# Which grey areas and unresolved arguments remain over substituting RPI for CPI – post *Barnardo's* and *BT*?

## White Paper Conference 2019


## Paul Newman QC

# Introduction

*Security and Sustainability in Defined Benefit Pension Schemes* (Cm 9412) February 2017

*Protecting Defined Benefit Pension Schemes* (Cm 9591) March 2018

# Where are we now?

*Danks v QinetiQ Holdings Ltd* [2012] Pens LR 131 (Vos J)

*Arcadia Group Ltd v Arcadia Group Pension Trust Ltd* [2014] BTC 40 (Newey J)

*Buckinghamshire v Barnardo's* [2015] Pens LR 501 (Warren J); [2017] Pens LR 26 (CA); [2019] Pens LR 84 (SC)

*Thales UK Ltd v Thales Pension Trustees Ltd* [2017] Pens LR 227 (Warren J)

*British Telecommunications PLC v BT Pension Scheme Trustees Limited* [2018] Pens LR 189 (Zacaroli J); [2018] Pens LR 189 (CA) (currently under appeal)

# Where are we now?

- s.67 PA95 will not prevent a selected alternative index from applying to pensions increases referable to service accrued prior to the index change, rather than simply to increases referable to post-change service

- the provisions relating to inflation-related indices in IR12 are admissible as guides to the interpretation of the definition

- where the definition of the index refers to RPI or an alternative index, it is implicit that there is an unconstrained power to select an index other than RPI

# Requirement for revenue approval

Definition of RPI in the 2001 version of IR12:

> *… the index of retail prices compiled by the Department of Employment or any other index agreed for use by a particular scheme by IR SPSS*

Para 7.1.12 of the Pension Schemes Office Manual:

> *The most commonly used index for calculating cost of living increases is the Government's Index of Retail Prices … If any other index is proposed ask the practitioner to explain why it is considered more appropriate. Refer the case to the Section Manager when a reply is received. The general principle to be followed is that increases should protect the real value of the pension's purchasing power*

# Requirement for revenue approval

*Arcadia*: the index had to be *satisfactory for the purposes of HMRC*

- fulfilled if there were no grounds on which HMRC could properly or reasonably consider the replacement index other than satisfactory for its purposes

- HMRC had already indicated in writing that it would consider CPI to be a satisfactory index for increases to pensions

But no need for any positive input from HMRC

# Requirement for revenue approval

2 possible constructions:

- the requirement no longer has to be satisfied following A-Day

- the power to select an alternative index is no longer exercisable, as the approval requirement can no longer be satisfied

# Requirement for revenue approval

Caselaw to support the former construction:

- *Arcadia* at [42]
- *Barnardo's* (CA) per Lewison LJ at [37]
- *Capital Cranfield Trust Corp Ltd v Sagar* [2002] OPLR 151
- *Davis v Richards & Wallington Ltd* [1990] 1 WLR 1511

# Requirement for revenue approval

Counter-argument:

- The basis for the survival of a power is that the draftsman cannot have intended the condition to rob the power of any practical application in those circumstances

- No need for its survival where the scheme contains a general power of amendment

# Requirement for revenue approval

- para 3 of sch.36 to the Finance Act 2004

- reg.2(1) of the Registered Pension Schemes (Modification of the Rules of Existing Schemes) Regulations 2009 (SI 2009/3055):

  *Any provision (however framed) in the rules of an existing scheme, as they stood immediately before 6th April 2006, to make an amendment to a rule of a scheme which would require the agreement, consent, approval of, or confirmation of continued approval of the scheme by … the Inland Revenue, shall be disregarded during the transitional period, to the extent that the provision requires such agreement, consent, approval or confirmation of continued approval of the scheme.*

# Requirement for revenue approval

- drafted on the basis that, but for it, the use of the amendment power would be inhibited by the requirement for Revenue approval

- the provision only applied for the transitional period, and its purpose was to enable schemes to amend their amendment powers so as to remove the Revenue approval requirement: if, after the end of the transitional period, the scheme retained that requirement, it would become operative again and be required to be complied with

- the regulations were specifically limited to the general amendment power, and did not extend to the ability for an alternative inflation-related index to be selected

# Substitution

*The Government's Index of Retail Prices or any other index published in substitution for that Index*

- RPI remains as an official index published by the ONS

- the fact that an element of RPI is widely regarded as flawed or unacceptable as a measure of inflation, or that it is no longer a registered National Statistic, is irrelevant

- the fact that RPI and CPI continue to be published side-by-side is flatly inconsistent with the concept of CPI being a substitute for RPI

# Frequency of exercise of power

Is the power personal or fiduciary?

- personal powers allow the donor to take account of its own interests, and there is no scope for implying either an obligation to keep the exercise of the power under review or to exercise it within a reasonable time

- fiduciary powers must be exercised for the purposes of the pension scheme, to secure the benefits for members and beneficiaries: the donor of such a power is under an obligation to keep the exercise of the power under review

Powers vested in trustees are usually fiduciary

Powers vested in employers may be fully fiduciary or may be subject to a lesser obligation

- is the power dispositive or administrative?

- *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587

# Frequency of exercise of power

Fiduciary powers are exercisable by trustees from time to time, and it is generally implied that those powers must be exercised within a reasonable time

Difference between:

- family trust powers (which usually fall to be exercised upon the happening of a certain event) and

- the power to replace RPI where it has become unsuitable (the occurrence of which may be impossible to identify)

# Frequency of exercise of power

*Entrust Pension Ltd v Prospect Hospice Ltd* [2012] Pens LR 341: augmenting a member's benefit on his retirement out of surplus assets: reasonable time implied

*British Telecommunications* (Zacaroli J, obiter): selection of alternative index where RPI became inappropriate: no duty to reach a determination within any particular time period

# Frequency of exercise of power

Consequences of a failure by the trustees or employer to exercise the power within a reasonable time:

- *Entrust*: trustee power does not lapse

- *Thales*: employer power cannot be exercised late, if it would be to the employer’s advantage

- *British Telecommunications* (Zacaroli J, obiter): employer power does not lapse

Exhaustion of power when the replacement index is selected

# Conclusion

*… this case turned on the particular wording of the rules. Those working at the sharp end in the field know full well that the drafting did not have the degree of precision attributed to it by the courts, whose personal experience is that of dealing with pedantic issues of expression.*

Wilberforce CHAMBERS

# Thank you