

# HIGH COURT RULES (TWICE) ON WHAT HAPPENS WHEN “SOMETHING HAS GONE WRONG” WITH PENSIONS DOCUMENTS

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## PENSIONS

### THE PRICE OF UNCERTAINTY

In two recent cases, both decided by the same judge (Mrs Justice Asplin) and just recently reported in quick succession, the High Court was asked to decide what a particular pensions document meant.

The issue in the first case, involving the Honda Group UK Pension Scheme (Honda)<sup>1</sup>, had a £47m price tag attaching to it (or £70m if the liabilities in contention were calculated on the buy-out basis). The values in the second case, involving the ICM Computer Group Pension Scheme (ICM)<sup>2</sup>, were not disclosed in the reported judgment, but since the case concerned that familiar issue – had sex equalisation been properly implemented? – we can be pretty certain that the amounts at stake were not insignificant.

### THE DOCUMENTS IN QUESTION

The document in the Honda case was a simple Deed of Adherence (insofar as any pensions document can ever be safely described as “simple”). The company argued that, although there was no reference to special benefits in the Deed, the Deed should be construed as having admitted the employees of a new employer on the terms of an announcement which concerned a lower scale than the then-prevailing benefits.

In the ICM case, the document in issue was a “Scheme Amendment Authority” (a form of amending a document associated with particular life office deeds and rules). While setting out the effect of equalisation in relation to a period up to a certain date (for which the normal retirement date would be age 60), it omitted to say anything about how equalisation would work after that date.

In Honda, the document in question dated back some 27 years to 1986. In ICM, the document was relatively recent, dating back a mere 16 years to 1997.

### HOW TO READ A PENSIONS DOCUMENT

In both cases, Mrs Justice Asplin re-iterated that the general principles to be applied to the construction of pension scheme documents do not differ from the general principles applicable to the construction of contracts and other written instruments.

It has only been a matter of time for the full impact of the commercial contract decisions, which permit virtually unlimited “rewriting” when it is “obvious” that something has gone wrong, to be extensively addressed in the pensions context.

The problem of course is that what may be obvious to one party may not be quite so obvious to another, in particular where member benefits are at stake.

### THE DECISIONS

While pensions practitioners, especially those who were around to see how things were done in the 1980s, will inevitably take a close interest in the particular facts of the cases, the importance of reading these two cases together is in seeing some of the limits and some of the flexibility of the modern approach to construction.

In Honda, the company encountered the limits, and it therefore failed in its attempt to have the Deed of Adherence read as importing the lower scale of benefits.

In ICM, by way of contrast, the parties all came to court in prior agreement that something had gone wrong with the document, and with a similar agreement as to how it should be fixed. The court showed that it was prepared to get out its red pen and, in order to make commercial sense of the document, fill in the missing words.

In her immediate pre-judicial life, Mrs Justice Asplin had been a QC with highly-regarded pensions expertise, and her familiarity with the concepts lends additional authority to the judgments.

### IMPLICATIONS

#### Acquiring pension liabilities on transactions

The two cases highlight the dangers still lurking for the unwary when considering acquiring historical pension liabilities. The liabilities may be governed by documentation which stretches way back into the past, when practices and standards were in certain respects somewhat different from those prevailing today. Appropriate due diligence and/or contractual protection are obvious methods of minimising risk when contemplating such an acquisition.

#### Dealing with existing issues

At the same time, the cases emphasise that the courts are prepared to consider the commercial background when called upon to construe a pensions document. Although in Honda the company did not get the commercial answer it wanted, the legal arguments deployed in court and recorded in the judgment illustrate the wide scope for valid disagreement. No reference is made, however, to the presumed windfall effect on the relevant members, and it remains to be seen whether the case is subject to an appeal.

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<sup>1</sup> *Honda Motor Europe Limited v Powell* [2013] EWHC 3149

<sup>2</sup> *ICM Computer Group Limited v Stribley* [2013] EWHC 2995

If you do unearth a pensions document which appears to do something other than what the parties probably thought it did at the time, the key message still remains: “don’t despair”.

We expect to see more such cases coming to court as employers seek some definition to their “defined benefit” liabilities.

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