Essay question

What is a pension fund surplus, should it be subject to a resulting trust, and, if so, in favour of whom?

Guidance

While a 'defined benefit' pension scheme is on foot (ie a pension scheme that fixes the final pension entitlement rather than giving the pensioner a proportionate share of the whole fund), there is no way to know for sure whether the fund will be sufficient to satisfy in full the pension entitlements of all present and future pensioners. The most that can be done is to make actuarial estimates from time to time as to the likely future performance of the fund according to the best available statistical information. In the late 1980s, after several years of stock market growth and increases in the value of real estate, many pension funds were greatly in surplus. Today, after several years of declining performance on the stock markets, pension surpluses are looking increasingly to be a thing of the past. Nowadays, many pension funds are notionally in deficit.

Although pension surpluses may be a thing of the past, the question of who should be entitled to them is still pertinent to the relationship between pensions and trusts, and, correspondingly, the relationship between contract and trusts. (See, generally, R. Ellison, 'Pension fund surpluses' (1991) TLI 60; R. Nobles, 'Who owns a pension surplus?' (1990) 19 ILJ 204.)

The employer and the employee will both claim to recover the pension surplus under a resulting trust. However, neither party can claim to be in the usual situation of the transferor who voluntarily makes a gift or sets up an express trust for another's benefit. Their contributions to the fund were not made voluntarily, but under the terms of contract

made between them, and therefore their entitlement to any surplus will turn, in large part, upon the terms of the trust deed and the contract (the pension 'plan' or 'scheme') by which the trust deed is established. In fact, as was stated in *Davis v. Richards and Wallington Industries Ltd* [1990] 1 WLR 1511 *per* Scott J at 1541 H:

> a resulting trust will be excluded not only by an express provision but also if its exclusion is to be implied. If the intention of a contributor that a resulting trust should not apply is the proper conclusion, it would not be right, in my opinion, for the law to contradict that intention

Scott J went to great lengths in *Davis* to justify the employer's entitlement to the surplus, but he dismissed the employees' claim on the ground that a resulting trust would have infringed a statutory limit on the amount of benefits that the employees were entitled to receive from the pension scheme. Accordingly, that part of the surplus representing employees' contributions was declared *bona vacantia*. However, the essence of a resulting trust, in this author's opinion, is that in the interests of public policy judges will assume that the last thing any transferor intends is that their wealth should pass to the Crown as *bona vacantia*. A pension surplus is quite unlike the surplus arising where anonymous donors have paid different amounts of petty cash into a collection box for some deserving cause. Employees do not intend to part with their contributions outright (least of all to the Crown), so the presumption that the employees should recover any surplus under a resulting trust (whether or not they expressly intended that outcome) should stand. The *Davis* employees might fare better today as a result of *Air Jamaica Ltd v. Charlton* [1999] 1 WLR 1399, PC, in which the Privy Council went to great lengths to preserve the members' interests in the fund. The pension scheme of employees of Air Jamaica was discontinued in 1994, when the company was privatized. Defined benefits were paid out under the terms of the scheme, but there remained a surplus of $400m. The

claimants, who were members of the discontinued pension scheme, claimed to be entitled to the surplus. Section 13.3(ii) of the rules of the scheme provided that, in the event of discontinuance of the scheme:

> any balance of the fund shall be applied to provide additional benefits for members and after their death for their widows or their designated beneficiaries in such equitable and non-discriminatory manner as the trustees may determine in accordance with the advice of an actuary.

Clause 4 of the trust deed provided that: '*No moneys which at any time have been contributed by the company under the terms hereof shall in any circumstances be repayable to the company*.' Despite these terms (and because of them), the company purported to amend the pension plan so as to acquire the surplus itself and had to be restrained by means of an interlocutory junction from implementing its intended amendments. When the matter eventually came before the Privy Council, the amendments were disallowed on three grounds: first, that the power to amend the plan was void for perpetuity; second, that the amendments had been made in bad faith; third, that they infringed Clause 4 of the trust deed. However, the company argued that, even if it could not recover under the terms of the original or amended scheme, it ought to be permitted to recover its contributions by a resulting trust operating outside the scheme. To make matters worse for the claimants, their claims were resisted not only by the company, but also by the Attorney General. The Attorney General argued on behalf of the Crown that the surplus had become *bona vacantia*. The Crown argued that the employees' claim must fail because the pension trust was void for perpetuity and that the employer's claim must fail because of Clause 4.

The opinion of the Privy Council, delivered by Lord Millett, reaffirms the 'first school of thought' on resulting trusts and its applicability to pension surpluses:

Prima facie the surplus is held on a resulting trust for those who provided it. …. Contributions were payable by the members with matching contributions by the company. In the absence of any evidence that this is not what happened in practice, the surplus must be treated as provided as to one half by the company and as to one half by the members

His lordship held that Clause 4 prohibited repayment of contributions under the terms of the pension scheme, but did not rebut the resulting trust arising outside the scheme. In reaching this conclusion his lordship relied on the principle that "a resulting trust is not defeated by evidence that the transferor intended to part with the beneficial interest if he has not in fact succeeded in doing so" (*Vandervell v. Inland Revenue Commissioners* [1967] 2 AC 291, per Lord Upjohn at 314)