Avon Cosmetics: A Critical Analysis

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When an amendment is made in breach of a fetter on the power of amendment, what is the position in relation to the amendments that were validly made, but which might not have been made had the trustees/employer known that part of the amendment was invalid?

This type of error is sometimes referred to in trust law as 'excessive execution'. It not infrequently arises in historic cases of scheme redesign. What if, for example, the trustees decided to change an accrual rate of 1/60ths to an accrual rate of 1/80ths plus a lump sum of 3/80ths in respect of past service, for the purpose of reducing the costs of the scheme, in breach of a fetter prohibiting reduction of accrued benefits? Are members entitled to the benefit of both 1/60th accrual *and* the 3/80ths lump sum?

Or what if - as occurred in the case of *Avon Cosmetics Ltd v Dalriada Trustees Ltd* [2024] EWHC 34 Ch - a scheme was closed to future accrual, in breach of a fetter prohibiting the breaking of the final salary link, again for the purpose of reducing the costs of the scheme? Would those who were better off as a result of having their pensions linked to statutory revaluation provisions be able to take the benefit of the amendment, despite the fact that it was invalid in respect of those who were better off if their pensions continued to be linked to final salary?

For a long time, the question of whether the 'bad could be severed from the good' was answered by reference to the dicta of Neuberger J in *Bestrustees v Stuart* [2001] Pens LR 283. He suggested that, by analogy with the approach in *Re Hastings Bass* [1975] Ch 25, the court should ask itself first whether the valid or invalid parts of the exercise were conceptually distinguishable from each other, and if so, whether the party exercising the power would still have done so in the way that it did, had it realised that part of the exercise would be invalid. This approach permitted the examination of evidence extrinsic to the trust documentation itself and appeared to be endorsed by the Court of Appeal in *IBM United Kingdom Holdings Ltd v Dalgliesh* [2018] ICR 1681 and applied again in *Wedgwood v Salt* [2018] EWHC Ch 78.

In a wide-ranging judgment in *Avon Cosmetics,* HHJ Davis-White KC has revisited the *Bestrustees* approach, reviewing it in light of the Supreme Court's decision in *Pitt v Holt* [2013] AC 108 and analogous dicta applying in the common law fields of contracts in restraint of trade and public law where questions of severance can also arise.

(i) In relation to *Pitt v Holt*, he noted the comments of Lord Walker to the effect that it was not useful to ask what the trustees would have thought and done if they had known about 'the problem' (i.e. that the purported execution of the power was in excess of its proper scope). Rather, the test should be objective.[1]

(ii) In relation to contracts in restraint of trade, he noted the requirement that removal of the provision should not generate any major change in the overall effect of all the post-employment restraints in the contract.[2]

(iii) In relation to public law, he noted the requirement that 'the substance of what remains after severance is essentially unchanged in its legislative purpose, operation and effect'.[3]

[1] *Avon Cosmetics* at [168].
[2] *Ibid*, at [60], citing *Egon Zehnder Ltd v Tillman* [2020] AC 254 at [87] per Lord Wilson.
[3] *Avon Cosmetics* at [62], citing *DPP v Hutchinson* [1990] 2 AC 783 at 804 per Lord Bridge.

The Judge concluded that, in the trusts context, it was preferable to follow the public law approach and to make an objective enquiry as to whether the proposed severed valid exercise of power would be a substantially different exercise of the power, rather than a subjective enquiry as to whether the decision-maker would have proceeded to exercise it in that way. Put a different way, the question was whether the objectively-ascertained intention was to effect the valid part of the exercise of the power, the intention to effect the invalid part being incidental.

There are a number of criticisms that can be made of this decision. In reaching it, the Judge made no reference to the comment made by Mummery LJ in the Court of Appeal in *Pitt v Holt* that analogies with public law are 'unhelpful and unnecessary',[4] a view endorsed by Lord Walker in the Supreme Court.[5] Mummery LJ pointed out that judicial review in public law was concerned with ensuring that public authorities were acting with the limits of a power set by statute, whereas trust law controlled the exercise of dispositive powers privately entrusted to a fiduciary who has been selected to exercise those powers for the benefit of members within a designated class.[6]

This contrast can be developed further by thinking about the contexts in which public authorities and trustees exercise their functions. It would be in the general interest of good administration for the acts of public authorities to be upheld unless the nature of that act were to be fundamentally changed by a declaration that an element of it was invalid. However, the exercise of dispositive powers by fiduciaries necessarily involves choosing between different interests and favouring some interests over others. Upholding part of an exercise of a power because it was not a 'substantially different exercise' from the intended whole, might run contrary to the decision made by the trustees as to the interest to be favoured.

[4] [2012] Ch 132 at [235].
[5] [2013] AC 108 at [11].
[6] [2012] Ch 132 at [235].

The analogy drawn with severance in the context of contractual restrictive covenants in restraint of trade is equally problematic. In that case the question for the court is whether to save elements of a bargain made between two contracting parties. There is no fiduciary duty owed by one party to another and no competing interests in respect of which dispositive powers must be exercised.

Furthermore, the question of 'what would/might the trustees have done?' remains a relevant question in trust law where the trustees have, in breach of fiduciary duty, failed adequately to perform their decision-making function, albeit that that is an objective question focusing on what the trustees, as reasonable trustees, 'should' or 'would' have intended. There was no suggestion that in answering this question, it was appropriate to consider only the nature of the decision itself made, without any reference to extrinsic evidence indicating the reasons why the trustees acted as they did and the interests which they determined to advance.[7]

In the *Avon Cosmetics* case, the Judge, looking at the amendment that was made, concluded that the 'substantial purpose' was to remove the final salary link and to link pensions in deferment to statutory revaluation. This was, indeed, what the amendment purported to achieve. However, this exercise overlooks the purpose for making the amendment in the first place, which was to reduce the cost of the scheme in respect of future service. Moreover, it does not take into account the context in which the amendment was made, in which in an era of low inflation the breaking of the final salary link would not have been expected to produce a large class of members who were better off as a result of revaluation rather than final salary linkage.

In effect, the Judge's decision reversed the impact of what the trustees had been trying to achieve, namely to reduce costs in the interests of the employer and ultimately the members of the scheme in their capacity as employees.

[7] *Pitt v Holt* [2013] AC 108 at [91].

It might be said in the current context that it did not run counter to the trustees' actual purposes for the employer to be saved the inevitable employment relations difficulties that would have arisen had the whole amendment been struck down, particularly in circumstances where insurers were standing behind the defendants to Part 7 proceedings. These are not, however, considerations that can be readily incorporated into a trust law analysis. It is a matter of regret that, given the nature of the Part 8 process, these interesting issues will not be explored by the Court of Appeal in the *Avon Cosmetics* proceedings. For now, they join the number of 'difficult issues that may one day be appealed' which populate our field of law.

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