Case No: HC-2016-002516

Neutral Citation Number: [2017] EWHC 916 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings,
Fetter Lane, London EC4A 1NL

Date: 25/04/2017

Before :

CHIEF MASTER MARSH

- -

Between :

(1) PETER EARNSHAW **(2) JOHN STUART EARNSHAW** **(3) ANTHONY DANIEL EARNSHAW** **(4) RICHARD REAVLEY WARDMAN** **(5) SUZANNE MICHELLE ELLIOT** **(6) JOB EARNSHAW & BROS LIMITED**	**Claimants/ Respondents**
- and -	
THE PRUDENTIAL ASSURANCE COMPANY LIMITED	**Defendant/ Applicant**

- -
- -

Hugh Jackson (instructed by **Gordons LLP**) for the **Claimants**
Edward Sawyer (instructed by **Prudential Legal Department**) for the **Defendant**

Hearing dates: 22 and 23 February 2017

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Judgment

Chief Master Marsh :

1. The first to fifth Claimants are the trustees ("the Trustees") of an occupational pension scheme established by the sixth Claimant ("the Employer") named the Job Earnshaw & Bros Limited Staff Pension Scheme ("the Scheme"). The Defendant was the Scheme's administrator from 1956 until 2012. It also provided actuarial services for the Scheme up to 2002. The Claimants seek damages against the Defendant in contract and in negligence in respect of breaches of duty which fall into three categories:

    i. Between 14 October 1999 and about 6 October 2012 the Defendant issued quotations to members of the Scheme and caused payments to be made pursuant to the Scheme to pensioners who had retired prior to their Normal Retirement Date ("NRD") without making a deduction for early retirement. The overpayment was estimated by the Claimants up to September 2016 to be £334,335.

    ii. The Defendant made errors in respect of the dates on which the benefits of male and female members in the Scheme were equalised as a result of the decision in Barber v Guardian Royal Exchange [1991] 1 QB 344. The Claimants say that the Defendant wrongly thought equalisation had occurred on 7 November 1990 rather than the true date of 31 December 1994. As a consequence, the Defendant wrongly calculated benefits in respect of pensions paid from 1993 onwards resulting in underpayments.

    iii. The Defendant made various other computational errors when calculating pensions including mistakes as to the applicable pensionable salary and periods of pensionable service.

2. For convenience these three types of claim are referred to respectively as "the Early Retirement Claim", "the Equalisation Claim" and "the Other Errors Claim". The quantum of the Early Retirement Claim is now said to be in the region of £420,000 plus interest. The Equalisation Claim, however, is much smaller and is likely to be in the region of £30,000.

3. The Defendant made an application under CPR 24.2 for summary judgment in respect of the Early Retirement Claim and the Equalisation Claim on the basis that the Claimants have no real prospect of success on those two parts of the claim and there is no other compelling reason why they should be disposed of at a trial.

4. The claim was issued in the Leeds District Registry. On 23 March 2016 an order was made by consent transferring it to the Chancery Division in London. A costs and case management conference was listed for hearing on 17 November 2016. However, prior to that hearing the Defendant's application for summary judgment had been issued and, therefore, the Deputy Master gave only very limited directions. There was some discussion at the hearing before the Deputy Master about whether there should be a stay for mediation prior to the hearing of the application. The Claimants are critical of the Defendant for refusing to agree to undertake mediation before the application is disposed of. To my mind such a criticism is without substance. The Defendant was entitled to seek to narrow the issues in dispute by obtaining summary judgment in respect of a significant part of the claim prior to undertaking mediation. The

Defendant has made it clear that whatever the outcome of the application may be, it will be willing to undertake a mediation in due course.

5. The jurisdiction under CPR 24.2 is well understood. The principles that are applicable have been summarised in a number of cases. I will have regard to the principles as they are summarised in the judgment of Mr Justice Lewison, as he then was, in Easy Air Limited v Opal Telecom Limited [2009] EWHC 339 (Ch) as approved by the Court of Appeal in AC Ward & Son v Caitlin (Five) Limited [2009] EWCA Civ 1098. The parties have, in addition, referred me to the summary of the relevant legal principles contained in the judgment of Green J in Paul Denning v Greenhalgh Financial Services Limited [2017] EWHC 143 (QB) at [42].

6. Although it is not a point included in either of those summaries, it is well established that if the applicant for summary judgment adduces credible evidence in support of the application, the respondent becomes subject to an evidential burden of proving some real prospects of success or some other reason for the claim being tried. Thus, the respondent to an application under CPR 24.2 cannot be complacent. A court is generally entitled to assume that if the applicant's evidence is such as to transfer the evidential burden to the respondent, it will have provided the court with all the evidence it has available to meet the case against it.

7. There are two important principles which bear emphasis:

    i. The court must have regard to evidence that could reasonably be expected to be available at trial which is not available at the hearing of the Part 24 application;

    ii. There is a need for caution where there are reasonable grounds for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case.

8. It is often the case on the hearing of an application for summary judgment that the respondent says the case is unsuitable for disposal on a summary basis because disclosure has not taken place and, therefore, the respondent is at a disadvantage because it does not know what evidence may emerge from disclosure. The court is required to determine in such cases whether the submission is mere Micawberism, or whether there are real grounds for believing that documents in support of the Claimants' case will emerge on disclosure. Something more than a rather fanciful hope that what is otherwise a claim without real prospects of success claim can be salvaged after disclosure must exist.

9. I would add that the exhortation to avoid conducting a mini-trial does not mean that the court may not grapple with what are sometimes difficult issues in dealing with a Part 24 application. What the court must not do, however, is to prefer the evidence of one side over that of the other unless the evidence being put forward is obviously unreliable.

10. The Defendant's application is supported by two witness statements from Yanting Mao who is senior legal counsel at Prudential UK & Europe and a solicitor. She has no first-hand knowledge about the relevant events. Her witness statement is based upon her review of the documents which have come to light as part of the litigation and her understanding of the practices and procedures of the Defendant as pension

scheme administrator which she has acquired in the course of her role as senior legal counsel. Save for one discrete issue of fact, her evidence is not controversial and largely comprises an explanation of the basis upon which the Part 24 application is made, namely upon the assumption that the facts relied upon by the Claimants in their pleaded case are true. The Defendant's case is that aspects of the claim cannot succeed at a trial based upon a legal analysis of the claim.

11. The Claimants' evidence, by contrast, is somewhat diffuse. Mr John Earnshaw who is Chief Executive Officer of the Employer and a trustee of the Scheme has made a witness statement but the principal evidence by volume is from Charles Howarth a partner at Gordons LLP solicitors and David Jordan of H & C Consulting Actuaries LLP who are the current administrators of the Scheme. Mr Howarth exhibits a short expert report from Mr Chris Tagg who is an associate of Barnett Waddingham, a firm that provides pension administration services. Given the limited scope of the issues before the court, the evidence provided on behalf of the Claimants is extremely lengthy and a considerable proportion of it is of no relevance or assistance.

The Claim

12. The Claimants allege that the Defendant was retained to provide and did provide administration and documentation services to the Claimants in respect of the day to day running of the Scheme up to 6 October 2012. In addition, the Defendant provided actuarial services to the Claimants in respect of the Scheme until about 28 November 2002. In paragraph 18 of the Particulars of Claim the Claimants set out a number of duties which they allege were owed by the Defendant both in contract and tort to the Trustees and to the Employer in tort only. The duties are taken from a statement of services dated 12 December 2008. The Claimants' case is that the duties defined in that statement were applicable throughout the period during which the Defendant acted as pension administrator and the contractual obligations are matched by tortious duties. For the purposes of the application that is not disputed, save the Defendant points out that under paragraph 5.1 of the statement Prudential is only required to "…use its best endeavours to ensure that its employees and agents carry out the services described in this agreement competently and in accordance with its terms." If the terms of the contract are taken to be the benchmark in respect of the duties owed then, in accordance with submissions made on behalf of the Defendant, the duties are not absolute because the Defendant is only required to use its best endeavours.

13. The duties are set out in paragraph 18 and Mr Jackson, who appeared for the Claimants, said they are all relied on but that the Claimants rely, in particular, on the duties specified at b, e, f, j, l, n, o and p. The Defendant's duties included, inter-alia, the following:

> "a. The maintenance of a record for each member of the Scheme.
>
> b. The recording of details of retained benefits in respect of all new entrants to the Scheme.
>
> c. The maintenance and retention of ongoing details of contributions made by members.

d. The issue of an anniversary and renewal pack to the Trustees.

e. The updating of members' records annually to take account of changes in personal details, salary details, contracted out earnings or protected rights along with appropriate contribution details and investment growth on any money purchase element within the Scheme.

f. The provision of an annual benefit statement reflecting benefits on the anniversary date in respect of each active Scheme member and a schedule of benefits and contributions after each anniversary date.

g. The provision of an annual listing of all members within 5 years of the Scheme's normal retirement age together with the provision of annual benefits statement to members.

h. The provision of an annual statement of account reconciling all payments made to and from the Defendant in respect of the Scheme.

i. The supply to the Scheme's actuary as soon as reasonably practicable of information as instructed by the Trustees as required in order that such actuary might determine the liabilities of the Scheme.

j. The supply of provisional and actual quotations of members' benefits under the Scheme in the event of retirement, death or withdrawal.

k. The supply of quotations to active and deferred members of the Scheme who were approaching the Normal Retirement Age.

l. The payment of benefits on behalf of the Trustees in accordance with any standing or specific instructions of the Trustees.

m. The referral to the Trustees of any case where payment or the issue of a quotation was subject to the Trustees' discretion.

n. The verification, based on information provided by the Trustees, that all benefits and contributions paid by or to the Scheme did not exceed any limits contained in the Scheme rules and, in the event that benefits appeared to exceed appropriate limits, to seek additional information and guidance from the Trustees in order to proceed.

o. The payment of pensions and other benefits in accordance with the Scheme's provision.

> p. The periodic carrying out of checks to confirm the legal entitlement of pensioners to continued payment.
>
> q. At the request of the Trustees, the drafting of the rules of the Scheme and any supplements thereto."

14. In paragraph 17.7 of the Amended Defence, the Defendant questioned the relevance of the 2008 statement of service. In their reply the Claimants said:

> "7. As to paragraph 17, and in particular the contention in paragraph 17.7 that it is unclear to the Defendant what the relevance of the 2008 Statement of Services is, the Claimants say:
>
> a. At all material times the Defendant provided a comprehensive service which included administration, documentation, investment and (until November 2002) actuarial services.
>
> b. The 2008 Statement of Services was a document prepared by the Defendant and, by clause 4.1 thereof it was recorded that the purpose of the same was, inter-alia, to outline the services which the Defendant was then providing and to formalise the Defendant's existing appointment.
>
> c and d. [omitted]
>
> e. It is specifically denied, if the same be alleged in paragraph 17.6 that the Defendant bore no responsibility for the correct computation and/or payment of benefits after pensions were first put into payment."

15. The Defendant made a Part 18 request for further information in respect of paragraph 7 of the Reply asking for the reasons for the Claimants' denial that the Defendant bore no responsibility for the correct computation and/or payment of benefits after pensions were first put into payment. The Claimants' response was limited to saying that the request appeared to be an invitation to engage in legal argument and submission. The answer to the request then goes on to provide examples of what are said to be the Defendant's maladministration.

16. A similar theme emerges from the Reply in relation to what is said to have been the wrongful payment of early retirement pensions without any deduction. At paragraph 21 of the Reply the Claimants said:

> "It is denied that [the] Defendant's breaches of duty were committed, and relevant damage suffered, solely when the pensions were put into payment as alleged. The Defendant further committed repeated breaches of duty thereafter at or about the time of making instalments in respect of unreduced pensions. Further or in the alternative for the avoidance of doubt, the Claimants say that the Defendant was obliged further

> to advise the Claimants as to early retirement factors following each valuation or as required from time to time, in particular upon the occasion of amendment to the Scheme Rules or the issue of an announcement to members."

17. The Claimants' response to a request for further information about that paragraph confirms that by early retirement factors, the Claimants meant an actuarially calculated reduction factor to be applied to an early retirement pension and gave dates for the triennial valuations and other key dates relevant to the duty alleged by the Claimants.

The grounds of the Part 24 application

18. The application is based upon five grounds. Grounds 1 – 3 relate to the Early Retirement Claim and grounds 4 and 5 relate to the Equalisation Claim. They are summarised in an annex to the Part 24 application in the following way:

> "1 Unreduced ER [early retirement] pensions were payable in accordance with rules of the Scheme, even on the facts alleged by the Claimants. Therefore the basis of the alleged breach in paragraphs 21 – 23 of the Particulars of Claim falls away.
>
> 2 The claims in respect of payment of unreduced ER pensions are time-barred because:
>
> 2.1 The Claimants cannot show that the "starting date" for the purposes of section 14A of the Limitation Act 1980 was later that November 2008, given their knowledge of the xafinity report dated 7 November 2008.
>
> 2.2 Even on the facts alleged by the Claimants, the relevant causes of action accrued when such pensions were first put into payment (the Defendant having no duty subsequently to re-check the correctness of payments). All claims in respect of pensions put into payment before 14 October 2008 are therefore time-barred.
>
> 3 Alternatively, on the facts alleged by the Claimants, they have failed to mitigate their loss or they have caused their own loss by continuing to pay unreduced ER pensions despite (on their case) discovering in 2012 (alternatively 2013 or 2014) that reduced pensions should have been paid. Further, these payments were made after the Defendant relinquished responsibility for paying pensions in 2012.
>
> 4 The Claimant cannot establish that the Defendant owed them any duty to identify the correct date of effective equalisation, this being a legal matter on which the Defendant had no duty to advise.

> 5 On the Claimants' case, the Defendant's alleged errors as to the date of equalisation were committed in the early to mid 1990's and any causes of action accrued at that stage. The Defendant had no duty subsequently to re-check the date of equalisation. All claims in respect of equalisation are therefore time-barred."

Ground 1

19. For the purposes of this ground, the Defendant accepts the construction put forward by the Claimants about the proper meaning of rule 12(C) of the 4th Edition Scheme rules executed on 31 December 1994. The Claimants' case is that the rule required the Employer to give two separate consents. First, consent for the member to retire early; secondly, consent to the payment without any reduction to the pension in the case of an employee who retired at the age of sixty. In the case of the eighteen employees who are named in a schedule to the claim who retired between the age of sixty and sixty-five, the Claimants say that the second consent was never given by the Employer. The short point made by the Defendant is that the absence of consent from the Employer to receive a pension without a reduction did not result in an automatic reduction of the pension by a fixed amount. That is because paragraph (ii) of rule 12(C) stipulates "the pension shall then be reduced by such amount as the Trustees shall determine to have regard to the Member's age on the date of retirement". The Defendant submits that the Trustees have a discretion to exercise as to the amount of reduction. Furthermore, that discretion must be exercised when the member retires and takes his pension because the pension must commence on the day next following the date of retirement.

20. The Defendant relies upon paragraph 19 of Ms Yangting Mao's witness statement where she says:

> "So far as the Defendant is aware, in this period [May 1995-October 2008] the Trustees never imposed a reduction for ER pensions for active members taking early retirement from age sixty."

In support of this assertion she relies upon a report prepared for the Scheme dated 7 November 2008 by xafinity consulting. The Defendant's evidence on this point was not challenged until a few days before the hearing when Mr Jordan made a second witness statement which was served without permission from the court. Although the evidence was very late, it should be admitted.

21. The Defendant says the Claimants' case can go no further than asserting the Trustees should have exercised their power to determine the reduction, but did not do so. It is not part of the Claimants' case that the Defendant breached its duties by failing to advise the Trustees in this respect. Were it to have been, it would have had to have been put in terms that the Defendant failed to provide proper advice to the Trustees concerning the exercise of their discretion. In the alternative, and assuming the Trustees were under a trust obligation to determine reductions, the Defendant relies upon the principle that the court does not deem the power to impose a reduction to have been exercised when in fact it was not exercised. Relying on the approach

adopted by Henderson J in Entrust Pension v Prospect Hospice [2012] Pens LR 341, the Defendant derives the following propositions:

> i. Where trustees have a trust power which they fail to exercise at the required time, the power still exists and may be exercised late.
>
> ii. However, the exercise of the trust power cannot be backdated [paragraph 122].

22. It is difficult to see how the relevant provisions in the rule can be anything other than a trust power rather than an obligation. The language directs the Trustees to reduce the pension by such amount as they shall determine to have regard for the members age at the date of retirement. In Entrust Pension v Prospect Hospice Henderson J expressed the view, in unequivocal terms, that the exercise of a trust power cannot be backdated. If that is right, as it seems to me with respect it is, unreduced pensions are not payable unless and until a reduction has been properly imposed. That has never been done.

23. The Defendant also points to a further difficulty for the Trustees. If there was an attempt to impose the reduction retrospectively, the provisions contained in sections 67 – 67G of the Pensions Act 1995 will apply. Under the somewhat convoluted provisions of those sections, a subsisting right cannot be modified without consent of the pensioner where it is a 'Protected Modification' under section 67A(3). A Protected Modification means a modification of an occupational pension scheme which:

> "(b) Would or might result in a reduction in the prevailing rate of any pension in payment under the Scheme rules."

In short, by virtue of the subsisting rights provisions, any attempt to undertake a 'Regulated Modification', which is defined to include a Protected Modification, would be voidable. In AON Trust Corporation v KPMG (a firm) and others [2005] EWCA Civ 1004, the Court of Appeal had no difficulty concluding that the modification of a benefit under the scheme in question in the exercise of an express power was self evidently a modification of the scheme and thus fell within the restrictions imposed by section 67 (2) of the Pensions Act 1995. There is no answer to this point.

24. The analysis put forward by Mr Sawyer, who appears for the Defendant, which I have summarised above is compelling. The Claimants' response raised very shortly before the hearing is to put in issue for the first time the factual basis upon which the analysis is based. The Claimants challenge the evidence of Ms Yangting Mao that the Trustees never imposed a reduction for early retirement pensions for active members taking early retirement from age sixty. They say that the quality of this evidence provided by someone who has no first-hand knowledge of the events is unsatisfactory and that the xafinity consulting report does not lend support to the Defendant's position.

25. In his second statement, Mr Jordan exhibits a memo from Mr MG Watson the Regional Pensions Director for the Defendant to the Defendant's office in Reading about the Scheme. The memo refers to his letter of 13 February 1991 (which is not available):

> "…regarding change of Early Retirement Factors the Company have decided [sic] to adopt a middle course and I attach a letter confirming this.
>
> The factors would of course only apply for retirements earlier than 60 as we have introduced a flexible retirement age."

26. The memo goes on to provide a set of factors for discounting pensions payable between the ages of 50 and 60. On the face of it, these factors have no relevance whatever to retirements between the ages of 60 and 65. But Mr Jordan argues it was believed in 1991 that every member retiring from active service could retire from age 50 with an unreduced pension as of right. This was prior to the rule change in 1994. Mr Jordan says that when the rule change came into effect, and members' normal retirement age reverted back to being 65, the factors described in the memo were then applicable from the appropriate normal retirement age, not age 60. He goes on to provide an example of the application of early retirement factors dating from 1998. However, the employee in that case was retiring aged 55 and one month and, therefore, it is unsurprising that early retirement factors were applied in that case.

27. Mr Jackson made extensive submissions about the factual background and referred to a number of contemporaneous documents dating from, in particular, the 1990's. The thrust of his submissions was that early retirement factors had been set by the Trustees (not the Employer) and, therefore, in the absence of a decision by the Trustees on a case by case basis to disapply them, the payment of a full pension upon a retirement between 60 and 65 years was contrary to a decision taken by the Trustees. Furthermore, he submitted that this was an area of some factual complexity such that it was inappropriate for the court to form a concluded view based on a limited number of documents obtained prior to disclosure.

28. For my part, I do not find it helpful to refer to documents prior to the 1994 rule change save for the announcement to members dating from November 1993. The relevant part of the announcement reads:

> "The Directors have decided, after very careful consideration, that they can no longer offer members the option to retire between the ages of 60 and 65 without the Company's consent. To continue with the existing arrangements could threaten the continuation of the Scheme. The directors [sic] therefore wish to change the existing provisions of the scheme so that in future, retirement between the ages of 60 and 65 will be with the consent of the Company.
>
> The Company have [sic] every expectation of allowing retirement in future on as favourable terms as set out in the announcement issued in 1991.
>
> With immediate effect you should note that for the purposes of the section headed "Retirement Date" in the above announcement, the option to retire early on more advantageous terms at any time between the ages of 60 and 65 will only be allowed with the Company's consent."

29. It is plain the announcement and the rule change were made in the context of advice given by the Defendant to Mr David Earnshaw of the Company about the cost of the pension scheme and the intention behind the change was to ensure that no retirement took place between 60 and 65 without the Company consenting. It is of note, however, that the announcement in November 1993 about retirements between the ages of 60 and 65 refers to "more advantageous terms" which suggests strongly that a standardised set of factors reducing the pension entitlement for retirements between those years was not in place.

30. Documents from 1998 suggest there was some uncertainty amongst employees of the Defendant about early retirement factors. In a memo dated 16 December 1998 there is reference to early retirement factors only going from the age of 60, not 65. The note, however, records the maker of the note having spoken to Mick Pegrum, the Scheme Actuary, and his instruction that early retirement factors on file from 65 downwards were to be applied. On the same date Martin Armstrong of the Defendant wrote to Mr David Earnshaw of the Company saying further clarification was needed. On 22 December 1998 Andy McLauren of the Defendant wrote to Mrs A Farrar of the Defendant saying:

> "As we discussed, it is the understanding of both myself and David Oakes that for early retirement cases after the age of 60, the discount factor is not applied. This being the case, the deferred pension given above would also be the early retirement pension at age 62."

31. A memorandum dated 22 December 1998 from the Defendant's files and a fax from Mr McLaren to Anita Farrar dated 19 January 1999 provide unequivocal confirmation that retirements after the age of 60 but before 65 "do not have the early retirement factor applied must be with the consent of the employer". These two documents are also relied upon because of the reference to the Defendant's "legal people" in support of the suggestion that the Defendant provided a turn key service for the Claimants which had limited resources of its own.

32. It seems to me that all the documents referred to by Mr Jackson point in one direction; that there were no discount factors in place for retirements between the ages of 60 and 65. It appears this is how the Defendant understood the position but it was subject to ensuring that the Company was made aware of the additional cost of paying a full pension where there was a retirement between the ages of 60 and 65, albeit that the Scheme was funded on the assumption that the normal retirement age was 65. A further review of the position was undertaken in January 2001 and a memo from Mick Pegrum to Dianne Lynch in Reading distinguishes early retirement before and after the age of 60. The note records in relation to the latter category:

> "Actives, the scale pension at exit with an equalisation adjustment for relevant service (comparing scale pension at exit in respect of that service with corresponding pension at age 60 with a late retirement factor applied)
>
> Deferreds, the normal early retirement pension (same as a above)."

33. Mr Jackson relies, in particular, upon a fax from John Earnshaw in his capacity as a Trustee of the Scheme and a director of the Company sent to the Defendant on 16 February 2001. The fax gives instructions to the Defendant to provide pension quotes for a specified individual for an immediate retirement, retirement at the age of 60 and 65. The fax concludes:

> "Also, in calculating the above, please do not apply the early retirement factor in this case. Future cases will be dealt with separately on an individual basis."

34. The minutes of the meeting of Trustees dated 15 October 2008 record that a discussion was held about retirement at the age of 60. The minutes go on as follows:

> "Following discussion it appeared that the Trustees were under the impression that early retirement penalties were being used though [David Earnshaw] thought that this might not be the case due the Scheme's healthy position in the past and advice from the actuary at that time. [John Earnshaw] to check this, and request more information regarding the figures provided."

35. This led to the report from xafinity consulting. Section 2 is titled "Early Retirement Factors". Paragraphs 2.3 and 2.4 of the report distinguish between those retiring before the age of 60 and those retiring after that age. Paragraph 2.4 is important. It states:

> "As part of the 2007 actuarial valuation the Employer has requested that all retirements before the age of 65 <u>are now subject to</u> an early retirement factor, previously the early retirement factors only applied to retirements before the age of 60." [my emphasis]

36. The report goes on to provide tables showing both proposed and current early retirement factors. The current factors for ages 60 to 64 are all 1.00 whereas the current factors for ages 55 to 59 are all less than 1.00 on a graduated scale that diminishes with age (ie the discount is greater the earlier the retirement age).

37. The report was considered by the Trustees at their meeting on 19 November 2008. The minutes merely record that the report was discussed. They do not record any dissent from xafinity's conclusions. It seems the Trustees accepted xafinity's advice and resolved to implement it. However, I was informed at the hearing that this is not being done.

38. In passing, I note an extract from the minutes under the heading "Early Retirement Factors" because it is important in relation to limitation issues. The minutes state:

> "The need for legal assistance was discussed, and all agreed that this was not required."

39. The Defendant's analysis in relation to Ground 1 is based upon the Claimants' construction of the rules and on the Claimants' case that the Trustees were required to exercise a discretion in the case of each early retirement as to the amount by which

the pension was to be reduced having regard to the member's age on the date of retirement. It is not part of the Claimants' case to suggest that the Trustees had determined there should be no deduction in the case of retirements from the age of sixty onwards. Were that to be so, the Claimants' case would be unsustainable because the Defendant was implementing decisions made by the Trustees. Notwithstanding the strenuous efforts made by Mr Jackson on behalf of the Claimants, I accept Mr Sawyer's submission that the Claimants have not answered the basic point that no decision was made about early retirements from age 60. It is, as the Defendant suggests, the case that the Trustees did not exercise their discretion and, therefore, the early retirement part of the claim has no real prospect of success and there is no compelling reason why it should be dealt with at a trial.

40. I do not accept Mr Jackson's submission that it is inappropriate to 'slice' the claim. This is not only permissible under CPR Part 24 but positively desirable to prevent the court having to determine unnecessary issues at a trial. The early retirement issue is a discreet one and can properly be isolated. There are no issues of fact that require a trial. I therefore will enter judgment for the Defendant on Ground 1.

41. Strictly speaking it is unnecessary to deal with the remaining issues that affect early retirement but it is plainly right that I give my reasons in respect of them briefly given that they have been fully argued and these proceedings may go further.

Ground 2

42. The Defendant relies upon limitation. Both limbs of Ground 2 proceed on the assumption that the Defendant wrongly failed to apply an early retirement reduction to early retirement pensions. Taking into account the effect of two standstill agreements entered into by the parties, the primary limitation period for the pleaded claims goes six years back from 14 October 2014 to 15 October 2008. There are eighteen early retirement claims listed in a schedule to the Particulars of Claim. Only the last one was put into payment within the primary six year limitation period.

43. Although the earliest claim relates to a retirement on 19 May 1995, the claims are limited to overpayments from October 1999 onwards. The first four claims relate to retirements outside the fifteen year longstop period which commences in October 1999. The premise of the claim is that each overpayment of a pension instalment gives rise to a separate cause of action so all pension instalments paid on the eighteen early retirement pensions in the six years before 15 October 2014 are in time. The Defendant's case is that the causes of action, whether in contract or in tort, arose not later than the date of first payment.

44. Under Ground 2 the Defendant seeks summary judgment on its limitation defence in two separate ways. Ground 2.1 is based upon the premise that the Claimants acquired starting date knowledge for the purposes of section 14A of the Limitation Act 1980 at the latest on or shortly after 7 November 2008 when they received the xafinity consulting report. If they are right on this ground, the three year period under section 14A (4)(b) expired on or about 7 November 2011 and the claim form was issued outside that time limit. It would follow that the Claimants can rely only on the primary six year limitation period and this would defeat the claim in respect of all pension payments paid before 15 October 2008. Ground 2.2 addresses the claim in respect of pension instalments paid within the primary six year limitation period from

15 October 2008 onwards. The Defendant's case, as indicated above, is that relevant causes of action arose when the early retirement pensions were first put into payment. If it is upheld, grounds 2.2 means that the whole of the claims in respect of the first seventeen early retirement pensions are time barred, including the instalment paid after 15 October 2008.

Ground 2.1

45. For the purposes of this judgment, it is unnecessary to set out the provisions of section 14A in full. They have been fully considered and explained by the House of Lords in Haward v Fawcetts [2006] 1 WLR 682 and there is a helpful summary of the principles in Shore v Sedgwick Financial Services [2008] EWCA Civ 863. At paragraph [58] Dyson LJ approved the summary provided by the first instance judge and at paragraph [60] referred to extracts to speeches from Lord Brown [90] and Lord Mance [126] in Haward v Fawcetts. The starting date under section 14A occurs when the Claimant has both the knowledge for bringing an action for damages in respect of the relevant damage and a right to bring such an action. The second element is not in contention here.

46. Mr Sawyer extrapolated the following principles from the authorities to which I have referred and I accept them as an accurate summary of the law:

> i. Knowledge for section 14A purposes is knowing facts with sufficient confidence to justify embarking on the preliminaries to the issue of a writ.
>
> ii. Knowledge that damage was attributable to the act or omission of the Defendant alleged to constitute negligence (see section 14A(8)) means knowledge in broad terms of the facts on which the Claimants' complaint is based and of the Defendant's acts/omissions. It must also be known there is a real possibility that those acts/omissions were a cause of the damage.
>
> iii. As to the degree of detail required the Claimants need "broad knowledge" of the matters pointing to the Defendant's acts or omissions, and appreciation "in general terms" and knowledge of the "essence" of the act or omission to which the injury was attributable.
>
> iv. All that is required is sufficient knowledge to realise there is a real possibility of the damage having been caused by some flaw or inadequacy in the Defendant's services; that is enough knowledge to start an investigation into that possibility.
>
> v. Actual knowledge involves knowing enough to make it reasonable for the Claimant to investigate whether or not there is a claim against a particular potential defendant.
>
> vi. It is not necessary that the Claimant should have all the detail of the knowledge required to bring an action or plead a case; the tipping point arises when a Claimant has sufficient knowledge to make it reasonable to begin to investigate whether it has a case.

47. These principles relate to actual knowledge. The Defendant also relies upon constructive knowledge which is dealt with in section 14A(10). Here it is necessary to set out the relevant provision in full:

> *"For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire –*
>
> *a from facts observable or ascertainable by him; or*
>
> *b from facts ascertainable by him with the help of appropriate expert evidence which it is reasonable for him to seek;*
>
> *but a person shall not be taken by virtue of this sub-section to have knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice."*

48. Under section 14A(10) there are two types of constructive knowledge, dealt with in section 14A(10)(a) and (b). It is convenient to refer to them as "constructive knowledge" and "constructive expert knowledge". Only the latter is subject to the proviso at the end of the sub-section.

49. The evidence relating to knowledge of the starting date is limited to the minutes surrounding the xafinity consulting report, the report itself and the witness statement of Mr John Earnshaw.

50. Mr Earnshaw says [17]:

> "At all times up to 2008 the claimants believed that unless express instructions had been given to the contrary, then reduced pensions were being paid to those members who retired early."

51. He goes on and refers to the minutes of the Trustees' meeting held 15 October 2008 and says [21]:

> "It can be seen from that minute that the Trustees were under the impression that early retirement discounts, or "penalties" were being applied. This was my understanding as well. We were of this view because this is what we believed the rules required. The minutes also note that David Earnshaw thought that this might not be the case, and I was to check the point."

52. The xafinity consulting report may have been generated because it was an actuarial valuation year and the actuary had noticed that if past practice of individuals retiring with an unreduced pension from the age of sixty continued, the actuarial assumptions would need to reflect this. Mr Earnshaw describes the report and the steps taken subsequent to its receipt in the following way:

> "23 The report confirms that as part of the 2007 actuarial valuation the Company had requested that all retirements

> before the age of 65 were subject to an early retirement factor, and that previously the early retirement factors only applied to retirements before the age of 60. Whilst we did request the early retirement report, it was only requested upon being told that the defendant was not applying a reduction factor for retirements before age 65. Prior to October 2008, we believed that early retirement factors were being applied on all early retirements.
>
> 24 Upon discovering this in October 2008, we instructed the Scheme actuary to calculate early retirement factors which would be applied to all early retirements."

53. I have already referred to the relevant passages in the xafinity consulting report. It bears emphasis, however, that they expressed doubt about the need for employer consent for non-reduction for early retirement and said the Trustees should obtain legal advice. This was re-iterated in their conclusions under the heading "What next?". They also invited discussion about any of the issues raised or their recommendations.

54. The report was considered by the Trustees at their meeting held on 19 November 2008. The minutes record the Trustees agreeing to apply a reduction to early retirements. The need for legal assistance was discussed but all the Trustees agreed that it was not required.

55. It seems to me the Defendant makes out a compelling case on actual knowledge. The analysis in Mr Sawyer's skeleton argument [44], which I adopt, is as follows:

    i) The Claimants (on their case) had believed that early retirement reductions were being imposed in accordance with the Rules, and (as they must have known) they had not consented to any non-reductions.

    ii) The xafinity report opined that the Rules only provided for unreduced early retirement pensions if the Employer consented to the non-reduction. The Claimants clearly accepted that analysis, as it formed the basis for their decision that they could henceforward impose an early retirement reduction on retirements at 60-65 without amending the Rules.

    iii) The xafinity report also showed that, in fact, unreduced early retirement pensions had been paid to date from age 60.

    iv) The Claimants therefore knew (on their own case) in November 2008 that:

        a) Under the existing Rules, the Employer's consent was needed for a non-reduction to an early retirement pension.

        b) The Employer had not consented in the past.

        c) Unreduced pensions had nevertheless been paid for early retirement from age 60, contrary to what the Claimants believed was required under the Rules.

56. Mr Earnshaw's evidence is that he believed early retirement reductions were being imposed. But I note the final person in the schedule attached to the Particulars of Claim retired on 19 October 2008 at the age 60 on a full pension. That date is shortly after the Trustees meeting on 15 October 2008 and shortly before the xafinity report was produced on 7 November 2008. It is clear, even to the casual reader of the report without expertise of the subject, that the early retirement factors marked against retirements between the age of 60 and 64 (the "current" factors) were in each case 1.00 and 1.00 means no reduction was being made currently. The current factors contrast markedly with the proposed early retirement factors which show a sliding scale of discount. Furthermore, the text of the report contrasts those retiring before the age of 60 with those retiring from the age of 60 and in paragraph 2.4 records the Employers' request to employ early retirement factors to all retirements before the age of 65. The minutes of the Trustees meeting held on 19 November 2008 record that the Trustees agreed to apply a reduction to early retirements. In the context of a review contained in the report it is very difficult to see that agreement as being anything other than an endorsement of the new early retirement factors proposed by the consultant for retirements between the age of 60 and 65.

57. The Defendant's case on constructive knowledge is also powerful. Even if the Claimants failed to understand what was being said in the xafinity consulting report, which is very unlikely, looked at objectively, they could reasonably have been expected to acquire such knowledge from the report and they could reasonably have been expected to acquire the knowledge with help of appropriate expert advice. The source of that advice would either be appropriate legal advice or the Scheme actuary. Thus, all three types of knowledge that trigger the starting date apply.

58. Clearly care is needed before concluding on an application for summary judgment that a Claimants' case is fanciful based on the limited evidence which is available. I am, however, in no doubt that the evidence here is more than sufficient to establish actual, constructive and constructive expert knowledge for the purposes of section 14A.

Ground 2.2

59. On the face of it this is a more fact sensitive issue because it concerns the nature of the duties, in contract and in tort, owed by the Defendant. The claim is pleaded on the basis of the statement of services and lists a wide range of functions many of which seem to have little or no relevance to the claim. The terms of the contract obliged the Defendant to use its best endeavours to ensure that its employees and agents carry out the services in the agreement competently and in accordance with its terms. This is clearly less than an absolute duty and I accept Mr Sawyer's submission that it accords with the general duty to act with reasonable care and skill. The core issue, therefore, is whether the Defendant's duty extended beyond an obligation to calculate the pension correctly, apply a discount factor, or not as the case may be, when the pension was put into payment or, alternatively, whether the Defendant was under a duty to keep the amount paid under review. Mr Sawyer points to the basis of charging in the contractual terms which is loaded heavily in favour of the work undertaken when the pension is put into payment with the subsequent charges for later administrative functions being very small. That may be an indication of the scope of the Defendant's duty, but it is certainly not determinative.

60. The Claimants have produced an expert report from Mr Chris Tagg who is an experienced pension administrator. The problem, however, with his evidence so far as it relates to this claim is that the "focus on governance and accountability around errors and discrepancies" is a relatively recent phenomenon. Processes for monitoring errors have evolved over time. Beyond that he is only able to say that monitoring errors is a matter of common sense with a view to learning from errors to reduce the possibility of them re-occurring in the future. He says it is now the case that a reasonably competent pensions administrator would be expected to have in place a documented set of internal controls within which they operate and best practice to share all member feedback with clients at regular intervals. All in all, I do not find his evidence helpful and, in any event, it does not sit easily with the evidence from the Claimants' current pensions administrator, Mr Jordan, who says:

> "Ordinarily a competent administrator would not, as a general duty, re-check pensions in payment as a matter of course."

61. Some assistance can be obtained from the recent decision of the Court of Appeal in Capita (Banstead 2011) Limited and another v RFIB Group Limited [2015] EWCA Civ 1310. The claim arose under a share purchase agreement by which the Defendant undertook to indemnify the First Claimant in respect of liabilities which might arise as a result of negligently performed services by the Second Claimant before the transfer date. The underlying issue concerned negligence in respect of a pension scheme. The Court of Appeal considered the authorities in relation to continuing breach of contract or duty and in particular Midland Bank Trust Co v Hett Stubbs & Kemp [1979] Ch 384 and Bell v Peter Browne Co [1990] 2QB 495. In referring to those authorities Longmore LJ said [19]

> "The obtaining and receiving of advice after a mistake has been made (even if the mistake can be easily rectified) cannot to my mind mean that an obligation to correct one's mistake or negligence continues to accrue and give a fresh cause of action every day after the mistake has been made. As Mustill LJ pointed out in the Bell case [1990] 2 QB 495 it would be unusual for there to be an express term in the average retainer contract (or the average pension adviser contract) requiring the adviser to exercise continuing vigilance to discover any mistakes he may have made and then to busy himself to put them right. Moreover, it cannot be right to imply what he called such "a strange obligation" into an apparently usual form of contract." [my emphasis]

62. Henderson J agreed with Longmore LJ [49] and at [50] pointed to a class of contractual duties which do give rise to a continuing obligation and referred to some examples. They are quite different contracts to the type of contract upon which the Claimants rely in this case and there is no reason to think that the duty in tort is any different.

63. On balance, however, it appears to me that issue 2.2 is not one which is suitable for determination under CPR Part 24. The precise scope of the duty in this case, and whether there was any duty at all to undertake some form of checking from time to

time is a fact sensitive issue. To my mind it is just the sort of issue which needs to be considered at a trial with the benefit of all the relevant evidence, and expert evidence.

Ground 3

64. The Defendant says that the Claimants have failed to mitigate their losses by continuing to pay unreduced early retirement pensions despite, on their case, discovering that reduced pensions were payable. This issue can be dealt with quite briefly.

65. It is odd that the Trustees have continued to pay unreduced early retirement pensions and in principle, the Claimants' case is unsustainable if it can also be said that at some point a duty arose to mitigate loss. The difficulty with the point, however, is that mitigation requires a party to act reasonably. Generally speaking, the threshold is relatively low and, on the evidence available at this stage, it is difficult to be precise about the date from which the Claimants are unable to recover. Mr Sawyer invited me to conclude that, even accepting all the Claimants' evidence concerning the time needed to carry out enquiries during the handover period between the Defendant and the new administrators, that process was completed by the end of 2013 and only a short period thereafter should be allowed before the Early Retirement Claim becomes irrecoverable.

66. It is, nevertheless, a fact intensive issue which involve careful examination of the events as they are described in Mr Jordan's witness statement. I do not feel able, on a Part 24 application, to alight upon a date with sufficient accuracy to enable a determination to be made.

Grounds 3 and 4

67. These issues relate to the Equalisation Claim. The basis of that claim is that there was an error by the Defendant. It understood that normal retirement dates had been equalised with effect from 7 November 1990 following the decision in Barber v Guardian Royal Exchange when, in fact, the correct date was 31 December 1994. On that basis it is said pensions have subsequently been miscalculated. A difficulty arose from the drafting of the 4th Edition rules dating from 31 December 1994 which purported to equalise normal retirement dates retrospectively. It is common ground, however, that the effect of European law was that they could only equalise with effect for future service.

68. The Defendant's objection to the Equalisation Claim is that if it made errors, they were committed in the period between 1990 and 1996 during which period two announcements were issued (1991 and 1993), the 1994 rules were drafted with a further rule amendment in 1996. The claims, it is said, are time barred as they occurred outside the fifteen year longstop period and do not constitute a continuing breach. Based upon the decision of the Court of Appeal in Capita, there is no realistic basis for contending that there was a continuing duty.

69. The position here is different to the allegation that pension payments should have been reviewed from time to time for error. The complaint about equalisation was not one which realistically could have been spotted on a review given that it arose from an error embedded into the Scheme by virtue of rule changes. In my judgment, the

Claimants have no real prospect of success on this issue as the claim is statute barred and there is no compelling reason why the issue should be disposed of at a trial.

The Claimants' revised case

70. The Claimants have provided extensive evidence designed to suggest that the Defendant may have deliberately concealed its alleged breaches in respect of the Early Requirement Claim. The case is put forward somewhat equivocally and it is not a case which has been pleaded. Rightly, Mr Jackson did not put it forward at the hearing and it is unnecessary for me to deal with it.

71. The Claimants also referred to an additional claim for breach of ongoing duties to review in the period after October 2008 causing the Claimants the loss of a chance to sue the Defendant earlier when there would have been no limitation defence. This sort of claim was considered in Gold v Mincoff [2001] Lloyd's Rep PN 423 and more recently in Mathiesen v Clintons [2013] EWHC 3056 (Ch). This claim has not been pleaded but there is a fatal flaw in any event. As is explained in Mathiesen v Clintons [158] and [181], it is necessary that the later active negligence conceals the earlier negligence. If the Claimant already has sufficient knowledge to sue for the earlier mistake, the later negligence does not conceal anything and does not cause the loss of a chance to sue. As I have already concluded, the Claimants had sufficient knowledge to sue from November 2008 onwards and thus the Defendant's alleged negligence after that date in failing to review did not conceal anything or cause a lost chance to sue.

Conclusion

72. For the reasons given above there will be judgment for the Defendant in relation to both the Early Retirement Claim and the Equalisation Claim.