Script for ACA Talk

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Introduction

Good morning.

My name is Patrick Kennedy. I am a Partner in Gateley Plc, the first commercial law firm to float on the Alternative Investment Market, and Founding Director of Entrust Pension Limited, Independent Trustee to the gentry. We count the Royal Household amongst the sponsors to our 60 plus schemes with around a billion or so under trusteeship. Our motto: "We endeavour to give satisfaction Ma'am".

This is a review of the latest legal issues affecting pensions actuaries and your clients with practical discussion of what you can do to protect yourselves and help your clients. I shall look at the GDPR, the Pensions Regulator year from the *Silentnight* case which just about crept into January 2017 to *ITV* or *Boxclever*, the *Coats* case, the big headline cases of *BHS* and *Tata Steel* to the quite recent development of using section 72 prosecutions for failure to provide information.

We shall peep behind the Pensions Ombudsman curtain very briefly and, whilst we are in the business of peeping behind curtains, take a look at same sex marriage in the pensions context.

We shall then get back to the good old fashioned black letter lawyer cases of *British Airways, IBM* and the BBC case.

Last of all I shall look at a new kid on the block - the surety pensions bond - and the role you may have as section 47 scheme actuary in making that exciting new Type C contingent asset work.

Slide 2
GDPR

Like the 16,141,241 remain voters in the EU referendum you voted not to attend a talk on GDPR but are getting one anyway. So I shall give you soft GDPR focusing on the main changes from the Data Protection Act regime it replaces and the practical actions to take before it comes into force on 25 March 2018.

GDPR survives Brexit and the main concepts of "data controller" - responsible for ensuring any data it holds is processed in a lawful manner - and "data processor" - anyone else processing data on behalf of the data controller - survive from the DPA into the GDPR regime.

As Plan actuary in your personal capacity under section 47 Pensions Act 1995 you remain a data controller alongside the trustees. Your firm will perhaps be a data controller especially if administration services are provided. “Personal data” remains much as it was before for pension schemes, member name, date of birth, NI number and so forth.

But under the DPA “sensitive personal data” is now filed under "special categories of data" and covers the usual suspects of health, sex life, sexual orientation, genetic and biometric data.

The DPA operated a fairly broad "deemed consent" regime for processing data, but the GDPR no longer permits implied consent of the type commonly assumed in member booklets. Instead the GDPR requires express consent to be "freely given, specific and informed" with the Information Commissioner's Office (or ICO) saying this means clear affirmative action. In other words, positive opt-in.

This is not practical for pensions schemes so, whilst there is grandfathering of historic information, as data controller you will need to identify which of six bases under which data may be processed lawfully apply to you and your clients.

The most likely bases are processing being necessary for

- the performance of a contract, for example, a contract for pension scheme payroll, treasury or administration services or indeed employment contract in the case of your company clients
- compliance with a legal obligation, such as your trustee clients' duty to administer the scheme or
- for the legitimate interests of the data controller or a third party like the scheme trustees.

As a further practical matter, express consent should be obtained for processing member data for a separate exercise like a member option exercise, especially if the member's data is being transferred to a third party like an IFA.

An updated and revised GDPR compliant privacy notice should be issued.

An updated data processing record should be created.

Under GDPR, for the first time, data processors have direct legal obligations.

This will require review of third party contracts to protect you (perhaps seeking an indemnity) and cyber security reviews by all those processing data to the required standard.

All data controllers and data processors will need to comply with a new 72 hours reporting of any breach - data destruction, loss, alteration, unauthorised disclosure or theft - to the ICO as well as notifying affected scheme members.

This will require, as a practical measure, some serious incident response planning.

Penalties for non-compliance for serious breaches can run to

- Euro 20 million or 4% of global annual turnover for commercial entities if higher; or
- Euro 10 million or 2% of global annual turnover for less serious breaches.

The 72 hours and high fines are especially scary given the timing preferences of cyber criminals. For example, in a US credit card cyber theft on a company called Target took place over the Thanksgiving Festival.

The first practical step is therefore a data audit which should be conducted before 25 May 2018.

Actuaries with a data controller status need to be especially wary

And the new direct duties on data processors coupled with rapid reporting obligations and high fines, require a complete incident response review.

Slide 3
From *Silentnight* to *Boxclever*

The Pensions Regulator year began with the *Silentnight* case where the lawfulness of TPR issuing Warning Notices in December 2014 and June 2016 warning of an exercise of the power to issue Contribution Notices was challenged in the High Court.

This type of challenge is known as judicial review and is predicated upon the Regulatory Authority acting unlawfully.

TPR requested a fast track hearing and Mr Justice Whipple duly obliged and rapidly endorsed TPR's view that there is ample scope for resolving any issues the potential recipients of Contribution Notices may have via the TPR Determinations Panel and thereafter on appeal to the Upper Tribunal under the Pensions Act 2004 framework. Mr Justice Whipple found there was nothing exceptional about the challenge the claimants wished to make in the case.

To protect yourselves and help your clients I suggest following the Pension Regulator's decision making and appeal processes very closely indeed and give those processes the utmost respect. There is appeal on points of law only, and not on determinations of fact, from the Upper Tribunal but the wise money is on making sure each stage of the Pensions Regulator's procedure is given the utmost respect to gain the best outcomes.

The Determinations Panel of TPR is made up of some rather experienced individuals. The faith placed in those individuals and the Pensions Act 2004 processes within which they operate in the *Silentnight* case has, arguably, been rewarded by the substantial settlements reached later in the year in the *Coats* case, *BHS* and *Tata Steel*.

Sometimes called the *ITV* case and at other times called the *Boxclever* case, Lady Justice Arden's Court of Appeal judgment in *ITV and the Pensions Regulator vs Box Clever Trustees Limited* upheld the Upper Tribunal's discretion to allow TPR to rely upon additional grounds in an FSD case to those initially contained in the Warning Notice and permit further evidence to be filed and fresh arguments made in the case.

The Warning Notice in this FSD case which will now be heard in full by the Upper Tribunal in January 2018 and is likely to take about a fortnight, had not included certain grounds and fresh evidence later used by TPR in support of the same.

There was at one point a very slight prospect I would be called as a witness to the robust and sustainable business model of Boxclever as it appears I was one of their last remaining customers to rent a television set.

Slide 4
Coats

Perhaps overshadowed a little by the *BHS* settlement and the *Tata Steel* Regulated Apportionment Arrangement, the *Coats* case involved the Regulator being approached by scheme trustees concerned at the impact of disposals of group investments and significant returns to shareholders. These were depleting the covenant supporting three group schemes, the *Coats Pension Plan* - deficit £400 million, the *Staveley Industries Retirement Benefits Scheme* - deficit £97 million and the *Brunel Holdings Pension Scheme* - deficit £80 million.

Shareholder funds of £434 million were to be reduced to £124 million.

TPR became satisfied the scheme employers were insufficiently resourced and issued Warning Notices for the schemes stating an intention to issue Financial Support Directions against group companies including *Coats*.

Many months of negotiations followed with *Coats* changing position to use the disposal proceeds to support the pension schemes and improve their funding positions.

This involved

- up front payments into the schemes of £329.5 million split to give a broadly equal funding position for all three schemes

- changing statutory employer to *Coats*' main trading company thereby significantly improving the covenant for each and

- a full section 75 deficit guarantee for each scheme.

This outcome represented five years of patient work and a distinct position on covenant being taken and maintained by the Regulator in the face of opposing views expressed by the group.
The practical lessons are to allow the Pensions Regulator to step in where wholesale covenant depletion would otherwise take place and to give the Regulator's covenant team, the business analysts their due.

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***BHS* (1)**

The 45 page section 89 report issued by TPR on its intervention followed the sale of BHS to Dominic Chappell's company, Retail Acquisitions Limited, on 11th March 2015, a Creditors Voluntary Arrangement with its landlords commencing 3rd March 2016, administration on 25 April 2016 and cessation of trading in August 2016. TPR's investigation had been ongoing since the sale which had itself followed a pre-Christmas 2015 BHS proposal for a Regulated Apportionment Arrangement. The RAA seemed to be going along quite nicely at the back end of 2015 but with stumbling blocks - chiefly a lack of information to enable the trustees to perform a "moral hazard assessment" - essentially a comparison of the RAA outcomes with the likely position if TPR intervened with its moral hazard powers. The PPF performs its own anti-embarrassment assessment to ensure the PPF does not lose out if post RAA the sponsor returns to profitability and the PPF's chief form of protection, aside from objecting to the RAA itself, is taking an equity stake in the post RAA company. Sadly, the RAA was withdrawn by the company which had proposed it to focus on the pre-Christmas sales season. .

TPR issued CN Warning Notices on 2nd November 2016. The Warning Notices were issued to the buyers and sellers on the grounds that they were party to an act, the sale, that had caused material detriment to or the main purpose of which was to avoid liability to the BHS schemes (there were two of these, a roughly 60% funded circa £300 million ongoing deficit main scheme for 19,000 members and a roughly 70% funded circa £30 million ongoing deficit 222 member senior scheme - assets £421 million main, £95 million senior. The Warning Notices were over 300 pages long.

There was also an FSD Warning Notice.

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***BHS* (2)**

In the TPR investigation 123 section 72 Information Notices were issued and nearly 100,000 documents were received which needed specialist technology to make an analysis. TPR also lament the number of parties and agencies, PPF, DWP and the like with whom they had to liaise. They also used independent experts for "speeding up progress", their words.

There was a significant overlap between the Green family's ongoing retail business, Arcadia, and post sale BHS such as "shared services" and Arcadia concessions in BHS stores. Sir Philip Green was given updates on the "turnaround strategy" and BHS business plan. The section 89 report suggests that their actions "eventually culminated" in Sir Philip Green's 9 September 2016 public statement of a desire to reach a voluntary solution for the schemes and their members.

The settlement itself involves £343 million in an independent escrow account to fund a new scheme with a further £20 million for costs.

Members can opt to transfer to the new scheme, take a lump sum if eligible (£18,000 "small pots") or remain in the current scheme which is almost certainly PPF bound.
Under the new scheme there is no PPF 10% reduction in pension and there is a 1.8% pre April 1997 pension increase compared to nil in the PPF.

A settlement deed containing the structure was entered into as this was key to the settlement.
The new scheme is estimated to have around £100 million low-risk basis surplus.
As part of the lessons learned section of the report, TPR regard the timeliness of their engagement and the clarity of their communications as areas for improvement.
They have also been pursuing advanced investigations under section 231 of the Pensions Act 2004 into imprudent technical provisions or inappropriate recovery plans. TPR has determined to make greater use of its section 231 power to bring more cases before the Determinations Panel.

Overall TPR has now secured over a billion in settlements. TPR emphasises an open door policy to settlement offers but stresses they must be fully worked proposals. TPR has fed the BHS case experience into TPR Future.

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Section 72 Prosecutions

The BHS settlement leads neatly to the criminal prosecution of Dominic Chappell for neglecting or refusing to provide information and documents, without a reasonable excuse, when required to do so under section 72 of the Pensions Act 2004, contrary to section 77(1) of that Act.
There are three such Notices, on 26 April 2016, 13 May 2016 and 20 February 2017.
Three similar prosecutions have taken place, two in April 2017 (a law firm partner and a charity executive, they had been chased for information for 9 and 18 months respectively) and one in July.
The July case involved an office manager in a firm being investigated in connection with a £13.8 million scam.

Practical lessons from BHS and section 72

Clients should be encouraged to persevere with an RAA

Support an application with fully worked information showing improved member outcomes compared with moral hazard power outcomes and accommodate PPF anti-embarrassment

Anticipate TPR business analyst requirements and those of any external advisers

Respond promptly and informatively to section 72 Notices

Consider a Deed of Settlement approach to any settlement as protection against “moving feast type settlements

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Tata Steel - Pensions Regulator initial approval to restructure 11th August 2017

On 11th August 2017 the Pensions Regulator granted initial approval to Tata Steel UK's proposal for a Regulated Appointment Arrangement for the British Steel Pension Scheme.

The RAA prevents Tata Steel UK insolvency which TPR was satisfied would happen within the next twelve months, involves a £550 million payment from the Tata Steel Group to the scheme and PPF receiving a 33% equity stake in Tata Steel UK.

The scheme will pass into PPF with members having the option to transfer to a PPF plus scheme.
The Tata Steel Group had no legal obligation to support the scheme.

Practical lessons from the Tata Steel case include the importance of foreign parent company guarantees to create a direct legal obligation upon the parent to support a U.K. subsidiary sponsored scheme.

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Pensions Ombudsman cases
Transfer/ Scam

In the case of *Mr R (PO-10365)*, a member of the Local Government Pension Scheme, administered by London Pension Fund Authority and Newham Council, a transfer was completed in April 2013 to the Gresham Scheme which, though it had been a registered pension scheme since December 2012, appears to be a scam.

Mr R had made two earlier failed attempts to be paid early retirement benefits and seemed so keen that the Ombudsman, agreeing with the PO adjudicator, found it more likely than not that he would have proceeded with the transfer even if LPFA had provided him with a warning about potential scams at the time.

LGPF offered £1,000 for that failing but no contributions towards Mr R's missing presumed lost £62,780 transfer monies.

The Ombudsman determined that Mr R would have lost his transfer monies in any event and whilst requiring a £1,000 payment for the significant distress and inconvenience agreed with LPFA that they should not refund Mr R's transfer.

The Ombudsman accepted the *Hughes vs Royal London Mutual Insurance Society Ltd* case law which establishes that, as a matter of law, the ultimate decision to transfer lies with the member.

This transfer took place in the early days of the development of pension scam regulatory practice. This aspect of our industry has some way to go before we can say we have truly risen to the challenge of pensions scamming. Perhaps I am overly sensitive, but the conclusion that Mr R was on an inevitable road to loss of his entire pension benefit sits very uncomfortably with me and I hope with all of us.

Unauthorised Payment

A member win at the Pension Ombudsman for *Mrs E (PO 12248)* when a member of the Wildfowl & Wetlands Trust Pension Scheme was entitled to receive his full range of pension commencement lump sum options after the administrators had understated his benefits two years earlier.

The administrators, upon discovering Mr E's benefit had been understated offered Mr E backdated pension and higher future pension payments but declined to revisit the PCLS citing the unauthorised payment rules.

The Ombudsman found this was maladministration and was impressed with Section 241 Finance Act 2004 which states that an unauthorised payment is exempt from being scheme chargeable if it is made on the ground that a court or any such person or body is likely to order the making of the payment (or would be were it asked to do so).

This case supports sensible outcomes where members have lost out and is a setback for "jobsworth" handling of revisiting earlier mistakes.

Trivial Communication/ “duped”

In *Mrs E (deceased) (PO-12824)* a member of a pension scheme passed away before signing a trivial communication of her benefits worth £25,796.98 and the Pensions Ombudsman dismissed a complaint from her estate that the scheme should have made the payment anyway.

The family also asserted they were "duped" into providing a death certificate in support of the complaint because this caused the deceased member's spouse's pension to cease.

In this, as in many cases, the Ombudsman agreed with the PO adjudicator's initial opinion evidencing the experience that now lies within the PO office and Anthony Arter's considerable process management skills in the role.

Missed Deadline

In the case of *Mr E (PO-13588)* a member of the Northern Foods Pension Scheme requested a transfer value, ignored a reminder about the deadline and finally submitted his transfer value request forms signed a week or two after the guarantee period had expired. By then a new transfer value basis was in place which reduced a £73,000 transfer value to £57,000, a drop of around 20% or so and Mr E complained that he should be paid the higher amount arguing the trustees had a duty to warn him of the change in the basis.

The Pensions Ombudsman dismissed the complaint, agreeing with the adjudicator's initial opinion that the *Occupational Pension Scheme's (Transfer Value) Regulations 1996* provided that the cash equivalent transfer value must be calculated on an actuarial basis that reflects the amount needed to make provision in the scheme for a member's accrued benefits. The trustees were therefore under a duty to monitor and review the appropriateness of the assumptions and actuarial factors used in the calculations. This could result in an increase or decrease in transfer values and the trustees' duty extended to fairness towards those remaining in a scheme as well as the individual transferring member.

Sharia Law

The case of *Mrs D (PO-10901)* concerns a trustee's duty to inform members about features of a scheme which may offend against strongly held religious beliefs.

Mrs D was a member of the Local Government Pension Scheme for two separate periods of service, who discovered in 2014 that LGPS invests in shares and interest bearing cash investments. Finding this offended against her Sharia law based religious beliefs, Mrs D requested a refund of her contributions even though she had not yet served the minimum two year period required for that entitlement. (Or is it that she had served over two years so no longer so entitled?).

West Yorkshire Pension Fund declined the request as LGPF rules did not give Mrs D that entitlement.

The Occupational and Personal Pension Scheme (Disclosure of Information) Regulations 2013, the Disclosure Regulations, do not require the disclosure of the nature of a scheme's assets or information potentially relevant to an individual's religious or ethical beliefs.

European fair trading and consumer credit laws concerning the sale and purchase of goods did not apply to the LGPS.

Whilst the PO adjudicator did not agree that Mrs D should have known about the nature of the LGPS assets the conclusion was that "where someone holds strong beliefs responsibility would be with them to make all the enquiries necessary to understand what they were entering into and paying for."

The PO adjudicator also declined to comment on whether or not the LGPS death benefit was permissible under Sharia law.

Things may well differ for a DC scheme where the requirement in paragraph 16 of schedule 2 to the Disclosure Regulations that schemes must provide a statement that the pension payable would "depend on several factors including the performance of investments" is more likely to comply with Mrs D's stated desire to be given sufficient information to make an informed choice about scheme membership in the context of Sharia law.

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***Walker vs Innospec* Same Sex Marriage**

In *Walker vs Innospec* the Supreme Court ruled that restrictions on same sex spouse's benefits to periods of service after 5 December 2005 were incompatible with European Union law. Therefore pension schemes need to ensure that pensions payable to same sex spouses are calculated on the whole of a member's pensionable service not just post 5 December 2005 service. The ruling applies to civil partnerships as well as same sex marriage.

The case itself considered such old friends as *Defrenne vs Sabena*, *Bilka-Kaufhaus vs Weber von Harz*, *Barber vs Guardian Royal Exchange* and *Ten Oever*.

The overall conclusion was that the time of any discrimination in pension entitlements was the time when the benefits fell to be paid. The period of accrual was not relevant; the date when the payment of the benefit was due was the time of any discrimination and that was outlawed by Council Directive 2000/78/EC of 27 November 2000 - the Framework Directive. The Framework Directive established a general framework for equal treatment in employment and occupation.

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The *British Airways* Case (1)

The *British Airways* case is 635 paragraphs of good old fashioned Chancery Division of the High Court fun.

A 1948 established scheme with just south of 30,000 members provides final salary benefits for a mature member profile - 90% pensioners.

Rule 15

Rule 15 provided the annual rate of pensions would be adjusted in accordance with Pension Increase Review Orders (PIROs) with no cap on the uplift so an "index linked" or "inflation proofed" defined pension benefit.

CPI Replacing RPI

George Osborne took time out from celebrating my 45th birthday on 22nd June 2010 to announce the move for public sector pension scheme indexation to change to CPI from RPI and the 8 July 2010 DWP announcement that CPI would replace RPI for Revaluation Orders duly followed with a CPI based PIRO on 11th April 2011, the 24th anniversary of my first date with Mrs Kennedy. Since you ask, a trip around the perimeter of London Zoo.

What did the trustees do about this?

First, they decided to do something about it. On 29 February 2011 they took time out from proposing to reluctant bridegrooms to vote unanimously to amend our friend Rule 15 to introduce a discretionary power to uprate pensions in excess of the PIRO.

Then they did something about it. On 25 March 2011, further to the earlier vote, the trustees executed a deed of amendment introducing the discretionary power.

They also took a vote on the exercise of the new discretionary power with regard to the April 2011 PIRO but there were insufficient votes in favour of so doing.

The same thing happened in February 2012, a vote taking placed on whether to exercise the discretionary power but not being carried.

Did they eventually come round to exercising the new power?

Yes. Third time lucky I guess. On 28 February 2013, the trustees unanimously agreed to grant a discretionary increase of 50% of the difference between CPI and RPI, which amounted to a 0.2% increase, but decided the decision would remain open to later review.

On 26 June 2013, the trustees confirmed their decision of 28 February 2013. There was an issue about the effective date for the increase of 1st September 2013.

And the final trustee decision on CPI / RPI considered in the case was a 19 November 2013 decision in which the trustees voted by majority (all the other decisions seem to have been unanimous I think) to grant a 0.2% discretionary increase with effect from 1st December 2013.

What did BA do about it?

BA brought proceedings five days after the effective date of the 19 November decision challenging pretty much all of the above.

BA had already contended that the decision to amend Rule 15 and the Deed of Amendment to bring about the change to Rule 15 were of no effect.

On 6th December 2013 BA also contended that even if Rule 15 had been amended the 28 February 2013, 26 June 2013 and 19 November 2013 decisions were of no effect.

The trustee countered that the Rule change and decisions were valid with an alternative effective date (1 September 2013 or 1 December 2013) for the increase.

The objects of the Scheme

The Scheme, called the *Airways Pension Scheme*, objects clause from the 1948 Deed states, starkly and perhaps unsportingly, "The main object of the Scheme is to provide pension benefits on retirement and a subsidiary object is to provide benefits in cases of injury or death." And that "the Scheme is not in any sense a benevolent scheme and no benevolent or compassionate payments can be made therefrom."

As Millenniums might say - "That's awkward." They might do "Awkward Turtle".

However I very much doubt that Michael Tennet QC, Sebastian Allen or Michael Ashdown for BA, the Claimant (instructed by Linklaters) or Keith Rowley QC, Jonathan Hilliard QC or Henry Day for the trustee defendant (instructed by Eversheds) took that particular argument.

Aviation Corporate History

Quite a lot of interesting stuff about this. BOAC. Anyone remember that?

I have footage of a 1962 family wedding where the happy couple boarded a BOAC flight to Rome. They drove to the airport in a beautiful shiny new Ford Anglia.

What did Rule 15 say?

Rather a lot so in probably dangerous summary something like:

"The rate of ... pensions ... shall be adjusted ... as specified ... [pretty much in the PIRO] PROVIDED ... if the said Act is repealed and not replaced or should it become necessary to review the basis of such annual adjustments steps shall be taken to ensure that the annual adjustments ... continue to be made based upon an appropriate national index or indices reflecting fluctuations in the cost of living PROVIDED ... any adjustment ... shall not apply:-

- to postponed pensions;
- to deferred pensions; and
- to actuarial increases or crystallisation uplifts.

Did the 1948 deed evolve quite a bit over time?

Yes

Clause 11 and Clause 18 Of The 1948 Deed

Lady Justice Arden's decision in the 2002 Court of Appeal case of *Stevens vs Bell* is relevant to these clauses.

In *Stevens vs Bell*, Lady Justice Arden considered a power under clause 11(b) of the 1948 Deed under which the Actuary upon certifying a "deficiency or disposable surplus ... shall ... make a scheme for making good the deficiency or ... disposing of the disposable surplus." Arden LJ decided that the clause 11(b) power could be used to increase pension benefits or provide new benefits.

However, clause 11(b) could not be used to, say, make a payment to an employer.

Clause 18, which contained the amendment power, prohibited any amendment introducing such a payment. Clause 18 is a wide power of amendment permitting deeds of amendment (the clause calls them supplemental deeds). It states the Rules "may be amended or added to in any way." Clause 18 also requires approval by Management Trustees two thirds of whom must vote on the decision. There are then four provisos being broadly that an amendment will not:-

- change the purpose of the scheme;
- result in return of contributions to an employer;
- diminish or prejudicially affect present or future rights of existing members; or
- run contrary to a half and half principle for employer and member representation within the Management Trustees.

Important findings of fact

There were a dozen or so trustees, numerous meetings and a lot of deliberations - too many to present in a coherent manner for today's purposes. The trustees did take advice from Mr Anthony Arter, now the Pensions Ombudsman. The advice steered the trustees, perhaps, towards a discretionary power response to the CPI / RPI scenario.

Mr Justice Morgan not impressed

Mr Justice Morgan was not impressed by the trustees' decision not to call certain trustees as witnesses.

Mr Justice Morgan was also perhaps a little under enthusiastic about a BA pleading which he found "altogether uneasy to summarise" saying it "begins by stating unconventionally that the background facts are summarised in" a witness statement. The said witness statement runs to 67 pages. Oops. That awkward turtle again.

Part 3 The Pensions Act 2004

The funding regime was discussed quite a bit including the then Code of Practice "Funding Defined Benefits"

Other aspects

There was a Share Security Agreement and 2010 funding agreements to consider, again too detailed for now but the Share Sale Agreement involved a £250 million special contribution and substantial payments being made thereunder. Very substantial. For June and July 2013 they came to just a smidgen under £900 million.

The BA challenge to amendment

The BA challenge to the amendment introducing the discretionary power was that it was:-

- an abuse of the power of amendment in clause 18; and
- that it was predetermined so the trustees did not genuinely consider the exercise of the power of amendment in clause 18.

Meetings, minutes and the Trustee's decision making process

Mr Justice Morgan was absolutely satisfied that trustee decision making was "*very elaborate*" with "*many, many meetings*", "*voluminous reports*" and "*most of the relevant meetings minuted*."

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***BA* (2)**

Mr Arter had said at one point that "*feelings were running very high*."
Pensions is fun isn't it?

One Captain Post resigned at the end of a meeting. Oh dear.

There were conferences with counsel, Mr Christopher Nugee QC and Mr Jonathan Hilliard. One began at 10am. The next one began at 12-30pm. A slightly more civilised hour.

A thing called the Discretionary Increase Sub Committee was created. This abbreviated to DISC. A member and pensioner meeting took place at Ascot Race Course. DISC met quite often. There was a Discretionary Increase Framework or DIF. There was correspondence between Linklaters and Eversheds. There was a 70 page paper which was "*not easy to summarise*" and "*full of graphs and figures and explanatory text*." I even did a blog (see appendix to this note).

Power of amendment

The power of amendment in clause 18 was a unilateral power of the trustee.

The amendment was not outside the scope of the power to amend especially having regard to the benevolent or compassionate restrictions.

It also did not change the purpose of the scheme.

Predetermination

Teleological. Not a decision to do one thing, a decision to introduce a power to do something. There was no exercise of the power so there was no exercise of the power which could be predetermined.

Decision of 26 June 2013

Trustees did not identify an effective date for an increase in the 26 June 2013 meeting so that was not an effective exercise of the discretionary power.[1]

Decision of 19 November 2013

None of the trustees failed in their duties as suggested in terms of predetermination. There seemed to be nine separate challenges to the trustee decisions[2] plus the suggestion the decision was irrational and perverse[3]. These were rejected and the statement made:

"*the merits of the decisions in this case are for the trustees and not for the court*."

The judge also said nice things about a Mr Pardie, an Actuary.

Final shake down

BA's challenges were dismissed entirely except in the case of the unidentified effective date.

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***IBM* Case**

In the *IBM vs Dalgleish* case, Lady Justice Arden's judgment at the Court of Appeal overturned the earlier High Court decision of Mr Justice Warren in a long and complicated scenario.

Mr Justice Warren had concluded in the High Court that the *reasonable expectations* of scheme members that no further revisions would be made to their pension schemes following earlier, quite extensive changes meant that where alternative means of making cost savings existed in the business it was unlawful as being contrary to the Imperial duty of good faith for the company to revisit pension change.

The Court of Appeal disagreed stating that Mr Justice Warren had made the mistake of concentrating on the outcome of the employer's decision to further restrict BD benefits and in so doing had fallen into the trap of substituting the Court, or Mr Justice Warren's, decision for that of IBM. IBM as scheme sponsor and not the Court was the primary decision maker. The Court of Appeal disagreed with the lower court which had attached a paramount significance to the scheme members' reasonable

[1] Incidentally, the whole thing was predetermined, as was you reading this footnote at this precise point in time. Unlucky to lose on this one BA.
[2] Why did BA stop at nine? Such a shame not to make it into double figures.
[3] Let's make this the tenth challenge and the BA legal team do make it into double figures for challenges. Spoiler alert. They lost.

expectations. Members' reasonable expectations were a relevant factor in IBM's decision making but it was not the proper role of the court to elevate that factor over and above other relevant factors.

The duty the Court was considering, known as the *Imperial duty of good faith*, is a duty not to exercise scheme powers in such a manner as would seriously damage or destroy the relationship of trust and confidence between an employer and its employee. The test has been "borrowed", so to speak, by pensions law to restrict the manner in which a scheme employer can exercise its scheme powers.

This case takes the robust line of accepting that employers will sometimes conclude that their employees' reasonable expectations will be disappointed without a decision to do so being unlawful.

The case overturned a High Court decision which had puzzled many pension lawyers as being overly lengthy (some said as long as all the Harry Potter books put together) and one in which the minutiae of numerous internal IBM trustee and employer deliberations were pored over in a manner which looked a little over eager. It always creates something of a sensation in the rarified world of pensions law for a High Court decision to be overturned. If you listen hard enough on the occasions when this does occur the sound you hear is one of monocles popping out. However, given the long and rambling nature of the lower court decision in IBM there was somewhat less surprise than usual at the Court of Appeal decision to overturn

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***BBC* Case**

Whilst Lady Justice Arden may have overturned Mr Justice Warren's High Court decision in IBM, Lady Justice Gloster was more kind to the good Justice in the case of *Bradbury vs BBC*. In this case, the member, Mr Bradbury had argued that a cap on future pensionable pay breached the prohibition against the surrender of DB pension benefits contained in section 91 of the Pensions Act 1995.

Mr Justice Warren at the High Court, in a decision Lady Justice Gloster noted "cannot be faulted", concluded a benefit which never arises because of the operation of a cap on pensionable pay cannot be surrendered contrary to section 91 of the Pensions Act 1995 or anything else for that matter. The cap on pensions above a certain pay level simply prevents the entitlement from coming into existence in the first place.

Similarly, the argument that the employer, here the BBC, had acted in breach of the implied term of mutual trust and confidence from the Imperial case, the *Imperial duty of good faith*, had to be assessed "*against the reality of the background that the BBC was faced with a multi-billion pound deficit in the scheme*." The deficit was so substantial that, without the changes Mr Bradbury was challenging, employer contributions would have to increase by an amount which would increase the BBC License Fee by up to 10%. This was unaffordable and trustees, union and the BBC had all agreed something had to be done.

Arguments that the salary cap singled out certain employees for unfair treatment were dismissed and alternative BBC arguments relying on wider contractual circumstances, often referred to as South West Trains arguments, did not need to be considered.

Slide 15
Surety Pension Bonds

Surety Pension Bonds have arrived. We at Gateley acted on the first one and typically our run rate is about £1 billion a year.

These are a PPF type C contingent asset capable of reducing the risk based PPF levy.

Sureties bond the scheme sponsor against failure to support the scheme.

The bonds are an on demand instrument and may require the section 47 scheme actuary to certify an ongoing or section 75 buyout deficit.

There is therefore a role for you as actuaries at the sharp end of these new and important contingent assets

Appendices

Patrick Kennedy, Gateley Plc/ Entrust blogs

Appendix 1-

Safe space, no platforming and final salary pension schemes; the decision of the Court of Appeal in the case of IBM vs Dalgleish

Many UK universities now operate “safe space” and “no platforming” policies to protect students from views which are perceived as being likely to come into conflict with their views or opinions.

Similarly, in the High Court judgment in the case of *IBM United Kingdom Holdings Ltd vs Dalgleish*, Mr Justice Warren concluded that, unless there was no other possible or reasonably possible course open to them, it was unlawful for IBM to propose a pension scheme closure exercise that came into conflict with the scheme members’ reasonable expectations.

The Court of Appeal reversed the High Court decision on the grounds that, provided the decision of IBM to make the proposal met the test of rationality, in the sense that it was not irrational, capricious or perverse, and involved a proper exercise of its pension scheme powers, it constituted a lawful exercise of the employer’s powers.

Mr Justice Warren had been applying the *Imperial good fait*h test to IBM’s conduct when IBM proposed a defined benefit pension scheme closure hot on the heels of some earlier quite extensive benefit reductions. Those earlier reductions had raised reasonable expectations amongst scheme members that, for a time at least, no further changes would be made.

The *Imperial duty of good faith* implies a restriction on the scope of the exercise by pension scheme sponsors of their scheme powers. They must not exercise the powers in such a manner that would destroy or seriously damage the relationship of trust and confidence between an employer and its employee.

The Court of Appeal concluded that Mr Justice Warren took the test a step too far, by holding that it prevented an employer making proposals that conflicted with scheme members’ expectations where other alternatives were available or might reasonably be available to the employer. The Court of Appeal decided that Mr Justice Warren had concentrated on the outcome of IBM’s decision and in doing so had fallen into the trap of substituting the Court’s decision for that of the primary decision maker – in this case IBM as the pension scheme sponsor. The Court of Appeal did not accept that IBM defined benefit scheme members’ reasonable expectations were of paramount significance. The members’ expectations were a relevant factor in IBM’s decision making but they should not be elevated above other relevant factors, such as to accord an overriding significance to those expectations.

Critics of safe space and no platforming policies in UK universities argue that the policies elevate the student views they seek to protect to an overriding significance, over and above other factors, like the intellectual stimulation of exposure to conflicting ideas and the analytical vigour to be derived from open and healthy debate. Similarly, the lower court was regarded as attributing too high a value to the expectation of IBM defined benefit scheme members, that the scheme would be left alone for a time after a number of benefit reductions. The case is a source of comfort to employers who have risked upsetting genuine and long held member perceptions as to the inviolability of ongoing defined benefit pension accrual, in the face of staggering increased costs of funding scheme deficits. Indeed the appeal court noted that the global strand of IBM’s justification for the closure exercise was the need for cost savings combined with a more localised UK business desire to improve efficiency, productivity and economic performance. And there are no safe spaces from that.

Appendix 2

In the same casual manner…

The opening credits to the BBC television sitcom *Porridge*, which ran from 1974 to 1977, written by Dick Clement and Ian La Frenais, and starring Ronnie Barker and Richard Beckinsale, began with the judge's sentencing of the main character as follows:

Norman Stanley Fletcher, you have pleaded guilty to the charges brought by this court and it is now my duty to pass sentence. You are an habitual criminal who accepts arrest as an occupational hazard, and presumably accepts imprisonment in the same casual manner.

Mr Fletcher is handed a maximum five year prison sentence for his troubles.

At a hearing in Brighton Magistrates' Court on 5th July 2017, an office manager was convicted in her absence of the offences of refusing to provide information and refusing to produce documents without a reasonable excuse, contrary to sections 72 and 77 of the Pensions Act 2004. The offender was ordered to pay a fine of £4,000, £550 costs and a £170 victim's surcharge.

The office manager had been employed in a Kent based company, which had come to the Pensions Regulator's attention in connection with potential pension scamming activity. The Pensions Regulator contacted her requesting that she disclose information about emails sent and received while she had been working at the company. There was no response and the Pensions Regulator issued a section 72 notice, noting that it would be a criminal offence if she did not comply with the request. The office manager refused to cooperate without providing a good reason for so doing.

Unlike the fictional Fletcher, the office manager did not attend the criminal hearing in her case. Continued failure to comply with a section 72 notice entitles the Pensions Regulator to bring further criminal proceedings. Presumably, given the repeated nature of the failure to comply without good reason, the criminal consequences are accepted in the same casual manner.

Appendix 3

Anyone for tennis? (Surety/ Pension Bonds)

In the best-selling book and immensely popular film *“Playing the Moldovans at Tennis”* Tony Hawks tests the thesis that a person who is well drilled in a particular sport or activity will have little difficulty beating opponents who are well drilled in another unrelated sport or activity. Hawks puts the theory to the test by reference to his own background in lawn tennis and the anticipated unfamiliarity of the Moldovan national football team with the same. No spoilers, but in the run-off stage of UK defined benefit pension schemes, a similar visitation from other fields of expertise and human endeavour can be observed, if only infrequently at present. An example is the surety market coming to the aid of the pensions industry.

Trustees of UK defined benefit pension schemes, encouraged, if not quite roared on, by the Pensions Regulator, seek contingent assets which vest in the event that the scheme sponsor is no longer able to support the scheme. Contingent assets usually fall into fairly tried and tested categories. For example, security over assets such as land (a typical example being the sponsor’s business premises), a variety of financial instruments like letters of credit, escrow account or other similar arrangements, asset backed funding strategies and the support of third party guarantees of the sponsoring employer’s liabilities to the scheme.

Sometimes a swathe of contingent assets is provided under an agreement between sponsor and trustees with restrictions on the quality and type of asset which can be provided up to pre-agreed limits. Such agreements frequently seek to strike a balance between the trustee need for security in the event of sponsor insolvency and the sponsor group’s desire for freedom of movement of assets in and out of the arrangement to take advantage of market opportunities. For example, when market conditions change, a sponsor may wish to substitute a more expensive contingent asset with a less expensive asset but which provides equal liability coverage. The securitisation agreement should provide for this, subject to satisfying any trustee concerns.

The surety market has in recent years become a very effective and efficient supplier of contingent asset solutions to pension schemes. Sureties are well drilled at stepping into the shoes of a primary obligor, like a pension scheme sponsor, to fulfil obligations which cannot be met by the primary obligor due to insolvency. The construction of the built environment has depended upon surety market expertise for many years. In a parallel to Tony Hawks’ tennis challenge to established football players, the expertise of sureties has enjoyed significant success in recent years in pension scheme contingent asset provision, especially in the context of securitisation packages.