a pension counted as income for the purposes of s 310(7).

State Pensions and GMPs

30. State pensions[17] (including the SERPS and the state second pension, S2P) do not pass to a trustee-in-bankruptcy, nor can they be assigned or charged. The Insolvency Service *Technical Guidance for Official Receivers*[18] comments "A state pension cannot form part of a bankrupt's estate, no matter the date of the bankruptcy petition."[19]

31. Social Security Administration Act 1992 (***SSAA 1992***), s 187[20] as amended provides that:

> "every assignment or charge on [state benefits] and every agreement to assign or charge such benefit shall be void; and, on the bankruptcy of a beneficiary, such benefit shall not pass to any trustee or other person acting on behalf of his creditors".

32. It has been held that such a provision is not incompatible with the making of what is now an IPO: *Re Garrett* [1930] 2 Ch 137 (Farwell J)[21] in relation to the Bankruptcy Act 1914, s 51, applying *Re Shine* [1892] 1 QB 522 and *Re Huggins* (1882) 21 ChD 85[22]. But the exclusionary wording in SSAA 1992, s 187 was given a wide meaning by the House of Lords in relation to the Scottish bankruptcy laws: *Mulvey v Secretary of State for Social Security* 1997 SLT 753, HL(S) (a case decided under s 32(5) of the Bankruptcy (Scotland) Act 1985)[23].

33. Similar non-assignment provisions as for state benefits apply to guaranteed minimum pensions (GMPs)[24] -s 159, Pension Schemes Act 1993[25] (***PSA 1993***). Section 159 renders void "any assignment of or charge on that pension, and every agreement to assign or charge that pension".

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[17] Including pensions payable under Part 1 of the Pensions Act 2014 (s 187(1)(zb), SSAA 1992) and any benefit as defined in s 122, Social Security Contributions and Benefits Act 1992 (s 187(1)(a), SSAA 1992).

[18] https://www.gov.uk/guidance/technical-guidance-for-official-receivers

[19] See 57.11, citing SSAA 1992, s 187.

[20] Similarly Police Pensions Act 1976, s 9.

[21] Farwell J at p 141/142 noted that a payment order did not involve any vesting in the trustee-in-bankruptcy: "An order under s. 51, sub-s. 2, does not have the effect of passing any part of the pension to the trustee in the sense of vesting it in him."

[22] Ian F Fletcher '*The Law of Insolvency*' (5th ed, 2017, Sweet & Maxwell) at 8-082.

[23] Per Lord Jauncey:

> "I therefore conclude that the purpose of that part of sec 187(1) above set out was to make clear beyond peradventure that the permanent trustee could have no interest in any entitlement of a debtor to receive any of the social security benefits to which it applied. I should add further that while the theoretical possibility of a permanent trustee invoking sec 32(2) in relation to a debtor whose sole income consisted of such benefits remains, the probability of any such invocation being successful must, at least in the case of those benefits such as income support benefit which are income-related, be virtually nil. In short, it can never have been contemplated in social security legislation that any part of the income-related benefits to which sec 187(1) applied would find their way into the hands of the permanent trustee of a bankrupt beneficiary and, indeed, the trustee has no right to proceed against the respondent for payment of any part of the benefit to which a debtor may be entitled."

[24] The provisions relating to GMPs used to apply as well to "protected rights" (ie the benefits representing contracted-out benefits on a defined contribution basis). However these references were deleted on the abolition of protected rights from 2012.

[25] Protected rights were within s 159 until their abolition in 2012 - s 159(1) amended from April 2012 by Pensions Act 2008 (Abolition of Protected Rights) (Consequential Amendments) (No.2) Order 2012 (SI 2011/1730).

34. Unlike the state benefit provision (in SSAA 1992, s 187), PSA 1993, s 159 does not now expressly refer to a bankruptcy[26]. Merely preventing assignment would not be enough to take the benefit out of the bankrupt's estate – eg *Rowe v Sanders* [2002] EWCA Civ 242, [2002] Pens LR 367. In practice a GMP will almost always arise under an occupational pension scheme which is a UK tax approved arrangement and so will be excluded from the bankrupt's estate under WRPA 1999, s 11.

35. However, PSA 1993, s 159 does go on to provide, in s 159(4A), that "no order shall be made by any court the effect of which would be that he would be restrained from receiving anything the assignment of which is or would be made void" by s 159(1). Under s 159(4B), it is provided that "Subsection (4A) does not prevent the making of an attachment of earnings order under the Attachment of Earnings Act 1971". This is similar to PA 1995, s 91(4)(a) dealing with occupational pension schemes generally, but there is no express equivalent in s 159 to the IPO provision in s 91(4)(b) – see below.

36. There are also statutory restrictions on suspending or forfeiting GMPs[27].

37. An income payments order (IPO) cannot be made in relation to a GMP as GMPs are expressly excluded from being part of the income of the bankrupt – IA 1986, s 310(7) to (9).

Public sector pensions

38. Some statutory pension provisions, such as those applicable to members of the armed forces, provide that any assignments of the pension shall be void, but add that nothing is intended to prejudice any other enactment providing for payment to a bankrupt's trustee[28].

39. The Local Government Pension Scheme (LGPS), for example, includes both non-assignment wording (reg 84(2)) and a provision that benefit does not pass to a trustee, but allows an IPO (reg 84(3)). The Local Government Pension Scheme Regulations 2013 (SI 2013/2356) provides at reg 84(2) and (3):

> 84. ….
>
> (2) No such benefit is assignable or chargeable with that person's, or any other person's, debts or other liabilities.

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[26] Section 159(5) used to refer GMP rights not vesting in a trustee-in-bankruptcy, but was repealed from April 2002 by WRPA 1999. See *Horton v Henry* at [22].

[27] See the summary in the paper by Jonathan Moody, *Inalienability of pension: section 91 Pensions Act 1995* (APL 2013 Summer Conference).

> PSA 1993, ss 13 and 17 provide for a minimum level of pension (the GMP) to be paid, but PSA 1993, s 21 allows for this to be suspended or forfeited in prescribed circumstances. The relevant circumstances are in Occupational Pension Schemes (Schemes that were Contracted-out) (No.2) Regulations (SI 2015/1677), reg 26(2) (formerly the Occupational Pension Schemes (Contracting-out) Regulations 1996 (SI 1996/1172, as amended), reg 61). The permitted forfeiture events do not include assignment or bankruptcy, but are limited to (a) treason; (b) breach of the Official Secrets Act; (c) (in the case of an armed forces pension scheme) "an act which is gravely prejudicial to the defence, security or other interests of the State"; and (d) (in the case of a spouse pension) unlawful killing of the spouse from whom the GMP is derived.

[28] Ian F Fletcher '*The Law of Insolvency*' (5th ed, 2017, Sweet & Maxwell) at 8-082, giving, as examples: Army Act 1955, s 203; Air Force Act 1955, s 203; Naval Discipline Act 1957, s 159(4) and (4A).

(3) On the bankruptcy of a person entitled to a benefit under the Scheme no part of the benefit passes to any trustee or other person acting on behalf of the creditors, except in accordance with an income payments order or agreement under section 310 or 310A of the Insolvency Act 1986

Recovery of excessive contributions

40. A trustee-in-bankruptcy can apply to court for an order in circumstances where excessive contributions have been made to a registered pension arrangement - IA 1986, s 342A. Such an order aims to restore the position to what it would have been had the excessive contributions not been made – IA 1986, s 342A(2).

41. For the court to make such an order it needs to be satisfied that the excessive contributions have unfairly prejudiced the individual's creditors – IA 1986, s 342A(2)(b). In particular the court will consider:
    - whether any of the contributions were made for the purpose of putting assets beyond the reach of any or all of the individual's creditors – IA 1986, s 342A(6)(a); and
    - whether the contributions were excessive in view of the individual's circumstances when those contributions were made – IA 1986, s 342A(6)(b).

42. In *Wilson v McNamara* [2020] EWHC 98 (Ch), Nugee J (as he then was) pointed out (at [37]) that these provisions direct the court to look at the circumstances prevailing at the time that the contributions are made. Nugee J stated that he "need not consider if these are the only potential relevant circumstances".

43. Nugee J also contrasted the s 342A(6) provisions as remodelled by WRPA 1999 with those formerly in place for occupational pension schemes under s 342A(3)(a)-(c), as originally inserted by PA 1995, where the Court was also directed to consider whether the level of benefits under the scheme (and any other occupational pension scheme to which the bankrupt was entitled or likely to become entitled) was excessive.

44. There is no time limit set for recovery under s 342A – the contributions could have been made some years before the bankruptcy.

45. The requirements for the statutory power to arise are quite stiff. There have not been many reported examples of this power being used – but for an example, see *Stanley v Wilson* [2015] 8 WLUK 49, [2017] BPIR 227 (HHJ Raeside QC).

WRPA 1999, section 12: protection for unapproved pensions

46. The protection for pension rights and funds in WRPA 1999, s 11 has been described as the "gold standard" of protection[29]. The legislation however is only expressed to extend to "authorised pension arrangements". As noted above, these are mainly limited to pension arrangements which

[29] *Wilson v McNamara* [2020] EWHC 98 (Ch) at [35].

are registered for tax purposes under the Finance Act 2004 (***FA 2004***), although the Secretary of State has power to extend this by regulations. Some regulations have been made[30], but the extensions are mainly limited to cases where UK tax relief has been granted on contributions.

47. Conversely, WRPA 1999, s 12 deals with "unapproved arrangements". The relevant schemes are described in regulations, along with the protections conferred[31]. Broadly these give the court power to make an exclusion order on application by the bankrupt (or for a qualifying agreement with the trustee-in-bankruptcy), within fairly tight time limits. The Court is directed to have reference to the future likely needs of the bankrupt and whether any other pensions are likely to be received (other than state pension) – reg 5(3).

Section 11 protection for foreign pensions? — *Wilson v McNamara* [2020] and [2022]

48. As mentioned above, the WRPA 1999, s 11 protection is stated to apply, in addition to UK tax registered pension schemes, to pension arrangements prescribed by regulations. The 2002 regulations[32], made under WRPA 1999, s 11(2)(h), prescribe, under reg 2, the following arrangements as being approved for the purposes of s 11 as well:

> 2(1) The arrangements prescribed for the purposes of section 11(2)(h) of the 1999 Act (pension arrangements which are "approved pension arrangements") are arrangements (including an annuity purchased for the purpose of giving effect to rights under any such arrangement)—
>
> (a) to which—
>
> (i) the holder of an office or employment has contributed by way of payments out of earnings which have been allowed as a deduction under paragraph 51 of Schedule 36 to the Finance Act 2004 (individuals with pre-commencement entitlement to corresponding relief),
>
> (ii) Article 17A of the Convention set out in the Schedule to the Double Taxation Relief (Taxes on Income) (Republic of Ireland) Order 1976 (pension scheme contributions) applies;
>
> (b) made with a scheme which is an occupational pension scheme—
>
> (i) registered under section 153 of the Finance Act 2004, or
>
> (ii) which is to be treated as becoming a registered pension scheme under section 153(9) of the Finance Act 2004 in accordance with Part 1 of Schedule 36 to that Act;
>
> (c) to which section 308A of the 2003 Act (exemption of contributions to overseas pension scheme) applies;
>
> (d) which are exempt or qualify for relief from, or are not liable to charge to, income tax by virtue of section 614 or 615 of the Taxes Act (exemptions and reliefs in respect of income from investments etc of certain pension schemes and other overseas pensions), or section 629, 630 or 643 of the 2003 Act (pre-1973 pensions

[30] See reg 2 in the Occupational and Personal Pension Schemes (Bankruptcy) (No 2) Regulations 2002 (SI 2002/836).

[31] See regs 3 to 6 in the Occupational and Personal Pension Schemes (Bankruptcy) (No 2) Regulations 2002 (SI 2002/836).

[32] The Occupational and Personal Pension Schemes (Bankruptcy) (No 2) Regulations 2002 (SI 2002/836).

> paid under the Overseas Pensions Act 1973 and Malawi, Trinidad and Tobago and Zambia government pensions);
> (e) made with—
> (i) a public service pension scheme, or
> (ii) an occupational pension scheme established under the auspices of a government department or by any person acting on behalf of the Crown.
>
> (2) Paragraph (1)(e) above does not apply to any employer-financed retirement benefits scheme arrangement which has been provided to an employee as part of or in addition to any pension arrangement referred to in paragraph (1)(e) above.
>
> (3) For the purposes of this regulation—
> ….
> (b) "occupational pension scheme" has the meaning given in section 1 of the Pension Schemes Act 1993;
> (c) "public service pension scheme" has the meaning given in section 1 of the Pension Schemes Act 1993

49. *Wilson v McNamara* [2020] EWHC 98 (Ch)[33] and, on return from the CJEU, [2022] EWHC 98 (Ch)[34] concerned whether an Irish pension of an Irish citizen made bankrupt in England and Wales was protected under English law from his trustee-in-bankruptcy. The issues in the *McNamara* case are outlined in the box below (adapted from [2] to [5] in the 2022 judgment of Nugee LJ):

> Mr McNamara, an Irish citizen, was made bankrupt in England (on his own petition). Prior to his bankruptcy he had been a property developer in Ireland. The proceedings concern the impact of his bankruptcy on any rights that he might still have under an Irish pension scheme, the Simcoe Scheme. The Simcoe Scheme held a unit-linked retirement policy issued by Irish Life and this was claimed by his Joint Trustees in Bankruptcy for the bankruptcy estate. Mr McNamara however contended that any rights he had under the Simcoe Scheme should be excluded from his bankruptcy on the basis that this was required by EU law, and specifically by Art 49 TFEU.
>
> This issue was argued before Nugee J (as he then was) in 2020 as a preliminary issue on agreed facts: [2020] EWHC 98 (Ch). Nugee J decided at the first hearing that the question whether the impact of insolvency on pension rights was within the scope of Art 49 TFEU was not acte clair, and that it was appropriate to make a reference to the CJEU to seek a preliminary ruling on this question.
>
> In effect the reference to the CJEU asked whether the relevant English provisions for exclusion from bankruptcy of the bankrupt's pension rights (namely s 11 WRPA 1999, supplemented by various regulations) were compatible with EU law.
>
> The CJEU handed down judgment on 11 November 2021 under the name *BJ and OV v Mrs M & others* (Case C-168/20) EU:C:2021:907. In summary the European Court decided that Art 49

[33] [2020] 2 CMLR 27, [2020] BPIR 661, [2020] Pens LR 15.
[34] An appeal to the Court of Appeal has been filed.

TFEU precluded a provision of the law of a Member State which made the automatic exclusion of pension rights from bankruptcy dependent on a requirement that the pension scheme be tax approved in that Member State, unless such a provision were justified in the public interest. In other words, the CJEU accepted that the relevant English provisions did constitute a restriction on freedom of establishment, and would therefore be contrary to EU law unless justifiable.

Nugee J had in the 2020 Judgment expressed his own (provisional) view:

- that the impact of insolvency on the accrued pension rights of a person exercising the right of self-establishment as a self-employed person was within the scope of Art 49 TFEU;
- that there had not been equal treatment between UK nationals and nationals of another Member State; and
- that the relevant English provisions therefore constituted discrimination in the enjoyment of a social advantage prohibited by Art 49 TFEU and Art 24 CRD: see the 2020 Judgment at [122] to [125].

Nugee J had also heard argument on the appropriate remedy if there were unlawful discrimination and went on to consider that question to avoid it having to be revisited. He concluded that it would be appropriate to read down s 11(2)(a) WRPA 1999 so that it included an exclusion of pension rights under a scheme established in another Member State which was "recognised for tax purposes" within the meaning of reg 2(3) of The Pension Schemes (Categories of Country and Requirements for Overseas Pension Schemes and Recognised Overseas Pension Schemes) Regulations 2006, (SI 2006/206): see the 2020 Judgment at [126] to [133].

Since the (Irish) Simcoe Scheme was (or very probably was) recognised for tax purposes within that meaning, the preliminary issue would therefore be answered "Yes", that is that Mr McNamara's rights under the Simcoe Scheme would be excluded from his bankruptcy in England and Wales.

50. In 2022, Nugee LJ (as he had then become) heard the case when it was referred back by the CJEU: *Wilson v McNamara* [2022] EWHC 98 (Ch)[35]. The parties had been unable to agree an order based on the CJEU's decision, the trustees-in-bankruptcy arguing that they should be able to argue that the CJEU had made it clear that the relevant provisions in WRPA 1999 (and the regulations) were only unlawful if they could not be justified and that it was for the UK referring court to decide whether there was any justification.

51. Ultimately, in the 2022 judgment, Nugee LJ decided that it was too late for the trustees-in-bankruptcy to raise justification arguments in relation to the UK legislation and that judgment on the preliminary point should therefore be given to Mr McNamara – ie that Mr McNamara's rights under the Irish pension scheme (the Simcoe Scheme) would be excluded from his bankruptcy in England and Wales.

[35] An appeal to the Court of Appeal has been filed.

52. In effect Nugee LJ held (see [71], [78] and [83] of the 2022 judgment) that s 11, WRPA 1999 should be read down by adding at the end of WRPA, s 11(2)(a):

> **"or is an "overseas pension scheme" (within the meaning of s 150(7) FA 2004) established in a Member State of the EU."**

Nugee LJ commented that this would "import two further requirements, one that it was a "pension scheme" as defined by s 150(1), Finance Act 2004 (***FA 2004***), and the other that it satisfied the requirements of reg 2(2) of" the Pension Schemes (Categories of Country and Requirements for Overseas Pension Schemes and Recognised Overseas Pension Schemes) Regulations 2006, (SI 2006/206).

53. FA 2004, s 150(7) defines an "overseas pension scheme":

(7) In this Part "overseas pension scheme" means a pension scheme (other than a registered pension scheme) which— (a) is established in a country or territory outside the United Kingdom, and (b) satisfies any requirements prescribed for the purposes of this subsection by regulations made by the Board of Inland Revenue.

The relevant regulations are the Pension Schemes (Categories of Country and Requirements for Overseas Pension Schemes and Recognised Overseas Pension Schemes) Regulations 2006 (SI 2006/206, as amended).

The term "overseas pension scheme" is defined in reg 2, broadly as a scheme which:

(a) Is a pension scheme (s 150(7)) as defined in FA 2004, s 150(1)[36]; and
(b) Is regulated (reg 2); and
(c) The scheme is open to persons resident in the country or territory in which it is established - reg 2(3)(condition 1); and
(d) Either (i) does not provide for tax relief on contributions; or (ii) the scheme is liable to taxation on its income and gains and is of a kind specified in Schedule 1 to the Regulations[37]; or (iii) all or most of the benefits paid by the scheme to members who are not in serious ill-health are subject to taxation – reg 2(3)(condition 2); and

[36] Section 150(1) provides:

"(1) In this Part "pension scheme" means a scheme or other arrangements, comprised in one or more instruments or agreements, having or capable of having effect so as to provide benefits to or in respect of persons—
(a) on retirement,
(b) on death,
(c) on having reached a particular age,
(d) on the onset of serious ill-health or incapacity, or
(e) in similar circumstances."

[37] Schedule 1 specifies a "complying superannuation plan as defined in section 995-1 (definitions) of the Income Tax Assessment Act 1997 of Australia."

(e) The scheme is approved or recognised by, or registered with, the relevant tax authorities as a pension scheme in the country or territory in which it is established - reg 2(3)(condition 3).

54. In the 2022 judgment in *Wilson v McNamara*, Nugee LJ noted that his decision would not bind any other person, save the current parties. He held that his decision on this point would not preclude any other person, including Government if it so wished, from seeking to argue in any future case that the restrictions in s 11 WRPA 1999 were in fact justified on the basis of an overriding public interest; and if such justification were made out, that would self-evidently be sufficient reason for the Court to decline to follow my decision in the present case.

55. Subject to any reversal by the Court of Appeal (Westlaw notes that an appeal has been filed), this means that Mr McNamara should have his Irish pension protected in his bankruptcy in England and Wales by WRPA 1999, s 11. It is open to other persons who are bankrupt in England and Wales with pensions in an EU member state to seek the same result, but also open to the trustee-in-bankruptcy to argue that the exclusion from s 11 is justified.

56. The decision in *Wilson v McNamara* is clearly limited to pensions established in another EU member state (as it is based on issues on the right of self-establishment as a self-employed person was within the scope of EU law, ie Art 49 TFEU). It would not apply to a pension arrangement established outside the EU.

II Can creditors enforce against pension savings (before, during and after bankruptcy)?

57. Under the first heading, we considered the restrictions on enforcing against pension savings during bankruptcy.

58. But what if the member/debtor is not (yet) bankrupt?

59. **Charging Orders Act:** Where the pension fund is constituted as a trust, the member may have an equitable interest in the fund (even if, as is usual, there is no vested interest in any part of the fund). Such an interest might in principle be subject to a charging order under s 2(1)(a)(ii) of the Charging Orders Act 1979, although a "mere hope" under a discretionary trust would be unlikely to qualify. But there are barriers in the way of obtaining a charging order over an interest in a pension scheme.

    - First, under s 91(1) Pensions Act 1995, no entitlement or future right under an occupational pension scheme can be assigned or made the subject of a charge or lien.

    - Secondly, the rules of many personal pension schemes have "anti-charging" clauses which automatically forfeit the right to benefit if the member's interest is assigned or charged[38].

[38] As mentioned at 15 above, this cannot apply where the forfeiting event is bankruptcy – PSA 1993, s 159A.

- Thirdly, even where an interest is charged, then it is not obvious how it can be realised, until the member makes an election to take a benefit (as to which election, see below).

60. **Third Party Debt Order:** Likewise, it is not possible to require payment of the benefit (not already in payment) from the pension fund by obtaining a third-party debt order under Part 72 of the Civil Procedure Rules (CPR). The fund itself is not a "debt", because the pension provider's liability to pay is contingent both on the member electing to draw benefits under the scheme, such as a lump sum, annuity or drawdown[39], and, in the cases where it has a discretion, on the provider deciding to give effect to the election. A contingent liability cannot be a debt for the purposes of a third-party debt order: *Dunlop & Ranken v Hendall Steel Structures* [1957] 1 WLR 1102. We discuss below the position of the pension trustees where they have a discretion as to payment.

Occupational pension schemes – effect of s91, Pensions Act 1995

61. For an occupational pension scheme[40] (but not a personal pension) a court is not allowed to make an order in relation to a person's entitlement under a scheme (or right to a future pension), if the effect of the order would be to restrain that person from receiving that pension (or other benefits[41]) – PA 1995, s 91(2)[42]. This restriction does not apply to occupational pension schemes that do not have UK tax registration[43]. There are exclusions allowing an attachment of earnings order or an income payments order (IPO) – PA 1995, s 91(4)[44].

62. It seems likely that the prohibition under s 91 only applies to the rights under the occupational pension scheme and the prohibition does not apply to a benefit that has fallen due for payment, nor to the proceeds once the payment has been made (eg into the member's bank account, which may have been charged) – eg Mance LJ in *Fisher v Harrison* [2003] EWCA Civ 1047, [2004] OPLR 127 at [26] and (in another context) Gloster LJ in *Horton v Henry* [2016] EWCA Civ 989, [2017] 3 All ER 735 at [42].

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[39] See eg *Blight v Brewster* at [59] and *Brake v Guy* [2022] EWHC 1746 (Ch) at [44], citing *Taurus Petroleum Ltd v State Oil Marketing Company* [2018] AC 690 at [88] and *Hardy Exploration and Production (India) Inc v Government of India* [2018] EWHC 1916 (Comm) at [120]. In *Brake* at [52], HHJ Matthews held that there is no debt if the relevant assets in the pension fund are held in the form of investments (and not cash).

[40] As defined in PSA 1993, s 1. Note that this can include a scheme established outside the UK. The s 1 definition changed at the end of 2020 as part of Brexit. The definition in s 1 now includes occupational pension schemes established in another member state (before 2020 these were excluded from the definition).

[41] See PA 1995, s 94(2): "pension" includes "any benefit under the scheme and any part of a pension and any payment by way of pension".

[42] On section 91, see the paper by Jonathan Moody, *Inalienability of pension: section 91 Pensions Act 1995* (APL 2013 Summer Conference).

[43] Occupational Pension Schemes (Assignment, Forfeiture, Bankruptcy etc.) Regulations 1997 (SI 1997/785), reg 8(3): "section 91(2) of the 1995 Act shall not apply in relation to schemes which are not registered schemes". However the exclusion from s 91(2) in reg 8(3) does not apply to the Armed Forces Pension Scheme and public service schemes – reg 8(4).

[44] Legislation does allow further exceptions – pension sharing orders and attachment (formerly earmarking) orders on divorce etc (see s 44(1), WRPA 1999 and s 166(5), Pensions Act 1995).

Prohibition on assignment

63. A prohibition on assignment as such (whether in a statute or a scheme rule) does not seem to be affected by the vesting of the bankrupt's estate in the trustee-in-bankruptcy on the making of a bankruptcy order under IA 1986, s 306. For pension rights within an approved pension arrangement (and where the bankruptcy petition is after May 2000) this is because the pension rights do not fall within the bankrupt's estate – WRPA 1999, s 11 and for an unapproved arrangement (where an order is made), s 12.

64. For pension arrangements outside s 11 (or s 12), the previous law will apply and it will usually be the case that the bankrupt member's rights and benefits (including future benefits under a pension scheme) transfer to the trustee-in-bankruptcy[45] under s 306.

65. A provision in the relevant scheme stating that an assignment (or charge) is ineffective will not apply to this statutory transfer, as it will not be a transfer made by the bankrupt, instead being by operation of law, with no need for an assignment – IA 1986, s 306(2). See for example Ferris J in *Re Landau* [1997] 3 All ER 322 at 328[46].

Attachment of Earnings Act 1971

66. Where a debtor's pension is already in payment through an annuity, the court can make an attachment of earnings order under Part 89 of the Civil Procedure Rules (***CPR***) and s 24 of the Attachment of Earnings Act 1971 (***1971 Act***). The term "earnings" is defined in the 1971 Act expressly to include pensions (s 24(1)(b)), but does not include "pension, allowances or benefit payable under any enactment relating to social security" (s 24(2)(c), as amended).

67. As noted above, attachment of earnings by an order under the 1971 Act is an exception to the prohibition for occupational pension schemes on assignments or charges (PA 1995, s 91) or in relation to GMPs (PSA 1993, s 159).

68. However, in making an attachment order, under s 6(5) of the 1971 Act, the court would need to specify a "protected earnings rate" being a rate "below which, having regard to the debtor's resources and needs, the court thinks it reasonable that the earnings actually paid to him should not be reduced". That vastly reduces the benefit of such an order, because the speed at which the debt would be paid off is likely to be commercially unacceptable to most creditors.

69. <u>But</u> despite the limits and protections noted above, the court may be able to force the member to make an election to draw benefits:

- before bankruptcy: *Blight v Brewster* [2012] EWHC 165 (Ch); or
- after bankruptcy (but only if the cause of action has survived the bankruptcy discharge): *Bacci v Green* [2022] EWHC 486 (Ch).

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[45] See *Re Landau* [1998] Ch 223, *Krasner v Dennison* [2001] Ch 76, *Patel v Jones* [2001] BPIR 919 and *Rowe v Saunders* [2002] EWCA Civ 242. For the pre 1996 view, see Ian Greenstreet '*When can a trustee-in-bankruptcy get his hands on your pension?*' (1996) 10 TLI 6.

[46] Citing on this: *Re Riggs ex p Lovell* [1901] 2 KB 16 (Wright J); and *Re Griffiths* [1926 Ch 1007 (Romer J).

We discuss these situations further below.

Before Bankruptcy: *Blight v Brewster* [2012] EWHC 165 (Ch)

70. The protection in WRPA 1999, s 11 for an approved pension arrangement only applies in relation to a bankruptcy. Before any formal bankruptcy takes place, it would still be possible for a judgment creditor of a member to seek an injunction (perhaps in support of a receivership order) requiring the relevant member to exercise any rights to draw down all or part of his or her benefits under a pension arrangement.

71. Tax rules for a UK tax registered pension arrangement (Finance Act 2004, ss 165 and 279) mean that no benefits can usually be paid out of a registered pension scheme before the relevant member reaches the minimum pension age. Currently this is age 55[47], but it is due to increase on and from 6 April 2028 to age 57 (Finance Act 2022, s 10, amending FA 2004, s 279). The minimum pension age does not apply to ill-health pensions and some members can have a protected pension age which is earlier.

72. But once the member is over the minimum pension age (currently age 55), then it is possible (at least if the member is not the subject of a bankruptcy order[48]) for the Courts to grant an injunction requiring the member to exercise any right to draw all or part of his or her benefits.

73. In *Blight v Brewster* [2012] EWHC 165 (Ch), [2012] 1 WLR 2841 Gabriel Moss QC (sitting as a deputy High Court judge) decided that a member (Mr Brewster) who was a judgment debtor could be compelled (by way of equitable execution[49]) to take his pension lump sum so that it would be claimed by his creditors. The member was entitled to draw his pension but had elected not to do so. There is no mention in the judgment of Mr Brewster being bankrupt.

74. The pension was stated in the judgment in *Blight* to be with "Canada Life" and so presumably was a personal pension[50] (and not an occupational pension scheme). This point is not mentioned in the judgment, but this is presumably the reason why the judgment does not discuss any limit on court orders under the Pensions Act 1995, s 91(2).

75. In *Blight*, the court allowed the judgment debt to be enforced against the member's lump sum entitlement, ordering the member to delegate the power of election to the claimant's solicitor. The court would then authorise the solicitor to make the election in the defendant's name. Immediately following the election, the sum payable from the pension fund would be subject to a third party debt order.

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[47] The age increased from 6 April 2010 to age 55 – Finance Act 2004, s 279(1).

[48] When IA 1986, s 285(3) prohibiting legal process against the debtor or their property may be relevant.

[49] Under the power to grant injunctions under s 37 of the Senior Courts Act 1981. Following the Privy Council decision in *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank & Trust Co (Cayman) Ltd* [2011] UKPC 17, [2012] 1 WLR 1721 and not following a divorce case, *Field v Field* [2003] 1 FLR 376.

[50] See also *Bacci v Green* [2022] EWHC 486 (Ch) at [38].

76. It seems that this could not apply if the member has no right or entitlement to draw benefits (eg if the pension scheme only allows benefits to be drawn with a third party's consent or if there is a protective anti-deprivation/assignment provision in the pension scheme[51]).

77. *Blight v Brewster* has since been followed in various family cases[52]. It was cited by the Court of Appeal in *Horton v Henry* [2016] EWCA Civ 989, [2017] 3 All ER 735 on the distinction between the position of a debtor before bankruptcy and after. But Gloster LJ made it clear that she was assuming for the purposes of the judgment in *Horton v Henry* (but without deciding) that the decision in *Bright v Brewster* was correct – at [39], footnote 9.

78. *Blight* was also cited by HHJ Hodge QC in *Office of the Bankruptcy Adjudicator v Shaw* [2021] EWHC 3140 (Ch) at [32] and [39]. *Shaw* is discussed below.

Ordering bankrupt to make transfer to another arrangement

79. *Blight* was also followed in *Bacci v Green* [2022] EWHC 486 (Ch) at [30] to [38]. In *Bacci*, the order arguably went further than *Blight* in allowing the order to extend not just to a right for the member to draw their pension and other rights, but also ordering the member to exercise his revoked enhanced protection and so draw down a larger amount that would otherwise have been paid.

    More recently, *Blight* has been followed in two recent pension cases (which were decided after the date of the Nugee Lecture):

    - *Brake v Guy* [2022] EWHC 1746 (Ch) (HHJ Paul Matthews, sitting as a High Court judge); and
    - *Lindsay v O'Loughnane* [2022] EWHC 1829 (QB) (Simon Birt QC, sitting as a deputy judge of the High Court).

    Brake v Guy followed both *Blight* and *Bacci* and rejected (at [67]) an argument that these cases only applied where there had been fraud. Similarly in *Lindsay v O'Loughnane* an order was made, but the judge refused to make a default order allowing the creditor to exercise options (on the debtor's behalf) in relation to the pension if the judgment debtor failed to comply with the order.

80. In a divorce case, *Maughan v Wilmot* [2020] EWHC 885 (Fam), [2020] 2 FCR 429, Mostyn J briefly considered *Blight* and considered that the court could order a transfer, commenting at [22]:

    > "[Counsel for the husband] seeks to argue that the court does not have power to make a mandatory order to require draw-down of pension funds or, still less, to require a transfer of funds to a flexible access product. In fact, such an order could be made: see *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Company (Cayman) Limited* [2011] UKPC 17, *Blight*

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[51] See Pensions Act 1995, ss 91 to 94 for occupational pension schemes and Pension Schemes Act 1993, ss 159 and 159A for GMPs and personal pensions.

[52] Eg *Goyal v Goyal* [2016] EWFC 50, [2016] 4 WLR 170 at [44] and *Maughan v Wilmot* [2020] EWHC 885 (Fam), [2020] 2 FCR 429, (Mostyn J) at [22].

v Brewster [2012] 1 WLR 2841, *Goyal v Goyal* [2016] EWFC 50, [2017] 2 FLR 236, [2016] 4 WLR 170, [2017] 1 FCR 188 at [44]."

81. Similarly in the criminal confiscation case, *R v Asplin (No 2)* [2022] EWCA Crim 9[53], Males LJ in the Court of Appeal envisaged (at [15]) a transfer from an occupational pension scheme to a personal pension being possible. However this was expressly stated to be subject to the potential for the trustees of the occupational pension scheme to forfeit the benefits before such a transfer (on the basis of a lien rule in favour of the defrauded employer).

After Bankruptcy: *Bacci v Green* [2022] EWHC 486 (Ch)

82. *Bacci v Green* [2022] EWHC 486 (Ch) involved a claim by judgment creditors to enforce a judgment against Mr Green against his beneficial interest under a tax registered money purchase occupational pension scheme. There was also a worldwide Freezing Order outstanding against Mr Green. Following the freezing order and the judgment for the debt, Mr Green was declared bankrupt.

83. Andrew Hochhauser KC (sitting as a deputy Judge of the High Court) in *Bacci* followed the decision in *Blight* and granted an order requiring Mr Green to elect to receive benefits under the pension scheme when he reached age 55 (ie in October 2022).

    - The Claimant's solicitors were to be delegated power on behalf of Mr Green to make various elections to arrange for lump sums and pensions to be paid by the scheme (see [12] and [13]).
    - These would be paid to one of Mr Green's bank accounts nominated by them, which account will be subject to the world wide freezing order.
    - The Claimant then intends to recover out of that bank account by seeking a third party debt order (see [14]).

84. The judgment in *Bacci* notes that the effect of the various elections would include a revocation to HMRC of Mr Green's enhanced protection in relation to his lifetime allowance. This would allow a greater lump sum to be drawn from the pension scheme (albeit with (broadly) a 55% tax charge deducted by the scheme before payment).

85. It is not clear from the judgment of Andrew Hochhauser KC in *Bacci* whether Mr Green's bankruptcy had been discharged[54]. It has been commented that Mr Green's discharge from bankruptcy had taken effect before the hearing[55]. Usually the discharge would have effect to release the relevant debts (assuming they were provable debts) – IA 1986, s 281(1). But in *Bacci*,

[53] Involving confiscation orders (under Criminal Justice Act 1988, s 72(7)) and compensation orders (under Powers of Criminal Courts (Sentencing) Act 2000, s 130).

[54] Usually discharge occurs one year after the bankruptcy commences– IA 1986, s 279(1). A bankruptcy commences on the date of the bankruptcy order – IA 1986, s 278(a).

[55] Practical Law Pensions , case report on *Bacci v Green* (at Comment, para 1).

the judgment makes it clear that the debts were incurred in relation to "fraud"[56] and so the exception from discharge would apply – IA 1986, s 281(3).

86. The *Bacci* judgment points to the distinction in the type of pension scheme involved, compared with that in *Blight*. It notes (at [38]) that the scheme in *Bacci* was an occupational scheme, although that in *Blight* appears to have been a personal pension scheme. The limits in PA 1995, s 91 are discussed at [39] and [40]. Although Mr Green's counsel did not argue that s 91 applied, the judge reached the conclusion that the limits in s 91 did not apply to the order sought, commenting:

> "40. S.91 of the 1995 Act does not prevent the Court granting the Order. The Order does not have the effect of restraining Mr Green from receiving the pension. It does the precise opposite - it ensures that payment of Mr Green's pension is effected, rather than remaining trapped in the Fund."

Effect of IA 1986, s285(3)? - Restriction on legal process

87. There is also no reference in the *Bacci* judgment to the effect of the restriction on legal process in IA 1986, s 285(3). This section provides:

> (3) After the making of a bankruptcy order no person who is a creditor of the bankrupt in respect of a debt provable in the bankruptcy shall–
>
> (a) have any remedy against the property[57] or person of the bankrupt in respect of that debt, or
>
> (b) before the discharge of the bankrupt, commence any action or other legal proceedings against the bankrupt except with the leave of the court and on such terms as the court may impose.

88. The extended meaning of property in IA 1986, s 436 will apply to cover pension rights. Where WRPA 1999, s 11 applies to exclude rights under an authorised pension arrangement, this only excludes those rights from the bankrupt's estate and does not operate to exclude those rights from being part of his or her property. This means that the restriction in s 285(3) could still apply. It is not clear if the s 285(3) restriction ceases to apply once the bankrupt has been discharged. There seems little reason for it to remain in relation to debts that could have been proved in the bankruptcy, as normally these will have been discharged and released.

[56] That is fraud in the sense used in IA 1986, s 281(3). Ie dishonesty - see *Masters v Leaver* [2001] 1 WLR 2378, [2001] 3 All ER 811; *Mander v Evans* [2001] 1 WLR 2378, [2001] 3 All ER 811; and *Woodland Ferrari v UCL Group Retirement Benefits Scheme* [2002] EWHC 1354 (Ch), [2003] Ch 115 (Ferris J).

[57] The term "property" in s 285 is any of the bankrupt's property, whether or not comprised in his estate – IA 1986, s 285(6)

III When might pension savings prevent a debtor from declaring bankruptcy?

89. Under the previous heading, we discussed how the policy of protecting pension savings is qualified by the ability of creditors to enforce against those savings either before or – in some circumstances – after bankruptcy.

90. We now turn to another such qualification, which is a restriction on the ability of debtors – again, depending on the circumstances – to invoke the protections of the personal bankruptcy regime at all.

91. Following the introduction of the pension freedoms legislation with effect from April 2015, it is considerably easier to access pension savings after the age of 55. Previously, access to pension savings was tightly controlled: aside from the typical (but limited) cash lump sum, savers looking to retire could only expect to receive a fixed (or index-linked) annual income.

92. By removing the requirement for savers to purchase an annuity, the legislation made it simpler to draw down from pension savings on an ad hoc basis. That includes an ability – subject only to tax charges (usually deducted at source by the pension scheme) – for savers to withdraw their entire pension savings in a single lump sum.

93. With that flexibility, though, comes vulnerability. A debtor who has reached minimum pension age (currently age 55) may now be prevented from declaring bankruptcy where they have pension savings available to pay their debts.

94. This risk to pension savers is illustrated by the recent decision of HHJ Hodge QC, sitting as a High Court Judge, in *Office of the Bankruptcy Adjudicator v Shaw* [2021] EWHC 3140 (Ch) (on appeal from the County Court at Liverpool, unreported [2020] 5 WLUK 239).

    (a) The factual background was not in dispute. Mr Shaw was indebted to creditors in a sum of just under £170,000. His assets included four pension plans, the principal of which was valued in excess of £400,000. The question was whether that pension should be taken into account when determining whether Mr Shaw was able to pay his debts.
    (b) The Bankruptcy Adjudicator held that the pension should be taken into account and therefore refused to make a bankruptcy order. Mr Shaw then obtained a re-hearing before a District Judge, who disregarded the pension and found that on a cash-flow basis Mr Shaw had insufficient assets with which to pay his debts as they fell due. The District Judge therefore made the bankruptcy order.
    (c) On appeal, HHJ Hodge QC noted that the case raised a fundamental, and apparently novel, question: what is the evidential burden, if any, resting on an applicant for a bankruptcy order to adduce evidence as to his inability to access his pension savings for the purposes of demonstrating – as required by IA 1986, s 263K(1)(b) (as amended) – that he or she is unable

to pay their debts at the date of the adjudicator's determination of the bankruptcy application?

(d) In answering that question, HHJ Hodge QC began with the principle that the value of pension savings should be taken into account in determining whether a debtor is insolvent on a cash-flow basis, provided that those pension savings are – on the facts – sufficiently realisable within an appropriate timescale. He found that Mr Shaw had borne the evidential burden of proving that his pension savings were not so realisable, and he had provided little or no evidence in order to do so. It followed that, on the limited evidence before her, the District Judge ought to have concluded that Mr Shaw's pension savings were sufficiently realisable[58] such that he was able to pay his debts as they fell due.

(e) HHJ Hodge QC therefore allowed the appeal and annulled the bankruptcy order. Presumably, this resulted in Mr Shaw having to draw down on his pension(s) as a means of paying his creditors. That was a very significantly worse outcome for Mr Shaw than if he had succeeded in declaring bankruptcy—then, as set out under the first heading above, his pension savings would have been protected (in accordance with s 11 of WRPA 1999) and his creditors left unsatisfied.

95. There are three key points to note arising out of *Shaw*.

(a) First, applying for bankruptcy cannot be used as a way of safeguarding pension savings after age 55, if those pension savings would mean that the individual could pay his or her debts. Unlike the District Judge, HHJ Hodge QC was unmoved by the submissions made on behalf of Mr Shaw that by taking the pension savings into account the Court would – in effect – be requiring Mr Shaw to withdraw them to pay his creditors. It was irrelevant that this was "anomalous" when set against the policy of protecting pensions on bankruptcy. There was no such policy prior to bankruptcy, as *Blight v Brewster* – discussed under the second heading above – had made clear. The courts will not allow bankruptcy to be used as a device to avoid payment of liabilities from assets, even if those assets would not form part of the bankruptcy estate.

(b) Second, adverse tax consequences have only limited relevance. Mr Shaw's tax-free lump sum of 25% would not have been sufficient to have discharged his debts, but he would have been able to withdraw in excess of that lump sum – subject to income tax at his marginal rate – so that the debts could be discharged in full. The only question was whether the net amount was sufficient to discharge the debts. So – in contrast with the exercise of discretion in *Bacci v Green,* discussed under the second heading above – the decision whether Mr Shaw could be adjudged bankrupt was a hard-nosed one. Mr Shaw was able to pay his debts, and so he simply had no option but to suffer the tax consequences of doing so.

(c) Third, this case underscores the need for creditors to be cautious before presenting a bankruptcy petition against a debtor who has substantial pension savings. The debtor's application will fail if the pension savings are sufficiently realisable within an acceptable timescale. But on a creditor's petition, the burden of proof (under IA 1986, s 271(3)) is

[58] Similarly, in a later case *R v Asplin (No 2)* [2022] EWCA Crim 9, involving confiscation orders (under Criminal Justice Act 1988, s 72(7) and compensation orders under Powers of Criminal Courts (Sentencing) Act 2000, s 130), the Court of Appeal held at [15] to [31] that pension assets and rights of defendants within an occupational pension scheme should be considered to be realisable assets of the defendants based on a cash equivalent transfer value (CETV) calculation and gross of tax.

reversed—so, in the absence of evidence as to the availability of the pension savings, the petition will succeed and the pension savings will be put out of reach for enforcement purposes.

96. In our view, there is now a clear trend of the courts favouring the payment of creditors over the protection of pension savings. Debtors who are yet to reach the minimum pension age (currently 55) will still have the advantage of limited protections, but – unless they are prepared to apply for bankruptcy – their pension savings will remain vulnerable to creditors who are prepared to bide their time.

IV How should pension trustees respond to bankruptcy and enforcement actions?

97. The trend towards enabling enforcement is likely to result in pension trustees[59] of approved pension arrangements (so protected in a UK bankruptcy) seeing more of this kind of application in future. So how should pension trustees respond when an attempt is made to enforce against funds which they hold?

98. The bankruptcy of a pension saver will have no direct impact upon their pension savings because such savings will fall outside their estate—we discuss this under the first heading above.

99. What is more likely to trouble pension trustees is any attempt to enforce against funds outside bankruptcy. Every case will be different, but we suggest that the following are key themes to consider.

100. First, pension trustees should consider whether a proprietary claim is being asserted against funds which they hold. The obvious example is a tracing claim, where the traceable proceeds of fraud – held on constructive trust for the victim – have been paid into the pension scheme. In those circumstances, the claim is not the enforcement of a debt but the vindication of a proprietary right.

101. Second, pension trustees should keep in mind their duties to seek to act in a way that promotes the success of the scheme in general (sometimes potentially misleadingly telescoped into a best interests of the members duty). Save, controversially, in the context of so-called "insolvent trusts", trustees do not owe a duty to act in the interests of their beneficiaries' creditors.

102. The extent to which the pension trustees have a choice – having regard to those duties –about how to respond, will depend in large part upon the rules of the relevant pension scheme.

[59] The position of individual pension trustees who themselves become bankrupt is outside this paper. See the talk in the 2018 Nugee Lecture series by Thomas Robinson "*When does a claim survive a trustee's bankruptcy (s281(3) of the Insolvency Act 1986) and enforcement against a trustee's pension*".

(a) The rules of some schemes provide no automatic rights to members, such that they can only exercise options under the rules with the consent of the provider or the employer (for example drawing benefits before normal pension age).

(b) Moreover, scheme rules also commonly grant the provider with discretionary powers to forfeit a member's benefits where they assign[60] or surrender their rights or attempt to do so, with a further discretionary power to apply the benefits so forfeited to the member, his or her spouse or civil partner or dependents.

(c) Some more recent scheme rules even contain a clause that grants the provider the discretion whether to act in accordance with a member's instructions in circumstances where it has become aware that the member's power to give instructions has been delegated to, or that the member's instructions are being given at the behest of, a creditor or trustee-in-bankruptcy.

103. The question whether a trustee should pay from the trust fund the creditor of a beneficiary was considered in the Jersey case, *Grupo Torras SA v Al-Sabah (No 6)* [2002] WTLR 337, (2001-02) 4 ITELR 555, a decision of Gloster, Sumption and Rokinson JJA sitting as the Jersey Court of Appeal. There, the beneficiary of a (non-pension) trust objected to the trustee exercising a discretion to paying the majority of the trust fund to his creditors, on the basis that it would not be in his best interests. The trustee surrendered its discretion to the court and, at first instance the judges refused to make an order for payment. On appeal, the Court of Appeal refused to overturn the first instance court, holding that the decision was a matter for its discretion and one which it was entitled to reach in accordance with applicable legal principles, stating:

> *"in considering whether it would be 'beneficial' to a beneficiary for his debts to be discharged or reduced from trust funds, one does not merely look at the balance sheet effect of the payment. Rather, ... one must consider whether the beneficiary's position after the payment would be better from a realistic, commonsense point of view."*

104. In considering how to respond, pension trustees should note carefully the impact which a member's bankruptcy would have on the pension savings they hold (this is discussed under the first heading above). Where bankruptcy is the likely alternative if the creditor is unable to enforce against the pension savings, the impact of bankruptcy will be highly relevant to an assessment of the member's best interests.

105. In many cases, it would plainly be in the member's interests to apply the pension fund to another family member – or alternatively to purchase an annuity or put the pension into drawdown – rather than to pay it to a creditor.

[60] Assignment of benefits may result in an unauthorised payment – FA 2004, s172. Conversely, a charge over benefits is not within an assignment within s 172. Conversely, in relation to the prohibition under PA 1995, s 91 applies to both an assignment or a charge over benefits.

106. Third, pension trustees should consider what role – if any – they should play in any proceedings. It is likely that they will wish to take a neutral role, participating only insofar as necessary to ensure that whatever order is made is one which the trustees can carry into effect without undue difficulty. To do otherwise carries with it a serious risk as to costs. Depending on the circumstances this can even lead to an indemnity costs order – see eg *Brake v Guy* [2022] EWHC 1911 (Ch).

Conclusion

107. The position of a pension remains potentially complex both on a member's bankruptcy and on the potential for enforcement by a creditor. There remains a complex inter-action between:
    a. Scheme rules;
    b. Pensions legislation; and
    c. Insolvency legislation; and
    d. (to a degree) tax legislation

Bankruptcy

108. Broadly, for a trustee-in-bankruptcy in England and Wales there may be little prospect of recovery from a UK tax registered pension scheme for the benefit of creditors (absent seeking to claw back contributions or using the "excessive contributions provisions).

109. It is now clear that the trustee-in-bankruptcy cannot force the bankrupt to draw benefits (or increase the amount already being paid) – *Horton v Henry*.

110. There may be scope, if the bankrupt reaches normal pension age during the time that could be covered by an IPO, for the trustee-in-bankruptcy to force the commencement of benefits by the pension scheme to the member. The scheme rules may provide that this is automatic unless the member seeks a deferral (and the relevant scheme trustee or provider agrees), although a lump sum commutation may be more dependent on trustee or employer consent. It is untested whether the co-operation obligation on the bankrupt could allow the trustee-in-bankruptcy to prevent the member exercising such a deferral (or withdraw one if given during the bankruptcy).

111. The position of the bankrupt with benefits under an unapproved arrangement is much less protected. He or she may seek an order under WRPA 1999, s 12, but this requires the court to balance the position.

112. For overseas pension arrangements within the EU, there is likely to be scope for a bankrupt to seek the full s 11 protection following the decision in *Wilson v McNamara.*

Before bankruptcy

113. Before bankruptcy has occurred, it seems likely that a creditor may be able to seek an order (or injunction) enforcing a judgment by way of requiring the member to trigger benefits under a pension scheme (assuming the member is aged over minimum pension age) and paying the

amount received (less tax) into a bank account (which is then charged) – *Blight, Maughan, Asplin*.

114. This can extend to forcing the member to exercise tax options – *Bacci*.

115. This process looks easiest if the member has (or will shortly have) a current right to relevant benefits under the scheme. If he or she does not, then an alternative may be to seek an order requiring the member to establish a new pension scheme (without the same limitations) and exercise the member's statutory right to take a transfer to the new scheme. This may be within the scope of a potential court order.

116. Such a process does not seem to be an "assignment" triggering a tax charge, nor running contrary to a prohibition on assignments (either under scheme rules or, for occupational pension schemes, under PA 1991, s 91) - *Blight*. It may be more arguable that it could constitute a "charge" and so relevant if this is also prohibited.

117. When considering if a person is insolvent for the purposes of making a bankruptcy order, the court will have regard to potential pension benefits - *Office of the Bankruptcy Adjudicator v Shaw*.

Trustee or employer discretions

118. If any benefits require the trustee (or employer under an occupational pension scheme) to give a consent, then it may be that the discretion holder (if a trustee) needs to consider the impact on the member of the exercise of the discretion[61]. Does this further the purpose of the scheme? It may be arguably for the benefit of the bankrupt member if all or part of his or her debts are paid off, but this looks more tricky, following the Jersey private trust case: *Grupo Torras SA.* A different issue may arise for employer discretions (as the employer does not owe the same trust duties as a trustee).

119. But care needs to be taken by the trustee (or pension provider). Defending a claim (eg for a receivership order) can expose the provider to a costs liability, and, depending on the circumstances can even lead to an indemnity costs order – see eg *Brake v Guy* [2022] EWHC 1911 (Ch).

After bankruptcy

120. Once the member has been discharged from bankruptcy, the relevant provable debts will usually be considered settled (by the recovery under the bankruptcy).

121. However if the relevant debts are not discharged (eg because these were derived from fraud), then it seems that the creditor may then be able to force the member to draw benefits and pay them into a charged bank account – *Bacci*.

[61] In a personal pension, it is unlikely that there will be a discretion, or, if there is, it will be construed in a limited way – see *Brake v Guy* [2022] EWHC 1746 (Ch) at [74].

What does it all mean? Interpretation of pension scheme documentation

Edward Sawyer and Jennifer Seaman

General principles of construction in the context of pension schemes

1. Most of us are familiar with the general principles of construction.

2. In *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912-913, Lord Hoffmann has taught us that:

    2.1. You need to ascertain the meaning which a document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation which they were in at the time of the contract.

    2.2. The courts will look at the background information surrounding a contract (its "matrix of fact") to put the contract in context and assist the court in its interpretation. Relevant background material includes anything which would have affected how the language of the contract would have been understood by a reasonable person and which should have been reasonably available to the original parties to the contract.

    2.3. However, previous negotiations between the parties and declarations of subjective intent should be excluded.

    2.4. Lord Hoffmann said there was a difference between the meaning of words and meaning of a document. The meaning of a document is what the parties would reasonably have been understood to have meant by the words in the document, taking into consideration the relevant background.

    2.5. If, on an examination of the relevant background material, it is clear that the parties have made a mistake in their use of language in the document, then the words should be interpreted to give effect to 'business common sense' and what the parties intended to say.

3. In *Rainy Sky v Kookmin Bank* [2011] UKSC 50, the Supreme Court said that the aim of interpreting a provision in a contract is a unitary exercise. The court must consider the language used *and* ascertain what a reasonable person (a person having all the background knowledge which would reasonably have been available to the parties in the situation which they were in at the time of the contract) would have understood the parties to have meant.

4. In *Arnold v Britton* [2015] UKSC 36 at [15]-[22] Lord Neuberger highlighted that the process of interpretation involves looking at the meaning of the relevant words in their documentary, factual and commercial context (including facts existing at the time the contract was made and which were known or reasonably available to both parties).

5. Then in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 the Supreme Court continued the move away from 'contextualism' and 'purposive interpretation' towards a focus on 'textualism' and the language of the document to be construed. Especially if the document is sophisticated and complex and prepared with the assistance of skilled professionals (like most pension schemes). But Lord Hodge in this case also recognised that there are often provisions in a detailed professionally-drawn contract which lack clarity, and assistance could be found in interpretation by looking at the factual matrix and the purpose of similar provisions in contracts of the same type.

6. On top of these general rules of objective interpretation, there are further principles to consider when construing pension schemes, as highlighted by the following key cases:

7. In *Re Courage Group's Pension Schemes* [1987] 1 WLR 495,505, Mr Justice Millett said that the provisions of a pension scheme should wherever possible be construed to give "*<u>reasonable and practical effect</u> to the scheme, bearing in mind that it has to be operated against a constantly changing commercial background."* Further at page 538, he said that each "*alteration in the rules must be tested by reference to the situation at the time of the proposed alteration*."

8. In *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587, 1610-1611, Mr Justice Warner approved Millett J's analysis, and described the proper approach to the construction of pension scheme documents as "*practical and purposive, rather than detached and literal*". Warner J then went on to state that the background circumstances relevant to the construction of pension scheme documents include the following features:

    8.1. That the rights of scheme members have contractual and commercial origins, earned by service with their employer.

    8.2. Where the scheme is approved and contracted-out, the requirements of HMRC and statutory requirements applicable to such schemes are relevant.

    8.3. The common practice from time to time in the field of pension schemes generally, as evinced by the evidence of actuaries and textbooks written by practitioners in that field.

9. In *Stevens v Bell* [2002] EWCA Civ 672 at [26]-[32], Lady Justice Arden identified certain characteristics which distinguished pension scheme documents from other analogous instruments in how they should be approached as a matter of construction:

    9.1. Members are not volunteers. The benefits members receive under the scheme are part of the remuneration for their services, and their relationship with the employer must be seen as running in parallel with their employment relationship.

    9.2. As Millett J said in *Re Courage*, the document should be construed to give a reasonable and practical effect to the scheme. This requires competing permissible constructions to be tested against the consequences they produce in practice. Technicality is to be avoided, and if the consequences are impractical or over-restrictive or technical in practice, that is an indication that some other interpretation was appropriate.

9.3. Difficulties can arise where different provisions have been amended at different points in time. The general principle is that each new provision should be considered against the circumstances prevailing at the date when it was adopted rather than the date of the original trust deed. Likewise, the meaning of a clause in the scheme must be ascertained by examining the deed as it stood at the time the clause was first introduced.

9.4. A trust deed must be interpreted in the light of the factual situation at the time it was created. This includes HMRC practice and common practice among practitioners in the field, as evidenced by the works of practitioners at that time.

9.5. Ultimately, the function of the court is to construe the document without any predisposition as to the correct philosophical approach.

9.6. The scheme should be interpreted as a whole, and the meaning of a particular provision should be considered in conjunction with other relevant provisions.[62]

***Barnardo's v Buckinghamshire* and factual matrix documents**

10. The most authoritative recent statement of the proper approach to construing pension scheme documents is the Supreme Court's decision in *Barnardo's v Buckinghamshire* [2018] UKSC 55. The case was concerned with the proper interpretation of the phrase "Retail Prices Index" in the scheme's rules.

11. Lord Hodge, giving the judgment of the Supreme Court, cited the recent leading Supreme Court cases on interpretation such as *Arnold v Britton* and *Wood v Capita*, and explained that "*In deciding which interpretative tools will best assist in ascertaining the meaning of an instrument, and the weight to be given to each of the relevant interpretative tools, the court must have regard to the nature and circumstances of the particular instrument*" (*Barnardo's* at [13]). This is clearly a reference back to Lord Hodge's own judgment in *Wood v Capita* at [13] where he had described textualism and contextualism as tools to ascertain the objective meaning of the parties' language, the usefulness of each tool depending on the circumstances of the document in question.

12. Lord Hodge continued at [14]-[16] of *Barnardo's*:

> *"14. A pension scheme, such as the one in issue on this appeal, has several distinctive characteristics which are relevant to the court's selection of the appropriate interpretative tools. First, it is a formal legal document which has been prepared by skilled and specialist legal draftsmen. Secondly, unlike many commercial contracts, it is not the product of commercial negotiation between parties who may have conflicting interests and who may conclude their agreement under considerable pressure of time, leaving loose ends to be sorted out in future. Thirdly, it is an instrument which is designed to operate in the long term, defining people's rights long after the economic and other circumstances, which existed at the time when it was*

[62] These principles were further summarised in *Armitage v Staveley Industries* [2005] EWCA Civ 792.

signed, may have ceased to exist. Fourthly, the scheme confers important rights on parties, the members of the pension scheme, who were not parties to the instrument and who may have joined the scheme many years after it was initiated. Fifthly, members of a pension scheme may not have easy access to expert legal advice or be able readily to ascertain the circumstances which existed when the scheme was established.

15. Judges have recognised that these characteristics make it appropriate for the court to give weight to textual analysis, by concentrating on the words which the draftsman has chosen to use and by attaching less weight to the background factual matrix than might be appropriate in certain commercial contracts: Spooner v British Telecommunications plc [2000] Pens LR 65, Jonathan Parker J at paras 75–76; BESTrustees v Stuart [2001] Pens LR 283, Neuberger J at para 33; Safeway Ltd v Newton [2018] Pens LR 2, Lord Briggs, giving the judgment of the Court of Appeal, at paras 21–23. In Safeway, Lord Briggs stated (para 22):

> *the Deed exists primarily for the benefit of non-parties, that is the employees upon whom pension rights are conferred whether as members or potential members of the Scheme, and upon members of their families (for example in the event of their death). It is therefore a context which is inherently antipathetic to the recognition, by way of departure from plain language, of some common understanding between the principal employer and the trustee, or common dictionary which they may have employed, or even some widespread practice within the pension industry which might illuminate, or give some strained meaning to, the words used.*

I agree with that approach. In this context I do not think that the court is assisted by assertions as to whether or not the pensions industry in 1991 could have foreseen or did foresee the criticisms of the suitability of the RPI, which later emerged in the public domain, or then thought that it was or was not likely that the RPI would be superseded.

16. The emphasis on textual analysis as an interpretative tool does not derogate from the need both to avoid undue technicality and to have regard to the practical consequences of any construction. Such an analysis does not involve literalism but includes a purposive construction when that is appropriate. As Millett J stated in In re Courage Group's Pension Schemes [1987] 1 WLR 495, 505 there are no special rules of construction applicable to a pension scheme but "its provisions should wherever possible be construed to give reasonable and practical effect to the scheme" . Instead, the focus on textual analysis operates as a constraint on the contribution which background factual circumstances, which existed at the time when the scheme was entered into but which would not readily be accessible to its members as time passed, can make to the construction of the scheme."

13. Further general points made by Lord Hodge in *Barnardo's* were:

    13.1. Despite the above, pension schemes must be construed against their fiscal background and tax rules (*Barnardo's* at [17]).

    13.2. The court should still be alive to the possibility that the drafting contains a mistake which can be remedied by applying a corrective construction (*Barnardo's* at [18] – corrective construction is discussed later in this paper).

    13.3. A provision in a pension scheme should be considered in the context of the document as a whole and one would in principle expect words and phrases to be used consistently, absent a reason for giving them different meanings (*Barnardo's* at [23]).

    13.4. It may be unprofitable to delve into the archaeology of previous rules (*Barnardo's* at [26] – a topic discussed further below).

    13.5. The court must construe the scheme without any preconceptions as to whether a construction should favour the employer or the members (*Barnardo's* at [28]).

14. Thus an important theme of Lord Hodge's judgment in *Barnardo's* is that the matrix of background circumstances that existed at the time the rules were made cannot be easily investigated or understood by members, so a contextual analysis should be given less weight than a textual analysis. This is not a new point: Judges in previous cases have expressed caution about relying on the factual matrix to construe pension scheme documents (e.g. *Lloyds Bank Pension Trust v Lloyds Bank* [1996] Pens LR 263 at [24], [27]; *Spooner v British Telecommunications* [2000] OPLR 189 at [6.5]; *BESTrustees v Stuart* [2001] Pens LR 283 at [33]). But *Barnardo's* reinforces the point and states it as a general principle.

15. The factual matrix would cover things such as predecessor rules, booklets, announcements, communications between trustees and employer and so on. Lord Hodge did not say that the factual matrix is *inadmissible* evidence on a point of construction; rather that it carries much less weight than a textual analysis of the document itself. (Though the general rule that statements of subjective intention are *inadmissible*, not merely of little weight, still applies.[63])

16. Pausing there, one might respectfully question how realistic the Supreme Court's approach is. Experience suggests that pension scheme members very seldom look at the rules at all, so the idea that confining the analysis to the text of the rules will somehow achieve an outcome that is more closely aligned to members' understanding and expectations is perhaps wishful thinking. The documents that members pay most attention to are booklets and information circulated to them by the trustees, but ironically on the *Barnardo's* analysis these may well carry little or no weight in the process of interpretation. The truth is that pension scheme rules are highly complex and are usually drafted by the expert advisers of the trustees and the employer (or just of the trustees), so if one were really interested in identifying the context that informs the meaning of the language used, one ought to look at the facts known to the trustees' and employer's advisers.

[63] *Arnold v Britton* at [15], factor (vi).

17. However, this is plainly not the law, and *Barnardo's* confirms that the law is almost the polar opposite. Understandably enough, the *Barnardo's* approach is driven by the policy concern that it is unfair that documents setting out the benefits earned by members should be interpreted by reference to matters which might reside only in the private knowledge of the trustees and the employer. In theory, at least, this approach means members should be able to work out the meaning of the scheme rules just by looking at their text.

18. So does *Barnardo's* mean that factual matrix documents will, in all cases, carry little or no weight in the interpretation of pension scheme documentation? The following paragraphs look at various different types of background materials and consider their relevance.

Factual matrix: predecessor rules

General position

19. *Barnardo's* provides strong support for the proposition that looking at predecessor rules will ordinarily be of little or no help in construing the current rules:

    19.1. In *Barnardo's* itself, Lord Hodge said at [26] that he derived little assistance from looking at the superseded prior rules, because the new rules were a wholesale re-draft in which the drafter may or may not have had regard to the earlier wording, so there was no basis for assuming that the use of different words meant that the new rule was intended to have a different meaning. He also agreed with the Court of Appeal's observation in *Barnardo's* that the nature of a pension scheme, which may have members who have no knowledge of the prior rules, makes it unprofitable to delve into the archaeology of the rules "*in this case*" (the latter qualification perhaps suggesting that there might be cases where the archaeology would assist).

    19.2. In the post-*Barnardo's* case of *British Telecommunications v BT Pension Scheme* [2018] EWCA Civ 2694, the court was invited to consider a predecessor rule on a point of construction, but its response was that background facts have a very limited role to play in the task of interpretation and that pension scheme archaeology was unlikely to be of much assistance: see [32]. The court also noted that there was a substantial change in the wording of the current rule and there was no evidence as to the reason for the change in wording. Although there was evidence that the redrafting of the rule was simply part of a "plain English 're-write'", that evidence was either inadmissible as a record of subjective intention or, to the extent it was part of the factual matrix, should be given little weight applying the *Barnardo's* approach: see [33]-[35].

    19.3. Similarly, in another post-*Barnardo's* case, *De La Rue v De La Rue Pension Trustee* [2022] EWHC 48 (Ch), the court was again asked to consider a predecessor rule on a point of construction. And once again, the court found it of limited assistance, because it was unclear that the current rule was intended to be no more than a consolidation of the old rule; the language of the two rules was very different: see [106].

19.4. More bluntly, in *Universities Superannuation Scheme v Scragg* [2019] ICR 738, Rose J said that submissions based on a predecessor rule were "the kind of interpretative tool which the Supreme Court has disapproved in [*Barnardo's*]."

20. Despite all this, there can be no doubt that predecessor rules are at least admissible as part of the factual matrix and (in the right sort of case) potentially relevant. House of Lords authority supports the proposition that it is permissible to use superseded scheme documents to construe succeeding documents: see *National Grid v Mayes* [2001] 1 WLR 864 at 887, where Lord Hoffmann said that even where there has been a change in language between one version of a scheme and a later version, the new language may still mean the same as the old.[64] The authority of *National Grid* on this point was accepted as still current in the post-*Barnardo's* case of *De La Rue v De La Rue Pension Trustee* [2022] EWHC 48 (Ch) at [94]. Arguably there are still situations where it is appropriate to consider predecessor rules.

Looking at rules in force when provision first introduced

21. In *Stevens v Bell* at [29] and [30], Lady Justice Arden said that as pension schemes represent a "patchwork" of provisions, the general principle is that each new provision should be considered against the circumstances prevailing <u>at the date it was adopted</u>, rather than the date of the execution of the trust deed if earlier. For example, you do not take into account clauses which did not form part of the trust deed at the time the clause in question was introduced.

22. This is to be contrasted with the approach of the Supreme Court in *Barnardo's,* where the focus is on 'textual analysis', not the background when the scheme was established or when the provision was introduced, because this would not readily be accessible to its members as they joined.

23. Further comments made by Lady Justice Arden, which have been approved post-*Barnardo's*, suggest that you can look at previous background circumstances, especially when a provision has been re-adopted:

    23.1. Lady Justice Arden in *Merchant Navy* [2011] Pens LR 223 at [35], building on her analysis in *Stevens v Bell*, said that the meaning of a clause which is readopted in pension scheme revisions from time to time does not necessarily always have the same meaning, and <u>regard should be had both to relevant circumstances at the date of its original adoption and to relevant circumstances at each subsequent re-adoption</u>. Those circumstances can then be weighed in the balance to assess the impact of all the relevant circumstances on the interpretation exercise in hand.

    23.2. This was subsequently approved post-*Barnardo's* by Mr Justice Nugee in *Atos IT Services UK Ltd v Atos Pension Schemes Ltd* [2020] Pens. L.R.17 at [50] (Nugee J was construing words in a draft 2011 Deed, but had regard to the fact that those words were first introduced in the Rules in 2007 and they might bear a different meaning if the context

[64] See too *Law Debenture Trust Corporation v Lonrho Africa Trade & Finance* [2002] EWHC 2732 (Ch) at [12]

was materially different, which was not ultimately the case in *Atos*) and by Lord Justice Nugee in *Britvic* at [65].

23.3. *Ove Arup & Partners International Ltd v Trustees of the Arup UK Pension Scheme* [2020] EWHC 1064 (Ch) involved an issue of interpretation. (Post *Barnardo's* and referring to *Barnardo's* as setting the present law in relation to the principles of interpretation [10]). The relevant provision was first introduced in a new Deed and Rules adopted in 1992, and replaced by a Deed and Rules in 1998, and then by a Deed and Rules dated 2013 [5]. At [11] it was agreed that although the earlier rules were superseded, the relevant provisions remained essentially unchanged since 1992 and the starting point for any consideration of how surrounding circumstances would have affected the objective observer's understanding of the words used is the context in which they were employed <u>in 1992</u>. The court then considered how that may have been affected by any material change in circumstances when the Rules were successively re-adopted, but there was no subsequent change that would affect the meaning of the relevant provisions in this case.

23.4. All these cases (either approved or decided post-*Barnardo's*) suggest that it might be relevant to look at predecessor rules. Indeed, on the *Stevens v Bell* / *Merchant Navy* approach, it would seem insufficient simply to look at the current rules of the scheme, as it would always be necessary to consider when any given rule was first introduced and look at the surrounding circumstances at that time, and also the surrounding circumstances at each subsequent re-adoption of that provision.

Terms of the amendment power pursuant to which the amendment was made

24. In one respect, at least, the current rules of a pension scheme cannot be wholly detached from the predecessor rules, because the later rules are the product of the power of amendment in the earlier rules. According to the pre-*Barnardo's* case-law, the later rules should be construed, where possible, so as not to result in a breach of any fetters on the earlier power of amendment: see e.g. *Bradbury v BBC* [2012] EWHC 1369 (Ch) at [50]-[51], [65]-[66] and *IBM v Dalgleish* [2014] EWHC 980 (Ch) at [150].

25. Arguably, this principle should still hold good post-*Barnardo's*, because the later rules will almost always refer to the earlier power of amendment and are an inextricable part of the amendment comprised by the later instrument.

Transfers to a new scheme

26. Another situation where it may be permissible to look at predecessor rules is where a new scheme is set up to mirror or receive a transfer from an old scheme. In such a case, in order to understand the provisions of the new scheme it may be essential to understand what the old scheme provided for. As long ago as 1990, Scott J said that the provisions of the old scheme were admissible factual matrix to construe the provisions of the new scheme to which members had been transferred: *Davis v Richards & Wallington* [1990] 1 WLR 1511 at 1529. In a more recent example, *Royal Mail v Evans* [2013] EWHC 1572 (Ch), the new scheme provided that transferred-in members from the

old scheme "*who had been entitled to have their pension in payment or in deferment increase without limitation in line with the retail prices index [under the old scheme] shall continue to be so entitled under [the new scheme]*". This clearly required consideration to be given to what the old scheme provided. In fact, the old scheme did not confer an entitlement to RPI increases. The Judge concluded that the new scheme simply misdescribed the old scheme benefits and that members were not entitled to RPI increases under the new scheme.

27. Thus the Judge in *Royal Mail* was compelled to look at the predecessor rules to work out what the current rules meant. However, it might be said this is not really an example of relying on the factual matrix, but merely of recognising that the new rule was a "referential" provision which incorporated by reference some other rules: see the distinction to this effect drawn in *Spooner v British Telecommunications* [2000] OPLR 189 at [6.7].

28. The rules of the old scheme were clearly regarded as part of the factual matrix in another case dealing with a transfer to a new scheme, *Britvic v Britvic Pensions* [2021] EWCA Civ 867 (a post-*Barnardo's* case). The new Britvic scheme was created as part of a corporate demerger and members were transferred across from the old scheme. The old and new schemes contained a rule in identical terms. The Court of Appeal plainly took into account the existence of the old rule and speculated about how and why the drafter had transposed the rule from the old into the new scheme (see e.g. [32], [78]), though ultimately the court felt it could not draw any clear inferences from the drafting history and there was nothing to counteract the effect of the clear wording of the rule in the new scheme.

Factual matrix: booklets / announcements

29. The textual approach favoured in *Barnardo's* would seem to suggest that contextual materials such as booklets and announcements to members will be of little assistance in resolving questions of construction. Indeed, long ago in *Lloyds Bank Pension Trust v Lloyds Bank* [1996] Pens LR 263 at [24], Rimer J said booklets issued to members could not be regarded as part of the relevant matrix of facts, as the booklets merely represented an attempt to summarise the meaning of the rules. Similarly in *Independent Trustee Services v Knell* [2010] EWHC 650 (Ch) at [12], Norris J said announcements and a newsletter were simply subjective statements of the trustees' intent, and were left out of account when construing an equalisation deed.

30. Yet judges have not invariably found announcements and circulars to be irrelevant:

    30.1. In *Sovereign Trustees v Glover* [2007] EWHC 1750 (Ch) at [33], a circular to members was held admissible for the purposes of construing a putative amendment (effected by a trustee resolution), though the court found the circular of little help as it was ambiguously worded.

    30.2. In the *Merchant Navy* case [2011] Pens LR 223 at [53], in a dispute between current and specified employers as to the meaning of a provision of a scheme, Lady Justice Arden held that part of the admissible background to the interpretation of the relevant provision was a circular dated 8 May 2000 to the current employers, which enclosed a separate document describing the proposal for the relevant pension scheme in detail.

This circular militated against an implied term that the appellant was advancing in that case. However, this case was obviously decided before *Barnardo's*.

30.3. In *Britvic*, the Court of Appeal did consider announcements to members to form part of the admissible factual matrix. The Court of Appeal looked at the benefit summary sent to transferring members by the employer, and recognised that this showed a "mis-match" between what the transferring members were told and what the scheme *prima facie* provided at [27] and [74], but ultimately followed *Barnardo's*[65] and applied the objective meaning of the language of the provision in question, despite the "mis-match" as a matter of pure interpretation of the relevant provision: [32] and [74]. Lord Justice Nugee reasoned that as there were not two possible rival interpretations of the term to be interpreted, there was no need to have regard to context or factual matrix or commercial common sense (or the desire to give reasonable and practical effect to the scheme) to resolve two such rival interpretations, and having regard to such matters ran the risk of impermissibly using such matters to displace the language that the parties have carefully chosen: see [72].

30.4. In *Goodrich v AB* [2022] EWHC 81 (Ch), Chief Master Shuman was asked to construe a trust deed which established the Walker Books Employee Trust, which was a long-term trust with a large and fluctuating class of beneficiaries and unlike a private trust. Chief Master Shuman considered "relevant evidence" including a contemporaneous letter to employees from the creator of the company dated the day before the trust was established setting out in lay terms what would be intended by the trust deed. She considered this admissible as an aid to construction at [27]-[28]. This seems to be at odds with *Britvic* and *Barnardo's*.

31. The reliance on the circular in *Sovereign Trustees v Glover* might now be doubted in the light of *Barnardo's*. In contrast, it may be that the reliance on the circular in *Merchant Navy* could still be justified in the post-*Barnardo's* world on the basis that the contribution rule in question primarily affected the scheme's *employers* who, unlike the members considered in *Barnardo's*, could be expected to have professional advice and ready access to factual matrix material. Indeed, the circular relied on in *Merchant Navy* was specifically addressed to the employers.

32. However, on the *Barnardo's* analysis, if the real test is whether the affected persons have ready access to the factual matrix documents, then one might think that member booklets and announcements would be a prime source of contextual material, since the members should have received them. Indeed, in the case of a transfer to a new scheme where all the transferring members receive announcements about the terms of the transfer, one would expect the announcements to be a key source of the members' understanding of what benefits the new scheme will provide – as in *Britvic*, which might explain the Court of Appeal's readiness to consider

[65] Sir Geoffrey Vos MR at [34] doubted the distinction made by the first instance judge that the situation in *Britvic* was different to *Barnardo's* and that Lord Hodge's 4th principle (members not being parties to the instrument and joining years after it was initiated) and 5th principle (members not having easy access to legal advice or able to ascertain relevant circumstances which existed when the scheme was established) in *Barnardo's* did not apply. The MR said the rights of members were likely to continue to be affected many years after the provision was drafted and there was no evidence about the expertise of members.

the member announcements in that case.[66] It may be that a better reason for giving little or no weight to member announcements is the one suggested by Rimer J in the *Lloyds* case, namely that announcements are simply summaries, so it would be allowing the tail to wag the dog to construe the rules by reference to a document which imperfectly summarises them. There is also the objection that, where the scheme has been open to new members for a long period, not all members will have received the same announcements.

Factual matrix: tax and technical background

33. It is clear from *Barnardo's* that the tax background remains relevant to the interpretation of pension scheme documents. This is in accordance with a long line of authority going back to at least *Mettoy Pension Trustees v Evans* [1990] 1 WLR 1587 at 1610-11 that the fiscal background is a relevant part of the matrix of fact.

34. This is arguably hard to square with the concern expressed elsewhere in *Barnardo's* about relying on contextual material which is not readily accessible to members or comprehensible without expert advice. The idea that members will consider the rules with a copy of the former IR12 or the Finance Act 2004 in their hands is far-fetched. Yet it is obvious that pension schemes are drafted to comply with the applicable tax regimes, so one can see why the Supreme Court made an exception for the fiscal background in *Barnardo's*.

35. For a recent post-*Barnardo's* example, see *Atos IT Services v Atos Pension Schemes* [2020] EWHC 145 (Ch) at [7]-[9], where Nugee J was strongly influenced by the definition of "retail prices index" in the tax legislation when construing a very similarly-worded definition in the scheme rules. No doubt the members of the scheme had no idea of the similarity, but that hardly mattered. See to like effect the post-*Barnardo's* case of *Coats UK Pension Scheme v Styles* [2019] EWHC 35 (Ch) at [63].

36. Tax rules are not the only technical materials that may be relevant as part of the factual matrix. In *Barnardo's* itself at [22] and [27], the Supreme Court took account of the technical history of inflation indices. The fact that such history is unlikely to be known to members or understood by them did not deter the Supreme Court.

37. Equally, Judges do not hesitate to take account of technical pensions legislation on questions of construction. This accords with the general principle (in non-pensions cases) that the state of the law can form part of the relevant background matrix: see *BCCI v Ali* [2002] 1 AC 251 at [39].[67] For a post-*Barnardo's* example in the pensions context, in *Britvic* at [14], the Court of Appeal understandably regarded the indexation provisions in section 51 of the Pensions Act 1995 as being part of the "essential legislative background" to the increase rule they were construing. The same provisions were also considered relevant in the RPI/CPI case of *Carr v Thales* [2020] EWHC 949 (Ch) at [63]-[66]. Likewise, in *De La Rue* at [124]-[126], the Judge was clearly influenced by the

[66] However, even though the new scheme was closed to new members so the entire membership had received the same announcements, the Court of Appeal said that the *Barnardo's* textual approach still applied: see *Britvic* at [34] and the previous footnote in this paper.
[67] Applied in the pensions context by Warren J in *Premier Foods Group v RHM Pension Trust* [2012] EWHC 447 (Ch) at [27].

revaluation provisions in Part IV Chapter II of the Pension Schemes Act 1993 when construing the scheme's revaluation rule.

38. None of this is at all surprising and many pre-*Barnardo's* cases relied on the legal background as being relevant to interpretation.[68] It makes obvious sense for a pension scheme to be interpreted against the technical legal background which its drafter was seeking to comply with. However, the relevance of such technical matters is difficult to reconcile with the reasoning in *Barnardo's* that contextual material which is not readily available to members should be given little weight.

39. It may be that the true effect of *Barnardo's* is that inaccessible contextual materials are to be given little weight, but there is an exception for technical materials (such as tax rules and the state of the law) which are readily available to pension scheme drafters and lawyers.

Factual matrix: discussions and advice at the time of the deed

40. On the *Barnardo's* approach, one would probably expect discussions preceding the deed between the trustee and the employer, or within the trustee board or employer board, to carry little weight as a matter of construction and/or to be inadmissible as a subjective statement of intention or pre-contractual negotiations.

41. This was indeed the position in the post-*Barnardo's* case of *British Telecommunications v BT Pension Scheme* [2018] EWCA Civ 2694. It was argued that the court should have regard to "comfort letters" passing between the employer and trustee at the time of the new rules being construed, which said that reference would be made to the predecessor rules to construe the new rules. The Court of Appeal said at [36] that, applying the *Barnardo's* approach, such communications could not cause a departure from the ordinary and natural meaning of the rules.

42. A similar conclusion was reached in the pre-*Barnardo's* case of *IBM v Dalgleish* [2014] EWHC 980 (Ch), where Warren J very much doubted that discussions at the trustee board and legal advice to the trustee (showing that a new deed was simply meant to be a "plain English" consolidation of the previous rules) were admissible on a question of construction: see [151] and [243]. Similarly, in *Stena Line v MNRPF* [2010] EWHC 1805 (Ch), Briggs J held that evidence of negotiations between employers and trustee, trustee minutes, legal advice and the subjective understanding of employers were inadmissible to construe an amendment to the scheme's contribution and winding-up rule (though an actuarial funding valuation was admissible): see [48]ff and [86]-[89].

43. Evidence of the drafting process is even more plainly inadmissible on a question of construction: see e.g. *Re Mitchells & Butlers Pension Plan* [2021] EWHC 3017 (Ch) at [403]. Such evidence is

[68] E.g. *Industry-wide Coal Staff Superannuation Scheme* [2012] EWHC 3712 (Ch) (a trust deed should be construed consistently with the statutory rule pursuant to which it was introduced); *Sterling Insurance Trustees v Sterling Insurance Group* [2015] EWHC 2665 (Ch) (section 67 of the Pensions Act 1995 was relevant to construing the fetter on a power of amendment introduced shortly after section 67 came into force: see [30]-[32], [44]). This can be contrasted with *Fisher v Harrison* [2003] EWCA Civ 1047 at [27] where it was held that section 91 of the Pensions Act 1995 was irrelevant to the construction of a consent order where the parties and the court were unaware of that provision.

akin to evidence of pre-contractual negotiations which is inadmissible on general principles of contractual interpretation.

44. Nevertheless, there does seem to be some room to argue that discussions at trustee and/or employer level should be taken into account as part of the factual matrix in some circumstances. For example, in the *Re Mitchells & Butlers Pension Plan* case, it was argued (post-*Barnardo's*) that discussions at the employer board level, trustee briefing papers and legal advice about a proposed corporate demerger were relevant background to the interpretation of a deed substituting the scheme's principal employer. The court accepted this argument, citing *Britvic*: see [242]-[243]. The court considered that the materials illuminated the circumstances and purpose of the demerger and substitution. This decision could be justified on the basis that a deed of substitution is an act between the trustees and the employers, so the *Barnardo's* concerns about the accessibility of information to *members* are inapplicable and a wider range of factual matrix documents should be given weight. However, it may be a fine line between board discussions which establish the objective purpose of a transaction and inadmissible statements of subjective intention about the meaning of a proposed document or pre-contractual negotiations.

45. Another case where board discussions were held to be relevant to interpretation is *ICM Computer Group v Stribley* [2013] EWHC 2995 (Ch). A prior trustee resolution was held to be admissible (and decisive) in construing an equalisation amendment. Asplin J explained this on the basis that the amending instrument was not a free-standing document but referred to the decision of the trustees: see [20]-[21], [24]. Yet the instrument simply said "*The Trustees of the Scheme have resolved … to make the following alterations*". Wording of this nature often appears in recitals to amending deeds, and it is not usually suggested that one can look at the prior resolution or decision to alter the meaning which the language of the document would otherwise bear. It might be open to question whether *ICM* would be decided the same way post-*Barnardo's*, although possibly the decision could be justified on the ground that the instrument in *ICM* plainly contained erroneous drafting, so it was permissible to resort to the factual matrix to correct the error.

Interaction of interpretation and rectification

46. A construction claim is different to a rectification claim because the process of finding the correct interpretation of a provision involves an objective exercise, looking at what a reasonable person would have understood the document to mean at the relevant time. In contrast, rectification involves looking at what the parties subjectively intended the provision to mean (see *FSHC Group Holdings Ltd v GLAS Trust Corp* [2019] EWCA Civ 1361).

47. Given the above, the evidence that a court will review when interpreting a provision in a pension scheme is more limited than the evidence it will review on a rectification action. For example, on an interpretation claim, the court will not generally look at evidence of subjective intentions behind the drafting of the provision or pre-document negotiations or matters subsequent to the execution of the document, such as how the scheme has been administered as a matter of practice.

Other points in recent case-law on interpretation

48. This is a convenient place to mention a few other interesting points that have come up in recent cases on pension scheme interpretation:

    48.1. *Dynamic interpretation*: There is a difference between what is called a static and a mobile interpretation of a contract: see Lewison, *The Interpretation of Contracts*, 6th ed, paragraph 5.1.5. Thus in an appropriate case the words of a long-term contract can be construed as covering a scenario not envisaged when the instrument was made (for example, the grant of a right of way with or without carriages might extend to motor vehicles).[69] The principle has recently been prayed in aid in submissions in pensions cases to try to extend the reach of definitions in pension scheme rules – for example, to argue that "retail prices index" covers other forms of index. While the courts have recognised the principle of dynamic interpretation, they have not applied it so far in the pensions context: see *Atos IT Services v Atos Pension Schemes* [2020] EWHC 145 (Ch) at [57] and *Carr v Thales* [2020] EWHC 949 (Ch) at [78]-[79]. There is no reason to doubt that the principle could apply in the right kind of pensions case, however.

    48.2. *Contra proferentem*: In *Carr v Thales* [2020] EWHC 949 (Ch), the Pensions Ombudsman had purported to apply the contra proferentem rule when construing a pension indexation rule in favour of members. On appeal to the High Court, Nugee J commented that it was "*probably*" right to say, in the pensions context, that the contra proferentem rule was a last resort which could only be used as a tie-break: see [61]. He noted that the Supreme Court had said in *Barnardo's* that the court should construe a pension scheme without any preconception as to whether a construction should favour the employer or the members.

    48.3. *Subsequent events*: In *De La Rue v De La Rue Pension Trustee* [2022] EWHC 48 (Ch), it was argued that subsequent administration of the pension scheme was admissible to construe an ambiguous amendment to show that no change was intended, relying on the employment case of *Dunlop Tyres Ltd v Blows* [2001] EWCA Civ 1032. At [108] of *De La Rue*, the court evidently regarded the *Dunlop* case with considerable caution (no doubt given the well-established principle that post-contractual conduct is not relevant to interpretation: *James Miller v Whitworth Street Estates* [1970] AC 583). The argument failed on the facts, because the post-amendment administration was not consistent with the interpretation contended for. However, it is notable that (despite his scepticism) the Judge did not wholly reject the proposition that post-amendment conduct might be relevant. It remains to be seen whether the argument will be revived in another case, but it would seem to be contrary to well-settled principles of contractual interpretation.

[69] In *Arnold v Britton* [2015] UKSC 36, Lord Neuberger's sixth principle in [14] was that where an event subsequently occurs that was plainly not intended or contemplated by the parties, if it is clear what the parties would have intended, the court will give effect to such intention.

Corrective construction

49. This is the process by which the courts can correct obvious and unambiguous mistakes in a document as a matter of construction. This is a separate interpretative tool from that involved in choosing between rival interpretations (*Britvic* at [75]).

50. Reliance on this principle has increased following Lord Hoffmann's 5th principle in his judgment in *Investors Compensation Scheme Ltd v West Bromwich Building Society Ltd* [1998] 1 WLR 896, 913:

> *"…We do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had…"*[70]

51. Further, in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38 at [14]-[15] and [22]-[25], Lord Hoffmann said:

    51.1. Given that we do not easily accept that people make linguistic mistakes in formal documents, it usually requires a "strong case" to persuade the court that there has been a mistake.

    51.2. In deciding whether there is a clear mistake, the court was not confined to reading the document without regard to its background or context. As the exercise is part of the single task of interpretation, the background and context must always be taken into consideration.

    51.3. There was no limit to the amount of rearrangement or correction which the court is allowed when applying this principle. The conditions for the application of the principle are that it is clear that something has gone wrong with the language, and it is clear what a reasonable person would have understood the parties to have meant.

52. In *Sterling Insurance Trustees Ltd v Sterling Insurance Group Ltd* [2015] EWHC 2665, the mistake was not readily apparent from reading the provision in issue, but Mr Justice Nugee was persuaded that adding the word "due" to "accrued" led to such odd consequences that it must have been included by mistake and by way of corrective construction, read the provision as if the word "due" was not there.[71]

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[70] E.g. in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 in a notice to determine a lease reading the 12th January as 13th January, and in *Doe d. Cox v Roe*, (1802) 4 Esp. 185, in a notice to quit, reading "The Waterman's Arms" as "The Bricklayer's Arms".

[71] In *ICM Computer Group Ltd v Stribley* [2013] EWHC 2995 (Ch) at [18]-[25], Mrs Justice Asplin used corrective construction to read into a document further wording to deal with an issue relating to retirement ages. As mentioned earlier, Asplin J took into account background evidence such as a trustee resolution agreeing to equalise retirement ages which she said the document was intending to put into effect. See also Asplin J in *Royal Mail Group v Evans* [2013] EWHC 1572 at [83], and in *Honda Motor Europe v Powell* [2013] EWHC 3149 (Ch) at [58]. See also the CA judgment in *Honda* at [2014] EWCA Civ 437 at [38] and [46].

53. In *Barnardo's*, Lord Hodge still recognised the need for corrective construction and the court being alive to the possibility that the draftsperson has made a mistake in the use of language or grammar which can be corrected by construction (at [17]).

54. In *Britvic* [2021] EWCA Civ 867:

    54.1. Sir Geoffrey Vos MR held at [33] that the process of corrective construction was only normally adopted in the case of an obvious mistake on the face of the document, and if an objective observer thinks that the provision could have been better drafted that was not enough to allow the court to depart from the clear language of the phrase. Especially when the rules of a pension scheme are being interpreted.

    54.2. Lord Justice Coulson also made similar comments at [59]-[61]. He said in this case "*there is neither an obvious error nor an obvious solution to any error*" (at [60]), and the authorities suggest corrective construction should be confined to cases like *Manni* and *Chartbrook* where something has obviously gone wrong in a description, a date, a figure or a calculation, and the correct description, date, figure or calculation is obvious from the material before the court ([61]).

    54.3. Lord Justice Nugee agreed at [78]. He said there was no basis for concluding that a drafting mistake had been made, but relied on the fact that the drafter had taken the language directly from the predecessor provision which he said was a rational thing to do. Therefore, Nugee LJ took into account background context in deciding if there was a mistake.

    54.4. Further in *Britvic*, the MR held that even if a mistake had been made, it was impossible to discern what the cure for the mistake was at [32].

55. In *Monsolar IQ Ltd v Woden Park* [2021] EWCA Civ 961, Lord Justice Nugee was asked to apply the principle of corrective construction in a case about the proper interpretation of a provision in a lease for a rent review. He said there was a distinction between a case which concerned a provision which seems merely imprudent or unreasonable and one which, when read literally, appears irrational, arbitrary, nonsensical or absurd [31]-[33], and it is in the latter category of case that corrective construction might apply. In this case, Lord Justice Nugee held that it was abundantly clear that the relevant provision contained a drafting error, as applied literally it produced results which were arbitrary and irrational, commercially nonsensical or absurd [39]. Lord Justice Nugee also relied on an explanation for how the error occurred, to support the conclusion that there had been an error (although not strictly necessarily as a matter of corrective construction [40]-[41]). As to the second issue in the appeal, Lord Justice Nugee held that it was clear how the mistake should be corrected, so the provision could be corrected by way of construction.

Does it have to be an obvious error on the face of the document?

56. Cases like *ICS*, *Chartbrook*, *Sterling Insurance* and *Monsolar* suggest that it does not have to be an obvious error on a literal reading of the document, but you can have regard to the background context to see if the provision, when read literally, is irrational, arbitrary, nonsensical or absurd.

57. Also in the case of *Re BCA* [2015] EWHC 3492 (Ch) at [28]-[34] the court took into account the background context of the predecessor rules and the fact that the current provision was the product of consolidation, to determine that a relevant paragraph had been omitted in error and its effect could be restored by corrective construction.

58. In contrast, Sir Geoffrey Vos MR and Lord Justice Coulson in *Britvic* said that the process of corrective construction was only normally adopted in the case of an obvious mistake on the face of the document. But, Lord Justice Nugee in *Britvic* took into account background material to determine if there was an error in the wording of the document.

59. The weight of the authority here is in allowing a review of the relevant context and background material to determine if there is an error on a literal reading of the document.

60. As we see from *Monsolar*, the important distinction is between interpretations which, given the background context, are absurd and arbitrary (where corrective construction is allowed) and interpretations which are merely imprudent or unreasonable (or as the MR said in *Britvic* – could be "*better drafted"*) (where corrective construction would not apply). Although query where *Sterling Insurance* fits as the provision was not absurd or illogical on a literal reading? It just had impractical consequences if the provision had a more limited application.

Other responses to apparent drafting errors

61. In some cases, courts have found solutions to apparent drafting errors which do not involve corrective construction. For example, in *De La Rue v De La Rue Pension Trustee* [2022] EWHC 48 (Ch), the court considered a potential construction of a particular revaluation rule which would have had the effect that the rule did not bite on any benefits under the scheme. It was argued that this meant the rule was a drafting mistake and that the stringent test for corrective construction would have to be met: see [68]. The court disagreed. Trower J said that if the rule did not bite on anything, it did not mean the rule was a mistake; it simply meant that the rule had been included to cover eventualities that had not, in the event, arisen. The language was surplus to requirements but not an error, and there was no need to satisfy the requirements for corrective construction: see [69].

62. In much the same way, in *Atos IT Services v Atos Pension Schemes* [2020] EWHC 145 (Ch), Nugee J held that an entire sentence of a pension indexation clause was merely otiose (because it was duplicative of an earlier sentence) and could be ignored. He did not suggest that the conditions for corrective construction needed to be met.

63. Another approach is simply to apply a robust construction which effectively "reads down" the disputed words and makes sense of the provision as a whole. For example, in *Carr v Thales* [2020] EWHC 949 (Ch), the pension increase rule said that the rate of increase was "*the percentage*

increase in the retail prices index [capped at 5%] … as specified by order under Section 2 of Schedule 3 of the Pension Schemes Act". The first part of the rule clearly referred to RPI, but the second part suggested that the statutory revaluation Order rate applied (which post-2010 was no longer RPI), so from 2010 onwards the two parts were inconsistent. The Judge resolved the conundrum by reading the first part as specifying the rate to be applied (RPI up to 5%) and the second part as merely providing supplementary information about where to find the rate; so the first part had primacy. He said he reached this conclusion as a matter of the "*natural and ordinary meaning of the words*", without resorting to the cases on corrective construction.

64. *Carr v Thales* thus illustrates that a pragmatic approach to construction can iron out drafting wrinkles without getting into the realms of corrective construction. In much the same way, in *Re Mitchells & Butlers Pension Plan* [2021] EWHC 3017 (Ch) at [404], Trower J was able to iron out tensions between two rival grandfathering provisions (which "*could have been more felicitously drafted*") without needing to resort to corrective construction. In other words, if a drafting problem can be cured by the ordinary processes of interpretation so as to give reasonable and practical effect to the scheme, then there is no drafting error in the first place, and the high threshold to apply a corrective construction does not need to be overcome.

Relying on Counsel's opinion

When can you rely on Counsel's opinion and when do you need a court order?

65. When you have a question of interpretation a different question that often arises, especially for the trustees of the pension scheme, is when is it sufficient to rely on Counsel's opinion and when do you need to incur the costs of a court order giving a ruling on the issue of interpretation?

66. There is no hard and fast rule here.

67. It is ultimately a question for trustees. In Ian Greenstreet's paper for the APL Annual conference in 2017 at 5.1 he said "*if there is a genuine legal uncertainty about how a particular provision in a trust deed and rules should be interpreted… (e.g. 50/50 arguments either way) this [relying on an opinion] does not work…*". Some trustees may not feel comfortable relying on an opinion if there are 60%/40% prospects either way. Also, if there are such percentages, counsel is likely to caveat his/her opinion to say that the answer is "probably" this or it is "likely" to be the case, and then the trustee needs to take a view on whether it is appropriate to administer the scheme on this basis. These issues may also be thrown up in a buy-out situation.

68. Consideration could be given to whether the employer indemnifies the trustees for any liability for breach of trust which may arise if they administer the scheme based on the views of counsel as to the interpretation of the scheme.

69. In some cases, the court has permitted the trustees to administer a trust on the basis of a legal opinion (but without a formal order under section 48 of the Administration of Justice Act 1985, which is considered in the next section of this paper). Thus in *Re Equilift* [2010] BCC 860, liquidators of a company which held some customer deposits on trust applied to court for directions as to the distribution of the modest funds held by the company. The liquidators were directed to obtain counsel's opinion as to which funds were held on trust; counsel concluded that

a number of deposits were not held on trust. The liquidators sought the court's directions as to whether or not to rely on the opinion. The court said that the reasonable and proportionate course was for the liquidators to act on counsel's opinion; and that, while this theoretically left the liquidators at risk of breach of trust claims, it was inconceivable that the court would not relieve them from liability under section 61 of the Trustee Act 1925 as they would be acting honestly and reasonably by relying on counsel's opinion. The court directed the liquidators to provide copies of the opinion to the potential trust claimants and give them an opportunity to make a claim for some other form of distribution.

70. The *Re Equilift* decision shows the court achieving a pragmatic solution to avoid a relatively small fund being eaten up in litigation costs. However, it is debatable whether a person who distributes despite knowing of potential trust claims really is acting honestly and reasonably and it is also doubtful whether the court can give advance relief under section 61 of the Trustee Act 1925 (particularly given that other cases say that reliance on legal advice is not, without more, a passport to relief under section 61: *Marsden v Regan* [1954] 1 WLR 423, 435).[72] In any event, the considerations of proportionality and cost-saving which weighed on the court in *Re Equilift* are unlikely to apply in the pensions context where much larger funds are at stake.

71. An alternative procedure was adopted in the private trust case of *Sutton v England* [2009] EWHC 3270 (Ch) (this point was not considered on the subsequent appeal). A question had arisen about how the trustees should attribute tax liabilities to different life interests. At [22], Mann J proposed that the trustees should be given power to act on counsel's opinion (subject to notice and a right of challenge being given to affected beneficiaries), such power to be added pursuant to section 57 of the Trustee Act 1925.[73] However, any such power could not alter beneficiaries' rights under the scheme, as section 57 is concerned with administration of trust property not with varying beneficial interests: see *Lewin on Trusts*, 20th ed, paragraph 52-009. It might also be open to debate whether section 57 can properly be used to confer such a power when statute already provides an express mechanism for reliance on a legal opinion under section 48 of the Administration of Justice Act 1985 (as to which, see below). In the pensions context, there is also an interesting question as to whether such a power could be added under a scheme's power of amendment, but that would merit a separate paper of its own and is not considered here.

Section 48 of the Administration of Justice Act 1985

72. Section 48 of the Administration of Justice Act 1985 provides:

> *48.— Power of High Court to authorise action to be taken in reliance on counsel's opinion.*
>
> *(1) Where —*

[72] A more satisfactory way of resolving the problem that arose in *Re Equilift* would perhaps have been a *Re Benjamin* application of the type approved in *Re MF Global (No 3)* [2013] 1 WLR 3874, where administrators were permitted to distribute a fund on the footing that (in summary) there were no trust claims to the fund except for those notified to the administrators following advertisement.

[73] Which permits the court to confer on trustees power to effect any expedient disposition or transaction [etc.] in the management or administration of trust property.

(a) any question of construction has arisen out of the terms of a will or a trust; and

(b) an opinion in writing given by a [person who has a 10 year High Court qualification, within the meaning of section 71 of the Courts and Legal Services Act 1990.] has been obtained on that question by the personal representatives or trustees under the will or trust,

the High Court may, on the application of the personal representatives or trustees and without hearing argument, make an order authorising those persons to take such steps in reliance on the said opinion as are specified in the order.

(2) The High Court shall not make an order under subsection (1) if it appears to the court that a dispute exists which would make it inappropriate for the court to make the order without hearing argument.

73. As the final part of section 48(1) envisages, the application may be dealt with on paper; and it may be made without naming a defendant (CPR PD 64A para 5).

74. So far as it relates to trusts (including pension schemes constituted under trust), the purpose of section 48 is to provide the trustees with a relatively low-cost way of obtaining the court's protection if they proceed on a particular view of the interpretation of the trust, supported by a legal opinion. The application does not determine the rights of the beneficiaries, who remain free to assert their true rights (which may differ from the view expressed in the legal opinion) and to follow any trust property which is distributed contrary to their true rights. Instead section 48 protects the trustees from any later breach of trust claim so long as they have acted in accordance with the opinion.

75. Since an application under section 48 does not determine the beneficiaries' rights, one would not normally expect to join a beneficiary to the proceedings or seek a representation order.

76. Section 48 is concerned solely with points of interpretation arising out of the terms of the trust (or will), not with questions of rectification (*Greenwald v Pike* [2007] EWHC 2202 (Ch)) nor with questions of statutory interpretation.

77. Section 48 can be relied on in the pensions context, as illustrated by *Re BCA Pension Trustees* [2015] EWHC 3492 (Ch), where trustees sought authorisation to administer the pension scheme on the basis of counsel's opinion on a point of construction. The point involved "corrective construction" to cure an obvious omission from the pension increase rule. The court granted the authorisation sought, but on terms that members (who had not been joined) should be notified of the court's order and reasons for it: see [42]. The court confirmed that the section 48 order did not bind the beneficiaries of the scheme and that they were free to contend for a different interpretation of the pension increase rule, but the order would protect the trustees against any complaint that it had wrongly administered the scheme: see [36].

78. It is to be noted that section 48(2) precludes an order being made if there is a dispute which would make it inappropriate for the court to make the order without argument. In the pensions context,

it may often be that there is no dispute, because doubtful points of interpretation tend to be picked up by the lawyers to the trustee or employer and are not appreciated by members (initially at least).

79. However, the absence of dispute does not mean that the court will always make the order. Section 48 is permissive: it says the High Court "*may*" make the order if the conditions are met. This suggests that the court has a discretion as to whether to make the order, albeit no guidance is given as to how the discretion is to be exercised. It may be that if the point of construction is very doubtful (even though ultimately the legal opinion comes down on one side or the other), the court would not be willing to make the order; and likewise if large amounts are at stake or the proposed construction would have particularly adverse effects for beneficiaries or would involve a departure from the established administration of the scheme.

80. Presumably also, the court would not be willing to grant the order if it disagrees with the legal opinion. Section 48 does not say anything about whether the court must agree with the opinion. In *Re BCA*, the Judge was careful to say he agreed with counsel's opinion and he gave a reasoned judgment on the point of construction: see [28]-[34]. But since the rationale of section 48 is that the trustees will be relying on a suitably qualified legal adviser and the court is not required to hear argument, it seems well-arguable that there is no obligation on the court to form its own view and it need not be satisfied that the legal opinion is correct.

Re BCA revisited

81. As a final comment, it is interesting to revisit *Re BCA* in the light of recent authority. There is no doubt that what *Re BCA* says about section 48 remains valid. What might be less clear is whether the court was right to apply a corrective construction in view of *Barnardo's*:

    81.1. The problem that arose in *Re BCA* was that, upon the consolidation of the scheme's rules, a paragraph had been omitted from the pension increase rule which identified which periods of accrual were subject to the different rates specified in the rule.

    81.2. The court concluded that it was clear, when one looked at the predecessor rules and took into account that the current rule was the product of a consolidation exercise, that the relevant paragraph had been omitted in error and its effect should be restored by a corrective construction: see [28]-[29], [31]-[32].

    81.3. Yet *Barnardo's* tells us that generally it is unprofitable to consider the previous rules or look at contextual factors unknown to members. It seems unlikely that the members would have appreciated that there was a consolidation process or that new joiners would have had access to the predecessor rules. Further, as pointed out earlier in this paper, other cases have questioned whether it is permissible to take account of the fact that rules were the product of a consolidation: see *British Telecommunications v BT Pension Scheme* [2018] EWCA Civ 2694 at [33]-[35] and *IBM v Dalgleish* [2014] EWHC 980 (Ch) at [151] and [243], referred to above.

    81.4. Thus a strict application of the *Barnardo's* approach might call into question the analysis in *Re BCA*. But it seems pretty obvious what had gone wrong with the drafting in *Re BCA*

and instinctively the outcome in that case feels like sound common sense. One might therefore be forgiven for wondering if, as suggested earlier in this paper, the *Barnardo's* approach is actually somewhat unrealistic in downplaying the importance of the contextual approach in pension scheme interpretation.

81.5. The answer to the apparent difficulty may be that *Barnardo's* should not be regarded as laying down an inflexible rule that contextual factors are to be given little weight: it all depends on the precise circumstances. As the end of [26] of *Barnardo's* makes clear, whether or not delving into the archaeology of prior rules will be of assistance may depend on the specific case before the court. And as [18] of *Barnardo's* states, drafting errors may fall into a special category, so that a more liberal approach to relying on context is warranted.

Using old law to solve new problems

Jonathan Hilliard KC, Tom Robinson and Sebastian Allen

Introduction

1. In this lecture we take a look at the breadth of the jurisdiction available to navigate a successful resolution of pension scheme disputes.
2. Recent years have seen varied and nuanced ways of dealing with those disputes, with parties making use of the multiple jurisdictional tools available to navigate a successful outcome. These have included compromising issues and obtaining specific declarations or related orders from the Court, all as part of a more holistic strategy to achieving an overall solution. A good practical example of that more holistic approach is the *Axminster* case – *Punter Southall Governance Services Ltd v Jonathan Hazlett* [2021] EWHC 162 (Ch) where the Court was being asked to exercise all three of those jurisdictions in the same hearing.
3. What these more nuanced and milt-faceted approaches to pension disputes reveal is that there is a bit of an art form in getting to a successful resolution of these sorts of complex and often intractable cases in as few moves as possible. It is, moreover, often seen as a bit of a *dark* art form because historically much of it has been done behind closed doors in discussions with representative beneficiaries, in private hearings and unreported judgments.
4. The purpose of this lecture is accordingly to draw out and explore the three most useful jurisdictions available for dealing with these sorts of cases.
5. What we are going to call – for those who practice the dark arts – the "3 Bs" of pensions litigation: Beddoes, Benjamins and Blessings (at least so far as blessings of compromises of pension disputes are concerned). Jonathan is responsible for the part of the lecture dealing with Beddoes, Tom with Benjamins and Sebastian with blessings (in the context of compromise).
6. There are three reasons why we have focused on these.
7. First – they are all examples of the exercise of the Court's supervisory jurisdiction over the administration of trusts:
   a. **Blessings** – are applications to the Court for approval for a particular course of action as being one that the Trustees can properly take;
   b. **Beddoes** – are applications to the Court for an order as to whether a trustee can bring or defend litigation in its capacity as trustee at the expense of the fund; and
   c. **Benjamins** – at least in their traditional form - are applications to the Court for liberty to distribute trust assets on a specific factual footing.
8. To that extent they are related to each other as being situations where Trustees can invoke the Court's jurisdiction to assist and protect them in resolving uncertainties surrounding how the Scheme should be administered and thereby ensuring that they cannot be accused of acting in breach of trust for having administered the Scheme on that basis.
9. Secondly there are subtle but important differences in their jurisdictional tests and so it can be all too easy to get mixed up both as to what jurisdiction actually needs to be engaged to achieve a particular outcome and as to the correct threshold test to be applying.

10. Thirdly - and this ties in with the title to this talk – is that they are jurisdictions that have become increasingly important in modern day pensions litigation and yet they all derive from some pretty old law: Beddoe (1893), Benjamin (1902) and powers to compromise - which is the context in which we are going to be looking at the Blessing jurisdiction – derives from s.15 of the Trustee Act 1925.
11. What is interesting is how these jurisdictions have evolved to meet the demands of modern day litigation.
12. It is only by understanding the flexibilities within those jurisdictions as they have evolved over time that they can then be skillfully adapted to the broad range of different situations that arise in practice. Benjamin orders are a particularly good example of this because they - or orders like them - are, as explained further below, increasingly being sought in a range of situations. Indeed, the fact that these jurisdictions have withstood the test of time so well – and are still flourishing to this day – shows the flexible and resourceful nature of the Court's supervisory jurisdiction over trusts.

<u>The Beddoe jurisdiction</u>

13. Over a hundred years ago, *Re Beddoe* encouraged trustees to come to Court to seek directions as to whether to litigate, on the premise that this was a cheap and quick procedure. The jurisdiction has stood the test of time. However, given the absence of reported decisions outside the territory of claims against beneficiaries where most of the hearing can take place in public, there is not the same body of case-law as in many other areas. Therefore, it is helpful to investigate how the jurisdiction works, and when it is necessary to get Beddoe relief given the cost in modern times of doing so.

What is the test for a standard case

14. The first question is what the relevant test is. Is it the same as a blessing test that simply examines whether the trustee has taken into account relevant considerations and acted for a proper purpose, or is it more intrusive?
15. One might argue from first principles that it should just be the blessing test, given that:
    a. an ability to turn a chose of action to account through Court proceedings is an asset, and a decision to litigate an investment of sorts;
    b. an ordinary blessing decision, such as relating to the sale of a property, carries with it the authority to incur legal costs in relation to it;
    c. the relevant considerations will often, depending on the proceedings, involve specialist advice in a field that the Court in question is not familiar with, and therefore the Court will necessarily have to place heavy reliance on the view of the expert in question.
16. However, despite that, the stance taken by the Court appears to be that it is a more intrusive test, where the Court takes into account the trustee's views but ultimately decides for itself whether the litigation is in the interests of the trust as a whole:
    a. *Re Evans* [1986] 1 WLR 101;
    b. *Re F Charitable Trust* [2017] 2 JLR 26, In the matter of the Arpettaz Settlement [2020] JRC 161; and
    c. *Trustee L v AG* [2015] Sc (Bda) 41 Com (15.5.15) (in which the range of considerations that the Court takes into account when deciding whether a trustee should be allowed a

Beddoe to litigate against a hostile beneficiary or (in the pensions context) the employer are explained).

17. The justification for this approach given in *Re F* is that the Court is necessarily more familiar with litigation than other courses of action proposed by the trustee, and therefore will scrutinise the proposed course of conduct in a *Beddoe* to a greater degree than in a standard blessing application.

What courses of action do *Beddoes* apply to?

18. The next question is what types of trustee action *Beddoes* apply to. They obviously apply to a trustee proposing to litigate or to defend litigation, but what beyond that?
19. This question arises in the context of a compromise of legal proceedings where the compromise does not require the Court to give CPR r.19.7(6) approval but rather involves the exercise of a discretion by the trustee. The Courts have tended to take a blessing approach to this.
20. This is the case even where a *Beddoe* was initially obtained: *Airways Pension Scheme Trustee v Fielder* [2019] EWHC 3032 (Ch).
21. This throws into focus what the rationale is for treating *Beddoe* proceedings as having a different test from ordinary blessing proceedings. If, for example, the rationale is simply that the Court is more expert in litigation than the other proposed courses of action that a trustee may bring before it, then why should the more onerous test not apply to cases to compromise litigation? The practical answer appears to be that there is something about the trustee proposed incurring of cost that causes the Court to look with a more critical eye about whether the course of conduct in question should be sanctioned.

Who can bring *Beddoe* proceedings?

22. Trustees can obviously bring such proceedings. But can anyone else?
23. In Jersey, beneficiaries were allowed to do so in a case where they proposed to bring an action on behalf of the trust*: In the matter of the X Trust* [2012] JRC 17. In England, a not dissimilar course of action was recently attempted to obtain funding to bring a derivate claim against directors of the trustee company: *McGaughey v Universities Superannuation Scheme Ltd* [2022] EWHC 1233 (Ch), and previously costs orders have been made in appropriate circumstances allowing pension scheme beneficiaries to bring claims on behalf of the trust fund: *McDonald v Horn* [1994] PLR 155.
24. In both cases, the Court should at root consider what course of action would be in the best interests of the trust. However, derivative actions obviously involve special considerations of their own, caused by the fact that the trustee is the ordinary claimant and so a beneficiary needs - at a high level - to show why it should be allowed to bring the claim.

Who are the other parties to *Beddoe* proceedings or otherwise allowed to make representations?

25. The effect of *Beddoe* authorisation is to allow the trustee to indemnify itself from the trust assets for the cost incurred in the litigation and insulate the trustee later from a claim that it should not have done so or that it was acting in breach of trust in taking the proposed step in the litigation.
26. It follows that before deciding whether to authorise such a step, in the large scale pension disputes we are concerned with in this paper, it is common to have the contrary position tested by someone with an interest in so doing.

27. While it is sometimes done, it is not necessary to seek representation orders in relation to a *Beddoe* because the Court is asking the question of whether *it* is happy to grant the authorisation in question. Consistent with this, while this should be avoided wherever possible, there can be urgent cases where it is not possible to join parties to *Beddoes* or authorisation of compromises, as was the case in relation to the latter in *Owens Corning Fibreglass (UK) Pension Plan Ltd* [2002] PLR 323.
28. The obvious candidate to test the trustee's position is a beneficiary, or sometimes where the matter is particularly complex, more than one beneficiary, although the latter should be avoided wherever possible.
29. Where the course of action in question is against a beneficiary (such as recovery of sums paid to a beneficiary), then that beneficiary should be allowed to appear at the *Beddoe* hearing and the modern practice - absent some countervailing consideration - is simply to join them. They will be excluded from part of the hearing.
30. In the pensions context, a closely related situation to that in the last paragraph is where the trustee is in litigation with the employer, say in relation to the funding of the scheme. In such a situation, the employer has an interest in opposing the claim as funder of the scheme because otherwise it may end up paying the costs of the trustee unsuccessfully bringing or defending litigation against the employer. Therefore, the employer should be allowed to oppose the application, as in the BA litigation.
31. The final class comprises people outside the above categories where the person in question has some interest in opposing the Beddoe for another reason, such that it is the counterparty to the main litigation in question. This may cover a diversity of situations so one cannot prescribe rules to cover all of them. Such persons are normally outsiders to the Beddoe because they are outsiders to the trust. However, the Cayman Court in *X v Y* (2017) 20 ITELR 689 allowed such persons to oppose the Beddoe by putting to the Court flaws in the trustee's claim in the main litigation, because the Court saw the benefit in ensuring that it is properly informed as to the merits of the main litigation, and the strength of the trustee's case can often usefully be tested by seeing what is said in response to it.

The consequences of obtaining *Beddoe* relief

32. That has been dealt with above (paragraph 28).
33. However, three qualifications need to be entered. First, the trustee must put before the Court all relevant information. Second, the scope of the *Beddoe* relief sought or granted may be limited to a particular step in the litigation and therefore necessitate a further application. Third, even if the scope is not so limited, the trustee will need to consider as the litigation proceeds whether circumstances have changed to such a degree that it is sensible to go back to the *Beddoe* Court for further guidance, and if so, whether this can be done on paper or requires a further hearing.

The consequences of not seeking *Beddoe* relief

34. As set out at the start, the *Beddoe* jurisdiction sprung up in a situation where it was assumed that the jurisdiction could be invoked cheaply and quickly. That is not, or certainly is not always, the case now.
35. Therefore, a trustee should always examine the alternative to a costly *Beddoe* application, which brings into sharp focus the consequences of not seeking *Beddoe* relief.

36. The CPR makes clear that the question of whether *Beddoe* relief was sought is only one of the considerations to take into account: PD46 para.1.1, considered in *Blades v Isaac* [2016] EWHC 601 (Ch). It was suggested in passing in *Bonham v Blake Lapthorn Linnell* [2006] EWHC 2513 (Ch) that it is likely only to be in exceptional circumstances that a trustee will be able to recover costs from the fund when he has failed ([123]), although as the Judge said later in the judgment, a trustee does not need a *Beddoe* order as long as he can show the costs were properly incurred ([191]).

37. Moreover:
    (1) where the trustee has the benefit of a wide indemnity clause, such as one that applies to all cases save for where the trustee acts in bad faith, the trustee will be able to indemnify itself in the scenarios set out in the clause;
    (2) statutory mechanisms exist in particular contexts for binding directions to be given to the trustee about how to act in relation to litigation, such as by the PPF under s.134 of the Pensions Act 2004;
    (3) it may be possible for the trustee to obtain binding comfort from the employer that it accepts that the trustee should take the course of action in question and that the employer will indemnify the trustee for such step; and
    (4) if an action is later brought against a trustee for funding unsuccessful litigation from the trust, and the trustee has the benefit of a wide exoneration clause, the trustee will be able to rely on this to defend a claim for breach of trust for taking the step in question in the litigation if it falls within the scope of the clause.

Relationship with prospective costs orders

38. It is possible as a matter of jurisdiction for a trustee to obtain a prospective costs order. However, it will at best be rare for a trustee to obtain such an order. Prospective costs orders determine the costs order in the main litigation, and therefore the requirements for one have traditionally been said to be more stringent.

39. In cases where the trustee litigation is against the employer, who will bear the ultimate burden of funding the litigation, a Beddoe may have the effect of determining the ultimate burden of costs under the litigation. However, as *Airways Pension Scheme Trustee v Fielder* [2019] EWHC 29 (Ch) confirms, the ordinary *Beddoe* test nonetheless applies because one is evaluating what course of action would be in the interests of the trust.

40. Similar points can apply in the private trust context where the litigation is against someone who claims that the property held by the trustee is in fact held on trust for him or her rather than on the written trusts.

41. A final related point arises where the trustee's conduct is itself criticised. In such a situation, the Court will naturally look closely at whether the course of action proposed by the trustee is in the interests of the trust as a whole rather than just being in the trustee's personal interest. As part of this, it will expect the trustee to have adverted to alternative routes for dealing with the issue, where there are such routes, such as whether a rep ben could defend the claim so as to leave open the possibility of the trustee ultimately bearing the cost personally at the end of the main litigation. These issues were canvassed in *Airways v Fielder*. Often, as there, it will not be realistic for the rep ben to defend the claim against the trustee.

Concluding thoughts

42. While the jurisdiction remains essentially the same as that in *Re Beddoe* itself, it throws up a number of interesting questions.

43. It will often not be possible for the answers to these questions to be made the subject of a public judgment, but given the modern attitude to when judgments should be public, it may increasingly be the case that these issues are dealt with in open judgments. It is, therefore, particularly important to consider the answers to the questions posed above in considering how best to approach any approach to the Court for *Beddoe* relief.

<u>The Benjamin jurisdiction</u>

Introduction & History

44. Part 64 of the CPR contains various rules about certain claims "*relating to trusts*".

45. These include, for example, the fact that they must be made by a Part 8 claim form, and all trustees must be parties to them (CPR 64.3 and 64.4(1)(a)). The White Book commentary on the scope of Part 64 describes various types of claims and applications that fall within Part 64, in particular those that fall within the description of "*claims – for the court to determine any question arising in – (ii) the execution of a trust*" (CPR r.64.2(a)(ii)). In addition to claims for *Beddoe* relief, the White Book commentary refers to claims "*for Benjamin orders*" as falling within this category.

46. What is a *Benjamin* order?

47. The White Book commentary (para 64.2.4) describes it as an order "*authorising the distribution of the fund on a particular footing*". The issue we want to consider in this lecture is how the jurisdiction has grown from the context of distribution to the context of general administration of a trust, and from the context of factual uncertainty to dealing with uncertainties of law and fact that need to be resolved so that a scheme can function.

48. In the case that gave this type of order its name, *Re Benjamin* [1902] 1 Ch 723, the Court gave the trustee permission to distribute a trust fund on the footing that a beneficiary had predeceased the testator.

49. The case concerned the will of a testator, Mr Benjamin, who had 13 children. His will provided for distributions to those of his children who were living at the date of his death. One of the 13 ("**P**") had disappeared some nine months before the testator's death. The trustees of the will made an application for the court to determine what should happen to P's share of the estate.

50. P's disappearance does indeed seem to have called for an explanation. The law report describes him as 24 years old, working as a "traveller" for a company called Blanckensee & Son. It appears that this was the role of a travelling salesman, and the company was a high class jewellers' with an office in Ely Place, just off Holborn. On 1 September 1892, he was at Aix-la-Chapelle on holiday when he received a message from his employer requiring him to return to London. He left by train, and was never seen again, despite what the report describes as advertisements in all the English Colonies, and in other parts of the world. It later turned out he owed some money to his employer, although the message to him contained no threat.

51. The trustees understandably argued that by the time of judgment in 1902 P must be presumed dead. However, the administrator of P said the rule of the Court is to presume life unless there is good reason to suppose the contrary. He relied on the "*presumption of life*" and said there

was abundant reason here for P disappearing but not contacting his relatives, so it ought to be presumed he was alive when the testator died.

52. The court disagreed, and considered it very likely that he had died, roughly when he left Aix-la-Chapelle. However the court added that it did not wish to prevent P's representative later making a claim if new evidence came to light. It therefore did not declare P had died, but instead made an order that the trustees of the will were at liberty to distribute on the footing that P had not survived his father.

Nature of the relief

53. The order in that case therefore allowed the trust to be executed in a particular way because it allowed distributions to be made on a particular footing.

54. The *Re Benjamin* case shows that one of the critical features of a *Benjamin* order is that it does not vary beneficial interests, but allows trustees to progress the execution of the trust according to practical probabilities. It will protect the trustees from subsequent claims that they have acted in breach of trust, but preserves the right of any person actually entitled to trust property to follow that property if they later appear.

55. The relief is most often sought in relation to situations of uncertain facts that impact on proposed distributions, where despite appropriate investigations it is not crystal clear what has occurred (although there is a high likelihood that one answer is right).

56. However the court can also authorise trustees to distribute on a given footing in relation to the legal issue of whether certain assets are held on trust. Thus in *Re Equilift Ltd* [2010] BCC 860 the court considered the insolvency of a company holding various deposits and prepayments from customers that might arguably be held on trust. The sums were not large enough to warrant adversarial litigation, so the court authorised the liquidators to distribute in accordance with counsel's opinion as to whether the relevant arrangements were sufficient to constitute a trust.

57. As regards the test that the court applies, this is simply whether it is "*just and expedient*" to make the order (*Re MF Global UK Ltd* [2013] EWHC 1655 (Ch); [2013] 1 W.L.R. 3874 at [26]).

Examples of its use

58. Before turning to the pensions context, it is worth noting the range of examples of the use of this jurisdiction.

59. Lewin on Trusts, paragraph 39-032 gives various examples of the use of the Benjamin jurisdiction:

    a. Where there is uncertainty as to the death of an individual, or when that death occurred (*Re Benjamin* itself);

    b. Where there is uncertainty as to whether a parent will have further children, so as to add to a class of beneficiaries (*Re Pettifor's Will Trusts* [1966] Ch. 257; *Figg v Clarke* [1997] S.T.C. 247*)*;

    c. Where advertisement for creditors is impossible, the trustees may be authorised to distribute on the footing that all creditors have been paid (*Re Gess* [1943] Ch 37 – in that case the relevant creditors would have been in Poland, but this was wartime and the court accepted that advertisement would have been impossible);

    d. Where the original trust instrument is lost, the trustees may be authorised to distribute on the footing that some secondary evidence accurately states its contents (*Perch v Robinson* (1943) 87 S.J. 66, as explained in *Hansell v Spink* [1943] Ch. 396 at 398–399);

e. Where there appear to be no beneficiaries (including beneficiaries by way of resulting trust), the trustees may be authorised to distribute on the footing that the Crown is entitled by way of escheat or as bona vacantia (*Re Lowe's Will Trusts* [1973] 1 W.L.R. 882 at 887B–C, CA.)

60. In the insolvency context, the *Re Benjamin* jurisdiction has been used when dealing with insolvencies of companies holding trust money. The factual uncertainty in these sorts of cases is often caused by inadequate records so that it is unclear which creditors might have proprietary claims.

61. In *Re MF Global UK Ltd* [2013] 1 WLR 3874 the court authorised administrators to make distributions on the basis that the only creditors with valid claims to the trust assets in question were those that had made their claims by a particular date, and that any claim that had been rejected was not to be treated as valid unless the creditor had applied to challenge the rejection. This is effectively setting up a claims resolution structure, designed to elicit relevant evidence, not simply reacting to the evidence already available. This was recognised as going beyond *Re Benjamin* – if creditors have made a claim then there is no relevant factual uncertainty as to their identity or claim, and the relevant uncertainty is as to the validity of their claim. Nonetheless the court was persuaded that it had jurisdiction to allow trustees to distribute on the basis that rejected claims were invalid (unless appealed). It held this fell within the inherent jurisdiction of the court in relation to trusts, and was just and convenient in order to allow the timely return of trust assets to beneficiaries.

The Pensions Context

62. Two relatively recent pensions cases show the jurisdiction at work.

63. In *Capita ATL Pension Trustees Ltd v Gellately* [2011] EWHC 485 (Ch); [2011] Pens LR 153 the Court (Henderson J.) used the jurisdiction to address a discrete area of factual uncertainty relating to which members of a pension scheme fell within a particular category entitled to more generous benefits. The case was mainly about the effectiveness of equalisation attempts, hence the presence of a representative beneficiary, the employer and the trustees as parties. There was some factual uncertainty as to the identities of those members. After hearing submissions from the trustees and on behalf of the employer as to the investigations carried out into this category, the court used the Re Benjamin jurisdiction to authorise the trustees to make distributions on the footing that the identities were those set out on a schedule to the claim form. Interestingly, the issue was recognised as necessary not only for the trustees to resolve, but also for the PPF to have resolved so that it could pay proper levels of compensation. Thus it was anticipated that the order would be relied on not only by the parties to the litigation.

64. The second case is *Re Axminster Carpets Group Retirement Benefits Plan* [2022] Pens LR 1.

65. The Plan was in a PPF assessment period and (like *Capita*) it was important to know members' true entitlements so that the trustee could correct past incorrect payments and had clarity as to entitlements before transfer. Thus this was not a case, as *Re Benjamin* was, of a proposed distribution by the trustee.

66. Issues that were litigated focussed on limitation and forfeiture, but prior to trial various other issues were compromised. They included issues as to the consequences of a 2001 Deed and Rules being invalid due to the lack of a section 37 confirmation.

67. Certain of the changes made by the 2001 Deed introduced or altered discretions of the trustee. For example the 2001 Deed introduced a discretion in relation to spouses of pensioners who

had married within 6 months of their death. Under the new discretion, payments to such spouses could be restricted. If the 2001 Deed were invalid, and no such discretion had been validly introduced, then there might have been a host of spouses able to complain of past underpayments. However it was uncertain whether the discretion had in fact ever been exercised.

68. The trustee asked the court to make a Re Benjamin Order allowing it to administer the trust on the footing that the discretion had never been exercised, so that there was in fact no need to litigate the s.37 issue because on the facts it made no difference.

69. The court received evidence as to the investigations undertaken into this issue, including a review of all trustee minutes for any evidence the discretion had been exercised. It noted that the evidence must show a "high degree of likelihood" of the existence of the relevant facts (or their non-existence, as appropriate). However it also noted that in Re Benjamin cases the court also looks at matters in a practical way. That will include the level of investigation that can reasonably be expected in any particular case.

70. The court heard from the representative beneficiary as well, who was appointed to represent those in whose interests it was to argue that the deed was invalid. The court made the order, and similar orders in relation to other areas of factual uncertainty as to whether discretions had ever been exercised in practice.

71. The court (Morgan J.) described the jurisdiction as follows (at [32]):

> *"As regards the Re Benjamin jurisdiction, I am not asked to make determinations as to matters of fact but instead to permit the Trustee to administer the Plan on a particular footing. On such an application, the court has regard to the evidence which exists as to relevant facts and matters. The court requires the evidence to show a high degree of likelihood of the existence, or non-existence, of the facts material to that footing and it also looks at matters in a practical way. The purpose of such an order is not to relieve the Trustee of any and all difficulties which might arise in the administration of a trust. Instead, the court balances any potential unfairness to beneficiaries against the real need to allow the trust to be administered without putting the Trustee to difficulty and expense which will probably not benefit anyone. A Re Benjamin order does not vary or negate any beneficial interests which there might be in the trust property but it protects the Trustee who cannot thereafter be accused of a breach of trust when it has acted under the authority of an order of the court."*

72. One point to note is that the court made it a term of the order that if any beneficiary later wanted to argue against the Benjamin order they were to give the trustee 42 days notice of any such proposed application and their grounds, and any such application would not be on terms that their costs would be paid as those of the representative defendant had been. So their beneficial interest is not varied, but the enforcement of it is certainly made a little harder.

Practical considerations

73. The first practical issue to note is the need for clear evidence of the investigations carried out into the relevant factual or other issue, in order to establish the probabilities of the situation.

74. As Morgan J stated, a "*high degree of likelihood*" of the relevant factual circumstance must be shown (*Axminster* at [32]). In *Axminster* we were able to review all trustee minutes and report to the court as to the outcome of that review.

75. The second issue is the need for representation orders or contrary argument. In both of the pensions cases mentioned above there were representative parties to the proceedings, and in Re Benjamin there was argument on behalf of the administrator of the missing beneficiary. However in the insolvency context the cases have proceeded with argument only from the office-holder[74] and there seems no reason in principle why that should not apply in the pensions context too.

76. A third issue might be to consider alternatives to the order. In *Evans v Westcombe* [1999] 2 All ER 777, the court recognised the cost of applying for *Re Benjamin* relief, and suggested that in an appropriate case it might be cheaper and perfectly in order for the trustee to take out missing beneficiary insurance.

77. Finally it is worth noting that the order can provide for what might happen if a beneficiary wishes to argue later that the factual circumstances are different to those identified in the Re Benjamin order. In Axminster the order provided for any later claim to be made on 42 days notice, and not on terms that the beneficiary's costs were covered (*Axminster* at [38]).

78. So the jurisdiction has grown to cover factual uncertainties as to the identities of beneficiaries, as to the existence of trust documentation, as to the use of trustee discretions or powers, and perhaps even as to issues of law. It is not limited to situations of imminent distribution; general administration of the trust is all that is required, and that can include by the PPF not the trustees seeking the order.

The Blessing jurisdiction in the context of compromises

79. A talk on compromise is made particularly tricky by the fact that – going back to the theme of the "dark arts" – most of the interesting things about the numerous compromises with which pensions practitioners are involved are not things they can really talk about.

80. There are, however, a number of general structural and practical considerations that arise when it comes to negotiating compromises in these sorts of pension disputes which can be distilled into a number of questions to ask when considering whether and how to engage the jurisdiction.

Question 1: what is the jurisdiction being exercised to compromise these issues?

81. There are two sources for that jurisdiction you need to have in mind:
    a. s.15 of the Trustee Act 1925; and
    b. the powers in trust deed and rules.

82. Under s.15 of the Trustee Act 1925, various powers are conferred on trustees and under sub-paragraph (f) this includes the power to "*compromise, compound, abandon, submit to arbitration or otherwise settle any debt, account, claim or thing whatever relating to…the trust*" and the section makes clear that for that purpose trustees can enter into, give, execute and do such agreements, instruments of composition or arrangement, releases and other things as seem expedient without being responsible for any loss occasioned by any act or thing done if they have discharged the duty of care under s.1 of the Trustee Act 2000.

[74] *Re MF Global UK Ltd* [2013] EWHC 1655 (Ch); [2013] 1 W.L.R. 3874; *Re Worldspreads Ltd* [2015] EWHC 1719 (Ch); [2016] 1 B.C.L.C. 162; *Allanfield Property Insurance Services v Aviva Insurance Limited* [2015] EWHC 3721; [2016] Lloyd's Rep. I.R. 217.

83. So the power is very wide – and is to be interpreted widely: see *Re Earl of Stafford* [1980] Ch 28.

84. When the section was enacted the draftsmen would clearly not have had in mind compromising vast pension scheme disputes involving multiple parties and numerous beneficial interests.

85. It has, however, adapted and we now know it is wide enough:
    a. to permit beneficiaries to surrender their interests under a trust;
    b. to compromise prospective liability as well as a liability which has accrued;
    c. to compromise s.75 debts between trustee and employer: see *Bradstock Group Pension Scheme Trustees v Bradstock Group plc* [2002] EWHC 1461 [2002] LCR 1427.[75]

86. What s.15 of the Trustee Act 1925 does not allow is for situations where there is no dispute about the interests of beneficiaries but there is an agreement to rearrange the beneficial interests in the form of a variation of trust (*Chapman v Chapman* [1954] AC 429) albeit that is not generally an issue in pension scheme disputes.

87. So in this context – s.15 of the Trustee Act 1925 is normally sufficient jurisdiction to enter into a compromise arrangement, although you will also normally have some form of power under the terms of the trust instrument.

88. In *T&N (No 3)* [2004] EWHC 2448 (Ch), for example, it was held that even the most generic of permissive powers to "*take any action or make any arrangement generally in connection with the administration or management of the Scheme*" included and encompassed the power to compromise.

89. So the *power* to settle is normally pretty uncontroversial.

Question 2: what involvement is required from the Court in the compromise process?

90. On this issue, it is important to distinguish between two main types of compromise.
    a. First - are compromises that can be made within the powers of the Trustee.
    b. Second - are compromises that cannot be made within the Trustee's powers and for which r.19.7(6) representation orders are needed to bind those with similar interests into the settlement.

Compromises within the powers of the Trustee

When do these arise?

91. These situations include:
    - **Compromises which can be effected simply by augmentation or Scheme amendment**: This would be the case where, for example, what is negotiated is that members receive the totality of the additional disputed benefits.
    - **Disputes over funding**: These are typically contractual-type disputes - not disputes over benefit structure.
    - **Regulatory disputes**: The compromising of enforcement actions brought by TPR.
    - **External disputes**: Such as professional negligence proceedings.

92. In these sorts of compromises - the trustee has to ask itself whether it wants to apply to Court for a blessing to enter into the compromise to shield itself from future criticism.

[75] That was a case before the Pensions Act 2004 and great care now needs to be taken before compromising a s.75 debt bearing in mind the relevant rules relating to PPF entry.

93. So – using the famous categories in *Public Trustee v Cooper* – it is a classic "category 2" situation – where you are doing something within your powers but you want the Court's blessing that it is an appropriate use of those powers.

What is the test?

94. The test for this type of blessing is well-established:
    a. *Bradstock Group Pension Scheme Trustees v Bradstock Group plc* [2002] EWHC 1461 [2002] LCR 1427 – whether it was something that "*a reasonable and properly advised Trustee*" could enter into (at [8]).
    b. In *T&N (No 3)* [2004] EWHC 2448 (Ch) the test was put neatly by Patten J. as being: "*The only task of the court is to satisfy itself that in reaching a decision about whether or not to support a plan, the trustees have taken all relevant matters into account, not had regard to anything irrelevant or impermissible, and have reached a conclusion which, on the material before them, a reasonable body of trustees, faced with the same decision, could reasonably come to*".
    c. In *Airways Pension Scheme Trustee v Fielder* [2019] EWHC 3032 (Ch) - Zacaroli J. put the test simply as one of rationality at [4], citing David Richards J in *Re MF Global UK Ltd* [2014] EWHC 2222 (Ch), at [32] as follows: *"Once it appears that the proposed exercise is within the terms of the power, the court is concerned with limits of rationality and honesty; it does not withhold approval merely because it would not itself have exercised the power in the way proposed."*
95. So this is why we say it is the least intrusive of the Court's supervisory jurisdictions.
96. It respects the fact that the trustee is better placed than the Court to decide between competing courses of action and subjects it only to a rationality-type assessment – which in practice trustees are invariably going to pass. Especially if they can point to properly taken professional advice and issues being properly stress-tested in well documented minutes.

Pros / Cons?

97. There are number of reasons why you might want to ask for the Court's blessing to enter into a compromise.
98. The typical situation is where the compromise is a particularly momentous one or where temperatures run high on a particular set of issues being settled among the membership.
99. That is surprisingly often the case – as many pensions practitioners will have experienced. So a blessing may be a sensible protection to bring both protection and finality.
100. Another reason is that:
    - Prior to the Trustee Act 2000 – s.15 of the Trustee Act 1925 itself provided protection provided the Trustee was acting in good faith – which was a very high threshold to cross.
    - In practical terms it meant it was normally unnecessary also to ask for blessing because s.15 of the Trustee Act 1925 already provided the protection Trustees needed.
    - That has now changed so that a trustee is only protected under s.15 of the Trustee Act 1925 to the extent the trustees have complied with their statutory duty of care under s.1 of the Trustee Act 2000 – which is a very different threshold and does not give Trustees anywhere near as much comfort.
    - So there is even more reason now to seek further protection from a Court

101. The downside is that it will normally require someone to appear to argue against the compromise – to stress-test it and argue why it is not an appropriate use of the trustees' power. That cannot generally be the employer because the employer cannot realistically argue against the settlement they have negotiated. So it will involve bringing in someone else to take on that role – which adds delay and cost to the settlement process.
102. Yet in the right case it is clearly better to have that approval – a recent example of which is *Airways Pension Scheme Trustee v Fielder*.

Compromises that cannot be made within the Trustee's powers – r.19.7(6) compromises

103. This type of compromise is one which cannot be made within the Trustee's powers and the Trustee needs the Court's assistance to approve the compromise on behalf of people who are not themselves parties to the compromise.
104. These situations will generally require a CPR r.19.7(6) order – where the Court may approve a settlement where parties are represented where it is satisfied that the settlement is for the benefit of the represented classes.
105. There are a number of things to bear in mind in this sort of settlement situation.
106. First - having represented parties is constraining on the settlement process. The relevant test is whether it is for the benefit of "*all represented persons*". What that means is that: (i) being no worse off is not sufficient and (ii) the benefit has to be for each represented person. This is very different from a blessing because – unlike in a blessing where all you need is to have both sides argued out – where there are represented classes you have to go beyond that and persuade the Court that you are acting in the interests of every member of the represented class.
107. In practice what that means is that every separately represented class brings with it additional (i) cost, (ii) delay and (iii) inevitable complexity to the settlement structure.
108. That is something which – particularly from an employer perspective – can be highly unattractive and difficult to explain to commercial clients because it means that the process is very different from the sort of commercial negotiation with which most employer clients will be familiar.
109. So the trick in these sorts of cases is to find a way to have the minimum number of represented classes possible.
110. The way to do that is to work out how to package the issues or settlement structure in such a way that minimises conflict between different classes of member. There are many ways of doing that and it will obviously depend on the exact nature of the issues in dispute as to how best to do it, but it is something that really repays careful and sometimes quite creative thought at the outset of any compromise process.
111. This is also where the developments in the *Benjamin* jurisdiction mentioned earlier are potentially so interesting because – if you can deal with certain issues by using *Benjamin* orders in situations where otherwise separate representation orders would be needed – you are reducing the number of classes for whom you have to show a benefit, as well as the cost and complexity of the overall settlement.
112. Secondly – what if someone in the represented class objects to the compromise being binding on them?
113. It does happen from time to time and it is always the fear that just as you get everything nailed down between the parties a beneficiary or employer stands up and objects to what you are doing. It happened in *Pilots (PNPF Trust Company Ltd v Taylor* [2010] Pens. L.R. 261) – although

in that case the relevant Harbour Authority applied to be separately represented – even though they appeared to have identical interests to another represented class – and that was permitted so they were in fact represented at the hearing and bound into the result.

114. It also happened in *MNRPF v Stena Line* [2022] EWHC 439 (Ch).

115. That was a slightly unusual situation of a series of last minute criticisms of the settlement process being communicated by email exchange during the open Court sessions - which the Court rightly did not allow to derail the representation orders. On the face of it, that is the right approach because a representation order can be made against the express wishes of an individual and it should not be the case that the whole deal is held hostage because of one disgruntled member.

116. It is, however, far from easy – because of the stringency of the test that the compromise is in the interests of all members.

117. One of the features of the compromise process in *MNRPF v Stena Line* which Mrs Justice Bacon referred to in dealing with the objecting members was the scale and duration of the notification process that had been undertaken as part of the compromise process. So that may be a salutary lesson as to the value of that sort of process being undertaken prior to the compromise getting to Court in case any last minute objector arises.

118. Thirdly – as a practical consideration – what sort of things will be accepted by the Court as being for the benefit of the class?

119. Plainly additional pension scheme benefits qualify. Courts have, however, also recognised a wide variety of other types of more generic "benefits" as also relevant.

120. In *Axminster*, Mr Justice Morgan explained at [26] that in addition to the compromise sums there were very real benefits from the fact that the compromise:
    - created certainty compared with the uncertainty of litigation;
    - provided an immediate resolution;
    - simplified the administration of the Plan; and
    - avoided the delay and cost of litigation.

121. Similar points were made by Mrs Justice Bacon in the *MNRPF v Stena Line* settlement approval hearing.

122. These are all important points – and are useful points when it comes to negotiating with representative beneficiaries, especially over peripherally affected classes for whom it may be less clear whether the compromise would otherwise be for their benefit.

Question 3: how do you deal with a change in circumstances?

123. It is often the case that any compromise reached will take a while to get to Court or be subject to a number of conditions precedent, including (for example) the condition of Court approval or the condition that rectification claims or other declarations are granted by the Court.

124. What happens if the circumstances change between the date of the compromise and the conditions precedent being met?

125. Important things that might change include:
    - changes in the deficit;
    - changes in covenant;
    - changes in investment outlook and
    - changes in the assumptions used for calculating quantum of deal.

126. In the compromise in *Airways Pension Scheme Trustee v Fielder* – the change that occurred was the fact that after the agreement was reached by which members would expect to receive RPI increases going forwards, the Government announced the planned convergence of RPI and CPIH by around 2030. What that would mean in practice was that for younger members the settlement would not be worth as much as they thought.
127. How do you deal with this in practice?
128. Where you are in the first type of compromise (i.e., a compromise within the powers of the trustees) and there are no represented classes – as was the case in the *BA* litigation – it is easier because you are still subject to the low threshold "rationality" test of a blessing so, provided it is still "rational" to enter into the compromise, there should be no issue – which is essentially what Zacaroli J. decided.
129. Even then, however, it is not clear to what extent you have to:
    - completely redo your decision-making process;
    - merely update your process; or
    - whether you can even decide not to reconsider the original compromise provided it is not "irrational" to form that view.
130. Whilst Zacaroli J. did not engage with exactly what is required to meet the test, the safest course of action is to show the Court that the new circumstances have been fully taken into account and updated professional advice has been obtained.
131. Where you are in the second category of compromise – with representation orders – it is much more difficult because it is perfectly possible that the change of circumstances means the Court can no longer approve the compromise as being in the interests of all those represented. It will not be enough in that situation to say that it was in their interests when the deal was signed. The Court will have to be satisfied at the point in time it is making its assessment.
132. All of these considerations point firmly to reducing as far as possible the gap between a settlement concluding and the date of the approval hearing.

Question 4: what regulatory or other public body involvement in the compromise is required?

133. The obvious candidate for public body involvement is HMRC.
134. There are almost always issues about the tax consequences for a scheme and for members of a compromise of pension benefits, but that is a subject for a talk all in itself. The other usual candidates are the PPF and TPR.
135. We know of course that the PPF has powers to direct the conduct of litigation under s.134 of the Pensions Act 2004 and those are regarded as stretching to cover directions when it comes to settlement.
136. The Pensions Regulator also enters into settlements of its enforcement actions.
137. It has no explicit jurisdiction to do so under the Pensions Act 2004, but it presumably relies on its "sweep up" powers in s.6 of the Pensions Act 2004 to do all things that are incidental or conducive to the exercise of their powers.
138. When you are in the thick of enforcement proceedings with TPR – it is useful to have a look at their settlement guidance.
139. It explains that TPR has a wide discretion to pursue settlement discussions and TPR will consider all relevant factors and sets out a non-exhaustive list - including:
    - Protection of member benefits
    - Protection of the PPF

- Position of relevant affected parties
- The nature and strength of TPR's case
- The possible duration and costs of regulatory action
- The ongoing sustainability of the solution
- Long term impact of the proposal
- Behavioural change

140. So if you are approaching TPR for settlement discussions – this list provides a very good starting point in terms explaining and justifying the proposed compromise as being one that TPR should support.

European pension schemes in a post-Brexit world

Emily Campbell and Caspar Bartscherer

Introduction

Two very familiar examples of issues which affect English occupational pension schemes are equalisation and scheme solvency. These areas have a strong foundation in aspects of European law which have been incorporated into English domestic law through primary and secondary legislation, and this legislation will not disappear simply because the UK has ceased to be a treaty partner with its European friends. Given this European thread, I have often had cause to wonder how these issues are dealt with in other European countries, which (together with a particular interest I have in German language and law) forms the background to the idea for this talk.

In this lecture, Caspar and I are looking at the comparative example of German occupational pension schemes. Germany is a good country to consider as a comparator as it has the largest GDP in Europe by some margin and because it has a strong track record of encouraging pension saving.

As far as it is possible to ascertain by internet searches, equalisation does not appear to have been a big issue for the Germans. This is likely to be because Article 3(2) of the "Grundgesetz" of 1949, which serves as the German constitution, provides that men and women shall have equal rights and prohibits discrimination on the grounds of sex. So, equalisation problems do not seem to be a fruitful source of comparison. Scheme funding is another matter, however, and Caspar is going to give you an overview of different types of commonly occurring German occupational pension schemes and will explain some interactions which the ECJ has had with German pension schemes on the question of the security of benefits.

After that, I am going to talk about reasons why European pension schemes may consider becoming UK registered pension schemes for tax purposes in the context of a case in which I appeared in 2019 concerning a Bavarian pension scheme.

Forms of pension provision in Germany

Based on information available from the website of BaFin,[76] the German financial regulator, German pensions law distinguishes between five types of pensions provision:

1. 'Direktzusage', or direct promise, where the Employer promises to pay a pension (whether DB or DC) itself.
2. 'Unterstützungskasse', or provident fund, where an employer contributes money to a fund but the employee does not get any legal entitlement to benefits.
3. 'Direktversicherung', or direct insurance, in essence the purchase of annuities from an insurance company.
4. 'Pensionskasse', a type of pension fund, which is classed as an insurance company for German regulatory purposes, and can only invest in certain types of securities. Pensionskassen are subject to IORP requirements.

[76] https://www.bafin.de/DE/Aufsicht/VersichererPensionsfonds/Einrichtungen_bAV/System/system_bav_node.html

5. ‘Pensionsfonds’, another type of pension fund, which is not an insurance company, can invest in a broader range of asset classes, but is also subject to IORP.

And of course, as you will hear about in a minute from Emily, there are also *sui generis* statutory pension schemes, such as the BAV that she acted for.

Underpinning all types of indirect funding is a form of direct employer liability, called Subsidiärhaftung, under §1, ¶1, sentence 3 of the 1974 Betriebsrentengesetz.[77] Under Subsidiärhaftung, insofar as a Kasse or Fonds fails to pay the promised benefits, the member in question has a direct claim against the employer.

Further, should the employer fall into insolvency, employees and pensioners entitled to pensions under the Direktzusage, Unterstützungskasse and Pensionsfonds models are entitled (under §7 of the Betriebsrentengesetz[78]) to have their benefits guaranteed by the Pensions-Sicherungs-Verein (the “**PSV**”), a German equivalent of the PPF.[79] Following a 2019 ECJ decision, this protection has now also been extended to Pensionskassen by a 2020 amendment to the Betriebsrentengesetz.

The PSV in Luxembourg: *Bauer*

The 2019 ECJ decision that precipitated the aforementioned legislative change is Case C-168/18 *Günther Bauer v Pensions-Sicherungs-Verein VVaG*.

Mr Bauer’s employer had insured his benefits with a Pensionskasse, the Pensionskasse der Deutschen Wirtschaft (“**The Pensionskasse**”). Due to financial difficulties, The Pensionskasse, in accordance with its governing instrument, reduced Mr Bauer’s pension by a total of approximately 14% between 2003 and 2013. As required by the Subsidiärhaftung under §1 of the Betriebsrentengesetz, Mr Bauer’s former employer initially paid him the difference, until it too got into financial difficulty and insolvency proceedings were initiated in respect of it.

Mr Bauer then sought to recover this difference from the PSV, which rejected his claim, on the basis that §7 of the Betriebsrentengestz did not require it to cover the shortfall from The Pensionskasse, unlike a shortfall from a Direktzusage. Thus, where an employer had secured payment of a pension through a Pensionskasse, there would be a lacuna in protection if both the Pensionskasse and the employer in question were unable to meet their liabilities. In simplified terms, Mr Bauer then claimed that that lacuna in the law constituted a breach of his right to the protection of his old-age benefits under Article 8 of EC-Directive 2008/94 (“**Article 8**”).

The ECJ held, in its decision of 19 December 2019, that the provisions of the Betriebsrentengesetz would conflict with Article 8, provided that a pensioner’s entitlement was being curtailed by more than 50%, or that the curtailment would result in that pensioner slipping below the poverty line. Since neither was applicable to Mr Bauer, the national court, to which this had been remitted back, held that Mr Bauer had no right to payment from the PSV.

Keen observers of the ECJ jurisprudence on Article 8 will of course observe a similarity between the questions asked by the national courts in *Bauer* and Case C-17/17 *Grenville Hampshire v Board of the Pensions Protection Fund*. On the rather extreme facts of that case – a reduction of Mr Hampshire’s

[77] https://dejure.org/gesetze/BetrAVG/1.html
[78] https://dejure.org/gesetze/BetrAVG/7.html
[79] The PSV does not secure payments under the ‘Direktversicherung’ model, since protection in the event of the insolvency of an insurance company is provided for separately in German law.

pensions entitlement to approximately 25% of what he would have been entitled to receive had his former employer not entered insolvency – the threshold for Article 8 was engaged.

European pension schemes as registered schemes

You will probably be more familiar with issues arising when UK-based pension schemes have employees in the EEA (e.g. issues concerning the Regulations on Cross-border Activities). The FTT case I am going to tell you about (*BAV-TMW-Globaler-Immobilien Spezialfonds v HMRC* [2019] UKFTT 129 (TC)), however, concerned a German pension scheme with UK property investments, which scheme I will refer to as "BAV".

BAV, officially known as the Bayerische Ärtzteversorgung (roughly, Bavarian doctors' scheme) in question is a very interesting one and has its own website[80] and wiki-page. It is the largest industry-related pension scheme in Germany, with over 150,000 Bavarian doctors, dentists and vets and their dependants as members. Founded in 1921 during the Weimar Republic, it was formally established by an Act of the Bavarian Landtag in August 1923. It is speculated that the reasons for its formation relate to the extremely valuable contribution made by doctors and (regarding primarily horses) vets during WWI on the battlefield.

A copy of the first page of the relevant statute is as follows. It is worthy of note that the Parliament of the Free State of Bavaria, as with those of other German states, is not analogous to the devolved government in Scotland. Unlike the position with the union of the nations of the UK, the union of German states is one in which those states retained and continue to retain partial sovereignty notwithstanding the creation of the federation, rather like America. Accordingly, the relevant Act of the Bavarian Landtag would be seen as being made under retained and not devolved powers. I would add that Bavaria joined the German Empire in 1871 and, in 1923, its relationship with Germany was governed by the Weimar Constitution of 1919.

[80] www.bayerische-aerzteversorgung.de.

Bayerische Ärzteversorgung.

23. Gesetz über die Bayerische Ärzte-Versorgung.

(GVBl. 1923 S. 255).

Der Landtag des Freistaates Bayern hat folgendes Gesetz beschlossen:

Art. 1.

Das Staatsministerium des Innern wird ermächtigt, eine mit Rechtspersönlichkeit ausgestattete Anstalt des öffentlichen Rechtes zu errichten, die den Zweck hat, den in Bayern wohnenden approbierten Ärzten, Zahnärzten und Tierärzten und ihren Hinterbliebenen eine Versorgung zu gewähren.

Art. 2.

I Die Verhältnisse der Anstalt werden, soweit sie nicht durch Gesetze bestimmt sind, von der Versicherungskammer mit Zustimmung des Verwaltungsausschusses durch eine Satzung geregelt.

II Bis zur anderweitigen Regelung durch die Satzung bestimmt das Staatsministerium des Innern im Benehmen mit den beteiligten Berufskreisen die Mitglieder des Verwaltungsausschusses und ihre Ersatzmänner.

III Die Satzung und ihre Änderungen bedürfen der Genehmigung des Staatsministeriums des Innern.

Art. 3.

I Die Anstalt wird von der Versicherungskammer unter Mitwirkung des Verwaltungsausschusses nach näherer Bestimmung der Satzung verwaltet.

II Sie wird von der Versicherungskammer gerichtlich und außergerichtlich vertreten. Die Versicherungskammer hat die Stellung eines gesetzlichen Vertreters.

III Die Kosten der Verwaltung trägt der Staat.

The FTT case was an appeal by a German real estate investment fund (BTI), which during the relevant period held some investment property in the UK. BTI was beneficially owned by BAV. During the relevant period, BTI received rental income from two UK investment properties, which it held for BAV. As a matter of German law, BTI was tax transparent, so that BAV was entitled to the income from the UK investment property as it arises.

Section 186 of FA04 provides that a registered pension scheme is exempt from income tax on its investment income. BAV was not a registered pension scheme so accounted for UK income tax on the profits of the UK property business, and subsequently sought to reclaim them. BTI's primary case was that the requirement for BAV to register with HMRC in order to obtain an exemption from income tax was an unjustified restriction on the movement of capital prohibited by Article 63 TFEU and thus unlawful. This argument was unsuccessful and I will not go into its details, save to say it focused on the additional burdens which might follow from registration for non-residents. I would just mention that several provisions of FA04 are in fact tailored to ensure that EEA persons are not having their treaty rights of free movement interfered with, and these provisions remain despite Brexit. An example is the rules as to the permitted residence of a scheme administrator: see section 270.

The argument upon which BTI won was, however, that BAV was not eligible in any event to register as a registered pension scheme and therefore had been discriminated against so that its appeal should be allowed. The types of pension scheme which may register are (see section 154) occupational ones (i.e. established by an employer, which BAV was not), personal pension schemes (i.e. established by FSMA-regulated bodies, again not relevant) and "*public service pension schemes*", including a scheme established by "*any enactment*": section 150(3)(a). The issue was therefore whether an Act of the Bavarian Landtag could be described as "*any enactment*". The FTT held that it was not and that the expression "*any enactment*" meant an enactment of a UK person or body.

The decision of the FTT, which was made prior to the Brexit date, had the effect that the UK was in breach of its treaty obligations. Accordingly, a statutory instrument was speedily enacted to enable schemes established under foreign enactments to register: see Finance Act 2004 (Specified Pension Schemes) Order, SI 2019/1425. The Treasury Order came into force on 21 November 2019, 8 months after the decision. Article 2 of the Order provides that a pension scheme is treated as a public service pension scheme if it is established by or under any enactment (a) of a country or territory other than the United Kingdom, or (b) of any political subdivision of that country or territory.

The factual matrix of the *BAV* case shows that it can be in the interests of a European pension scheme to register in the UK if it holds UK investments. But what of the consequences of registration for such a scheme other than tax relief on investments? Fortunately, clarifying previous HMRC practice, legislation enacted by FA 2017 (introducing Part 4, Chapter 5A into FA04) provides a definition of a "non-UK registered scheme", being a registered pension scheme established in a county or territory outside the UK: section 242A. The Chapter provides amelioration in relation to the consequences of registration for non-UK registered schemes. With the exceptions of the annual allowance and taxable property provisions, the general rule is that FA04 will apply to non-UK registered schemes only to the extent of the UK-relieved funds, i.e. funds that have benefited from UK tax relief (as defined in section 242B).

The following example is given on www.gov.uk.:

> *If a member of a non-UK registered scheme has no UK-relieved funds, they will not be liable to the lifetime allowance charge and the scheme administrator doesn't need to give that member a BCE statement … when they crystallise benefits under the scheme.*

Occupational Pension Schemes and Sharia Law

Michael Furness KC and Michael Ashdown

Introduction

Sharia law is the body of religious law of the Islamic faith, and as such is of great importance to millions of Muslims worldwide. It might, though, reasonably be wondered why it is of any particular relevance to occupational pension schemes in England and Wales, to their trustees and employers, and to the professionals who advise them. The answer is simply that adherents to Sharia law include members (and potential members) of occupational pension schemes, and yet, as explained below, it is far from straightforward for an occupational pension scheme to be established and operated in a manner which is clearly Sharia-compliant. In consequence, both the sponsoring employer and the trustees of an Occupational Pension Scheme must be alive to their obligations under the Equality Act 2010 not to discriminate on the ground of religion or belief, including indirectly. An employer may of course also wish to operate its pension scheme in a manner which does not unfairly disadvantage some Muslim employees as a matter of good employment practice, quite apart from the requirements of the Equality Act.

This paper addresses this issue in five stages. First, it identifies the key Sharia law principles which affect the operation of occupational pension schemes. Second, it identifies the Equality Act 2010 obligations of scheme employers (and to a lesser extent, trustees). Third, it considers when an occupational pension scheme might be found to have breached those obligations. Fourth, it discusses the options available to satisfy Equality Act claims. Fifth, it sets out the matters that a scheme employer might rely upon by way of defence to such a claim.

What are the potential Sharia law issues with occupational pension schemes?

We do not profess to be experts on Sharia law generally, but we are aware of certain aspects of its principles which interact with the way in which occupational pension schemes are set up and managed under English law. These arise in particular in relation to matters of investment and insurance.

The starting point is that there is nothing intrinsically Sharia non-compliant about the concept of a pension. There is no objection to responsible saving for retirement, or to proper investments being made to fund retirement benefits. It may be that some pension schemes are already fully Sharia compliant. For example, in Pensions Ombudsman decision PO-10901 (25th November 2016) the Ombudsman (Anthony Arter) recorded that the West Yorkshire Pension Fund (part of the Local Government Pension Scheme) had provided information to the member that the scheme was permissible under Sharia law, albeit that it was also said that "*different scholars take different views on this matter*".

The starting point must be with certain general principles which underpin the detail of the relevant parts of Sharia law. First, that valid commercial transactions must be underpinned by real assets or services. They cannot simply be about money: money is properly to be treated merely as a store of value and a medium of exchange. It facilitates "real" trade in goods and services. Second, that there

can be no permissible investment return without investment risk. The investor must take a real risk in relation to the underlying assets (or services). A joint venture may therefore be permissible, whereas interest on money on deposit is not.

The detail of the law is complex, and no attempt is made here to address it all. Reference should be made to specialist works, some of which are quite accessible to non-experts (e.g. F Karbani, *Mastering Islamic Finance* (Pearson 2015)). But for present purposes there are three main Sharia principles which touch on pension schemes. First, certain fields of business are entirely prohibited. These include alcohol, tobacco, pork and gambling. No investment or transaction is permissible, no matter how it is structured. Second, the prohibition on paying or receiving interest (known as *Riba*). Third, the rules around contractual validity, including fairly onerous requirements of certainty (known as *Gharar*). These prohibit, in particular, undue uncertainty as to the subject matter or price of a contract.

In relation to investment, this has wide-ranging consequences:

(1) No investment at all in prohibited fields of business.
(2) No bonds or conventional gilts because of the prohibition on interest.
(3) No derivatives, because they are not based on transactions involving actual sales and purchases of assets (although there is some debate about whether futures trading is permissible).
(4) Equities are permissible: they involve the investor taking a risk as to the success of the business. But investors must be careful not only to exclude impermissible types of business, but also to consider whether the company is itself involved in non-Sharia compliant transactions e.g. paying or receiving interest (even though this may have very little relevance to the investment). The practical difficulty this can cause is ameliorated by many scholars now accepting limited indirect exposure to interest transactions e.g. holding that interest and other non-compliant activities should be less than 5% of the business's total revenue.
(5) Property is a permissible investment, in relation to both capital growth and rental income.
(6) Specialist Sharia-compliant financial instruments are available e.g. sukuk (often referred to as "Islamic bonds"). The UK Government issued its own sukuk in 2014, based on rental income from UK Government owned properties, and again in 2021.

Similar difficulties arise in relation to insurance. Conventional insurance contracts are not considered Sharia-compliant for three reasons. First, the uncertainty as to whether (or when) the insured event will occur is considered to be *Ghara* i.e. impermissibly excessive uncertainty. Second, paying an insurance premium may be treated as akin to placing a bet on whether or when the insured outcome will occur, which breaches the prohibition on gambling. Third, in an insurance contract arrangement either the insurer or the insured ultimately "wins", depending on whether the premia paid are more or less than the amount ultimately paid out. This breaches the prohibition on interest.

There is a Sharia-compliant alternative known as *Takaful*, based on risk-sharing, and similar to traditional mutual insurance and friendly societies. But there is very limited availability of such insurance products in the UK market at present.

The result of all of this for pension schemes is at least relatively clear. Both defined benefit (DB) and defined contribution (DC) pension arrangements are in principle permissible. However, in relation to

DB schemes it is in practice very difficult to ensure compliance with Sharia rules relating to investment and insurance, whilst also complying with domestic legal and regulatory requirements. The position is different where DC arrangements are concerned: there do exist in the market Sharia-compliant DC funds which have been vetted and approved by Islamic scholars.

What rights does the Equalities Act confer on members of religious faiths?

The starting point must be EA section 4 which includes "religion or belief" among the characteristics protected by the Act. This is expanded in section 10 of the Act:

(1) Religion means any religion and a reference to religion includes a reference to a lack of religion.

(2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.

(3) In relation to the protected characteristic of religion or belief—

(a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief;

(b) a reference to persons who share a protected characteristic is a reference to persons who are of the same religion or belief.

The Act is applied to employers by section 39. Of particular relevance for present purposes is subsection (2)

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

Failure to provide a non-Sharia compliant pension arrangement could never amount to direct discrimination, but might amount to indirect discrimination. Section 19 prohibits indirect discrimination in the following terms:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) *it puts, or would put, B at that disadvantage, and*

(d) *A cannot show it to be a proportionate means of achieving a legitimate aim.*

(3) *The relevant protected characteristics are—*

…

religion or belief;

The basic structure of an indirect discrimination claim against an employer who provides a non-Sharia compliant occupational pension scheme would therefore be as follows:

(1) The relevant provision criterion or practice ("PCP") for the purpose of section 19(1) is the provision only of a non-Sharia compliant occupational pension scheme.
(2) That PCP applies to Muslims and non-Muslims alike.
(3) The PCP puts Muslims at a particular disadvantage compared with non-Muslims (because they are not permitted by their religious beliefs to be a member of it).
(4) The employer cannot show that the provision of the non-Sharia compliant scheme is "a proportionate means of achieving a legitimate aim" (and will return to this later by way of "Defences").

When might occupational pension scheme arrangements be held to breach those rights?

(a) *defined benefit arrangements*

In relation to the few DB schemes still open to new members (predominantly public or quasi-public sector schemes), the issue will arise at the point of joining the scheme (e.g. through auto-enrolment).

- There will be potential indirect discrimination because the employer is not offering an equivalent DB scheme.
- However, in practice it is extremely unlikely that the employer could offer a Sharia compliant equivalent DB scheme because of the emphasis placed in scheme funding requirements on having interest bearing assets to back liabilities. There are also perceived to be difficulties around the certainty of the benefit promise, granted that it is linked to the life of the member[81].
- The employer could offer contributions into a Sharia-compliant DC arrangement – but this would be unlikely to match the DB benefits (or, at the least, this would be a real risk).
- There would be an issue around the appropriate level of contributions. Would it be appropriate to offer the same as the ongoing funding rate in the DB scheme? The DC arrangement would not offer a level of guaranteed benefits (backed by the PPF), but that would be impossible to reproduce, especially as conventional annuity policies would typically be regarded as non-compliant.

[81] There is evidence that at least one Islamic scholar considers that the LGPS is sharia compliant, but it is unclear how widespread this view might be.

- There is clearly a risk that a Sharia compliant scheme may not produce as good an outcome from its investments as a non-compliant scheme, as a result of the restrictions imposed by Sharia law. But that must be a detriment which the member concerned must accept as the price of observance of his or her religious principles.

In relation to existing members of DB schemes, typically closed to new members, the issue will arise if the member feels obliged to transfer out.

- A member who is newly alive to the non-Sharia compliant status of the DB scheme can only effectively remedy this by transfer out.
- But a standard CETV is unlikely to enable purchase of equivalent benefits via a Sharia compliant DC arrangement.
- This raises the question whether a member who is forced to leave a DB scheme for religious reasons should be granted a better level of CETV than someone who simply chooses to leave for personal or financial reasons, unconnected with their beliefs. There is a real risk that this may be the case.

(b) defined contribution arrangements

The issues here are more straightforward, as there are Sharia compliant DC arrangements on the market which can be made available to transferring or new-joining members.

What options are available to satisfy claims?

(a) where the scheme alleged to be discriminatory is a DB scheme

The following options are available

- Providing a new DB scheme or section – this is highly unlikely to be practicable, or to be required by law.
- Enhancing transfer values for transfer out to a Sharia-compliant personal pension.

(b) where the scheme alleged to be discriminatory is a DC scheme

- Provide a new DC scheme or section which is Sharia-compliant.
- A standard transfer value should then be sufficient, together with employer contributions on the same basis as for the non-compliant DC arrangement.

But if what is provided is not sufficient in either case, the EA 2010 claim is a damages claim – so the ultimate remedy would be a cash sum calculated by reference to the actuarial calculation of the "lost" pension benefits suffered by the member/potential member.

What defences might there be?

Where the objection is indirect discrimination under section 19 of the Equality Act 2010, the principal defence the law affords is for the defendant to show that the PCP adopted is "*a proportionate means of achieving a legitimate aim*" (section 19(2)(d)).

This will be a matter of evidence in each case, and is likely to entail factual evidence about the scheme, actuarial evidence in relation to its investments and benefits, and likely also expert evidence as to the applicable Sharia law and the difficulties this causes. It is therefore not possible to say with any certainty what would be relevant, or whether the defence would succeed, except by reference to a specific case. However, the following matters would likely be relevant in most cases:

(1) what steps would have to be taken to ensure Sharia-compliance, or to provide a Sharia-compliant alternative for members who sought one;
(2) the cost of taking those steps;
(3) whether that cost would be proportionate or disproportionate to the benefit provided;
(4) the risk or likelihood of harming the benefits provided to other employees who are not concerned with Sharia-compliance;
(5) whether the scheme (or type of scheme) is already accepted by others as Sharia-compliant e.g. where the complainant takes an unusually strict approach to the applicable rules and therefore considers the employer's existing "Sharia-compliant" DC arrangement to be insufficient;
(6) whether proposed remedial steps would actually eliminate the discrimination alleged, or would make no difference in practice e.g. if the employees in question would not actually take up a new Sharia-compliant arrangement if offered.

The Court's focus in such cases is likely to be very much on the question of proportionality. But wider questions may also be brought into account. For example, it might be relevant to consider whether other groups of employees could also require their own pension scheme adhering to different religious or ethical values, which need not overlap much (or at all) with the Sharia principles considered here (and it is notable that the protected characteristic of "*religion or belief*" is defined by section 10 of the Equality Act 2010 as including "*a philosophical belief and a … lack of belief*"). An employer might ask: how far does it have to go to provide separate schemes to cater for every employee's own religion or belief, where these may be numerous and conflicting? At present, the law simply does not provide a clear answer to that question.

Wilberforce contacts

Michael Furness KC

Call: 1982

KC: 2000

Email: mfurness@wilberforce.co.uk

Jonathan Hilliard KC

Call: 2003

KC: 2016

Email: jhilliard@wilberforce.co.uk

Andrew Mold KC

Call: 2003

KC: 2020

Email: amold@wilberforce.co.uk

David Pollard

Call: 2006 (Solicitor: 1980)

Email: dpollard@wilberforce.co.uk

Emily Campbell

Call: 1995

Email: ecampbell@wilberforce.co.uk

Edward Sawyer

Call: 2001

Email: esawyer@wilberforce.co.uk

Tom Robinson

Call: 2003

Email: trobinson@wilberforce.co.uk

Sebastian Allen

Call: 2006

Email: sallen@wilberforce.co.uk

Jennifer Seaman

Call: 2007

Email: jseaman@wilberforce.co.uk

Michael Ashdown

Call: 2013

Email: mashdown@wilberforce.co.uk

Joseph Steadman

Call: 2015

Email: jsteadman@wilberforce.co.uk

Caspar Bartscherer

Call: 2019

Email: cbartscherer@wilberforce.co.uk

For information about Wilberforce Chambers and our services please contact:

Nicholas Luckman (Practice Director)

Direct: +44 (0) 20 7304 2856

Mobile: +44 (0) 7964 101 636

Email: nluckman@wilberforce.co.uk

Hayley Duggan (BD and Marketing Manager)

Direct: +44 (0) 20 7304 2899

Mobile: +44 (0) 7866 983 243

Email: hduggan@wilberforce.co.uk

Contact us:
Tel: +44 (0) 20 7306 0102
Fax: +44 (0) 20 7306 0095

Wilberforce Chambers
8 New Square, Lincoln's Inn
London, UK
WC2A 3QP

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Jonathan Chew		Call 2010
Harriet Holmes		Call 2011
Alice Hawker		Call 2011
Bobby Friedman		Call 2011
Simon Atkinson		Call 2011
Sri Carmichael		Call 2012
Jack Watson		Call 2012
Jessica Brooke		Call 2012
Michael Ashdown		Call 2013
James Goodwin		Call 2013
Rachael Earle		Call 2013
Elizabeth Houghton		Call 2014
Tim Matthewson		Call 2014
Jamie Holmes		Call 2014
Joseph Steadman		Call 2015
Tara Taylor		Call 2016
Daniel Scott		Call 2016
Cara Goldthorpe (unregistered barrister)		Call 2017
Jia Wei Lee		Call 2017
Francesca Mitchell		Call 2017
Daniel Petrides		Call 2018
Lemuel Lucan-Wilson		Call 2018
Caspar Bartscherer		Call 2019
Ram Lakshman		Call 2020
Benjamin Slingo		Call 2020

Caroline Furze (unregistered barrister) Call 1992
Door Tenant

Nicholas Luckman
Practice Director

Edward Nugee QC
1928 - 2014

Wilberforce Chambers has a well-established reputation in the field of pensions law, due in large part to the late Edward Nugee QC, to whose memory these lectures are dedicated.

+44 (0)20 7306 0102
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