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WHAT ARE THE WIDER IMPLICATIONS FOR PRACTICE OF THE *NEWELL RUBBERMAID* CASE?

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- Judgment proves the truth of Benjamin Franklin’s dictum
- Judges are only human, so expect the unexpected
- Perhaps easier said than done, as one can never be confident as to how an argument will play with a judge – don’t count your chickens and be discriminating in the arguments you advance

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Three areas:

- The missing Scheme instrument
- The *Re Courage* proviso
- Age discrimination

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Brief facts:

- Trustee's CPR Part 8 application - Parker Pension Plan established in 1958
- Move from DB to DC for reasons of cost
- *cf. IMG* [2010] Pens LR 23
  - PoAs included *Courage* provisos
  - Members moved from DB to DC and accrued rights converted without consent

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But in *Newell* members divided into 3 classes:

- U40s (included RB) automatic transfer and conversion
- 40-44s transfer and conversion optional
- 45 and over remained in DB, because would have insufficient number of remaining working years to build up DC pots

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The missing instrument

- Interim Amending Deed of 6 Jan 92 intended to introduce DC section and effect transfer and conversion
- IAD sought to make amendments by incorporating by reference two annexed Plan booklets
- Undertaking by employer and trustees to execute by 1 Jan 94 a deed giving effect to the alterations

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Two broad sub-issues:

- Original IAD could not be found, only copies, including an original certified copy
- RB argued language of booklets insufficient to establish DC section and convert U40s' past service benefits

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Sub-issue 1:

- Not on CPR Part 8 Claim Form
- Judge described RB's argument as "*somewhat extraordinary*" and "*opportunistic*"
- Who remembers the best evidence rule? Secondary evidence admissible and may (as here) suffice
- Court will take practical approach to missing documents
- Very much in point following *Virgin Media*

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Sub-issue 2:

- Adequacy of the language used in the annexed booklets
- Again not raised on Claim Form
- Executory trust argument (court "*exercises a large authority in subordinating the language to the intent*": *Sackville-West v. Viscount Holmesdale* (1869-70) L.R. 4 H.L. 453)
- *Davis v. Richards & Wallington Industries Ltd.* [1991] 1 W.L.R. 1511
- Comforting decision for practitioners
- For the scholars present, *certum est quod certum reddi potest*

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Re Courage

- Was transfer and conversion permissible given *Courage*-type proviso?
- First appeared in Plan documentation only in 1975
- Scope of *Courage* not fully appreciated for some time; *cf.* Tolley's Pensions Handbook, 1st ed., 1993

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Newell PoA proviso:

- Identical terms to that considered by Newey J. in *Briggs v. Gleeds (Head Office)* [2015] 1 Ch. 212 ("*accrued*" and "*secured*")

- Namely:

  "… 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"

IMG PoA proviso:

"no amendment shall have the effect of reducing the value of benefits secured by contributions already made"

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- In *IMG* Arnold J. held that conversion was permissible:

  "subject to an underpin which preserves the future monetary value of the proportion of Final Pensionable Pay which the member has accrued in respect of pre-amendment Service" (§141).

- *cf.* definition of "*underpin benefits*" in the Occupational Pension Schemes (Winding Up) Regulations 1996, S.I. No. 1926, reg. 13(3):

  "… money purchase benefits which under the provisions of the scheme will only be provided in respect of a member if their value exceeds the value of other benefits in respect of him under the scheme which are not money purchase benefits".

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RB's 3 arguments:

- Single conceptual change – conversion and introduction of DC section stood or fell together
- Conversion was invalid due to *Courage* proviso
- Conversion valid but subject to an *IMG*-type underpin.

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Judge greatly troubled by concept of *IMG* (or indeed any) underpin (§201):

"… it is unclear to me what the juridical basis for the imposition of an underpin by the Court is. If the conversion breaches the Proviso, it means that there was no power to make those amendments to the Plan and they were ultra vires. However, if the conversion was permissible but the amendments broke the final pensionable salary link, IMG *in particular suggests that the amendments can be saved by the Court imposing an underpin that preserves the link to the final pensionable salary. In other words, the Court can rewrite the amendments by including an underpin in certain terms that would mean the amendments were within the power and not ultra vires. Millett J in* Courage *did not need to do that … It was only in* IMG *that Arnold J gave effect to the proviso by reading in an underpin. While it makes perfect sense to have done so, thereby saving the amendments to the scheme, it does not explain how the Court has the power to do this nor why the amendments were not simply ultra vires and therefore ineffective."*

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- Court *"imposing"* an underpin involving a *"rewrite"* of the amendments?
- Or gives effect to members' existing and protected right to final salary linkage?
- Possibly helpful analogies are:
  - the implication of terms into documents (and see *IBM UK Holdings Ltd. v. Dalgleish* [2014] Pens. L.R. 335 at §289(iii)), and
  - maxim that a contract is to be construed as being lawful (Lewison, *The Interpretation of Contracts*, 8th ed. at §§7-119 to 7-125)

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Single conceptual change

- Given judge's conclusions on RB's arguments 2 and 3 did not arise
- But no difficulty in applying the doctrine of severance if it had

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Conversion invalid

- RB sought to distinguish *IMG*:
  - *IMG* proviso protected "*the value*" of members' benefits
  - *Newell* proviso protected simply "*the benefits*" - judge described as being *"a somewhat more amorphous concept"* (§209) or *"vaguer concept"* (§212)
- Rejected primarily on basis of *"would"*/*"might"* distinction
- Judge's test:

  "It is much safer to stick to the words actually used, which is whether prejudice "would" *be suffered. It is important that this can be judged at the time of the amendment with some certainty as the administrator of the Plan needs to know if the amendment is valid or not."*

- Or did conversion *per se* prejudice or impair?

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IMG-type underpin

- Employer sought to distinguish from *IMG*
- Are *Mettoy* [1990] 1 W.L.R. 1587 and *Axminster* [2022] Pens. L.R. 1 the answer?
- Termination of pensionable service argument – but previously considered and rejected in *Gleeds* [2015] 1 Ch. 212 at §§125-128
- Plan's transfer rule, but either (i) voluntary transfer out at the request the member or (ii) transfer without consent to connected scheme with member's employment treated as continuous
- §226 judge felt constrained by the weight of preceding authority to hold link not broken
- But was he so constrained?

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Sting was in the tail

- Judge declined to follow *IMG* on the nature of the underpin (underpin there was tested at point a member's final pensionable salary was determined)
- Correct analysis was that conversion sum should be what he called (at §237) the *"appropriate amount"*, using the *"retrospective approach"*
- This used 1992 actuarial assumptions modified to incorporate known data as to salary and actual (as opposed to assumed) statutory revaluation
- *IMG* underpin effectively amounted to what he called *"reinstatement"*
- Was this a case of overreach by the RB?

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Implications

- Not intending to cast doubt on the *Courage* principle, only its application
- The *"would/might"* argument is still open, because he did not decide it
- Departure from *IMG* underpin significant because of doctrine of precedent:
  - Employers pretty pleased
  - Trustees should follow
  - Likelihood of any member challenge in a later case low

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Age discrimination

- Sufficiently far into Brexit that now concerned only with accrual from 1 Dec 2006 when AD became unlawful under domestic law

- Any argument in respect of accrual prior to that date based on EU general principles of equal treatment and non-discrimination has now gone

EA 10 section 61:

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"61 Non-discrimination rule

(1) *An occupational pension scheme must be taken to include a non-discrimination rule.*

(2) *A non-discrimination rule is a provision by virtue of which a responsible person (A) –*

(a) *must not discriminate against another person (B) in carrying out any of A's functions in relation to the scheme;*

…

(3) *The provisions of an occupational pension scheme have effect subject to the non-discrimination rule.*

(4) *The following are responsible persons –*

(a) *the trustees or managers of the scheme;*

(b) *an employer whose employees are, or may be, members of the scheme;"*

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- Sheet-anchor of RB's argument was *Walker v. Innospec Ltd.* [2017] I.C.R. 1077, sexual orientation case
- Dates:
    - W lived with his male partner since 1993
    - Took early retirement on 31 March 2003 (NRD not until 2007)
    - Civil Partnerships Act 2004 came into force on 5 Dec 2005
    - Civil partnership registered 23 Jan 2006
    - Thereafter W told that his civil partner would not receive a spouse's pension if he, W, died first

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- Key date in *Newell*: 6 Jan 1992
- Judge's first instinct (§254):

  "the relevant decision to differentiate on the grounds of age was taken in 1992 when it was lawful to do so and that therefore there was no issue as to unlawful age discrimination."

- Distinction he drew with Walker (§302):

  "… the company, and presumably the trustees had already decided they were not going to pay the spouse's pension, albeit that this was on the basis of the temporal limitation provisions. That decision was made after that form of discrimination had become unlawful."

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Whereas in *Newell* (§303):

"the decision was taken in 1991/2 to split the members into groups on the grounds of their age. There is no further decision for the Trustee to take in relation to the section of the Scheme that each member should be in. The Trustee only has to pay the pension benefits to each member in accordance with the rules of the section they are in. The fact that those benefits may be lower for those in the MP section than those who were able to remain in the FS section as a result of the decision taken in 1991/2 by PPUK and the trustees is not because of any decision or action taken by the Trustee after age discrimination became unlawful."

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- Was judge's focus on whether a decision which was discriminatory in nature taken before or on or after 1 Dec 2006 correct?

- See language of EA 10 section 61(2) and (3) and judgments interpreting those provisions, e.g., *London Fire Commissioner v. Sargeant* [2021] I.C.R 1057 (Sir Alan Wilkie at §113):

  "… if … a provision of an occupational pension scheme… would oblige a responsible person to discriminate against another person on the ground of age, that provision is subject to the non-discrimination rule, which the scheme must be taken to include. That rule obliges the responsible person not to discriminate."

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Justification (§§312-328):

- EA 10 S. 13(2)) *"a proportionate means of achieving a legitimate aim"*.
- Employer relied on:
  - Inter-generational fairness
  - Cushioning blow for older members by allowing them to retain DB
  - Steps it took, on actuarial advice, to ensure as far as reasonably possible that DC benefits would be equivalent or comparable to DB
  - Its wish to obtain certainty as regards its future pension liabilities
  - *Obiter* would have found treatment of U40s was justified.

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Two over-arching observations

- On the advisory side, generally gives us clear steers on the three areas I have covered (as well as others, *e.g., SWT*), even though we may quarrel with the reasoning

- On the litigation side, contains some useful lessons on how litigation of this character should be conducted.

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