

# IRISH PENSIONS

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# Trustee Actions under the Spotlight



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## *British Airways Plc v Airways Pension Scheme Trustee Limited<sup>1</sup> -*

In this recent case, a majority of the English Court of Appeal held that an amendment made by the trustee of the Airways Pension Scheme (the “**Scheme**”), which introduced a trustee power to award discretionary post-retirement pension increases, went beyond the proper purpose of the amendment power and was invalid.

This has been seen as an important decision in the UK. While the case turns on its own facts and is of persuasive authority only in Ireland, it touches on points of general application relating to the exercise of an amendment power, the principle or proper purpose test and the role of trustees in relation to the scheme for which they act.

## **Background**

The catalyst for the rule change made by the trustee was the decision at UK Government level that a switch should be made from the Retail Price Index (RPI) to the Consumer Price Index (CPI) as a measure for setting minimum pension increases for public sector schemes. Due to the design of the Scheme, this change affected the Scheme and its members. The members of the Scheme were vocal in expressing their concern that, as a result of this change, future pension increases would be reduced and pensions would not be adequately protected against inflation.

Unusually, under the terms of the Scheme, the trustee had a unilateral amendment power (ie, the approval of the employer was not required in order for amendments to be made). In 2011, the trustee exercised this power to introduce a rule change which gave them the power to grant

<sup>1</sup> British Airways Plc v Airways Pension Scheme Trustee Limited [2018] EWCA Civ 1533



discretionary increases on pensions in payment, over and above those granted automatically under the Scheme.

The trustee exercised this new power for the first time in February 2013 to award an additional pension increase of 0.2% over CPI. At the time, British Airways (“**BA**”) the sponsoring employer of the Scheme, called the trustee decision “*perverse and irrational*”, estimating that it would cost an additional £12 million in funding. Soon afterwards, BA initiated legal action against the trustee in the UK High Court. The two main questions at issue were firstly whether, in introducing the power to grant discretionary increases, the power of amendment was validly exercised and secondly whether, if the amendment was properly made, it was exercised validly in granting the increase. Connected with this second question was whether the

granting of a discretionary increase conflicted with a prohibition in the trust documentation on “*benevolent or compassionate*” payments.

The High Court held<sup>2</sup> that the trustee was entitled to amend the Scheme to introduce the discretionary increase power and that their subsequent exercise of that power was also valid.

### Grounds of Appeal

BA appealed the decision of the High Court to the Court of Appeal, claiming that the exercise of the amendment power to introduce the discretionary increase power was beyond the scope of, and contrary to, the purpose of the Scheme’s power of amendment. BA also appealed on the basis that the increase awarded in 2013 breached the prohibition on making “*benevolent and compassionate*” payments as set out in the objects clause of the Scheme.

### Ruling

By a two to one majority, the Court of Appeal held that the amendment to the Scheme rules to allow the trustee to award discretionary increases went beyond the purpose of the Scheme’s power of amendment. In this regard, it held that the purpose

<sup>2</sup> British Airways Plc v Airways Pension Scheme Trustee Limited [2017] EWHC 1191 (Ch)

of the power of amendment was to be determined by looking at the purpose of the Scheme as a whole.

Effectively, the Court of Appeal held that it was clear from the terms of the trust that it was never intended that the trustee could “*remodel the balance of powers between themselves and the employers*” by exercising the amendment power. In this regard, it was noted that the trust documents gave the employer the power to increase benefits however no such power was awarded to the trustee. The trustee’s function, based on a detailed review of the trust documents, was held to be to manage and administer the Scheme, “*not to design it*”.

Lewison LJ in his reasoning on this point noted that the amendment, in circumstances where the Scheme was in deficit, would require BA to fund the “*additional benefits*” decided upon by the trustee. The Scheme provided for a number of circumstances in which the employer could be required to pay more, however discretionary increases were not one of these. Lewison LJ held that a distinction can be drawn between the exercise of a power of amendment, as considered in other pensions related cases, to augment

benefits from an existing surplus<sup>3</sup> (or to increase employer contributions to fund existing benefits<sup>4</sup>), and the exercise of such a power to increase benefits saying “*I do not agree that, in effect, the Trustees can do whatever they like so long as their ultimate purpose is to provide pensions.*”

The Court unanimously agreed that the discretionary increase awarded in 2013 did not constitute a “*benevolent and compassionate*” payment (this was no longer strictly relevant given that the amendment itself was found to be invalid). The Court refused BA permission to appeal this point, but granted the trustee permission to appeal to the Supreme Court. It remains to be seen whether the trustee will, in fact, appeal.

### **What does this mean for trustees of Irish schemes?**

As noted above, as a decision of the English Court of Appeal, the judgment in this case is of persuasive authority only in the Irish context. That said, given the relative dearth of Irish case law on pensions, it is likely that, if faced with a similar fact scenario, the Irish Courts would be guided by the reasoning in this case.

3 Law Debenture Trust Corp Plc v Lornho Africa Trade and Finance Ltd [2003] Pen LR 13

4 PNP Trust Co Ltd v Taylor [2010] Pens LR 261; Stena Line Ltd v Merchant Navy Ratings Pension Fund Trustee Ltd [2010] Pens LR 411

Most schemes do not provide for a unilateral amendment power. The finding, however, that the amendment made was within the scope of the express wording of the power but was invalid on the basis that it was made for an improper purpose can be said to have relevance to any exercise of an amendment power, whether or not that power may be exercised unilaterally. In this regard, both trustees and employers should bear in mind that the purpose of the amendment power was determined by looking at the purpose of the Scheme as a whole, and not simply at the wording of the amendment power itself. Trustees should also note the findings of the Court regarding the limits of the role of the trustee in this case, which could be determined based on an examination of the Scheme's trust documentation. To avoid challenge of a trustee decision, trustees should be careful to ensure that they are aware of the limits of their role and avoid straying beyond those limits, when making decisions.

It is also worth bearing in mind that, although it is unusual for a scheme to contain a unilateral power of amendment, it is not uncommon for a scheme to provide for other powers that can be exercised unilaterally by trustees. This decision suggests that careful consideration should be given to the exercise of such powers to ensure that they are not exercised for an improper purpose. From the perspective of the employer, the judgment may provide an avenue for challenging the exercise of a unilateral power by trustees where such exercise results in an increase in benefits (and associated costs) provided for under the trust. ■

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