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# Issues arising from *Verity Trustees Ltd v Wood and Save the Children, Re: The Pensions Trust*

Association of Pension Lawyers Annual Conference 2026

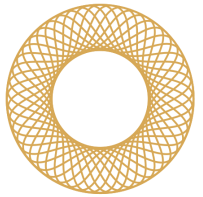
- Andrew Spink KC & Nicolas Stallworthy KC

# BREAKING NEWS

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Have you received your copy of the judgment ?

# BREAKING NEWS



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Nor have we …

(and no, not an embargoed draft either)

# BROKEN NEWS

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- When we agreed in May to speak about the judgment, it seemed so easy … we could just talk you through it …
- But to be fair, the judge is undertaking an epic task (for which we are most grateful and full of respect)
- So no complaint or discourtesy is intended by such jests
- We seek only – as warm-up acts – to remind you of the issues likely to be the subject of judgment in due course.

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- Group 3: separating the good from the bad after excessive execution
- Group 4: s.37 PSA93 & reg.42(2) of the Contracting-out Regulations
- Group 5 – miscellany, including directions re: the distant past

# Background facts: TPT

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- Industry-wide scheme for non-associated employers, primarily in charitable, voluntary & social housing sectors
- Umbrella structure:
  - 57 different sections, including 52 sub-trust ‘schemes’
  - 2,496 employers
  - 445,184 beneficiaries
  - £9.4 billion of assets
- Established in 1946 as a ‘building block’ arrangement
- 1976: final salary rules added (in same single trust) and what was argued to be “*Alternative Arrangements Power*”

# Background facts: 1982

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- In 1982 all/most final salary benefits segregated into new sub-trust sections: separate final salary "*Schemes*"
- Constitutional & administrative provisions in Trust Deed & Rules ("*TDR*", including "*TDR PoA*")
- but separate "*Scheme Documents*" for each Scheme, customising benefit design (amendable by "*SD PoA*" in FS Rules)

# Background facts: 1995

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- "*Matrix Options*" structure, under which Scheme Documents could select from numbered options set out in TDR for most elements of benefit design (e.g. eligibility, NRD, definition of final salary, accrual rate, revaluation, escalation, ending accrual)
- New iteration of TDR produced every few years; Scheme Documents less often
- Complex interaction between successive TDRs and Scheme Documents, as potentially up to 4 applicable modification powers: AAP, TDR PoA, SD PoA and ability to select Matrix Options (arguably only possible under SD PoA)

# Background facts: 1995 (continued)

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- TDR PoA fetters (cl.9(ii)): "*No amendment shall be made which …*

  *(c) operates to diminish or prejudicially to affect the rights …*

  *(d) which is contrary to the principle* [that Committee consist of equal number of employer & member reps] *and the principle* [that its resolutions be passed by specified majorities]".

- SD PoA fetters: "*Nothing in the Scheme Document shall contravene* ***the principles set out in clause 9(ii)*** *of the Trust Deed or prejudice Approval.*"

# Structure of the litigation

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- As usual, issues-based representation orders
- Uniquely, Trustee ("**T**") proposed to represent those interested in maintaining *status quo* (in most cases = employers)
- Against a Representative Beneficiary ("**Rep Ben**") representing those interested in arguing the opposite on each point
- Save the Children ("**StC**") asked to be named as D2: agreed by T & Rep Ben before issue of proceedings

# Structure of the litigation (continued)

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- Part 8 claim form, providing for
  - stage 1 trial (excluding most factual points); and
  - (if need be) stage 2 trial (addressing more factual points)
- Lengthy, phased, pleading process for a List of Issues / Position Paper
- Trial across 7 weeks;
  - 5 Groups of submissions;
  - Generic Issues cf. Questions

# Group 1: amendment powers & fetters
# Generic Issue 1 and Question 1

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- TDR PoA's fetter: "*no amendment shall be made which … operates to diminish or prejudicially to affect the rights of any person in receipt of a pension or otherwise interested in the assets of the Fund unless … no other course is reasonably practicable having regard to the interests of all persons interested therein*" - aka 'the Rights Directed Fetter'
- No express temporal qualification or restriction
- Under each successive TDR, **did fetter protect past service only or also 'rights' which might accrue in the future ?**

# Generic Issue 1 & Question 1

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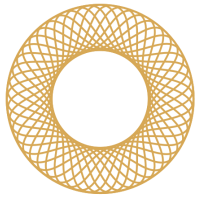
- = What is the principled approach to a fetter referring to 'rights' without any temporal qualification ?
- *Courage Group Pension Schemes* [1987] 1 WLR 495 at 505
- *Wedgwood v Salt* [2018] EWHC 79, [2018] Pens. L.R. 9
- Much of the debate concerned the extent to which the reasoning in *Wedgwood* (on next slide) had been overtaken by subsequent appellate caselaw

# *Wedgwood v Salt* [2018] EWHC 79, [2018] Pens. L.R. 9 at [44]

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*"the natural meaning of the words 'the rights of any member' in Rule 48 is as contended for by Mr Spink. They mean, at the time the amendment was introduced, the rights which had accrued to a Member as a result of past service. The word 'rights' does not ... naturally cover benefits which might in the future be obtained as a result of future service with the employer. ..."*

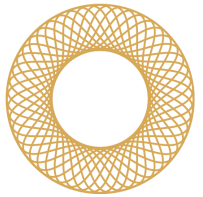
# *Wedgwood v Salt* [2018] EWHC 79, [2018] Pens. L.R. 9 at [44] (continued)



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*"... this conclusion is consistent with the proper approach to construction of a pension scheme and in particular that the rules should be construed so as to give a reasonable and practical effect to the scheme bearing in mind that the scheme has to be operated against a constantly changing commercial background. ... it is important to avoid unduly fettering a power to amend the provisions of the scheme as it is important for the parties to be able to make changes which might be required by the exigencies of commercial life." =* ***Courage***

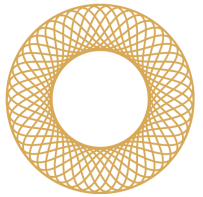
# Was *Wedgwood* ? overtaken by:



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- *BBC v BBC Pension Trust Ltd* [2024] EWCA Civ 767, [2024] I.C.R. 1399 at [15]: *Courage*'s comment about not unduly fettering the amendment power is not some form of overriding principle; and/or
- *Virgin Media Ltd v NTL Pension Trustees II Ltd* [2024] EWCA Civ 843, [2024] Pens. L.R. 14 at [92]: " '*Rights' is a very general word which takes its meaning from its context, and it is a natural use of language to understand* [the expressions 's.9(2B) rights' or 'rights attributable to … service in contracted-out employment'] *as referring to rights whether already earned or yet to be earned*"

# Or was *Wedgwood* ? endorsed by:



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*Virgin Media* at [91]:

- said that *Wedgwood* at [44] "*an understandable view to take in the particular context of the scheme rule in question*".

# Generic Issue 1 & Question 1 (continued)

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- Pre-1967 TDR PoA had referred to "*rights already earned*", raising relevance of drafting archaeology, including:
  - why drafting had changed; and
  - what (if anything) could be inferred from the change ?
- Exception to the fetter: "*unless the Actuary shall advise that no other course is reasonably practicable having regard to the interests of all persons interested* [in Fund]".
  - raised points about how fetter interacted with the funding provisions, which contemplated benefit reductions to address deficit being reflected in amendments (i.e. amendments reducing future accrual)
- Whether employer's exclusion powers affected characterisation of future accrual as 'rights' (since future accrual could be terminated immediately)

# Generic Issues 2, 3 & 7 and Q2 & 3

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Edward Sawyer's talk tomorrow will cover these Generic Issues and Questions: can you amend an amendment power ? And if so, how much ?

**GI.2: Could the TDR PoA be used to introduce a new power to amend the provisions of TPT ?**

**GI.3: If so, was such a new power automatically subject to the fetters on, and/or formal requirements of, the TDR PoA, including the RDF ?**

# Generic Issue 7 and Questions 2 & 3

**(continued - tomorrow)**

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Q2 – was introduction of the AAP, the SD PoA and the ability to select Matrix Options valid (as within the scope of the TDR PoA) ?

Q3 – would exercise of SD PoA be subject to the fetter to the TDR PoA – the RDF – as a matter of trusts law ?

**GI.7: Was fetter engaged when effect of amendment to rights depends on future events which are unknown at the time of amendment ?**

= if amendment only 'might' cf. 'would' have the prohibited effect

# Generic Issue 4

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**Did the wording of the SD PoA under the Final Salary Rules apply the TDR PoA's RDF to the SD PoA by cross-reference ?**

- TDR clause 9(ii) set out the fetters to the TDR PoA
- SD PoA: "*nothing in the Scheme Document shall contravene the principles set out in clause 9(ii) or prejudice Approval*".
- Was that a reference only to the 'principles' (expressly so-called) in clause 9(ii), sub-paragraph (d), re: the Committee's composition & decision-making ?
- Or was that a reference to the entirety of clause 9(ii) and its wider fetters on the TDR PoA, including the RDF ?

# Group 2 - indexation

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**Generic Issues 5 & 6: Under the terms of TPT from time to time, were members' entitlement to**

- **(5) escalation of pensions in payment /**
- **(6) revaluation of deferred pensions**

**an entitlement to the rate of escalation / revaluation specified in the Scheme Document at the date of increase / revaluation ? or some other, and if so what, entitlement ?**

# Generic Issues 5 & 6 (continued)

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- 1982 TDR provided that pension "*shall be increased by* ***such percentage each year*** *of the amount of that pension immediately before that increase* ***as the Scheme Document shall specify"***
- Was it a *Danks v Qinetiq* situation in which the member had a right only to such percentage as was specified in the Scheme Document at the applicable increase date ?
- Or did the member accrue a right to the specified percentage during service ?
- Was it the percentage specified 'when applied' or 'while earned' ?

# Group 2 – indexation (continued)

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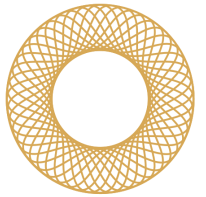
- Most of the other Questions in this Group were specific to TPT drafting
- Question 17 raised interesting point of interpretation as to whether a Scheme Document's cross-reference to Options set out in the Rules is static or dynamic; i.e. the Option as in the TDR when the SD was made ? Or as in the TDR from time to time (as amended).
- But Question 16 raised applicability of the Apportionment Act 1870, s.2 …

# Apportionment Act 1870, s.2

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- "*All rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.*"
- Under s.5, '*annuities*' defined to include '*pensions*'
- Applies to rent increases: *Parry v Robinson-Wyllie Ltd* (1987)
- But not to apportion future liabilities. So can the increase be treated as referable to the past and therefore apportionable under s.2 ?
- May make express pro-rating provisions redundant

# Group 3: separating the good from the bad after excessive execution



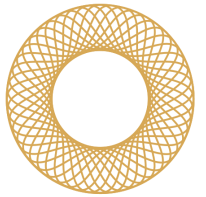
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- Do you have to have regard to what the holder of the power would have done if they had appreciated the effect of the fetter ?

**GI.8: Where the RDF is partially engaged by an amendment, is the whole amendment invalid, or does an underpin or some other appropriate limitation apply, whether as a matter of construction of the RDF, by reason of the doctrine of severance, or for some other, and if so what, reason?**

**GI.9: In any event, are there conditions that must be satisfied before such an underpin applies, and if so, what are they ?**

# Group 3: separating the good from the bad after excessive execution (continued)



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- All agreed that for partial validity the 'good' must be distinguishable or conceptually separable from the 'bad'
- The debate was whether there was a second pre-condition re: what the holder of the power would have done if they had appreciated the effect of the fetter
- The parties' competing approaches are illustrated by:
  - *Bestrustees v Stuart* [2001] EWHC 549, [2001] Pens. L.R. 283 at [48]; cf.
  - *Betafence Ltd v Veys* [2006] EWHC 999 (Ch), [2006] Pens. L.R. 137 at [69]

# *Bestrustees v Stuart* [48], Neuberger J

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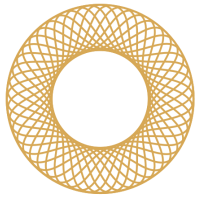
*"… one must not only ask oneself whether they are easily severable conceptually but also whether there is anything in the exercise of the power which leads one to believe that, had the trustee been told that it was not entitled to exercise the power retrospectively, it would not have exercised the power as it purported to do prospectively at all, or, in the alternative, in the way that it did. In that connection, it seems to me that that approach is consistent with the approach of the Court of Appeal in Re Hastings-Bass …, to which I shall refer in a little more detail shortly."*

# *Betafence Ltd v Veys* [69], Lightman J

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

# Group 3: Trustee and StC argued:



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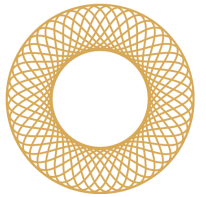
- *Betafence* approach treats partial validity as a matter of interpretation of the fetter, applied to the amendment attempted.
  - Easier to advise: no need to investigate and consider what holder of the power might have done
  - Default position = the extent of the amendment which is within scope remains valid; and the extent which is outwith scope never happened
  - Any claim that holder of the power would not have made amendment at all if they had appreciated effect of fetter > mistake/inadequate deliberation (per *Pitt v Holt*)
- *Bestrustees* approach wrongly requires test akin to *Hastings-Bass*, before allowing extent of amendment which <u>is</u> within scope to stand

# Group 3: Rep Ben argued:

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- *Bestrustees* two-limb test is the correct legal approach to severance in an excessive execution case involving a partially infringing amendment
- *Betafence* is not authority to the contrary
- Trustee/StC analysis fails to address adequately a partially infringing amendment where the permissible element of the change would *only* have appeared desirable to the donees of the amendment power in circumstances where they could *also* make the prohibited element of that change.

# Competing appellate authority ?



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- Trustee and StC argued that:
  - *Betafence* (interpretation) approach determined by *FDR Ltd v Dutton* [2017] EWCA Civ 200, [2017] Pens. L.R. 14; and
  - *Bestrustees* approach predicated on a 'rule in *Hastings-Bass*' which had been overtaken by *Pitt v Holt* [2013] UKSC 26, [2013] 2 A.C. 108 (as argued in *Wedgwood v Salt*)
- Rep Ben argued that:
  - *Bestrustees* approach determined by *IBM United Kingdom Holdings Ltd v Dalgleish* [2017] EWCA Civ 1212, [2018] I.C.R. 1681; and
  - the argument that *Bestrustees* had been overtaken by *Pitt v Holt* had rightly been rejected in *Wedgwood v Salt*

# *FDR Ltd v Dutton* [13], Lewison LJ

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"*… **the answer to the conundrum lies in the proviso and what it would have been understood to protect**. In answering that question I do not think that we can, in any conventional sense, look for the presumed intention of the parties to the amendment. The intention of the trustees and the employer is clear. They wanted to do away with the old rule completely and bring in the new. The question is the extent to which the proviso frustrates that intention. … For the same reason **I do not find it profitable to speculate on how the trustees might have exercised the power of amendment if, contrary to the facts, they had appreciated that the proviso prevented them to some extent from doing what they purported to do***."

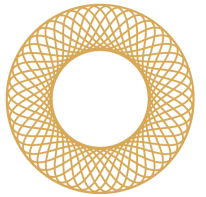
Also *HR Trustees Ltd v German, Re IMG Pension Plan* [2009] EWHC 3410 (Ch), [2024] 035 PBLR (005) at [5]-[6]

# *IBM UK Holdings Ltd v Dalgleish* [174], Sir Timothy Lloyd ?

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"***If one were to ask whether Holdings would have given the same notices if it had been aware that it would not be able thereby to break the final salary link, the answer would have to be that it would. The object of terminating DB accrual was the principal reason for using the power.*** *That it could not break the final salary link would perhaps have been seen as a disadvantage, but not at all as a reason for not exercising the power to the full extent available, not least because that feature was also to be dealt with by the NPAs as a separate element of Project Waltz.*"

# Group 3: the more recent cases



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- *Wedgwood v Salt* and *Avon Cosmetics Ltd v Dalriada Trustees Ltd* [2024] EWHC 34 (Ch), [2024] I.C.R. 512 relied on *IBM* at [174] as determining that *Bestrustees* approach correct
  - *Avon* also holding that whether holder would still have wished to make the amendment (to extent possible) to be assessed objectively
- Trustee and StC argued that the comment in *IBM* at [174] re: what IBM would have done was exclusively about whether an improper purpose was causative
  - Improper purpose does not vitiate exercise of power if holder would have done the same thing in any event

# Group 4: s.37 PSA93 and reg.42(2) of the Contracting-out Regulations

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- Group 4 added to the proceedings (by amendment) after *Virgin Media*
- … before the 'remediation' provisions of the Pension Schemes Bill were announced
- a raft of issues which the 'remediation' provisions don't answer – we need the answers to know when 'remediation' is required
- in particular, as to what is a 's.9(2B) right' ?
- whether indexation entitlements form part of a 's.9(2B) right'
- how reg.42(2) applies to an amendment closing scheme to accrual

# Procedural consequences: s.101 PSA26

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- Group 4 fully argued at trial
- After trial, Pension Schemes Bill produced
- An alteration is excluded from 'remediation' if any question relating to its validity (so far as relating to reg.42(2)(a) & (b)) was in issue in proceedings on or before 5 June 2025 and remained in issue when s.101 PSA26 came into force on 29 April 2026: see s.101(9)(c).
- Trustee discontinued all Group 4 Questions unilaterally (as of right) under CPR Part 38 in February 2026 (before s.101 PSA26 into force).
- Application to amend the claim form to restore the Group 4 Questions heard in late July 2026. Decision reserved to the main judgment …

# Generic Issue 10: reg.42(2)

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The rules of COSR scheme cannot be altered **in relation to any s.9(2B) rights** under the scheme unless:

a) the trustees have informed the actuary in writing of the proposed alteration;

b) the actuary has considered the proposed alteration and confirmed to the trustees in writing that he is satisfied that the scheme would continue to satisfy the statutory standard in accordance with s.12A if the alteration were made; and

c) the alteration would not otherwise prevent the scheme from satisfying the conditions of s.9(2B)

# Generic Issue 10: s.9(2B) rights

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- Reg.1(2) defined 's.9(2B) rights' as
  "*rights to the payment of pensions and accrued rights to pensions (other than rights attributable to voluntary contributions) under a scheme contracted-out by virtue of* [s.9(2B)], *so far as attributable to an earner's service in contracted-out employment on or after* [06.04.97]"
- was an alteration "*in relation to any s.9(2B) rights*" for the purposes of reg.42(2), so as to require actuarial confirmation, if **irrelevant** to s.9(2B) (esp. sub-paragraph (a) = the condition of satisfying s.12A and ∴ the RST)?
- Or did reg.42(2) cover every alteration affecting "*rights to the payment of pensions and accrued rights to pensions … attributable to … service in contracted-out employment*"?

# Generic Issue 10: text in full

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**Whether, taking account of the purpose of s.12A PSA 1993 and reg.42, the "*s.9(2B) rights*" defined in reg.1(2) of the Contracting-out Regulations 1996 (as in force 06.04.97 to 05.04.13) and/or "*rights … attributable to an earner's service in contracted-out employment*" within the meaning of reg.42 (as in force 06.04.13 to 05.04.16) are limited to rights to the benefits required to be included in the reference scheme referred to Generic Issue 10 in s.12B of the PSA93 ?**

# Question 11A: only textual alteration?

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Question 11A: was an exercise of each modification power an 'alteration' of 'the rules' within the meaning of s.37 PSA93 & reg.42(2) ?

- was the legislation only concerned with textual changes ?
- the legislation repeatedly refers to alteration to 'the rules'
- if e.g. the power to select Matrix Options did not require an exercise of the SD PoA, was it like an exercise of an existing discretion (not subject to reg.42)

# Question 11B and Schedule 2: what alterations engaged reg.42(2)

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Schedule 2 asked whether, and (if so) how, a range of example alterations engaged reg.42(2) including:

- alterations to indexation (revaluation & escalation)
  - if 's.9(2B) rights' are only rights relevant to s.9(2B) (under GI.10), were indexation entitlements under scheme rules part of the RST ?
- alterations effecting closure to accrual

# Q11B & Sch.2: indexation

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- Reg.23 requirements for meeting the statutory standard
  - set out a range of matters to which the actuary must and must not, and may and may not, have regard in determining whether pensions broadly equivalent to RST
  - said nothing about indexation

- Cf. reg.25 requirements for a reference scheme:
  "*A reference scheme is a scheme which, in addition to complying with the requirements of s.12B(3) & (4)…,* ***complies with*** *the requirements of Chapter II of Part IV… (revaluation of benefits in the case of scheme members who leave pensionable service before attaining normal pension age) and* [s.51 PA95] *(indexation of pensions).*"

# Q11B & Sch.2: closure to accrual

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Trustee and StC argued:

- impossible to certify that future accrual satisfied RST if no such accrual
- improbable that intended to be impossible to terminate accrual by rule alteration without first surrendering contracting-out certificate or varying to stop members' employment being contracted-out
- 's.9(2B) rights' are only pension rights "*attributable to … service in contracted-out employment*"
- so reg.42(2) could not be engaged re: accrual after member ceased to be contracted-out by reference to the scheme
- variation/surrender of contracting-out certificate was usually retrospective, but s.8(4) "*conclusive*" once election accepted by Secretary of State (SoS)

# Q11B & Sch.2: closure (cont)

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Alternative approaches to achieving effective closure without a reg.42 confirmation canvassed in the parties' submissions included:

**(1) Construction** of scope of s9(2B) and reg.42(2)

- Cessation of accrual brings to an end the earner's contracted-out employment. That is the effect of s.8(1) PSA 93
- On this basis no surrender of the COC is required to enable the closure alteration to be effective

**(2) "Retrospective" variation/surrender of COC** after purported date of closure (and so after purportedly effective date of closure alteration) at the election of the employer, with confirmation being provided by SoS after closure with a pre-closure effective date, was legally/mechanistically permissable such that, as at date of closure by amendment, members were not in C/O employment and so reg.42(2) was not engaged

# Q11B & Sch.2: closure (cont)

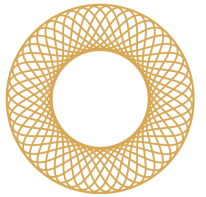
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- **(3) "Prospective" variation/surrender of COC** before purported date of closure could be effectively achieved for reg.42 purposes provided that the employer's election pre-dated the closure.

**Rep Ben's approach on each of these:**

- **(1) Construction -** Absent effective variation/surrender of COC prior to closure, members remained in C-O employment when the closure alteration purported to take effect and so s37/reg.42 is engaged and the alteration cannot be legally effective without the requisite actuarial confirmation.
- **(2 & 3) Variation/Surrender** - For the purposes of avoiding reg.42 being engaged by the closure alteration, surrender must have been agreed by SoS prior to the purportedly effective date of the closure alteration, which should practicably have been achievable in time, contrary to the Trustee's and StC's timing objection.

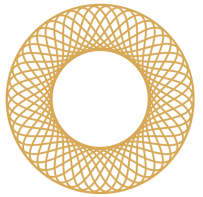
# Q11C: triennial recertification and presumption of regularity / inferences



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- Was it possible for a previously void alteration to be validated prospectively by triennial confirmation or other confirmation after execution ?
  - Does reg.42(2)'s reference to "*proposed alteration*" mean simply the alteration which the trustee proposes should have effect ?
- To what extent can one rely on the presumption of regularity and/or the preparedness of court to draw inferences ?
  - Judgment perhaps unlikely to give much guidance in the abstract on such fact-sensitive issues

# Q11D & E: extent of voiding effect ?

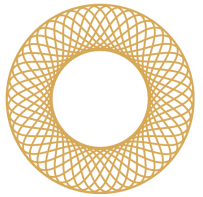


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- Question 11D: did s.37 & reg.42(2) only strike down the extent of the alteration that affected s.9(2B) rights ?
  - did they only do so where there was a substantive alteration (cf. a textual alteration) – e.g. what if there was no confirmation for a consolidation ?
  - cf. the pre-1997 regime for s.37 and JOM77

- Question 11E: how s.37 & reg.42 operated where one part of a scheme was contracted-out, another not ? was the amendment void for both parts ?

# Q3A: imputed amendment to validate a void alteration prospectively ?



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- 2006 Deed of Amendment recited that it was supplemental to 2003 TDR and made detailed textual amendments to provisions in 2003 TDR
- 2006 Deed of Amendment had actuarial confirmation
- If 2003 TDR otherwise void due to lack of actuarial confirmation, could 2006 Deed of Amendment be an imputed exercise of power of amendment to validate the 2003 TDR prospectively ?
- *Re Shinorvic* [2013] WTLR 337 (Royal Court of Jersey)
- Of wider interest and application than s.37 & reg.42(2)

# Group 5 - miscellany, including directions re: the distant past

Outer Temple

- Question 21: *Re: Benjamin* orders about how to administer a Scheme for which no documentation survived from the period before its first Scheme Document

- Question 22: The Superannuation and Other Trust Funds (Validation) Act 1927
  - Did registration validate an alteration only prospectively ? or fully, with effective from its intended effective date ?