Neutral Citation Number: [2019] EWHC 3032 (Ch)

Case No: PE-2018-000015

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/11/2019

Before :

THE HONOURABLE MR JUSTICE ZACAROLI

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Between :

AIRWAYS PENSION SCHEME TRUSTEE LIMITED	**Claimant**
- and -	
(1) MARK OWEN FIELDER **(2) BRITISH AIRWAYS PLC**	**Defendants**

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Jonathan Hilliard QC, David Southern QC and Henry Day (instructed by **Eversheds Sutherland (International) LLP**) for the **Claimant**
Michael Furness QC (instructed by **Hogan Lovells International LLP**) for the **First Defendant**
Michael Tennet QC and Sebastian Allen (instructed by **Linklaters LLP**) for the **Second Defendant**

Hearing dates: 31 October 2019 and 1 November 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE ZACAROLI

Mr Justice Zacaroli:

1. At a hearing commencing on 31 October 2019 the corporate trustee (the "Trustee") of the Airways Pension Scheme (the "Scheme") applied to the court for approval of its decision to enter into a settlement agreement with the second defendant, British Airways plc ("BA").

2. During the open part of the hearing (and before going into private session to receive confidential submissions on behalf of the Trustee and on behalf of the first defendant, the representative beneficiary of the Scheme) an issue arose as to the test which the court should apply in determining the Trustee's application.

3. Counsel for the Trustee, Mr Hilliard QC (supported by counsel for BA, Mr Tennet QC), submitted that the test to be applied is that applicable to the second category of case identified by Robert Walker J in a decision given in chambers in 1995 and cited by Hart J in *Public Trustee v Cooper* [2001] WTLR 901:

> "The second category is where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers. Obvious examples of that, which are very familiar in the Chancery Division, are a decision by trustees to sell a family estate or to sell a controlling holding in a family company. In such circumstances there is no doubt at all as to the extent of the trustees' powers nor is there any doubt as to what the trustees want to do but they think it prudent, and the court will give them their costs of doing so, to obtain the court's blessing on a momentous decision. In a case like that, there is no question of surrender of discretion and indeed it is most unlikely that the court will be persuaded in the absence of special circumstances to accept the surrender of discretion on a question of that sort, where the trustees are prima facie in a much better position than the court to know what is in the best interests of the beneficiaries."

4. It is common ground that the test to be applied in a case falling within this second category is whether the Trustee's decision is one that a reasonable body of trustees could arrive at. As explained in Lewin on Trusts (18th ed) at 29-299 (now Lewin on Trusts (19th ed) at 27-079), cited with approval by David Richards J in *Re MF Global UK Ltd* [2014] EWHC 2222 (Ch), at [32]:

> "Once it appears that the proposed exercise is within the terms of the power, the court is concerned with limits of rationality and honesty; it does not withhold approval merely because it would not itself have exercised the power in the way proposed."

5. Mr Furness QC, counsel for the representative beneficiary, agrees that in a case where a trustee seeks the approval of the court for a settlement agreement without there having been a previous order of the court permitting the trust fund to be expended on litigation, then the test is merely one of rationality. He contends, however, that where, on a previous *Beddoes* application (*Re Beddoe* [1893] 1 Ch 547), the Trustee has been permitted to expend Scheme funds on litigation, then a more nuanced approach is necessary. While accepting that there may be aspects of an overall settlement agreement where the court is bound to defer to the Trustee (so that the court's role is necessarily limited to a rationality test) he contends that there is an additional requirement that the court reaches its own determination as to whether the settlement agreement as a whole is in the best interests of the Scheme.

6. During the course of the hearing on 31 October 2019, I announced my conclusion that the correct approach in this case was to apply the rationality test applicable in the second category of case identified in *Public Trustee v Cooper*, but indicated that my reasons would follow. This judgment contains my reasons.

Background

7. For the purposes of the decision the subject of this judgment I need only refer to a high-level summary of the background.

8. The settlement agreement between the Trustee and BA has been reached in the course of hard-fought litigation which has been in progress for a number of years. In March 2011 the Trustee, by deed, amended Rule 15 of Part VI of the Scheme ("Rule 15") so as to permit the Trustee by resolution (by a two-thirds majority of trustees) to apply discretionary increases to pensions. In November 2013 the Trustee resolved to apply such a discretionary increase.

9. BA commenced proceedings in December 2013 challenging the validity of the purported amendment of Rule 15 and of the November 2013 resolution to apply a discretionary increase.

10. In May 2017, Morgan J rejected BA's challenge: see *British Airways plc v Airways Pension Scheme Trustee Ltd* [2017] EWHC 1191 (Ch). BA appealed to the Court of Appeal which, by its judgment dated 5 July 2018, decided by a majority that the Trustee had acted contrary to the proper purpose of the power of amendment in amending Rule 15: *British Airways plc v Airways Pension Scheme Trustee Ltd* [2018] EWCA Civ 1533. It rejected BA's alternative argument that the grant of a discretionary increase infringed the prohibition against making "benevolent or compassionate" payments in Clause 2 of the Scheme's deed and rules dated 1 April 2008 (the "2008 Deed and Rules").

11. The Court of Appeal gave permission to the Trustee to appeal to the Supreme Court. There is a pending application by BA for permission to cross-appeal to the Supreme Court on the "benevolent or compassionate" issue.

12. Clause 17(b) of the 2008 Deed and Rules contains an indemnity for, among others, the Trustee. Initially, BA refused to accept liability under the indemnity for the Trustee's costs of the main proceedings. By a *Beddoes* order dated 15 July 2014, the Chancellor authorised the Trustee to defend the claim (down to and including the

completion of disclosure and inspection) and ordered that the Trustee's costs be paid out of the Scheme assets: *Spencer v Fielder* [2014] EWHC 2768 (Ch). BA subsequently accepted its liabilities under the indemnity and the *Beddoes* order was stayed. The Trustee's costs in relation to the appeal to the Court of Appeal were similarly covered by the indemnity.

13. BA refused, however, to accept liability under the indemnity for the Trustee's costs of the appeal to the Supreme Court. Accordingly, the Trustee issued proceedings on 3 September 2018 (amended on 10 December 2018) seeking further *Beddoes* relief. By order dated 15 January 2019, Arnold J authorised the Trustee to pursue the appeal to the Supreme Court and ordered that the Trustee's costs of the appeal be paid out of the assets of the Scheme (subject to a limit of £1,034,000): *Spencer v Fielder* [2019] EWHC 29 (Ch).

14. The settlement agreement was entered into (subject to conditions including the approval of the court) in April 2019. It includes the compromise of the pending appeal to the Supreme Court, but extends beyond this to settling, and providing clarity on, a number of other matters.

The applicable test

15. Mr Furness's contention that a hybrid approach is required, within which the court must be satisfied for itself that the settlement is in the interests of the Scheme, is based purely on the fact that the court has previously authorised (in the form of the *Beddoes* order of Arnold J of 15 January 2019) the pursuit of the appeal by the Trustee. He submits that this mandates a different approach because it involves the court in a change of mind: whereas the court has previously concluded that it is in the best interests of the Scheme to litigate, it would now be required to determine that it is in the best interests of the Scheme to settle.

16. He points to the fact that there is no prior authority directly in point, noting that in the cases cited by the Trustee (for example *Bradstock Group Pension Scheme Trustees Ltd v Bradstock Group Plc* [2002] Pens LR 327; *Re Owens Corning Fibreglass (UK) Ltd* [2002] Pens LR 323; and *MF Global* (above)) in which a pure rationality test was applied there was no question of compromising existing litigation.

17. I reject this contention which, in my judgment, fails to take account of the different question the court is being asked on the different applications.

18. On a *Beddoes* application the court is asked to sanction the use of the Scheme's funds in paying the costs of future litigation. The court does not direct the Trustee *to pursue* the litigation; it merely *authorises* its pursuit. The decision to do so remains that of the Trustee. In particular, it is no part of the court's function to choose between the two options of litigating or compromising the dispute. (I disagree, in this respect, with the characterisation of the court's decision on the *Beddoes* application being that it was in the "best" interests of the Scheme to pursue the litigation, which implies that a choice was made as between following that, or any other, course.)

19. Accordingly, when the court is asked to approve a subsequent settlement of the litigation, there is no risk of contradiction with the court's earlier decision on the *Beddoes* application. It is consistent for the court to authorise the Trustee to pursue

litigation on the basis that the Scheme's assets will be burdened with the cost of doing so, and for the Trustee subsequently to decide that it is in the best interests of the Scheme to compromise the dispute.

20. It follows in my judgment that there is no inconsistency in the court reaching its own view as to whether it is appropriate for the costs of the litigation to be borne by the Scheme, but deferring to the Trustee's judgment (subject only to a test of rationality) on the question whether the dispute should be compromised.

21. For these reasons I accept the submissions of Mr Hilliard QC that the fact that the court has previously authorised the pursuit of the appeal, and the use of the Scheme's assets for that purpose, is a relevant piece of background when it comes to assessing the rationality of the Trustee's decision to enter into the settlement agreement, but it does not require a different test to be applied by the court from that which it normally applies when asked to approve a trustee's decision to enter into a settlement.

22. Mr Hilliard and Mr Tennet also relied on the fact that (as I have noted above) the matters being resolved by the settlement agreement go beyond the compromise of the issues directly involved in the main proceedings. I agree that this provides a further ground of distinction from the *Beddoes* jurisdiction, but I do not consider it necessary to rely upon this in reaching the conclusion that the normal, rationality, test applies to the relevant decision in this case.