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Case No: PE-2022-000007

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND & WALES
BUSINESS LIST: PENSIONS (ChD)

Royal Courts of Justice
Rolls Building
Fetter Lane, London , EC4A 1NL

Date: 28/07/2023

Before :

MR JUSTICE ADAM JOHNSON

- -

Between :

BRITISH BROADCASTING CORPORATION	**Claimant**
- and -	
(1) BBC PENSION TRUST LIMITED	
(2) CHRISTINA BURNS	**Defendants**

- -
- -

Michael Tennet KC and Edward Sawyer (instructed by **PricewaterhouseCoopers LLP**) for the **Claimant**
Brian Green KC and Joseph Steadman (instructed by Slaughter and May) for the First Defendant
Andrew Spink KC and Saul Margo (instructed by **Stephenson Harwood LLP**) for the **Second Defendant**

Hearing dates: 3, 4 and 10 May 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 28 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE ADAM JOHNSON

Mr Justice Adam Johnson:

Introduction & Background

1. This Part 8 Claim brought by the British Broadcasting Corporation ("*BBC*") raises two important, inter-related questions about the treatment of *future service benefits* under the BBC Pension Scheme ("*the Scheme*").

2. A pension fund ("*the Fund*") was first established by the BBC by means of an Interim Deed ("*the Interim Deed*") in 1947. This was followed by a definitive Deed ("*the Deed*") and Rules ("*the Rules*") in 1949. There have been many variations to the Scheme since 1949, and it is currently governed by the 52nd Deed of Variation as subsequently amended.

3. The Scheme provides retirement benefits on a defined benefit ("*DB*") basis for BBC employees who joined before 1 December 2010. There are in fact four DB structures under the Scheme. Two of them - the Old Benefits and New Benefits categories of membership - provide traditional 1/60th final salary benefits. The two others – the Career Average Benefit categories – provide average salary benefits. These are known as CAB 2006 and CAB 2011.

4. The Defendants are (1) BBC Pension Trust Limited (the "*Trustee*") and (2) Ms Christina Burns, who has been appointed as a Representative Beneficiary, primarily representing the interests of the Active Members under the Scheme - i.e., pre-1 December 2010 employees who are still in employment and thus accruing DB pension benefits.

5. The present proceedings come about because of the BBC's interest in limiting the ongoing costs of funding the Scheme. Costs have increased significantly in recent years, as explained in the evidence of Ms Leigh Tavaziva, Chief Operating Officer of the BBC. As at May 2022, the BBC was paying a contribution rate of 42.3% of the pensionable salaries of Active Members to fund their ongoing pension accrual in the Scheme. That was almost three times the contribution rate in 2010. An important point of comparison is that the contribution rate of 42.3% compared to an average 7% or 8% rate for employees who joined after 2010 and are members of certain separate Defined Contribution ("*DC*") plans. As at the date of Ms Tavaziva's evidence, the DC employees were over 60% of the workforce but received less than 20% of the BBC's current spend on pension provision, whereas the DB employees were less than 40% of the workforce but accounted for over 80% of the spending.

6. Rising pension costs are not a new problem. The same issue gave rise at an earlier stage to steps taken by the BBC in 2010. These included the imposition of a limit on the extent to which future pay rises would count as pensionable pay for certain employees. This change followed a period of consultation with members and trade unions between July and November 2010. In due course there was a dispute about what had been done, and this resulted in substantial litigation brought by a former member of the New Benefits category, Mr John Bradbury, and in important decisions both of Warren J in the Chancery Division (Bradbury v. BBC [2012] Pens LR, 238), and of the Court of Appeal (Bradbury v. BBC [2017] EWCA Civ. 1144, [2018] ICR 61). I will need to come back to these decisions below since they are said to have a bearing on the present case.

7. Against this background, the BBC is now considering further options for reducing ongoing costs. The BBC has been clear that the options do not involve reducing any benefits already earned by past service – what it has called *past service benefits*. But they do include the possible curtailment or removal of *future service benefits*. *Future service benefits* are described as benefits which have not yet been earned via ongoing service.

8. The ongoing costs might be managed in a number of different ways. For example, one possibility might be to close the Old and New Benefits categories to future accruals; another might be to reduce the rate of accruals for the future (for instance, by moving from an accrual rate of 1/60th of final salary per year to a rate of 1/80th of final salary, with the effect that benefits accrue more slowly, and employees have to work for longer to reach the same level of overall pension benefits); yet another might be to vary the terms on which contributions are made, so as to increase the contributions made by Active Members.

9. Against that background, the present proceedings seek to define the limits within which the terms of the Scheme can be amended. The proceedings are constituted as a Part 8 Claim, and specifically seek the Court's findings on two questions concerning the amendment power contained in what is presently Section 19 of the Rules (referred to as "*Rule 19*").

10. I set the questions out in full at [11] and [89] below, but the key points may be summarised as follows:

    i) Question 1, broadly, concerns the scope of the amendment power in Rule 19. Rule 19 gives what on the face of it seems to be a very broad power to the Trustee, provided it acts with the consent of the BBC, to "*alter or modify any of the trusts, powers or provisions of the Trust Deed or the Rules*". The amendment power has remained in substantially the same form since the first version of the Deed was introduced in 1949. Although on the face of it very wide, it is subject to certain limitations or *fetters*, set out in a series of provisos. The particular provision which is relevant concerns possible amendments which affect Active Members. I will call this the "*3rd Proviso*". It provides that no alteration or modification shall take effect as regards Active Members "*whose <u>interests</u> are certified by the Actuary to be affected thereby*" (my emphasis), unless certain criteria are fulfilled, which (broadly) are designed to ensure that the relevant "*interests*" are not substantially prejudiced. The critical issue which arises is what is meant in the 3rd Proviso by "*interests*", and do "*interests*" include what the BBC have called *future service benefits*?

    ii) Question 2 is a related question. It is essentially about what have been called the separate *domains* under a pension scheme of (a) the employer (here, the BBC), and (b) the scheme trustees. The point made by the Representative Beneficiary is that any change to *future service benefits* is really a matter within the domain of the *employer*, not the trustees, because it is for the employer only to engage in what has been called *benefit design* – the role of the trustee is concerned only with management and administration. In the present case, it is said that there are established procedures governing how the BBC can go about effecting changes to the package of benefits enjoyed by employees: in short, it is said there must be consultation and consensus, either by means of agreements

with individual employees or through collective bargaining via the relevant trade unions. It is then said that if the Trustee were to seek to bring about an amendment or amendments affecting *future service benefits* without such procedures having been followed, that would involve an exercise of the power of amendment by the Trustee for an improper purpose – i.e., for the purpose of redesigning the Scheme, rather than for the purpose of managing and administering it.

Question 1

The Issues

11. Question 1 is divided into a number of sub-Questions or issues, as follows:

> *"(1) Whether on the true construction of the proviso in Rule 19.2(3) [i.e. the 3rd Proviso], 'interests' of Active Members refers to:*
>
> *(a) the rights earned by past service up to the date of any amendment;*
>
> *(b) any linkage of the value of those past service rights to final salary;*
>
> *(c) the ability of members to accrue future service benefits under the Scheme on the same terms as provided for under the Scheme immediately before the amendment;*
>
> *(d) the ability of members to accrue any future service benefits under the Scheme; and/or*
>
> *(e) those members' interests in some other (and if so what) right or benefit.*"

12. One can see that Question 1 assumes the possibility of an amendment to the Scheme, and seeks to explore, using the date of the amendment as the reference point, what types of *interest* are protected by the 3rd Proviso. It is common ground between the parties that Question 1(a) should be answered in the affirmative – i.e., *interests* includes rights earned by past service. But thereafter there is disagreement. The BBC says that the matters covered by Question 1(a) represent the limit of the matters protected by the 3rd Proviso, save possibly for the point covered in Question 1(b) – this is the so-called *final salary link*. The Representative Beneficiary meanwhile argues that the concept of *interests* is sufficiently wide to embrace not only 1(a) and (b), but also the other matters covered by at least Questions 1(c)-(d) as well.

13. I should mention that since the BBC has not made any decision about pension reforms or put forward any specific proposals, the parties are agreed that the question whether any specific proposal would "*substantially prejudice*" Active Members' interests is outside the scope of the present hearing, and likewise have agreed that a further Question 3 described in the Part 8 Claim which deals with the meaning of that phrase in the 3rd Proviso does not presently need to be dealt with.

"*Future Service Benefits*"

14. I think it helpful to be a little more precise about what are meant by *past service benefits* and *future service benefits*. It is useful to give an example by reference to the Old Benefits and New Benefits categories of membership under the Scheme.

15. As I have noted, both categories provide traditional 1/60th final salary benefits. I will use the New Benefits category as a reference point, from which to explore the concepts in play. The New Benefits category is dealt with in Section 6A of the current Rules. This provides, in Rule 6A.2, that an Active Member who leaves service on or after "*Normal Retirement Age*" (60) will receive what is called the "*Scale Pension*", starting the next day. "*Scale Pension*" is then defined to mean:

> " *... a pension for life at an annual amount of 1/60th of the Member's Final Pensionable Salary for each Year (not exceeding 40) of his or her Pensionable Service ...* ."

16. The basic concept underlying this sort of structure is a straightforward one. Leaving aside the detailed mechanics, the essential idea is that the employee will receive on retirement 1/60th of final salary for each year in service.

17. The moving parts in the equation are therefore the number of years in service and the amount of the final salary payable immediately before retirement: an employee who works for 20 years and whose final salary is £60,000 will receive a pension of £20,000 – corresponding to 20/60ths of £60,000. That is the essence of what might be called the *pension promise*.

18. The issue of *future service benefits* arises in this way. Vary the example and assume an employee who has been employed for say 20 years and is on a present salary of £60,000, but who remains in employment and will not reach Normal Retirement Age (I will call it "*NRA*") for another 10 years. According to Mr Tennet KC, such a person has already by that stage earned or secured a legally enforceable right to a pension payable on retirement corresponding to 20/60ths of his then salary. It is true that the right is contingent only, in the sense that it will not crystallise until the happening of a future and uncertain event (in the example, the employee reaching retirement age). But there is a legally enforceable right nonetheless, which corresponds to an interest in the BBC *Fund* at that point in time, reflecting the value of contributions made to date and an appropriate share of the Fund assets as a whole.

19. Such a person also, however, has the prospect of accruing further benefits over time, which (broadly speaking) may arise in two ways:

    i) One is that his *final salary* will increase - if it goes up over the next 10 years, then he will qualify for an appropriate share not of his *current salary* (£60,000) but of his *final salary*, whatever that turns out to be.

    ii) The second way is that, assuming he remains in employment, then the numerator in the n/60th calculation will increase – and where "*n*" increases, the proportion of the final salary figure which translates into a pension increases also: 30/60ths of final salary is obviously worth more than 20/60ths of final salary.

20. The point, though, is this: at the 20 year waypoint given in my example, the future is not known. The employee's benefits will increase *if* certain things happen – in short, *if* he remains in employment and *if* he receives further pay increases. But none of that is certain. He may choose to leave and get another job, or be dismissed, or may even die and never reach NRA; or the Scheme may be wound up in the meantime; or even if he remains employed, he may not be given any pay rise. To put it another way, all he has is the promise that *if* certain things happen in the future, then he will receive additional benefits as a result. But at the 20 year waypoint, they have not yet happened and may never happen, and so the additional benefits may never in fact accrue; and moreover, the employee is not given any promise under the Scheme that they *will* happen.

21. It is these prospective benefits that we are concerned with in this case. Do they qualify as "*interests*" of Active Members within the meaning of that word in the 3rd Proviso, such that any amendment which causes them to be substantially prejudiced will be ineffective? Or are they so inchoate that they do not even qualify as "*interests*"?

22. The BBC say the latter. Mr Tennet KC in his oral submissions described such potential *future service benefits* as reflecting the "*mere hope*" of accruing benefits by means of service not yet rendered and contributions not yet paid, such "*mere hope*" not representing a legal right of any recognisable type, whether contingent or not. He submitted that is not what is contemplated by the idea of *interests* within the meaning of the 3rd Proviso.

23. Mr Spink KC meanwhile submitted that the interests protected by the 3rd Proviso must include an interest in the terms of the Scheme which govern the ongoing accumulation of benefits remaining the same into the future, and not being amended in a manner which would leave Active Members worse off in terms of such accumulating benefits than they were before - for example by means of an amendment which would or might remove the idea of a final salary link (see Question 1(b)), or reduce the rate of future accruals (see Question 1(c)), or remove the right to future accrual altogether (see Question 1(d)).

<u>The Amendment Power and the 3rd Proviso</u>

24. Now is a convenient time to set out the terms of the amendment power. This is presently set out in Rule 19.2. Rule 19.2 is headed, "*Alterations of Trust Deed and Rules*", and provides as follows:

> *"The Trustees may from time to time, with the consent of the BBC, by deed executed by the Trustees and the BBC, alter or modify any of the trusts, powers or provisions of the Trust Deed or the Rules.*
>
> *Provided that no such alteration or modification shall –*
>
> *(1) vary the main purpose of the Scheme, namely the provision of pensions for employees on retirement at a specified age;*
>
> *(2) authorise the making of any payment or repayment to the BBC out of the Fund, except in accordance with the proviso to*

clause 4 of the Interim Trust Deed of the Scheme dated 23 September 1947, which reads as follows:

'PROVIDED ALWAYS that the said Definitive Deed may provide for payment to the Corporation on the winding-up of the fund of any surplus assets of the fund which shall not be required for (a) the purchase of annuities for the remainder of their lives for those of the members of the fund who are in receipt of or entitled to pensions out of the fund such annuities to be of amounts equal to the amounts of the pensions which such persons are then receiving or to which they are entitled or (b) the purchase of such annuities for or making such lump sum payments to the members of the fund as shall correspond with their respective interests therein';

(3) take effect as regards the Active Members whose interests are certified by the Actuary to be affected thereby unless –

(a) the Actuary certifies that the alteration or modification does not substantially prejudice the interests of such Members; or

(b) the Actuary certifies that to the extent to which the interests of such Members are so prejudiced, substantially equivalent benefits are provided or paid for by the BBC or the Trustees or provided under any legislation; or

(c) the alteration or modification is approved by resolution adopted at a meeting of such Members convened by the Trustees;

(4) take effect as regards any person, not being an Active Member, who is, at the date of the alteration or modification, entitled to a pension under the Scheme or any person who will, on the death of any such person as aforesaid, be so entitled and whose interests are certified by the Actuary to be affected thereby unless–

(a) the actuary certifies that the alteration or modification does not substantially prejudice the interests of such person; or

(b) the written consent of such person is obtained;

(5) breach section 67 of the Pensions Act 1995 ('Restriction on powers to alter schemes');

(6) breach section 37 of the Pension Schemes Act 1993 (relating to alterations to rules of contracted-out schemes)."

25. We are particularly concerned here with sub-paragraph 3 above: this is what I have called the *3rd Proviso*. I will refer to the other provisos in similar fashion (e.g., "*4th Proviso*", etc.).

General Principles of Construction

26. There was no real dispute about the principles in play. The parties referred me to the recent and authoritative statement of Lord Hodge in the Supreme Court in Barnardo's v Buckinghamshire and others [2018] UKSC 55; [2019] 2 All ER 175 at [13]-[18]. I note in particular the emphasis to be given to textual analysis in the pension scheme context. At [15], having drawn attention in [14] to certain characteristics particular to pension schemes, including the fact that they are usually the product of specialist drafting and the fact that they are designed to operate in the long term, Lord Hodge said as follows:

> "*Judges have recognised that these characteristics make it appropriate for the court to give weight to textual analysis, by concentrating on the words which the draftsman has chosen to use and by attaching less weight to the background factual matrix than might be appropriate in certain commercial contracts.*"

27. At [16], however, Lord Hodge sounded a note of caution:

> *"The emphasis on textual analysis as an interpretative tool does not derogate from the need both to avoid undue technicality and to have regard to the practical consequences of any construction. Such an analysis does not involve literalism but includes a purposive construction when that is appropriate. As Millett J stated in Re Courage Group's Pension Schemes, Ryan v Imperial Brewing and Leisure Ltd [1987] 1 All ER 528 at 537, [1987] 1 WLR 495 at 505 there are no special rules of construction applicable to a pension scheme but 'its provisions should wherever possible be construed to give reasonable and practical effect to the scheme'. Instead, the focus on textual analysis operates as a constraint on the contribution which background factual circumstances, which existed at the time when the scheme was entered into but which would not readily be accessible to its members as time passed, can make to the construction of the scheme".*

28. The other point to mention concerns the relevance of earlier versions of the Deed and Rules. The point arises because, as noted, the terms of the amendment power have remained very largely unaltered since the Deed was first executed in 1949. Aside from renumbering and other stylistic changes, the only amendments of substance which remain in effect have been (1) the amendment of the 2nd Proviso in 1985, but only so as to set out in full in the body of that Proviso the text of cl 4 of the 1947 Interim Deed which before had only been cross-referred to, and (2) the addition of the 5th and 6th Provisos in 2000.

29. Given this continuity, both Mr Tennet KC for the BBC and Mr Spink KC for the Representative Beneficiary, encouraged me to consider the terms of the original Deed, which they submitted was a permissible form of textual *archaeology*: see, e.g., Stena Line *v* MNRPF Trustees [2011] Pens LR 223, where at [34] Arden LJ (as she then was) said that where a clause has been re-adopted without change through a number of trust deeds, the likely inference was that it retained its original meaning without any material change. That supports the logic of asking what it meant when it was first introduced.

30. In this case, I agree with the utility of considering the 1949 Deed and Rules, although like Leech J in Re CMG UK Pension Scheme [2022] EWHC 2130 (Ch), I prefer to start with the current versions and then to use the 1949 documents by way of a cross-check, to see whether they suggest any different conclusion as to the issues I have to address. Since the relevant terms are essentially the same, one would not expect so; but the exercise is nonetheless a useful one. That being so, I set out in the Appendix to this Judgment the text of the main provisions from the 1949 Deed and Rules referred to in argument, namely clause 25 of the Deed (the amendment power: the forerunner of present Rule 19), and Rule 25 (the winding-up provision: the forerunner of present Rule 18).

Restrictions on Powers of Amendment

31. In addition to these general principles, both sides also referred me to established first-instance case law dealing with powers of amendment, and more specifically dealing with the meaning of limitations or *fetters* on such powers.

32. The parties were agreed that one must approach such case law with caution, because each case will necessarily turn on the terms of the specific scheme in question; but there are some general points of interest and background, principally it seems to me in helping to define more precisely the idea of the *final salary link*.

33. Consider for example a fetter to an amendment power which prevents any amendment which would *"… vary or affect benefits secured by past contributions in respect of any member*". What benefits have been *secured* by an employee who has completed, say, 20 years of service but has not yet reached retirement age? Is it 20/60ths of *current salary,* as at the date of the amendment; or is it 20/60ths of *final salary*, so that the benefits secured even after only 20 years have to be revalued up to retirement? This is the question of the *final salary link*.

34. The fetter I have described was in fact the fetter in the well-known decision of Millett J in Re Courage Group's Pension Schemes [1987] 1 WLR 495. In that case, "*benefits secured by past contributions in respect of any member"* was held to mean (following my example) 20/60ths of *final* salary, not *current* salary – i.e., the wording of the fetter was apt to preserve the *final salary link*. In dealing with the central question of construction, Millett J said the following at p. 513 (my emphasis added):

> *"'Accrued pensions' is defined in the rules to mean pensions based on salary at the relevant date. There was some dispute whether 'benefits already secured by past contributions' means the same thing, or includes the prospective entitlement to pensions based on final salary. In the absence of express definition, I see no reason to exclude any benefit to which a*

> *member is prospectively entitled if he continues in the same employment and which has been acquired by past contributions, and no reason to assume that he has retired from such employment on the date of the employer's secession when he has not. The contrary argument places a meaning on 'secured' and 'accrued' which is not justified."*

35. This approach has been followed in other cases, which are conveniently summarised by Nugee J in G4S v. G4S Trustees [2018] EWHC 1749 (Ch), [2019] ICR 14 at [34]-[36], including Briggs v. Gleeds (Head Office) [2014] EWHC 1178 (Ch), [2015] Ch 212 (in which the wording was "*benefits accrued*", which Newey J accepted had the same meaning as "*benefits secured*" in the Courage case); and HR Trustees Ltd v. German [2009] EWHC 2785, [2010] Pens LR 23 ("*benefits secured by contributions already made*").

36. Statutory protection in the same arena was introduced in 1997, with the coming into effect of section 67 of the Pensions Act 1995. Section 67 in its current form restricts certain amendments to occupational pension schemes, including detrimental modifications to "*subsisting rights*", but these are defined as accrued rights determined, in the case of an active member, on the assumption he has terminated pensionable service, i.e. the protection is of past service rights but *not* including salary linkage: see s 67 and s 67A(3), (6), (7). This is the opposite of the approach adopted by Millett J in Re Courage Group's Pension Schemes, on the language in that case. (I also note here, since I will come back to it briefly below (see at [58]), that section 67 of the Pensions Act 1995 is the provision now referenced in the 5th Proviso to Rule 19.2: the 5th Proviso was introduced by amendment of the Rules in 2000).

Leaving Service Pension

37. Related to the topic of the final salary link is the question of "*leaving service pension*". Along with many other schemes (and as now required by the Pension Schemes Act 1993), the Scheme provides that an Active Member who leaves service before NRA qualifies for a *leaving service pension*, based on the number of years' service up to the point of departure and the salary payable at that point. Payment though is deferred to NRA. In the meantime, the benefits accrued (say 20/60ths of salary at the time of leaving pensionable service) are revalued by applying a capped rate of inflation-linked growth over that period. This is known as "*revaluation in deferment*". The right to a revaluation of past service benefits is reflected in current Rule 10.1(4), but is also required by statute under legislation first introduced in the Social Security Acts 1985 and 1990.

38. This has not always been the case, however. When the Scheme was first given its definitive provisions in 1949, it made no provision for a leaving service pension. A pension was only payable, subject to certain conditions, on reaching NRA. This has some consequences for the construction of the 3rd Proviso as it stood at the time of the original Deed in 1949, which I will come back to below (see at [53]-[55]).

Discussion

Natural Reading of the Amendment Power and 3rd Proviso

39. The precise wording of Rule 19.2 is that the Trustee, with the consent of the BBC, may "*alter or modify any of the trusts, powers or provisions of the Trust Deed or the Rules* ...", provided that no such alteration or modification shall "*take effect as regards the Active Members whose interests are certified by the Actuary to be affected thereby*", unless one of the relevant conditions (in sub-paras (a)-(c)) is fulfilled.

40. Given this wording, the question which arises in any given case is a straightforward one: does the proposed alteration or modification to the Deed or Rules *affect* the *interests* of the Active Members? That is, on the face of it, a broad test, not limited by reference to any particular time period or other temporal restriction.

41. As a matter of ordinary language, the concept of *interests* does not seem to me apt to suggest that the intended division between matters which are protected and matters which are not is marked by the fault line between benefits already earned by past service and those which are yet to be earned in the future.

42. Instead, it seems to me a natural focus of the inquiry is on the position the Active Members have under the terms of the Deed and Rules as they presently stand, prior to the proposed amendment, compared to their intended position if the proposed amendment or modification comes into effect. The question to ask is: are their positions going to be different under the proposed amendment or modification? If they *are* different then it seems to me inescapable that their *interests* are *affected*, and the protections in the 3rd Proviso at (a) to (c) become relevant. These are designed, broadly, to give assurance that although the positions of Active Members will be different before and after the proposed amendment, they are not substantially worse (in the language of (a), "*substantially prejudiced*"), or if they are, then the difference is made up in some way the Actuary deems appropriate (sub-para. (b)), or if there is doubt about either point, that the proposed change has been approved by Active Members at a duly convened meeting (sub-para, (c)).

43. I do not see why these protections should be restricted so as to apply only to benefits which have already been earned, because it seems obvious that even if such benefits are left entirely intact, the Deed and the Rules may nonetheless be amended or modified in a manner which puts the Active Members in a different and potentially worse position for the future. If that happens, I find it difficult to see on what basis it can be said that their *interests* are not *affected*.

44. One does not need to think hard to identify some relevant examples. As I have already noted, one possibility canvassed in argument was a change to the Rules which has the effect of slowing the rate at which benefits accrue – e.g., by changing the rate of accrual so that the pension payable on retirement is calculated not as 1/60th of final salary for every year in service but instead as 1/80th of final salary. The potentially negative impact of the change is obvious: all other things being equal, an Active Member will receive a lower overall pension on retirement after the Rule change than before, even if his accrued or secured benefits up to the point of the amendment are preserved. I think it clear that the change would therefore *affect* his *interests*, because he has an interest

in the Rules which govern his rate of accrual remaining the same and not changing in a way which disadvantages him if he remains in service.

45. I do not think it makes a difference to this analysis that the question of him actually remaining in service until retirement is an inherently uncertain one. Granted, he may not: he may be dismissed, or choose to leave, or die. But the possibility of such vicissitudes intervening, which may mean he never in fact gets a pension, does not affect the fact that, at the point in time of the amendment, his *interests* are *affected* by it. That is so because, equally, the vicissitudes may not occur, and if they do not then the terms on which his pension is eventually calculated will be less advantageous. His *interests* are *affected* because the rules of the game will have changed part-way through in a manner that will leave him worse off if he stays the course to the end of the match.

46. In such circumstances, I think it quite artificial to say that his *interests* are not *affected*. If the terms which will define the value of a future, but uncertain event are amended or modified in a manner which means that the value, if the event does eventually crystallise, will be less than originally promised, then it seems to me plain that the *interests* of the party with the benefit of those terms are affected. The *interests* of a gambler who places a bet at odds of 10/1 would plainly be affected if, half-way through the race, the bookmaker was allowed to reduce them to odds of 5/1, even though his horse may not be placed or may not finish at all. To say otherwise, it seems to me, is to confuse the terms which will define the extent of the benefit if it arises, with the risk of events intervening which mean it never does arise. I think it clear that a person's *interests* are *affected* if the terms change, even if there is a risk that the occasion for the terms being deployed will never in fact arise.

47. To put the point in another way, I think it a mistake to characterise the position of an Active Member vis-à-vis the accrual of future benefits as being empty of anything except "*mere hope*" (see above at [22]). As well as a hope of accruing future benefits, an Active Member also has a present right not to be subject to any change in the terms of the Deed or Rules which affects his position, otherwise than subject to the procedures contained in, and protections afforded by, the 3rd Proviso. Those procedures and protections, it seems to me, are designed precisely to ensure that such terms are not amended in a manner which affects him, unless the Actuary confirms he is not substantially worse off as a result, or he is provided with suitable alternative benefits, or the Active Members as a group agree.

48. Part of Mr Tennet KC's case was that this approach to construction would lead to serious problems with the ongoing management of the Scheme, given the increasing costs I have referred to. He relied on Millett J's statement in Re Courage, approved by Lord Hodge in the Barnardo's case (see above at [27]), to the effect that where possible pension scheme terms should be construed "*to give reasonable and practical effect to the scheme*". He argued that it would not give reasonable and practical effect to the present Scheme to adopt a construction which gave the BBC only limited flexibility to change the terms on which benefits would accrue to Active Members in the future, and relied on *dicta* to that effect in Wedgwood Pension Plan Trustee Ltd v. Keith Salt [2018] EWHC 79 (Ch), [2018] Pens. L.R. 9, a decision of Penelope Reed Q.C. sitting as a Deputy High Court Judge (see esp. at [44]).

49. I see the force of those points, but to say that one must try to give reasonable and practical effect to the Scheme rather begs the question how the Scheme is intended to

work. Here, it seems to me clear as a matter of language, and as a matter of the overall structure of the 3rd Proviso (which I address further below at [56]), that as far as amendments are concerned, it is intended to work as I have suggested. So far as the decision in Wedgwood v. Salt is concerned, I can see there is a possible tension between my view and the view taken by the Learned Judge in that case, but the terms of the amendment power there were different and referred not to *interests* but to *rights*. I agree with Mr Spink KC's submission that the two are different, and that the former suggests a broader scope of protection than the latter, *interests* more naturally including a reference to the effects of an intended change to the terms on which benefits can be earned in the future.

The Contrary Case

50. In arguing for the opposite conclusion, Mr Tennet KC for the BBC relied mainly on the use of the word "*interests*" in other parts of the Deed and Rules:

i) He relied in particular on the provisions as to winding-up of the Scheme, now set out in Rule 18 but originally in Rule 22 of the 1949 Rules. Mr Tennet's submissions were focused on the latter, and rested on the point that, in setting out a mechanism for the treatment of (effectively) Active Members in the case of the winding-up of the Scheme, the draftsman had used the same word – *interests* – which was also used in the 3rd Proviso. Mr Tennet's argument was that the same word must have been intended to have the same meaning in both cases, and if that was correct, then the wording of Rule 22 gave a clear indication of what was meant by *interests* in the amendment power (in cl. 25 of the 1949 Deed), because Rule 22 referred to Active Members' "*interests in the Fund*", i.e. in the pool of assets first established in 1947. Such "*interests in the Fund*" at the time of winding-up would naturally reflect benefits already earned at that time by past service; and if that was correct, then the draftsman must be taken to have intended the same concept in the 3rd Proviso.

ii) To similar effect, Mr Tennet KC relied on the wording of the 2nd Proviso to Rule 19.2. This again is effectively unchanged since 1949. It deals with the question of any surplus on winding-up being available for distribution to the BBC, but importantly provides that there will only be a surplus if (amongst other things) Fund assets have already been used for the purchase of such annuities or the making of such lump sum payments to (in effect) Active Members, "*as shall correspond with their respective interests therein*" – i.e., in the Fund. This reference point again, argued Mr Tennet, necessarily implied a temporal limitation inherent in the concept of *interests*, because interests in the Fund on winding-up must be a reference to interests reflecting benefits accrued at the point of winding-up.

iii) Mr Tennet also relied on the use of the word *interests* in the 4th Proviso to Rule 19, which deals with the position of Scheme members who have already reached retirement age, or who have left employment before retirement age and have the benefit of a leaving service pension. The 4th Proviso refers to the *interests* of these groups, and by definition *interests* in the context of such parties can only refer to the rights they have already accrued by past service, because they are no longer in employment and so are not in a position to accrue any *future* benefits.

51. These are seductive points of analysis, but ultimately I am not persuaded by them. The reason is a simple one. I do not see why the word *interests* has to have precisely the same *content* in every context in which it appears. In fact, it seems to me that it has an inherent pliability, and has been used precisely in order to allow the content it describes to differ as necessary, according to the context in which it appears and the identity of the party or parties affected. I do not see this as a matter of *interests* having a different meaning; it has the same meaning, which is to refer to matters of relevant concern. The point is rather that what *are* matters of concern will differ according to the context and the identity of the party or parties whose interests are described.

52. That being my view of it, I do not accept Mr Tennet's argument. Even accepting that an Active Member's interests on a winding-up are confined to the protection of benefits already accrued, those interests are defined by the context: the context on a winding-up is that there will be no future benefits to earn. The same is true in the case of members who have already retired or have a leaving service pension: their interests are delimited by the circumstances in which they find themselves, and those circumstances do not permit future benefits to be accrued. But the same is not true of Active Members. Their situation is different and the context which delimits the scope of their interests is wide enough to include the ability to continue accruing benefits into the future on the same terms as before, or at least on different terms which are not substantially worse.

The Representative Beneficiary's View of the 1949 Deed

53. As Mr Spink KC submitted, I think this conclusion is in fact supported rather than undermined by an analysis of the 3rd Proviso as it stood in 1949, at the time of the original Deed.

54. A little background is needed in order to understand the point. In 1949, as Mr Spink KC emphasised, there was no right under the Rules to a leaving service pension. Instead, the entitlement under the Scheme was to a pension payable *on retirement*: see Rule 6. An employee became eligible for a pension on retirement having served for a minimum period of 10 years. The pension was payable at NRA. An employee who left service before then had no right to a pension, only a right to return of the contributions he had already made plus interest: see Rule 8. The Trustee was given a *discretion* to award an "*early retirement pension*" under Rule 7, but that was only if someone left service after 10 years due to "*ill health or mental infirmity confirmed by a medical adviser*". This basic structure changed only in 1955, when consistently with developing market practice, the First Deed of Variation introduced a new Rule 8 to the Scheme. The new Rule 8 gave employees who left service before NRA the option to receive either a return of contributions <u>or</u> "*a yearly pension commencing on the day following … Normal Retirement Age*" – i.e., a leaving service pension.

55. In light of this important context in 1949, I do not see how a natural reading of the 3rd Proviso supports the conclusion that the *interests* it preserved when introduced were intended *only* to correspond to the benefits already "*banked*" or secured by Active Members through ongoing service. Looking at the *interests* of an Active Member of the Scheme in 1949, I think Mr Spink KC was correct to say that such a person would naturally have had a very keen interest in the terms on which benefits would accrue into the future remaining the same (or at least not becoming substantially less advantageous), because the principal focus of the Scheme at the time was on the benefits payable *at the point of retirement*. There was no prospect of a right to a leaving

service pension arising before then. To put it colloquially, an Active Member in 1949, with his eyes fixed on the far horizon of reaching NRA, would naturally have an *interest* in the rules of the game not changing in a substantially prejudicial way before he got there, and would be surprised to be told that his interests were confined to benefits already earned which had no immediate value to him and which he could never realise if he left employment before NRA.

The scheme of the 3rd Proviso

56. It also seems to me that this view is consistent with the overall scheme of the 3rd Proviso. Looked at as a whole, its purpose is plainly to ensure that if amendments to the Deed or the Rules are proposed, such proposed changes do not make Active Members materially worse off after the amendment, unless they agree to it. The scheme of it is clear enough. Either the Actuary must be able to confirm that their *interests* are not substantially prejudiced (sub-para. (a)); or if they are, the Actuary must be able to confirm that the difference is made up in some appropriate way (sub-para. (b) – "*substantially equivalent benefits*"); or alternatively, the alteration must be "*approved by a resolution adopted at a meeting of [Active Members] convened by the Trustees*" (sub-para. (c)).

57. This structure seems to me entirely consistent with the idea that the *interests* protected include the terms on which Active Members are to accrue benefits on an ongoing basis into the future. It identifies the circumstances in which those terms can be modified. Some flexibility is provided, in the sense that even if Active Members would be substantially worse off, the amendment will be effective if substitute benefits are provided or if the Active Members agree to the change in a duly convened meeting (which in practice, both in 1949 and today, would mean agreement by a majority in number). I agree with Mr Spink KC that this degree of flexibility is consistent with the idea that the *interests* protected under the 3rd Proviso are intended to be broader and potentially more inchoate than the *interests* protected by the 4th Proviso, which deals with the positions of retired members and deferred pensioners with a leaving service pension. Their interests are different and by definition will already have fully crystallised, and that is why the structure under the 4th Proviso is less flexible than that under the 3rd: it allows for amendment only if the Actuary can certify there is no substantial prejudice, or if there is written consent provided on an individual basis. To my mind, this stricter regime reflects the nature of the interests protected by the 4th Proviso, which *do* correspond to the value of benefits already earned and banked. The more flexible regime under the 3rd Proviso suggests that the interests protected there are different and have the potential to include a forward-looking element, and so do not merit such an inflexible form of protection.

The 5th Proviso

58. Finally, I consider my construction is consistent with the *5th Proviso*. This provides that the amendment power is not exercisable if it would result in a breach of section 67 of the Pensions Act 1995. As noted above at [36], this further Proviso was added in by amendment in 2000. Given the effect of s.67 which, as I have explained above, is to preserve accrued benefits but without any final salary link, it would be odd if such benefits also represented the full extent of the benefits preserved by the 3rd Proviso (which, in effect, was the BBC's primary case on the 3rd Proviso). That would result in two provisions covering the same ground and providing protection for the same benefits

but in different ways. On this point, Mr Tennet KC said it was not unusual for reference to mandatory statutory provisions to be included in pension deeds: this was a sensible technique which provided a useful checklist of provisions having overriding effect. I acknowledge that, and do not suggest that this point on its own is determinative; but I do think that in construing a document such as a pension deed one is entitled to assume that the drafting has been undertaken carefully by skilled professionals, and thus to assume it is unlikely that a construction was intended which would produce an obvious anomaly. If that is right, and if I therefore proceed on the footing that the 3rd Proviso was intended to have a different and wider meaning than the 5th Proviso, that reinforces the conclusion that the *interests* protected by the former are more extensive than the accrued benefits protected by the latter.

Bradbury v. BBC

59. Having set out my view of Rule 19, I must now consider whether any different view is required or compelled by the outcome of the litigation initiated by Mr Bradbury which I have mentioned above (see at [6]). As noted, this resulted in decisions of Warren J and of the Court of Appeal. In the present case Mr Tennet KC relied both on aspects of the reasoning of Warren J and on aspects of the reasoning in the Court of Appeal, which he argued were at least highly persuasive from the point of view of this Court, or possibly even determinative of the points I have to decide.

60. I will summarise Mr Tennet KC's arguments below, but first will need to set the scene. The facts are somewhat complicated. I will try to keep to the essentials, but even the essentials will take a little explanation.

The Dispute

61. As I have noted above, the Bradbury case concerned the amendments to the Scheme introduced in 2010. Mr Bradbury at the time was a member of the New Benefits section of the Scheme, and so entitled to a pension calculated on the basis of n/60ths of his final salary. The BBC, at that stage also seeking to limit costs, offered employees a range of options, one of which was to stay as a member in the New Benefits section but to accept a proposed 1% cap on pensionable pay – i.e., whatever pay rises they received in the future, only 1% would count as pensionable and therefore feature in the eventual calculation of *final salary*. The other options were to opt out of the New Benefits section and instead join a new Career Average Benefit section (CAB 2011 – referred to above at [3]), or alternatively to opt out of the Scheme completely and join a DC arrangement called the "*BBC Life Plan*."

62. Mr Bradbury took the second option – i.e., he chose to opt out of the New Benefits section and join CAB 2011. But that did not stop him complaining about how he had been treated. He complained that the process used to procure his agreement had been unfair and had involved a breach of the obligation of good faith owed to him by the BBC, because in one way or another it had effectively ignored his existing rights (i.e., his right to a pension calculated by reference to a *final salary* reflecting the whole of any intermediate pay rises not subject to any cap), and/or had forced him and others to compromise such rights in a way which ignored the proper procedures under the Deed and Rules.

63. There are many detailed points in the case but what is relevant for present purposes is one of the BBC's responses to Mr Bradbury's complaints. The BBC said, in effect, that it did not really matter what was or was not agreed with employees vis-à-vis the 1% cap, because they (the BBC) already had the power under the Rules to impose a cap on pensionable pay, as a result of an amendment to the Rules which had been introduced some 10 years before, in 2000.

64. Before that amendment, "*Pensionable Salary*" under the Scheme was calculated essentially by reference to "*basic salary and wages*" (see the Judgment of Warren J at [43]); but the effect of the 2000 amendment was to introduce a new defined term – i.e. "*Basic Salary*" – and to give to the BBC the discretion to determine what "*Basic Salary*" was to be. The new definition (I will refer to it as the "*2000 definition*") was as follows (my emphasis added):

> *"… the amount <u>determined by the BBC</u> as being an Employee's basic salary or wages payable under the terms of his or her Continuing or Fixed Term Contract.*"

65. The 2000 definition gave rise to a question of construction. The contest was as follows. Mr Bradbury argued that its purpose was to permit the BBC to decide, in marginal cases, whether a particular employment benefit (e.g. overtime) should be treated as part of Basic Salary or not. Its purpose was *not* to allow the BBC to redesignate something which obviously *was* Basic Salary as *not* Basic Salary, so as to avoid it counting as *Pensionable Salary*, and thus save on pension costs. The BBC argued that the discretion was wide enough to allow it to do precisely that, and that was the proper meaning of the definition.

66. In short, Warren J at first instance sided with Mr Bradbury on this issue of construction (see his Judgment at [64]-[67]), but the Court of Appeal sided with the BBC (see the Court of Appeal Judgment at [34]).

The Decision of Warren J

67. Warren J's approach to the construction question had two main limbs. The first was to say that the BBC's proposed construction would lead to outcomes which were obviously objectionable viewed from Mr Bradbury's perspective as a member of the Scheme entitled to a final salary pension. Warren J identified two particular issues:

    i) To begin with (see at [64]), he considered that "*excluding an element of basic pay from Basic Salary will impact <u>on the emerging benefit in respect of past service</u>*" (my emphasis added). I understand this to be a reference to the concept of the *final salary link*. What I understand Warren J to be saying is that, even just looking at the benefits Active Members would already have accrued *before* any exercise of the suggested discretion, those existing benefits would naturally be taken to include the right to have their emerging, future pensions calculated in a manner which reflected *the whole* of any future increases in basic salary and wages. It was therefore very unlikely that the 2000 definition was intended to give the BBC the discretion it claimed, because that would involve an interference with Active Members *existing* benefits, which included a link to *final salary*.

ii) That was not all. Warren J thought there was potentially an even bigger problem, because if the BBC was correct in its construction, then the consequences would not only be limited to future pay rises. Logically the BBC could also redesignate *existing* pay, so that if an employee was paid say £40,000 per annum, it would be open to the BBC to designate only £35,000 as Basic Pay for the future (see at [48] and [65]). Warren J thought that, in order to justify such a construction, "*the clearest of words*" would have been needed, and the wording of the 2000 definition was not sufficiently clear to confer the discretion the BBC said existed.

68. The second limb of Warren J's reasoning relied on the circumstances in which the 2000 definition had been introduced. The amendment had been given effect after the Scheme Actuary had provided a certificate under para. (a) of the 3rd Proviso confirming that its introduction would not *substantially prejudice* Active Members' interests (see Warren J's judgment at [30]). That being so, reasoned Warren J, no one at the time can have thought that the amendment introduced in 2000 had the meaning the BBC now contended for, because if that really was its meaning, it was very difficult to see how the Actuary could have confirmed that the interests of Active Members were not *substantially prejudiced*: see at [50] and also at [66], where Warren J said, "*[v]iewed against the requirement for actuarial certification, the construction for which Mr Bradbury contends is in my judgment to be preferred to that for which the BBC contends*".

The Decision of the Court of Appeal

69. The Court of Appeal disagreed with Warren J's analysis on the construction of the 2000 definition. The leading judgment was given by Gloster LJ, with whom Henderson LJ and Lewison LJ agreed.

70. An important difference in the Court of Appeal was that by then, the BBC had conceded that they were not contending for a construction of the 2000 definition which would enable them to redesignate as non-pensionable any part of the *existing* salary already paid to Active Members: they were concerned only with *future* salary increases. As to future salary increases, the BBC adopted the construction that the power to designate Basic Salary operated by way of a ratchet: i.e., once something was designated Basic Salary, it could not be undesignated. This effectively dealt with one of Warren J's basic objections (i.e., that at [67(ii)] above). It was a point which did not arise on the facts (see per Gloster LJ at [37]: "*... that is not what is proposed in this case and these are not arguments which we need to address*").

71. As to the effect of the 2000 amendment on *future* salary increases, the Court of Appeal disagreed with Warren J's construction of the 2000 definition. They determined it was entirely natural to read the 2000 definition as permitting the BBC to decide what proportion of such increases should be designated as Basic Salary. That was because employees had no legal right to any increase in salary, and the BBC was not obliged to give them one; and that being so, it was not surprising that the BBC should have the power to decide *how much* of any increase should be treated as pensionable, *if* one was given (see per Gloster LJ at [34]). That was precisely what the language of the 2000 definition allowed the BBC to do (*ibid.*). Having made this finding, Gloster LJ was able then to go on to reject Mr Bradbury's argument that the BBC's conduct had overridden his right to maintain some form of immutable link between his final salary

and his pension. The argument was based on a misconception (see at [38] and [45]). In truth (see at [45]), his only right was a right to have his future pension calculated in accordance with the Rules, and if the Rules on their proper construction gave the BBC a discretion to decide how much of any future pay increase should be pensionable, then it would be. There was only a link with his final salary in that sense – i.e., in the sense that *if* his salary was increased and *if* some or all of it was designated as pensionable (i.e., as *Basic Salary*) then it would count. Otherwise it would not.

72. The Court of Appeal also dealt with the further point which Warren J had found persuasive (see [69] above) – i.e., the idea that the BBC's construction of the 2000 definition was impossible to square with the fact that when it was introduced by amendment, it was certified as *not* having a substantially prejudicial effect on the interests of Active Members.

73. This was given fairly short shrift by Gloster LJ. At [40] she said the following (I have amended the dates Gloster LJ referred to as shown in square brackets – there is a mistaken reference in the original text to the relevant amendment having been made in 2006, not 2000; and the original text also refers to the "*2011 definition*", but that is the same thing as the *2000 definition*, albeit set out in the then current version of the Rules from 2011):

> "*The short answer is that the actuary had certified the amendment. It was a moot point as to how the actuary had reached the qualitative view that the amendment did not substantially prejudice members' interests. On the BBC's construction, this was correct. Moreover, in the proceedings before us there was no challenge to the legitimacy of the [2000] amendment to the definition of pensionable salary. Mr Stafford [counsel for Mr Bradbury] relied on the old definition and the role of the actuary only as an aid to construction of the [2000] definition. He did not suggest that the [2000] amendment was open to challenge or that the claimant could directly rely on the terms of the old definition*."

The Arguments

74. Against that background, Mr Tennet's arguments were as follows:

 i) Starting with the Judgment of Warren J, the first limb of his reasoning (see at [67(i)] above) had focused only on the possible effects of the 2000 definition on *past service benefits*. What Warren J thought objectionable was the potential impact of the BBC's construction on benefits which had *already accrued*, including the link to final salary. He saw nothing objectionable in the idea of future service benefits being affected, and that is consistent with the idea of future service benefits having no particular protected status under the Deed or Rules.

 ii) Turning then to the decision of the Court of Appeal, the Court had endorsed a similar overall approach, even though it disagreed with Warren J on the question of construction of the 2000 definition. The overall approach was discernible from para. [40] of Gloster LJ's Judgment. This showed that the Court of Appeal

had found unobjectionable the amendment given effect in 2000, which resulted in the 2000 definition. That, however, was just the sort of amendment which *would* be objectionable on the Representative Beneficiary's construction of the word *interests* in the present case, because its effect had been to alter the terms on which benefits would accrue in the future. Since the Court of Appeal had found it unobjectionable, it must follow that *interests* within the meaning of the 3rd Proviso do not include any alteration to the terms on which future benefits will accrue. That point has therefore already been decided and the decision is binding on this Court.

Discussion

75. I see the force in these arguments, but ultimately I am not persuaded by them.

76. Starting with the decision of Warren J, I would make three points:

i) Warren J's comments on the issue of construction of the 2000 definition were *obiter*. Warren J's overall conclusion was that the question of what the BBC had power to do under the 2000 definition did not strictly arise for consideration, because whatever the Deed and Rules provided, it was always open to Active Members to agree that only part of any future pay rise would be pensionable, and that was essentially what had happened on the facts (see at [63]). Warren J said expressly at [64] that that conclusion made it unnecessary for him to consider the question of construction of the 2000 definition, but he went on to express his views anyway in the section of his Judgment between [64] and [67] which I have already referred to.

ii) In any event, I do not read Warren J's comments between [64] and [67] as saying that the 3rd Proviso was concerned *exclusively* with past service benefits. He was not concerned with the 3rd Proviso; he was concerned with the 2000 definition, and it was enough for his purposes to be able to point to the problems which he thought would occur in relation to past service benefits if the BBC's construction was the correct one. That is not the same as saying the 3rd Proviso offered no protection beyond the protection of past service benefits. The closest one gets is Warren J's statement at [64] that the BBC's favoured interpretation of the 2000 definition made no distinction between past service and future service; but I find it difficult to read into such an oblique reference, in an *obiter* passage dealing with a question of construction of a different provision in the Rules, any clear finding about the proper scope of the 3rd Proviso.

iii) The final and obvious point is that Warren J's conclusions on the construction of the 2000 definition were of course overturned by the Court of Appeal.

77. Turning then to the decision of the Court of Appeal, the overall approach there was different. Unlike Warren J, its analysis took the construction of the 2000 definition as the central point, which potentially was determinative (see at [30]).

78. The fact remains however, that like Warren J, the Court of Appeal was not concerned with defining the scope of the amendment power in Rule 19, or with the scope of the 3rd Proviso. The Court was only concerned with the proper meaning and effect of the 2000 definition.

79. In doing so it had to contend with Mr Bradbury's argument that the certification provided by the Actuary could be used as a lever to promote his preferred construction of the amended wording. His point was that the fact of the certification *necessarily* led to the conclusion that the BBC's construction of the amended wording was wrong, because if it was right then it simply would not have been "*possible*" (see at [39]) for the Actuary to have provided the certification he did.

80. I do not see that the Court's reasoning on this point led it to make any finding about the nature of an Active Member's *interests* which would preclude me from reaching the conclusions I have set out above. I comment as follows:

    i) To begin with, Mr Bradbury's argument was not concerned with whether or not the amendment proposed in 2000 affected Active Members' *interests*. His argument, and indeed the reasoning of the Court of Appeal, proceeded on the basis that it *did*. His point was rather about the Actuary's determination that such interests were not *substantially prejudiced* by the 2000 amendment. But that is a different question to what the relevant *interests* are, as the parties in this case themselves recognise (see above at [13]). If anything, therefore, it seems to me that the reasoning of the Court of Appeal proceeds on a basis which is consistent with the conclusions I have expressed, because it accepts that Active Members' interests *were* engaged by a proposed amendment concerning a link with future salary. The issue raised by Mr Bradbury's argument was based on that premise.

    ii) The issue was rather about the separate matter of *substantial prejudice*. As to this, my reading of it is that the findings of the Court of Appeal were in fact quite limited and specific. They had to be because as Gloster LJ pointed out in the passage at [40] of her Judgment I have set out above (see at [73]), the Actuary's certification had not been put in issue in the proceedings and the Court was not equipped to look behind it. Mr Bradbury's argument was nonetheless that the Court faced a hard choice: either the certification was properly given, in which case the BBC's construction was plainly wrong; or if the BBC's construction was correct, then the certification was improperly given. That was the argument the Court rejected, but its reasons for doing so did not depend on the scope of an Active Member's *interests*. All it said was that Mr Bradbury's argument involved a false logic. Although it was not possible to be clear about what the Actuary had done, there was at least an argument (i.e., it was "*a moot point*") that the Actuary had done the right thing in saying there was no *substantial prejudice*, even assuming the BBC's construction was correct. It was in that context that, having made her comments at [40], Gloster LJ then went on at [40]-[41] to set out the arguments that might justify the Actuary's certification of no *substantial prejudice*. The overall conclusion reached was only that the Court did not have to choose between Mr Bradbury's hard alternatives. There *was* a way of squaring the Actuary's certification with the BBC's preferred construction, but the matter had to be approached cautiously since it was not clear what the Actuary had in fact done and the circumstances surrounding the certification had never been in issue. Even so, that was enough to liberate the Court from the straitjacket Mr Bradbury sought to impose on it, and so properly analysed there was nothing in his argument which would undercut the conclusion already reached that the 2000 definition meant what the

BBC said it meant. As Gloster LJ put it at the end of paragraph [40], ultimately Mr Bradbury's argument "*goes nowhere*". For present purposes, the short point is that I see nothing in this line of reasoning which is directly relevant to, or determinative of, the questions I have to address, which are not concerned with any issue of *substantial prejudice*, but only with the scope of Active Members' *interests* under the 3rd Proviso.

81. In summary, I do not consider there is anything in either the decision of Warren J or in the decision of the Court of Appeal which prevents me from reaching the conclusions as to the scope of the 3rd Proviso I have already set out above.

Conclusions on Question 1

82. In light of the above, I would state my conclusions in relation to the different parts of Question 1 as follows.

Whether on the true construction of the proviso in Rule 19.2(3) [i.e. the 3rd Proviso], 'interests' of Active Members refers to ... (a) the rights earned by past service up to the date of any amendment?

83. I would answer yes. This is in any event common ground.

Whether on the true construction of the proviso in Rule 19.2(3) [i.e. the 3rd Proviso], 'interests' of Active Members refers to ... (b) any linkage of the value of those past service rights to final salary?

84. I would answer yes. In my opinion the concept of *interests* is sufficiently broad to include, in a case where benefits have already accrued in light of past service, that aspect of such benefits which requires them to be revalued on an ongoing basis by relevant increases in salary while the Active Member is employed. To put it another way, I think it clear that an amendment proposed in order to provide for such past service benefits to revalue on the same basis as they would for a member who had left employment at the date of the amendment (i.e., *revaluation in deferment*, as mentioned above at [37]) would certainly affect the *interests* of Active Members.

85. That conclusion is of course subject to the qualification which necessarily flows from the Court of Appeal's decision in the Bradbury case on the question of construction of the 2000 definition. That is to say, in relevant cases there is a link to final salary only in the sense that there is a link between past service benefits and such part of an Active Member's future salary and wages as may be determined by the BBC to qualify as *Basic Salary* under the 2000 definition and thus as *Pensionable Pay*. Any proposed amendment to that machinery would, in my opinion, engage Active Members' *interests*, and so would be subject to the protections afforded by the 3rd Proviso. It would be a separate question, in any given case, whether Active Members' *interests* were *substantially prejudiced* by whatever amendment was proposed.

Whether on the true construction of the proviso in Rule 19.2(3) [i.e. the 3rd Proviso], 'interests' of Active Members refers to ... (c) the ability of members to accrue future service benefits under the Scheme on the same terms as provided for under the Scheme immediately before the amendment?

86. I would answer yes. See, in particular, [39] to [49] above.

Whether on the true construction of the proviso in Rule 19.2(3) [i.e. the 3rd Proviso], 'interests' of Active Members refers to ... (d) the ability of members to accrue any future service benefits under the Scheme?

87. Again I would answer yes. This question, as I understand it, is directed to the possibility of the Scheme being closed to future accruals. I answer yes on the basis that the terms of the Deed and Rules presently provide for accruals on an ongoing basis, so that an amendment to the Deed or Rules would be required in order to change that position. If that is correct, then in my opinion the *interests* of Active Members would be engaged, because their *interests* include the terms of the Deed and Rules not changing in a manner that affects the basis on which they accrue benefits in the future.

Whether on the true construction of the proviso in Rule 19.2(3) [i.e. the 3rd Proviso], 'interests' of Active Members refers to ... those members' interests in some other (and if so what) right or benefit?

88. As I see it, this final question was included as a catch-all. I was not addressed directly on it, and I consider that the arguments canvassed before me have been sufficiently addressed in the answers to Questions 1(a) to (d) I have already given. I therefore do not propose to provide any separate answer to Question 1(e).

Question 2

The Issues

89. Question 2 is as follows:

> *(2) Whether an exercise by the Trustee of the power of amendment in Rule 19.2 for the purpose of:*
>
> *(a) terminating future service accrual; or*
>
> *(b) otherwise engaging in benefit redesign to reduce the Scheme's future service liabilities;*
>
> *would, of itself, be an exercise of that power for an improper purpose (i.e. even if there were no other matters in point which could render the exercise of the power improper) either:*
>
> *(I) generally, or*
>
> *(II) specifically, if the BBC and affected Active Members (whether by the unions representing them or individually) have not previously agreed the same."*

90. The underlined wording was added by amendment during the hearing before me, in order to specify clearly what emerged during the course of submissions as the real nub of the Representative Beneficiary's point on Question 2.

91. I can summarise this as follows.

92. On the facts of British Airways Plc v. Airways Pension Scheme Trustee Ltd [2018] EWCA Civ. 1533. [2018] Pens. L.R. 19, the Court of Appeal accepted the proposition that the activity undertaken by the scheme trustees involved them exercising their amendment power for an improper purpose. The activity in question was the introduction, to a scheme which was already in deficit, of a new power exercisable by the trustees to grant additional discretionary pensions. This had the potential greatly to increase the costs of the scheme to the employer, British Airways, and led to a challenge by British Airways to the validity of the amendment. The challenge succeeded. In short, the Court of Appeal held (by a majority) that the role of the scheme trustees was limited to management and administration of the scheme; that the new provision for the grant of additional discretionary pensions went beyond management and administration and trespassed on the area of *benefit redesign*, which was a matter for the employer; and that therefore the use of the amendment power in order to introduce the new provision was an exercise of the amendment power for an improper purpose.

93. Using this analysis as a platform, the Representative Beneficiary submitted that a similar approach was justified in the present case, as follows: (1) the matter of benefit redesign was within the domain of the BBC, as employer; (2) the BBC, in turn, was constrained in terms of what it could do by way of benefit redesign, principally because of provisions in the BBC Charter which contemplate that terms and conditions of employment are to be settled by negotiation between the BBC and its employees; and consequently (3) this had the effect that the purpose of the amendment power in Rule 19 was only to give effect to instances of benefit redesign which had first been negotiated or agreed with affected members, either individually or collectively (for example by consultation with the unions). It further followed, (4) that it would be an improper use of the amendment power for the Trustee to embark upon an attempt to change the benefit structure of the Scheme "*in circumstances where the BBC had not agreed those changes with the employees either individually or collectively*" (see the Representative Beneficiary's Skeleton at [28]).

94. In short, the real nub of that point was that it would be an improper use of the amendment power for the Trustee to attempt to introduce any material change to the Scheme's benefit structure (or structures) unless first agreed with the Active Members.

Discussion

95. I reject this argument. In my judgment, the position is straightforward and can be dealt with shortly.

96. To begin with, I do not see the present case as a parallel with British Airways. There, the complaint was that the trustees had acted against the interests of the employer, and the improper purpose (as Peter Jackson LJ put it at [121]) was the use of the amendment power by the trustees "*to remodel the balance of powers between themselves and the employer*." That arose because the effect of the new provision was that the trustees

"*added the role of paymaster to their existing responsibilities as managers and administrators*" (*ibid*.).

97. That is not the position here. Question 2 does not postulate the Trustee acting in a manner inconsistent with the desires of the BBC as employer. Under the terms of Rule 19, they could not lawfully do so, because the amendment power is only exercisable "*with the consent of the BBC*", and if the Trustee acted without the BBC's consent that would not be an exercise of a power for an improper purpose, but a purported exercise of a power it did not have.

98. It seems to me that I must approach Question 2 on the basis that the amendment proposed has the consent of the BBC, but not the consent of the affected Active Members expressed either collectively via the unions or individually. What then? The crux of the Representative Beneficiary's argument was that in such circumstances, the introduction of an amendment to give effect to a benefit redesign would *necessarily* involve use of the Rule 19 amendment power for an improper purpose.

99. I disagree, for the following reasons:

i) If, as I postulate, whatever amendment is proposed has the support and consent of the BBC, the use of the amendment power to give it effect would not on any view involve the Trustee arrogating to itself a responsibility falling exclusively within the domain of the employer. On the contrary, it would be giving effect to the wishes of the employer.

ii) The point is rather about whether consent of the Active Members in either of the forms suggested is a necessary precondition to the amendment power being exercised for a proper purpose. I think not. That is because Rule 19.2 itself contemplates that it can be exercised *without* their consent being manifested in such a manner, provided the safeguards in the 3rd Proviso are observed – i.e., either (a) certification that their interests are not substantially prejudiced, (b) confirmation of substantially equivalent benefits, or (c) approval at a duly convened meeting. It is through these provisions that the Scheme affords protection to the interests of Active Members. Neither (a) nor (b) requires their consent or agreement. Instead, these provisions operate by empowering the Actuary to provide the appropriate confirmations, and if either form of confirmation is provided, then in principle it would be a proper exercise of the amendment power for the proposed amendment to be carried through, whether or not consented to by the Active Members in some other way. Similarly as to (c), approval by a majority of Active Members assumes the possibility of a lack of consent by at least some others, but still it seems to me that in principle the amendment power would be properly exercisable on a positive majority vote at a duly convened meeting, whether or not consent had been manifested in some other way.

iii) I can put the matter straightforwardly. My view is that if a proposed amendment is consented to by the employer and is compliant with one or other of the safeguards stipulated in the 3rd Proviso, then to use the amendment power in Rule 19 to give effect to that amendment must in principle involve the exercise of that power for a proper purpose, because its very purpose is to allow amendments to be made which fulfil those criteria. I do not see how it can be

said there is some other independent requirement of consent to be given in a particular way by the Active Members in order for the purpose to be a proper one, because that would directly cut across the terms of Rule 19, which expressly contemplate circumstances in which an amendment may be made without any such consent.

iv) Further, I think this conclusion is reinforced, rather than undermined, by consideration of the BBC Charter and the various documents made under it concerning the management of employee relations. These have been set out in the evidence filed for the BBC by Mr James Hacker, the BBC's Head of Pensions and Benefits. As Mr Hacker explains, the Charter only requires the BBC to consult with appropriate organisations on arrangements for the settlement of terms and conditions of employment of BBC employees, and to have in place arrangements for consultation with BBC staff. The BBC has had arrangements in place with the recognised trade unions for many years. The current arrangements are set out in a Procedure Agreement dated April 1995, but as regards pensions, this states only that they will be dealt with under "*separate procedures*". Consistent with that, an "*Agreed Statement*" published under the 1995 Agreement (Statement D7a) dealt expressly with the Scheme, but pointed to the Deed and Rules as the governing documents: "*This statement outlines the basic provisions of the BBC Pension Scheme: it is for guidance only. The scheme is governed by a Trust Deed and Rules which can be seen in local Personnel Departments*". To the same effect, Agreed Statement D7a has now evolved into part of the current online Contracts of Employment Policy, which provides at 8.2 that "*the definitive provisions of the Scheme are set out in the Trust Deed & Rules*", with a series of hyperlinks linking to the Scheme Handbook for information. The current Handbook in turn provides that that it "*is intended only as guidance. The definitive provisions of the Scheme are set out in the Trust Deed and Rules, which supplement and override this handbook in the event of any difference.*"

v) These and other similar references, it seems to me, are consistent with the idea that ultimately the amendment power in Rule 19.2 was and is intended to be a self-contained code for the making of amendments to the Deed and Rules. Of course, the BBC would expect to consult on material changes to the Scheme, and has already confirmed it will consult all affected members in relation to any changes to future service benefits under the Scheme. But ultimately the protection afforded to Active Members as regards any proposed amendments is via the mechanism in the 3rd Proviso itself, which makes clear that any proposed change to the terms of the Deed or Rules which affects their *interests* will be ineffective if it creates substantial prejudice to those interests, unless adequate alternative benefits are provided or unless there is agreement in a duly convened meeting. It thus seems to me that, as regards potential amendments to the Deed and Rules, the machinery in Rule 19, including the protections for Active Members in the 3rd Proviso, must be taken to represent the "*separate procedures*" referenced in the 1995 Agreement.

100. In light of those conclusions, I would answer both parts of Question 2 in the negative, but subject to two important qualifications or assumptions. That is to say, provided both (a) that the BBC has consented to any proposed termination of future service

accrual or other benefit redesign, and (b) that the protections afforded to Active Members by the 3rd Proviso have also been duly complied with as regards such amendments as are required to bring the desired changes into effect, then:

i) in my judgment, an exercise by the Trustee of the power of amendment for the purpose of implementing the desired changes would not, of itself, be an exercise of that power for an improper purpose; and

ii) the same result would follow whether or not the BBC and affected Active Members had previously agreed the changes via union consultation or individually.

101. Of course, this way of answering Question 2 does no more than bring one back in a circle to Question 1. Quite apart from any issues of proper purpose, if the protections afforded to Active Members by the 3rd Proviso are *not* complied with, then the amendment (whatever it is) cannot be made effective, because the Trustee will have no power to act at all.

102. This analysis obviously links the answer to Question 2 with the answer to Question 1. If I am correct in answering Question 1 in a way which gives wide scope to the 3rd Proviso, then I think it makes sense to answer Question 2 in the negative, because Question 2 seeks to identify a further layer of potential protection for Active Members which it seems to me is unnecessary if the 3rd Proviso has the scope I think it has. To put it another way, Mr Spink KC, having secured his preferred answer to Question 1, cannot I think succeed as well on Question 2. On the other hand, I think Mr Tennet KC is correct on Question 2, but I am reinforced in that conclusion because I think he is wrong on Question 1.

Conclusion and Disposition

103. My answers to the two Questions posed in this Part 8 Claim are set out already above. I should be grateful for assistance from the parties in drawing up an Order which appropriately reflects the findings contained in this Judgment, and in dealing with any necessary consequential matters arising.

APPENDIX: EXTRACTS FROM THE 1949 DEED AND RULES

1949 Deed Clause 25

25. The Trustees may without prejudice to any other power in this behalf at any time and from time to time with the consent of the Corporation by Deed executed by the Trustees and the Corporation but not otherwise alter or modify any of the trusts powers or provisions of this Deed or of the Schedules to this Deed provided that no such alteration or modifications shall:-

(A) Vary the main purpose of the Fund namely the provision of pensions for employees on retirement at a specific age ;

(B) Authorise the making of any payment or repayment to the Corporation out of the Fund except in accordance with the proviso to Clause 4 of the Interim Trust Deed ;

(C) Take effect as regards the members whose interests are certified by the Actuary to be affected thereby unless –

(i) the Actuary certifies that the alteration or modification does not substantially prejudice the interest of such members, or

(ii) the Actuary certifies that to the extent to which the interests of such members are so prejudiced substantially equivalent benefits are provided or paid for by the Corporation or the Trustees or provided under and legislation or

(iii) the alteration or modification is approved by resolution adopted at a meeting of such members convened by the Trustees ;

(D) Take effect as regards any person not being a member who is at the date of the alteration or modification entitled to a pension under the Pension Scheme or any person who will on the death of any such person as aforesaid be entitled and whose interests are certified by the Actuary to be affected thereby unless-

(i) the Actuary certifies that the alteration or modification does

not substantially prejudice the interests of such person, or

(ii) the written consent of such person is obtained

1949 Rules Rule 22

22. The Corporation may terminate its contributions to the Fund by six months' notice in writing to the Trustees expiring at any time or at any time by notice in writing to the Trustees in the event of the Corporation being wound up and thereupon the contributions of the members shall also cease. In the event of such termination the Pension Scheme shall unless the Trustees otherwise decide also determine and thereupon or on the expiration of the trusts thereof under Clause 26 of the Trust Deed the Fund shall be realised and the proceeds thereof after payment of all costs charges

and expenses properly payable thereout applied First in the purchase from the Government or an Insurance Office of repute of non-commutable and non-assignable annuities of the same amount and duration as the pensions payable or which may become payable to such persons as are then entitled to the receipt of pensions such members as shall then have attained Normal Retirement Age and such persons as may on the death of any such person or member become so entitled Secondly in the purchase in like manner of non-commutable and non-assignable annuities whether immediate or deferred for members entitled in anticipation to pensions or other benefits under the Pension Scheme each such annuity to be of such yearly amount and on such terms as shall be determined by the Actuary to be just and equitable having regard to the value to be determined by the Actuary of their respective interests in the Fund and Thirdly in the payment to the Corporation of any balance which shall remain. Any such annuity shall be purchased in the name of the person to whom the same relates and the Trustees shall have power in exceptional cases of serious ill-health or incapacity or where the amount of the annuity would be trivial in lieu of purchasing an annuity for any person to make a cash payment to such person of an amount equal to that which but for this provision would have been applicable in the purchase of an annuity for him.