
**Drawing on the BA case, where is
the tipping point between proper
and improper use of trustees'
powers of discretion?**

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Question:

1. Where is the tipping point between proper and improper use of trustees' powers of discretion?
2. What impact will the decision of Morgan J, when given, in the *BA* case have?



Outline

Courts will respect decisions by trustee board:

- the trust gives the power/discretion to the trustee
- Not a power for the court (unless surrendered)

But *Scott v National Trust*:

- “Trustees must act in good faith, responsibly and reasonably. They must inform themselves, before making a decision, of matters which are relevant to the decision.”

Who may claim

A beneficiary

This seems to include the employer

What remedy is claimed?

- 1 **reversal of the decision** – with the trustee board being asked to decide again. Such a reversal may perhaps only be possible if:
 - o there is “excessive execution” (the decision is void ab initio) where the trustee board takes a decision outside its powers or
 - o a breach of “fiduciary duty”. It is unclear what this means in the context of powers of a trustee board.

Not all powers owed by a fiduciary (such as a trustee) are full fiduciary powers or duties.

- acting where there is an unauthorised conflict of interest = fiduciary
- not clear if it includes (say) acting without due care.

Pitt v Holt seems to allow a trustee decision to be overturned even if it is not a full fiduciary duty that has been breached.

What remedy is claimed?

2 **Damages or equitable compensation** against the trustee board – but this may be limited by an exoneration clause. And in a large pension scheme the amounts at stake may exceed the resources of the trustee.

3 **Third Party:** Liability of or a claim against a third party (eg the directors of a trustee company) if they knowingly assisted the breach and were dishonest or received trust property without being a bona fide purchaser for value without notice of the breach. This may only apply if the breach was one of a full fiduciary duty.

4 Seek the **removal of the trustee** from being a trustee (under the inherent jurisdiction of the court or by the statutory powers of the Pensions Regulator).

Grounds

1. The decision must not be made in bad faith: *Dundee General Hospital v Walker* ;
2. the exercise must not be outside the power conferred on the trustee - this is really a ultra vires point: *Pitt v Holt*;
3. the power must not be exercised for a different purpose from that for which the power was conferred: *Vatcher v Paull* ; *Howard Smith v Ampol*; *Re Courage Group's Pension Schemes*; *Eclairs*;
4. the trustees must properly consider whether to exercise the power: *Klug v Klug*; *Re Gulbenkian's Settlement*
5. Trustees must exercise their own discretion. There must be a real and genuine consideration: *Karger v Paul*. Executing without realising that they had a discretion was set aside: *Turner v Turner*.

Grounds

6. Trustees must take the decision at the proper time – this is the right way of describing any “no fetter” rule: *Thorby; Fulham Football*;
7. None of the members of the trustee board must have a conflict of interest or duty: *Bray v Ford; Phipps v Boardman*, unless excused by the trust instrument or an implied term or with the informed consent of all the beneficiaries: *Kelly v Cooper; Manning v Drexel Burnham Lambert* ;
8. the trustee board must ask themselves the correct questions; the trustees must direct themselves correctly in law; they must adopt a correct construction of the trust instrument: *Harris v Lord Shuttleworth*

Grounds

9. The trustee board must act with due care and skill. For example in investment decisions a prudent man test was implied in private trusts in the 1880s: *Learoyd v Whitely* and *Cowan v Scargill*

- The Trustee Act 2000 also can impose a statutory duty of care on trustees, but this does not apply (see s36) to the trustees of an occupational pension scheme in relation to their investment duties or in relation to the acquisition of land .

10. the trustees must not arrive at a perverse, capricious or irrational decision i.e. a decision to which no reasonable body of trustees could arrive: *Harris v Lord Shuttleworth*; and *Edge v Pensions Ombudsman*.

This is similar to a public law *Wednesbury* test – See *Braganza v BP Shipping*

11. the trustees would have come to a different decision if they had taken into account all relevant factors or not taken into account any irrelevant factors: *Re Hastings Bass*, but there must be a breach of duty by the trustees – *Pitt v Holt* . Again this is similar to a public law *Wednesbury* test.



BA case

British Airways PLC v Spencer
Mr Justice Morgan

Morgan J

High Court judge since 2007.

Pensions cases include:

- *Hughes v Royal London Mutual Insurance Society Ltd* [2016] EWHC 319 (Ch)
- *Pi Consulting (Trustee Services) Ltd v The Pensions Regulator; Dalriada Trustees Ltd v Nidd Vale Trustees Ltd* [2013] EWHC 3181 (Ch)
- *Industry-Wide Coal Staff Superannuation Scheme Co-ordinator Ltd v Industry-Wide Coal Staff Superannuation Scheme Trustees Ltd* [2012] EWHC 3712 (Ch)
- *Swallow v HM Revenue and Customs* [2010] EWHC 771 (Ch)
- *Re the AC Skelton Pension & Life Assurance Scheme; Capital Cranfield Trustees Ltd v Beck* [2008] EWHC 3181 (Ch)
- *Hearn v Dobson* [2008] EWHC 1620 (Ch)
- *Chittoo v British Telecommunications Plc* [2007] EWHC 2944 (Ch)



BA case

Case heard over many weeks in autumn 2016

Judgment not now expected before April 2017

Preliminary judgment of Warren J: *British Airways Plc v Spencer & Ors (Trustees of the Airways Pension Scheme)* [2015] EWHC 2477 (Ch)

BA case Preliminary judgment: [2015] EWHC 2477 (Ch)

Warren J: Parties allowed to bring expert actuarial evidence.

BA's case (see [5]):

- the Amendment Decision was invalid because it involved the exercise of the amendment power for an "improper purpose".
- The Pension Increase Decisions were invalid because [see next slide]

BA case Preliminary judgment: [2015] EWHC 2477 (Ch)

The Pension Increase Decisions were invalid because ... :

- (a) The Trustees failed to give active or genuine consideration to the exercise of their discretion in making the Pension Increase Decisions;
- (b) The Pension Increase Decisions involved the exercise of the discretionary increase power for an "improper purpose";
- (c) The Trustees failed to comply with the requirement of Rule 15 of the Rules in the exercise of the discretionary power;
- (d) The Pension Increase Decisions were "irrational" or "perverse";
- (e) The Pension Increase Decisions were invalid under the rule in *Re Hastings Bass* {[1975] Ch 25} as explained in *Pitt v Holt* {together with *Futter v Futter* [2013] UKSC 26 [2013] 2 AC 108}, dealing with the duties of Trustees when providing advice; and
- (f) The scope of the actuarial advice the Trustees received went beyond the scope of the advice upon which a professional actuary could advise.



BA case Preliminary judgment:

BA's argument on predetermination (see [13])

“(a) The Trustees, some of whom had been elected on a campaigning platform that the Scheme should pay RPI not CPI increases, had predetermined that the Scheme should pay increases above those required under the Trust Deed and Rules in order to reverse the impact of the change in the basis of increases from RPI to CPI.

(b) This "objective" and determination resulted in the Trustees using their professional advisers to assist them in finding ways to justify granting such augmented benefits, rather than simply advising them whether it was an appropriate thing to do in the circumstances.

(c) This resulted in:

i) the Trustees' failing to follow professional advice that did not support the granting of enhanced benefits;

ii) one of the Member Nominated Trustees even criticising the Trustees' actuarial advisor who provided such advice; and

iii) the Trustees seeking to tailor the professional advice they received in order to purport to permit enhanced benefits and thus to achieve their stated "objective", which tailoring included consistently diluting the levels of prudence in the actuarial advice received.

(d) BA relies on such conduct as demonstrating that the Trustees had closed their minds to the possibility of not granting pension increases above those provided for under the rules, so that (as the Pensions Regulator itself noted in correspondence with the Trustees) it became a question of "when" and "how" to grant such increases not "whether" such increases were appropriate.“



History and background (1)

- BA is sponsor to two schemes: APS and NAPS
- CPI/RPI change
 - Ex-public sector, so expectation of RPI
 - Trustee resignations and re-election (2011)
 - “best financial interests”
- Rule amendment to give power
 - Unilateral amendment power for trustee
 - Unilateral increase power
 - Discretionary Increase Framework (“DIF”)
- Decision: 0.2% above CPI
 - Postponed for the period of the court case

[This and Next few slides based on ones kindly provided by Mark Atkinson]



History and background (2)

- APS very mature – over 90% of liabilities for pensioners
- Undertaken a programme of de-risking
- Funding basis is gilts plus 0.4% p.a. post-retirement
- In 2012, funding provision included to move from CPI to RPI increases over a 10-year period
- Recovery plan in place with contributions of £55 million p.a.
- Additional £250m to be available in 2019 for APS or, if not needed by APS, NAPS
- NAPS trustee interest
- TPR interest



Framework of principles

- Covering discretionary increases
- Supported by actuarial analysis
- Three key objectives:
 - Benefit security
 - Granting increases in line with RPI
 - Any increase to be supportable in the long term



Legal challenges

- BA's case: decision making improper
- Improper purpose
- Reversing the RPI to CPI move
- Not a benevolent fund
- Predetermination, so not proper exercise of a discretion
- Strong views
- Campaigning
- Flawed decision making
- Use of advisers (“feeling a bit bruised”)



Key questions

- Can a scheme in deficit grant discretionary increases?
- Is this affected by whether there are increases already provided under the Trust Deed and Rules?
- How should benefit security be assessed?
- How important is further de-risking compared with granting discretionary pension increases?



Points of interest

- Conflict on part of TPR
 - NAPS
 - PPF
- “Best financial interests”
- Purpose of power
 - Not benevolent fund
- Confidential information
 - Witnesses reported apparent flows to ABAP
- As always: everything you write may later be debated in court
 - “Retaliation”, cash sweep “manipulation”
 - What does this mean for negotiation?
- Expert actuarial advice in court
 - Warren J upheld use in 2015 decision



Applying the proper purpose test

Proper Purpose?

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

OUP, 2013

Counsel:

“The leading textbook on
occupational pension schemes”

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 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)

BA argues improper to say that “will act in the best interest of members”

Questions/Comments/Discussion?

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