ON THE CASE

A new take on *Courage* fetters? *Newell Trustees v Newell Rubbermaid*[1]

By Edward Sawyer

Edward is a barrister at Wilberforce Chambers

Summary

In *Newell Trustees v Newell Rubbermaid UK Services*, Michael Green J had to consider the validity of the conversion of a defined benefit ("DB") occupational pension scheme to a defined contribution ("DC") scheme. The scheme's power of amendment was subject to a *Courage*-style fetter which precluded such amendments "as would prejudice or impair the benefits accrued in respect of membership up to [the time of amendment]". In an impressive and accessible judgment, Michael Green J held that the fetter did not preclude the conversion of the scheme from DB to DC nor did it require preservation of an actual final salary link. Rather, he held that the fetter protected the actuarial value of the accrued benefits at the date of amendment, so long as the calculation allowed for the assessed value of the final salary link. The Judge also resolved a number of interesting points about extrinsic contracts and age discrimination.

Key facts

As of the early 1990s, the Parker Pension Plan (the "Plan") was a DB scheme. It was then governed by a 1979 Deed, which provided that members accrued pension benefits comprising a percentage of Final Pensionable Salary for each period of completed Pensionable Service. The amendment power in the 1979 Deed was in the following form:

[1] [2024] EWHC 48 (Ch).

> "The Principal Employer and the Trustees may jointly from time to time without the consent of the Members by Deed alter cancel modify or add to any of the provisions of this Deed and by memorandum under hand signed in the case of the Principal Employer by a director duly authorised, alter cancel modify or add to any of the Rules, provided that no such alteration cancellation modification or addition shall be such as would prejudice or impair the benefits accrued in respect of membership up to that time."

The underlined words are the fetter at the heart of the case – which the Judge said was part of a "common form" of amendment power [21].

By a 1992 Deed, the amendment power was purportedly exercised to introduce a DC section. Members aged under 40 were automatically transferred to the DC section with their accrued DB benefits converted into a cash amount that was credited to their DC accounts; the calculation of the cash sum did not take account of potential future pensionable salary increases. Those aged 40-44 had the option of transferring or staying in the DB section. Those aged 45 and older had to remain in the DB section.

Subsequently, a new scheme, the Newell Rubbermaid UK Pension Scheme (the "Scheme"), was established by a 2007 Deed, to which the assets and liabilities of a number of existing schemes, including the Plan, were transferred. The Judge considered that the effect of the transfer arrangements was that the Trustee of the new Scheme became liable to provide the transferring Plan members with benefits that reflected their true legal entitlement under the Plan, whether or not the Plan had historically been administered on a legally correct basis. So the question was what the ex-Plan members had been entitled to under the Plan following the purported conversion in 1992.

The Trustee of the Scheme brought a Part 8 Claim to resolve the issues arising, joining the Scheme's Employer and a representative beneficiary.

The fetter issue – conversion to DC benefits

The main issue addressed in the judgment, and probably the aspect of the case of most general interest to pension lawyers, is the question whether the conversion from DB to DC benefits in 1992 was invalidated by the terms of the fetter.

The Judge proceeded on the basis that *In re Courage Group's Pension Schemes* [1987] 1 All ER 528 should be followed at first instance, and that *Courage* decided that a fetter such as the one in the Scheme protected the final salary link: see [23], [200] and [226] of the judgment. The Plan's fetter was in very similar terms to that considered by Newey J in *Briggs v Gleeds (Head Office)* [2015] 1 Ch 212, but *Gleeds* was not a case about conversion from DB to DC benefits. In contrast, *HR Trustees Ltd v German* [2010] Pens LR 23 ("*IMG*") *was* a case about conversion from DB to DC benefits, but the fetter in *IMG* was in a different form, providing that "no amendment shall have the effect of reducing the *value* of benefits secured by contributions already made." In *IMG*, it was accepted that the conversion of DB benefits to DC benefits was valid but it was held that the effect of the fetter was that there was an underpin protecting the future monetary value of the proportion of Final Pensionable Earnings that the member had accrued by past service (i.e. the final salary link).

In *Newell*, the representative beneficiary argued that the Plan's fetter protected not just the "value" of accrued DB benefits (such as the fetter considered in *IMG*), but the "benefits" themselves, which the representative beneficiary said included the final salary formula or method of calculation: see [203] of the judgment.

The Judge saw the issue as whether one should look purely at the value or amount of the respective benefits, or whether one should have regard to the representative beneficiary's "amorphous concept" of "benefits" [209]. Having described the DB formula as an "amorphous concept", it is unsurprising that the Judge then went on to hold that it was not protected by the fetter, which he said could only be sensibly understood as protecting the *amount* of a member's benefit rather than the method of calculation [210].

By way of observation on this, although the Judge described the DB formula as an "amorphous concept", it should be recalled that the Court of Appeal in *Edge v Pensions Ombudsman* [2000] Ch 602 had described the fact that a DB scheme's benefits are fixed by the rules as the first of the three concepts "fundamental to a pension scheme of this nature". Likewise, in *G4S Trustees v G4S* at [32], Nugee J had described the year-by-year accrual formula as being the "*essence of a final salary scheme such as an n/60 scheme*".

Be that as it may, the Judge also accepted the Employer's submissions based on the particular wording of the fetter ("*would* prejudice or impair the benefits accrued"). The Judge accepted that this meant the relevant question was whether it could be said at the time of the amendment that a member "will be" better or worse off in terms of the financial value of the benefits [211]. He also accepted that, given cases such as *Punter Southall Governance Services v Hazlett* [2022] Pens LR 1 and *Mettoy Pension Trustees Ltd v Evans* [1990] Pens LR 9, there is a material distinction between a fetter which refers to an amendment which "would" prejudice benefits and one which (like s.67 of the Pensions Act 1995) refers to an amendment which "would or might" prejudice benefits. In *Newell*, the fetter was of the former type. For such a fetter, the Judge considered that it must be possible, at the time of the amendment, to judge with some certainty that prejudice "would" be suffered [219]. This could not be shown as at the amendment date, because whether the amendment prejudiced value depended on how well the member's DC pot would perform after the date of the amendment, and members might end up better or worse off than under the DB formula [211]. The Judge therefore concluded that the fetter did not preclude the conversion of DB benefits to DC benefits [223]. There is force in these points. But given that final salary benefits are inherently of uncertain value while they are linked to future (unknown) final salary, there may be many situations where one cannot say that a *probably* prejudicial amendment would *definitely* prejudice the ultimate value or amount of the emergent benefit. Thus, in combination, the Judge's conclusions (i) that the fetter protects the value the member is to receive and (ii) that it must be ascertainable at the amendment date that the value *would* certainly be reduced, mean that

such a fetter will provide a somewhat limited degree of protection for a final salary benefit whose value is uncertain.

Another point worth noting is that, in *IMG*, Arnold J had said that the fetter (in that case, protecting "the *value* of benefits secured") did not merely protect the actuarially assessed value of the member's accrued benefits: see *IMG* at [140]. But this is in effect what the Judge concluded in the *Newell* case (in relation to a fetter which was not even limited to protection of "value"). At [237], the Judge in *Newell* referred to Arnold J's view and said he disagreed. However, his comments were in the context of whether to recognise an underpin (see below), so it is not obvious how the Judge reconciled his view of what the *Newell* fetter protected with Arnold J's apparently different conclusion in *IMG*.

More generally, it is interesting to observe that the Judge regarded the fetter as protecting only the assessed value or amount of the accrued benefit. It would seem that he regarded the fetter as only achieving a kind of actuarial equivalence protection, i.e. accrued benefits could be modified if actuarial equivalence was maintained. However, in contrast to, say, s.67 of the Pensions Act 1995, there was no mechanism built into the fetter for certifying actuarial equivalence, meaning that on this interpretation there could be considerable scope for after-the-event disputes about whether actuarial equivalence was maintained.

Furthermore, it could be said that, contrary to the Judge's view that the DB formula was "amorphous", the substitution of fixed DB rights with an actuarially-assessed capital amount is an interference with members' rights. This point came up in a different context in *Lloyds Banking Group Pensions Trustees v Lloyds Bank* [2018] EWHC 2839 (Ch) where a proposed GMP equalisation method involved replacing member's rights to a pension calculated in accordance with the DB formula with an actuarially equivalent sum. As recorded by Morgan J at [387] of *Lloyds*, the members submitted that the method "involves an impermissible interference with their rights. They say that their rights under the scheme are to receive the pension payments to which they are entitled under the scheme … . The

[members] submit that [the method] substitutes for the pensioner's and the survivor's actual entitlement an entitlement based on actuarial assumptions. Only in the case of a coincidence will those assumptions be the same as the actual circumstances which come about." At [390], Morgan J accepted the members' submission that the method involved an interference with their rights. So it might be said that *Lloyds* suggests that the imposition of an actuarial equivalent, far from being a method of protecting accrued benefits, is an interference with them. On the other hand, in yet another context, in *SoS for Work and Pensions v Hughes* [2021] EWCA Civ 1093, the Court of Appeal considered that the provision of actuarially equivalent value was a satisfactory way of protecting pension interests (see e.g. [85]-[86]).

So it might be said that the *Newell* case illustrates an important point of principle as to whether one regards a DB pension benefit as comprising the future flow of actual pension payments, responsive to actual experience, or as the actuarially-estimated value of that future payment flow – with the Judge in *Newell* preferring the latter. Then again, it might be said that *Newell* is specific to its own facts, in particular that the Plan was being converted from DB to DC via the capitalisation of members' accrued benefits into cash transfer sums, so in that particular context it was appropriate to consider issues of actuarial equivalence; but that might be less appropriate in the context of other types of amendment (e.g. scheme closure but where the DB nature of benefits is unchanged).

The fetter issue – final salary linkage

As noted above, the Judge found that the fetter protected the final salary link, applying *Courage*. It might be open to question whether the Judge's analysis of whether the fetter precluded the conversion from DB to DC can be reconciled with the *Courage* line of cases, which regarded interference with final salary linkage as breaching similarly-worded fetters, even though in those cases it was also uncertain at the amendment date what the value of the emergent benefits would be.

The Judge did not seek to carry out such a reconciliation, as he said that *Courage* was too well-established at first instance to be departed from, so he regarded himself as obliged to find that the fetter did not permit the final salary link to be broken [226].

The Judge noted that the Employer had four arguments as to why final salary linkage should not be protected by the fetter (see [225]), of which the "*would vs. might*" argument was the first [225](i). The Judge said he saw the force of the argument and noted that it had not been properly considered in the *Courage* line of cases. The implication would appear to be that he regarded the "*would vs. might*" argument as inconsistent with the *Courage* analysis, yet he relied on the "*would vs. might*" argument as a reason for finding that the fetter did not preclude the conversion of benefits from DB to DC.

[226] of the judgment also appears to suggest that the Employer's remaining three arguments as to why the fetter did not require the preservation of final salary linkage (listed at [225](ii) to (iv)) involved a challenge to the *Courage* line of cases. However, those arguments do not appear to allege that *Courage* was wrongly decided; rather they allege that as a matter of analysis of the Plan's rules or the transfer arrangements, the final salary link was not actually broken or that any break was achieved otherwise than by amendment. That being so, it is not obvious why the obligation to follow the *Courage* decision at first instance was an answer to those arguments.

The fetter issue – an underpin?

The representative beneficiary's case was that, if the conversion of DB to DC benefits was generally valid, the breach of the fetter regarding final salary linkage should lead to the recognition of an underpin giving members a minimum of their final salary benefits [234]. This was the result that had been reached in the *IMG* case.

The Judge viewed the matter as requiring the recognition of an "implied limitation" in the defective 1992 amendment "that preserves the final salary link". However, he

considered that the implied limitation "needs to be something that could have applied at the time of the amendments", i.e. in the context of an otherwise valid conversion of DB to DC benefits [236]. Otherwise, said the Judge, he did not understand the legal or juridical basis for the imposition of the final salary link [201], [236]. It appears from [201] that the Judge considered that "the Court can rewrite the amendment by including an underpin in certain terms that would mean the amendments were within the [amendment] power and not *ultra vires*".

On that basis, the Judge decided that the focus should be on whether the conversion of the DB benefits to a cash DC sum "was in the appropriate amount" [237] and that "members are entitled to have had their [DB] accrued benefits properly valued at the time so as to take account the final pensionable salary link" [245]. He then concluded that the 1992 transfer sums should be recalculated so that the actuarial equivalent recognised the value of the final salary link, using the original 1992 transfer basis (presumably much cheaper than an up-to-date basis) but taking account of retirees' subsequent actual experience in relation to dates of service and salary increases [241], [245] (but assumptions could be made for those who had not yet retired [246]-[247]). If the recalculation reveals a shortfall, the member's DC pot should be credited with the shortfall amount plus the investment returns he/she would have earned in the relevant DC fund [249].

This is a novel and thought-provoking approach. In previous cases where the final salary link had been broken in contravention of a fetter, the actual DB right had been preserved by recognition of an underpin (e.g. *IMG* and also *IBM UK v Dalgleish* [2014] EWHC 980 (Ch) at [289](iii), which the Judge relied on in support of his actuarial equivalent approach, although Warren J in fact ordered an actual salary link, not an actuarially-estimated equivalent). *FDR v Dutton* [2017] Pens LR 14 (not a case about salary linkage) was another example where breach of a fetter resulted in preservation of the actual DB right via a "higher of two amounts" underpin rather than an actuarial equivalent.

The Judge felt that the juridical basis for recognising an underpin of this nature was not apparent to him. It be might be said that the juridical basis has been sufficiently explained in the relevant case-law as arising from the principles of severance so that, as a matter of construction, the good is severed from the bad, as discussed in many pensions cases from *Bestrustees v Stuart* [2001] Pens LR 283 onwards. In *FDR v Dutton* at [14], Lewison LJ framed the relevant question as being: "what was the right that a pensioner enjoyed under the old rule which is protected by the proviso"? Having identified the old protected right, Lewison LJ concluded at [15] of *FDR* that "the right that has been preserved by the proviso is in my judgment the old right", i.e. the right protected by the fetter cannot be taken away but is preserved. So it can be argued that if a fetter protected actual final salary linkage, it could not be removed by amendment and, as it still persists, can be recognised as an underpin. To this, it might be answered, based on the Judge's analysis in *Newell*, that the *Newell* fetter never protected actual final salary linkage, only the actuarial value of such linkage.

Conclusion on the fetter issues

The Judge's analysis is fascinating and is likely to stimulate some debate. We should watch this space to see how the analysis is developed and received in other cases.

Other issues considered in Newell

This article has so far focused on the fetter aspect of *Newell*, as it is likely to be of wider importance. Numerous other interesting issues were determined in *Newell*, which this article is not going to seek to analyse in detail, but the Judge's analysis of them is illuminating and worth reading. For example (this is not an exhaustive list):

- The 1992 Deed was an interim amending deed, which said the Plan was to be administered in accordance with attached booklets. There was no extant copy of the 1992 Deed with the signed booklets attached. The Judge gave short shrift to the representative beneficiary's attempts to question whether the booklets had ever been attached: see [86]-[100]. He would also have held that other booklets issued to members would have been effective to amend the Plan as cl.1(i) of the 1992 Deed

allowed further amendments to take the form of "alterations which may be announced from time to time" [101].

- The representative beneficiary argued that, because the 1992 Deed was an interim deed with booklets attached, they were insufficiently clear and complete to have the effect of moving members into the DC section [106]. The Judge rejected this argument, holding that the 1992 Deed created an executory trust (i.e. one where the trust property is vested in the trustees but the interests to be taken by the beneficiaries are to be set out in some subsequent instrument or there is an enforceable agreement to create a trust for beneficiaries that remain to be delimited). As it created an executory trust, a close textual analysis was inappropriate, and the intent behind the interim document was sufficiently plain to be effective [119]-[122].
- The Judge also said that, even if the 1992 Deed had been ineffective because of its interim nature, the ensuing definitive 1993 Deed validly took retrospective effect back to the date of the interim deed, following *Imperial Food v Jeeves* (1986) [2007] 08 PBLR. At [129]-[132], the Judge accepted that, in an appropriate case, it was in principle possible to adopt rules with retrospective effect and for the parties to agree that their relationship should be treated as having departed from historical reality, applying *Burgess v BIC* [2019] Pens LR 17.
- The Judge also held that if (contrary to his analysis) the 1992 and 1993 Deeds had been invalid, there was an extrinsic contract between the then Employer and the members aged 40-44 who agreed to transfer to the new DC section. This would have been binding on a *South West Trains* basis and bound the 40-44s who chose to transfer to the DC section, such that they would have been entitled only to DC benefits [184]. On the way to reaching this conclusion, the Judge's findings included the following interesting points:
    - The Judge agreed with Newey J's view in *Gleeds* (contrary to the view of Arnold J in *IMG*) that it was not necessary to prove the member's informed consent in order to establish a *South West Trains* contract [167].

- The offer to transfer was made to the 40-44s in the booklets. Although some of the terms of the booklets were a little vague or ambiguous, this does not mean they could not be contractually agreed and become binding [178].
- The Judge appears to have accepted Arnold J's view in *IMG*, followed by Newey J in *Gleeds*, that it is necessary to establish that the parties had an intention to create contractual relations, not merely legal relations [159]. An intention to create contractual relations was present, because the Employer had offered to fund enhanced pension increases via the cash sums to be transferred to the DC section, which was extraneous to the amendment of the Plan's trust deeds; this also provided consideration to support the contract [181]-[183].
- The Judge evidently rejected the representative beneficiary's argument that the existence of a contract could only be determined outside the Part 8 proceedings on a member-by-member individual basis (analogously with the view taken in *Burgess v BIC* that estoppel could not be determined on a group basis) [173]. However, the Judge did expressly except from his conclusion that extrinsic contracts had been entered into "any personal defences [a member] may have to enforcement" [184].
- The Judge considered that the *South West Trains* agreements were binding on successors in title, including the new Employer who had taken over when the Plan members were transferred to the Scheme [184].
- One point worth noting is that, despite being of the view that the 40-44s would have been subject to extrinsic contracts binding them to the terms of the DC section, the Judge nevertheless held they were subject to the final salary underpin (see above). This seems to have been because the Judge's extrinsic contract findings were premised on the 1992 and 1993 Deeds being invalid, whereas he held they were in fact valid. It is unclear from the judgment why the validity of the 1992 and 1993 Deeds would have prevented there being an extrinsic contract in addition.

- In addition, the representative beneficiary advanced an argument that members aged under 40 as of 1992, who had been automatically transferred to the DC section, were suffering age discrimination because they were now being less favourably treated than the 40+ members who had been permitted or required to remain in the DB section. It is beyond the scope of this article to explore in detail the age discrimination issues raised in the case, but in very brief summary:
    - Age discrimination only became unlawful in 2006, long after the 1992 conversion. However, the crux of the representative beneficiary's case was that the current Deed of the Scheme had incorporated the age discriminatory eligibility criteria for membership of the DC section in 1992 and that, by analogy with *Walker v Innospec* [2017] UKSC 47, unlawful discrimination in a pension scheme only happens on payment of the benefits and it does not matter if the alleged discriminatory rule was introduced before that form of discrimination was made unlawful [294], [300].
    - The Judge rejected the representative beneficiary's age discrimination case as "fatally flawed" because there was nothing in the current Scheme rules that contravened the non-discrimination rule implied by the Equality Act 2010 or which obliged the Trustee to act in contravention of such a rule [255]-[256].
    - The question of which section members were a member of (DC or DB) had been determined in 1992 and was a matter of historical fact; there was nothing in the current rules which required the Trustee to discriminate against any group of members on grounds of age [288], [292]. The actual act of discrimination, if any, had occurred in 1992 and was then not unlawful [289], [298]-[299]. The current eligibility criteria did not require the Trustee to do anything, but merely explained how members had got into and remained in their respective DB or DC sections.
    - Even if the rules did require a different of treatment on grounds of age, the difference of treatment of the members in 1992 was justified: it had the proportionate and legitimate aim of inter-generational fairness and of

cushioning the blow for older employees, even if the Employer's overall motive had been to improve its balance sheet [326]-[327].

- The representative beneficiary also argued that, if unlawful age discrimination had been established, it would have applied in respect of pensionable service both before and after age discrimination became unlawful in 2006. This argument was based on the proposition that the temporal restrictions in UK age discrimination legislation could be set aside under general principles of EU law, as had happened in *Walker* and *Ministry of Justice v O'Brien (No 2)* [2019] ICR 505. The Judge rejected this argument, on the ground that the Brexit legislation had done away with the relevant general principles of EU law [329]-[344].

Final words

Overall, this was a comprehensive victory for the Employer. The representative beneficiary's case was described as "somewhat opportunistic" and the Judge did not welcome the fact that, in his view, the representative beneficiary had insisted "on pursuing all possible objections to [the DB-DC conversion's] validity." As the conversion had taken place over 30 years ago, the evidence was inevitably incomplete, but the Judge said this incompleteness "should not mean that every issue is taken to trial, at the expense of the Company, and there should in my view have been more concentration on the more realistic issues". It seems the Judge had in mind the fetter issue as the realistic issue, with the other points being in the Judge's opinion makeweights.

It would be very useful to see what the Court of Appeal makes of the issues if the members appealed, at least on the fetter issue; but under our system of representative proceedings it is generally very difficult for a representative beneficiary to obtain costs protection for an appeal, so we may be left waiting for the Court of Appeal's views.

Published February 2024