

# Remedies for defective exercises

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# Structure of Talk

- 1) Practical overview of considerations before the matter gets to Court.
- 2) Legal analysis – saving part of the amendment

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# Some potential issues

- Entity a party to a deed in two separate capacities but executed only once
- Witness attestation issues e.g. failure to witness or witness failing to sign
- Execution by majority of trustees, rather than by all
- Changes to a power of amendment clause

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# Advice on issues

Includes:

- 1) How the issues interlink
- 2) Do equitable principles help?
- 3) A capping deed
- 4) Maybe no invalidity issue on some aspects?
- 5) Explore obtaining further information
- 6) Drafting Part 8 issues. Could be before power exercised (*BBC* [2023] EWHC 1965 (Ch))

# Professional Negligence considerations

- Against adviser(s) responsible for the faulty deed and loss suffered as a result
- Consider limitation issues and standstills, or issue protective Part 7 Claim Form
- Detailed pre-action letters
- Mitigation by way of the Part 8

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# Appropriate parties to the Part 8

- Trustees. Usually Claimants and neutral. But technically possible for T to take a rep role:
  - *CMG v CGI* [2022] EWHC 2130
  - *Atos* [2023] Pens LR 6
  - *Mitchells & Butler* [2022] Pens LR 6
  - *Grolier International v Capital Cranfield* [2015] Pens LR 485, at [15] (in a compromise)
- Employer. Can be Claimants.
- Rep Ben to argue the opposing position.
- Issue based representation orders – CPR r.19.9(2).
- Input of previous professional as representative
  - See *Singapore Airlines v Buck* [2012] Pens LR 1



# Binding professionals to the Part 8

- In issue in *Briggs v Clay* [2019] EWHC 102 (Ch)
- Agreements to be bound
- Added as a Defendant party (*Shannan v Viavi Solutions UK Ltd* [2016] EWHC 1530)
- Bound under CPR r.19.13 (previously 19.8A)
- Share drafts prior to issue.

# Announcement to members

- Highlight issues raised and representation structure.
- Invite comments before Court hearing.

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# Compromises

- Pragmatic solution
- Often involves input from previous professional
- Needs to be Court sanctioned as representative parties involved (CPR r.19.9(5)).
- Court needs to be satisfied that for the benefit of all representative persons (r.19.9(6)). Usually requires a confidential opinion from counsel.

# Saving part of the amendment

- The principle:
  - (1) As a matter of construction – reading into the amendment the restriction in the Scheme’s amendment power so the amendment is only valid to the extent it did not infringe the implied restriction e.g. *Doyle v. Manchester Evening News* [1989] Pens LR 47.
  - (2) The doctrine of severance – enabling the excess and non-excessive exercise of the power to be severed, e.g. *Bestrustees PLC v. Stuart* [2001] Pens LR 283

# Saving part of the amendment

- *Wedgwood v Salt* [2018] EWHC 79 (Ch)
  - The answer is the same whether construction or severance.
  - But held that the *Hastings-Bass* requirement had to be complied with, without *Pitt v Holt* gloss (breach of fiduciary duty).
- Look out for *Newell Rubbermaid* decision of Mr Justice Michael Green.

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Thank you