

---

# Trustee Discretion: Proper Purpose

**David Pollard**

**Whitepaper Conference: 8 March 2016**

# Full Text

---

Full text of talk in pack

In part based on extract and  
update from:

*“The Law of Pension Trusts”*  
**(advert).**

OUP, 2013

# Question:

---

Should trustees act to “maximise” benefits or pay the “correct” benefits when exercising their powers of discretion

– for instance when setting scheme factors or determining an inflation index to use to increase benefits?

# Outline

---

## Proper Purpose Test

- Not a best interests duty
- Two stage test

Application to pension schemes

Exercising powers fairly

Questions





# Proper Purpose Test

# Proper Purpose

---

“In law context is everything” – Lord Steyn in *R v SofS ex p Daly* (2001)

Trustees have discretions under the trust instrument

Millett J in *Courage* (1987):

‘It is trite law that a power can be exercised only for the purpose for which it is conferred, and not for any extraneous or ulterior purpose. The rule-amending power is given for the purpose of promoting the purposes of the scheme, not altering them.’

# Introduction – APL talks

---

Can applies to non-fiduciaries too

Applies to company directors: *Eclairs* (2015) and *Howard Smith* (1974)

Section 171, CA 2006:

A director of a company must—

- (a) act in accordance with the company's constitution, and
- (b) only exercise powers for the purposes for which they are conferred.

## There is no literal “best interests” duty

---

- Mentioned in quite a lot of caselaw
- But imprecise and unworkable
- At best just a “shorthand” or “portmanteau”
- Really no more than a part of the proper purpose test:
  - *MNRPF*
  - *Edge*
  - Lord Nicholls
  - Christopher Nugee

## Not “act in the best interests of members”

---

- Why only members? – what about other beneficiaries – inc the employer
- Better if test is reversed: that fiduciaries do not exercise powers in own interests
- Success of the scheme? – similar to the director test
- *MNRPF* – what happened
- Best interests =
  - objective test - look at end result?
  - Does not override deed terms or proper purpose test – *Eclairs/ Howard Smith*
  - Could never be satisfied? There is always something else could be done?

# Purpose of a pension scheme

---

To pay retirement benefits?

My suggestion:

The purpose of a defined benefit occupational pension scheme is to provide the stated and accrued relevant benefits to (and in respect of) the members at a cost acceptable to the employer.

# Applying the proper purpose test

# Applying the test

---

Two stages:

- 1 Work out the proper purpose applicable to the relevant power ; and
  2. Decide what purpose the decision maker (here the trustee board) has considered when exercising the power.
- look at the particular power or discretion being exercised. Not just at the overall purposes of the trust (save perhaps in the case of the amendment power); and
  - It is not just relevant to the proper purposes test whether a non-object (ie non-beneficiary) of the trust or power benefits

# 1. What are the proper purposes?

---

Look at power and work out its purpose

Lord Sumption in *Eclairs*: If term is silent:

- Inference from mischief – deduce from express terms
- Analysis of effect
- Court's understanding of business context.

So this means:

- Fix at time adopted into scheme
- Probably an objective test – Bean J in *Dalriada* (2011)



## 2. What is the trustee's purpose?

---

### Subjective test (*Eclairs*)

- Question of fact
- Court will draw inferences

More than one purpose? - “but for” test?

More than one decision maker

- Proudman J in *Roadchef* (2014)

# Proper purposes and pension schemes

# Amendment powers

---

Look at overall purpose of scheme

- Millett J in *Courage* (1987)
- PC in *Bank of New Zealand* (2003)
- Warren J in *IBM* (2014)

## Transfers out

---

Not to get round surplus refund restriction: Knox J in *Hillsdown* (1997)

Trustee can choose amount: PC in *Fletcher Challenge* (2001)

Can use cunning plan to game the employer – *Easteary* (2009)

But sometimes not more than share of fund if purpose is to “game” the PPF? – Henderson J in *ITS v Hope* (2009)

# Investment

---

Purpose must be to invest

- So usually must aim for best financial gains:  
*Cowan v Scargill* (1985) and Law Comm (2014)
- Can use to maximise employer debt? - *Pitmans* (2004)
- Cannot use to make loans aiming to get round tax restrictions – *Dalriada* (2011)

Given need to consult with employer on SIP, presumably can take account of employer wishes/interests.

# Early retirement reduction

---

Deed provides for reduction in pension for member drawing pension before NRD.

Trustee power to fix reduction

Can fix at nil?

- Almost certainly no – purpose of power looks to be to fix an actuarial equivalent (subject to preservation minimum)

Eg Warren J in *IBM (2012)*

Could fix at nil if employer agreed (effectively an augmentation)

# Commutation factors

---

## Tricky area

Good report (2006) on Institute and Faculty of Actuaries website on “Member options”

## Probably:

- Can take account of tax impact
- Aim for equivalent value (but range of discretion)
- Not too much if impacts on other members (eg *ITS v Hope?*)

# Pension increases

---

Eg if rules give Trustee discretion over level of increases (over statutory minimum)

Or discretion over which index to use – eg *Danks v Qinetiq* (2012) and *Arcadia* (2014)

- Probably quite a wide power
- Purpose seems likely to be one of seeking to reduce reduction in “real” value of pension
- One ground of challenge in forthcoming BA case

# Questions/Comments/Discussion?

---

**LON40112078**

This material is for general information only and is not intended to provide legal advice.

© Freshfields Bruckhaus Deringer LLP 2016

