Neutral Citation Number: [2019] EWHC 29 (Ch)

Case No: PE-2018-000015

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
BUSINESS LIST (CHANCERY DIVISION)

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 15 January 2019

Before :

MR JUSTICE ARNOLD

- -

Between :

AIRWAYS PENSION SCHEME TRUSTEE LIMITED	**Claimant**
- and -	
(1) MARK OWEN FIELDER	**Defendants**
(2) BRITISH AIRWAYS PLC	

- -
- -

Jonathan Hilliard QC and **Henry Day** (instructed by **Eversheds Sutherland (International) LLP**) for the **Claimant**
Michael Furness QC and **Elizabeth Ovey** (instructed by **Hogan Lovells International LLP**) for the **First Defendant**
Michael Tennet QC and **Sebastian Allen** (instructed by **Linklaters LLP**) for the **Second Defendant**

Hearing dates: 18-19 December 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE ARNOLD

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Introduction

1. This is an application for *Beddoe* relief (see *Re Beddoe* [1893] 1 Ch 547) which is made in unprecedented circumstances. The Claimant ("the Trustee") is the trustee of the Airways Pension Scheme ("the Scheme"). The First Defendant ("Mr Fielder") is a member of the Scheme, who has acted as a representative member for the purposes of this application. The Second Defendant ("BA") is the principal employer under the Scheme, which has been joined to the application at its own request. In 2013 BA brought proceedings ("the Main Proceedings") against the then trustees of the Scheme ("the Trustees") challenging two decisions of the Trustees ("the Decisions"): (i) a decision in 2011 to exercise the unilateral power of amendment conferred by clause 18 of the Scheme trust deed to amend the Scheme rules to empower the Trustees to augment members' benefits by the award of discretionary increases ("the DI Power") and (ii) a decision in 2013 to exercise the DI Power to confer a 0.2% increase. In 2017 Morgan J rejected BA's challenges to the Decisions. On 5 July 2018 the Court of Appeal held by a majority (Lewison and Peter Jackson LJJ, Patten LJ dissenting) in *British Airways plc v Airways Pension Scheme Trustee Ltd* [2018] EWCA Civ 1533, [2018] Pens LR 19 that the first Decision was invalid because it was a use of the power of amendment for an improper purpose. It followed that the second Decision was also invalid. Very unusually, the Court of Appeal granted the Trustee permission to appeal to the Supreme Court. The Trustee has filed a Notice of Appeal at the Supreme Court. The Trustee now seeks the approval of this Court for it to pursue the Appeal and for the Trustee to be indemnified in respect of its costs of the Appeal, and any adverse costs order, from the Scheme funds. Mr Fielder supports the application. BA vigorously opposes it.

2. Given that BA is a party to the proceedings, the application was heard almost entirely in open court, and I shall deliver this judgment in open court. I received written evidence from all the parties which was exchanged upon an open basis save for two aspects which are covered by privilege. First, both the Trustee and Mr Fielder put before the Court opinions of counsel as to the merits of the Appeal. Those opinions are subject to legal professional privilege, and therefore were not disclosed to BA (see *Re Moritz* [1960] Ch 251). Secondly, BA has recently made a settlement proposal to the Trustee covering not just the Main Proceedings, but also other matters. That proposal is subject to without prejudice privilege which is common to BA and the Trustee, but by consent it was disclosed to Mr Fielder in confidence. I received brief submissions from counsel for BA with respect to the settlement proposal in the presence of the Trustee's and Mr Fielder's representatives and brief submissions from counsel for the Trustee in the presence of Mr Fielder's representatives but in the absence of BA's representatives.

Factual background to the Main Proceedings

3. For present purposes the factual background to the Main Proceedings may be summarised as follows.

4. The Scheme is a balance of cost, defined-benefit occupational pension scheme for BA employees. The Scheme was established by a deed and rules dated 8 October 1948 against the backdrop of the Civil Aviation Act 1946, section 1(1) of which established two of the Scheme's initial employers. The trust deed required the Trustees to comprise

an equal number of employer and member representatives. It gave the Trustees a unilateral power to amend the deed and a unilateral power to amend the benefit structure, in each case subject to the provisions of the 1946 Act.

5. The deed and rules were confirmed, and hence brought into effect, by the Airways Corporations (General Staff Pensions) Regulations 1948 made by the then Minister of Civil Aviation under the 1946 Act. Regulation 7 of the 1948 Regulations provided that no amendment to the deed and rules would have effect unless confirmed by regulations made by the Minister. Thus the power of amendment was then a unilateral trustee power to amend with Ministerial consent.

6. The Scheme's benefit structure at that stage operated on a "building block" basis: for each year of service a member earned a specified amount of benefit, determined by reference to the employer and member contributions paid in respect of that member during that year. Those building block pensions did not increase, whether in payment or deferment.

7. By the Air Corporations (General Staff, Pilots and Officers Pensions) (Amendment) (No 2) Regulations 1971, it was provided that Regulation 7 of the 1948 Regulations should cease to have effect and that accordingly the Scheme could be further amended without Ministerial confirmation (save in one case which is not material for present purposes). Since 1971 the Trustees have therefore had a unilateral power of amendment without the need for Ministerial consent.

8. In 1973 Part VI of the Scheme's rules was added by amendment, and it is this part of the rules to which the Main Proceedings relate. Part VI provided benefits calculated on a final salary basis, including a rule for pension increases, rule 15, that linked them to the annual review orders made for public servants and provided for a review of such increases where necessary. Rule 15 was entitled "Adjustment of Pensions and Allowances" and provided as follows:

> "The annual rate of all pensions and allowances payable or prospectively payable under Rules 8, 9, 10, 11, 12, 13 and 16 hereof shall be adjusted as if the rates of increase as specified in the Annual Review Orders issued in accordance with section 2 of the Pensions (Increase) Act 1971 were applicable thereto …."

9. After the introduction of rule 15, increases in benefits were consistently awarded in accordance with the Pensions Increase (Review) Orders initially made under the Pensions (Increase) Act 1971 and later under the Social Security Pensions Act 1975, which provided for indexation in accordance with the Retail Price Index ("RPI").

10. The Scheme was closed to new members on 31 March 1984 in connection with the privatisation of BA. It remains open to benefit accrual for active members. Employees who joined BA between 1 April 1984 and 2003 are members of a successor scheme, the New Airways Pension Scheme ("NAPS"). NAPS closed to new entrants in 2003 and to future accrual in March 2018. As at 31 March 2015, NAPS had a deficit of £2,785 million on the technical provisions basis.

11. On 1 April 2008 the Trustees adopted a Consolidated Trust Deed and Rules incorporating all the amendments to the 1948 deed and rules which had been made prior

to that. The key provisions of the 2008 Deed for present purposes are clauses 2, 4(a), 11(d) and 18. Clause 2 sets out the main object of the Scheme:

> "The main object of the Scheme is to provide pension benefits on retirement and a subsidiary object is to provide benefits in cases of injury or death for the staff of the Employers in accordance with the Rules. The Scheme is not in any sense a benevolent scheme and no benevolent or compassionate payments can be made therefrom."

12. Clause 4(a) provides:

> "The Management Trustees shall manage and administer the Scheme and shall have power to perform all acts incidental or conducive to such management and administration and the Custodian Trustees shall concur in and perform all acts necessary or expedient to enable the Management Trustees to exercise their powers of management or any other power or discretion vested in them accordingly for which purpose the Custodian Trustees shall have vested in them the power for and on behalf of and (if necessary) in the name of the Management Trustees to execute any deed or other instrument giving effect to the exercise by the Management Trustees of any power vested in them and the Custodian Trustees shall deal with the Fund and the income thereof as the Management Trustees shall from time to time direct and the Custodian Trustees shall be under no liability otherwise than by recourse to the trust property vested in them for making any sale or investment of or otherwise dealing with the trust property and/or the income thereof as directed by the Management Trustees."

13. Clause 11(d) provides:

> "If the Actuary certifies that there is a disposable surplus attributable to an Employer the scheme referred to in paragraph (b) above shall provide that:
>
> (i) the amount or outstanding term of any existing annual deficiency contribution shall be reduced to such extent as the disposable surplus will permit
>
> (ii) if after having extinguished as aforesaid all outstanding annual deficiency contributions of an Employer a balance of disposable surplus still remains the contributions of the Employer shall be reduced to an extent required to dispose of such balance by annual amounts over such a period not exceeding 30 years from the date of the valuation as the Actuary shall advise."

14. Clause 18 is the current power of amendment:

> "The provisions of the Trust Deed may be amended or added to in any way by means of a supplemental deed executed by such two Management Trustees as may be appointed by the Management Trustees to execute the same. Furthermore the Rules may be amended or added to in any way and in particular by the addition of rules relating to specific occupational categories of staff. No such amendment or addition to the provisions of the Trust Deed or to the Rules shall take effect unless the same has been approved by a resolution of the Management Trustees in favour of which at least two thirds of the Management Trustees for the time being shall have voted PROVIDED THAT no amendment or addition shall be made which -
>
> (i) would have the effect of changing the purposes of the Scheme or
>
> (ii) would result in the return to an Employer of their contributions or any part thereof or
>
> (iii) would operate in any way to diminish or prejudicially affect the present or future rights of any then existing member or pensioner or
>
> (iv) would be contrary to the principle embodied in Clause 12 of these presents that the Management Trustees shall consist of an equal number of representatives of the employers and the members respectively."

The Management Trustees referred to in clauses 4(a) and 18 were the Trustees.

15. In his Emergency Budget on 23 June 2010, the Chancellor of the Exchequer announced that henceforth public sector pensions (and other public sector benefits) would increase annually by reference to the Consumer Price Index ("CPI") rather than RPI. CPI is generally lower than RPI, which could reduce a pensioner's pension by a significant amount across the pensioner's retirement.

16. It was the impact that this change would have on members' benefits, and the adverse reaction from the Scheme's membership, which led to the adoption of the DI Power on 25 March 2011. That power took the form of the addition to rule 15 of Part VI of the following proviso:

> "PROVIDED FURTHER THAT the Management Trustees may at their discretion, and shall in any event at least once in any one year period, review the annual rate of pension payable or prospectively payable under Rules 8, 9, 10, 11, 12, 13 and 34 and shall have the power, following such a review, by resolution to apply discretionary increases in addition to those set out in this Rule, subject to taking such professional advice as appropriate. This discretion cannot be exercised unless at least two thirds of

> the Management Trustees for the time being vote in favour of the resolution."

17. It was the purported exercise of the DI Power on 26 June 2013 which first precipitated the challenge by BA to the adoption of that power, by letter dated 2 August 2013. At a meeting held on 19 November 2013, following re-examination of whether to grant an increase for that year, the Trustees decided to do so in the sum of 0.2% (half of the then gap between CPI and RPI) with effect from 1 December 2013. This led BA to commence the Main Proceedings on 6 December 2013.

18. In the meantime, the Scheme's actuarial valuation as at 31 March 2012 had been signed off at the end of June 2013. This assumed that pension increases would transition linearly from CPI increases in April 2013 to RPI increases from 2023 onwards. The deficit at that point on the technical provisions basis was £680 million, including a reserve for discretionary increases of £424 million (equating to a funding level of 91.5%). The Scheme has a recovery plan in place to address the deficit which existed as at 31 March 2012, under which BA is making additional contributions of £55 million per year.

19. As a consequence of the Main Proceedings, it has not been possible to conclude the Scheme's 2015 valuation or commence its 2018 valuation. It is common ground that:

    i) the Scheme's funding level has improved significantly since 31 March 2012 to the point that it is in surplus on some measures, although in deficit on others;

    ii) it will not be possible definitively to state whether the Scheme is in surplus or in deficit until the outstanding valuations have been completed; and

    iii) the outstanding valuations will not be completed until the Main Proceedings have been concluded.

20. By deed dated 26 October 2016 the Trustees were replaced by the Trustee. Prior to that point, the Trustees comprised six employer-nominated trustees and six member-nominated trustees. The Trustee board consists of six employer-nominated directors and six member-nominated directors.

<u>The Main Proceedings</u>

21. BA challenged the Decisions on a wide variety of grounds, alleging that the Trustees had:

    i) failed to exercise their discretion properly or at all and were guilty of predetermination;

    ii) behaved perversely and irrationally;

    iii) failed to take into account relevant considerations;

    iv) taken into account irrelevant considerations;

    v) as a matter of fact, taken no decision to grant discretionary increases in June 2013;

vi) acted outside the scope of the Scheme's power of amendment, it being contended that discretionary increases would constitute a "compassionate or benevolent payment" prohibited by clause 2 of the Scheme's trust deed and that the Decisions were consequently *ultra vires*; and

vii) exercised the Scheme's power of amendment for an improper purpose, it being contended that, as a matter of the power's purpose, amendments increasing the benefits provided under the Scheme required BA's consent.

22. The range of these allegations led to (a) four sets of pleadings (of which all but the original points of claim exceeded 100 pages), (b) the proceedings taking three years from commencement to trial, (c) a considerable amount of expert evidence being adduced, (d) 24 trial bundles, (e) a seven-week trial before Morgan J in October to December 2016 and (f) a judgment of Morgan J delivered on 19 May 2017 running to 636 paragraphs: *British Airways plc v Airways Pension Scheme Trustee Ltd* [2017] EWHC 1191 (Ch), [2017] Pens LR 16.

23. All BA's challenges were rejected by Morgan J (with the exception, which was immaterial to the outcome, of whether the Trustees had taken the decision to award a discretionary increase in June 2013 as opposed to November 2013). In relation to the proper purpose challenge, Morgan J noted that the power to amend the Scheme rules containing the benefit structure was, as a matter of construction, a unilateral trustee power of amendment. The draftsperson deliberately having chosen such a power (rather than one of the other standard variants of (a) a trustee power subject to employer consent, (b) an employer power subject to trustee consent or (c) a unilateral employer power), the proper purpose doctrine should not operate so as to impose an employer consent requirement to increase benefits. As the Judge put it at [423]:

> "… The position is simple. Clause 18 is a unilateral power to amend. It was not always a unilateral power. Originally, a proposed amendment had to be approved by the Minister. At that time if the trustees proposed to make an amendment and they obtained the approval of the Minister, it could not be said that the purposes of the scheme imposed an additional requirement, namely, the consent of the employers, in a case where the amendment involved an increase in benefits. Now that the requirement for the approval of the Minister has gone, it is still the case that it cannot be said that the consent of the employer is needed to an amendment which involves an increase in benefits. I also agree with the trustees that it is not appropriate to use a general concept such as the purposes of a pension scheme to write in a requirement of BA's consent to the unilateral power to amend conferred by clause 18. I also agree that BA's position is a relevant consideration when the trustees are considering whether to amend the scheme to increase benefits. BA's position may indeed be a highly relevant consideration but it does not have a veto."

24. Of BA's various challenges at first instance, only two were pursued on appeal with permission granted by Morgan J, *viz.* that the Decisions:

i) were *ultra vires* as being outside the scope of the Scheme's power of amendment; alternatively,

ii) constituted the exercise of that power for an improper purpose.

25. The Court of Appeal unanimously upheld the Judge on BA's scope argument but, by a majority, reversed his decision on BA's improper purpose argument, holding that the Decisions were invalid on this ground.

26. Lewison LJ's reasoning can, I think, be summarised as follows. Clause 11 of the 2008 Deed dealt with what was to happen in the event of a deficit and in the event of a surplus ([93]-[94]). The proviso to rule 15 introduced by the amendment, however, gave the trustees unlimited power to "design" the Scheme ([95]). Clause 2 was not enough on its own to show that this was beyond the purpose of the power of amendment ([99]). Clause 4(a) showed, however, that the function of the Trustees was to manage and administer the Scheme, not to "design" it ([102]). The design of the benefit structure was neither the management nor the administration of the Scheme, and fell within the domain of the employer ([103]). The Trustees were arrogating to themselves the responsibility for "designing", as opposed to managing and administering, the Scheme in circumstances in which (a) the fund was in deficit and (b) the employer would be required to provide additional contributions to fund the additional benefits. That was not the Trustees' constitutional function under the Deed, and so the amendment went beyond the purpose of the power of amendment ([110]).

27. Although Peter Jackson LJ concluded his judgment by agreeing with the judgment of Lewison LJ ([127]), he had previously set out his own reasoning which in my opinion differs to some extent from that of Lewison LJ. I would summarise Peter Jackson LJ's reasoning as follows. The essential contours of the Scheme were provided by clauses 2, 3 (employer covenant), 4, 11, 13 (Trustees' power to determine entitlement and resolve disputes) and 24 (employer's power to increase benefits) and rule 15. The question was what the purpose of the power of amendment was in the context of the purpose of the Scheme as a whole ([116]). There were a number of matters which shed light on that question ([118]). The "design" of the Scheme specifically mandated circumstances in which the employer was or might be required to pay more: rule 15, clause 11 and clause 13. It also allocated a discretionary power to increase benefits to the employer: clause 24 ([119]). By contrast, there was no provision for unilateral discretionary increases by the Trustees ([120]). The description of the Trustees' role in clause 4 as being to manage and administer the Scheme was of clear significance. It did not preclude them from making decisions that had financial repercussions for the employer. But the amendment to rule 15 resulted in a scheme with a different overall purpose, in which the Trustees effectively added the role of paymaster to their existing responsibilities as managers and administrators ([121]). Trustees' actions in taking steps to dispose of a surplus were conceptually different from actions that would increase the employer's liability for a scheme already in substantial deficit ([122]). It was not correct, however, that the fundamental purpose of the Scheme was to deliver the benefits that the employer was willing to fund ([125]). Peter Jackson LJ expressed his conclusion at [126] as follows:

> "Taking all these matters into account, I conclude that the true purpose of clause 18 is to give the trustees a wide power to (as was described in *Courage* [1987] 1 W.L.R. 495) make those

> changes which may be required by the exigencies of commercial life. The amending power granted to these trustees was never intended to permit them to impose discretionary increases upon BA and the amendment of Rule 15 in 2011 and the exercise of the purported power in 2013 were 'for purposes contrary to those of the instrument': *Equitable Life* [2002] 1 A.C. 408 at 460F. …"

28. As noted above, Patten LJ dissented. The essence of his reasoning appears from the following passage in his judgment (emphasis added):

> "73. … BA's argument seems to me to be an attempt to elevate particular provisions of the scheme which construed together do not impose a relevant restriction on the Trustees into a purpose of the scheme best expressed as a principle that there should be no increase in or alteration to the benefits structure which would impose on BA as employer a funding obligation it was not prepared to consent to.
>
> 74. In my view this is not a purpose or object of the scheme but a matter of detail which will differ from scheme to scheme depending on how they were originally constructed or have developed over time. It is not and cannot be part of BA's argument that a power for trustees to increase benefits without the employers' consent is by its very nature inimical to any occupational pension scheme and unless it can be regarded as fundamental in that kind of way I do not see how the equitable principles we are concerned with come to be engaged. The question becomes one of vires alone and, as to that, the parties are agreed that the amendment was lawful unless it resulted in the making of benevolent or compassionate payments to the members. The absence of any requirement for the employer to consent to an increase or change in benefits may be unusual but in the present case that is largely the product of the scheme's history which I have set out in the earlier part of this judgment. *I also agree with [counsel for the Trustee's] submissions that the various qualifications which BA has accepted in its formulation of this principle, in particular its non-application when the scheme is in surplus, are likely to make it difficult in practice for the Trustees to know with any certainty what are the precise limits to the exercise of the power. With respect to Peter Jackson LJ, the formulation of the purpose of clause 18 suggested at [126] would in my view place the Trustees in a position of complete uncertainty about the scope of their powers.* This is in sharp contrast to the express terms of clause 18 itself.
>
> 75. As the judge observed, the clause 18 power of amendment does embody a number of safeguards including the requirement for a two-thirds majority of the Trustees in favour of its exercise which will enable the employer-appointed trustees to exert a significant influence in any discussion about whether to increase benefits as they did in the present case. But more important is

> that it is to be exercised in good faith in a proper trustee-like manner which requires the Trustees to take into account and give proper weight to the obligations of the employer and issues such as the deficit in the scheme and the affordability of the increases. These do not of course give the employer the same level of protection as a veto but they do require the Trustees to carry out a rigorous and realistic assessment of the position which can be subject to review by the Court as it was in this case. Those are the control mechanisms to guard against any aberrant or excessive exercise of the power."

Events since the Court of Appeal judgment

29. As noted above, the Court of Appeal granted the Trustee permission to appeal to the Supreme Court. Following a decision taken at a Trustee meeting on 31 July 2018, a Notice of Appeal was served on BA on 15 August 2018 and filed at the Supreme Court on 16 August 2018. BA served its Notice of Acknowledgment on 21 August 2018 and filed it on 22 August 2018.

30. A further Trustee meeting was held on 11 September 2018, at which the Trustee considered whether to pursue the Appeal to a substantive hearing and seek *Beddoe* relief or to bring the Appeal to an end and seek the Court's blessing for so doing, and decided upon the former course.

31. An application by BA for permission to cross-appeal on the scope issue was dismissed by the Court of Appeal, but BA has intimated that, if the Appeal proceeds, it will apply to the Supreme Court for permission to cross-appeal. The Trustee has agreed that it will not object to BA applying to the Supreme Court for an extension of time to do so until 15 January 2019.

32. The next step in the appeal process is for a statement of facts and issues to be agreed by the Trustee and BA, together with an appendix of relevant documents. In the light of the listing of the present claim for *Beddoe* relief, the Trustee has applied to the Supreme Court for, and obtained, an extension of time for so doing until 15 February 2019.

33. The Supreme Court has provisionally listed the hearing of the Appeal for 3-4 July 2019.

The Trustee's grounds of appeal

34. The Trustee contends in its Notice of Appeal that the decision of the majority of the Court of Appeal was wrong for the following reasons:

> "3. First, the majority's judgments fail to have proper regard or give due weight to the fact that the power to amend the Rules of the Scheme (which contain the Scheme's benefit structure) has been vested in the Trustee, initially with the consent of the Minister of Civil Aviation and since 1971 unilaterally. Giving someone a power to amend the Rules of the Scheme is giving them the power to change the benefit structure. So it cannot be the employer who decides whether to make amendments; that flies

in the face of the express choice to vest the power to make amendments in the Trustee.

4. As is the conventional practice in the drafting of the governing documentation of an occupational pension scheme, the Scheme's benefit structure is and has always been set out in its Rules rather than its Trust Deed. Not only has the Power of Amendment at all times been expressed to extend to the Rules, without any exclusion or qualifications on its operation, but the unqualified application of the same to the Rules was and is also made plain by Rule 28 of the 1948 Deed and Rules and Rule 30 of the 2008 Deed and Rules.

5. The implication of the majority's reasoning is that it is the *employer*, BA, who 'designs' the Scheme by making amendments to the benefit structure (and that the Trustee must accept the employer's decision). This wrongly ignores the fact that the employer has no role under the Power of Amendment and has never had a role in its exercise at any stage in the 70-year life of the Scheme. The Corporations had no role or function under the Power of Amendment in its 1948 iteration. When the requirement for Ministerial confirmation was statutorily removed in 1971, no provision was substituted to the effect that the agreement or consent of the Corporations was instead required to any exercise by the Trustees of the Power of Amendment.

6. Second, if it was intended to give the employer the power to amend (whether unilaterally or with trustee consent), this is what the Power of Amendment would have said. It is common to have powers of amendment that provide for the trustee to be able to amend scheme rules with employer consent or vice versa, or for the employer to have the power to amend unilaterally. It is not in dispute that the Power of Amendment was not such a power.

7. The references in the judgments of the majority to the Trustees using the Power of Amendment to '*design*' the Scheme beg the question, because any exercise of a scheme's power of amendment so as to amend its benefit structure necessarily amends the 'design' of the Scheme. An occupational pension scheme which does not include a power of amendment enabling its benefit structure to be changed would be virtually unprecedented, and the question the majority ought to have addressed was as to the person(s) in whom under the Scheme that necessary power is vested.

8. Third, the judgments of the majority are inconsistent with the judgment of this Court in *Eclairs Group Ltd v JKK Oil and Gas Plc* [2015] UKSC, [2016] 3 All ER 641, as to the nature of the proper purpose rule. Its application here by the majority (i)

circumvents the clear balance of powers that exists under the Scheme's governing documentation and (ii) produces a result that does not turn in any way on the subjective intention of the Trustees as the donees of the power, which is the true function of the rule. Per Lord Sumption at paragraph 15 in *Eclairs*, the rule is concerned with abuse of power, by the doing of acts which are within the scope of the power in question but subjectively done for an improper reason (as was the position, for example, in *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821, relied on by the majority).

9. As both the judge held and Patten LJ concluded in his dissenting judgment, the true nature of BA's argument is that it is one of *vires*, which goes to the scope of the Power of Amendment. However and as Patten LJ also correctly observed, putting to one side its argument in respect of the '*benevolent or compassionate*' wording in Clause 2 of the 1948 and 2008 Deeds, which argument the Court of Appeal did not accept, BA does not contend that, as a matter of construction, the Power of Amendment did not permit the Trustees to adopt the DI power contained in the 2011 Deed of Amendment. Absent such a contention being advanced and upheld, BA's challenge to the validity of the 2011 Deed of Amendment should have been dismissed.

10. Moreover, as Patten LJ explained, when considering the structure of the Scheme so as to derive from it an unexpressed purpose or object, it is necessary to take into account not only the Scheme's existing benefit structure but also the Trustees' power, which has existed since the Scheme's establishment in 1948, to make changes to that structure.

11. The Power of Amendment has always been subject to four express and entrenched provisos restricting its exercise, and the practical effect of the majority's judgment, as the Judge correctly held, would be to insert an additional fifth and unexpressed restriction or (which amounts to the same thing) write in an employer consent requirement to changes to the benefit structure set out in the Rules.

12. This is all the more inappropriate where, as Patten LJ explained at [68] and [70], Clause 2 makes clear that the purposes of the Scheme are to provide pension benefits on retirement, together with death and injury benefits, and the first proviso to the Power of Amendment expressly bars amendments that would change the purposes of the Scheme. One would not expect in such a situation there to be other fundamental and unexpressed purpose restrictions on the Power of Amendment.

13. Fourth, as both Lloyd J and the Court of Appeal recognised when the Scheme was previously before the Courts in *Stevens v*

Bell [2001] EWHC Ch 13, [2001] Pens LR 99, and [2002] EWHC Civ 672, [2002] Pens LR 247, the terms of the Power of Amendment strike a balance between the respective interests under the Scheme by requiring a super-majority before any amendment (including a constitutional change, which would affect members' benefits) may be made.

14. Fifth, the majority was wrong to place the weight that it did on Clause 4 of the Scheme's governing documentation, providing that the Trustees should manage and administer the Scheme. Self-evidently any trust, not just an occupational pension scheme, requires a person or persons to manage and administer the same, and Clause 4 is a common form provision to find in the governing documentation of an occupational pension scheme. The approach the majority should have adopted was to ask themselves what other duties or powers were conferred on the Trustees of the Scheme in addition to Clause 4, and should not have used Clause 4 as they did so as to read down the clear terms of the Power of Amendment.

15. Sixth, the majority was also wrong to place the reliance it did on Clause 11 of the 2008 Deed and Rules (which provides for the steps to be taken where an actuarial valuation discloses a surplus or deficit), the Court of Appeal itself having recognised in *Stevens v Bell* that Clause 11 is not an entrenched provision and may therefore be amended by the exercise of the Power of Amendment.

16. Seventh, at [119] of the judgment of Peter Jackson LJ, reliance is placed on certain other provisions of the Scheme that, in the Trustee's submission, can have no bearing on Clause 18.

16.1 As noted in the judgment of Patten LJ, neither Clause 24 of the Trust Deed (setting out the employer's power to increase benefits) nor Rule 15 (as it originally stood) formed part of the Scheme's original Trust Deeds and Rules, the latter being introduced in 1973, the former only in 1990. Neither provision therefore has any bearing on the construction or purpose of Clause 18, which in accordance with established principles of construction falls be construed at the time of its creation: *Stevens v Bell* [2002] Pens LR 247 at [29] per Arden LJ.

16.2 Clause 13 of the Trust Deed provides only for the Trustee's power to determine benefit entitlements and resolve disputes (as recognised at [11] and [115]). Such functions cannot operate to limit the Power of Amendment.

17. Eighth, contrary to the conclusion of the majority, the DI power does not give the Trustees '*unlimited power, in effect, to design the scheme*', but is limited to the grant of discretionary increases in addition to those already provided for by Rule 15. As Patten

LJ correctly stated, the grant of any such increase would clearly fall within the main purpose of the Scheme as defined by Clause 2 of its governing documentation and for that reason (and others) would not be improper.

18. Ninth, in their 2008 iteration, Rules 4, 8, 8A, 9, 10, 11, 12 ,13, 13A, 13B, 14, 15, 16, 19, 20, 20A, 20B, 20C and 22 all have as their subject matter the pecuniary benefits to which members or persons claiming through them are entitled under the Scheme, yet the effect of the majority's judgment is that the Power of Amendment cannot be used by the Trustee so as to amend any of the same unless either (i) the Scheme is in surplus (on a basis or to be determined in a manner which is neither prescribed by the Scheme's governing documentation nor explained in the judgment of the majority and which, as Patten LJ concluded, would produce practical uncertainty for the Trustee) or (ii) BA consents to the same.

19. Tenth, the reliance placed by the majority on the judgments of the Court of Appeal in *Edge v Pensions Ombudsman* [2000] Ch 602 and of Sir Andrew Park in *Smithson v Hamilton* [2007] EWHC 2900 (Ch), [2008] 1 WLR 1453, was wrong, in that:

19.1 The power of amendment in *Edge* was not unilateral but did not require the consent of a majority of that scheme's employers, nor can that judgment sensibly be read as meaning that benefits under an occupational pension scheme are "*fixed*" so as to be incapable of change.

19.2 Sir Andrew Park's observations in *Smithson* were addressed to the establishment of an occupational pension scheme and the majority's reliance thereon overlooks the judgment of Newey J (as he then was) in *Arcadia Group Ltd v Arcadia Group Pension Trust Ltd* [2014] EWHC 2683 (Ch), [2014] 067 PBLR (018). At paragraphs 34 to 37 of his judgment there Newey J distinguished *Smithson*, correctly holding that whilst, in the ordinary course, the employer may be principally responsible for the initial design of a scheme, thereafter the functioning of the scheme, and the respective powers of the employer and the trustees, will depend upon the terms of the scheme's governing documentation."

The previous *Beddoe* proceedings

35. A claim for *Beddoe* relief in respect of the Main Proceedings was previously brought by the Trustees in 2014 ("the Previous *Beddoe* Proceedings"). That claim was necessitated because, initially, BA refused to accept that, under the indemnity provided to the Trustees under clause 17(b) of the 2008 Deed, it was liable for the costs of the Main Proceedings incurred by the Trustees. Mr Fielder was joined to the Previous *Beddoe* Proceedings as a representative beneficiary. Mr Fielder was at that time an active member of the Scheme, and thus cannot benefit from the 2013 Decision, although

he has since retired. Mr Fielder did not object to the order that was made. BA was not joined as a party to the Previous *Beddoe* Proceedings. Nor did it appear at the hearing or make written submissions. It did, however, strongly object to the grant of *Beddoe* relief in correspondence.

36. The Previous *Beddoe* Proceedings were heard by Sir Terence Etherton C (as he then was), who directed that the Trustees should defend the Main Proceedings as far as completion of disclosure and inspection and be indemnified out of the assets of the Scheme in respect of their costs: *Spencer v Fielder* [2014] EWHC 2768 (Ch), [2015] 1 WLR 2786.

37. The Chancellor summarised BA's principal argument against the grant of the relief sought at [21] as follows:

> "The essence of BA's objections is that in the main proceedings the trustees are facing serious criticism of their conduct, including allegations of conduct amounting to breaches of trust. BA says that the trustees are in an analogous position to the third category described in the judgment of Kekewich J in *In re Buckton* [1907] 2 Ch 406, 415 (adverse claims between beneficiaries where the unsuccessful party should usually bear the costs of all whom he has brought before the court) and that it cannot be right that the court in the present proceedings, to which BA is not a party, can, in advance of the hearing of the main proceedings, place the costs of the main proceedings ultimately on BA under its covenant to fund the scheme. BA says that this is not a case in which it can possibly be predicted that, at the conclusion of the main proceedings, if BA is successful, the trial judge would order that the trustees be indemnified out of the scheme's assets. BA says that the main proceedings are internal hostile litigation and that the trustees are no more entitled to the relief sought than they would be if the main proceedings had been brought by another member of the scheme. BA relies on the statement of Hoffmann LJ in *McDonald v Horn* [1995] ICR 685, 697 that, before granting a pre-emptive costs application in ordinary trust litigation or proceedings concerning the ownership of a fund held by a trustee or other fiduciary, the court must be satisfied that the judge at the trial could properly exercise his or her discretion only by ordering the applicant's costs to be paid out of the fund."

38. The Chancellor did not accept BA's arguments. The core of his reasoning is to be found in the following passages in his judgment:

> "25. The starting point is that the trustees are entitled to pay or to be reimbursed out of the scheme's assets all expenses properly incurred by them when acting on behalf of the trust. Section 31(1) of the Trustee Act 2000 so provides. To that extent, that section supplements or qualifies the provision in section 51(1) of the Senior Courts Act 1981 that, subject to the provision of any other enactment and to rules of court, the costs of and

incidental to court proceedings shall be in the discretion of the court. Aside from section 31(1) of the Trustee Act 2000, CPR r 46.3 provides that, where a person is or has been a party to any proceedings in the capacity of trustee, and CPR r 44.5 (dealing with the situation where costs are payable under a contract) does not apply, the general rule is that that person is entitled to be paid the costs of those proceedings, in so far as they are not recovered from or paid by any other person, out of the relevant trust fund as assessed on the indemnity basis.

26. There are obvious types of case in which trustees will not usually be entitled to be indemnified in respect of their costs under those provisions. One is if they are successfully sued for compensation for past breaches of trust. Another is where they take an unsuccessful partisan position in hostile litigation between rival claimants to a beneficial interest in the subject matter of the trust. Such examples were considered by Lightman J in *Alsop Wilkinson v Neary* [1996] 1 WLR 1220. They are to be contrasted with cases where, whatever the form, the substance of the litigation is to clarify some matter of uncertainty in the administration of the trust or the conduct of the trustees in the litigation is otherwise in the best interests of the beneficiaries as a body rather than for the personal benefit of the trustees themselves. Often it is sought, as BA has done in the present case, to categorise trust litigation for this purpose into one or other of the three categories of case mentioned by Kekewich J in *In re Buckton* [1907] Ch 406. As has been pointed out on numerous occasions, however, that categorisation is not some kind of statute and there are cases which do not fit easily within any of those categories: see, for example, *Singapore Airlines Ltd v Buck Consultants Ltd* [2013] WTLR 121. Furthermore, as has also been pointed out, Kekewich J was not strictly addressing trustees' rights of indemnity at all. He was concerned with principles applicable to the costs of beneficiaries: *des Pallières v JP Morgan Chase & Co* [2013] JCA 146, paras 30-31 (Jersey Court of Appeal, Nugee JA).

27. I have emphasised that what matters is whether, in substance, trustees who are parties to litigation are acting in the best interests of the trust rather than for their own benefit. It is clear, for example, that, depending on the precise facts, trustees may be entitled to an indemnity for costs even though incidentally they will secure a personal benefit from a successful claim or defence or where there are allegations of breach of trust: see, for example, *Macedonian Orthodox Community Church St Petka Inc v Diocesan Bishop of the Macedonian Orthodox Diocese of Australian and New Zealand* [2008] HCA 42 .

28. Turning to the relevant facts here, it is perfectly clear, as Mr Jonathan Evans has himself submitted on behalf of Mr Fielder,

> that the main proceedings should not go undefended. The 2011 amendment and the 2013 decision will benefit the overwhelming majority of the members of the scheme, that is to say some 29,000 pensioners and deferred members out of a total, including active members, of just under 30,000. …
>
> 29. Further, it is important that the claims in the main proceedings are determined by the court in order to resolve the uncertainties about the validity of the 2011 amendment and the 2013 decision, to which BA's allegations give rise.
>
> ….
>
> 32. Accordingly, as Mr Evans submitted, the costs of serving a defence to the main proceedings and of disclosure and inspection must necessarily be incurred for the benefit of the members of the scheme as a whole.
>
> 33. It is entirely unrealistic and unreasonable to expect, as BA has suggested …, that the trustees should undertake the defence of the main proceedings without a protective costs order at this stage, even if, as matters stand at the moment, it is reasonable to anticipate that, whatever the outcome of the main proceedings, the trial judge would award the trustees their costs out of the scheme's assets in so far as they are not paid by anyone else. While … BA has said that it will not claim its costs of the main proceedings from the trustees, whatever the outcome at trial, the trustees cannot be expected to take any risk at all of personal exposure to their own costs and expense of the litigation if they are litigating in substance for the benefit of the scheme's members as a whole rather than their own personal benefit. ….
>
> 34. There are, in the circumstances, only two practical possibilities: either the trustees must defend the main proceedings and receive a protective costs order at this stage or a member of the scheme who has not been involved in the 2011 amendment or the 2013 decision will have to do so in a representative capacity. Such a representative defendant would inevitably be entitled to a protective costs order in just the same way as the pension scheme members were entitled to such an order in *McDonald v Horn* [1995] ICR 685. The fact that in that case they were to be claimants in the proceedings but in the present case the representative member would be a defendant to the main proceedings makes no difference."

The Chancellor went on to accept Mr Fielder's argument that it was more practical for the Trustees to defend the proceedings down to disclosure and inspection than for Mr Fielder to do so.

39. BA subsequently conceded its liability under clause 17(b), a consent order was made accordingly by Birss J ("the Birss Order") and the Previous *Beddoe* Proceedings were stayed by the Chancellor.

40. Following the first instance judgment in the Main Proceedings, Morgan J extended the Birss Order to include payment by BA of the costs and expenses incurred by the Trustee in responding to BA's appeal before the Court of Appeal.

41. Given that the Previous *Beddoe* Proceedings sought directions only as to the defence of the Main Proceedings at first instance, the Trustee considered that the appropriate course was to issue the present claim rather than seek to restore the Previous *Beddoe* Proceedings.

Applicable legal principles

42. There was disagreement between BA on the one hand and the Trustee and Mr Fielder on the other hand as to the legal principles which are to be applied in the present circumstances, but on analysis the difference between them turns out not to be as great as at first appears.

43. BA contended that:

    i) a trustee who appeals to the Court of Appeal from a first instance decision made in internal trust proceedings concerning the construction of the trust deed and similar issues does so at his own risk as to costs, at least in the absence of exceptional circumstances, because the order made at first instance operates to protect the trustee and there is no need for him to appeal; and

    ii) the position is no different in the case of a trustee appealing to the Supreme Court against a decision of the Court of Appeal (even where, as here, the Court of Appeal was divided and reversed the trial judge).

44. Counsel for BA submitted that proposition (i) is firmly established by authority. He accepted that proposition (ii) is not established by any authority, but submitted that it follows as a matter of logic and principle from proposition (i).

45. The Trustee and Mr Fielder contended that there is no inflexible rule, and that the true question is whether, in the specific circumstances of the particular case, the trustee would be acting in the interests of the trust as a whole by appealing. If the trustee would be acting in the interests of the trust as a whole by appealing, then it is proper for the trustee to do so and the trustee is entitled to be indemnified from the assets of the trust in respect of his own costs and any adverse costs order. The Trustee and Mr Fielder accepted that, on a *Beddoe* application, this is a matter on which it is for the court to form its own view, rather than simply considering whether the trustee's view is a reasonable one.

46. I was referred to a considerable number of authorities on this question. The authorities fall into three groups. The first group are cases in which either costs orders have been made at the conclusion of appeals involving trustees where *Beddoe* relief had not been obtained in advance or observations have been made about the incidence of costs in such circumstances. The second group are *Beddoe* applications by trustees and

executors defending claims to the whole of the property of the trust or estate. The third group are cases concerning prospective costs orders ("PCOs") sought by beneficiaries involved in trust litigation. Before considering these authorities, I will set out the current relevant legislative provisions and comment on the categorisation of the Main Proceedings.

Relevant legislative provisions

47. Section 31(1) of the Trustee Act 2000 provides:

> "A trustee -
>
> (a) is entitled to be reimbursed from the trust funds, or
>
> (b) may pay out of the trust funds,
>
> expenses properly incurred by him when acting on behalf of the trust."

48. CPR rule 46.3 provides:

> "(1) This rule applies where –
>
> (a) a person is or has been a party to any proceedings in the capacity of trustee or personal representative; and
>
> (b) rule 44.5 does not apply.
>
> (2) The general rule is that that person is entitled to be paid the costs of those proceedings, insofar as they are not recovered from or paid by any other person, out of the relevant trust fund or estate.
>
> (3) Where that person is entitled to be paid any of those costs out of the fund or estate, those costs will be assessed on the indemnity basis."

49. Practice Direction 46 provides:

> "1.1 A trustee or personal representative is entitled to an indemnity out of the relevant trust fund or estate for costs properly incurred. Whether costs were properly incurred depends on all the circumstances of the case including whether the trustee or personal representative ('the trustee') –
>
> (a) obtained directions from the court before bringing or defending the proceedings;
>
> (b) acted in the interests of the fund or estate or in substance for a benefit other than that of the estate, including the trustee's own; and

> (c) acted in some way unreasonably in bringing or defending, or in the conduct of, the proceedings.
>
> 1.2 The trustee is not to be taken to have acted for a benefit other than that of the fund by reason only that the trustee has defended a claim in which relief is sought against the trustee personally."

Categorisation of the Main Proceedings

50. There was some debate between counsel as to the correct categorisation of the Main Proceedings. Counsel for BA submitted in his skeleton argument that the Main Proceedings fell into the second of the three categories described by Kekewich J in *Re Buckton* [1907] 2 Ch 406, although in his oral submissions he submitted that the Appeal was in the third category. Counsel for the Trustee disputed this. As the then Chancellor pointed out in *Spencer v Fielder*, however, there are cases which do not fit easily into any of the three categories and it is questionable whether the categorisation matters for present purposes. In my view all that matters is that, so far as the Appeal is concerned, the Main Proceedings are internal trust proceedings concerning the proper interpretation of the 2008 Deed.

Costs orders following appeals

51. In *Re the Earl of Radnor's Will Trust* (1890) 45 Ch D 402 a trustee of a will trust and another person appealed a decision of Chitty J approving a decision to sell trust property made by the tenant for life. Lord Esher MR regarded the appeal as hopeless, saying that there was "as clear a case as possible" that the judge was justified in agreeing with the tenant for life. He went on at 423:

> "One of the Appellants was the surviving trustee of the will; he and the other appellant were perfectly entitled to take the opinion of Mr. Justice Chitty as to what was right to be done; but when they appeal to this Court from him, being absolutely protected as trustees by his decision—I do not say they are wrong in appealing, but they appeal to this Court under the ordinary conditions of Appellants, and they fail in the appeal; therefore this appeal must be dismissed with costs."

Lindley and Bowen LJJ agreed with Lord Esher.

52. In *Mayor of Westminster v Rector and Churchwardens of St George, Hanover Square* [1909] 1 Ch 592 the defendants were the trustees of a charitable trust. The plaintiffs brought a claim for a declaration that the power to administer the income from some land had been transferred to them by the London Government Act 1899. Warrington J held in favour of the plaintiffs. The defendants appealed, and the Court of Appeal upheld Warrington's decision by a majority. The Court of Appeal ordered the costs of the appeal to be paid out of the trust funds. All three members of the Court of Appeal (Cozens-Hardy MR, Fletcher Moulton LJ and Buckley LJ) emphasised that the case was an exceptional one. It is sufficient to refer to the reasons given by Cozens-Hardy MR for making the order at 614-615:

> "This is a very peculiar case, and I hope that in anything I say I shall not trench upon what I take to be the undoubted and well-established rule of the Court. That rule is, I think, this, that a trustee has a right—not merely that he can appeal to the discretion of the Court, but that he has a right—to indemnity out of the trust fund in any case in which he reasonably and properly applies to the Court or is brought to the Court for directions in the administration of the trust. But that right ends with the order which has been obtained giving full effect to the indemnity which as I say is a matter of right. If a trustee appeals to the Court of Appeal against a decision in the Court below and the appeal is unsuccessful, I feel no doubt that under ordinary circumstances the trustee as appellant is in no better position than another appellant, and under ordinary circumstances if the appeal fails, it fails with what we so frequently describe as the usual consequences. But this is not in my view an ordinary case, and, without in any way infringing upon those principles which I have endeavoured to lay down, I think we shall in the exercise of our discretion be doing what is right and just in saying that the costs of this appeal, though unsuccessful, may be paid out of the large trust fund which is in the hands of the trustees.
>
> This is a very difficult case, in which there was undoubtedly a very serious question as to the persons who were entitled to determine the beneficial enjoyment or the proper mode of application of the proceeds of this valuable property, if sold, or of the rents and profits of it until sale. The plaintiffs in the action, the Corporation of Westminster, alleged that they were the persons who had the right to determine the application within certain limits. The defendants, the trustees, contended wrongly, as we thought, but undoubtedly not without considerable plausibility, that that was not so, that there ought to be a scheme directed with a view to the application of the rents for ecclesiastical purposes rather than other purposes which might be either civil or ecclesiastical. There was nobody to present that view to the Court of Appeal unless the trustees themselves did it, for the plaintiffs, for some reason which I have not been able to understand, did not bring in the Attorney-General and make him a party to the action, as I think they would have been well advised if they had done. Under these circumstances I think it is right that we should in the exercise of our discretion direct the costs of this appeal to be paid out of the trust funds …"

53. *Re Stuart* [1940] 4 All ER 80 is reported solely on the question of costs. The trustees had applied to the court for a question of construction to be determined. One of the defendants had appealed unsuccessfully against a decision of Farwell J on that question. When dealing with the costs of the appeal, Clauson LJ, with whom Luxmoore LJ agreed, said at 81:

> "Counsel for the appellant has invited us to exercise the jurisdiction which we undoubtedly have to order the costs of an unsuccessful appeal to be paid out of the estate. It is most important that there should be no mistake about the power of the court to order that, and it is equally important that we should be quite clear that it is to be exercised only in the proper cases. The cases in which the court will exercise that power are, I think, exceptional. Sometimes there are cases where large interests are at stake, very often interests of unborn persons and so on, and it is perfectly proper that a second opinion should be taken. In cases of that kind, the court does make this exception. In this particular case, the point was quite fairly brought before the court by the trustees. There is an appeal, which has been argued, and which is without foundation. In those circumstances, I cannot conceive of any course being taken except that of ordering the unsuccessful appellant to pay costs."

The trustees got the difference between party-and-party costs and solicitor-and-client costs out of the estate.

54. In *Re Londonderry's Settlement* [1965] Ch 918 the trustees had sought the court's directions as to whether they were bound to disclose certain trust documents at the request of a beneficiary, but had done so in abstract terms rather than in relation to specific identified documents. Plowman J decided that the trustees were bound to disclose the documents, and the trustees appealed. The appeal was successful in part. Harman LJ, with whom Danckwerts LJ agreed, observed *en passant* at 930-31 that the appeal was "an irregularity", because "[t]rustees seeking the protection of the court are protected by the court's order and it is not for them to appeal. That should be done by a beneficiary…". Salmon LJ expressed the view at 936 that "the trustees were fully justified in bringing this appeal. Indeed it was their duty to bring it since they believed rightly that an appeal was essential for the protection of the general body of beneficiaries".

55. When it came to costs, the Court of Appeal ordered the costs of the trustees and the defendant to be taxed on the common fund basis (equivalent to the standard basis now) and paid out of the trust funds. The Court did not give any reasons for making this order.

56. In *Re R & RA Trusts* (unreported, Guernsey Court of Appeal, 20 May 2014) the trustees of certain family trusts applied for disclosure of information by some of the beneficiaries of those trusts. The third respondent supported the trustees' application and made her own application for more far-reaching disclosure orders against the other respondents. The Deputy Bailiff dismissed both applications. The third respondent appealed. The Guernsey Court of Appeal allowed the appeal in part.

57. The leading judgment was given by Birt JA, with whom Sir John Nutting agreed, who observed:

> "16. The Trustees brought the application before the Royal Court because they considered that they needed the information sought in order to reach a fair decision as to how to separate the interests of the daughter and her family. They could not do that without

being able to assess accurately the value of the trust fund. It follows that they were disappointed with the Deputy Bailiff's decision to refuse them the required information.

17. However, the trustees have not sought leave to appeal. The reason for this is that they have been advised not to appeal and to leave any appeal to the daughter. This is on the basis of an observation of Harman LJ in *Re Londonderry Settlement* [1965] Ch 918. In that case the trustees sought directions from the court as to whether they should disclose certain documents to beneficiaries. They then appealed the decision of the judge of the first instance and the Court of Appeal allowed the appeal in part on the basis that the judge's order went too far. However, in passing, Harman LJ said this at 930 about the appeal:-

> 'This appeal, as it seems to me, is an irregularity. Trustees seeking the protection of the court are protected by the court's order and it is not for them to appeal. That should be done by a beneficiary…'

Danckwerts LJ gave a judgment in which he said that he agreed with Harman LJ but he did not deal with this aspect specifically. Salmon LJ on the other hand disagreed with Harman LJ and had this to say at 936:-

> 'I agree with what has fallen from my Lords. However, in my view the trustees were fully justified in bringing this appeal. Indeed it was their duty to bring it since they believe rightly that an appeal is essential for the protection of the general body of beneficiaries.'

18. In my judgment, the view of Salmon LJ to be to preferred. Whilst I fully accept that in the majority of cases a trustee who has sought directions from the court should not appeal even if he is not convinced that the court reached the right decision, a trustee is perfectly entitled to appeal if convinced that the decision of the court is not in the best interests of the beneficiaries. Strictly speaking, a trustee who appeals may be at risk of an adverse costs order should the appeal fail; but such an adverse costs order will only be made in administrative proceedings where the appeal court concludes that the trustee has acted unreasonably in appealing, because it is only where a trustee has acted unreasonably that he is to be deprived of his indemnity as to costs (see *Alhamrani v J P Morgan Trust Company (Jersey) Limited* 2007 JLR 527 at para 69 per Vos JA)."

58. He went on to say that the trustees should have appealed and that it was always very unlikely that they would be denied their indemnity out of the trust fund. Beloff JA agreed, and added that on the question of the trustees' entitlement to appeal he was "in the Salmon rather than the Harman camp".

59. Counsel for BA submitted that *Re R & RA Trusts* did not represent English law. That may be technically correct, but the case is nevertheless persuasive authority. Even if *Re R & RA Trusts* is disregarded, however, it does not seem to me that the English authorities establish any inflexible rule with regard to trustees' appeals.

Beddoe cases

60. In *Re Dallaway* [1982] 1 WLR 756 Sir Robert Megarry V-C applied the general rule that, where a settlement was set aside, the court would allow trustees who had unsuccessfully defended the claim to take their costs out of the fund if they had acted properly, to the case of an executor defending a claim by two out of twelve beneficiaries under the testator's will to the whole of the estate. Accordingly, he authorised the executor to defend the claim on the basis that it would be entitled to be indemnified out of the estate for all its costs unless the trial judge made an order to the contrary.

61. *Re Evans* [1986] 1 WLR 101 was a similar case, except that the deceased had died intestate and one of the beneficiaries on intestacy had taken out letters of administration. The Court of Appeal nevertheless distinguished *Re Dallaway* on the ground that, unlike in that case, the plaintiffs proposed to join the other beneficiaries as defendants. The Court of Appeal held that, in cases where the beneficiaries were all adult, *sui juris* and capable of deciding whether or not to resist a claim, the potential injustice to the plaintiffs had to be balanced by countervailing considerations of some weight, such as the merits of the claim, before it would be right to allow the administrator to be indemnified out of the estate for his costs of defending the claim.

62. In *Alsop Wilkinson v Neary* [1996] 1 WLR 1220 the plaintiff applied for an order under section 423 of the Insolvency Act 1986 setting aside two settlements by the first defendant, a former partner in the plaintiff, as transactions defrauding creditors. The plaintiff had already obtained judgment against the first defendant for misappropriation of client money. The trustees of the settlements applied for directions as to whether to defend the action and for a pre-emptive costs order. Lightman J said at 1224:

> "Trustees (express and constructive) are entitled to an indemnity against all costs, expenses and liabilities properly incurred in administering the trust and have a lien on the trust assets to secure such indemnity. Trustees have a duty to protect and preserve the trust estate for the benefit of the beneficiaries and accordingly to represent the trust in a third party dispute. Accordingly their right to an indemnity and lien extends in the case of a third party dispute to the costs of proceedings properly brought or defended for the benefit of the trust estate. Views may vary whether proceedings are properly brought or defended, and to avoid the risk of a challenge to their entitlement to the indemnity (a beneficiaries dispute), trustees are well advised to seek court authorisation before they sue or defend. The right to an indemnity and lien will ordinarily extend to the costs of such an application. The form of application is a separate action to which all the beneficiaries are parties (either in person or by a representative defendant). With the benefit of their views the judge thereupon exercising his discretion determines what course the interests of justice require to be taken in the

> proceedings: see *In re Evans, decd.* [1986] 1 W.L.R. 101 considered by Hoffmann L.J. in *McDonald v. Horn* [1995] I.C.R. 685. So long as the trustees make full disclosure of the strengths and weaknesses of their case, if the trustees act as authorised by the court, their entitlement to an indemnity and lien is secure.
>
> A beneficiaries dispute is regarded as ordinary hostile litigation in which costs follow the event and do not come out of the trust estate: see *per* Hoffmann L.J. in *McDonald v. Horn* [1995] I.C.R. 685, 696."

63. In *Trustee L v Attorney General* [2015] SC (Bda) 41 Com Hellman J sitting in the Supreme Court of Bermuda Commercial Court authorised trustees to defend a claim that certain Bermuda non-charitable purposes trusts were void alternatively that transfers of assets into the trusts should be set aside on the basis that the trustees would be indemnified from the trust assets. After reviewing *Re Dallaway*, *Re Evans* and *Alsop Wilkinson* and cases on PCOs, among other authorities, Hellman J concluded:

> "83. … When deciding whether to give the trustee advance authorisation to incur [costs from the trust estate], the question for the court is whether in incurring them the trustee would be acting reasonably and for the benefit of the trust rather than for his own benefit.
>
> 84. … when deciding what is reasonable, I find it helpful to ask what is practical and fair. … "

64. On the facts of the case, he granted the order sought on the basis that the trustees were the proper contradictor of the claim, there were sufficient prospects of success to warrant the trustees defending the claim, the claim was likely to go undefended if the trustees were not given an indemnity and the litigation costs would consume no more than a small part of the trust estate.

65. None of these authorities addresses the question of the costs of an appeal by trustees. Thus this line of authority is only of assistance with regard to the basic principle.

PCOs

66. I reviewed the authorities concerning PCOs in *HR Trustees Ltd v German* [2010] EWHC 321 (Ch), [2010] Pens LR 131 at [9]-[52]. I shall take that review as read and not repeat it. It suffices for present purposes to cite two passages from the judgment of Carnwath J (as he then was) in *Laws v National Grid plc* [1998] Pens LR 311. The first is what he said at [65] (quoted at [24] of *HR Trustees*):

> "… where there is a genuine difficulty, trustees, and by analogy beneficiaries, may be able to seek authoritative guidance of the High Court at the expense of the fund, but once such guidance has been obtained from the High Court's decision, then in the absence of some special circumstances, such for example as difficulties arising from that decision itself, the parties have the authoritative guidance they need. The fact that they do not like it

> is not a reason for litigating further at the expense of the fund. That principle would apply equally in this case. The judgment provides the sort of clear guidance which is required under the *Buckton* approach, and the fact that some of the parties do not like it would not justify the cost of the appeal."

Although this statement lends some support to BA's argument, it does not purport to lay down an inflexible rule.

67. The second is what Carnwath J said at [78] (quoted at [26] of *HR Trustees*):

> "… once it has been decided that the case is of the kind which justifies a *McDonald* order at the first stage, it cannot be right, in my view, for the jurisdiction of the court (as opposed to the exercise of its discretion) to continue that order at a later stage depending on who won or lost. That, it seems to me, must depend on the nature of the case, and the circumstances will differ widely."

Although this statement was directed to the jurisdiction to make a PCO in favour of beneficiaries, it seems to me that it sheds light on the correct approach to an appeal by trustees.

68. In *HR Trustees* Mr German was a representative beneficiary who sought a PCO in respect of the costs of a cross-appeal on one issue in internal trust proceedings when IMG was appealing on four issues. I concluded that it was likely, but not inevitable, that the Court of Appeal would order IMG to pay the costs of the cross-appeal in any event, and that in the circumstances the justice of the case made it appropriate to make a prospective order in Mr German's favour.

69. Subsequently Warren J made a similar order in *IBM United Kingdom Holdings Ltd v Dalgleish* [2015] EWHC 1870 (Ch), which again involved internal trust proceedings. It seems to me that Warren J's judgment is consistent with my analysis in *HR Trustees*.

70. The key point that emerges from the PCO cases is that there are circumstances in which it may be proper for the court to make a PCO in favour of beneficiaries appealing a first instance decision in internal trust proceedings. Contrary to the submission of counsel for BA, such circumstances are not limited to cases involving misappropriation of assets or other wrong-doing. While this does not directly affect the position of trustees who appeal, I regard it as inconsistent with an inflexible rule that trustees cannot be indemnified in respect of an appeal in such proceedings.

Conclusion

71. In my judgment these authorities do not support the existence of an inflexible rule of the kind contended for by BA. On the contrary, I agree with the Trustee and Mr Fielder that the true principle to be extracted from them is that a trustee is entitled to be indemnified from the assets of the trust if, in the specific circumstances of the particular case, the trustee would be acting in the interests of the trust as a whole by appealing.

72. Upon analysis, it seems to me that what divides the parties' approaches to this question are two points. The first concerns the circumstances in which it would be in the interests of the trust as a whole for the trustee to appeal. The second concerns the question of whether the trustee would be acting in the interests of the trust as a whole, as opposed to the interests of certain beneficiaries, by appealing.

73. So far as the first point is concerned, I did not understand counsel for BA to dispute that there could be exceptional cases in which it would be in the interests of the trust as a whole to appeal. Rather, his argument was that such cases were limited to ones in which the decision under appeal created significant uncertainty as to the interpretation or operation of the trust. I agree that cases in which the decision under appeal creates significant uncertainty represent the paradigm example of when an appeal will be in the interests of the trust as a whole. I am not persuaded, however, that that is the only circumstance in which an appeal can be in the interests of the trust as a whole.

74. Turning to the second point, counsel for BA argued that a trustee would not be acting in the interests of the trust as a whole unless an appeal would be in the interests of all the beneficiaries and that it was not sufficient that it would be in the interests of some beneficiaries, even if those beneficiaries represented a majority of those entitled. By contrast, counsel for the Trustee and for Mr Fielder submitted that it was not necessary for an appeal, any more than any other step which trustees might take, to be in the interests of all the beneficiaries. An appeal, or other step, could be in the interests of the trust as a whole even though it involved balancing the interests of different beneficiaries, or classes of beneficiaries, provided that it did not involve the trustee taking sides between rival claimants to some beneficial interest.

75. Counsel for the Trustee gave a number of examples of situations where it could be in the interests of a trust as a whole for trustees to take a particular step even though it involved balancing the interests of different beneficiaries, or classes of beneficiaries. It is not necessary to go through these examples, because in my judgment the principle for which counsel contended is supported by *Spencer v Fielder*. The Chancellor's first reason for holding that it was in the interests of the Scheme for the Trustee to defend the Main Proceedings was that it was in interests of the overwhelming majority of members of the Scheme – not that it was in the interests of all beneficiaries of the Scheme. (The Chancellor's second reason was that it was important to resolve the uncertainties to which BA's allegations gave rise.)

76. I do not intend to cast any doubt on the proposition that, in most cases, the trustee should accept the decision at first instance; but where an appeal would be in the interests of the trust as whole, the trustee should not be deterred from appealing by the risk of an adverse costs order. The advantage of the *Beddoe* jurisdiction is that it enables the trustee to obtain the court's assessment of whether an appeal would indeed be in the interests of the trust as a whole.

Would the Trustee be acting in the interests of the Scheme by appealing?

77. The Trustee and Mr Fielder contend that the Trustee would be acting in the interests of the Scheme as a whole by appealing for a number of reasons, which I will consider in turn.

78. First, the merits of the Appeal. I have set out the grounds of appeal in full above. Counsel for BA realistically accepted that, given that (i) the Court of Appeal had differed from Morgan J, (ii) the Court of Appeal was divided and (iii) the Court of Appeal had given permission to appeal to the Supreme Court, it necessarily followed that the Appeal had a real prospect of success. As mentioned above, the Trustee and Mr Fielder have obtained opinions from counsel as to the prospects of success which have been disclosed to the Court, but not BA. In those circumstances, all that is proper or necessary for me to say is that I am satisfied that the Appeal has a good prospect of success; which is not, of course, to say that success is assured.

79. Secondly, as the Chancellor accepted in relation to the Main Proceedings at first instance in *Spencer v Fielder*, success on the Appeal would benefit the vast majority by value of the Scheme's members. Excluding 22,837 so-called EPB members (who, although large in number, receive very small benefits and account for less than 0.1% of the Scheme's liabilities), some 97% of the 23,312 (non-EPB) members of the Scheme stand to benefit from any exercise of the DI Power after 2018 and 90% will benefit from the 2013 Decision. Moreover, such success will not come at the expense of other beneficiaries of the Scheme, since (if the Scheme is in deficit) the 2013 Decision and any future exercises of the DI Power will have to be funded by BA.

80. Counsel for BA relied upon the fact that BA had a contingent interest in the assets of the Scheme in the event that it was wound up. There is no evidence that the Scheme is likely to be wound up in the foreseeable future, however. Moreover, although BA may have to fund the costs of discretionary increases awarded in the exercise of the DI Power, this will not be the case if, and for so long as, the Scheme is in surplus.

81. Counsel for BA also relied upon the fact that funds which BA had to provide to the Scheme could not be used to repair the deficit in NAPS. Again, however, this only matters if the Scheme is in deficit. Even then, there is no evidence that this would materially affect BA's ability to repair the deficit in NAPS.

82. Thirdly, the amount in issue is significant. The total cost of the 2013 Decision was of the order of £12 million. Although there is no guarantee that the DI Power would be exercised again, given the need for a two-thirds majority of the Trustee's board to decide to do so, and the total cost of any future exercises of the DI Power is a matter for speculation, the fact that a reserve of £424 million was budgeted for in 2012 provides some indication. The projected costs of the Appeal are a small fraction of this, although this is an aspect of the matter I shall return to below.

83. Fourthly, counsel for the Trustee and for Mr Fielder submitted that the differences between the reasoning of Lewison LJ and Peter Jackson LJ, and in particular the test propounded by Peter Jackson LJ at [126], made it very uncertain in what circumstances the Trustees could exercise the power of amendment conferred by clause 18 without BA's consent. In support of this, they relied in particular upon the passage from the judgment of Patten LJ at [74] which I have italicised in paragraph 28 above. They also relied upon the fact that the Scheme may now be in surplus. Against this, counsel for BA submitted that the decision of the majority gave the Trustee sufficient certainty. In my respectful opinion, the judgments of the majority do not make it clear what the limits on the Trustee's power of amendment are. Even if the Appeal is unsuccessful, I consider that it is reasonable to anticipate that the Supreme Court will provide greater clarity in this respect.

84. Counsel for BA also argued that pursuit of the Appeal would in itself cause uncertainty, in particular by further delaying the 2015 and 2018 valuations. I accept that it would cause some further delay in this regard, but there is no evidence that this will cause any difficulty in the operation of the Scheme in the meantime. I will address the impact of the delay on BA below.

85. Fifthly, the Trustee and Mr Fielder contend that the only party realistically capable of pursuing the Appeal is the Trustee. The Trustee has been the defendant to the Main Proceedings for five years, and it is the natural party to have conduct of the Appeal. Substituting Mr Fielder or another representative member as appellant would be likely to delay the hearing of the Appeal, as well as causing unnecessary disruption and expense.

86. BA does not accept this, but in any event contends that, if the members of the Scheme who stand to benefit from the Decisions want the Appeal to proceed, then the members should take the risk of an adverse costs order if the Appeal fails. In that regard, reliance is placed by BA on the fact that the Association of British Airways Pensioners ("ABAP"), an association of members of the Scheme, NAPS and successor BA pension schemes, has some £440,000 in funds available to it. Mr Fielder's evidence, however, is that it would be inconsistent with ABAP's constitution for all of its funds to be used for the benefit of members of the Scheme. In any event, the sum in question is too small even to pay the Trustee's costs of the Appeal, let alone an adverse costs order. Although BA suggests that ABAP could and should raise further funds from members of the Scheme, Mr Fielder considers that this is not a realistic prospect in the time available. I accept that assessment.

87. In those circumstances, the Trustee and Mr Fielder contend that, if Mr Fielder were to take over the Appeal, he could only do so with the benefit of a PCO, which he would be likely to obtain. It is not necessary for me to decide whether Mr Fielder would be entitled to a PCO in that event. It is sufficient that I accept that Mr Fielder cannot realistically take over the Appeal without a PCO, because there is no realistic prospect of the members of the Scheme raising the necessary funds in time.

88. Sixthly, the Trustee and Mr Fielder rely upon the fact that the Main Proceedings were initiated and pursued to the Court of Appeal by BA in its own commercial interests. Furthermore, they contend that there can be little doubt that, if the shoe was now on the other foot, BA would appeal. In other words, suppose that a majority of the Court of Appeal had decided in favour of the Trustee, but the Court of Appeal had granted BA permission to appeal, then BA would be the party appealing. In those circumstances, the Trustee would be a necessary party to the appeal. The Trustee and Mr Fielder contend that, on that hypothesis, the Trustee would be entitled to an indemnity for its costs of resisting BA's appeal for essentially the reasons given by the Chancellor in *Spencer v Fielder* and that the position should be no different just because the majority of the Court of Appeal came down the other way. I think there is some force in this, although I do not give it as much weight as the factors considered above.

89. Seventhly, the Trustee and Mr Fielder consider that the settlement proposal recently made by BA is a factor which favours pursuit of the Appeal for reasons which it is unnecessary to spell out. BA suggests that this is a neutral factor. In my view it is a minor factor favouring pursuit of the Appeal.

90. Lastly, the Trustee and Mr Fielder accept that BA's interests are a factor to be taken into account, but submit that those interests are not determinative. The Trustee and Mr Fielder accept that the order they seek exposes BA to the risk of having to pay a substantial sum by way of additional contributions to the Scheme to meet the Trustee's and its own costs even if the Appeal is unsuccessful, but contend that this is justified by the factors set out above. BA also relies upon the fact that it will have to continue to make additional contributions to the Scheme during the pendency of the Appeal which may be unnecessary if the Scheme turns out to be in surplus. It is not certain that the Scheme is in surplus, however. Moreover, given the proposed hearing date of the Appeal, the additional contributions will not have to be paid for a long period even it turns out that the Scheme is in surplus.

91. Taking all of these factors into account, I conclude that the Trustee would be acting in the interests of the Scheme as a whole by pursuing the Appeal and that it should therefore be entitled to an indemnity in respect of its costs of doing so from the assets of the Scheme.

Should the Trustee's costs be limited?

92. As counsel for the Trustee accepted, however, it does not follow from the conclusion reached in the preceding paragraph that the Trustee should have *carte blanche* to spend whatever sum it chooses on the Appeal. I am very concerned about the estimated costs of both sides, but particularly the Trustee's estimated costs.

93. The Trustee's estimated costs of the Appeal amount to £1,239,063, of which £444,033 has already been incurred. This estimate is based on the assumption of a 1½ day hearing and does not include the costs of BA's proposed cross-appeal. For comparison, BA estimates its costs at £1,034,000 for a two-day hearing including its cross-appeal. It appears to me that part of the reason for the difference, although not necessarily the only one, is that the Trustee intends to instruct two QCs and a junior on the Appeal whereas BA only intends to instruct one QC and two juniors. To put these figures into perspective, the Trustee has so far spent £12,863,666 on the Main Proceedings excluding the Appeal; it may be assumed that BA has spent a similar sum.

94. In my view it is deeply alarming that the Trustee should be proposing to spend some £1.24 million on an appeal raising a single point of law with a hearing lasting only 1½ days. I consider that it is necessary for the court to intervene to ensure that the Trustee's costs are kept within some semblance of reasonableness. Counsel for the Trustee accepted that the Court had the power to place a cap on the Trustee's recoverable costs, but submitted that the Court should not do so and that an alternative was to direct that the Trustee's costs be subject to assessment on the indemnity basis unless Mr Fielder agreed those costs. Mr Fielder supported that alternative rather than a costs cap.

95. In my judgment the alternative proposed by the Trustee and supported by Mr Fielder does not go far enough because it does little to protect BA from excessive costs being incurred by the Trustee. I consider that the Court should seize the nettle now so that everyone knows where they stand. If BA can deal with the Appeal and its proposed cross-appeal at a cost of £1,034,000, I see no good reason why the Trustee should not be able to do likewise. I recognise that the Trustee has incurred costs on taking advice which BA has not had to incur, but in my view that should enable costs to be saved later. I also recognise that the Trustee will bear more costs through being the appellant,

but in the Supreme Court that should be a marginal factor. Moreover, BA will incur more costs in respect of its cross-appeal, notably in seeking permission to appeal from the Supreme Court. Accordingly, I will restrict the costs in respect of which the Trustee is entitled to an indemnity from the Scheme to the sum of £1,034,000.