

## **Actuaries' Liabilities**

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### **(1) Extent of the duty of care**

#### ***Who is the client?***

It is tempting to think that the only person to whom a professional adviser owes legal obligations is his client, with whom he has contracted and by whom he is paid. In the case of a pensions actuary, this would often be wrong.

In addition to the appointment of an individual actuary as scheme actuary<sup>1</sup>, it is common for a firm of actuaries to be retained by the trustees of a pension scheme to provide a range of advice and services going beyond those which the scheme actuary is required to perform. Hence, usually, the actuary's clients are the trustees.

Yet, in a conventional defined benefit scheme (which is where the actuary's role is most significant), the financial effect of the actuary's advice is ultimately felt by the company or companies which sponsor the scheme. Although the immediate consequence of a particular decision by the actuary (or more probably a decision of the trustees in reliance on advice provided by the actuary) may be a change in the value of the assets or liabilities (and hence the overall funding level) of the scheme itself, it is ultimately the sponsoring companies who have to fund the scheme and therefore who have to make up any shortfall or who (often, but not invariably) stand to benefit from any improvement in scheme funding – most typically by means of an increase or a reduction in their payments to the scheme.

So the employer is very much affected, and foreseeably so, by the actuary's actions in providing advice and services to the trustees. Accordingly, it is generally accepted that the actuary will owe duties of care (in tort) to the sponsoring employers as well as the duties he owes to his client trustees.

Often, of course, the firm will also provide some advice directly to the company in relation to certain matters of scheme administration or strategic planning. This can result in difficult problems of conflicts of interest, which need to be closely monitored to ensure that the actuary's position as adviser to the trustees is not compromised, particularly in the case of the individual appointed scheme actuary.

As if one additional avenue of liability were not enough, it is also possible that, in some circumstances, the actuary may owe direct duties of care to individual scheme members. This will be less common, but it is not impossible. There may be

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<sup>1</sup> See section 47 Pensions Act 1995

situations where the actuary has provided information to the member, for example benefit calculations, on which the member has relied, for example in deciding whether to accept an offer of voluntary redundancy and early retirement. If that benefit calculation is wrong (suppose the level of benefits was negligently overstated), neither the trustees (representing the scheme) nor the employer suffers any loss – the correct level of benefits will be paid and funded. But the member may well feel aggrieved that he is receiving less than he had been led to believe and may have a claim for negligent mis-statement against the actuary.

So, although it remains the case that the primary duties and potential liabilities arise out of the service agreement with the client, this is not the whole story and actuaries (and those insuring them, as well as those accountancy firms providing actuarial services) need to be aware of the potential for claims from many angles.

### *Overlapping duties*

A particularly fruitful area for litigation is the overlap between the duties of one pension professional and another. The scope for blaming someone else is considerable.

Disputes of this sort tend to arise in one of two situations. The first is where more than one person has had a hand in something and it is later alleged to have gone wrong. The second is where no-one took action and it is later alleged that someone should have done. Both can be very destructive of hitherto good working relationships with the other professionals involved with a scheme.

A common source of conflict is between lawyers (usually solicitors, since they tend to be at the sharp end, whereas barristers generally wait until there is blood on the carpet (i.e. it is too late) before getting involved). This often relates to the drafting of scheme documents or compliance with legislation. Sometimes it is unclear who should have drafted something or given advice that action needed to be taken to comply with legislation. Sometimes it is clear that the drafting has not achieved the intended result but unclear whose fault this is. Another problem is where advice has been given and documents drafted but the result which was intended and achieved is not compliant with the legislation.

Another area of overlap, outside the pensions context, is between auditors (or sometimes the auditors in-house actuarial department) and external actuaries in relation to the valuation of future claims liabilities for insurance business. Sometimes it is not clear who is assuming responsibility for the accuracy of the advice regarding the valuation of these liabilities and whether it is appropriate for the auditors to rely on external advice as being accurate rather than doing the work themselves.

Actuaries, particularly the larger firms and those with an associated consultancy business, frequently provide a range of services going beyond the purely actuarial. Yet there is often a lawyer lurking in the background somewhere too. Trustees have a tendency to “run things past” most if not all of their advisers before implementing any change. This is of course very wise, as it not only increases the chances of mistakes or oversights being corrected before it is too late, but also

increases the chances of finding someone against whom a successful claim could be made at a later date if and when it all goes wrong.

Sometimes, the lines of demarcation between one professional's sphere of responsibility and another's are clear. But not always. A common scenario is where the actuarial firm's service agreement includes terms offering to advise on benefit design and provide document drafting services, the firm provides advice about a change to the benefit structure and produces a first draft of a rule amendment intended to implement such a change, and the trustees then involve the solicitors, asking them to review the drafting. It might be that the proposed change is unlawful and/or that the deed of amendment is ineffective to achieve the intended result. Cue heated debate.

More subtle problems can arise in relation to specific issues, such as whether a proposed amendment is precluded by the statutory restriction on the exercise of amendment powers<sup>2</sup>. Whether this statutory restriction is triggered often involves very complex questions which may be actuarial, legal or (most often) a combination of the two. It is ultimately the trustees and/or employer (depending on who is exercising the amendment power and what it is supposed to achieve) who need to know whether the amendment can be validly made. But if the section is triggered, the actuary often assumes a central role in complying with its terms, as he may be asked to provide a certificate regarding the effect of the amendment on members' benefits<sup>3</sup>. Actuaries, in my experience, are often insufficiently alive to the possibility that there are prior legal issues which need to be addressed before they can begin crunching numbers and calculating the effect on benefits. In the past, they have been surprisingly willing to "take a view" on section 67 issues in circumstances where it is highly doubtful that they have addressed all the underlying issues and questionable whether they have the expertise to do so, where those issues are questions of law.

A further common area of overlap between pension professionals is between the actuary and the investment adviser. Here, it is usually possible to draw one fairly clear distinction. It is usually the fund manager's job to select particular investments. While stock selection can no doubt cause its own problems in unhappy times, it is not this feature of investment advice which generally involves the actuary. Rather it is the strategic investment decisions regarding risk allocation, portfolio structuring, matching assets to the scheme's liability profile and such like. Under the (relatively) new statutory funding regime ("scheme specific funding"<sup>4</sup>), ultimate responsibility for the scheme's investment strategy lies with the trustees. But they are required to obtain advice from the scheme actuary in relation to the central issues affecting scheme funding<sup>5</sup>. So the actuary has a central role in advising the trustees in relation to their investment strategy. But it is common for trustees to have specialist investment advisers advising on investment strategy, as well as the appointed scheme actuary, whose main functions relate to valuation of assets and liabilities and hence advising on the necessary contributions to fund the benefits. Where an allegation of negligent investment advice is made (for example, failing to respond to a change in the strength of the employer's covenant or a material event in the life of the scheme by de-risking

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<sup>2</sup> See s. 67ff Pensions Act 1995

<sup>3</sup> The "actuarial equivalence statement": see s. 67(2) and s. 67C-D PA 95

<sup>4</sup> See Part 3 of the Pensions Act 2004

<sup>5</sup> Ie calculating the technical provisions, preparing the statement of funding principles, schedule of contributions and any recovery plan: see s. 230 PA 04

the assets) it can often be difficult to decide which of the actuary and the investment advisers should have provided advice to the trustees about the need to revisit their investment strategy in response to the changed circumstances.

### ***Terms of the retainer***

In any claim against the actuary by the client trustees, a key document will be the service agreement. This will be the primary source of contractual obligations and hence a reference point for establishing what duties are owed to the client.

It still surprises me how often there is no comprehensive and up to date contract in place. Often the relationship with the client is long-standing and traces its origin back to a very brief and bland letter of engagement, which does not really make clear what functions fall within the actuary's remit. This is now changing, with increasingly detailed service agreements, which is definitely a step in the right direction as far as limiting the actuaries' liability is concerned. Ignoring questions of financial limits on the actuary's liability which may be imposed under such contracts (the subject of an altogether different talk – considerable care is needed especially in regard to the level at which the limit is set), detailed service agreements can fulfil a very useful function in identifying which services the actuary is agreeing to provide and which he is not.

This can be particularly important in relation to an alleged duty proactively to monitor the circumstances of the scheme and provide unsolicited advice to the trustees, effectively alerting them to things they need to consider doing. Non-professional trustees can be inclined to rely on their professional advisers not only to provide good advice but also to tell them when they need that good advice (and then tell them what to do in response to the advice). Sometimes, indeed often, this is unfair as the actuary has not agreed to adopt any such proactive role and is not on a general retainer, but has only agreed to provide actuarial advice on specific points referred to him, to be charged on a time-spent basis. This argument is much easier to run if the contract makes the point clear.

### ***Going beyond the retainer***

It is not uncommon to find professional advisers straying beyond the strict confines of the matters covered in their service agreement and providing advice, or appearing to do so, in relation to wider issues when their views on those matters are sought (or even sometimes when they are not). This is not a problem confined to actuaries and all professionals would be well advised to stick to what they profess to know about rather than offering opinions outside their sphere of expertise.

If the temptation is succumbed to, the consequences will be that the adviser's conduct will be judged by reference to the standards applicable to the professional with expertise in the area into which he has trespassed. Hence an actuary drafting formal deeds of amendment will be expected to do so to the same standard of competence of a pensions lawyer. Similarly, if the actuary takes it upon himself to advise on the legal entitlement of members, before then going on to value the scheme's liabilities, he will again be judged by reference to the standard to be

expected of lawyers. The important point to note here is that this will be the case irrespective of what the service agreement says. It is not unusual to find that an actuary's service agreement expressly states that no legal advice can or will be provided and the trustees must seek separate advice from lawyers in relation to matters of law. As discussed above, this can be effective to determine whether the actuary should have advised the trustees about a particular legal issue which arose in relation to the scheme. But if, despite this apparent limitation of the scope of his services in the service agreement, the actuary does in fact provide what amounts to legal advice or services, for example drafting a rule amendment or advising on the validity of a past rule amendment, the limitation in the contract will not offer any defence to an allegation that he has acted negligently, if that advice is later found to be defective.

### ***Particular areas of concern***

Areas which give rise to problems and disputes about the extent of the actuary's duties of care, in my experience, include:

- drafting of formal scheme documents
- making amendments to the scheme – compliance with the necessary formalities
- equalisation of benefits
- alterations to the rates of escalation and revaluation
- investment strategy
- reliance on information or interpretation of data provided by the client

## **(2) The impact of legislation**

As with every other aspect of pension scheme governance and administration, legislation plays an increasingly important role. This is, in my view, a consequence of the increasing social and economic importance of pensions, particularly in view of increasing longevity, and the resulting political pressure to intervene and legislate and regulate.

Some aspects of this are undoubtedly beneficial. The increasing emphasis on the need for trustees to understand their role and equip themselves to fulfil it is in my view the most significant improvement in recent years – though it brings with it its own difficulties regarding recruitment to that role. Also, the introduction of a new regulator with new powers and a new role is, in my view, an improved safeguard in terms of benefit security.

Legislation has also had a significant effect on the role of the pensions actuary. From being very much a back room role, providing technical and strategic advice to both trustees and employers, the actuary (or at least the appointed individual scheme actuary) now plays a central and to some extent independent role in the life of any scheme. The relationship between the scheme actuary and the trustees and sponsoring employer is therefore crucial to the successful management of the scheme.

A particular example of this is the actuary's role in relation to valuations and scheme funding. Here, the actuary's role has changed somewhat since the 1995 Act. Whereas under the MFR regime which applied under the 1995 Act most valuation questions were ultimately matters for the scheme actuary to determine, under the new scheme specific funding regime, it is the trustees who actually have to determine the key principles to be applied to questions of funding, albeit they must take the advice of the actuary before doing so. So the actuary's role (in this context) has reverted to that of an expert adviser, but one whom legislation requires the trustees to consult.

In reality, the advice of the actuary will still be key, since there will not be many trustees who will be sufficiently self-confident to set the technical provisions at a level significantly different from that advised by the scheme actuary. But the responsibility has undoubtedly shifted back to the trustees.

There are of course still plenty of other functions which the scheme actuary is required by legislation to perform and where a failure to perform properly could give rise to claims. The most obvious and probably the most important is carrying out the regular scheme valuations, which will determine the level of funding required in the future. Certifying the effect of proposed scheme amendments on benefits is another function already touched on above<sup>6</sup>. Another relates to the ability of trustees to reduce transfer payments where the scheme is in substantial deficit<sup>7</sup>. Similarly, where it is desired to make transfers without member consent, the actuary assumes a central role: he is required to provide a "no less favourable" certificate before such a transfer can be made<sup>8</sup>.

One major role given to the actuary by statute is the calculation of the statutory debt which arises when the scheme winds-up, or on employer insolvency or on cessation of participation<sup>9</sup>. This topic will re-appear below, but the short point for present purposes is that statute gives the task of calculating and certifying the amount of this debt to the actuary: the trustees simply enforce it. In current climate, this is a very significant event in scheme's life and the risk or threat of this debt arising can drive employer's entire pension strategy.

The legislation tends to operate by requiring the trustees to get the scheme actuary to do certain things, rather than imposing a statutory directly on the actuary with the possibility of a claim for breach of statutory duty if the actuary does not do it. The impact of legislation is not so much to create an additional source of actionable duties as to impose a series of tasks, any one of which could result in a claim if it is performed negligently. The statute therefore gives content to the common law duties, rather than creating new causes of action.

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<sup>6</sup> See the "actuarial equivalence" test and the requirement for an actuarial equivalence statement: s. 67C PA 95; see also GN 51 in this regard

<sup>7</sup> This requires an "insufficiency report" to be prepared by the scheme actuary before TVs can be reduced: see the Occupational Pension Schemes (Transfer Values) Regulations 1996, as amended, Reg 7D and Schedules 1A and 1B

<sup>8</sup> See regulation 12(3) of the Occupational Pension Schemes (Preservation of Benefit) Regulations 1991 and GN 16

<sup>9</sup> This is an over-simplification of the triggering events: see s. 75 PA 95 and the Employer Debt Regulations 2005 for the full picture.

### **(3) Professional Guidance**

Since the Morris review in 2005, technical actuarial standards are now set by the Board for Actuarial Standards (BAS), which is part of the Financial Reporting Council (FRC) and therefore independent of the profession itself. Ethical standards remain the responsibility of the profession and are set by the Faculty and Institute of Actuaries.

The BAS has not yet set any technical standards of its own; it has simply adopted the existing guidance notes (GNs) previously published by the Faculty and Institute. It has, however, published a conceptual framework for its new technical actuarial standards, classifying them and explaining how they are to be followed and enforced<sup>10</sup>.

The relationship between professional requirements or guidance such as this and the test for negligence is a fluid one. Breach of professional guidance or a professional standard is a ground for disciplinary action, but not necessarily proof of negligence. However, it is at least strongly suggestive of negligence. In my view, technical standards are likely to be very influential in determining negligence, as they offer a very useful benchmark for an otherwise possibly bewildered judge. Certainly, if the professional guidance applies and had not been followed, the actuary is very firmly on the back foot when defending a negligence claim.

It is rare for there to be any express statutory (or other) requirement to apply or follow the professional guidance. Normally the statute says that the trustees must, if they are to have power to do something, obtain an opinion or certificate from the actuary to a particular effect. The guidance exists to assist the actuary when providing that opinion or certificate. However, sometimes the actuary is expressly required to have regard to the guidance. An example of this is in relation to scheme funding: the Act requires the trustees to obtain (and, presumably, consider) the advice of the scheme actuary before doing certain things which they are required to do: see section 230. The regulations then make clear that, when giving that advice, the actuary must have regard to the relevant guidance note<sup>11</sup>. Hence a failure to follow GN 49<sup>12</sup> would be a failure to comply with the statute and hence (almost certainly) negligent, even though not giving rise to any separate claim for breach of statutory duty.

The simple message here is that actuaries need to be (and in my experience generally are) fully informed about what legislation and professional guidance requires of them in any given context. It is not sufficient to deal only with the client's concerns and respond to the client's requests: more may well be needed.

The tasks required of the scheme actuary often call for the exercise of independent professional judgment – that is the whole point of having an appointed qualified scheme actuary with responsibility for key matters in relation to the scheme. This can be a source of tension between the actuary and his client trustees or, more

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<sup>10</sup> Available on the BAS website at:  
[http://www.frc.org.uk/documents/pagemanager/bas/Conceptual\\_framework/BAS%20Conceptual%20Framework.pdf](http://www.frc.org.uk/documents/pagemanager/bas/Conceptual_framework/BAS%20Conceptual%20Framework.pdf)

<sup>11</sup> GN 49: see regulation 15 of the Scheme Funding Regulations 2005

<sup>12</sup> Eg by failing to request up to date information about the scheme and the employer

frequently, the employer. Pressure can be brought to bear on the scheme actuary to adopt an approach which is closer to what the trustees or employer wish to see than that which the actuary may initially have indicated. In relation to some issues, such as financial assumptions regarding future inflation, salary growth, interest rates, and the assumptions regarding future investment returns which are linked to these base assumptions, there is often scope for considerable differences of opinion within the profession. The same is true, albeit to a lesser extent, in relation to non-financial assumptions such as mortality and other demographic assumptions relevant to the scheme. Some actuarial firms develop a reputation for being more conservative in their assumptions than others. This can lead to separate actuarial advice being obtained (usually by the employer) and shown to the scheme actuary in an attempt to influence the actuary's opinions and hence the advice given to the trustees. There is of course nothing wrong with this, but the scheme actuary needs to be clear that his role is to exercise his own professional judgment, not deliver the result which the client seeks. While both trustees and actuary should share the same objective of protecting the security of scheme benefits, the dynamic between the trustees and the scheme actuary is such that it permits the scheme actuary to adopt a disinterested, independent role, providing expert advice to the trustees and it is the trustees who then have to decide what to do in the light of this advice. This is a sensible structure and should enable the actuary to feel free to provide best advice, rather than feeling under pressure to modify that advice to suit the perceived need of the clients: it is for the trustees to depart from the actuary's recommendations if they think fit and the fact that they have that freedom should enable the actuary to give truly independent advice to them.

#### **(4) An expert or a mere adviser?**

Obviously, pensions actuaries are very expert at what they do. The question here is whether their conduct, when challenged, falls to be examined as that of an expert or a "mere" professional adviser. The difference can be of considerable importance when deciding whether the actuary's decision is susceptible to challenge, but not, I suggest, as regards potential liability in negligence.

Summarising considerably, an expert's decision cannot usually be challenged (absent fraud etc) unless it is possible to show that the expert has failed to follow his instructions and has, in essence, not performed the task required of him. Even if the decision can be shown to be mistaken, it will be binding. However, the expert may be liable in negligence for making a mistake in arriving at his conclusion<sup>13</sup>.

This approach has been adopted in the pensions context relation to the certification of a statutory debt by a scheme actuary: see *Cornwell v Newhaven Port and Properties* [2005] PLR 329 and *Gleave v PPF* [2008] EWHC 1099 Ch. There is still considerable scope for argument in any particular context about the extent to which the actuary's certificate is conclusive and what needs to be proved to render it susceptible to challenge. That is material for another talk<sup>14</sup>.

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<sup>13</sup> See *Jones v Sherwood Computer Services Ltd* [1992] 1 WLR 277

<sup>14</sup> Those interested in the topic are referred to the very helpful analysis provided by Michael Furness QC in his talk at the annual conference of the Association of Pension Lawyers in 2007: "Challenging and Actuary's certificate: *Cornwell v Newhaven* revisited"

There are some circumstances where the scheme actuary is required to give a certificate – scheme amendments (s. 67 PA 95), bulk transfers without consent (regulation 12(3) of the Preservation Regulations and GN16) and statutory debts on winding up or cessation events (s.75 PA 95) are the most obvious examples. In those situations, it is suggested that, once a certificate has been given, it is binding unless and until it can be set aside and the correct approach is that the actuary is to be treated as an expert and the certificate can only be set aside on the narrow ground that he has not performed the correct task, rather than if he has made a mistake in carrying out that task.

By contrast, most situations where the actuary is involved require the actuary to provide advice to the trustees, on which they are then required to act. Although that is undoubtedly expert advice, there is no sense in which the actuary's advice is binding or not susceptible to challenge. The relevant decision is that of the trustees. If it is possible to show that the advice they received was flawed, it may be possible to set aside their decision on the grounds that it was improperly reached and in that sense mistaken, as they took into account matters which they ought not to have done (the incorrect advice) and, had they been properly advised, they would not have acted as they did<sup>15</sup>. But it is the trustees' decision which is operative, not that of the actuary.

In both cases, however, the actuary will in principle be vulnerable to a claim in negligence if he has made mistakes in providing the certificate or advice: see *Jones and Cornwell*. If it can be shown that the actuary's negligence has caused the trustees to act in a way which they would not have done had the advice not been negligent, the actuary will be exposed to a possible claim.

The much more difficult issue here is what degree of latitude the actuary will be afforded in stating his opinion and performing his calculations. Where the task required is one which requires the exercise of professional judgment and then the stating of an opinion, it is to be expected that the actuary will only be held negligent if his opinion is one which no reasonably competent actuary could have formed. The test is by reference to the range of opinion in the profession. It will not be enough to show merely that another actuary considers the opinion to be in some sense "wrong". In matters of expert judgment, the actuary will be given considerable latitude.

The position is a lot less clear where the actuary has made an error which is not one of judgment but of calculation or implementation of his chosen methodology. On the current state of the law, it is unclear whether it is sufficient to establish liability that a careless error has been made which has had a material consequence, resulting in loss. If the resulting advice or figure quoted is, despite the error, still within the range of outcomes which could have been stated by a reasonably competent actuary in comparable circumstances, there is some authority that the actuary will not be liable. Those involved with claims against surveyors and auditors will recognise the argument, often known as the "bracket" defence. According to this argument, the defendant is only liable if his result falls outside the range or "bracket" of reasonable results and it is irrelevant that he has made mistakes in stating his result: if it is in the bracket, he is not liable.

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<sup>15</sup> See *Re Hastings-Bass* [1975] Ch 25 and the many cases following, applying and criticising it since then.

In the context of actuarial valuations, this is a decidedly thorny issue and there is no easy answer, mainly because there is no directly relevant or comparable English authority on the point<sup>16</sup>. This is a difficult area and one which is likely to be developed further as more cases arise. Certainly, there seems something odd about applying a range of reasonable values approach to tasks which are not matters of expert judgment, but purely mechanical implementation: it is doubtful that this is what the bracket defence was intended to apply to, but it apparently does in other fields.

### **(5) Problems quantifying loss**

The first issue in any analysis of loss is always to identify the person who has suffered the loss and who is therefore the correct claimant in any action. This can be a trap for the unwary or a delight for the hard-pressed defendant. Sometimes the loss is one for which the trustees can sue, acting on behalf of members of the scheme whose benefits have been adversely affected. More often (at least in an ongoing scheme with a solvent employer) it is the employer who has suffered the loss in the form of increased contribution obligations. Occasionally, corporate transactions since the events giving rise to the claim can raise issues about the need for an assignment of the claim against the actuary, since the person now bearing the loss was not owed a duty by the actuary at the time when the events concerned occurred.

The answers to these issues depend on the context and it is sufficient for present purposes simply to note this as an important point to be addressed in analysing any claim.

Two other issues deserve a mention in this context. They both concern the method for calculating damages.

The first is the date at which damages should be assessed. Again, it is not possible to lay down any universal rule here, but the “breach date rule” by which damages are assessed at the date when the breach of duty occurred and interest is added to revalue to the present date, is often inappropriate in a pensions claim. This is because of the ongoing nature of the fund and the constant state of flux when attempting to identify the financial cost of any event affecting the scheme. This is due to both market movements in the cost of meeting liabilities and the value of assets and also constantly changing demographics in the membership of the scheme. A calculation of the financial effect of any breach of duty as at the date when it occurred is therefore very likely to have been affected, in either direction, by the date of trial.

Subject to the particular liability which needs to be valued, it is suggested that a date as close to trial or settlement as possible is usually the fairest valuation date.

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<sup>16</sup> Those interested are referred to the discussion of this point in *Professional Negligence*, ed Simpson, chapter 19, and invited to contact the editors of that chapter with any insights they might have.

The second point is a more technical one. It concerns the actuarial basis of valuation of any claim. Most claims arise because the actuary's negligence has, in one way or another, resulted in higher scheme liabilities with the result either that the employer(s) have an increased funding burden or (eg if the scheme is winding up) the available scheme assets have to be spread more thinly. In a case of this type, one issue is the basis for valuing the increased liabilities: should they be valued on the same basis as the scheme's current liabilities are valued for ongoing funding purposes (ie the "technical provisions" basis used to calculate the contributions required to fund the scheme on a long-term basis) or the "buy-out basis" (i.e. assuming the immediate purchase of immediate and deferred annuities to secure the liabilities) or something in between? Again, there is no obviously right answer, but I suggest that the question is best addressed by reference to two things.

First, the likely future conduct of the scheme. If the scheme is already in winding-up or it is likely to enter winding-up in the near future, a buy-out basis of valuation is more appropriate than if the scheme is expected to remain ongoing for years to come. On a winding-up, the trustees will be required to secure liabilities by the purchase of appropriate contracts of insurance. The buy-out basis will therefore mirror scheme experience and the use of any less conservative valuation basis risks leaving the scheme under-compensated. By contrast, if the scheme is not expected to wind-up imminently and damages are paid on a buy-out basis, there is a chance that this will result in over-compensation for the scheme (and hence the employer(s)). Unless the trustees do actually purchase buy-out policies with the damages they receive<sup>17</sup>, there is a chance, indeed in normal events a strong likelihood, that the damages received, when combined with investment return and perhaps scheme experience, will generate a sum in excess of that required to meet the liabilities as they fall due from the scheme. This might suggest that the buy-out basis of assessing damages is overly generous to the scheme and a method resulting in a lower payment should be used, at least where the scheme is not expected to wind up imminently.

The second relevant consideration is risk. Anything short of the cost of actually purchasing insurance contracts to secure the additional liabilities will involve an element of risk to the scheme (and therefore the employer(s)) that the damages will ultimately prove insufficient, when combined with investment return over the period until payment, to meet the additional liabilities. I suggest that this factor is likely to weigh heavily with the court required to assess damages. In a contest between the loss-suffering claimant and the negligent defendant regarding who should bear the risk that damages might result in over or under-compensation, it seems to me likely that the court would err in favour of the claimant on the basis that it is unreasonable to expect it to bear any significant risk that the damages will not fully compensate it for its loss. It is a difficult argument to advance for a defendant that the claimant should be compensated only to a level which assumes the continuation of the scheme, the continued support of the employer and investment returns at a level which will result in the compensation proving adequate, rather than paying damages at a level which ensures full compensation, but risks over-compensation.

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<sup>17</sup> Which may in many cases simply not be possible if the additional liabilities are marginal increases on benefits rather than entirely separate benefits which can be the subject of discrete insurance contracts

Yet again, this is not a point which has yet been tested in court and, like all the other views expressed above, might well be wrong. In any event, I reserve the right to argue the contrary when called on to do so.

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