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Case No: CA-2023-001978

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST: PENSIONS (ChD)
The Hon Mr Justice Adam Johnson
[2023] EWHC 1965 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/07/2024

Before :

LORD JUSTICE LEWISON
LADY JUSTICE FALK
and
SIR CHRISTOPHER FLOYD

- -

Between :

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

- -

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

Hearing dates: 25, 26 & 27/06/2024
- -

Approved Judgment

This judgment was handed down remotely at 11.00am on 09/07/2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Lewison:

Introduction

1. The issue on this appeal concerns the limits on a power to make alterations in the BBC pension scheme. The power is contained in rule 19.2 of the current rules of the scheme. The power is that of the trustee; but it may only be exercised with the consent of the BBC as the sponsoring employer. The power is also limited by provisos; and it is the meaning of those provisos that is in issue.

2. More specifically, the BBC is concerned about the rising cost of funding the scheme and is concerned to know the potential scope of the power of amendment to reduce or limit future benefit accrual under the scheme.

3. Although the precise scope of the power raises a number of potential questions, it has been agreed between the parties that some of those questions should be answered (if at all) in later proceedings. We are asked to consider very specific questions, and nothing I say should be taken as applying more widely than the specific questions we have been asked.

The scheme

4. The scheme was first established by an interim deed in 1947, with its definitive provisions being set out in 1949 in a definitive deed and rules. It has since undergone a number of variations and restatements and is currently governed by the 52nd deed of variation of May 2016 (to which further amendments have been made).

The rule and the issue

5. The scheme divides members into a number of different categories: Career Average Benefits 2011 Members, Career Average Benefits 2006 Members, Old Benefits Members and New Benefits Members. Old Benefits Members are those employees who joined the scheme before 1 October 1996; the New Benefits Members are those who joined between 1 October 1996 and 1 November 2006; and the others are those who joined thereafter while the scheme remained open to new entrants. By way of example, Old Benefits Members and New Benefits Members are entitled to a "Scale Pension" equal to 1/60th of final Pensionable Salary (as defined) for each year of Pensionable Service (subject to a cap). The level of contribution to be made by Active Members in those categories is 7.5% of Pensionable Salary or such lower percentage as the BBC, with the consent of the trustee, decides. The rate of accrual, the link between pension and final salary and the level of contribution are, subject to the power of amendment, fixed. An "Active Member" is a member who has not yet left Service or become a Pensioner in respect of the whole of their benefits under the scheme.

6. In the judgment under appeal, Adam Johnson J lucidly explained how the scheme worked using the Old Benefits and New Benefits categories as examples:

> "[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.
>
> …
>
> [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."

7. Rule 19.2 derives from clause 25 of the 1949 deed. It 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)."

The questions

8. The relevant questions raised by the claim form are:

"(1) Whether on the true construction of the proviso in Rule 19.2(3), "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."

9. It was common ground that the answer to question (a) was "yes", and that question (e) did not require a separate answer.

10. The critical question, therefore, is the meaning of the word "interests" in proviso (3). The BBC contends that the "interests" protected are the legal entitlements and claims to benefits under the scheme that have been earned by pensionable service already performed by an Active Member at the date of the amendment. The proviso is not engaged if the proposed variation only affects matters in respect of which an Active Member has no accrued right, such as the prospect of earning future pension as a result of future pensionable service. Thus at least in principle it would be open to the trustee (with the consent of the BBC) to vary the scheme so as to limit or modify the rate of future accrual under the scheme. Similarly, the power could be exercised so as to modify for the future any link between pension and salary; or to increase the level of active members' contributions. Any exercise of the power of variation in that way would not engage the protection given by proviso (3). Further, proviso (3) would not protect the link to final salary (even in respect of past service) so far as it relates to future increases in salary.

11. The judge declined to give the power of variation such a wide interpretation. He held that the division between what was protected by proviso (3) and what was not so protected was "not marked by the fault line between benefits already earned by past service and those which are yet to be earned in the future". Rather, the focus of the inquiry is a comparison between the position that Active Members have under the scheme before amendment and the position in which they would be if the amendment were made. If the before and after positions are different, then their "interests" are affected. He decided that the concept of "interests" embraced not only rights earned by past service, but also the linkage of the value of those past service rights to final salary and, in addition, the ability of members to accrue any future service benefits under the scheme as it stood before any variation. His decision is at [2023] EWHC 1965 (Ch), [2023] Pens LR 14. With his permission the BBC appeals.

12. The trustee takes a broadly neutral position, although it has made submissions designed to protect its own position. The main opposition to the appeal came from Ms Burns, appointed as a representative beneficiary.

The interpretation of pension schemes

13. It was common ground that the principles applicable to the interpretation of a pension scheme are those set out by Lord Hodge in *Buckinghamshire v Barnado's* [2018] UKSC 55, [2019] ICR 495. Although there are no special rules which apply to the interpretation of pensions schemes, they do have particular characteristics which bear

on the process of interpretation. Lord Hodge set these out at [14]. These characteristics make it appropriate for the court to give weight to textual analysis, by concentrating on the words which the drafter has chosen to use and by attaching less weight to the background factual matrix than might be appropriate in certain commercial contracts. Nevertheless, as he said at [16]:

> "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."

14. In so saying, Lord Hodge approved the statement by Millett J in *In re Courage Group's Pension Schemes* [1987] 1 WLR 495. Since Mr Tennet KC, for the BBC, placed considerable reliance on that statement it is worth setting out a fuller part of it than that quoted by Lord Hodge. Millett J said at 505:

> "First, there are no special rules of construction applicable to a pension scheme; nevertheless, its provisions should wherever possible be construed to give reasonable and practical effect to the scheme, bearing in mind that it has to be operated against a constantly changing commercial background. It is important to avoid unduly fettering the power to amend the provisions of the scheme, thereby preventing the parties from making those changes which may be required by the exigencies of commercial life. This is particularly the case where the scheme is intended to be for the benefit not of the employees of a single company, but of a group of companies. The composition of the group may constantly change as companies are disposed of and new companies are acquired; and such changes may need to be reflected by modifications to the scheme."

15. Mr Tennet stressed Millett J's statement that it was important not to fetter the power of amendment where an amendment was required by the exigencies of commercial life. He submitted that the rising cost to the BBC of funding the scheme, and the disparity in pensions between those who were members of a defined benefits scheme and those who were not were exactly the kind of commercial exigencies that Millett J had in mind. Nevertheless, I do not consider that this is an autonomous, let alone an overriding, principle of interpretation of pension schemes. Even where the court is concerned to interpret a power of amendment in a pension scheme it must be "even-handed between the parties". Such a power should not be interpreted with any greater liberality than other documents, purposively interpreted. A power of amendment "should be interpreted precisely in accordance with its terms, neither more nor less": *Stena Line Ltd v MNRPF Trustees Ltd* [2011] EWCA Civ 543, [2011] Pens LR 223 at [48]. As Lord Hodge said in *Barnardo's* at [28] "The sponsoring employer's gain may be the members' loss and vice versa." Nor it is appropriate to use hindsight of how events have turned out to assess whether a provision makes good commercial sense: *Barnardo's* at [27].

16. In explaining his reasons for adopting his preferred interpretation of the Barnardo's pension scheme, Lord Hodge made a number of points. Among them was this at [23]:

> "Fourthly, it is trite both that a provision in a pension scheme or other formal document should be considered in the context of the document as a whole and that one would in principle expect words and phrases to be used consistently in a carefully drafted document, absent a reason for giving them different meanings."

17. It is also pertinent to bear in mind what Lord Carnwath said in *Lambeth LBC v Secretary of State for Housing, Communities and Local Government* [2019] UKSC 33, [2019] 1 WLR 4317 at [19]:

> "In summary, whatever the legal character of the document in question, the starting point—and usually the end point—is to find "the natural and ordinary meaning" of the words there used, viewed in their particular context (statutory or otherwise) and in the light of common sense."

18. One other point of interpretation arose; and that was the relevance of the 1949 deed and rules. As I have said, the proviso to rule 19.2 derives from clause 25 of the 1949 deed (although the cross-reference in that deed to the interim deed has been expanded into a quotation in the current version). Mr Tennet argued that the logical place to start in the search for the correct interpretation of rule 19.2 was the interpretation of the equivalent provision in the 1949 deed. The judge used the 1949 deed as a cross-check only, which led the judge to give too little weight to the meaning of the word "interests" in the 1949 deed as indicative of the correct meaning to be attributed to that word in the current deed. The obvious inference from the re-adoption of a clause in a pension scheme without modification is that the same words do not change their meaning.

19. It is common ground that the 1949 deed is admissible for the purpose of interpreting the scheme in its current form. Mr Spink KC for the representative beneficiary argued, however, that the terms of the 1949 deed were only one factor which needed to be weighed in the balance. As Arden LJ put it in *Stena Line* at [35]:

> "… the meaning of a clause which is readopted from time to time has additionally to be considered in the context of circumstances subsequent to the date of its original adoption. It follows that regard should be had both to relevant circumstances at the date of its original adoption and to relevant circumstances at each subsequent re-adoption. Those circumstances can then be weighed in the balance to assess the impact of all the relevant circumstances on the interpretation exercise in hand."

20. I have myself expressed some scepticism about whether it is useful to delve into the archaeology of a pension scheme, when current members of the scheme may have joined many years after the scheme was initially established: *Barnardo's v Buckinghamshire* [2016] EWCA Civ 1064, [2017] Pens LR 2 at [23], apparently approved on appeal *Buckinghamshire v Barnado's* at [26]. It also makes life difficult for a trustee if it has to trawl through previous iterations of a scheme in order to decide what it can or cannot do. But in view of the limited common ground on this question, I do not propose to discuss the principle any further.

21. Recognising my scepticism, in the course of his reply Mr Tennet adopted what might be called a "twin-track" approach, namely: to look at the meaning of the proviso in the scheme as it now exists on the one hand, and its meaning in the 1949 deed on the other. His essential point was that either approach leads to the same conclusion.

The 1949 Scheme

22. The 1949 scheme was very different from the scheme as it currently exists. Rule 6 deals with the right to a yearly pension. Entitlement to such a pension arose only if a member retired from the service of the BBC after reaching normal retirement age. In other words, it was dependent on long service. An employee who left before reaching normal retirement age was not entitled to any yearly pension at all. Instead, under rule 8 they were entitled to a return of their own contributions (not any contributions made by the BBC) plus interest at 2 ½ per cent. If a member did become entitled to a yearly pension on attaining normal retirement age, it was calculated in a different way from the calculation under the current scheme and was also subject to a monetary cap.

23. Rule 22 gave the BBC the power to terminate its contributions to the fund by 6 months' notice in writing in which event the scheme would terminate (unless the trustee decided otherwise); and the rule went on to prescribe how the fund should be dealt with.

24. The power of variation was contained in clause 25 of the trust deed. It is to be noted at this stage that there were restrictions on powers affecting "members" and "any person not being a member who is at the date of the alteration… entitled to a pension under the Pension Scheme." These two categories comprised active members on the one hand and pensioners whose pensions were in payment. There was, at that time, no third category of deferred members.

25. An amendment made in 1955 introduced the right of an early leaver to choose between a return of contributions plus interest or a yearly pension beginning at normal retirement age. In other words, a new category of deferred member was introduced.

26. The words of the power of amendment did not change, but it is common ground that deferred members fell within the scope of what is now proviso (4). So although the words did not change, its scope did as the underlying rights or potential benefits changed. This supports my scepticism about interpreting rule 19.2 of the current scheme by reference to its operation in 1949.

27. Moreover, it appears from recital (E) and clause 1 of the deed of variation of 23 October 2006 that the operative clauses and schedules attached to that deed were intended to be a complete restatement of the scheme. The same appears to be true of other deeds of variation including, in particular, the May 2016 deed which is the principal governing deed for the scheme as it now exists. The fact that the scheme has been set out in its entirety at times subsequent to 1949 is another pointer against attributing weight to the 1949 deed.

Powers of amendment

28. It is commonplace if not inevitable for pension schemes to contain powers of amendment; and also common for them to include restrictions or fetters on the

amendments that they authorise. Such restrictions or fetters take many different forms (of which I give some – paraphrased – examples):

i) An amendment may not "vary or affect any benefits already secured by past contributions" (*Re Courage Pension Schemes*).

ii) An amendment may not be made "decreasing the pecuniary benefits secured to or in respect of" a member "under the Scheme" (*Lloyds Bank Pension Trust Corpn Ltd v Lloyds Bank plc* [1996] Pens LR 263).

iii) An amendment may not be made if "the rights and interests" of a member would be prejudiced (or substantially prejudiced) "insofar as such rights and interests concern benefits secured in terms of the Scheme" prior to the amendment (*Walker Morris Trustees Ltd v Masterson* [2009] Pens LR 307).

iv) No amendment may be made which has "the effect of reducing the value of benefits secured by contributions already made" (*IMG Pension Plan HR Trustees Ltd v German* [2010] Pens LR 23).

v) No alteration "shall be such as would prejudice or impair the benefits accrued in respect of membership up to that time" (*Briggs v Gleeds (Head Office)* [2014] EWHC 1178 (Ch), [2015] Ch 212; *Newell Trustees Ltd v Newell Rubbermaid UK Services Ltd* [2024] EWHC 48 (Ch)).

vi) No amendment may be made which would substantially "reduce in aggregate the value ... of the benefits accrued due in respect of any Member up to the date of such alteration" (*Sterling Insurance Trustees Ltd v Sterling Insurance Group Ltd* [2015] EWHC 2665 (Ch)).

29. Clauses like this bear what Nugee J described as a "family resemblance" but ultimately the meaning of a particular clause turns on its own interpretation: *Atos IT Services UK Ltd v Atos Pension Schemes Ltd* [2020] EWHC 145 (Ch), [2020] Pens LR 17 at [2].

Bradbury v BBC

30. In addition to the general principles of interpretation, I need to refer to the decision of this court in *Bradbury v British Broadcasting Corporation* [2017] EWCA Civ 1144, [2018] ICR 61 which considered the interpretation of this very scheme. Although Mr Tennet retreated from the position he had taken before the judge, namely that that decision was, in effect, determinative of the outcome of this case, it still featured prominently in ground 2 of the grounds of appeal. So it is necessary to consider exactly what it decided.

31. Mr Bradbury was a New Benefits Member of the scheme. He was therefore entitled to a pension based on his "Pensionable Salary". That, in turn, was defined as a member's "Basic Salary" which included "such other regular additions to basic Salary as the BBC may determine from time to time". Basic salary was also defined as "the amount determined by the BBC as being an employee's salary or wages".

32. As in the present case, the BBC were trying to reduce the cost of the pension scheme. In the result they offered Mr Bradbury a choice: (i) remain in the New Benefits section of the scheme and accept a 2% pay rise of which only 1% was to count as an increase

to basic salary for the purposes of the scheme; (ii) remain in the New Benefits section and have no pay rise at all; or (iii) accept a 2% pay rise but move to a different section of the scheme which would either result in a pension linked to career average salary (rather than final salary) or a pension linked to defined contributions rather than defined benefits.

33. The issue for the court was whether "determined by the BBC" in the definition of "Basic Salary" in the existing rules of the scheme enabled the BBC to decide how much (if any) of a pay rise counted as "Basic Salary" for the purposes of the scheme. The court held that it did. The essence of the reasoning of Gloster LJ (with whom Henderson LJ and I agreed) is encapsulated in paragraph [34] of her judgment:

> "I conclude that, on a proper construction of the language used in the trust deed and the relevant rules, the BBC could indeed decide whether an *increase* in pay (or how much of the increase) counted as basic salary and thus was entitled to limit any increase in basic salary (as defined) as part of the process of determining its amount. I do not regard the conclusion that the BBC is able to determine whether (and how much of) a pay rise is pensionable as particularly startling. Given, as was accepted by the claimant, he had no contractual right to any pay rise, I see no reason why it should not be open to the BBC to determine *how much* of that pay rise would count as basic salary and therefore how much was "pensionable". In my view that is precisely what the language of the relevant definition clauses allows the BBC to do." (Original emphasis)

34. In other words, the court reached its conclusion by interpreting the words of the scheme as they stood. They did not need to be varied in any way in order to produce that result.

35. Although it is true that Gloster LJ quoted part of rule 19.2 at [15], I do not consider that it formed any part of her reasoning. One of the arguments advanced on Mr Bradbury's behalf was that the definition under consideration had been introduced by amendment in 2000 (not, as the court thought, 2006) following an actuary's certification that the amendment did not substantially prejudice the interests of active members. Thus, it was argued that if the definition had the meaning for which the BBC contended it would not have been possible for the actuary to provide that certificate. Gloster LJ rejected that argument for two reasons at [40]. The first ("the short answer") was that the actuary had certified the amendment. How he reached his conclusion was a "moot point". In other words what the actuary took into account in issuing the certificate was unknowable. The second was that there was no challenge to the legitimacy of the amendment. Thus the scope of rule 19.2 was simply not in issue.

36. She added at [42]:

> "But the critical point is that the exercise of the power of determination contended for by the BBC does not have any reductive effect on an employee's existing pension entitlement, as at the date of an increase in salary. A determination by the BBC as to what proportion of a future *increase* in salary was

> pensionable could never operate to *reduce* the total quantum of the anticipated pension based on the existing basic salary."

37. She next turned to consider an argument that although Mr Bradbury had no right to a specific pay rise in the future, he nevertheless had an existing right to a future pension based on his *gross* final pay. Gloster LJ rejected that argument at [45]. She said:

> "I cannot accept this argument. Whilst no doubt, as at the date of the BBC's offer, the claimant had an existing right to a future pension calculated in accordance with the rules, he had no "right", whether accrued, subsisting or otherwise, either to any future increase in salary level, or, more importantly, to any such increase in his pensionable salary, which any increase in designated basic salary would produce. All he had was an *existing* right that, if there was indeed an increase in his designated basic salary, it would be treated as pensionable salary under the rules. Section 91 protects the actual, accrued rights of employees. It applies where a person "has a right to a future pension"; it does not apply where a person may acquire a future right to a pension, as a result of a future increase in basic salary; i.e. to have a future pay increase." (Original emphasis)

38. The important point here, is that Gloster LJ was not suggesting that Mr Bradbury had no existing right to a link between pension and final *pensionable* pay; all she was saying was that, because of the way in which "basic salary" and "pensionable salary" were defined under the rules of the scheme as they stood, that link did not prevent the BBC from deciding that only part of a pay rise would count towards pensionable pay. The link between years of past service and future final pensionable pay was, indeed, part of Mr Bradbury's existing rights.

39. This is consistent with a long line of cases at first instance, starting with *Courage*, which decide that where an employee has acquired a right to a pension linked to final salary by reason of past service, that link is part of his accrued right whatever his final salary may turn out to be: see *G4S plc v G4S Trustees Ltd* [2018] EWHC 1749 (Ch), [2019] ICR 141 where Nugee J summarised the previous cases and endorsed them. *Courage* and the cases which followed it on the linkage point were not cited in *Bradbury* and were not the subject of any consideration by the court. It is not plausible to suggest that the decision in *Bradbury* casts any doubt on *Courage* in that respect. Nor do the grounds of appeal in this case independently suggest that *Courage* and the cases which followed it were wrong.

40. In short, I do not consider that the decision of this court in *Bradbury* is any authority on the scope of rule 19.2.

41. There is, however, one further point about what the court decided in *Bradbury* that I must mention. The BBC accepted that once it had decided what pay counted as basic salary, it could not reverse that decision. As Gloster LJ put it at [37]:

> "I accept Mr Furness's argument that, although the BBC had a power to determine what pay counted as basic salary (and therefore pensionable salary), once it had determined that a part

> of the employee's pay or a pay rise counted as basic salary, that formed part of the employee's entitlements under their employment contract and it could not be "redetermined". I agree with Mr Furness's example that if an employee earned £40,000 p/a and this had previously counted as basic salary, it would be not be open to the BBC to determine that henceforth only £35,000 would be pensionable: the BBC could not unilaterally reduce the employee's contractual rights."

Interests

42. The phrase to be interpreted in rule 19.2 is "Active Members whose interests are … affected" by a proposed amendment.

43. Both parties pointed to dictionary definitions of the word "interest". Mr Tennet drew attention to the definition in the Oxford English Dictionary (1989 edition, which is not exactly the same as the current online edition):

> "The relation of being objectively concerned in something, by having a right or title to, a claim upon, or a share in.
>
> a. The fact or relation of being legally concerned; legal concern in a thing; esp. right or title to property, or to some of the uses or benefits pertaining to property…"

44. Mr Spink on the other hand drew attention to several legal dictionaries. Black's Law Dictionary (11th ed, which appears to be an American publication) states:

> "1. The object of any human desire; esp. advantage or profit of a financial nature … 2. A legal share in something; all or part of a legal or equitable claim to or right in property…"

45. Jowitt's Dictionary of English Law (6th ed) states:

> "A person is said to have an interest in a thing when he has rights, advantages, duties, liabilities, losses or the like, connected with it, whether present or future, ascertained or potential: provided that the connection, and in the case of potential rights and duties, the possibility, is not too remote. The question of remoteness depends upon the purpose which the interest is to serve."

46. Stroud's Judicial Dictionary of Words and Phrases (11th ed) quotes a statement of Arden LJ:

> "The "interests" of a person are wider than his rights." *Hill v Spread Trustee Co Ltd* [2006] EWCA Civ 542 per Arden LJ at [101]."

47. Mr Tennet accepts that in some contexts the word "interests" may extend further than simply legal rights, but he says that the primary dictionary meaning does equate the word "interest" with a legal right or claim to property. Whatever else may be said, it cannot be said that the meaning for which he contends is a strained or unnatural

meaning. Indeed, it would be the starting point for a reasonable reader wishing to understand the scope of rule 19.2.

48. Although the use of a dictionary is a permissible aid to the interpretation of a written instrument, as Steyn LJ said in *Arbuthnott v Fagan* [1995] CLC 1396, 1402:

> "Dictionaries never solve concrete problems of construction. The meaning of words cannot be ascertained divorced from their context. And part of the contextual scene is the purpose of the provision."

49. In addition, as Lord Hoffmann pointed out in *R v Brown* [1996] AC 543, 561 it is a fallacy to treat the words of an English sentence as building blocks whose meaning cannot be affected by the rest of the sentence. The unit of communication by means of language is the sentence and not the parts of which it is composed. The significance of individual words is affected by other words and the syntax of the whole.

50. In many cases the word "interest" is often only part of a composite phrase. For instance, an "interest in land" is a right or entitlement to land recognised by the law as being enforceable either at law or in equity. The part of the phrase "in land" colours the meaning of the word "interest". An interest in a fund may be the right to an ascertained part of a fund; but a person with an entitlement to be considered as one of a class of discretionary beneficiaries may also be described, without misuse of language, as having an interest in the fund. Their respective interests in the fund may be different, but that is because of their different rights. In other words, the word "interest" is flexible enough to encompass both. In the very different context of permission to apply for judicial review, the concept of "sufficient interest in the matter" in section 31 (3) of the Senior Courts Act 1981 is not based on the concept of rights but on interests: *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868 at [170]. Again, the word is coloured by the context.

51. Here the word "interests" in proviso (3) is untethered to any composite phrase.

52. In short, I agree with the judge at [51] where he said:

> "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." (Original emphasis)

53. The judge went on to say in the same paragraph that the meaning of "interests" in each case meant "matters of relevant concern". Mr Tennet pointed out that the very broad meaning adopted by the judge had no logical stopping point. I do not agree with that submission in the way in which it was put. What is a matter of relevant concern will depend not only on the context and identity of the persons concerned, but also the nature of the proposed amendment under consideration. The judge's elucidation of the meaning of "interests" must be read in the context of the particular questions raised in the claim form. Ultimately, however, whether that gloss is overbroad as a matter of generality does not in my view matter for the purposes of this appeal. We need only

consider its meaning in the context of the specific questions raised in the claim form in relation to proviso (3).

54. Although, as I have said, Mr Tennet accepted that the word "interests" does not have a single natural meaning, he argued that the use of the word elsewhere in the scheme demonstrated how that word was to be understood in proviso (3).

55. First, he relied on the quotation from the 1947 interim deed in proviso (2). That dealt with payments out of surplus in the event of the scheme being wound up. Any such surplus could be paid to the BBC if it was not 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"

56. *Ex hypothesi*, if the scheme was being wound up, there could be no question of further pensionable service under the scheme. It therefore followed that "their respective interests therein" could only mean such rights as a member had accrued at the date of the winding up. I do not find this a helpful pointer. This proviso is concerned only with a member's interests at a particular point in time. It is not concerned with what a member's interests might be following an amendment to an ongoing scheme. In this example, moreover, the word "interests" is tied to the word "therein"; that is to say interests in the fund at the point of winding up. There is, therefore, a built-in temporal limitation. In addition, the first part of this proviso is concerned with *entitlement* rather than *effect* on interests; and the word "interests" must be read in that context.

57. Mr Tennet's second example was proviso (4). That precludes an amendment taking effect, subject to exceptions:

> "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"

58. Since it is only Active Members who continue to accrue pension rights based on pensionable service, the use of the phrase in relation to those outside that category can only be a reference to rights based on past service. This too is concerned with *entitlement* to pension; and the effect of an amendment on such entitlement.

59. I agree with Mr Tennet that the word "interests" in those provisos has the meaning that he ascribes to it. But that is because of the context in which that word appears, and the factual situation to which it is relevant. In essence, that is what the judge decided at [52] and I agree with him. It does not follow that the word "interests" in proviso (3) is limited to accrued legal rights earned by past pensionable service.

60. In that connection Mr Spink pointed to proviso (5) which prohibits amendments which would breach section 67 of the Pensions Act 1995. That proviso was inserted into the scheme by a deed of variation in 2000. Section 67 in the version as it stood at the time prohibited any amendment to a pension scheme which would or might affect any entitlement or accrued right of a scheme member acquired before the power is exercised unless either (a) the member consents or (b) the scheme actuary has provided the trustees with a certificate that the change would not adversely affect those rights. The version of section 67 currently in force (and the sections which explain and amplify that section) are immensely complicated, but to cut a long story short they prohibit any amendment to a pension scheme which would have a detrimental effect on a member's subsisting rights unless either the member consents or the scheme actuary has provided the trustees with a statement that the benefits provided immediately before and after the change are actuarially equivalent. A member's subsisting rights at any time are to be determined as if he had opted, before that time, to terminate his pensionable service. Mr Spink's point is that if proviso (3) has the limited meaning for which the BBC contends, it already occupies the whole of the ground which would otherwise be covered by proviso (5). I do not consider that this is a weighty point. Rather, it is an example of "belt and braces" drafting of the kind that Nugee J alluded to in *Carr v Thales Pension Trustees Ltd* [2020] EWHC 949 (Ch), [2020] Pens LR 19 at [64]. There is, however, an additional aspect to Mr Spink's point. Whereas under the statute (as currently in force) a breach of section 67 makes an amendment voidable rather than void, proviso (5) prohibits such an amendment completely. He thus suggested that proviso (5) introduced an additional layer of protection for members. Since the introduction of proviso (5) long post-dated the drafting of proviso (3), I find it difficult to draw any firm conclusion from this.

61. Mr Tennet also referred us to rule 10.6. Rule 10.6 (1) provides that "an entitlement or prospective entitlement to a benefit under the Scheme" will be terminated if the beneficiary attempts to assign or charge it. Rule 10.6 (3) provides that the termination of a beneficiary's "interest under (1) above" will not affect entitlement to death benefit. I did not find this illuminating, not least because Rule 10.6 (1) is tied to "entitlement" and not to "interests" and the use of the word "interest" in rule 10.6 (3) is limited to what is provided by rule 10.6 (1) and must be read in that context.

62. Mr Tennet pointed to rule 18 of the rules which enables the BBC to give notice to the Trustee terminating its liability to contribute to the scheme. Although there are issues of interpretation about the precise scope of rule 18 which are outside the scope of this appeal, I will assume for present purposes that it is therefore within the BBC's power to prevent any further accrual of pension rights under the scheme by persons still employed by the BBC. It followed, Mr Tennet argued, that if the BBC could prevent any further accrual of pension rights under the scheme by freezing it, it would make no sense for it to be unable to reduce the rate of accrual of such rights.

63. There is, in my view, some force in this point. But I do not consider that the fact that the BBC has what one might call the nuclear option necessarily leads to the conclusion that the word "interests" in proviso (3) is restricted to accrued rights to pensions. The BBC's power to terminate further liability to contribute to the scheme is a power which is to some extent constrained by what, in the jargon, is known as its "*Imperial* duty" (see *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 1 WLR 589); that is to say that it must be exercised in good faith. It is not, of course, a fiduciary

power, and in deciding whether or not to exercise it the BBC may look after its own financial interests, to the extent that they do not conflict with that duty. Moreover, it is a power to terminate further liability to contribute to the scheme as a whole; not a power to terminate further liability to contribute to part only of the scheme. That would require the BBC to comply with the duty as regards all members of the scheme, whether active or deferred and whether accruing pension by reference to final salary or career average. What it does not permit is the differentiation between one category of member and another.

64. In addition, the right on the part of the BBC to terminate future liability to contribute is to be contrasted with the power of amendment which, in my judgment, presupposes the continuing existence of the scheme both before and after amendment. As Mr Green KC submitted on behalf of the trustee, whatever may or may not be envisaged about scheme cessation does not tell you much about amendment of an ongoing scheme. The same point applies equally to the current power under rule 18 and also to the previous power under rule 22 of the 1949 deed.

65. I have already pointed out major differences between the structure of the scheme set up by the 1949 deed and the scheme as it now exists. If one were to consider the meaning of "interests" in the landscape of the 1949 deed, I think that the judge was right in his evaluation at [55]:

> "… 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 (Original emphasis)."

66. The points developed by both counsel are intricate, and were skilfully advanced. But the starting point (and usually the end point) is, in my view, the natural meaning of the phrase seen in its context. The question is whether a proposed amendment affects the interests of Active Members.

67. Mr Tennet placed some reliance on the role of the actuary. His point was that the relevant "interests" referred to in proviso (3) were intended to be capable of actuarial valuation. The task of the actuary in deciding whether to certify under paragraph (a) or

(b) required him to look at the position of each Active Member individually in order to decide whether his or her "interests" would be affected by the proposed amendment and/or whether substantially equivalent benefits would be provided. It could not have been intended that the actuary would have to perform the impossible task of valuing an interest which would depend on imponderables such as whether the particular member would leave the BBC. I find that a very difficult argument to accept. In the first place it would place a very onerous duty on the actuary in relation to a scheme in which there may be many thousands of Active Members. Second, the consequences of this approach might result in the actuary certifying in respect of some Active Members but not others. There would in consequence be unequal treatment as regards those Active Members in relation to whom the actuary had given individual certificates and those Active Members in relation to whom no such certificate had been given, even though they were all members of the same class. Not only does that seem to me to be wrong in principle, it is likely to complicate the administration of the scheme. That would not, in my view, be an interpretation which would give "practical effect" to the scheme. In my judgment, therefore, the role of the actuary is to look at Active Members as a class or, where a proposed amendment would affect a sub-group of Active Member (say, Career Average Benefits 2006 Members only) that sub-group.

68. Third, it is within the professional expertise of an actuary to make assumptions about the future as he would have to do if, for example, considering whether a pension scheme was in deficit. Fourth, in deciding whether or not to certify the actuary does not have to come up with a precise valuation. All that the actuary needs to do is to decide (a) whether the Active Members will be substantially worse off after the amendment than they were before and (b) if so, whether the new benefits on offer are substantially equivalent to the old benefits.

69. I consider therefore, that proviso (3) is concerned with Active Members (or a sub-group of Active Members whose interests are similarly affected) as a class and not any individual Active Member. That ties in with exception (c) to proviso (3) which allows an amendment to proceed with the consent of the relevant Active Members as a class. It is very unlikely that the drafter could have intended that relevant Active Members as a class could have the right to approve or veto a proposed amendment which affected only one or some of them. Mr Tennet said that any amendment had to be proposed by the trustee which had fiduciary duties to all members of the scheme. A scenario in which half the Active Members vote away the rights of the other half was not one which would be supported by the trustee. I did not find this a convincing point. The vote by Active Members comes after the trustee has proposed an amendment. Thus the amendment proposed by the trustee (in conformity with its fiduciary duty) precedes and is independent of any vote by Active Members. The trustee cannot accurately predict the outcome of any vote; and in any event those Active Members who cast their vote have no fiduciary duties to anyone. This point does not detract from my view that proviso (3) is concerned with Active Members (or a sub-group of Active Members) as a class. Accordingly, in my judgment the fact that a particular Active Member may (for example) leave the employment of the BBC and thus have a lesser interest in an amendment affecting future benefits than another Active Member is beside the point. The relevant question, therefore, is whether the interests of the relevant Active Members (or a sub-group of Active Members) as a class are affected by the proposed change. That question can only be asked and answered on the basis that there will continue to be that class of relevant Active Members who acquire rights under the

scheme both before and after amendment. It follows, in my judgment, that whatever the position of a particular Active Member might be, there will be relevant Active Members participating in the scheme following the amendment; and the question is whether their current and prospective rights under the amended scheme will differ from their rights under the scheme as it stood before the amendment.

70. There is one further point arising out of the ability of Active Members as a class to approve a proposed amendment whatever its effect (subject to proviso (5)). In contrast to that exception in proviso (3), the equivalent exception in proviso (4) requires the individual consent of persons who are not Active Members. Those persons covered by proviso (4) are either deferred members or persons whose pensions are in payment. Mr Spink posed the question: what is the reason for the difference in treatment? His answer, which I found persuasive, is that the difference between Active Members within proviso (3) and those persons within proviso (4) is that the former, but not the latter, have interests based on future pensionable service, whereas those within proviso (4) have only interests based on past pensionable service. Where, for example, the BBC proposed the amendment of future service benefits for Active Members, which would normally have been negotiated beforehand with the unions and the workforce and may well form part of a broader package, a majority vote by Active Members would be enough.

71. The judge said at [42]:

> "… 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))." (Original emphasis)

72. That is a straightforward reading of the phrase in its context; and I agree with it. I agree, therefore, with Mr Spink's submission that the use of the word "interests" is a deliberately simple, broad and open-textured word. Unlike other examples of fetters on powers of amendment (some of which I have referred to above) it is not tied to "rights"; still less to rights that have "accrued" or been "secured". Nor is it limited by reference to any particular cut-off date. Nor is there any limitation by reference to "past contributions" or "contributions already made". I agree also with his submission that one of the most valuable interests that an Active Member has is the ability to continue to accrue benefits on particular terms as their length of pensionable service increases, even if they have no enforceable legal right under the scheme to continue in

employment with the BBC. To put the point another way: if one asks whether an Active Member has an interest in the particular features of the benefit structure that are the subject of the questions raised in the claim form, my answer, like that of the judge, is: yes.

73. This reading is, in my judgment, reinforced by a consideration of the circumstances in which an amendment may be made which does affect the interests of Active Members. One such circumstance is where the amendment is approved by the Active Members. Another is where:

> "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."

74. The equivalent benefits referred to in this exception are benefits which the Active Member will enjoy following an amendment. In that context, the reference to benefits provided by legislation is of some significance. It would be a rare piece of legislation which would retrospectively apply to a member's accrued rights. The prospect that legislation would operate for the future is far more likely. In context therefore the possibility that the actuary would certify that equivalent benefits are provided by legislation is far more likely to refer to benefits equivalent to benefits arising from future service than benefits equivalent to accrued benefits. Mr Tennet referred in this connection to rule 14 of the 1949 scheme which enabled a member to ask for a greater pension in lieu of the pension which would otherwise be payable under the scheme until he reached statutory pension age and a lower pension thereafter. But that is a power that is triggered only by the request of an individual member; and, so far as we were shown, is not replicated in the scheme as it now stands. I do not consider that it sheds light on a power in the current scheme exercisable without the member's consent.

The questions answered

75. I would therefore endorse the judge's reasoning in his admirably clear judgment and his answers to the questions 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;
>
> **Yes**
>
> (b) any linkage of the value of those past service rights to final salary;
>
> **Yes, subject to the qualification that in relevant cases the linkage is between past service benefits and Final Pensionable Salary calculated by reference to such part of an Active Member's future salary and wages as may,**

consistently with the Court of Appeal's decision in *Bradbury v BBC* [2017] EWCA Civ 1144, be determined by the BBC to qualify as Basic 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;

Yes

(d) the ability of members to accrue any future service benefits under the Scheme;

Yes, on the basis that this question is directed to the possibility of the Scheme being closed to future accruals of benefits.

Result

76. I would dismiss the appeal.

Lady Justice Falk:

77. I agree.

Sir Christopher Floyd:

78. I also agree.