

5 Stone Buildings

Has BA changed trustees' ability to increase employer contributions unilaterally?
When must trustees take account of the company's needs ?

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14 May 2019

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Increasing employer contributions as a result of the exercise by trustees of a unilateral power. What was the position before BA ?

- In relation to contribution rules, position on authority before BA was that trustees could take into account the interests of the employers to the extent that:
 - Doing so furthered the purpose of providing benefits under the rules and
 - The employer's covenant was sufficiently strong to fulfil that purpose (*MNRPF* [2015] # 233) and
 - Inappropriate to attempt to overfund (*Edge* - per Chadwick LJ at 623)
- Has BA changed this ?

Limits on trustees' unilateral powers ?

BA is successful challenge to a unilateral power of amendment on the basis of improper purpose:

Even if an action is within the **scope** of the power (and not otherwise in breach of trust), it may be void because outside the **purpose** of the power.

Facts in BA

- APS effected pursuant to statutory instrument
- By 2008 had power of amendment exercisable by the trustees without the consent of the employer
 - proviso that could not be exercised to change purposes of the scheme
 - Express statement of purposes “*to provide pension benefits on retirement ... not in any sense a benevolent scheme and no benevolent or compassionate payments can be made therefrom*” (ie contrast *Eclairs*)
- 2011 trustees conferred on themselves power to augment rates of increase above CPI with 75% majority (2011 decision)
- No majority to augment in 2011 or 2012 but in 2013 majority resolved to augment rate of increase by 0.2% (= half the difference between CPI and RPI) - 2013 decision
- Scheme in deficit

BA - challenge to decisions

Three points:

- 1) Trustees failed to take correct matters into account - **Morgan J dismissed on facts - no appeal**
- 2) Increasing rates (ie 2013 decision) and/or conferring power to increase rates (ie 2011 decision) were outside the scope of the power as a matter of construction because increasing rates was *“benevolent or compassionate payment”* - **CA dismissed 3-0 (#81, #84, #113)**
- 3) 2011 decision and 2013 decision were outside the purpose of the power of amendment and therefore invalid: **CA decisions invalid 2-1 (Lewison and Jackson/Patten)**

Outside the purpose of the power ?

Basic principle:

“...the donee, the appointor under the power, shall, at the time of the exercise of that power, and for any purpose for which it is used, act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object (I mean sinister in the sense of its being beyond the purpose and intent of the power) which he may desire to effect in the exercise of the power.”

per Lord Westbury in *Duke of Portland v Topham* 11 ER 1242

Outside the purpose of the power ?

Principle applies to amendments which are within the scope of the power - ie not a question of implying restrictions into the power as a matter of construction:

*“I do not doubt that a term limiting the exercise of powers conferred on the directors to their proper purpose may sometimes be implied on the ordinary principles of the law of contract governing the implication of terms. But that is not the basis of the proper purpose rule. **The rule is not a term of the contract and does not necessarily depend on any limitation on the scope of the power as a matter of construction.** The proper purpose rule is a principle by which equity controls the exercise of a fiduciary’s powers in respects which are not, or not necessarily, determined by the instrument.”* per Lord Sumption in *Eclairs* # 30 (nb contrast Warren J in *PNPF v Taylor* at #145)

Outside the purpose of the power ?

But when is an act outside the purpose of the power ?

“92.It is unnecessary for a claimant to prove that a director was dishonest, or that he knew he was pursuing a collateral purpose. In that sense, the test is an objective one. ..The court must:

92.1. identify the power whose exercise is in question;

92.2. identify the proper purpose for which that power was delegated to the directors;

92.3. identify the substantial purpose for which the power was in fact exercised; and

92.4. decide whether that purpose was proper.

93. Finally, it is worth noting that the third stage involves a question of fact. It turns on the actual motives of the directors at the time”

per Jonathan Crow in *Extrasure Travel Insurance v Scattergood* [2003] 1 BCLC 598 (nb where there are mixed proper and improper purposes, not decided whether *but for* test applies to improper purpose (*Eclairs* #21-24 SC split 3-2)

In BA, the effect of the two decisions was said to be outside the proper purpose of the power: therefore the trustees must have had an improper purpose (?)

Outside the purpose of the power ?

But how do you gauge the purpose of the power ?

Definition based formulation:

“Ascertaining the purpose of a power where the instrument is silent depends on an inference from the mischief of the provision conferring it, which is itself deduced from its express terms, from an analysis of their effect, and from the court’s understanding of the business context.” (per Lord Sumption in Eclairs Group v JGX Oil and Gas (#30) - applied in BA at #86 and #125)

Test-based formulation (ie description of amendments within the power):

Power is confined *“to such amendments as can reasonably be considered to have been within the contemplation of the parties when the contract was made having regard to the nature and circumstances of the contract”* *Hole v Garnsey [1930] AC 472* and see *PNPF v Taylor* at #138

What about purpose of the deed ?

Not limited to express statement of the purposes in the deed (*Bank of NZ v Board of Management of the Bank of NZ Officer's Provident Association* [2003] OPLR 281 per Lord Walker at #20)

And can change over time (*Bank of NZ* at #19 approving Millett J in *Courage* at 505-506):

“So the main purpose of a club or pension scheme may be enlarged by appropriate amendments to the rules; and once it becomes too late to challenge the amendments, the enlarged purposes become the new basis by reference to which any further proposed changes must be considered.”

And

“By changes made gradually over a long period, alterations may be made which would not be acceptable if introduced all at once. Even the main purpose may be changed by degrees.”

Purpose of the deed

Cf the concept of the “substratum” of a trust in the context of variation of private settlements

“If an arrangement changes the whole substratum of the trust, then it may well be that it cannot be regarded merely as varying that trust. But if an arrangement, while leaving the substratum, effectuates the purpose of the original trust by other means, it may still be possible to regard that arrangement as merely varying the original trusts, even though the means employed are wholly different and even though the form is completely changed.” Megarry J in *Re Ball’s Settlement* [1968] 1 WLR 899 (see *PNPF v Taylor* at #144 and contrast Jackson LJ at para 116 of BA)

Jackson LJ - machinery part of the purpose

“116..... The purpose of the scheme is therefore not simply to provide pensions, but also to provide the machinery whereby pensions are provided. I therefore respectfully part company from Patten LJ when he characterises core elements of the scheme as matters of detail. This effectively limits the inquiry to what appears in the objects clause and overlook the essential character of the scheme that was designed to achieve those objects”

What material does the court have available to it for gauging purpose ?

- Objects clause (although see *Bank of NZ*)
- The express words of the deed
- “*The court’s understanding of the business context*” (*Eclairs* #30)
- Admissible evidence:
 - What the parties did in fact contemplate at the time of the document not admissible (*PNPF* at #144)
 - Revenue material admissible (*Stevens v Bell* [2002] PLR 247 at #30 and *BA* at #81)
 - ? (contrast charity cy-pres cases)

The business context

- In BA Lewison LJ and Jackson LJ relied on the statement of Park J in *Smithson v Hamilton*:

“87. A decision to have a pension scheme and the consequential decisions about the structure and design of the scheme are matters for the employer, or at least matters primarily for the employer. If the scheme is to have a pension trust fund there will be trustees, but the design of the scheme is still a matter for the employer, not for the trustees. This is not to say that the trustees are compelled to accept the employer’s design. If the trustees object to it they cannot be compelled to join in executing the deed and rules.”

However, I persist that it is the employer which takes the lead in formulating the design of the scheme. If in the event the trustees do not object and are content to execute the documents in the terms prepared by the employer or the employer's advisers, then the scheme is the employer's scheme, not the trustees' scheme. Once the scheme is established the trustees will have important functions to carry out and duties of a fiduciary nature to perform in connection with the scheme, but the trustees do not have a major role in determining what the rules of the scheme are to be."

The business context

Lewison and Jackson LLJ concluded that the trustees' role was limited to managing and administering the scheme and did not include

“designing the benefit structure” (Lewison #103) or

“remodelling the balance of powers” (Jackson #121)

Trustees' decision to increase pensions in payment by 2011 and 2013 decisions involved both and therefore outside their role

Some themes from BA

- Not part of purpose of power of amendment
 - to alter the “*constitutional balance*” of the Scheme (#103, 121)
 - to “*design benefit structure*” (#103,126)
 - Therefore improper to do so.
- Purpose of scheme
 - Goes beyond the objects clause
 - But is not “*to deliver the benefits that the employer is willing to fund*” (#125).

“Altering constitutional balance”

- Trustees unilateral amendment power is ancillary to power of management and administration and limited to that extent
 - Suggestion is that the trustees were improperly using the power to take control of benefit design
- Analogy drawn with cases where directors use powers under articles to affect outcome of general meetings: takeover cases
 - Eg *Eclairs*: power to require information of shareholders
 - *Howard Smith v Ampol* [1974] AC 821 power to issue shares

“Designing benefit structure”

- Not a blanket ban:
 - Power of augmentation where there is a surplus is really a power of management and administration (#92 and cf #124) - explanation of eg *Law Debenture v Lonrho* [2003] PLR 13 and *Stevens v Bell*
 - But contrast *MNRPF* [2015] #232 in context of setting funding obligations for employers:

“...given the uncertainties inherent in the administration of a pension scheme and the fact that a surplus or deficit is to some extent merely the product of the actuarial assumptions which have been applied, it seems to me that it would be wrong and entirely artificial to conclude that different duties arise depending upon whether there is a surplus or a deficit.”

“Designing benefit structure”

- Trustees using a power to increase contributions
 - Not designing benefit structures but securing pre-existing benefits promised under the rules - explanation of eg *PNPF* and both *MNRPF* cases [2010] and [2015] (#88-89)
 - Compare *PNPF* (allocation of liabilities among employers) and *Society of Lloyds v Robinson* (terms of Lloyds membership amended to require additional security for existing obligations)

Does BA affect the extent to which trustees can take into account the interests of employers in exercising unilateral powers ?

- Position before BA was that trustees could take into account the interests of the employers to the extent that:
 - Doing so furthered the purpose of providing benefits under the rules and
 - The employer's covenant was sufficiently strong to fulfil that purpose (*MNRPF* [2015] # 233)

Does BA affect the extent to which trustees can take into account the interests of employers in exercising unilateral powers ?

- After BA:
 - Trustees will normally not be able to use unilateral powers to design benefits or to amend the balance of powers within the scheme
 - But BA will not normally affect
 - using powers to improve or maximise security for existing benefits (subject to not overfunding - see *Edge* at 623) - matters of administration.
 - Or taking into account the strength of the employer's covenant in pursuing that aim.

BA: some takeaway points

- Not easy to establish purpose of a power beyond any express purpose clause in the trust (and necessary to establish detail of purpose - eg Jackson LJ purpose includes “*machinery to provide pensions*”)
- But CA confident that they were able to describe the purpose of a pension deed - quote from *Smithson v Hamilton* - and consequent delineation of powers. This needs to be taken into account when advising trustees. (nb Patten at #74 - trustees in “*position of complete uncertainty*”)
- Point may work in other ways: Employers should not interfere in the management of the scheme? Discretionary increases to pre-97 pensions ? Member’s rights ?
- Caution required in exercising unilateral powers of amendment before judgments in SC - other powers?

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