



# Landmark legal cases

➤ ***Pensions Age* looks at some of the most important legal cases over the past year, and what effect these rulings may have for the pensions sector**

The past year has, in particular, seen a significant number of landmark High Court and Court of Appeal pension cases. As the rulings in these are likely to be of considerable practical interest for the UK pension industry, we have asked pensions lawyers to summarise some of these recent court cases, and the impact that they may have.

## **Virgin Media v NTL Pension Trustees II**

In *Virgin Media*, the Court of Appeal upheld the High Court's decision that a failure to obtain a 'section 37' actuarial confirmation in relation to an amendment to a salary related contracted-out scheme invalidated that

amendment in relation to both past and future service rights, even where the amendment improved such rights.

The court placed significant weight on what it considered to be the purpose and policy intent of the relevant regulations, prioritising this over what might be considered a more natural interpretation of the definition of 'section 9(2B) rights'.

It is widely accepted that this decision could have significant implications for schemes. Industry bodies have formed a working group that has requested that the Department for Work and Pensions (DWP) considers making regulations to "remove this uncertainty by validating retrospectively any amendment that is held to be void...".

It remains to be seen whether and when the government will act, although the change of government and then Pensions Ministers may be contributing to this delay. Meanwhile, trustees involved in de-risking projects and corporate transactions or facing pressure from their scheme sponsor and its auditors may need to investigate potential exposure, with some undertaking reviews of governing documents executed between 6 April 1997 to 5 April 2016 at varying levels of detail.

**DLA Piper partner, Matthew Swynnerton**

## **BBC v BBC Pension Trust**

The case of *BBC v BBC Pension Trust* was a Court of Appeal decision concerning a restriction in the BBC Pension Scheme amendment power. Following a High Court decision that the restriction protected changes to future service, the BBC appealed.

The restriction in question specifically applied to active members, and prevented alterations where their 'interests' were certified by the actuary to be affected,

unless the actuary could certify that the alteration did not substantially prejudice those interests. While the context for the case was the BBC considering options for reducing pensions costs, including the possibility of reducing or ceasing accrual, there was no specific amendment proposal before the court.

The Court of Appeal confirmed the decision of the High Court that 'interests' in this context included the ability of members to continue to accrue benefits on the same terms. The decision focused on the word 'interests' being a deliberately simple, broad and open-textured word that was not limited by reference to any particular cut-off date. The court also referred to the ability to continue accruing benefits on particular terms as being one of the most valuable interests an active member has, even if they have no enforceable legal right to continue in employment.

This decision will be of particular relevance to other schemes with amendment powers protecting members' 'interests'. However, it should be treated with some caution as the context in which the word is used is very important, and each amendment power needs to be considered on its own terms.

*Linklaters managing associate,  
Sarah Opie*

### **Ballard v Buzzard**

In this case, the High Court ruled that a defective scheme amendment where the trustee failed to sign the document in his correct capacity can be rectified. The trustees and the employer of the scheme brought proceedings to determine the validity of four amending documents. Two of the amendments were Scheme Amendment Authorities (SAAs) made in 2001 and 2005, which related to, among other things, pension increases. The third amendment was an SAA relating to the definition of final pensionable earnings. The fourth was a consolidating deed adopting new rules, made in 2006 (2006 Deed).

The scheme's amendment power required an amendment to be signed by all five of the trustees. The issue in respect of the SAAs arose because the signature blocks on the pro forma documents prepared by the administrator did not enable all five trustees to sign as trustees. Instead, they provided for four trustee signatures and one signature "for and on behalf of the principal employer". Therefore, although all five trustees did sign the SAAs, one of the trustees, Mr Beauchamp, signed on behalf of the Principal Employer, rather than in his capacity as trustee. The problem in relation to the 2006 Deed was that it failed to reflect the SAA made in 2005, which had purported to amend the annual pension increase provisions.

The court ordered rectification of the SAAs and the 2006 Deed. The judge accepted evidence from the chair of trustees that an error was made by the administrator in that there should have been five signature blocks for trustees in the SAAs, in addition to the block for the Principal Employer, and that Mr Beauchamp would have considered that he had signed the document in the manner required. In relation to the 2006 Deed, it was the judge's view that it was clear from the undisputed witness evidence and the contemporaneous evidence that the intention of the 2006 Deed was to consolidate the existing amendments and to ensure conformity with changes in law. The judge considered that the failure of the 2006 Deed to reflect the 2005 SAA had been a mistake.

The judge concluded by noting that the defects in the execution of the SAAs and the 2006 Deed amounted to a cautionary tale that will be taken to heart by pension trustees and their advisers.  
*DLA Piper partner, Matthew Swynerton*

**Newell Trustees v Newell Rubbermaid UK Services**  
*Newell Trustees Ltd v Newell*

*Rubbermaid UK Services* related to a conversion of certain members' final salary benefits to money purchase benefits in 1992. At the time, a proviso to the amendment power prevented amendments that 'would prejudice or impair the benefits accrued in respect of membership up to that time'. Significantly, the evidence in the case was that some members were better off as a result of the conversion than they would have been if they had remained entitled to final salary benefits.

In relation to the central issue in the case, the judge decided that the conversion was not prevented by the proviso to the amendment power, because at the time of the change it was not certain that prejudice 'would' be suffered. It was not sufficient to say that it 'would probably' happen. The judge also decided that it was the value of the benefits that were protected, not their form.

A related point was whether the proviso meant that a final salary link had to be maintained. The judge acknowledged the force of points made by the employer in disputing this, but decided that the final salary link was too well-established at first instance. As a result, an underpin applied with the values at the point of conversion being recalculated as if the final salary link had been maintained.

The case also considered points on age discrimination and missing documentation, but it is the points on the amendment power that are likely to be of wider interest to other schemes. This is particularly where schemes have amendment power restrictions based on changes which 'would', rather than 'might', be detrimental.

*Linklaters managing associate,  
Sarah Opie*

### **Arcadia Group Pension Trust v Smith**

In this case, the High Court permitted an amendment to the rules of a defined



benefit pension scheme that enabled a surplus in one scheme to be used to cross-subsidise another scheme that is in deficit.

The case concerned two pension schemes operated for employees or former employees in the now insolvent Arcadia Group. Historically, both schemes had in various respects been operated in tandem as 'sister schemes'. They shared the same principal employer, adopted a joint approach to funding and negotiated one aggregate pension contribution with the employer, which was apportioned between the schemes to achieve funding parity.

The position was reached in which one scheme was in surplus but the other in deficit. This funding disparity was never intended. The court ruled that the trustee of one scheme (the Staff Scheme) would be acting properly in amending its rules to permit the merger of another scheme (the Executive Scheme) into it. Although this would improve the benefits of Executive Scheme members and dilute

any surplus available for Staff Scheme members, the latter members would still receive their full benefits. The court ruled that the employer of both schemes was in liquidation and that the schemes were being wound up did not impose an implied fetter on the power to amend the Staff Scheme rules.

Pension scheme surpluses are now back. However, traditional problems remain, including how to access surpluses that can be trapped. This practical and sensible decision, which enabled an efficient use to be made of a surplus in a scheme, is likely to be of interest and use to trustees and employers alike.

**Gowling WLG UK partner and head of pension disputes, Ian Gordon**

#### **Avon Cosmetics v Dalriada Trustees**

In *Avon Cosmetics v Dalriada Trustees*, the court had to decide issues relating to severance following the closure of the scheme to future accrual and introduction of a career average revalued

earnings (CARE) benefits for future service. This broke the final salary link, but while this was detrimental for some members (the FS Winners), others were better off following the change (the Revaluation Winners).

Following a compromise relating to the FS Winners, the court was asked to decide whether invalidity for FS Winners meant the amendment was invalid in its entirety, or whether it could be saved for the Revaluation Winners.

The court's decision was that where the exercise of the power could be conceptually separated into an invalid and a valid exercise, then the valid part could be saved. However, it also needed to be established that the invalid part was only incidental to the valid part, and so it would not result in a substantially different exercise of the power. This could be determined from the context and amending document itself. As the judge considered the substantial purpose in this case was to remove the final salary link and change to CARE benefits, he decided that the change only being valid for Revaluation Winners was still within the overall objective intention.

This represents an interesting development in the application of severance to 'save' part of an amendment where part is invalid, but leaves the law in a state of uncertainty given the potential inconsistency with other cases on similar issues. In this case it meant that members got the 'best of both worlds', despite the original purpose of the change being to reduce costs.

**Linklaters managing associate, Sarah Opie**

#### **Manolette Partners v White**

In a unanimous judgment, the Court of Appeal overturned the decision of the High Court that a member's pension can be accessed to satisfy debts owed. Mr White was the owner and controller of the company and the sole member of an occupational pension scheme established for his benefit (the scheme).

The company went into liquidation in 2017. The unpaid claims of creditors were in excess of £3 million. In 2020, Manolete (the litigation funder) took an assignment from the liquidators of claims that Mr White had breached his fiduciary duties to the company by causing it to make a series of substantial payments in the run up to the administration. In 2022, Manolete obtained a judgment against Mr White for £1 million, which it sought to enforce. Mr White did not and still has not paid any part of the judgment debt.

The High Court case was concerned with whether Mr White's rights in his scheme could be accessed to pay the amounts owed. Following the court decisions in *Bacci v Green* and *Lindsay v O'Loughnane*, the court held that it was within its power to grant an injunction requiring Mr White to exercise his rights under the scheme to draw down his pension in order that he satisfy his judgment debt (the Order). Mr White appealed on the grounds that the effect of the Order was that he would not receive his pension from the scheme; rather it would be used to discharge the judgment debt and that this is prohibited by section 91(2) of the Pensions Act 1995. Mr White contended that, in making the Order, the judge had adopted an artificial approach that was contrary to the clear meaning and statutory purpose of sections 91(1) and (2) i.e. that entitlements and rights to future benefits under occupational pension schemes should be immune from the claims of creditors.

The Court of Appeal agreed, noting that section 91(2) is drafted in terms that prohibit the making of an order "the effect of which" would be that a member would be restrained from receiving their pension. Furthermore, the judge noted the public policy intention behind section 91, which is a general prohibition on creditors having access to entitlements and rights to future pensions from occupational pension schemes. For those reasons, among others, the judge

considered that the Order was prohibited by section 91(2) and that Mr White's appeal should be allowed.

The judge acknowledged that the underlying merits of the case were not on Mr White's side and that many small creditors' claims remained unsatisfied. Nonetheless, the judge was of the view that, where occupational pension schemes are concerned, the courts must give effect to the statutory regime.

**DLA Piper partner, Matthew Swynerton**

### The Pensions Trust

In one of the longest pension trials ever heard, the High Court is considering a vast number of issues concerning the validity of aspects of the legal documentation governing The Pensions Trust.

Amongst others, the court will consider a number of 'section 37 issues' unresolved by *Virgin Media*. Such issues including whether a rule amendment to close a DB contracted-out scheme to future accrual needed an actuarial confirmation (it is widely thought no such confirmation was needed) and whether an actuarial recertification in a valuation after an intended rule alteration had been made had the effect of validating that amendment, either from the date of the recertification or the date of the amendment itself.

The industry is holding its breath as

to whether some of the consequences of *Virgin Media* will be alleviated by a more practical judicial approach in The Pensions Trust case.

Given the number of issues the court is having to consider, it is likely to be into the autumn (if not later) that judgment is available. It will be awaited with great interest.

**Gowling WLG UK partner and head of pension disputes, Ian Gordon**

### Final thoughts

As Gowling WLG UK partner and head of pension disputes, Ian Gordon, notes, the past 12 months have seen an unusually high number of significant High Court and Court of Appeal pension cases.

"Unlike in the Court of Appeal, there are currently no High Court judges who specialised in pensions law when they were in practice. This means it is more difficult than ever to predict what the outcome of pensions cases will be," he says.

"In a number of the cases that have come before the High Court in the past 12 months, judges have taken a pragmatic, practical and realistic approach to the issues that have come before them, including on the availability of pension scheme documentation created decades ago. Such an approach is welcome and it is to be hoped will continue."

