

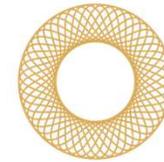
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**Invalid amendments -
With *Verity Trustees Ltd v Wood &
Save the Children* bubbling away,
how can you sever invalid
amendments from valid ones — and
can you perfect invalid amendments?**

Nicolas Stallworthy KC

11 March 2026

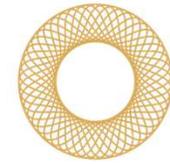
What's this all about ?



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- Amendments which exceed the scope of the amendment power – i.e. ‘excessive execution’.
- Often because the amendment is partly, but not entirely, precluded by a fetter to the amendment power: e.g.
 - reduction to accrual rate w.e.f. date prior to amending instrument, so retrospective extent prejudices accrued rights; or
 - change to indexation from 3% fixed to 5% LPI w.e.f. date prior to amending instrument, prejudicing accrued rights when RPI is below 3% in any year, but improving rights when RPI is over 3%; or
 - changing past accrual from DB to DC, prejudicing accrued rights if eventual DC pension is less valuable than the DB.

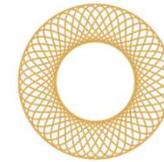
‘Would’ or ‘might’ ? Generic Issue 7



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- Some fetters to amendment powers are framed to be engaged where the proposed amendment ‘might’ have the prohibited effect.
- Some fetters are framed only to be engaged only where the proposed amendment ‘would’ have the prohibited effect.
- Are those fetters much less often engaged ?

‘Would’ or ‘might’ ? (continued)



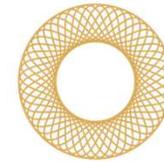
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Is a ‘would’ fetter engaged when the effect of an amendment to rights depends on future events which are unknown at the time of the amendment ?

E.g. no amendment:

- “*shall...lead to the*” payment of any part of the fund to the employer: *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 at 1595E-G (in the 1967 interim deed) and 1597A-D (in the 1969 definitive deed);
- “*shall be made which would diminish the benefits ... already accrued*”: *Punter Southall Governance Services Ltd v Hazlett, Re Axminster Carpets Group Retirement Benefits Plan* [2021] EWHC 1652 (Ch); [2022] Pens LR 1 at [216];
- “*shall be such as would prejudice or impair the benefits accrued...*”: *Newell Trustees Ltd v Newell Rubbermaid UK Services Ltd* [2024] EWHC 48 (Ch) at [21]

‘Would’ or ‘might’ ? (continued)



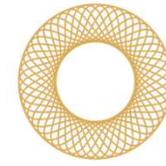
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Is such a fetter engaged only where the prohibited effect is the necessary consequence of the amendment ?

- “... *possible consequences are not ... within the prohibition in the provisos*”, e.g. where “*the consequences of the alteration are imponderable*” (and only “*might*” lead to the prohibited effect): *Mettoy* at 1631C, per Warner J;
- the proviso is not infringed where a prohibited effect “*might happen*”, but “*it cannot be said that it ‘would’ happen*”: *Axminster* at [221], per Morgan J; and
- “*There is a clear difference ... between saying something ‘would’ happen and that something ‘would probably’ happen. There might be questions as to how probable the prejudice would have to be – more than 50%, or 60% or 70%? - for the amendment to breach the proviso. It is much safer to stick to the words actually used, which is whether prejudice ‘would’ be suffered*”: *Newell* at [219] per Michael Green J.

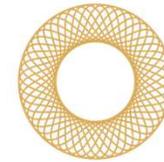
Where engaged, what do you need to show ?

...



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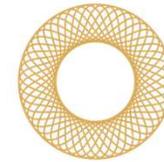
Don't we already know the answer ?



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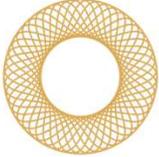
- The first condition for partial validity (i.e. severing the good from the bad) is that the ‘excessive’ extent is ‘conceptually severable’.
- If it is, partial validity is usually achieved by e.g.
 - ‘severing’ the retrospective extent of the reduction to accrual rate;
or
 - applying an ‘underpin’ to changes to indexation from 3% fixed to 5% LPI for past accrual and/or changing past accrual from DB to DC.
- But cases say differing things about what you have to prove to be able to do so ...

Two lines of authority



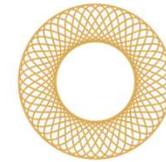
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- Some cases say you have to be able to prove **what the holders of the power would have done** if they had known of the limitation to what they were trying to achieve ...
 - which may involve factual investigation; and
 - increases uncertainty when advising on partial validity.
- Some cases say it does not matter what the holders would have done; it is **a function of the scope of the power as a matter of interpretation** ...
 - which makes partial validity the default (and advising easier): any challenge based on inadequate deliberation/mistake is separate; but
 - increases the risk of members getting the ‘best of both worlds’ (in a way never intended); e.g. the higher of two benefit bases.

***Bestrustees v Stuart* [2001] EWHC 549,  Outer Temple
[2001] Pens. L.R. 283 at [48]**

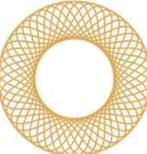
*“It seems to me, however, that one must not only ask oneself whether they are easily severable conceptually but also whether there is anything in the exercise of the power which leads one to believe that, had the trustee been told that it was not entitled to exercise the power retrospectively, it would 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* ...”*

Bestrustees v Stuart (continued)



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- This reasoning in 2001 has to be viewed in its historical context, before *Pitt v Holt*, when the so-called ‘rule in Hastings-Bass’ roamed wild.
- It is arguably unclear:
 - whether Neuberger J contemplated that ‘what the trustee would have done, if he had known’ was an inherent component of the test for validity of the part of an amendment which was within the scope of the power; or
 - whether he was moving from partial validity to inadequate deliberation, given the current understanding of that separate doctrine.
- Either way, what he said has now to be viewed in the light of *Pitt v Holt* (and, closer to this context, *FDR Ltd v Dutton* – addressed below).

***Betafence Ltd v Veys* [2006] EWHC 999  Outer Temple
(Ch), [2006] Pens. L.R. 137 at [69]**

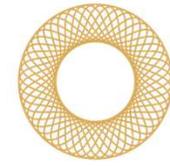
“The 1993 Amendment must be construed as having effect subject to the overriding limitation on the power of amendment contained in the proviso. Questions of severance do not arise, but if they did the principles governing severance in a case such as the present (as the cited authorities establish) lead 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.”

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



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“[5] In support of the Employers' contention, counsel for the Employers argues that the underpin is in the nature of an implied term and as such, should be no wider than necessary to give effect to the clause 7(i) Fetter. On that basis, he submits that interpreting Value 1 in the way the Employers contend is the minimum necessary to give effect to the judgment. Counsel for the Existing Members submits that this is not in accordance with the judgment. Moreover, he submits that it is not correct to say that the underpin is in the nature of an implied term, but rather the underpin is the consequence of the construction of clause 7(i) that I arrived at in the judgment.”

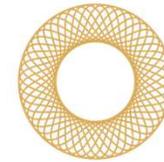


*HR Trustees Ltd v German, Re the
IMG Pension Plan* (continued)

“[6] I agree with counsel for the Existing Members. The underpin is not an implied term. The underpin is the consequence of the construction of the Fetter in clause 7(i) that I have arrived at when applied to the factual scenario that operated as at the date of the purported conversion.”

- So purely a matter of interpretation of the fetter, applying it to the amendment attempted (not an implication based on presumed intention).

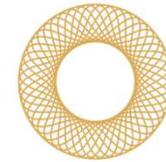
***FDR Ltd v Dutton* [2017] EWCA Civ
200, [2017] Pens. L.R. 14 at [12]-[13]**



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[12] while “*in a sense a question of interpretation*”, not concerned with the intention of the holder of the power.

[13] “*The judge regarded the solution to the conundrum as lying in the interpretation of the old rule and the new rule as a blend. While I see the force of that approach, I do not agree with it. In my judgment 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. ...*”

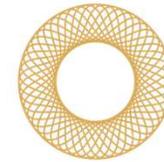


FDR Ltd v Dutton (continued)

“ ... 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.”

- So purely a matter of interpretation of the fetter, applying it to the amendment attempted.
- Not involving speculation on what the holder of power would have done.

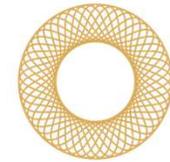
***IBM United Kingdom Holdings Ltd v Dalglish* [2017] EWCA Civ 1212, [2018] I.C.R. 1681 at [174] ?**



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- Only relevant issue before Court of Appeal re: the new exclusion power was whether its exercise had been for an improper purpose.
- Warren J’s reasoning in holding that the new exclusion power had been validly introduced, but was subject to a limitation that it could not break the final salary link, was simply not in issue.
- While Court initially adopted Warren J’s description of that limitation as an “*implied limitation*” [168] & [173], in [174] the Court characterised the limitation as an “*implicit limitation*” (see also [166]).

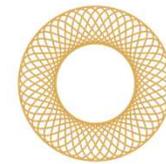
IBM v Dalglish (continued): [174]



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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.**”*

IBM v Dalglish (continued): [175]

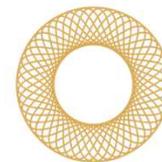


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“... in the present case it seems to us that Holdings’s intention was to use the power to exclude DB members from their membership of the scheme, which is within the scope of the power. The fact that IBM also hoped, but failed, thereby to break the final salary link was incidental. We therefore dismiss the cross-appeal.”

- The test for validity where there is an ulterior or improper purpose is a ‘but for’ test; i.e. whether ‘but for’ that purpose, the holder would have exercised the power the same way in any event.
- In [174] the question “*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*” was directly relevant to whether there was a relevantly causative ulterior purpose.

***Wedgwood v Salt* [2018] EWHC 79,
[2018] Pens. L.R. 9 at [56]-[70] & [74]**



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- Rejected the argument that the second half of Neuberger J's [48] in *Bestrustees* has been overtaken by *Pitt v Holt*: see [67], recording the argument for the trustee; and
- concluded that in *IBM* the Court of Appeal was endorsing a requirement that it be shown that the trustees would have exercised the power in the same way if they had known the true limits of their power: see [70] & [74].
- *FDR Ltd v Dutton* not cited.

Avon Cosmetics Ltd v Dalriada Trustees Ltd
[2024] EWHC 34 (Ch), [2024] I.C.R. 512



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- Concluded that in *IBM* the Court of Appeal was endorsing a requirement that it be shown that (objectively) the trustees would have exercised the power in the same way if they had known the true limits of their power: see [167] & [169]; and
- treated interpretation of the fetter and ‘severability’ of otherwise excessive execution as alternative ‘lenses’ through which to determine whether a partially valid amendment can take effect subject to an underpin: see [173]-[174]
- *FDR Ltd v Dutton* not cited.

Verity Trustees Ltd v Wood & Save the Children – judgment pending; Group 3

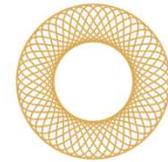


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Generic Issues 8 & 9:

- “8: Where the fetter 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 fetter, by reason of the doctrine of severance, or for some other, and if so what, reason?”
- 9: In any event, are there conditions that must be satisfied before such an underpin applies, and if so, what are they?”
 - 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 ?

Can you perfect invalid amendments?



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- Not if and to the extent that the invalidity is because the amendment was (and remains) outside the scope of the power of amendment.
- But *if* you don't have to have regard to what the holder of the power would have done (which depends on *Verity*), there is less risk of invalidity.
- The **default** position would be that the extent of the amendment within the scope of the power is valid.
- And the burden of bringing any challenge based on *Pitt v Holt* (inadequate deliberation/mistake) falls on any challenger thereafter.