A 'Two Steps' Tango: Amending Amendment Powers

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Amendment powers: two steps

This paper looks at the question of whether an amendment power[1] within a trust can itself be amended by use of that power.[2] It argues that the answer to this question depends on the amendment being made and whether it is within the scope of the (unamended) amendment power, in particular any prohibitions within that power.

Some statements in the cases, in particular the 'two steps' comment by Lord Millett in *Air Jamaica*, could be taken as meaning that amendment power cannot itself be amended in any circumstances. This paper argues that this would be too wide an approach – while probably right in the relevant cases (ie using the power to delete a prohibition), it is going too far to say that the amendment power can never itself be amended (eg where a prohibition is not being deleted, but instead some other facet, eg whether amendments need to be by deed or not).

Air Jamaica and 'two steps'

In the Privy Council decision in *Air Jamaica v Charlton*[3] (an appeal from Jamaica), Lord Millett commented that the amendment power in an occupational pension scheme could not be used to remove a restriction in that power on amendments that would allow payments to the employer.

In *Air Jamaica v Charlton*, the Privy Council dealt with the position where an amendment had been made to a Jamaican pension scheme to provide for payment back of funds to the employer (despite a limit in the amendment power). Lord Millett, giving the judgment of the Privy Council, commented that 'the trustees could not achieve by two steps what they could not achieve by one'.

The Privy Council was dealing with a plan that was winding-up and had a surplus. Lord Millett held:[4]

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1 For amendment powers generally, see David Pollard, *The Law of Pension Trusts* (Oxford University Press, 2013); Gino Dal Pont, 'The amendment of trust deeds – a super(annuation) gloss?' (2008) 31 Australian Bar Review 1; Dan Schaffer, 'Amendment rules: dealing with defective amendments' (APL 1996 conference) and 'Amendment powers – playing within the rules' (APL 2000 conference); Ian Greenstreet 'Practical issues when updating your pension scheme documentation' (APL 2007 conference); Isabel France, 'Pension scheme amendments – getting it right' (2004) 18 TLI 202; Richard Leigh 'Scheme amendments in the light of the Pensions Act' (APL Pensions Act conference, 1997).

See also in Australia, Pamela McAlister, 'Accrued Benefits – In Search of a Legal Meaning' (2000) 11 ASLB 73; Michael Mathieson 'Secured Versus Accrued Benefits: The Brashs Case' (2002) 13 ASLB 53; David MacLean, 'Effect of an Invalid Deed of Amendment of a Superannuation Fund Trust Deed' (2001) 76 ALJ 158.

2 This paper is based on part of the chapter on amendment powers in my book *The Law of Pension Trusts* (Oxford University Press, 2013) but updated and expanded. It is based on a talk given to the APL in February 2015.

3 [1999] 1 WLR 1399, PC.

4 At p 1411.

> 'it is difficult to see how the plan could lawfully be amended in any significant respect once it had actually been discontinued. But even if it could, their Lordships are satisfied that it could not be amended in order to confer any interest in the trust fund on the company. This was expressly prohibited by clause 4 of the trust deed. The 1994 amendments included a purported amendment to the trust deed to remove this limitation, but this was plainly invalid. The trustees could not achieve by two steps what they could not achieve by one.'

This 'two steps' statement runs the risk of being treated as a self-standing legal principle in relation to the use of amendment powers. As we shall see, this would be an error – there is no general 'two steps' prohibition, but it is usually right that a prohibition in an amendment power itself cannot be removed by use of that power – because that use would itself be in breach of the prohibition.

An example of this point in relation to amendment powers is the statement (pre-dating *Air Jamaica*) that: 'As a general rule of interpretation, it seems to me that the amendment power would not itself be capable of amendment.'

This is taken from my first talk to the Association of Pension lawyers (APL) 25 years ago in February 1990.[5] It was a joint talk, with Daniel Shelley, on amendment powers. A copy of my section is in the library on the APL website. Re-reading the paper, it is clear that much has changed over the intervening 25 years.

I now think that the statement above is too wide a statement – in my defence, the paper goes on to comment that the reason for the limit is that removing a restriction is in itself contrary to the restriction. I still think that is right.

Pension scheme amendment powers – general

It is common (and probably completely impractical otherwise) for wide amendment powers to be included within the trust deeds and other instruments governing an occupational pension scheme. This is because:

(a) such schemes and trusts potentially last for a long time – even if a scheme becomes closed to future new entrants, it will still be providing benefits for members (and potentially their spouses and dependants) until the last relevant member or dependant dies. Occupational pension schemes are not subject to the limits on the life of a trust under the rule against perpetuities.[6]

(b) the governing legislation and underlying tax position of occupational pension schemes is constantly changing. Starting with the Social Security Act 1973 (in relation to pensions regulation) and many finance acts (in relation to tax), it is a sign of the importance of occupational pension schemes that Parliament cannot resist making changes to the system.

5 David Pollard. '*Talk on Amendment Powers*' (APL seminar, 13 February 1990) at p 16. On the APL website.

6 Perpetuities and Accumulations Act 2009, s 2(4), exempts 'relevant pension schemes' (defined in s 15 to include an occupational pension scheme under Pension Schemes Act 1993, s1). Before 6 April 2010 contracted-out schemes and those with tax registration were excluded from the rule against perpetuities by Pension Schemes Act 1993, s 163 and the Personal and Occupational Pension Schemes (Perpetuities) Regulations 1990 (SI 1990/1143) (and before that see Social Security Act 1973, s 69). These were repealed from 6 April 2010 by the 2009 Act.

(c) in some cases the legislation is overriding or specific powers of amendment are included within the legislation. However in some it is not.
(d) the commercial needs of the employer and the members in relation to retirement provision may change over time. For example there has been an increasing shift over recent years away from a defined benefit (DB) accrual towards a defined contribution arrangements.
(a) discrimination laws are been made directly applicable to occupational pension schemes (particularly sex discrimination and, more recently, age discrimination). These have also tended to drive scheme amendments (particularly attempts to 'equalise' benefits between male and female members following the ECJ decision in *Barber*[7]).

Having noted this, a power of amendment probably cannot be implied into a pension scheme – for example see the Canadian case *Re Reevie and Montreal Trust Co of Canada*.[8] Some (limited) amendment powers are implied by statute.

In *Re Courage Group's Pension Schemes*[9] Millett J (as he then was) summarised this, holding that:

> '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.'

In *Capital Cranfield Trust Corporation Ltd v Sagar*,[10] Neuberger J was dealing with a case of whether the trustee had power to amend the scheme as part of its winding-up. He commented:

> 'In my judgment, particularly given that there are express fetters, it would be wrong to imply any further fetters unless it was plainly necessary and obvious that they should be implied. On the contrary, in the present case I think that it is by no means plain that such fetters should be implied.'

In *Stena Line Ltd v Merchant Navy Ratings Pension Fund Trustees Ltd*,[11] Briggs J at first instance held that an amendment power in a pension scheme should be given a broad interpretation. But on appeal,[12] Arden LJ in the Court of Appeal held:

> 'If by 'broad interpretation' the judge meant that the power of amendment should be interpreted with greater liberality than other documents purposively construed with a view to holding that an amendment is binding on Participating Employers who have not consented to it, I would disagree. In my judgment, a power of amendment should be interpreted precisely in accordance with its terms, neither more nor less.'

Express powers of amendment come in many forms and most often contain restrictions or limitations. Usually, the power will be exercisable by:

7 See the discussion by Warren J in *Premier Foods* [2012] EWHC 447 (Ch).
8 (1984) 46 OR (2d) 667, (1984) 10 DLR (4th) 286, Ontario CA.
9 [1987] 1 All ER 528 (Millett J) at 505G.
10 [2002] OPLR 151 (Neuberger J).
11 [2010] EWHC 1805 (Ch) (Briggs J) at paras [97] and [105].
12 *Stena Line Ltd v Merchant Navy Ratings Pension Fund Trustees Ltd* [2011] EWCA Civ 543, CA at para [48].

(a) the principal employer alone; or
(b) the trustees alone;[13] or
(c) the principal employer, with the consent of the trustees; or
(d) the trustees, with the consent of the principal employer.

In practice in my view there is no real distinction between the last two – it makes no difference in reality whether the trustee initiates the amendment (which is then agreed by the employer) or whether the employer suggests the change (which is then agreed by the trustees).[14]

The exercise of an amendment power will mean:

(a) the employer needs to exercise the power (or give its consent) in line with the implied duties on it, in particular the implied mutual duty of trust and confidence.[15] Its powers are not fiduciary (save in very rare cases);[16]
(b) the trustees need to exercise the power in accordance with their fiduciary duties;
(c) both employers and trustees need to exercise the power for a proper purpose;
(d) the exercise needs to be carried out in accordance with any relevant formalities (eg if exercisable by deed, there is a deed);
(e) the amendment needs to be within the terms and scope of the power;
(f) the amendment needs to comply with any implied limitations;
(g) the amendment needs to comply with any express restrictions in the power; and
(h) the amendment will need to comply with the statutory limitations on amendments (in particular s 67 of the Pensions Act 1995).

The effect of a failure to meet one or more of these requirements can differ. For example failure to comply with a mandatory condition (eg that an amendment must be by deed) can mean that the purported amendment is invalid and void.[17]

Conversely some other requirements may result in an amendment only partially taking effect (eg a reduction in benefits contrary to a restriction in the amendment power in relation to past service benefits, can be effective for future service, but invalid for past service). Some other requirements do not affect the amendment at all (eg usually a separate obligation to notify members of changes[18]) or make the amendment voidable at the discretion of the Pensions Regulator (breach of s 67 of the Pensions Act 1995, as amended by the Pensions Act 2004).

13 This is unusual, at least before a winding-up starts. For examples of unilateral trustee powers to amend or increase benefits, see the schemes in *Aitken v Christy Hunt* [1991] PLR 1 (Ferris J); *Harding v Joy Manufacturing Holdings Ltd* 2000 SLT 843, [2001] OPLR 235, CSIH and *Law Debenture Trust plc v Lonrho Africa* [2002] EWHC 2732 (Ch), [2003] OPLR 167 (Patten J).

14 But I have heard it argued that there is a difference. Andrew Short QC commented in a talk 'Trustees, Mistakes and Negligence Actions' (February 2015, White Paper Conference on Pensions Law) that the rule in *Hastings-Bass* can only apply if there is a breach by the trustee. He commented in a footnote (p 2, fn4): 'NB – the rule applies only to the acts of the trustee. Where the power to amend is vested in the employer but made subject to the consent of the trustee, it may be difficult to demonstrate that the act in question is the act of the trustee, see *Smithson v Hamilton* [2008] 1 WLR 1453.'

15 See *The Law of Pension Trusts*, Chapter 13.

16 See *The Law of Pension Trusts*, Chapter 11.

17 See eg *Briggs v Gleeds (Head Office)* [2014] EWHC 1178 (Ch), [2015] 1 All ER 533, [2014] 3 WLR 1469 (Newey J). An appeal to the Court of Appeal is scheduled for later this year.

18 *Betafence Ltd v Veys* [2006] EWHC 999 (Ch) (Lightman J) at [67] and see *The Law of Pension Trusts* at 17.169. Considered in *Briggs v Gleeds*.

Principles of construction

Much of the analysis in the cases on amendment powers in pension schemes involves the interpretation of the power. The courts have laid down various principles for the construction of pension schemes.

Practical and purposive

In *Courage*,[19] Millett J said that pension schemes 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 . . .'.

In *Mettoy Pension Trustees v Evans*[20] Warner J held that 'the court's approach to the construction of documents relating to a pension scheme should be practical and purposive, rather than detached and literal'. This was also the approach adopted by Millett J in *Courage*.[21] This was endorsed by the Court of Appeal in *National Grid v Laws*.[22] It has been cited in many later cases, for example Henderson J in *Gellately*.[23]

In *Mettoy*, Warner J went on to say that, although there are no special rules which govern the construction of pension scheme documents, the background facts or surrounding circumstances in the light of which they have to be construed include four special factors:

- The first factor is that the members are not volunteers, and their rights have contractual and commercial origins.
- Secondly, the documents have to be construed in the light of Inland Revenue (now HMRC) approval requirements.
- Thirdly, the background facts include 'common practice from time to time in the field of pension schemes generally'.
- Fourthly:
  'temporary and imprecise documents . . . are brought into existence as a result of the practice of the Inland Revenue and of the Occupational Pensions Board which is to recognise and give effect to such documents for statutory purposes, albeit to a limited extent. It would be inappropriate and indeed perverse to construe such documents so strictly as to undermine their effectiveness or their effectiveness for their purpose.'

Professor Dal Pont has criticised[24] the 'practical and purposive' wording as not adding much to the analysis of a provision, but instead just leading on to the adoption of a broad approach.

But the approach has been followed (and cited constantly in later cases). In *Independent Trustee Services Ltd v Knell*,[25] Norris J commented:

19 [1987] 1 All ER 528, [1987] 1 WLR 495 (Millett J) at 505.
20 [1991] 2 All ER 513, [1990] 1 WLR 1587 (Warner J) at 1610–11.
21 *Re Courage Group's Pension Schemes* [1987] 1 All ER 528 (Millett J) at 537.
22 [2000] ICR 174, [1999] OPLR 95, CA at 106 (para [41]).
23 [2011] EWHC 485 (Ch) [2011] All ER (D) 108 (Mar) (Henderson J). See also the Court of Appeal in *Re K & J Holdings Ltd; Capital Cranfield Trustees Ltd v Walsh; Capital Cranfield Trustees Ltd v Pinsent Curtis* [2005] EWCA Civ 860, [2005] 4 All ER 449, CA.
24 Gino Dal Pont 'The amendment of trust deeds – a super(annuation) gloss?' (2008) 31 Australian Bar Review 1 at pp 7–9.
25 [2010] EWHC 650 (Ch) (Norris J).

> 'Within the context of a pension scheme the interpretation must be one that is practical and purposive, and if more than one interpretation is possible, the correct choice may depend on the practical consequences of choosing one rather than the other'

He later cited on this point the observation of Neuberger J (as he then was) in *Bestrustees v Stuart*[26] that:

> '... A pension scheme is likely to continue for a substantial period of time and ... those most affected by them and entitled to protection from the Trustees, the employer and indeed the court, will be people who are comparatively poor, who will not have easy access to expert legal advice, and who will not know what has been going on in relation to the management of the Scheme. In those circumstances, it seems to me that protection of the beneficiaries requires the court to be very careful before it permits a departure from the plain wording and plain requirements of the Trust Deed.'

Stevens v Bell principles

In 2002 in the British Airways case, *Stevens v Bell*,[27] Arden LJ (with whom Waller and Auld LJJ agreed) set put a number of interpretation principles for pension schemes including in particular the following statement:

> '... a pension scheme should be construed so to give a reasonable and practical effect to the scheme ... it is necessary to test competing permissible constructions of a pension scheme against the consequences they produce in practice. Technicality is to be avoided. If the consequences are impractical or over-restrictive or technical in practice, that is an indication that some other interpretation is the appropriate one.'

No special rules of construction for pensions

Arden LJ held that there are no special rules of construction[28] but pension schemes have certain characteristics which tend to differentiate them from other analogous instruments. She went on to hold, in summary:

> 'First, members of a scheme are not volunteers: the benefits which they receive under the scheme are part of the remuneration for their services and this is so whether the scheme is contributory or non-contributory. This means that they are in a different position in some respects from beneficiaries of a private trust. Moreover, the relationship of members to the employer must be seen as running in parallel with their employment relationship. This factor, too, can in appropriate circumstances have an effect on the interpretation of the scheme.

26 [2001] OPLR 341 (Neuberger J) at para [34].

27 [2002] EWCA Civ 672, [2002] OPLR 207, CA at paras [26] to [32]. Sometimes cited as *British Airways Pension Trustees Limited v British Airways plc*.

28 See also Knox J in *LRT Pension Fund Trustee Co Ltd v Hatt* [1993] OPLR 225 at 254: 'Pension schemes operate under the law, and it is no part of the court's functions to disregard the law. The settled practice of experienced pension scheme practitioners may well constitute a valuable guide to what the law is and how its provisions should be construed, just as the settled practice of conveyancers has long been recognised and given effect by courts dealing with conveyancing matters but that is not to say that pension scheme practitioners operate in a form of Alsatia or have the power to override the provisions of statute law or equity.'

> 28. Second, a pension scheme should be construed so [as] to give a reasonable and practical effect to the scheme. ... In other words, it is necessary to test competing permissible constructions of a pension scheme against the consequences they produce in practice. Technicality is to be avoided. If the consequences are impractical or over-restrictive or technical in practice, that is an indication that some other interpretation is the appropriate one.
> [...]
> 29. Third, in pension schemes, difficulties can arise where different provisions have been amended at different points in time. The effect is that the version of the scheme in issue may represent a ''patchwork'' of provisions ... The general principle is that each new provision should be considered against the circumstances prevailing at the date when it was adopted ... Likewise, the meaning of a clause in the scheme must be ascertained by examining the deed as it stood at the time the clause was first introduced.
> [...]
> 30. Fourth, as with any other instrument, a provision of a trust deed must be interpreted in the light of the factual situation at the time it was created. This includes the practice and requirements of the Inland Revenue at that time, and may include common practice among practitioners in the field as evidenced by the works of practitioners at that time. It has been submitted to us that the factual background is only relevant if the document is ambiguous. I do not accept this submission, which is inconsistent with the approach laid down by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896.
> [...]
> 31. Fifth, at the end of the day, however, the function of the court is to construe the document without any predisposition as to the correct philosophical approach.
> [...]
> 32. Sixth, a pension scheme should be interpreted as a whole. The meaning of a particular clause should be considered in conjunction with other relevant clauses. To borrow John Donne's famous phrase, no clause ''is an Island entire of itself''.'

Amending an amendment power

In my view, there is no reason in principle why an amendment power cannot itself be amended by use of the amendment power. The issue turns entirely on a question of construction of the amendment power.

If there is an amendment power that merely provides that the employer and the trustees may amend the terms of the Scheme (and the trust deed) from time to time, there seems to be no reason why that does not give power for the amendment power itself to be amended (eg to delete any requirement for the trustee to agree to future amendment or to impose a new method of amendment).

A similar principle was upheld by the House of Lords in relation to legislation. In *R (on the application of Jackson) v Attorney-General*,[29] the House of Lords upheld the use of the procedure in the Parliament Act 1911 to pass an Act of Parliament (regulating fox hunting) even though the procedure under the Parliament Act 1911 had been amended using its own provisions (by the Parliament Act 1949).

29 [2005] UKHL 56, [2006] 1 AC 262, HL. A nine-Lord panel. See further discussion below.

For example in *Re Smith*,[30] Lord Fraser (in the Court of Session) approved an amendment to a pension scheme moving the amendment power from the directors of a company to its liquidators. Lord Fraser held that the amendment was within the (wide) terms of the amendment power (and also did not infringe a limitation on amendments which prejudice the rights of members to benefits).

However, various issues can arise:

- Is it a breach of duty for the trustee (or the employer) to agree to the amendment? This is a general issue applicable to all uses of the amendment power.
- It is sometimes argued that amending a deed (or amending an amendment power) to include a further restriction, etc is then invalid as being 'fetter' on the power of the trustees. However this is misconceived in most situations. Trustees are continually 'fettering' their discretion by making and acting on decisions – for example in relation to members or investments or amendments. The equivalent point (a release of a power) was raised in *Mettoy Pension Trustees Ltd v Evans*[31] and dismissed by Warner J. It seems to add nothing to the duty point made at (a) above.[32]
- It would usually be very difficult for an existing *restriction* in an amendment power to be deleted using the amendment power itself. This is sometimes raised[33] as a reason why the amendment power cannot of itself be amended, but this would be a wider proposition.

Removing a prohibition

This turns on a question of interpretation of the amendment power itself. Although the cases do not deal with this very clearly, it must be right that a prohibition in an amendment power cannot itself be deleted merely by using the amendment power. By way of example, take an amendment power which includes a proviso that:

> '*no amendment may be made that would result in the payment back of any part of the fund to the employer*'

In my view, it is not possible to delete this prohibition from the amendment power using the amendment power itself. The reason for this is that the effect of the amendment (ie amending the amendment power) would be to contravene the restriction. The only effect of deleting the restriction would be in order to facilitate or enable a later amendment that purported to allow a payment to the employer.

For examples of this see *Harwood-Smart v Caws*,[34] *HR Trustees Ltd v German*[35] and, from Australia, *BHLSPF Pty Ltd v Brashs Pty Ltd*[36] and from New Zealand, *UEB Industries Ltd v W S Brabant*.[37]

30 (1969) SLT 94 (Lord Fraser).
31 [1991] 2 All ER 513 (Warner J) at 561h.
32 See further David Pollard 'Trustees and Fiduciaries: the Limits on Any 'No Fetter' Rule' (APL conference, November 2014), (2014) 28 TLI 105 (Part 1) and (2014) 28 TLI 191 (Part 2).
33 For example by me in my 1990 APL talk, mentioned above.
34 [2000] OPLR 227 (Rimer J).
35 [2009] EWHC 2785 (Ch), [2009] All ER (D) 235 (Nov) (Arnold J) at para [125].
36 [2001] VSC 512 (Warren J).
37 [1992] 1 NZLR 294, NZ CA.

In the 1941 private trust case, *Re Bruners' Declaration of Trust*,[38] Simonds J held that a limit in the amendment power (no change to clause 3) included the implied limits in clause 3, which could not therefore be deleted.

As mentioned above, in *Air Jamaica v Charlton*,[39] the Privy Council dealt with the position where an amendment had been made to a Jamaican pension scheme to provide for payment back of funds to the employer (despite a limit in the amendment power). Lord Millett, giving the judgment of the Privy Council, commented that 'the trustees could not achieve by two steps what they could not achieve by one'.

The Privy Council was dealing with a plan that was winding-up and had a surplus. Lord Millett held:[40]

> 'it is difficult to see how the plan could lawfully be amended in any significant respect once it had actually been discontinued. But even if it could, their Lordships are satisfied that it could not be amended in order to confer any interest in the trust fund on the company. This was expressly prohibited by clause 4 of the trust deed. The 1994 amendments included a purported amendment to the trust deed to remove this limitation, but this was plainly invalid. The trustees could not achieve by two steps what they could not achieve by one.'

The result is clearly correct (for the reasons given above) but, if taken literally, the reasoning of Lord Millett in the Privy Council is too wide and difficult to understand.

Take a simple example:

- A scheme (say) contains a restriction in its investment power saying that none of the assets of scheme can be invested in land.
- Clearly if the trustees then wanted to make an investment in land, this would be unauthorised (and a breach of trust).
- However, if there was an unfettered amendment power, it would not be contrary to the width of that power for the employer and the trustee to agree an amendment deleting the restriction in the investment power and the trustee then arranging to invest in land.
- This would seem unexceptional and there would be no reason for the law to say that this was not possible.
- However it seems to squarely fall within the 'two steps' statement of the Privy Council in *Air Jamaica*, which must therefore be regarded as too wide on this point[41] and so only applicable where there is a prohibition in the amendment power.

Case law on amendments following *Air Jamaica*

In the 2009 *IMG case*, *HR Trustees Ltd v German*,[42] Arnold J followed *Air Jamaica*, holding:

38 *Re Brunner's Declaration of Trust, Coghill v President and Council of Cheltenham College* [1941] 2 All ER 745 (Simonds J).

39 [1999] 1 WLR 1399, PC.

40 At p 1411.

41 This seems a good example of a case where the judges have expressed a principle too widely. See, eg the comment (albeit in a different context entirely) by Lord Walker in *Pitt v Holt* [2013] UKSC 26 at [32] that the decision in *Mettoy* as one that 'can claim to be an application of Buckley LJ's summary statement of principle, but only if that statement is taken out of context and in isolation from the earlier part of the judgment'. See also Lord Walker in *Bridge Trustees v Houldsworth* [2011] UKSC 42 at [59] '... apparently wide propositions may have to be read in the context of the particular facts of the case to which they related.'

42 [2009] EWHC 2785 (Ch) (Arnold J).

'**The Employers' second argument: clause 7(i) amended to rule 27**

115. The Employers' second argument is that, in adopting rule 27 of the 1981 Rules, the Trustee exercised the power of amendment conferred by clause 7(i) to amend clause 7(i) itself. It is common ground that the procedural requirements of clause 7(i) were satisfied, since the 1981 Rules were adopted by the Trustee by a written instrument under hand.

116. As I understand the arguments of counsel, it is also common ground that the validity of this amendment depends on two questions. First, was the amendment within the scope of the power of amendment upon its true construction? Secondly, was the amendment a proper exercise of the power of amendment? The Employers contend that both questions should be answered in the affirmative, while the Existing Members contend that they should both be answered in the negative.

117. The scope of the power of amendment. The correct approach to interpreting powers of amendment was stated by Lord Tomlin in *Hole v Garnsey* [1930] AC 472 at 500:

> ''In considering such a power as this, it must, I think, be confined to such amendments as can reasonably be considered to have been within the contemplation of the parties when the contract was made, having regard to the nature and circumstances of the contract. I do not base this conclusion upon any narrow construction of the word 'amend' in Rule 64, but upon a broad general principle applicable to all such powers.''

'118. Clause 7(i) permitted the Trustee to ''alter or add to *any* of the provisions of this Declaration [emphasis added]''. Taken literally, this wording includes clause 7(i) itself. Furthermore, clause 7(i) does not contain any explicit prohibition on amendments to clause 7(i). The Employers contend that no such prohibition is implied. In support of this contention the Employers rely upon the statement of principle of Millett J (as he then was) in *Re Courage Group's Pension Schemes* [1987] 1 WLR 495 which was cited with approval by Arden LJ in *British Airways* at [28]. Accordingly, the Employers contend that clause 7(i) empowered the Trustee to amend clause 7(i) by replacing it with rule 27 either with effect from 21 October 1977 or with effect from 1 July 1981.

119. The Existing Members contend that clause 7(i) cannot be construed as permitting an amendment to remove the proviso or fetter ''but no amendment shall have the effect of reducing the value of benefits secured by contributions already made'' (''the Fetter''), since otherwise the Trustee could circumvent the Fetter by first amending clause 7(i) to delete the Fetter and then exercising the amended clause 7(i) in a manner precluded by the Fetter. The Existing Members also contend that clause 7(i) cannot be construed as permitting an amendment to replace a unilateral power of the Trustee by one requiring the consent of the Principal Employer.

120. The Existing Members' first contention receives considerable support from three authorities. In *UEB Industries Ltd v W S Brabant* [1992] 1 NZLR 294, the original trust deed establishing the pension scheme in 1972 contained a permanent alienation clause (clause 13) which included the proviso ''and notwithstanding anything herein contained no amendment or alteration of this Deed shall be made or permitted the effect of which would authorise any such payment or reversion''. In 1978 the trustee exercised its power of amendment under clause 10 of the 1972 deed to rescind that deed and replace it with a new deed and rules containing a permanent alienation clause without that proviso. In 1980 the trustee purported to introduce a power to refund surplus to the employers in the event of a winding up of the scheme and a

corresponding exception to the permanent alienation clause. When the scheme was wound up, the New Zealand Court of Appeal held that the amendment to the permanent alienation clause in 1978 was ultra vires. The leading judgment was given by Cooke P (as he then was), who said at 301:

> ''As to the main point, it is evident that the introduction in 1980 of provision for payment to the employer ... was beyond the power of the trustees unless the limitation on their amending power contained in the last limb of clause 13 of the original 1972 deed, in the words beginning 'and notwithstanding', had in some way been removed. The discarding of that limb in clause 13 of the deed of 22 May 1978 might be alleged to have the effect of enlarging the scope of the amendment powers in clause 10. But patently the trustees could not enlarge their own powers so as to remove a restriction to which they were subject from the very foundation of the trust. The power of amendment conferred on the trustees when the fund was established did not extend to an amendment the effect of which would be to permit or authorise in some circumstances a payment or reversion to the company. It seems inescapable that, if on its true construction the deed of 22 May 1978 authorised the introduction into the rules of a provision for payment or reversion to the employers (such as was introduced in 1980), to that extent the deed of 1978 was beyond the powers of the trustees. It is a simple case of ultra vires or acting outside power. In some of the argument the expression 'fraud on a power' has been used but it need not be invoked and seems to me not altogether appropriate. Certainly the motives for the change in 1978 do not require examination. It is simply that, whether or not dropping the restriction on the power of amendment was deliberate, it was not something which the trustees had power to do.''

'121. In *Air Jamaica Ltd v Charlton* [1999] 1 WLR 1399, the original trust deed establishing the scheme in 1969 contained a clause (clause 4) which provided that ''No moneys which at any time have been contributed by the company under the terms hereof shall in any circumstances be repayable to the company''. Section 13.1 of the plan authorised the company to amend the plan and section 13.2 authorised the company to discontinue the plan, but not so as to enable any part of the trust fund to be used otherwise than for the exclusive benefit of the members or other persons entitled to benefits under the plan. In 1994 the trust deed and plan were amended by deleting the fetters from the amendment and discontinuance provisions and inserting a power to return surplus to the company. The Privy Council held that the purported amendment to delete the fetter was invalid. The judgment of the Privy Council was delivered by Lord Millett, who said at 1411G:

> ''... their Lordships are satisfied that [the plan] could not be amended in order to confer any interest in the trust fund on the company. This was expressly prohibited by clause 4 of the trust deed. The 1994 amendments included a purported amendment to the trust deed to remove this limitation, but this was plainly invalid. The trustees could not achieve by two steps what they could not achieve by one.''

'122. In *BHLSPF Pty Ltd v Brashs Pty Ltd* [2001] VSC 512 the original trust deed included provisions (rules 15 and 18) which gave the trustees discretion to apply any unallocated part of the scheme assets in augmenting members' benefits, or in providing assistance to any member or ex member in case of need, sickness or hardship, and to

apply any ultimate surplus on winding up by dividing it amongst all remaining members in such proportions as the trustees saw fit. Rule 9 permitted the trustees to modify etc the trust deed ''provided that no such modification rescission alteration or addition shall operate so as to detract from the benefits secured to a member by the contributions paid by him and by the Company in respect of him prior to the date of such modification rescission alteration or addition''. In 1974 the trustees replaced the original trust deed with a deed which contained no provisions corresponding to rules 15 or 18. Warren J in the Supreme Court of Victoria held that the deletion of rules 15 and 18 was ultra vires rule 9.

123. Counsel for the Employers argued that these authorities should be distinguished from the present case on the ground that the relevant provisions in those cases contained restrictions that were clearly intended to be permanent, whereas clause 7(i) of the 1977 Deed did not. I do not accept this argument. Clause 7(i) of the 1977 Deed was plainly intended to protect the interests of the members by preventing amendments which had an effect detrimental to their interests. In my judgment it cannot have been the draftsman's intention to permit such amendments by an indirect route when he had prohibited them directly. Accordingly, I consider that the reasoning in *UEB*, *Air Jamaica* and *BHLSPF* is applicable to the present case.

124. Counsel for the Employers also argued that the restriction in clause 7(i) of the 1977 was not nugatory if it could be dispensed with by amendment, since it would have effect prior to any such amendment. In support of this argument counsel relied upon the reasoning of Ferris J in *Aitken v Christy Hunt plc* [1991] PLR 1, holding that the exercise by trustees of a power of amendment so as to remove a requirement that the employer should consent to benefit augmentations did not render the requirement pointless since it applied down to the date of its removal. I have some doubt as to whether this reasoning can be reconciled with that in *UEB*, *Air Jamaica* and *BHLSPF*. In any event, the decision appears to me to be one that depends on the precise terms of the provisions in issue in that case.

125. I therefore conclude that the introduction of rule 27 was outside the scope of the power of amendment conferred by clause 7(i) for the first reason given by the Existing Members. In those circumstances it is not necessary to consider the Existing Members' second reason. In my judgment the consequence of this is that rule 27 is invalid in its entirety. This is not a situation like that considered by Neuberger J (as he then was) in *Bestrustees v Stuart* [2001] PLR 283 where the amendment is partially valid because it is possible to distinguish conceptually between the valid part of the exercise of the power and the invalid part.'

Similarly Warren J in 2014 in *IBM v Dalgleish*:[43]

'... an amending party cannot achieve in two steps what he cannot achieve in one (eg by purporting to delete a fetter to an amendment power and subsequently making a second amendment which would have been precluded by that fetter): see *Air Jamaica v Charlton* [1999] 1 WLR 1399 at 1411G and *HR Trustees Ltd v German & IMG* [2009] EWHC 2785, [2010] PLR 23 at [115]–[125], especially [123].'

43 *IBM United Kingdom Holdings Ltd v Dalgleish* [2014] EWHC 980 (Ch), [2014] All ER (D) 54 (Apr) at [163]

What if not a prohibition being deleted?

But these are all cases where a restriction in the amendment power itself was being removed.

Conversely, take an amendment power stating:

> 'Amendments to the Trust Deed and the Scheme may be made by the Employer by deed with the consent of the Trustee.'

It seems to me to be perfectly within the terms of such a power for the Employer and Trustee to agree (in a deed) to amend the power so that (say) future amendments can be by deed or in writing.[44]

It is worth noting that the 'two steps' analysis was also used by the House of Lords in 2005 in the fox hunting case, *R (on the application of Jackson) v Attorney-General*.[45] As already mentioned, in this case the House of Lords upheld the use of the procedure in the Parliament Act 1911 to pass an Act of Parliament (regulating fox hunting) even though the procedure under the Parliament Act 1911 had been amended using its own provisions (by the Parliament Act 1949).

The Parliament Act 1911 allows, in s 2(1), 'any' public bill to be enacted using a special procedure (where the consent of the House of Lords is not needed). But this provision is stated *not* to apply to a 'Money Bill' or 'a Bill containing any provision to extend the maximum duration of a Parliament beyond five years'. In the *Jackson* case, the House of Lords considered the scope of that section and held (unanimously) that it was wide enough to allow the section itself to be amended by the special Parliament Act procedure.

The Law Lords also considered whether the section was wide enough to allow a future bill to be enacted using the special procedure deleting the restriction on the length of a Parliament. Clearly the special procedure could not be used to enact a bill that just provided for an extension, but could two steps be used, that is, a first bill deleting the restriction and then a later bill extending the life of Parliament?

This was clearly hypothetical in the case being considered, but the Law Lords considered the point. Lord Bingham thought that this process would be allowed,[46] but the majority were against this. Lord Nicholls held:

> '[57] ... The wording of s 2(1) of the 1911 Act makes clear beyond a peradventure that when enacting this statute Parliament intended the Commons should not be able, by use of the new s 2 procedure, unilaterally to extend the duration of Parliament beyond this newly-reduced limit of five years. The political party currently in control of the House of Commons, whichever it might be, could not use its majority in that House as the means whereby to postpone accountability to the electorate. The government could not, of itself, prolong its period in office beyond a maximum of five years. Despite the 1911 Act, such an extension would still require the approval of the House of Lords.
> [58] So much is apparent from the express language of the Act. But would it be open to the House of Commons to do indirectly by two stages what the House cannot do directly in one stage? In other words, could the s 2 procedure be used to force through a

44 The 'two steps' argument was not raised in *Briggs v Gleeds* where it was argued that a later document added a new method of amendment. The new deed failed for other reasons: *Briggs v Gleeds* [2014] EWHC 1178 (Ch); [2015] 1 All ER 533 (Newey J) at [61]. Similarly *Harwood-Smart v Caws* [2000] OPLR 227 (Rimer J) at p234 (referring to the 1963 deed).

45 [2005] UKHL 56, [2006] 1 AC 262, HL. A nine-Lord panel.

46 See para [32].

> bill deleting from s 2 the words ''or a Bill containing any provision to extend the maximum duration of Parliament beyond five years'? If this were possible, the Commons could then use the s 2 procedure to pass a bill extending the duration of Parliament.
> [59] In my view the answer to these questions is a firm 'no'. The Act setting up the new procedure expressly excludes its use for legislation extending the duration of Parliament. That express exclusion carries with it, by necessary implication, a like exclusion in respect of legislation aimed at achieving the same result by two steps rather than one. If this were not so the express legislative intention could readily be defeated.'

This view was supported in the judgments of Lord Steyn,[47] Lord Hope,[48] Lady Hale,[49] Lord Carswell[50] and Lord Brown.[51]

The analysis in *Jackson*, although applying to an Act of Parliament rather than a scheme amendment power, supports my analysis above. The amendment power itself can be changed (eg by removing a process provision – in *Jackson* that was the need for the bill to have passed the House of Commons three times), but this cannot apply to a restriction on the power itself.

Conclusion on a 'two steps' rule

The comment made by Lord Millett in *Air Jamaica* that 'trustees could not achieve by two steps what they could not achieve in one' needs to be read in its context.

There is no blanket prohibition on a two steps approach to allowing trusts to use an amendment power to allow another action (eg deleting a limitation in the investment power). This extends to amendments of the amendment power itself (eg changing the method by which amendments are made).

But it is not possible to use an amendment power to delete an express prohibition or restriction in the amendment power on the amendments that can be made by the power itself. This is because the only effect of deleting such a restriction in the amendment power would be to facilitate or enable a later amendment to that effect and this is itself contrary to the restriction.

This is the sort of amendment that was being dealt with by Lord Millett in *Air Jamaica* and indeed in the later cases (*HR Trustees v German* and *IBM v Dalgleish*) citing the 'two steps' proposition.

There is no reason to extend the 'two steps' proposition to include other changes (or indeed changes to amendment power itself) which are not contrary to a prohibition in the amendment power. Such an extension of the 'two steps' limitation would be contrary to a 'practical and purposive approach' (*Courage* and *Stevens v Bell*) – for example if a 'two steps' rule were applied it would automatically (for no good reason) prevent an extension in powers for the trust (eg an extended investment power). The analogy with the position of the Parliament Act 1949 is apt (where the House of Lords held that such a restriction did not apply: *R (ota Jackson) v Attorney-General*).

47 At [79].
48 At [118].
49 At [164].
50 At [175].
51 At [194].