

**Trust and Confidence**

**When does an employer breach its implied duty of trust and confidence to employees in the context of a pension scheme?**

**Which elements of the IBM decision are most vulnerable to being overturned on appeal?**

**JENNIFER SEAMAN**

## IBM v. Dalglish

- Two main judgments:
  - [2014] EWHC 980 (Ch) – Whether IBM had breached its duty of good faith and confidence
  - [2015] EWHC 389 (Ch) – Remedies

## Implied duty of trust and confidence

- Implied duty of 'good faith'
- First formulated in a pensions context in Imperial Group Pension Trust Ltd v. Imperial Tobacco Ltd [1991] 1 WLR 589. The 'Imperial duty'. Reviewed by Newey J in Prudential Staff Pensions Ltd v. Prudential Assurance Co Ltd [2011] EWHC 960
- Warren J distinguished the Imperial duty from the duty implied into a contract of employment (see Lord Steyn in Malik v. BCCI SA [1998] AC 20)

## Imperial duty of trust and confidence

- Limitation on employer in exercise of discretionary powers under a pension scheme
- Warren J raised 5 issues to highlight the nature of the duty:
  - 1) Genuine and rational exercise of power
  - 2) Not a test of fairness
  - 3) Severe
  - 4) Objective
  - 5) Employer's financial and other interests are relevant

## Imperial duty of trust and confidence

- When analysing the conduct of an employer:
  - 1) No limit on the type of conduct which is capable of being destructive of the relationship of trust and confidence
  - 2) Could fall within the employer's powers or otherwise not be actionable
  - 3) Reasonable Expectations are relevant (see below)
  - 4) Test: 'irrationality or perversity', in the sense that no reasonable employer would act this way

## Reasonable Expectations

- *“an expectation as to what will happen in the future engendered by the employer’s own actions which gives employees a positive reason to believe that things will take a certain course.” [454]*
- Contrast with ‘mere expectation’ (*“one which an employee may have in fact as to the future, in the sense that they anticipate, assume or expect that something will happen in the ordinary course of events.” [454]*)

## Disappointing Reasonable Expectations

- Conduct which disappoints Reasonable Expectations may amount to a breach of the Imperial duty on the basis of it being conduct that is irrational or perverse. ([445] and [453])
- Looked at objectively. But focus on the context in question [478]
- ‘Heavily fact-dependent’ [478]
- Needs to be a clear representation. But can be a breach of Imperial duty even if there is no remedy in contract, estoppel or misrepresentation [471]

## **Project Waltz – Breach of trust and confidence**

- The exclusion of members from DB schemes was not for an improper purpose
- Holdings in breach of its Imperial duty in relation to accrual of benefits and change in Early Retirement policy [1528]
- UKL in breach of its contractual duty of trust and confidence regarding the 2009 Non-Pensionability Agreements [1528] (See [2015] EWHC 1385 (Ch))
- The consultation that IBM carried out gave rise to a breach of the contractual duty [1575]

## The expected debate in the Court of Appeal

- (1) Imperial test – is ‘irrationality or perversity’ the correct threshold?
- (1) Should the disappointment of a Reasonable Expectation constitute a breach of the Imperial duty?
- (1) Should the NPAs give rise to a breach of the contractual duty? Can the non-pensionability term in the NPAs be severed from the rest of the agreement?
- (1) Was IBM’s exercise of the exclusion powers for an improper purpose?

## Conclusion

Thank you for listening.

For any further information or to get in touch directly, contact us here:

+44 (0)20 7353 6381

[clerks@outertemple.com](mailto:clerks@outertemple.com)

[www.outertemple.com](http://www.outertemple.com)