

Surplus and winding-up:
How are familiar surplus and winding-
up issues playing out in a new context?

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What did Russell J. decide in *Lucas v. The Telegraph Construction and Maintenance Co. Ltd.* [1925] L.N. 211?

- Winding-up rule in *Lucas* provided that if, after benefits had been secured, Administrators determined that there was no beneficiary to whom they should give any assistance out of the Fund, they should apply to the court as to the manner and purposes for which they should apply the surplus
- Possible issue of construction as to whether a beneficiary would have been required to show financial need before being eligible?

What is the new context?

- Last time round winding-up was almost invariably triggered by employer insolvency
- Insolvency practitioners' *cri de coeur* –overfunding attributable to excess contributions made by employer
- See *Davis v. Richards & Wallington Industries Ltd.* [1991] 1 W.L.R. 1511 (*cf. Re Courage Group's Pension Schemes* [1987] 1 All E.R. 528)

The nature of a surplus

- Walton J. in *Re Imperial Foods Ltd. Pension Scheme* [1986] 1 W.L.R. 717:

"But what is called, in this connection, a surplus, having no existence in reality, represents, in a case of the present nature, what may be termed temporary surplus funding by the employing company."

- *Tolley's Pensions Law Service* at [G2A.2]:

"It is therefore ultimately questionable whether there can really be such a thing as a surplus in a continuing scheme"

- Lord Millett in *Wrightson Ltd. v. Fletcher Challenge* [2001] Pens. L.R. 207 at §28

"... the surplus is merely an actuarial valuation which may be falsified by events ..."

But:

- PA 95 s. 37
- Finance Act 1986
- *National Grid Co Plc v. Mayes* [2001] 1 W.L.R. 1614 Lord Hoffmann:

"A surplus is (by definition) money in excess of what is needed to effect the main purpose of the scheme."

Recent surplus cases

- *Mr. S., Water Companies PS – Bristol Water plc Section* CAS-92093-N4DP (August 2023)
- *Re abrdn (SLSPS) Pension Trustee Co Ltd.* [2024] Pens LR 2 (August 2023)
- *Mr. Y., CCHT Pension Fund Section* CAS-94719-B9L5 (November 2023)
- *KO UK Pension Trustees Ltd. v. Barker* [2026] Pens. L.R. 1 (July 2024)
- *The Littlewoods Pensions Scheme*, Determination notice C212251039 (February 2025)
- *Arcadia Group Pension Trust Ltd. v. Smith* [2025] Pens. L.R. 7 (February 2025)

Older surplus cases

- Who has power to deal with surplus?
- Ambiguity
- Surplus in commercial transactions
- Surplus extraction cases

Who has the power to deal with surplus?

- *Icarus (Hertford) Ltd. v. Driscoll* [1991] Pens. L.R. 1 (liquidation)
- *Mettoy Pension Trustees Ltd. v. Evans* [1990] 1 W.L.R. 1587 (receivership and liquidation) – hearing over 41 court days
- *Re William Makin & Son Ltd.* [1992] Pens. L.R. 177 (receivership and liquidation)

- Employer's power to deal with surplus was treated as being fiduciary (cf *Ashley Dawson-Damer v. Grampian Trust Company Ltd.* [2025] 1 W.L.R. 3530 - concept of breach of fiduciary duty "in a wide sense")
- Now generally accepted that *Imperial Group Pension Trust Ltd. v. Imperial Tobacco Ltd.* [1990] Pens. L.R. 263 implied duty of trust and confidence correct analysis
- *UC Rusal Alumina Jamaica Ltd. v. Miller* [2015] Pens. L.R. 15

- *Icarus* - Aldous J. held power nevertheless exercisable the liquidator acting in good faith
- *Mettoy* and *William Makin* held (i) an irreconcilable conflict of interest disabled liquidator from exercising power and (ii) it was not an asset caught by floating charge so not exercisable by receiver either
- Insolvency Act 1986 Schedule 4, “*necessary for winding up the company’s affairs and distributing its assets*”
- Stalemate – court intervened (*Mettoy*) or RBs directed to bring forward scheme for distribution (*William Makin*)

Ambiguity cases

- *Thrells Ltd. v. Lomas* [1993] 1 W.L.R. 456 - unambiguous language, typography and layout meant only deferreds could benefit from discretion to augment benefits
- *Independent Pension Trustee Ltd. v. Stevens* [2002] 37 PBLR - winding-up rule which provided that trustees had a discretion to use surplus “either” to augment benefits “or” to be paid to employers

“... it seems to me fairly obvious that what one would want to achieve with a surplus is reasonable flexibility for the trustees, and that it would be odd if they were faced with an “all or nothing” situation in which the surplus, however great, could only be applied in one of two ways.”

- *Stevens* accords with authority in re wills - “or” may be read as meaning “and”: *Bogg v. Raper* [1998] 1 I.T.E.L.R. 267
- Who is eligible?
- Compare *Bank of New Zealand Officers’ Provident Association v. Bank of New Zealand* [2003] O.P.L.R. 281 and *Scully v. Coley* [2009] UKPC 29

Commercial transaction cases

- *Re Imperial Foods Ltd. Pension Scheme* [1986] 1 W.L.R. 717

"... such portion of the fund as shall in all the circumstances appear to him to be appropriate at the time the subsidiary company ceases to be a subsidiary ..."

- *Stannard v. Fisons Pensions Trust Ltd.* [1991] Pens. L.R. 225
 - Contract June 1982 and transfer amount paid in December 1982 based financial position in April 1982 using the total reserve method, but improved position would have allowed past service reserve method
- *Wrightson Ltd. v. Fletcher Challenge Nominees Ltd.* [2001] Pens. L.R. 207 – trustees to allocate *"as is appropriate"* justified past service reserve rather than share of fund

Surplus extraction

- Notorious examples:
- *Re Courage Group's Pension Schemes* [1987] 1 All E.R. 528
- *Hillsdown Holdings Plc v. Pensions Ombudsman* [1997] 1 All E.R. 862

Some current issues

- Application of surplus
- Historic amendments to a scheme's winding-up rule
- Resulting trusts.
- Running on

Application of surplus

- Don't know what happened in *Mettoy* and *William Makin*
- *Thrells* - liquidator surrendered its discretion
- Sir Donald Nicholls V.-C. exercised judgment of Solomon by deciding how the surplus should be divided between members and, notionally, the employer, but in reality given that it was in liquidation, the employer's creditors
- Explained in his judgment the different factors he had taken into account, and none of them will come as any great surprise to you
- See also *Alexander Forbes Trustee Services Ltd. v. Halliwell* [2003] Pens. L.R. 269.

PO determinations in:

- *Mr. S., Water Companies PS – Bristol Water plc Section CAS-92093-N4DP* (August 2023, Arter) – entire surplus proposed to be returned to employer
- *Mr. Y., CCHT Pension Fund Section CAS-94719-B9L5* (November 2023, Harris) – surplus split 50:50

And:

- Equality is not equity, and trustees can prefer one class of members over another: *Edge v. Pensions Ombudsman* [2000] Ch. 602
- *KO UK Pension Trustees Ltd. and Arcadia* - blessing applications

Historic amendments

- *Mettoy* (again) – power to apply surplus moved from trustee (1969 TDR) to employer (1980 TDR)
- *Air Jamaica Ltd. v. Charlton* [1999] 1 W.L.R. 1399 – post-discontinuance amendment removing prohibition on use of surplus other than exclusively for members held to be invalid
- *Harwood-Smart v. Caws* [2000] Pens. L.R. 101 – Old Code restriction prohibiting payment to employer “*in any circumstances*” could not be removed

- *B.H.L.S.P.F. Pty. Ltd. v. Brashs Pty. Ltd.* [2001] V.S.C. 512 - proviso that no amendment shall
- *“detract from the benefits secured to a member by the contributions paid by him and by the Company in respect of him”*
- Provisos *“are or may be of benefit to members either directly or indirectly and are capable of being regarded as “benefits secured” within the meaning of the proviso”*

- Friendly nod in *HR Trustees Ltd. v. German* [2010] Pens. L.R. 23
- *cf Barclays Bank PLC v. Holmes* [2000] Pens. L.R. 339 and PA 95 s. 67
- *UEB Industries Ltd. v W. S. Brabant* [1991] Pens. L.R. 109 - right to participate in a winding up surplus part of the members' "interest in the fund" protected by fetter to amendment power

Resulting trusts

- *Re ABC Television P.S.* (1973) [1989] Pens. L.R. 21 – no RT due to proviso (no longer goodlaw)
- *Dan Jones v. Williams* [1989] 03 PBLR – RT where TDR is silent
- *Davis v. Richards & Wallington Industries Ltd.* [1991] 1 W.L.R. 1511
- *Air Jamaica Ltd. v. Charlton* [1999] 1 W.L.R. 1399 –
“No moneys which at any time have been contributed by the Company under the terms hereof shall in any circumstances be repayable to the Company”
- *Re abrdn (SLSPS) Pension Trustee Co Ltd.* [2024] Pens. L.R. 2

Deadlock?

- *The Littlewoods Pensions Scheme*, Determination notice C212251039 (February 2025)
 - Benefits had been fully bought out and augmented, employer refused to agree to further increases, but no power to pay surplus to employer and any such amendment prohibited
 - Size of scheme and amount of surplus <£10 per member, nor was adjustment of annuities possible
 - RT “*was likely to be a complex process*” possibly requiring court approval
 - Order made under PA95 s. 69(1)(b) authorising modification of scheme to permit return of surplus

Capital Cranfield Trust Corp. Ltd. v. Sagar [2002]
O.P.L.R. 151 – employer dissolved:

“Given that the principal employer is dissolved and, therefore, as a matter of law, does not exist, two alternatives are possible. The first is that the power ... is not exercisable. The second is that it can be exercised without the need for consent. It seems to me that those two alternatives only have to be put forward for one to see which of the two is correct, namely the latter.”

Running on

- tPR's "New models and options in defined benefit pensions schemes" (3 June 2025):

"There are potential benefits from running on the scheme. These include:

- *increasing the potential to provide additional discretionary benefits to members or having; control over member experience (including member option terms)*
- *using surplus to fund the employer's DC payments for other members*
- *paying surplus to the employer"*

- Important factors to consider may include the following:
 - “Where using surplus to fund the employer’s DC payments, ensuring there is adequate skills, knowledge and understanding to ensure the DC scheme is also well governed.”

Case law:

- *Kemble v. Hicks* [1999] Pens. L.R. 287
- *Barclays Bank PLC v. Holmes* [2000] Pens. L.R. 339
- *Mr. J.R. Watts-Morgan* [TPO, J00113 8 June 2001]

Merger becoming commonplace – but is there a possibility of a *Hillsdown*-type challenge?

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