

Ombudsman's Determination

Applicant	Mr D
Scheme	Bland Bankart Retirement Benefits Scheme (the Scheme)
Respondent	PTL Governance Ltd (PTL)

Outcome

1. I do not uphold Mr D's complaint and no further action is required by PTL.
2. My reasons for reaching this decision are explained in more detail below.

Complaint summary

3. Mr D's complaint is that the Scheme's 1997 Deed of Amendment means that his current wife is not entitled to a full widow's pension.

Background information, including submissions from the parties

4. Mr D was a Director of P & G Bland Limited (the **Company**) and a Part 1 Member of the Scheme, then called P & G Bland Group Limited Retirement Benefits Scheme. Mr D was also a trustee together with Mr GD and Mr WG (collectively the **Trustees**).

5. In 1997 Mr D divorced his then wife, SB.

6. At the time, as relevant rule 3.5, 'Widow's or Widower's Pension', of the Scheme's Rules said:

"(a) Subject to the conditions of these Rules, a Widow's or Widower's pension calculated in accordance with section (b) below will be payable on the death of a Member to his Widow or Widower...Where the Member is not a Part 1 Member a Widow's or Widower's pension will only be payable if he dies in Service before Normal Retiring Date.

(b) ...the annual amount of Widow's or Widower's pension will be the aggregate of the following –

(i) a normal Widow's or Widower's pension calculated as follows –

...

(b) if the Member dies on or after the Normal Retiring Date while in Service or after retirement (excluding early retirement) a normal Widow's or Widower's pension of one-half of the pension to which the Member was entitled at Normal Retiring Date..."

7. As part of the divorce settlement it was agreed that SB would be entitled to a widow's pension under the Scheme if Mr D pre-deceased her.
8. To accommodate this the power of amendment contained in rule 4.17 of the Scheme Rules was exercised. This power of amendment vested in the Trustees and provides that they may at any time with the written consent of the Company alter all or any of the rules by Resolution or Deed.
9. The Trustees engaged a solicitor to draw up a Deed of Amendment (the **Deed**). The Deed was executed on 14 April 1997 by the Company and the Trustees. This Deed refers to the fact that the Trustees with Employer consent are altering the rules of the Scheme. Mr D is party to the deed in his dual capacity as a Trustee and a Member of the Scheme.
10. The Deed defined Mr D as "the Special Member" and SB as "the former spouse of the Special Member". The Deed inserted rule 3.5(e) into rule 3.5. It states:

"Notwithstanding anything to the contrary contained in the Trust Documents, on the death following retirement of the Special Member, no widow's pension will be paid in excess of the Widow's guaranteed minimum pension. However, notwithstanding the above, if [SB] survives the Special Member, the Trustees shall pay to [SB] a Dependant's pension equal to the Widow's pension payable under the Revised Rules in force at the date of this Deed to which she would have been entitled had she still been married to the Special Member at the date of his death.

Notwithstanding Rule 4.17, this Rule 3.5(e) may not be altered without the consent in writing of [SB]."

11. In September 1997 SB died.
12. Mr D remarried in June 2000. He retired at the end of December 2000.
13. The Scheme now has an Independent Trustee, PTL. In 2017 Mr D queried his wife's entitlement should he die before her. PTL maintain that his wife is only entitled to a widow's GMP in accord with the wording of the Deed.

Mr D's position

14. Mr D / Mr D's Solicitor says:-
 - In 1997 the Trustees recognised if SB were to receive a widow's pension on his death it would not be possible for any person who subsequently became his wife to receive a pension. This was agreed because it would be actuarially cost neutral and impose no additional cost on the Scheme or the Employer.

- At the time he was an experienced financial adviser about pensions and other financial vehicles and was well aware much of the legal small print should be left to legal specialists.
- They engaged a solicitor to prepare the Deed and relied on the solicitor to do what was intended and without any unintended adverse consequences.
- The Deed does not do what was intended or what any other trustees acting reasonably could have intended.
- The intention was that if SB was living at his death she would receive a widow's pension but if she predeceased him it should not affect the right of any other person who became his widow.
- Read literally clause 2.1 of the Deed provides an absurd result. No person except SB can have the same contingent right as in the normal rule, even if SB's contingent right ceases on her death. Meaning no widow's pension is payable on his death even though no pension had been paid to SB.
- It cannot be argued that there were actuarial or other financial reasons for making the amendment as read literally.
- If they had been fully advised about the effect of the Deed they would have instructed the solicitor to redraft it to comply with their intention.
- He agrees with PTL's contention that its conclusion reflects the literal meaning of rule 3.5(e). But PTL cannot rely on literalism if the result is absurd or inconsistent with the rest of the rules or the rule does not reflect the intention of the parties.
- The two golden rules of interpretation are:
 - (i) words must be given their ordinary sense¹; and
 - (ii) a document must be construed as a whole², because the meaning of any part may only be revealed in the context of other parts.
- The Deed is ineffective. Section 67³ of the Pensions Act 1995 (the **Act**) provides that a power to modify a scheme cannot be exercised in a manner which effects a member's accrued right unless either the certification or consent requirement is met. The Deed made an alteration to the Scheme which effected his accrued right, which include benefits for dependants, but the Trustees did not comply with either the consent or certificate requirement.

¹ John Grey and Others v William Pearson and Others [1857] VI HL Cases 61.

² AG v Prince Ernest Augusts of Hanover [1957] AC 436 and Re Sigma Finance Corporation [2009] UKSC2.

³ 'Restriction on powers to alter schemes'

- Section 91⁴, 'Inalienability of occupational pension', of the Act provides that a member cannot assign or surrender an entitlement or accrued right and any agreement to do so is unenforceable. The effect of rule 3.5(e), as interpreted literally is a surrender by him of an entitlement or accrued right. Therefore, if PTL assert that he agreed (which he denies) to the effect of the rule as interpreted literally, it is void and unenforceable under section 1991 of the Act.

15. For completeness, Mr D's Solicitor has previously referenced Section 92⁵ of the Act, saying that it prohibits the forfeiture of an entitlement or accrued right.

PTL's position

16. PTL says:-

- Mr D agreed the drafting of the Deed.
- The amendment is clear that no widow's pension will be paid in excess of the widow's guaranteed minimum pension. The only exception to this is if SB survived Mr D, in which case the ordinary widow's pension would have been payable to her.
- It appreciates that there are examples of the courts taking a more purposive interpretation of pension scheme documents in certain circumstances. However, to give effect to the parties' intentions it is necessary to determine what the parties' intentions were. While Mr D has explained his recollection of events around the time of the drafting of the Deed he has submitted no documentary evidence to prove or disprove what the parties' intentions were, despite being asked to do so. The Scheme solicitor has conducted various searches (hard and electronic), but due to the passage of time since the Deed was executed it has been unable to locate any documents that may assist.
- In the absence of any evidence of the parties' intentions, PTL's overriding duty is to administer the Scheme in accordance with the Rules, particularly as the Deed is clearly written.
- As Trustee, PTL is required to act in the interests of all the Scheme Members. The Scheme Actuary has estimated that if the widow's pension was reinstated this could increase the Scheme's liabilities at July 2017 by £556,000.
- Mr D signed the Deed in multiple capacities: as a Trustee, as a director of the Principal Employer and as a Member of the Scheme. At the time he was a senior pensions professional and the Deed was relevant to his personal circumstances. It is not unreasonable to have expected Mr D to understand what he was signing and object if it did not reflect his intention.

⁴ 'Inalienability of occupational pension'

⁵ 'Forfeiture, etc'

- Section 67 of the Act, as it stood at the time the Deed was executed, makes no reference to any survivor of a member. There is therefore an argument that clause 2.1 of the Deed was not caught by section 67 as it stood at that time. This argument is strengthened by the fact that a spouse's pension is contingent and any entitlement or right to the benefit does not arise until the member dies. But even if section 67 did the member consent requirement was met given that Mr D signed the Deed as a Trustee and a Member.
 - Even if section 92 could, in isolation, operate to invalidate the Deed, the generally accepted view is that section 67 "trumps" section 92. Parliament would not legislate to allow the amendments by consent that reduced a member's accrued benefits and then ban them from doing that 25 sections later in the same Act. As Mr D consented to the amendments made by the Deed and therefore the consent requirements of section 67 were complied with the Deed does not contravene section 92.
17. PTL has not seen Mr D's / his Solicitor's comment regarding section 91(1) of the Act.
18. Sections 67, 91 and 92 of the Act, as in force on 14 April 1997, are detailed in the Appendix.

Adjudicator's Opinion

19. Mr D's complaint was considered by one of our Adjudicators who concluded that no further action was required by PTL. The Adjudicator's findings are summarised below:-
- There are two disputes; the first over the validity of the Deed and the second over its interpretation.

The validity of the Deed

Section 67 of the Act

- Section 67(1) of the Act, as in force on 14 April 1997 (subsequently amended by the Pensions Act 2004), provides as follows:
 - (1) This section applies to any power conferred on any person by an occupational pension scheme (other than a public service pension scheme) to modify the scheme.
 - (2) The power cannot be exercised on any occasion in a manner which would or might affect any entitlement, or accrued right, of any member of the scheme acquired before the power is exercised unless the requirements under subsection (3) are satisfied.

(3) Those requirements are that, in respect of the exercise of the power in that manner on that occasion –

(a) the trustees have satisfied themselves that –

- (i) the certification requirements, or
- (ii) the requirements for consent, are met in respect of that member, and

(b) where the power is exercised by a person other than the trustees, the trustees have approved the exercise of the power in that manner on that occasion.

- The modification to rule 3.5 (e) under the Deed of Amendment is an exercise of an amendment power which is caught by section 67, as the spouse's pension although a contingent right is considered to fall within the ambit of accrued rights⁶.
- Therefore, given that Mr D is a party to the deed in his dual capacity as a Trustee and a Member of the Scheme the argument that the Trustees did not comply with either the consent or certification requirement is set aside.

Section 91 of the Act

- This provides that where a person is entitled to a pension under an occupational pension scheme or has a right to a future pension under such a scheme the entitlement or right cannot be assigned, commuted or surrendered nor can any agreement to effect any of those things be enforceable.
- However, section 91(5) does not apply to an agreement to affect an assignment in favour of the member "in question's widow, widower, surviving civil partner or dependant". Section 91(5) will not apply to Mr D for the Deed references SB as the "former spouse of the Special Member".
- In terms of whether SB fell within the definition of 'dependant', this is not defined by the Act. But it can be construed to have the same meaning as that contained in the Inland Revenue Practice Notes IR12 which defines a 'Dependant' as, "...a person who is financially dependent on the employee... or who was so dependent at the time of the employee's death or retirement..."⁷
- The Scheme Rules provide:

““Dependant” means the spouse or child of the Member or such other individual as the Trustees may consider to have been wholly or partly dependent financially on the Member at the time of the Member's death or in relation to the election of

⁶ The Occupational Pension Scheme (Modification of Schemes) Regulations 1996, SI 1996/2517, Joint Opinion Section 67 Pensions Act 1995

⁷ It is not necessary to show financial dependency in the case of widows or widowers they automatically qualify for survivor's benefits on the basis that partners in a legal marriage may always be assumed to be financially dependent on one another.

the option in terms of Rule 1.7 ['Dependant's Option Pension'] at the Member's Normal Retiring Date or earlier date on which his pension commences."

- Mr D says when he divorced SB in April 1997 it was felt that earmarking would not give adequate security to SB. Therefore, one of the financial terms of the divorce was that, if he was to die before her with the result that the periodic payments that he had agreed to pay her during her life would cease, she would be entitled to a pension from the Scheme as if she was his widow.
- This confirms that Mr D was making periodic payments to SB during his lifetime, so she was partly dependent on Mr D and thus would appear to meet the criteria by which a Section 67 deed amendment would/might not be invalidated under Section 91(5). Therefore, there is no valid reason why an amendment (which also limited pensions for any future wife) that was agreed and validly executed with consent should be ignored/overtaken, simply because Mr D did not have foresight to contain sufficient provisos to deal with the situation that he now finds himself in.

Section 92 of the Act

- Section 92(1) sets out in which circumstances the forfeiture provisions apply. Section 92(1) provides that such an entitlement or right cannot be forfeited other than because of "an actual or purported assignment, commutation, surrender, charge, lien or set-off which under section 91 is of no effect". However, the trustees still retain a discretion under section 92(2) as to whether they pay any pension or benefit. Section 92 is not considered to apply as Mr D consented to and assigned his right to SB.
- In summary the deed of amendment appears to be valid. It is a detrimental modification caught by section 67, however Mr D consented. The Deed does not fall foul of the provisions in section 91 and section 92 does not apply.

The interpretation of the Deed

- Turning now to the interpretation of the Deed. In 2015 Lord Neuberger summed up the current approach to contract interpretation:

"When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words ... in their documentary, factual and commercial context.

That meaning has to be assessed in the light of

- (i) the natural and ordinary meaning of the clause,

- (ii) any other relevant provisions of the lease,
- (iii) the overall purpose of the clause and the lease,
- (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and
- (v) commercial common sense, but
- (vi) disregarding subjective evidence of any party's intentions.”

- Lord Neuberger went on to say:

“the reliance placed in some cases on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader.”

“the clearer the natural meaning the more difficult it is to justify departing from it.”

“commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language.”

“a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight...it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice.”

“when interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties.”

“in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention.”

- While Lord Neuberger was specifically talking about contract interpretation the principles transfer across to the consideration of the Deed.
- The natural and ordinary meaning of rule 3.5(e) is that on Mr D's death following retirement a widow's GMP is to be paid. However, in the event of Mr D predeceasing SB, SB is to be provided with a dependant's pension equal to the widow's pension she would have received if she had remained Mr D's wife. The wording is clear, it is not ambiguous and does not amount to an absurd outcome.

- While Mr D says the rule amendment is not what was intended he agreed the amendment. He signed the Deed as a Trustee. He was the 'Special Person' of the Deed, a director of the Company and an experienced financial adviser about pensions. If the worded amendment was not what was required Mr D; and or the other Trustees, could have referred it back to the solicitor they had engaged for revision before signing it.
- However, there appears to be no contemporaneous evidence that the intention behind the rule amendment actually diverged from that expressed in the Deed.
- In all the circumstances there are no grounds for the Ombudsman to interfere in this matter.

20. Mr D did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. Mr D's Solicitor provided further comments which do not change the outcome. I agree with the Adjudicator's Opinion and I will therefore only respond to the key points made by Mr D's Solicitor for completeness.

Ombudsman's decision

21. Mr D's Solicitor says:-

- The former Trustees made an amendment, which in breach of duty, is capable of not being cost neutral, causing a detriment to a member, while giving the Scheme and, because it is liable for the balance of the cost, the employer, an actuarial benefit. Also, it is inconsistent with the Scheme's provision as a whole. The result is absurd and repugnant.
- There should be no expectation of or need for evidence of intention because it is self-evident from the amendment that the intention was to enable the Trustees to pay a pension to SB, if Mr D were to die before her, as if she was his widow.
- A literal interpretation of the words show that the Trustees' intentions have not been carried out properly, from which it follows that PTL must interpret the amendment as though it complied with the Trustees intentions.
- The execution of the Deed does not show that Mr D and his then co-trustees agreed to the consequences asserted by PTL. Instead it shows that the former Trustees had not been informed of the full meaning and effect of the amendment. It is also self-evident that Mr D, as a member and as an experienced financial (but not legal) adviser, could not have intended and would not have agreed to the effect of the amendments.

22. Effectively what is being argued is that there was, in 1997, a failing in advice or drafting of the Deed by the solicitor for the then Trustees.
23. However, I can only consider whether PTL has fairly interpreted the Deed/Scheme Rules. I am satisfied PTL has done so. Consequently, there is no basis for me to say that Deed should be interpreted differently or ruled invalid.
24. Therefore, I do not uphold Mr D's complaint.

Anthony Arter

Pensions Ombudsman
29 April 2019

Appendix

The Pensions Act 1995, as in force on 14 April 1997

25. Section 67, ‘Restriction on powers to alter schemes’, says:

(1) This section applies to any power conferred on any person by an occupational pension scheme (other than a public service pension scheme) to modify the scheme.

(2) The power cannot be exercised on any occasion in a manner which would or might affect any entitlement, or accrued right, of any member of the scheme acquired before the power is exercised unless the requirements under subsection (3) are satisfied.

(3) Those requirements are that, in respect of the exercise of the power in that manner on that occasion—

(a) the trustees have satisfied themselves that—

(i) the certification requirements, or

(ii) the requirements for consent, are met in respect of that member, and

(b) where the power is exercised by a person other than the trustees, the trustees have approved the exercise of the power in that manner on that occasion.

(4) In subsection (3)—

(a) “the certification requirements” means prescribed requirements for the purpose of securing that no power to which this section applies is exercised in any manner which, in the opinion of an actuary, would adversely affect any member of the scheme (without his consent) in respect of his entitlement, or accrued rights, acquired before the power is exercised, and

(b) “the consent requirements” means prescribed requirements for the purpose of obtaining the consent of members of a scheme to the exercise of a power to which this section applies.

(5) Subsection (2) does not apply to the exercise of a power in a prescribed manner.

(6) Where a power to which this section applies may not (apart from this section) be exercised without the consent of any person, regulations may make provision for treating such consent as given in prescribed circumstances.

26. As relevant section 91, 'Inalienability of occupational pension', says:

“(1) Subject to subsection (5), where a person is entitled, or has an accrued right, to a pension under an occupational pension scheme—

- (a) the entitlement or right cannot be assigned, commuted or surrendered,
- (b) the entitlement or right cannot be charged or a lien exercised in respect of it, and
- (c) no set-off can be exercised in respect of it,

and an agreement to effect any of those things is unenforceable.

...

(5) In the case of a person (“the person in question”) who is entitled , or has an accrued right, to a pension under an occupational pension scheme, subsection (1) does not apply to any of the following, or any agreement to effect any of the following—

- (a) an assignment in favour of the person in question's widow, widower or dependant,
- (b) a surrender, at the option of the person in question, for the purpose of—
 - (i) providing benefits for that person's widow, widower or dependant, or
 - (ii) acquiring for the person in question entitlement to further benefits under the scheme,
- (c) a commutation—
 - (i) of the person in question's benefit on or after retirement or in exceptional circumstances of serious ill health,
 - (ii) in prescribed circumstances, of any benefit for that person's widow, widower or dependant, or
 - (iii) in other prescribed circumstances,

....

(7) This section is subject to section 159 of the Pension Schemes Act 1993 (inalienability of guaranteed minimum pension and protected rights payments).”

27. Section 92, 'Forfeiture, etc', says:

“(1) Subject to the provisions of this section..., an entitlement , or accrued right, to a pension under an occupational pension scheme cannot be forfeited.

(2) Subsection (1) does not prevent forfeiture by reference to—

(a) a transaction or purported transaction which under section 91 is of no effect, or

(b) the bankruptcy of the person entitled to the pension or whose right to it has accrued, whether or not that event occurred before or after the pension became payable.

(3) Where such forfeiture as is mentioned in subsection (2) occurs, any pension which was, or would but for the forfeiture have become, payable may, if the trustees or managers of the scheme so determine, be paid to all or any of the following—

(a) the member of the scheme to or in respect of whom the pension was, or would have become, payable,

(b) the spouse, widow or widower of the member,

(c) any dependant of the member , and

(d) any other person falling within a prescribed class.

(4) Subsection (1) does not prevent forfeiture by reference to the person entitled to the pension, or whose right to it has accrued, having been convicted of one or more offences—

(a) which are committed before the pension becomes payable, and

(b) which are—

(i) offences of treason,

(ii) offences under the Official Secrets Acts 1911 to 1989 for which the person has been sentenced on the same occasion to a term of imprisonment of, or to two or more consecutive terms amounting in the aggregate to, at least 10 years, or

(iii) prescribed offences.

(5) Subsection (1) does not prevent forfeiture by reference to a failure by any person to make a claim for pension—

(a) where the forfeiture is in reliance on any enactment relating to the limitation of actions, or

(b) where the claim is not made within six years of the date on which the pension becomes due.

(6) Subsection (1) does not prevent forfeiture in prescribed circumstances.

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(7) In this section and section 93, references to forfeiture include any manner of deprivation or suspension.”