NEW SQUARE

Critical issues arising in negligence claims against pensions advisers

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The shape of the claim

- Errors (or alleged errors) dating back to the 1990s
- Concerning botched equalisations; amendments designed to limit the scheme liabilities, carried out without regard for the relevant amendment provisions; a failure to execute deeds in accordance with the statutory provisions; etc
- A possibility that the unwanted liabilities might be extinguished or reduced by 'remedial litigation', raising issues of estoppel, extrinsic contract (etc); usually brought pursuant to Part 8
- The Part 8 proceedings may go to trial; or be compromised; or (as in the *Gleeds* litigation) be compromised after trial pending appeal
- Unless, very unusually, the remedial litigation provides a complete answer to the problem, the out-of-pocket employer will look to the allegedly negligent adviser for compensation

Issues that commonly arise: (1) Limitation

Limitation

Often, the relevant mistake(s) occurred 20+ years before the penny drops and the employer/trustees set about obtaining compensation. The claim will prima facie be statute-barred. Indeed, the reasons why the law permits a limitation defence tend to be engaged: memories have evaporated, witnesses have died, documents have disappeared, and there is much force in an argument that the claim is too stale to be tried fairly.

Possible Claimant counter-attacks:

- S. 32 Limitation Act 1980: deliberate concealment

Requires extreme facts, usually involving some form of impropriety on part of D

- S. 14A: 3 years from 'date of knowledge'

Highly fact-specific: good summary in Cole v Scion Limited [2020] EWHC 1022

Defendant riposte to reliance on s.14A:

- S. 14B: The 15 year long stop period: no action to be brought more than 15 years after date (or last date) on which there occurred negligent act/omission to which relevant damages (or part thereof) alleged to be attributable

The counter to 14B: continuing duty

Where the 15 year period has expired, as will usually be the case (now) where the relevant errors occurred in the 1990s, the claim is unquestionably in trouble.

The standard claimant counter-attack is to construct a secondary claim as follows:

- At a time (say, mid 2000s) when the original claim was still in time (because primary 6 year period had not expired, or s.14A 3 year period had not even started to run), D was continuing to act as adviser to the scheme
- Pursuant to continuing retainer, D owed a duty to identify and advise on the original error
- Its failure to do so was a breach of duty
- That duty deprived C of the opportunity of bringing proceedings in time
- C may therefore recover damages in respect of the lost chance of obtaining compensation from timeous proceedings

All very neat. Does it work?

Differentiate between two types of continuing duty case

Case A: Revisiting earlier work and policing one's own competence

Ex hypothesi, D has been guilty of some error in the past which has had an adverse effect on the client's position, usually because scheme liabilities are higher than intended/understood.

It might be said that D should keep one eye on the risk that errors may have occurred in the past; should from time to time revisit past work; and should blow the whistle on itself.

But is professional life, and professional indemnity insurance for that matter, workable on this basis?

Case B: D under a continuing (or new) retainer to carry out further work, which gives rise to a duty to do (and/or advise on) something which **as it happens** would alert C to the claim in respect of the original error

In this type of case, there is no doubt about the existence of the duty in question – it arises pursuant to a retainer in the normal way, and D is being paid to do what it does. If, on the particular facts of the case, the proper discharge of that duty would give C information which would enable it to bring the claim which has been killed off by 14B in time, and C would have done so (the causation issue), then why should C not recover compensation for the lost claim?

Broadly put, case A doesn't work; case B sometimes does

The case law is very hostile to case A continuing duty arguments:

- *Gold v Mincoff* [2001] Ll Rep PN 423 (paragraphs 97-104)
- *Ezekiel v Lehrer* [2002] EWCA Civ 16 (paragraphs 24-25; 49)
- *Mathieson v Clintons* [2013] EWHC 3056 (paragraphs 181-182)
- *Capita (Banstead 2011) v RIB Ltd* [2015] EWCA Civ 1310 (paragraphs 19-21)

As Ward LJ observed in *Ezekiel:*

Secondly, if it is correct that a solicitor, or barrister or any professional person genuinely believes that the advice he has given is good advice, and not negligent advice, then it would be absurd to suggest that he has to tell the client at the time he gives the advice that it may be negligent and that the client had better take other advice to see whether or not it is negligent. The adviser to whom the client turns would be bound to give the same warning. Like Rugby football's mythological Ooh-Aah bird, the client would be going round and round in ever decreasing circles seeking advice on the advice on the original advice *ad infinitem* (and professional life would end up suffering the bird's ghastly fate).

Recent case law

PSGS Corporation v AON [2022] EWHC 2058

D's strike-out application, relying on s.14A defence and s.14B

C's case on s.14A held arguable; dicta of Miles J. worth noting:
"*[C's] approach wrenches the documents from their context and puts them under an artificial forensic spotlight. It seems to me to ignore some basic context: the long time gaps …; that they were given for different purposes …*"

"*In the real world, people concentrate on documents when they need to and then forget them or recall them imperfectly …*"

On the continuing duty point, the judge held that C's case was hopeless. It was a Case A argument:

The alleged continuing duty came to no more than "*a duty to look back and spot the earlier errors*"

Recent case law contd

James Cropper Plc v Aviva [2022] EWHC 1689

Also decided in July 2022, very shortly before the AON case. Another strike-out application by D, raising s. 14A and 14B/continuing duty issues.

As in the AON case, D failed to persuade judge that C's case on 14A was hopeless. Fact-specific, but the two cases taken together suggest that summary applications by Ds on s.14A points require cogent and uncontradicted evidence.

By contrast with the AON case, D also failed to persuade judge that C's case on continuing duty was hopeless. D acted as administrator of the scheme pursuant to what appears to have been a wide-ranging retainer. In particular, D provided an actuarial valuation report within the 15 year period which, if accurately prepared, would have revealed the earlier error.

The relevant passage in the judgment is short, and does not review the cases mentioned above. Miles J. was taken to it in the AON case, but found it of no assistance. If correct, then it must be on the basis that *Cropper* is concerned with a Case B continuing duty, using the above terminology

Issues that commonly arise: (2) management of dual litigation

There is, obviously, a close connection between the remedial litigation (deploying estoppel and extrinsic contract arguments, etc) and the claim against the negligent adviser.

In short:

- Success in the remedial litigation extinguishes/reduces the claim against the adviser
- The costs of the remedial litigation (often very substantial indeed) may, though, form part of the claim against the adviser, and therefore unsuccessful remedial litigation can increase the adviser's liability
- The same factual issues can and often will arise in both matters

Until quite recently, it was routine to proceed in two stages: remedial litigation first; claim against negligent adviser second. The negligent adviser would normally be kept informed, to a greater or lesser extent, as to the progress of the remedial litigation.

This is what occurred in the *Gleeds* litigation: see *Gleeds Retirement Benefits Scheme* [2015] Ch 212

The Gleeds litigation

- A series of amendments to a pension scheme, intended to reduce the employer's liabilities, made by deeds over a period from the early 1990s to 2010
- Discovered in 2010 that the deeds had not been properly executed
- If these defects were fatal, and the deeds of amendment were of no effect, then the employer's liability to contribute to the scheme would be increased by a very substantial amount
- Part 8 Proceedings were brought in an attempt to cure the defects by arguing (among other things) that all relevant parties were estopped from disputing the validity of the deeds
- The negligent pension adviser, Aon, was not a party to these proceedings though it had been notified of a potential claim against it, and was kept informed of the development of the proceedings
- Newey J. held that estoppel could not cure a deed which failed to comply with the 1989 Act where the defect was plain on the face of the deed
- The attempt to remedy the defects was largely unsuccessful
- The employer was left with a very substantial unwanted and unintended bill
- An appeal against the decision was **compromised** on terms that left the employer liable to make lower, but still very substantial, additional payments.

Aon's involvement in the Part 8 proceedings

- Aon was notified of a potential claim, and kept informed of developments in the Part 8 proceedings
- Some of the communications concerning the development of the proceedings and the settlement of the appeal were without prejudice
- No proceedings were begun against Aon during the currency of the Part 8 proceedings
- The claim against Aon, seeking in effect an indemnity in respect of the additional liabilities and in respect of the costs of the Part 8 proceedings, was begun after the compromise had been completed.

Aon's response

- Aon eventually admitted negligence in respect of the preparation of the defective deeds
- It took various points in seeking to reduce the damages which it was liable to pay
- The principal argument was that there had been a failure to identify an issue which, if identified, allegedly would have led to a much better outcome in the Part 8 proceedings
- This became known as 'the Participating Employer Argument'
- Most of the members of the scheme were employed by corporate entities who had purportedly joined the scheme by Deeds of Adherence which were affected by the same defect as all the other deeds
- Aon contended that the employer should have taken the point that this meant that most 'members' of the scheme were not in fact members at all, because their employers had not adhered to the scheme in accordance with the provisions of the scheme documents

Joinder of the lawyers

- Aon, by amendment, alleged that solicitors and counsel ("the lawyer defendants") who had been acting for the employer in the Part 8 proceedings had been guilty of negligence
- Aon went further: it pleaded that the alleged negligence broke the causal connection that might otherwise have existed between Aon's initial negligence and the eventual loss
- This plea made the joinder of the lawyer defendants inevitable; had Aon remained the only defendant, and had Aon's "break in the chain" argument succeeded, the claimants would have been left facing the prospect of a third major piece of litigation in which the defendants would not be bound by the outcome of earlier proceedings
- The multiparty action, with 3 sets of defendants (Aon; solicitors; counsel) travelled towards trial
- The lawyer defendants firmly denied the allegations of negligence against them
- One important issue was whether the Participating Employer Argument ("PEA") was well-founded as a matter of law; the lawyer defendants contended that it was not. This issue turned on a close analysis of the relevant provisions in the Scheme documents.
- The lawyer defendants relied on, among other things, the undeniable fact that Aon and its advisers had had ample opportunity to identify the PEA during the currency of the Part 8 Proceedings, but had not done so

Why was Aon able to challenge the outcome of the Part 8 proceedings?

- This is a question of some general importance
- At the time, it was not the practice to join allegedly negligent pension advisers to the 'remedial litigation' which seeks to rectify the position which has arisen as a result of the relevant error
- Here, the fact that Aon was not joined (or otherwise compelled to accept that it was bound by the outcome of the remedial litigation) meant that it was able to go behind the decision of Newey J., with the consequence that Gleeds and the trustees found that they were litigating various issues for a second time
- Aon could have been joined to the remedial litigation, either pursuant to CPR 19.8A, or simply as a party liable to pay damages
- The court could have been asked to make directions whose effect would be that Aon could participate in the argument as to the validity of the deeds, and would be bound by the outcome of that argument

Should allegedly negligent pensions advisers be joined to remedial litigation?

- It is suggested that in the future, and in the light of the lessons taught by the *Gleeds* case, this question must always be closely considered
- The principle established by *Aldi Stores Ltd v WSP Group plc* [2008] 1 W.L.R. 748 may be said to be relevant: a party to litigation who contemplates that in the future it may wish to bring a further claim relating to the subject matter of the litigation must raise that with the court
- Also: see Chancery Guide 29.92 and *Jackson & Powell* 11-323
- The answer to the question will depend on the facts of the case: where it is uncertain whether there is a good claim against the pensions adviser, that may militate against joinder. Costs implications will be important. There may be a concern that joinder will cause the employer to lose control of the conduct of the remedial litigation.
- That said, the case for joinder is cogent: it avoids burdensome and duplicative relitigation.

Issue (3): Quantifying claim by reference to earlier compromise

- The analysis of the claim against Aon was complicated by the fact that the liabilities had been fixed by means of a compromise, as opposed to a judgment of the court
- There is an interesting line of cases in this area, running from *Biggin v Permanite* [1951] 2 KB 31 to *Supershield v Siemens Building Technologies* [2009] EWHC 927
- Early reservations about allowing a claimant to found a claim on liabilities established by a compromise, without being required to prove that the liabilities would have existed without the compromise, have faded away
- The desirability of compromise, and the need to avoid deterring parties from settling their disputes, has led to a more pragmatic approach
- *Supershield* establishes the principle that it is sufficient for a claimant to prove that the compromise lay within the range of compromises that might reasonably have been made by a person in the claimant's position. Borrowing from the terminology used in valuation claims, it is sufficient to show that compromise is "*within the bracket*". The test is objective.

Issue (4): Quantifying the claim for costs as damages

- As tends to be the case, the cost of the Part 8 proceedings was high
- There were 4 sets of advisers: employer/2 rep-bens/trustees
- In the negligence proceedings, Aon argued that the costs (as damages) should be assessed on the standard basis
- The case law does not speak with one voice, but the more recent cases suggest that costs claimed as damages will normally be recoverable on the indemnity basis
- See: *Herrmann v Withers LLP* [2012] EWHC 1492

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