

# Challenging Rule Amendments

**Andrew Spink Q.C.**

- Rule amendments raise a host of issues.
- However, for today's purposes we are interested in two namely:
- **First Issue:** How open to attack are trustees when asked to approve rule amendments that reduce benefits for future service?
- **Second Issue:** How should trustees test whether employer decisions have been properly made and all formalities observed?

- Amendments that reduce or terminate the future accrual of benefits are a common and contentious feature of the pensions landscape.
- Amendments are normally prompted by aspects of the financial health of the employer, i.e. it cannot afford to maintain the benefit structure going forward and must therefore prioritise accrued rights, although there may be a genuine need to balance the cost of funding one group of employees' FS benefits against the cost of funding other employees' DC benefits.

- Potential ways of attacking such amendments are to:
  - (i) Allege that the amendment was beyond the scope of the power;
  - (ii) Allege that the power was not exercised for its proper purpose;
  - (iii) Allege that the trustees have taken irrelevant considerations into account or otherwise misdirected themselves or reached a perverse decision;
  - (iv) Allege that, in proposing and participating in the making of the amendments, the employer was acting in breach of its *Imperial* duty/contractual duty of trust and confidence.
- (iv) will be dealt with Jennifer Seaman. This talk will consider (i) to (iii).

- There are many cases on the principles applicable to construing the scope of an amendment power. See e.g. Millett J in **Re Courage Groups Pension Scheme**, Arnold J in **HR Trustees v German (IMG)** and Warren J in **PNPF Trust Co Ltd v Taylor & Ors**, but note the recent trend to a (possibly) stricter approach, i.e. **Arnold v Britton**.
- An example of a case in which the language of the power in question **expressly** limited its scope is **Re Courage** with its well-known fetter on the power of amendment. This was held as a matter of construction to prevent amendments being made that broke any final salary linkage.
- **Re Courage** is therefore a prime example of how a fetter can be used to challenge amendments regarding future service benefits. On a related point see **Briggs & Ors v Gleeds** and **IMG**.
- Highpoint of protection of members' future benefits as a matter of construction: **Lloyds Bank Trustee Co Ltd v Lloyds Bank**

## Protecting the Trustee in cases of doubt

- Contested Part 8 application with appointment of Representative Beneficiary to argue in favour of those in whose interests it would be for the proposed amendment to fail.
- ? Part 8 application under s.48(1) AJA 1985 based on opinion of Counsel of at least 10-years' High Court qualification : see **In re BCA Pension Plan**

*(1) Where— (a) any question of **construction** has arisen out of the terms of a will or a trust; and (b) an opinion in writing given by a [person who has a 10 year High Court qualification, within the meaning of section 71 of the Courts and Legal Services Act 1990] has been obtained on that question by the personal representatives or trustees under the will or trust, the High Court may, on the application of the personal representatives or trustees and without hearing argument, make an order authorising those persons to take such steps in reliance on the said opinion as are specified in the order.*

*(2) The High Court shall not make an order under subsection (1) if it appears to the court that a dispute exists which would make it inappropriate for the court to make the order without hearing argument*

- Another tool for understanding the scope of the power is to analyse whether the proposed amendment is **consistent with the purposes for which the power can be exercised**.
- **Re Courage** (again): *“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.”*
- **Hole v Garnsey**: a power to amend cannot be used to make an amendment which was outside the *“reasonable contemplation of the parties”*. This must be objectively assessed and, as an approach, *“is consistent with descriptions of the restriction on the scope of a power to alter the objects of purposes of the trust; the amendment must not change the whole substratum of the trust”*:  
**PNPF Trust Co Ltd v Taylor**
- For an application in the case of a power of amendment, see **Dalriada v Faulds** ([73-78])

## Consequential questions:

- What is the “purpose” of a pension scheme whilst ongoing?
- Is it contrary to the purpose of the scheme to reduce the benefits provided for in the rules, even though only doing so prospectively?

## Judicial (and other) statements:

- **MNRPF**: The primary purpose in that case was to “secure the benefits due under the Rules” (NB this was a scheme already closed to accrual)
  - **Edge v PO**: “..to provide the ... benefits to which the members, pensioners and dependants are entitled under the rules”
  - **Pollard**: “...to provide the stated and accrued relevant benefits to (and in respect of) the members at a cost acceptable to the employer ... [balancing the interests of the employer and the members]”
- (And remember result in **Lloyds Bank Pension Trust v Lloyds**)

- An aggrieved party, e.g. a member, will have to show that the trustees strayed from the principles set out in **Harris v Lord Shuttleworth** that are akin to the Wednesbury principles.
- In practical terms unless a complainant can demonstrate that the trustees have misdirected themselves in law, have taken into account an irrelevant factor or have failed to take into account a material consideration, then it will be difficult to challenge the exercise of a discretion.
- The task of the Court on a review of an exercise of a discretion is not to substitute its own view for that of the Trustees. Rather it is to determine whether the Trustees' decision was in the realm of the reasonable.

## (1) “Blessing” applications

- **Public Trustee v Cooper** – momentous decisions within trustees’ powers
- **Merchant Navy Ratings Pension Fund Trustees Ltd v Chambers & Ors** – (a) irrelevant, improper or irrational factors? (b) a decision no reasonable body of trustees properly directing itself could have reached?
- Examples:
  - **Merchant Navy Ratings Pension Fund Trustees Ltd v Stena Line Ltd & Ors**
  - **Wilson, Cotton & Moore v Brudenell-Bruce & ors** ((a) relevance of trustees relying on expert evidence; (b) court not usually finding facts)

## (2) s.48 authorisation not applicable

## Proper decisions and formalities? (1)

- Obvious practical limitations on the extent to which Trustees can test whether Employers have exercised the amendment power **properly** e.g. in a manner contrary to the **Imperial** duty.
- Extent to which **formalities** need to be checked depends on the requirements of the amendment power.
- If the power is relatively informal then there may be more scope for challenging whether the employer has – as a matter of fact - exercised the power.
- Courts tend to take a strict approach to this issue. See for instance **BESTrustees v Stuart**.

## Proper decisions and formalities? (2)

- Other evidential techniques may be available to establish that the Employer has complied i.e. the drawing of inferences or the application of “the presumption of regularity”.
- See for instance **Harris v Knight** (“*The maxim expresses an inference which may reasonably be drawn when an intention to do some formal act is established; when the evidence is consistent with that intention having been carried into effect in a proper way; but when the actual observance of all due formalities can only be inferred as a matter of probability*”) and **Entrust Pension Limited v Prospect Hospice Limited**.
- Also estoppel: **Shah v Shah** and **Gleeds**

Any Questions?