



Fetters on pension scheme amendment powers:

British Broadcasting Corporation v BBC Pension Trust Ltd¹

By Joseph Steadman

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When pension scheme employers wish to understand their options for reducing the cost of future pension provision under a “*defined benefit*” pension scheme, one of their first ports of call will be to consider the power of amendment: who has power to amend the scheme, and what are the limits on that power? In the case of the BBC – which announced a review of its future pension provision for employees in May 2022 – the answer to that question was uncertain.

The BBC therefore brought a Part 8 claim seeking clarification from the High Court, and named one of the Active Members as a Representative Beneficiary on behalf of those in whose interests it would be to establish the least scope for exercising the Scheme’s amendment power to terminate future service accrual or otherwise engage in benefit redesign to reduce future service liabilities. The BBC was clear that it had not made any decision about pension reforms and that it was not asking the Court to consider any specific proposals.

¹ [2023] EWHC 1965 (Ch).

The questions before the Court

The power of amendment for the BBC Pension Scheme (the “**Scheme**”) was vested in the Trustee and could be exercised only with the consent of the BBC. It included a series of provisos, of which the third (the “**Third Proviso**”) was that no alteration or modification could “*take effect as regards the Active Members whose interests are certified by the Actuary to be affected thereby*” (emphasis added) unless certain conditions were fulfilled (the “**Conditions**”, which are set out below).

The first question for the Court was the meaning of the word “*interests*” in the Third Proviso. In relation to this question, the BBC contended that the word “*interests*” was limited to benefits the Active Members had already earned by past service. There was no legal right to accrue further benefits through future service, and so the hope of doing so was not an “*interest*” protected by the Third Proviso. This was, the BBC contended, supported by the use of the word “*interests*” to mean “*existing benefits*” elsewhere in the rules. It was also a practical and purposive construction, which would provide the BBC with flexibility to change remuneration policy in response to the exigencies of commercial life. The BBC also contended that the meaning of “*interests*” had already been given a narrower construction in *Bradbury v BBC* [2012] Pens LR 238 and [2017] EWCA Civ 1144.

Against this, the Representative Beneficiary contended that the meaning of the word “*interests*” was broader, encompassing all of the interests of Active Members including their interest in future benefit accrual. In other words, the power of amendment could only be used to change future service benefits and/or member contributions for Active Members if one of the Conditions was fulfilled.

The second question for the Court was whether the use of the power of amendment to change future service benefits would be an exercise of that power for an improper purpose. In relation to this question, the Representative Beneficiary argued that there would be a breach of the proper purpose doctrine, on the basis that – drawing on dicta from *British Airways Pensions Trustees Ltd v British Airways plc* [2002] Pens LR 247 – the role of the Trustee was focused on the management and administration of the Scheme, and not benefit design (which was the domain of the BBC as employer, and was to be achieved otherwise than through an amendment power vested in the

Trustee). The power of amendment could only be used to implement changes to benefit design which had already been effected outside the Scheme.

Against this, the BBC contended that there would not be any such breach, because a benefit design change which was permitted by the Third Proviso would be within the express scope of the power of amendment, leaving no room for the proper purpose doctrine to impose an implied limitation on that scope. Moreover, any such amendment would necessarily have to be made with the BBC's consent.

The Trustee – as is conventional – was neutral on the answers to these two questions. It took part in the proceedings primarily to assist the Court and to ensure that all relevant information was provided, and that all relevant questions and arguments were raised.

The Court's decision

Question 1: meaning of "interests"

Adam Johnson J found that as a matter of ordinary language the concept of interests was not *"apt to suggest that the intended division between matters which are protected and matters which are not is marked by the fault line between benefits already earned by past service and those which are yet to be earned in the future"* (at [41]). Rather, the natural focus of the inquiry was on whether the position of the Active Members would be different after the proposed amendment than it was beforehand (at [42]). If it would be, then their *"interests"* were *"affected"*.

The fact that there were uncertainties regarding the level of future benefits any individual Active Member might earn – because they might be dismissed, or choose to leave service, or die before retirement – did not affect that conclusion: the Active Member's interests are affected *"because the rules of the game will have changed part-way through in a manner that will leave him worse off if he stays the course to the end of the match"* (at [45]).

So, as well as a hope of accruing future benefits, an Active Member also had “*a present right not to be subject to any change in the terms of the Deed or Rules which affects his position, otherwise than subject to the procedures contained in, and protections afforded by, the 3rd Proviso*” (at [47]). Those protections provided some flexibility to address the exigencies of commercial life, by satisfying the Conditions (at [49] and [57]).

The use of the word “*interests*” elsewhere in the rules did not affect that conclusion. The word “*interests*” had an inherent pliability, referring to matters of relevant concern which would differ according to the context and the identity of the party or parties whose interests were described (at [51]). Where the circumstances would not permit future benefits to be accrued, for instance upon a winding-up of the Scheme, the word “*interests*” would have a narrower meaning than the “*interests*” of Active Members (at [52]).

Finally, on this question, Adam Johnson J found that neither of the decisions in *Bradbury* precluded him from reaching those conclusions (at [76] and [80]).

The result was therefore that the Third Proviso prevented the power of amendment from being used to change future service benefits and/or member contributions for Active Members unless one the Conditions has been satisfied, namely:

- (a) *the Actuary certifies that the alteration or modification does not substantially prejudice the interests of such Members [“**No Substantial Prejudice**”]; or*
- (b) *the Actuary certifies that [...] substantially equivalent benefits are provided [...] [“**Substantially Equivalent Benefits**”]; or*
- (c) *the alteration or modification is approved by resolution adopted at a meeting of such Members convened by the Trustees [“**Active Member Consent**”].*

This highlights the courts' continuing focus on textual analysis of pension scheme deeds and rules, consistent with Lord Hodge's analysis in *Barnardo's v Buckinghamshire* [2018] UKSC 55 at [15]. It illustrates the limitations of arguments based on the need for provisions to be interpreted in a "practical" way, which as Adam Johnson J pointed out at [49], are often question-begging—practical for whom?

Question 2: proper purpose

Adam Johnson J found that it would not be an improper use of the amendment power for the Trustee – with the consent of the BBC and in compliance with the Third Proviso – to change future service benefits and/or member contributions for Active Members.

The situation was different from that in *British Airways*. There, the complaint was that the trustees had acted unilaterally, against the interests of the employer, and the improper purpose was the use of the amendment power to remodel the balance of powers between themselves and the employer; here, the Trustee could only act with the consent of the BBC (at [96] and [97]).

Moreover, the power of amendment itself contemplated that it could be used to change future service benefits and/or member contributions for Active Members, subject to the Third Proviso and if necessary to satisfying one of the Conditions (at [99(ii)]). That was the very purpose of the power of amendment (at [99(iii)]).

Interestingly, Adam Johnson J concluded by noting that the answer to Question 2 was linked with the answer to Question 1: the broad scope of the Third Proviso meant there was no need to identify a further layer of potential protection through the proper purpose doctrine (at [102]). Had there been a differently-worded proviso, construed more narrowly, the result on proper purpose might perhaps have been different.

The decision illustrates the context-sensitive nature of any proper purpose inquiry – consistent with *Grand View Private Trust Co Ltd v Wen-Young Wong* [2022] UKPC 47 and *Eclairs Group Ltd v JKK*

Oil & Gas plc [2015] UKSC 71 – and confirms that *British Airways* does not set down a general principle that an amendment power vested in a trustee cannot properly be used to effect changes to benefit design.

What next?

This is the first time in almost thirty years – since *Lloyds Bank Pension Trust Corporation v Lloyds Bank plc* [1996] PLR 263 – that a domestic court has found that a fetter on a pension scheme’s amendment power protects future service benefits.

For those involved in administering pension schemes, it is a reminder of the importance of understanding the particular wording of their amendment powers – including any provisos – and is perhaps an opportune moment to consider whether there is any uncertainty concerning the validity of any past or proposed exercises of those powers. For the BBC in particular, the way forward will no doubt be the subject of further careful consideration.

Meanwhile, a hearing to deal with consequential matters – including any application for permission to appeal – has been listed for 15 September 2023.

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