Neutral Citation Number: [2019] EWCA Civ 806

Case No: A3/2018/1291

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
[2018] EWHC 785 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/05/2019

Before:

SIR GEOFFREY VOS, CHANCELLOR OF THE HIGH COURT
LORD JUSTICE HENDERSON
and
MR JUSTICE NUGEE

- -

Between:

BIC UK LIMITED	**Appellant**
- and -	
(1) MICHAEL JOHN BURGESS **(2) BENOIT CHAMBONNET** **(3) DAVID EVERITT**	**Respondents**

- -

Mr Keith Rowley QC and Ms Elizabeth Ovey (instructed by **Trowers & Hamlins LLP**) for the **Appellant**
Mr Andrew Short QC and Mr Saaman Pourghadiri (instructed by **Stephenson Harwood LLP**) for the **Respondents**

Hearing dates: 6 & 7 February 2019

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Approved Judgment

Lord Justice Henderson:

Introduction

1. This appeal concerns an attempt by the trustees and the principal employer of a private sector defined benefit occupational pension scheme to introduce inflation-linked annual increases to the pensions of members of the scheme earned by service before 6 April 1997. The relevance of that date is that under section 51 of the Pensions Act 1995 such increases were first required by statute to be made to pensions earned by service from and after 6 April 1997.

2. It is now common ground that the original attempt to introduce these increases ("the pre-1997 Increases") in 1991/2 was invalid for failure to comply with the necessary formal requirements in the version of the rules which then governed the scheme ("the Fourth Edition"). However, the invalidity was not perceived at the time, and the pre-1997 Increases were not only added to pensions in payment, but were also taken into account in calculating accruals of future pension entitlements and the funding of the scheme, until the problem first came to light some twenty years later in 2011.

3. The Fourth Edition was superseded by a new Definitive Deed and Rules dated 29 May 1993 ("the 1993 Deed and Rules"), which as it happens (for reasons unconnected with the present problem) were expressed to take effect retrospectively from 6 August 1990. At least arguably, however, certain powers contained in the 1993 Deed and Rules, had they been in force and exercised at the relevant times in 1991/2, would have validated the steps which were then taken to introduce the pre-1997 Increases. Two main questions therefore arose after the present problem had come to light. The first question, broadly stated, is whether the back-dated effect of the 1993 Deed and Rules could in principle be relied upon so as to validate the steps which had in fact been taken in 1991/2 to introduce the pre-1997 Increases, even though the only rules then in force were the Fourth Edition. If the answer to that question is yes, the second main question is whether, on the true construction of the 1993 Deed and Rules, any of the relevant powers would, if exercised, have achieved the objective of validly introducing the pre-1997 Increases.

4. These questions, together with the logically prior issue whether the steps taken in 1991/2 had in fact complied with the formal requirements of the Fourth Edition, were debated at the trial of the present action before Arnold J in March 2018. The claimants are the present trustees ("the Trustees") of the BIC UK Pension Scheme ("the Scheme"), and the defendant, BIC UK Limited ("BIC UK"), has at all material times been the principal employer of the Scheme. Representation orders were made by consent pursuant to CPR rule 19.7, appointing the claimants to represent those in whose interests it was to argue for an affirmative answer to the question whether the pre-1997 Increases were properly made (and for a negative answer to certain consequential issues with which we are not concerned), and appointing BIC UK to argue for the contrary outcome.

5. In his reserved judgment handed down on 17 April 2018, the neutral citation of which is [2018] EWHC 785 (Ch), the judge answered both the questions which I have identified in favour of the claimants. In relation to the first question, the judge said at

[125] that he had found it difficult to resolve but he preferred the submissions of counsel for the claimants, for reasons which he then summarised as follows (ibid):

> "The 1993 Deed and Rules were deliberately expressed to have retrospective effect, and for good reason (albeit a reason unconnected with the Pre-97 Increases). I see the force of the point that the 1993 Deed and Rules did not themselves provide for the payment of the Pre-97 Increases, but in my view that does not prevent effect from being given to the decision recorded in [*the*] 1991 Minutes if that does not involve impermissibly re-writing history (assuming, for this purpose, that the 1993 Deed and Rules enable this to be done). I also see the force of the point that the Claimants' case involves relying upon different powers contained in the 1993 Deed and Rules to validate an amendment that was not validly made under rule 36 of the Fourth Edition. But, as I see it, the key point is that the amendment could have been made under rule 36, and the only reason why it was not validly made is due to the failure to observe the correct formalities. It is true that reliance upon the powers in the 1993 Deed and Rules involves an element of re-writing history, but that will often be the case where an instrument is expressed to have retrospective effect. In my judgment, however, it does not involve doing so impermissibly. Rather, it enables effect to be given to what, as a matter of historical record, was in fact decided and done."

6. The judge next considered the five separate provisions of the 1993 Deed and Rules which were relied upon as validating the decision to pay the pre-1997 Increases, and held that four of them were individually sufficient to achieve that purpose: see the judgment at [127] to [146].

7. Finally, the judge also dealt briefly with a subsidiary question of construction which concerned the position of certain members of a previously separate scheme for hourly paid BIC employees ("the Works Scheme") which had been amalgamated with the Scheme by an Amalgamation Deed dated 12 October 1992 ("the Amalgamation Deed").

8. BIC UK now appeals to this court, with permission granted by the judge, from his decisions on the two main questions and the subsidiary issue relating to the Works Scheme. There is no appeal, as I have already indicated, from the judge's decision on the prior question whether the pre-1997 Increases were validly effected under the Fourth Edition rules. It is now common ground that they were not. Nor is there any appeal in relation to the judge's adverse decision on the fifth of the possible validating provisions contained in the 1993 Deed and Rules.

The facts

9. The relevant facts were found with exemplary clarity by the judge. They are no longer in dispute. The account which follows is largely based on the helpful summary provided by counsel for the appellant (Keith Rowley QC, leading Elizabeth Ovey) in their skeleton argument in support of the appeal.

(a) The current state of the Scheme

10. The Scheme closed to future accrual on 1 December 2010. At the last triennial valuation, made as at 5 April 2015, the Scheme had assets of £34,230,000 against liabilities of £40,060,000 on the Scheme's ongoing funding basis, excluding liabilities in respect of the pre-1997 Increases. If those liabilities had been included, the total liabilities would have amounted to £45,120,000, an increase of £5.06 million. Payment of the pre-1997 Increases has been suspended since March 2013.

11. As at 6 April 2017, the Scheme had 377 members, of whom 219 were pensioners and 158 were deferred members. Of the pensioner members, 25 have never received pre-1997 Increases and would not receive them if they were reinstated. Of the deferred members, 54 would not receive pre-1997 Increases if they were reinstated. There is accordingly a significant body of members and beneficiaries who do not benefit as a result of the judge's decision, either because their pensionable service all post-dates 5 April 1997 or because they have no benefits in excess of their guaranteed minimum. Payment of these members' benefits could potentially be affected by the increase in the Scheme's liabilities of approximately £5 million resulting from the judge's decision, although we were told that this is not likely to be a practical concern given the financial health of the BIC group.

(b) The history of the Scheme

12. The Scheme was established with effect from 1 October 1951 by an Interim Deed of Trust dated 27 September 1951. Following other intervening Deeds, the Fourth Edition rules were adopted by a Deed of Variation dated 10 October 1977. Amendments were then made by a written instrument dated 1 February 1978 to enable the Scheme to become contracted out from the state earnings-related pension scheme ("SERPS"). As a result, members acquired rights to a guaranteed minimum pension ("GMP") and, with effect from 6 April 1988, to statutory increases on their GMPs. The Fourth Edition rules, as originally adopted and as amended, did not confer on members any general right to increases to pensions in payment.

13. The Works Scheme, designed for BIC employees who were not covered by the Scheme and who were paid on an hourly basis, was established by an Interim Trust Deed dated 29 September 1967, and was also amended so that it could become contracted out. The Works Scheme was amalgamated with the Scheme by the Amalgamation Deed, with retrospective effect from 6 August 1990 (therein defined as "the Effective Date"). Members of the Works Scheme had no right to increases to pensions in payment except in relation to their GMPs.

14. In February 1984, Noble Lowndes Associated Pensions Limited ("Noble Lowndes") were appointed as the advisers, administrators and actuaries of the Scheme and the (still separate) Works Scheme. Noble Lowndes or its successors retained those roles until 2003.

15. By 1987, there was a substantial surplus in the Scheme and BIC UK reduced its employer contributions. The reduction was made on advice from Noble Lowndes, who drew the attention of BIC UK and the Trustees to new legislation (originally contained in the Finance Act 1986 and regulations thereunder, and subsequently in the Income and Corporation Taxes Act 1988 and regulations thereunder) by which the surplus in a

scheme had to be reduced to no more than 5% of the value of the liabilities, calculated on a prescribed basis, in order to avoid potential tax charges and penalties.

16. At a meeting of the Trustees held on 18 February 1991, the chairman, Mr Donald Hartridge, who was also the managing director of BIC UK, reported that the Scheme was in surplus and that steps had to be taken to reduce the surplus. His fellow trustees, also present at the meeting, were Mr Gerald Burgess and Mr David Everitt, each of whom was also an executive director of BIC UK. The minutes of the meeting ("the 1991 Minutes") read as follows, after Mr Hartridge's initial explanation:

> "Several options had been considered and it was proposed that part of the surplus be used to enhance the pension of existing pensioners and improve future benefits for both them and the members of the pension scheme.
>
> The proposals would involve increasing pensions in payment in line with inflation since the commencement of their payment and increasing future payments by RPI or 5% whichever was the lower.
>
> The increasing of pensions in payment would be made at the discretion of the Trustees.
>
> It was RESOLVED that the proposed action be carried out as soon as possible."

The 1991 Minutes record that the meeting closed at 1.45 pm, fifteen minutes after it had started. The minutes were signed at the next meeting of the Trustees on 24 March 1992 by the chairman, but not by the other two trustees.

17. In April 1991, some two months after the Trustees' meeting on 18 February, a new explanatory booklet for Scheme members was issued. The booklet explained how members' GMPs would be increased, but made no reference to the enhancement of existing and future pensions which the Trustees had agreed to implement in February.

18. On 19 March 1992, the Trustees issued an announcement to members signed by Mr Hartridge ("the March 1992 Announcement") in the following terms:

> "THE BIRO BIC SUPERANNUATION FUND
>
> NOTICE TO MEMBERS
>
> At a time when there is genuine concern regarding company pension funds, the Trustees are pleased to report that the Fund continues to be in good financial health.
>
> Since the decision of the Trustees to change the Fund from an insured scheme to a Managed Fund, there has been a considerable improvement in the fund's assets. Regular reviews of the investment managers and their active supervision by the Trustees has helped maintain this trend.

> There is proposed legislation to increase pensions in payment, to reduce the effect of inflation on their buying power. The Trustees have decided to implement this proposal now rather than wait for the requirement to come into effect. Moreover, due to the strength of the Fund it will not be necessary at present to seek additional contributions from the members towards the extra cost of this improvement.
>
> Therefore, all pensions commencing after 6th April 1992 will be increased each year by 5% or the Retail Price Index, whichever is the lower. The increase will be applied to that part of the benefit in excess of the Guaranteed Minimum Pension.
>
> The Trustees will continue their efforts to ensure that the Fund remains strong and healthy in the future."

The notice was signed by Mr Hartridge "[f]or and on behalf of the Trustees" of the Scheme.

19. From 6 April 1992, increases were paid at that rate (often conventionally referred to as "5% LPI") on all pensions in payment, whenever commencing and in respect of all service. The increases were also paid on pensions of former members of the Works Scheme, even though the Amalgamation Deed had not yet been executed. Further, the future liabilities of the Scheme were calculated on the footing that members were entitled to such increases.

20. No documents other than the 1991 Minutes and the March 1992 Announcement have been found which evidence the making of a decision by the Trustees before 6 April 1992 to grant the pre-1997 Increases. Nor have any documents come to light which evidence such a decision by BIC UK, but having heard oral evidence from two of the Trustees, Mr Hartridge and Mr Everitt, the judge found at [92] that BIC UK had agreed to their payment. As the judge said, the three executive directors of BIC UK were "clearly content" for Noble Lowndes' proposal to pay the pre-1997 Increases to be adopted by themselves in their capacity as trustees. Had that not been the case, the proposal would not have proceeded.

21. The 1993 Deed and Rules expressly provided that increases to pensions in payment were payable only on members' GMPs. There were no provisions which expressly authorised or reproduced the effect of the increases across the board at 5% LPI which had in practice been introduced with effect from 6 April 1992. This continued to be the position until the 1993 Deed and Rules were in turn replaced by a new Definitive Trust Deed and Rules dated 16 January 2006 ("the 2006 Deed and Rules"), which again contained no provisions entitling members to payment of the pre-1997 Increases. Subject to immaterial amendments, the 2006 Deed and Rules constitute the current governing documentation of the Scheme.

22. The judge considered that "the most likely explanation" for the failure to mention the pre-1997 Increases in the April 1991 members' booklet, the 1993 Deed and Rules or the 2006 Deed and Rules was "simply oversight": see [89].

The position under the Fourth Edition rules

23. The power of amendment in the Fourth Edition rules was contained in rule 36, which provided that:

> "… the Trustees may from time to time and at any time with the consent of the Principal Company [*i.e. BIC UK*] by way of formal variation of these Rules adopted by any deed or deeds executed by the Trustees and the Principal Company or by any writing effected under hand by the Trustees and the Principal Company alter or modify all or any of the provisions of the Scheme…"

24. Clearly, there was no deed executed by the Trustees and BIC UK introducing entitlement to the pre-1997 Increases. Accordingly, the only way in which they could have been validly introduced by amendment to the Fourth Edition rules was "by any writing effected under hand" by the Trustees and BIC UK. It was common ground, as the judge recorded at [99], that the words "effected under hand" mean that the document in question must be signed: see Trustee Solutions Ltd v Dubery [2006] EWHC 1426 (Ch), [2006] 1 All ER 308, at [21] to [36]. The judge therefore accepted, at [100], that if the 1991 Minutes had been signed by all three of the Trustees, and on behalf of BIC UK, then the decision to pay the pre-1997 Increases would have constituted a valid exercise of the rule 36 power. The obvious problem, however, was that the 1991 Minutes had been signed only by Mr Hartridge at a meeting of the Trustees.

25. In an attempt to get round this difficulty, the claimants submitted that the failure to comply with the specified formalities could be cured by the equitable maxim that equity looks on that as done which ought to be done, relying for this purpose on the decision of Vos J (as he then was) in HR Trustees Ltd v Wembley PLC [2011] EWHC 2974 (Ch). The judge considered this argument at [101] to [114], together with the discussion of the Wembley case by Newey J (as he then was) in Briggs v Gleeds (Head Office) [2014] EWHC 1178 (Ch), [2015] 1 Ch 212. He concluded that the reasoning of Vos J in the Wembley case depended on the fact that the scheme trustees had come under an enforceable obligation to make the required declaration (which had been signed by only four of the scheme's five trustees), whereas, in the present case, the Trustees and BIC UK had a purely discretionary power of amendment, which equity would not have compelled them to exercise: compare Lewin on Trusts, 19th edition, at paragraphs 29-204 and 205. Hence, the judge concluded that the decision to pay the pre-1997 Increases could not be validated by reliance upon rule 36.

26. This conclusion set the scene for the claimants' alternative argument based on the retrospective effect of the 1993 Deed and Rules, to which I now turn.

The question of principle: could the invalid steps taken in 1991/2 to introduce the pre-1997 Increases be retrospectively validated pursuant to the 1993 Deed and Rules?

27. Before descending into detail, it is important not to lose sight of the big point which underpins this part of the argument. It is that the 1993 Deed and Rules were expressly stated to be substituted for the Second Definitive Deed and the Existing Rules (which

included the Fourth Edition rules) with effect from 6 August 1990, that being the date (itself retrospective) on which the amalgamation of the Works Scheme with the Scheme had taken effect. On that footing, so the argument runs, the trusts, powers and provisions of the 1993 Deed and Rules must be treated as having been in place since 6 August 1990, with the consequence that the validity of steps taken in the administration of the Scheme since that date must now be tested by reference to the 1993 provisions instead of the superseded provisions. Thus, if appropriate powers can be found in the 1993 Deed and Rules which could have validated the steps actually taken by the Trustees in 1991/2 to introduce the pre-1997 Increases, those powers must now be treated as having been exercised to the extent necessary to achieve that result.

28. I emphasise that the argument seems to me to depend not only on identifying a relevant enabling power in the 1993 Deed and Rules, but also on finding a proper basis for regarding that power as having been exercised at the material time. As a matter of principle, there is a clear distinction between having the power to do something, and actually exercising the power. The significance of this distinction appears to have been somewhat elided in argument before the judge, but with a little prompting from the court it featured much more prominently in the argument before us, and led (as I shall explain) to an application by counsel for the Trustees10 (Andrew Short QC, leading Saaman Pourghadiri) for permission to file a respondent's notice and to rely on certain additional arguments.

Relevant provisions of the 1993 Deed and Rules

29. The 1993 Definitive Deed was expressed to be made between BIC UK as the principal employer (1) and the Trustees (2). The recitals set out the history of the Scheme from the Interim Deed of 27 September 1951 onwards, including the amalgamation with the Works Scheme, and recited the desire of the Trustees with the consent of BIC UK to amend the provisions of the Second Definitive Deed and the Existing Rules. Clause 1(a) then provided as follows:

> "(a) Effective Date
>
> The provisions of the Second Definitive Deed and the Existing Rules are hereby deleted with effect from 6 August 1990 (referred to in this deed as the "Revision Date") and the following provisions substituted for them EXCEPT THAT (1) any of the substituted provisions expressed to take effect from other dates shall take effect from those dates, (2) notwithstanding Rule 2, any person who was a member of the Scheme immediately prior to the deletion of the Existing Rules shall be deemed to be a Member in relation to any benefit to which he or any other person continues to remain entitled (contingent or otherwise) under the Scheme and (3)…
>
> Prior to the execution of this deed, the Trustees have administered the Scheme in accordance with
>
> (i) the Interim Deed, the First Definitive Deed, the First Rules, the Second Definitive Deed, the First Instrument, the Second Instrument and the Existing Rules;

> (ii) written notifications issued to the Members by the Trustees or by the Employer with the Trustees' consent;
>
> (iii) the requirements contained in Section 63 and Schedule 16 of the Social Security Act 1973 and any regulations made under it relating to the preservation of benefits under the Scheme, together with such other requirements of social security legislation as apply to the Scheme, and
>
> (iv) the requirements of Sections 53 to 56 (inclusive) of the Pensions Act and any regulations made under it relating to equal access for men and women to membership of occupational pensions schemes
>
> and in a manner which does not prejudice treatment of the Scheme as an Exempt Approved Scheme.
>
> This deed shall not invalidate any decision which was taken or power which was exercised by the Trustees and/or an Employer in accordance with the terms of the items in (i), (ii), (iii) and (iv) above prior to the execution of this deed."

30. Clause 4 provides for amendment of the Trust Deed or Rules, as follows:

> "4. AMENDMENT OF TRUST DEED/RULES
>
> THE Trustees may at any time… with the consent of the Principal Employer,
>
> (i) by deed executed by the Principal Employer and the Trustees in the case of this deed or the Rules, or
>
> (ii) by resolution (in writing) of the Trustees in the case of the Rules only
>
> modify alter or extend all or any of the trusts, powers or provisions of this deed or the Rules, and any such modification, alteration or extension shall have effect from such time as may be specified in that deed or resolution and so that the time so specified may be the date of that deed or resolution or any reasonable time previous or subsequent to it, so as to give the modification, alteration or extension retrospective or future effect (as the case may be)
>
> PROVIDED THAT [*three provisos are then set out, which in summary prevent any amendment prejudicial to a member without his consent in writing, preserve the Exempt Approved tax status of the Scheme, and prohibit the payment of any part of the Fund to any of the Employers*]."

31. Clause 9 is headed "AUGMENTATION", and states that:

> "IF and for so long as the Scheme is to be treated as an Exempt Approved Scheme, then subject to the provisions of Part II of the Schedule, the Trustees may, on the Principal Employer's direction, grant any new and additional Relevant Benefits to any person, or augment any of the Relevant Benefits (including pensions in payments) which any person may be entitled to under this deed or the Rules."

32. Rule 3(c) of the 1993 Rules deals with "Actuarial reviews", to be arranged every three years. Paragraph (c)(iii) then states that:

> "Despite any actuarial valuation of the Scheme made in accordance with paragraph (ii) of this Rule 3(c), if the Actuary is of the opinion that the value of the Fund exceeds the value of the liabilities of the Scheme and for that (or any other) reason, certain alterations are recommended to be made to the benefits or to the contributions payable under the Scheme, the Trustees with the consent of the Principal Employer may make such of those alterations or take such other action as they deem expedient to reduce that excess, except the payment of money out of the Fund to the Employers."

33. Finally, rule 9 is headed "PENSION INCREASES" and provides:

> "(a) Increases to pensions in payment
>
> Any pension in course of payment, whether to a Member or to a Dependant, may be increased annually (or at such other intervals as the Trustees shall determine) after the start of that pension, by such amount as the Employer (with the Trustees' consent) shall decide.
>
> …"

The judge's decision on the question of principle

34. The judge began his discussion of this topic at [119], saying it is "well established that, in general, a contract may provide for its provisions to have effect from a date prior to the execution of the contract". The authorities which he cited for this uncontroversial proposition were Trollope & Colls Ltd v Atomic Power Constructions Ltd [1963] 1 WLR 333 (at 339, per Megaw J) and Northern and Shell PLC v John Laing Construction Ltd [2003] EWCA Civ 1035, 90 Con. L. R. 26, at [51].

35. The judge then said that, in the present context, the applicable principles are those laid down by Lord Walker of Gestingthorpe giving the judgment of the Privy Council in Bank of New Zealand v Board of Management of the Bank of New Zealand Officers' Provident Association [2003] UKPC 59, [2003] OPLR 281, at [26]. Before I quote that paragraph, I should explain that the issue in that case concerned the validity of certain proposed amendments to the statutory rules of the Bank's superannuation fund, in circumstances where (unusually) there was a large surplus for the trustees to dispose of. The proposed amendments included increases to the lump sum benefits taken by members, including former members, of Division 2 of the scheme at any time after 1 November 1995. The Board of Management began proceedings in 2001 for a declaration that the amendments would be valid. The issue turned on the scope of the power of amendment, which was subject to no relevant restrictions apart from the "general principle that a power must be used only for the purposes for which it must be supposed to have been intended": see the judgment of the Board at [18].

36. Against this background, and upholding the decision of the New Zealand Court of Appeal to the effect that lump sum payments could properly be made to an officer of the Bank after cessation of his or her period of service "in circumstances not involving any impermissible retrospectivity", Lord Walker said at [26]:

> "In the courts below the Board of Management's power to make a retrospective amendment was dealt with as a separate topic. But before their Lordships it was rightly conceded that this topic is merely a reflection of, or another (and possibly less helpful) way of putting, what is essentially the same point as to the scope of the power of amendment. Modern authority (as reviewed and summarised by Lord Mustill *in L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486, 524-525) has recognised that when the law raises a presumption against the retrospective operation of an enactment or a disposition (including a rule change), it is concerned with fairness in the circumstances of the particular case, rather than with the application of some general formula. In the amendment of pension scheme rules, back-dating (that is, deeming a change of the rules to have been made at a date earlier than the date of the actual change) cannot be used as a device so as to rewrite history or validate an amendment which would otherwise be beyond the scope of the power of amendment. But if the substance of what is proposed is within the power, back-dating will not by itself lead to invalidity (whether it will be more or less helpful, simply as a matter of drafting technique, will depend on the circumstances)."

37. The judge then referred to the decision of Mr Timothy Fancourt QC (as he then was) in Shannan v Viavi Solutions UK Ltd [2016] EWHC 1530 (Ch), [2016] PLR 193. One of the issues which arose in that case was whether a power to change the principal employer in an occupational pension scheme could validly be exercised with retrospective effect. The power was in the following terms:

> "The Trustees may agree with an employer or holding company that it may become the Principal Employer unless this would prejudice Approval. The consent of the existing Principal Employer shall be necessary unless it has been dissolved."

The judge discussed this question at [63] to [77] of his judgment, concluding that retrospective exercise of the power was not possible.

38. For present purposes, the most useful part of the discussion is in [67] and [68], which Arnold J quoted in full at [121]. After referring to the Bank of New Zealand case, and observing that "the question is to be resolved as one of the scope of the power conferred, having regard to the likelihood or otherwise of its exercise giving rise to impermissible re-writing of history", Mr Fancourt QC said at the end of [67]:

> "It is clear in this and other authorities that "re-writing history" is used in the sense of doing so impermissibly: see *Dalriada Trustees Ltd v Faulds* [2012] 2 All ER 734, para 78. What is impermissible is exercising a power so as adversely to affect accrued rights, or to falsify something that was true and/or effective when done, or validate something that when done was a breach of trust."

39. Returning to the present case, Arnold J continued as follows:

> "122. In the present case, it is common ground that the key question is whether exercising the powers conferred by the 1993 Deed and Rules with effect from 6 August 1990 would involve impermissibly rewriting history. That in turn depends on whether it would have been within the scope of the power of amendment contained in rule 36 of the Fourth Edition (pursuant to which the 1993 Deed and Rules were made).
>
> 123. Counsel for the Claimants submitted that this was a case of retrospectively validating a power that, as exercised, was invalid for want of formality to give effect to expectations raised, and that it would have been within the scope of the power conferred by rule 36 of the Fourth Edition to grant the Pre-97 Increases either in 1991 or 1993.
>
> 124. Counsel for BIC UK submitted that the retrospective introduction of a power which operated to validate a previous invalid exercise of another power in different terms was outside the scope of the power conferred by rule 36 of the Fourth Edition. He also submitted that there was nothing in the 1993 Deed and Rules which manifested an intention to validate what had been done previously, and that, on the contrary, the 1993 Deed and Rules manifested an intention inconsistent with the payment of the Pre-97 Increases."

40. After saying that he "found this a difficult question to resolve", the judge then stated his conclusions in the passage from his judgment which I have already quoted at [5] above. To recapitulate, the key point, in the judge's view, was that the amendment could have been made under the Fourth Edition amending power (rule 36), and "the only reason why it was not validly made is due to the failure to observe the correct formalities." While reliance upon the powers in the 1993 Deed and Rules would admittedly involve an element of re-writing history, there was nothing objectionable about this because "it enables effect to be given to what, as a matter of historical record, was in fact decided and done."

Submissions

41. Counsel for BIC UK emphasise that the Trustees have never contended that there was an actual exercise with retrospective effect of any of the powers in the 1993 Deed and Rules which are relied on. Rather, the argument is that the execution of the 1993 Deed and Rules created those powers with retrospective effect, and that they are to be treated, without more, as having been exercised in 1991, by the decision of the Trustees recorded in the 1991 Minutes to which BIC UK agreed. The relevant question, therefore, is whether the scope of the rule 36 power of amendment was wide enough to permit an amendment to the Scheme's governing documentation which not only introduced new powers, but also treated those powers as having been available for exercise, and as having in fact been exercised, at an earlier date, even though the additional benefits thus introduced into the structure of the Scheme would have been in conflict with the express terms of the 1993 Deed and Rules. The only possible answer to this question, submits BIC UK, is that such an amendment would have been outside the scope of the rule 36 power, because it involves the re-writing of history to an impermissible extent.

42. Counsel for BIC UK buttress this submission with the following points:

(1) An attempt by subsequent amendment to validate a previous breach of trust is outside the scope of a power of amendment, as the court recognised in Dalriada. The payment of the pre-1997 Increases from 6 April 1992 involved an innocent breach of trust, and for this reason alone was therefore incapable of subsequent validation by amendment of the scheme rules.

(2) Since the only increases to pensions in payment provided for by the 1993 Deed and Rules were on members' GMPs, and since the 1993 Deed and Rules were themselves introduced by a valid exercise of the rule 36 power of amendment, the parties cannot objectively have contemplated that the introduction of the 1993 Deed and Rules should automatically bring about a benefit structure incompatible with those express provisions. The obvious course, had such a result been intended, would have been to incorporate entitlement to the pre-1997 Increases in the express provisions of the 1993 Deed and Rules.

(3) While it is accepted that the pre-1997 Increases could have been granted in 1991 by a valid exercise of the rule 36 power of amendment, and alternatively that they could have been validated retrospectively by appropriate express provision made in the 1993 Deed and Rules, the simple fact is that neither of those courses was adopted. On the

contrary, the Trustees and BIC UK adopted the 1993 Deed and Rules in terms that were inconsistent with members having any such entitlement.

(4) The error in the judge's analysis is that he failed to appreciate the full width of the re-writing of history required by the Trustees' argument, which depends on one or more powers which did not in fact exist in 1991 being treated as if they had actually been exercised in 1991. This is not, therefore, a straightforward case of making good a failed exercise of the power of amendment by a retrospective exercise of the *same* power to grant the benefits which were intended to be, but were not, given.

(5) Nor can any support for the Trustees' case be found in the express words of clause 1(a) of the 1993 Deed. In particular, the concluding words of the sub-clause support the view that the intention of the parties was merely not to *invalidate* any decisions or action taken by the Trustees before the date of execution of the 1993 Deed, save to the extent that the benefits expressly provided by the terms of the 1993 Deed and Rules were now to be treated as the benefits to which members had been entitled since 6 August 1990.

43. I now turn to the submissions of counsel for the Trustees. They submit that the unambiguous language of clause 1(a) shows that it was the intention of the parties to substitute the 1993 Deed and Rules, in their entirety, for the previous governing documentation of the Scheme, and to do so retrospectively with effect from 6 August 1990. Although that date was no doubt chosen to coincide with the date on which the Works Scheme merged into the Scheme, this does not in any way limit the effect of clause 1(a). Once the 1993 Deed and Rules had been executed, the Scheme, from the date of merger, was to be governed by the new documentation instead of the old.

44. Furthermore, there was good reason for the parties to invoke the legal fiction of retrospectivity in this case. It was clearly in the contemplation of the parties that the Scheme had been administered, at least in part, by written notifications issued to members by the Trustees: see sub-paragraph (ii) in clause 1(a). The parties also knew that the 1993 Deed and Rules relaxed the level of formality required in some respects and/or conferred new and wider discretions on the Trustees. While it would have been possible for the 1993 Deed and Rules to have ratified expressly each and every decision made and set out in notifications given by the Trustees to members, the legal fiction of retrospection provided a simpler method of achieving the same end. At the same time, there was no question of any decision taken, or power exercised, before 23 May 1993, whether in accordance with the earlier governing documentation or any written notification, being *invalidated* by the 1993 Rules. That is the force of the final sentence of clause 1(a).

45. The Trustees go on to submit that there is no rule of law which restricts the retrospective operation of the 1993 Deed and Rules. The retrospective validation of the pre-1997 Increases was well within the scope of rule 36 of the Fourth Edition. This is shown by the fact that it would have been possible to amend the scheme under rule 36 so as:

> (a) to introduce the pre-1997 Increases in 1991 or 1992, if the necessary formalities had been satisfied;
>
> (b) to validate the increases by express amendment made on or before 23 May 1993; or

(c) to provide for the increases by express provision within the 1993 Deed and Rules.

Accordingly, what was done, as a matter of substance, fell within the scope of rule 36.

46. It further follows, say the Trustees, that an objection to reliance upon the 1993 Rules cannot be to the principle of retrospectivity itself, but only to the absence of any express reference to the pre-1997 Increases. However, no express reference was needed, because if the agreed legal fiction of the Effective Date is applied, and the events of 1991 and 1992 are considered against the terms of the 1993 Deed and Rules, it can be seen that the pre-1997 Increases were effectively granted.

47. More generally, the Trustees submit that there is nothing unfair about the Scheme providing benefits which it was entitled to provide, which it had told its members would be provided, and which were in fact provided. Instead, it would be unfair to remove and attempt to recoup those increases.

48. As I have already explained, the oral argument before us focused more than it did below on the question whether (and, if so, how) the potentially relevant new powers in the 1993 Deed and Rules, assuming them to have been notionally available to the Trustees in 1991, are to be regarded as having been exercised so as to confer entitlement to the pre-1997 Increases. Furthermore, it became increasingly clear that Mr Short QC sought to rely on at least some new arguments of fact and/or law, which were not the subject of any respondent's notice and did not appear to have been run at trial. In those circumstances, we invited counsel for the Trustees to reflect overnight on which new points they wished to pursue, and indicated that, if they wished to do so, they would need to file a respondent's notice and make a formal application for permission.

49. This was duly done, and at the start of the second day of the hearing we heard argument on an application by the Trustees for permission:

(a) if needed, to advance further arguments on the effect of clause 1(a) of the 1993 Deed; and

(b) if the appeal succeeded in establishing that the powers in the 1993 Deed and Rules were not capable of having retrospective effect, to advance two new grounds of appeal.

The first new ground was that the judge ought to have found that pension increases were validly granted under rule 9(a) of the 1993 Rules in respect of the period after the date of the 1993 Deed, in circumstances where the original decision to grant such increases had been made in 1991, the parties believed the grant to have been valid, the increases were implemented annually from 1992 until 2012, with the knowledge of the parties, and no complaint was made until they were first challenged by BIC UK in December 2011. The second new ground was that the judge ought to have found, by reference to specific provisions in clause 1(a) of the 1993 Deed, that those members whose pensionable service terminated before the deletion of the Fourth Edition rules are entitled to be paid increases in accordance with the notifications given to them by the Trustees. Although there was no direct evidence, the inevitable inference was said to be that written notification of the increases had been given to all such members.

50. After hearing argument, we decided to refuse permission to advance the two new grounds of appeal, mainly because they raised factual issues which had not been fully explored at trial, and in respect of which BIC UK might legitimately have wished to adduce further evidence. We were reinforced in taking this view by the fact that the competing arguments had been fully canvassed during a lengthy process of pre-trial negotiation designed to elicit all the points on which the court would be asked to rule. In agreement with Mr Rowley QC, we concluded that it was simply too late for these further arguments to be run.

51. On the other hand, Mr Rowley did not object to Mr Short being given the opportunity to amplify his arguments on the effect of clause 1(a) of the 1993 Deed, and to the extent that permission was needed for him to do so, we granted it. As summarised in the respondent's notice, the amplified argument is that the judge ought to have found that the pension increases were validly granted because the effect of clause 1(a), properly construed, was that the powers in the 1993 Deed and Rules were made available retrospectively with effect from 6 August 1990, and either (a) the validity of decisions made in the period after that date but before 29 May 1993 was to be considered by reference to the requirements of the 1993 Deed and Rules, or (b) the parties are to be treated as having exercised any relevant power thus made available to them retrospectively. Otherwise, the powers cannot be said to have been made retrospectively available in any meaningful sense, and the 1993 Deed and Rules are not in fact being construed so as to take effect from 6 August 1990.

52. In support of this submission, Mr Short relied by way of analogy on the established principle that the intention to exercise a power will be implied, or imputed, where such exercise would be necessary in order for the intended disposition to take effect. This principle was discussed, and applied, by Scott J in Davis v Richards & Wallington Ltd [1990] 1 WLR 1511 at 1530-1531. As Scott J put it, at 1530F:

> "A disponor (A) purports to make a disposition of property. The disposition cannot be effective unless associated with the exercise of a power vested in A and that A could properly have exercised in order to make the disposition. The disposition makes no mention of the power and does not purport to be an exercise of it. The effect of the principle and cases to which I have referred is that A's intention to make the disposition justifies imputing to him an intention to exercise the power, provided always that an intention not to exercise the power cannot be inferred. If the requisite intention can be imputed, the court will treat the disposition as an exercise of the power."

Discussion

53. In considering this issue, I begin by asking myself what is meant by the concept of exercising a power with retrospective effect. Obviously, the clock cannot be turned back in the real world. Events which have actually happened cannot be undone, and events which never took place cannot later be turned by magic into events which did in fact happen. Outside the world of science fiction, the past cannot be rewound and

replaced with a different version of historical reality. In that important and literal sense, history cannot be re-written.

54. On the other hand, there is no reason in principle why parties should not have the freedom to agree to proceed for the future on the basis that historical facts are to be treated, in a specific context or for certain purposes, as modified in a particular way which departs from historical reality. So, for example, as a matter of contract, or a common assumption of the type that may ground an estoppel by convention, it is normally open to parties to modify or replace the historical record with a different version of past events which will govern their future legal relationship. Lawyers are well used to dealing with hypothetical or deemed states of affairs, both in construing statutes and in many different private law contexts. Familiar principles have been developed to assist courts in deciding how far, and for what purposes, it is right to treat a deemed or hypothetical state of affairs as supplanting reality. In a contractual context, the question is in principle one of construction of the parties' agreement, to be determined objectively by application of the usual principles of contractual interpretation.

55. I have spoken so far of parties agreeing to depart from historical reality for the future, but in principle it must also be open to them to agree that their past relationship is to be treated as having departed from historical reality in specified respects. A deemed or hypothetical state of affairs can be projected backwards as well as forwards, if that is what the parties intend. But if it is projected backwards, the problem has to be confronted of possible conflict between the hypothetical state of affairs and the historical reality of what in fact did or did not happen. Resolution of that conflict is again normally a matter of giving effect, as far as possible, to the parties' intentions, objectively ascertained; but however the conflict is resolved, as between the parties, one thing which cannot be changed is the historical reality of what did, or did not, happen in the past.

56. Similar principles, as it seems to me, must also be applied in construing the power of amendment conferred on the Trustees by rule 36 of the Fourth Edition. Those rules took effect pursuant to a Deed of Variation dated 10 October 1977 and made between BIC UK and the Trustees ("the 1977 Deed"). The 1977 Deed was itself made pursuant to the rules previously in force, which dated back to the 1952 Definitive Trust Deed and had been altered or modified by various intermediate deeds and resolutions. The Fourth Edition therefore had its ultimate origin in the agreement between BIC UK and the Trustees to establish the Scheme.

57. I have already set out the basic terms of rule 36: see [23] above. The power was subject to an express proviso that no alteration or modification of the Fourth Edition should be made:

> "which would have the effect of varying or affecting any benefits (whether immediate or prospective but not including Death Benefits) applicable to Pensionable Service completed before the alteration or modification (upon the basis that the Member's current Pensionable Salary will remain unchanged until the Normal Pension Date) without the consent in writing of any member affected thereby."

It was then provided that notice in writing of any such alteration or modification should be given in advance to every Member who would be affected by it.

58. Subject to that express proviso, and to the general law applicable to the exercise of fiduciary powers, I see no reason why rule 36 should be construed as precluding variation of the rules, or the introduction of a new set of rules, with retrospective effect in the sense which I have sought to clarify. Thus it is rightly common ground that the 1993 Deed and Rules were validly made in exercise of the rule 36 power, notwithstanding that they were stated to take effect retrospectively from 6 August 1990. It is equally clear, in my view, that the proviso to rule 36 (quoted above) was duly honoured, both because the provisions of the 1993 Deed and Rules did not (so far as I am aware) purport in any way to prejudice the benefits of members attributable to pensionable service completed before 29 May 1993, and because of the saving effect of the tailpiece to clause 1(a) of the 1993 Deed, which in general terms was clearly designed to preserve the validity of decisions taken, and powers exercised, during the previous history of the Scheme. As the contents page at the start of the 1993 Deed indicated, part of the purpose of clause 1(a) was that "action prior to execution [*is*] not invalidated"; and this saving effect must have been intended to reach back to the inception of the Scheme, because of the express reference in sub-paragraph (i) of clause 1(a) to all the governing deeds of the Scheme back to the 1951 Interim Deed.

59. It is important, however, to note the limits of the scope and purpose of the saving provision at the end of clause 1(a). In agreement with the submissions of BIC UK, I consider that it can only be read as a provision which prevents the *invalidation* by the 1993 Deed and Rules of decisions taken, or powers exercised, during the previous history of the Scheme. It presupposes that, but for the effect of the 1993 Deed and Rules, those prior decisions or exercises of powers would have been *valid.* Otherwise, there would be nothing which could have been invalidated. What the provision does not do, either expressly or by necessary implication, is to *validate* previous decisions or purported exercises of powers which, for whatever reason, had failed to achieve their objective. Still less does it go the further step which the Trustees' alternative submission would require, and treat any previous invalidity as cured by an implied, or imputed, exercise of powers which were not in fact available to the Trustees at the relevant time, even if the Trustees are now to be regarded as having had those powers since 6 August 1990.

60. It is at this point, in my judgment, that the distinction between having a power, and the exercise of a power, assumes crucial importance. The only way in which the pre-1997 Increases could have been validly introduced in 1991/2 was by a valid exercise of the rule 36 power of amendment. It is now common ground that no such valid exercise took place. Nor can that position be altered by the mere fact that, as a result of the introduction of the 1993 Deed and Rules, the Trustees must now be regarded as having had available to them in 1991/2 one or more enabling powers which could have validated the invalid steps which they actually took to introduce the increases. To achieve such a result, it would be necessary to go further and find some proper basis for treating the Trustees as having exercised the further powers now notionally made available to them.

61. For that purpose, it would in my view be necessary to find some positive evidence that the Trustees had addressed their minds to the problem and decided to rectify it in this way; or at the very least, to find a common intention on the part of the Trustees and

BIC UK that the introduction of the 1993 Deed and Rules was to have the effect of validating any purported amendments to the Scheme which had been invalid in point of form when made, but which could have been validly effected under the 1993 Deed and Rules. Furthermore, had the Trustees and BIC UK had such a common intention, and had they envisaged that the execution of the 1993 Deed and Rules would alone achieve it, one would expect to find recitals to that effect in the 1993 Deed, and a clause explicitly stating that this was part of its purpose. The need to address the matter explicitly is reinforced, in my view, by the fact that (as I have already pointed out) entitlement to the pre-1997 Increases is neither introduced by, nor reflected in, the express provisions of the 1993 Deed and Rules themselves. It cannot therefore be assumed, without more, that merely by executing the 1993 Deed the parties must have intended to validate the pre-1997 Increases.

62. The fundamental problem with the Trustees' argument, and with the judge's analysis, is in my judgment that they fail to explain how the mere introduction of the 1993 Deed and Rules, and their back-dating to 6 August 1990 for reasons wholly unconnected with the pre-1997 Increases, can have brought about the deemed exercise by the Trustees of any enabling powers which, had they been in place in 1991/2, might have validated the steps which the Trustees then took to introduce the pre-1997 Increases. Mr Short did his best to persuade us that the necessary intention could be distilled from clause 1(a) of the 1993 Deed, but as I have sought to explain that clause is unable to bear the weight which his argument would place upon it, and in particular it is not possible to treat the tailpiece as if it were a provision validating previously invalid transactions, rather than a provision preserving previously valid transactions from being invalidated by the introduction of the 1993 Deed.

63. For similar reasons, I am satisfied that the day cannot be saved for the Trustees by recourse to the doctrine of implied (or imputed) exercise of powers, exemplified by cases such as Davis v Richards & Wallington. That doctrine has a valuable function to perform in cases where trustees intend to bring about a particular result in the administration of a pension scheme which would depend for its validity on the exercise of a power vested in them. In appropriate circumstances, the trustees' intention to make the relevant disposition may justify imputing to them an intention to exercise the power, even if they were unaware of its existence. As it seems to me, however, there are at least two reasons why the doctrine can have no application in the present case. First, the relevant enabling power must in my view be in existence at the time when the relevant disposition takes place. The focus is on the position at the actual time of the disposition, and it cannot therefore be sufficient if a power is subsequently conferred on the person making the disposition which, had it been in existence at the relevant time, would have authorised it. Secondly, an intention to exercise the power may only be imputed where an intention *not* to exercise the power cannot be inferred: see the passage from the judgment of Scott J quoted at [52] above. In the present case, an imputed retrospective exercise of an enabling power in the 1993 Deed and Rules would, on the face of it, be incompatible with the limited express provision thereby made for increases to GMPs, but not to pensions in excess of GMPs.

64. If, as I think, it is impossible to spell out of the very unusual circumstances of the present case any intention on the part of the Trustees to exercise powers retrospectively conferred on them in 1993 so as to validate the pre-1997 Increases, it must also follow, in my view, that the necessary validation cannot be achieved without a deemed exercise

of those powers. It cannot be enough merely to point to the introduction of the new powers with retrospective effect, and to test the validity of the steps actually taken by the Trustees in 1991/2 by reference to those powers, as if they had actually been in existence but without any deemed exercise of them. This is in my judgment the fatal objection to the primary way in which the Trustees put their case on this issue.

65. I would not, however, accept the submission of BIC UK that it is impossible to remedy an innocent breach of trust by exercise of a power of amendment. Whatever the position may be for deliberate breaches of trust, I am aware of no principle of law which would prevent trustees from exercising a power of amendment so as to confirm a previous purported exercise of the power which was invalid through an unwitting failure to comply with the necessary formalities for a valid exercise of the power. On the contrary, it seems to me that the ability to take remedial steps of this nature is in principle salutary, and conducive to good trust administration. The situation in the Dalriada case was very different, and concerned the power to make an amendment which (as the court found) would have been outside the reasonable contemplation of the parties at the time when the contract containing the power was made. Furthermore, the relevant breaches of trust involved improper uses of trust assets as part of a plan to give members of an occupational pension scheme access to their pension capital prior to retirement without breaching HMRC rules.

66. The plan which the court had to consider in Dalriada was a commercially marketed scheme which depended for its efficacy on the making of reciprocal loans by the trustees of one pension scheme to a member of another such scheme, and vice versa, in purported exercise of the trustees' powers of investment. In holding that the plan was ineffective to achieve its purpose, the principal ground of decision of Bean J (as he then was) was that the loans constituted "unauthorised member payments" as defined by section 160(2) of the Finance Act 2004. In those circumstances, it was common ground that the loans fell outside the trustees' powers and were void in equity, nor could they be validated either retrospectively or prospectively by certain amendments recently made to the schemes: see the judgment at [57]. The judge went on, however, to consider the position on the alternative footing that the loans were *not* unauthorised member payments, in case the matter went further: ibid. It was in that context that the judge considered the validity of the new clause 8A introduced into the schemes by way of amendment, which purported to authorise the trustees at their discretion to "enter into one or more transactions involving the funds of the Scheme with one or more members of any other Registered Pension Schemes, on such terms as the Trustees at their discretion shall decide…". As I have already indicated, the judge held that the new clause 8A could not validate the loans, even assuming them not to be unauthorised payments, because any such exercise of the power would have been outside the reasonable contemplation of the parties when the pension scheme was established: see [75] and [76].

67. Bean J then said, at [77], that the position was "even clearer as regards retrospective effect". After citing from the judgment of Lord Walker in the Bank of New Zealand case, he said at [78]:

> "New cl 8A is an attempt to validate retrospectively acts which, at the time they were committed, were breaches of trust. As such it is, as the claimant submitted, a device to rewrite history and accordingly ineffective."

In my judgment, those brief comments must be read in their context, and were not intended to lay down a general principle that a prior breach of trust can never be validated retrospectively by exercise of a power of amendment. On the facts of Dalriada, the trustees were attempting to provide retrospective authority for actions which, when they were taken, fell outside the proper scope of their powers and constituted deliberate breaches of trust. Those were the factors, in my view, which made the attempt clearly ineffective, rather than the mere element of retrospection. The position would be different if, as in the present case, the action previously taken by the trustees potentially fell within the scope of their existing powers, and their breach of trust in failing to exercise those powers effectively was inadvertent. In such a case, I can see nothing objectionable about the trustees taking remedial action by a further exercise of their powers of amendment. Indeed, counsel for BIC UK appeared to recognise as much in some of their alternative submissions.

68. It is also convenient at this point to refer to another first-instance decision which I have not so far mentioned, but upon which Mr Short placed considerable reliance. The decision is that of His Honour Judge Jarman QC, sitting as a judge of the High Court, in Vaitkus v Dresser-Rand UK Ltd [2014] EWHC 170 (Ch), [2014] P.L.R.153. The relevant history may be summarised as follows:

> (a) The contributory pension scheme of the company (Dresser-Rand UK Ltd) was established, in accordance with the then usual practice, by an Interim Trust Deed in April 1988, pending approval by HMRC of a later definitive deed. Clause 11(a) of the interim deed provided that the trustees would as far as practicable operate the scheme so as to give effect to the "Explanatory Literature", which was defined as meaning "any literature setting out the provisions of the Scheme (including any amendment of those provisions) and issued or to be issued to members and prospective members of it".
>
> (b) In April 1991, before any definitive deed had been executed, a notice was drawn up by the trustees ("the 1991 Notice") which was expressly addressed to female members who had joined the scheme on 6 April 1988, with the stated object of equalising their benefits upon retirement between the ages of 60 and 65 so as to achieve equality with all male members of the scheme and with women who had joined since 6 April 1988. The 1991 Notice was a response to the decision of the European Court of Justice in the *Barber* case (Barber v Guardian Royal Exchange [1991] QB 344). As the judge found, the 1991 Notice was duly issued to all the female members affected by it, but it was not issued to the male members of the scheme.
>
> (c) On 22 December 1992, the definitive deed and rules were executed. Clause 1(a) of the definitive deed provided that it should be read and construed and should take effect as if it had been executed on the same day as and immediately after the interim deed, while clause 1(b) stated that "The Trust established by the Interim Trust Deed is hereby confirmed and shall be administered by the Trustees in accordance with the provisions of the Deed and of the Rules for the time being in force…". Clause 5 provided for amendment of the definitive deed or rules, including with retrospective effect, by deed executed by the principal employer and the trustees. The 1992 rules did not, however, replicate the *Barber* equalisation previously brought about by the 1991 Notice.

69. Against that background, the first question which the judge had to determine was whether the 1991 Notice had been effective to amend the scheme from 6 April 1991 in accordance with its terms. The judge held that it was, because the notice amounted to "explanatory literature" within the meaning of clause 11(a) of the interim deed, and it had been sufficient to issue the notice to the members affected by it. The second question was whether that position was then reversed by the introduction of the definitive deed and rules, which as I have said were back-dated to the date of the interim deed in 1988. The judge dealt with this question at [41] to [57], and concluded that the effect of the 1991 Notice had not been overridden. After summarising the competing submissions of leading counsel (Mr Robert Ham QC and Mr Short) and referring to the Bank of New Zealand case, the judge said at [57]:

> "I do not accept that to find that the notice is not overridden by the definitive deed involves a rewriting of history. I have found that the notice was effective in 1991 to amend the explanatory literature issued under the interim deed and that that is what the company intended to do. The definitive deed is to take effect as if it had been executed on the same day as and immediately after the interim trust deed. That it seems to me has the corollary that clause 5 [*the power of amendment*] is to take effect as [*if*] it was in force on the same day and immediately after the interim trust deed. The company in issuing the notice did not know that, but it intended to bring about the result set out in the notice. I prefer the submission of Mr Ham in these respects."

70. With respect to Judge Jarman, I do not find the reasoning in this paragraph entirely easy to follow, but the critical point, as it seems to me, is that the 1991 Notice was valid and effective when introduced. In that respect, the position was entirely different from that in the present case. The relevant question was therefore whether the *valid* provision originally made by the 1991 Notice was retrospectively *invalidated* by the execution of the 1992 deed and rules. That is not a question which confronts us in the present case, where the issue is whether a previously *invalid* exercise of a power of amendment can be retrospectively *validated* by the mere introduction, with retrospective effect, of a potentially validating power.

71. I would add, for completeness, that the actual decision of Judge Jarman on the second issue in Dresser-Rand may well have been correct on either or both of two grounds, although neither is clearly articulated in his judgment. The first is that the effect of the 1991 Notice may have been preserved by clause 1(b) of the 1992 deed, which expressly confirmed the trust established by the interim deed. The second, assuming the position to have been retrospectively governed by clause 5 of the 1992 deed, is that the clause contained a proviso preserving the effect of a notice in writing of any amendment published in a form and manner agreed by the principal employer and the trustees, pending the execution of a formal deed of amendment.

72. In the end, however, I can see no escape in the present case from the conclusion that the Trustees are inviting us to go further than the law allows in seeking to construct a valid basis for the pre-1997 Increases. The simple fact is that the necessary formalities for a valid exercise of the rule 36 power were not complied with in 1991/2, and the

failure was not in my view remedied by the mere introduction in 1993 of potentially validating powers with retrospective effect to 1990. The law should lean in favour of validating transactions undertaken by trustees in good faith if it properly can, but it must also recognise that formal requirements have a purpose, and if they are not complied with, the normal consequence is that the intended transaction is of no effect. Had the Trustees and BIC UK directed their minds to the problem, there are various ways in which the position could have been remedied with retrospective effect. Unfortunately, however, no such steps were ever taken; and in their absence, the pre-1997 Increases were never validly introduced.

73. For all these reasons, I consider that the question of principle must be answered in BIC UK's favour, with the consequence that the pre-1997 Increases could not have been validly granted pursuant to any enabling powers contained in the 1993 Deed and Rules. This conclusion makes it strictly unnecessary to go on to consider whether, had the question of principle been answered in the Trustees' favour, the judge was also right to hold that the four provisions in the 1993 Deed and Rules which he identified as being sufficient to validate the pre-1997 Increases in fact had that effect. Since we heard full argument on the question, however, I will go on to consider it, although more briefly than I would have done if it were necessary to our ultimate decision.

Could the relevant powers in the 1993 Deed and Rules, if available and exercised, have validated the introduction of the pre-1997 Increases?

(a) Rule 9(a)

74. It is convenient to begin with the power to make increases to pensions in payment contained in rule 9(a) of the 2003 Rules, because counsel for the Trustees placed it at the forefront of their submissions on this part of the case. I have already set out the wording of the power at [33] above. It provides, in simple language, that any pension in course of payment may be increased annually, after the start of the pension, by such amount as BIC UK (with the Trustees' consent) shall decide. Counsel for the Trustees submit to us, as they did to the judge, that this is a free-standing provision which would clearly have authorised the pre-1997 Increases as set out in the March 1992 Announcement, which as the judge found was made with the agreement of BIC UK.

75. The judge accepted this argument. He pointed out, at [144], that the rule contains "no requirement of formality". He also rejected the argument of BIC UK that any change to the limited pension increases for GMPs provided for in the Schedule to the 1993 Rules would require an exercise of the power of amendment in clause 4 of the 1993 Deed. The judge said, at [145]:

> "On its face, rule 9(a) appears to confer a free-standing power of specific and narrow scope. I see no reason not to give effect to the wording because of the existence of a more general power of amendment, and to construe rule 9(a) in the manner suggested by BIC UK would render it surplusage."

76. The same argument was repeated to us by counsel for BIC UK, but like the judge I find it unconvincing. The focus of the rule 9(a) power is relatively narrow and specific, and

I can see no good reason for reading into it the further requirement that it may only be exercised by means of an amendment made in accordance with clause 4. I would construe it as a free-standing power, and consistently with this Mr Short was able to show us three other provisions in the 1993 Rules which appear to be drafted on the assumption that rule 9 might be an independent source of pension increases: see rules 5(a), 6(d) and 12(f). So, for example, rule 5(a) contains a reference to "such amount (if any) by which the Member's pension, after it has started to be paid, has been increased in accordance with Rule 9".

77. BIC UK further submitted that it was not the purpose of rule 9(a) to permit Scheme-wide changes to pensions in payment, and that the scope of the power should in any event be construed as confined to the augmentation of existing benefits, with the result that it could have no application to new joiners. Accordingly, it was said, an exercise of the rule 9 power would have been inconsistent with the terms of the 1991 Minutes, which were clearly intended to benefit the whole range of future members of the Scheme. We were referred, in this context, to Walker Morris Trustees Ltd v Masterson [2009] EWHC 1955 (Ch), [2009] P.L.R. 307, at [93] to [109]. Again, however, I can find no proper basis for cutting down the clear and simple language of rule 9(a), nor in my view can we gain assistance from a decision on differently worded provisions in a different pension scheme.

78. In conclusion, therefore, I agree with the Trustees and the judge that the rule 9(a) power, had it been in existence and exercised in 1991/2, would have authorised the introduction of the pre-1997 Increases. Further, since it would only be necessary for the Trustees to succeed in relation to one of the powers they rely upon, this conclusion would alone be sufficient to uphold the judge's decision in their favour, had they succeeded before us on the first main question.

(b) Rule 3(c)(iii)

79. I have set out the terms of rule 3(c)(iii) of the 1993 Rules at [32] above. The power in question is exercisable by the Trustees with the consent of BIC UK, and (in common with rule 9(a)) the rule itself prescribes no formalities for its exercise. On the other hand, the power is contained in a section of the rules dealing with actuarial reviews, and the power only comes into play if the Scheme Actuary is of the opinion that the Scheme is in surplus and for that (or any other) reason recommends that certain alterations be made either to the benefits or to the contributions payable under the Scheme. The relevant action by the Trustees and BIC UK therefore has to be initiated by a recommendation from the Actuary, but they are not obliged to follow the Actuary's recommendation, so long as the purpose of the action taken is to reduce the funding surplus in the Scheme.

80. The judge considered this question at [137] to [142]. As he observed, at [137]:

> "On its face, this appears to be one of the two most apposite provisions in the 1993 Deed and Rules for dealing with the situation arising out of the 1991 Minutes (the other being rule 9(a))."

The judge then rejected BIC UK's contention that the rule did not confer a free-standing power on the Trustees, and said he was not helped by the decision of the House of Lords

on differently-worded provisions in National Grid Co Plc v Mayes [2001] UKHL 20, [2001] 1 WLR 864. In the judge's view, rule 3(c)(iii) confers a "free-standing power which is triggered in specific and narrow circumstances", and it should not be construed as merely specifying a particular circumstance in which the more general power of amendment in clause 4 may be exercised. With regard to the need for initial input from the Actuary, the judge inferred from the 1991 Minutes that the Actuary had expressed the opinion that the Fund was in surplus before 18 February 1991, and that one of his recommended solutions was to improve the benefits in the Scheme in the manner set out in the 1991 Minutes: see [140]. Furthermore, the evidence of Mr Hartridge and Mr Everitt had been to the same effect: ibid. Finally, the judge rejected the submission that the rule did not extend to new joiners: [141].

81. As will be apparent from the above summary, apart from the need for initial actuarial input, which the judge found to be satisfied, and the need for any action taken to be deemed expedient to reduce the funding excess, the general nature of the arguments in relation to this power was very similar to those deployed in relation to rule 9(a). From the point of view of the Trustees, however, the position is less clear-cut than under rule 9(a). For example, the focus on "alterations" to the Scheme originally proposed by the Actuary is perhaps more naturally read as referring to a proposed exercise of the clause 4 power of amendment, rather than the exercise of a free-standing power conferred by rule 3(c)(iii) itself. Similarly, the need for the action taken to be directed at a reduction of the funding surplus arguably makes it harder to construe the scope of the power as extending to future members of the Scheme, because the numbers, ages and salaries of such members are unlikely to be known in advance with any degree of certainty, so the impact which they will have on the funding of the Scheme may well be correspondingly difficult, if not impossible, to extrapolate from existing information. In my view, there is real force in these points, which were not explored by the judge. Since it is unnecessary for us to reach a conclusion on the point, however, I prefer not to do so. I will merely say that, if the Trustees cannot find the necessary enabling power in rule 9(a), they are in my judgment unlikely to find it in rule 3(c)(iii).

(c) Clause 9 of the 1993 Deed

82. Clause 9 is a self-contained provision in the main body of the 1993 Deed itself: see [31] above. Its wording is very wide, and no formalities are prescribed for its exercise. The judge was satisfied that its wording "is wide enough to encompass the provision of augmented benefits to all member, since "any person" can include any group of persons": see [134]. He was also satisfied that the wording was "wide enough to extend to new joiners, since "any person" can include persons who are not current members": [135].

83. For reasons similar to those which I have already given in relation to the rule 9(a) power, I agree with the judge. Indeed, the wide wording of the two provisions seems to me very similar in all material respects, and I would find it paradoxical to conclude that the pre-1997 Increases could have been validly made under rule 9(a), but not under the clause 9 power, or vice versa.

(d) The clause 4 power of amendment

84. I have set out the relevant part of the clause 4 power of amendment at [30] above. Assuming that the powers I have so far considered were not free-standing, and that an

exercise of the clause 4 power of amendment were therefore necessary in order to introduce the pre-1997 Increases, clause 4 gives rise to an initial question of construction. The only amendment which the Trustees would need to make is one of the 1993 Rules. There would be no need to amend the 1993 Deed itself. Accordingly, although the amendment would still have to be made with the consent of BIC UK, because the power of amendment is only exercisable "with the consent of the Principal Employer", nevertheless the only formal requirement imposed by paragraph (ii) would appear to be a "resolution (in writing) of the Trustees". The question is whether BIC UK would also have to execute a deed in order to signify its consent.

85. At first sight, some support for this contention might appear to be found in paragraph (i), which explicitly requires a deed to be executed by the Principal Employer and the Trustees "in the case of [*an amendment of*] this deed or the Rules". But it seems clear that the draftsman, for whatever reason, intended a lesser degree of formality to be needed for an amendment of the Rules alone, and in such a case I do not consider it a plausible construction of paragraph (ii) to require a deed to be executed by BIC UK in addition to a written resolution by the Trustees. On this point, I agree with the judge's view expressed at [128]. I am also attracted by his suggestion that the explanation for the rather odd wording of paragraph (i) is that the intended sense was that "a deed is required to amend either the Deed or the Deed and the Rules", but not the 1993 Rules alone.

86. If that is correct, the next issue is what is meant by "a resolution (in writing)". Can the 1991 Minutes satisfy that requirement, even though they do not purport to set out the text of any amendments to the 1993 Rules, nor were they signed by two of the three Trustees? The judge thought that the condition was satisfied, because the Trustees resolved on the proposed action at their meeting on 18 February 1991, and their resolution was recorded in writing. Provided that the resolution was sufficiently clear in its effect, the judge saw no need for the text of an amendment to the 1993 Rules to be set out: see [130]. He also rejected a submission that the 1991 Minutes evidenced no more that the adoption of a policy: [131].

87. With some hesitation, I would (if it were necessary to our decision) be inclined to disagree with the judge's conclusion on this issue. To my mind, the natural reading of the 1991 Minutes is that they do no more than record a resolution on future policy, leaving the implementation of that policy to "be carried out as soon as possible". The 1991 Minutes did not purport to effect an immediate alteration of the Scheme rules, and if that had been the intention, one would expect to find the text of the necessary amendments set out in a written document signed by all three of the Trustees. Furthermore, one would expect to find a formal reference in the amending document to the consent of BIC UK, and even if a deed was unnecessary, one would still expect BIC UK to have signified its agreement by signing the document in its capacity as Principal Employer. In short, I would be disposed to accept the submission of BIC UK that the 1991 Minutes were simply never intended to be a transactional document.

88. Having expressed my provisional view, however, I prefer to leave the question open and leave it to be decided, if necessary, in a case where the outcome turns on it.

The issue of construction relating to the Amalgamation Deed

89. I come finally to the short issue of construction of the Amalgamation Deed, concerning former members of the Works Scheme. One of the arguments advanced by the Trustees at trial was that the Transferred Pensioners of the Works Scheme were entitled to the pre-1997 Increases by virtue of clause 2(b) of the Amalgamation Deed, which contained a covenant by the Trustees, in their capacity as trustees of the Scheme, to increase the benefits of Transferred Pensioners:

> "…which may from time to time have been awarded in exercise of any discretion conferred by the Rules of the Staff Scheme in all respects as if such…benefits had been payable pursuant to the provisions of the Staff Scheme."

By virtue of clause 1(a)(i) of the Amalgamation Deed, "the Rules" were defined as meaning "the Fourth Edition of the Rules of the Staff Scheme adopted by Deed of Variation of the Staff Scheme dated 10th October 1977 *and as amended from time to time*" (my emphasis).

90. The issue was whether the definition of "the Rules" which I have just quoted was wide enough to embrace the 1993 Deed and Rules. The judge held, at [147], that the 1993 Rules fell within the definition, since they are in substance an amended version of the Fourth Edition, but the 1993 Deed did not. Nothing turned on this distinction, however, since the judge had already held that provisions in both the 1993 Deed and the 1993 Rules could be relied upon to validate the pre-1997 Increases.

91. Before us, the point is equally academic if the other members of the court agree with my conclusions so far. Even if the definition of "the Rules" in the Amalgamation Deed can be read as including the 1993 Rules, that will not avail the Transferred Pensioners from the Works Scheme in the absence of any actual or imputed exercise of any discretion conferred by the 1993 Rules so as to confer on them the pre-1997 Increases. Nevertheless, I will briefly state my opinion on the question.

92. In my view, it would be appropriate, in the context and for the purposes of the Amalgamation Deed, to construe "the Rules" as including the 1993 Rules, because the 1993 Rules were introduced by an admittedly valid exercise of the power of amendment contained in rule 36 of the Fourth Edition. The fact that the 1993 Rules entirely superseded the Fourth Edition does not seem to me to matter, because the 1993 Rules still owe their origin to the Fourth Edition and represent an amended version of it. There is still, so to speak, an umbilical cord which attaches the 1993 Rules to their predecessors, just as the definition of "the existing Rules" in recital J to the 1993 Deed itself encompassed all previous versions of the rules governing the scheme. Furthermore, if this were not the right approach, arbitrary differences of outcome might arise depending on whether extensive amendments to one version of the rules were incorporated in the existing version or included in a replacement version. That would not be a rational distinction to draw, where the focus is on the rules of the Scheme as they apply to the Transferred Pensioners from time to time.

Conclusion

93. If the other members of the court agree, I would allow BIC UK's appeal on the ground that the invalid steps taken in 1991/2 to introduce the pre-1997 Increases were not retrospectively validated by the 1993 Deed and Rules in any of the ways for which the Trustees contend. In respectful disagreement with a very experienced judge, I consider that the solution which he adopted went a step too far and involved the re-writing of history to an impermissible extent.

Nugee J:

94. I agree.

Sir Geoffrey Vos, Chancellor of the High Court:

95. I also agree.