Solving Defective Changes in Pensions and Commercial Trusts – Seven Potential Easier Fixes

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Introduction

This article focuses on the issues arising where there has potentially been a defective appointment of new trustees under a commercial trust or an occupational pension scheme, looking at:

- the problem;
- what goes wrong;
- potential 'easier' fixes; and
- ratification.

These issues can also arise in other areas where there has been a defect in what has happened. Examples that have recently involved court decisions are:

- a defective amendment, where there was no 'deed' – *Briggs v Gleeds*;[1] or
- a potentially defective change in the scheme's 'principal employer' – *Shannan v Viavi Solutions.*[2]

The problem

The potential problem that this article will look at is what happens if, on a review (eg by new advisers or in preparation for an insurance buy-in or buy-out), it is discovered that a change in trustee (or principal employer) was not properly documented or was invalidly done.

An example of this would be:

- A trustee 'resigned' two years ago and a new one was 'appointed'.
- No formal deed/document (as required by the Scheme Rules) can be found.
- There have been several trustee 'meetings' and 'decisions' and executed 'deeds' of amendment since then.

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1 *Briggs v Gleeds (Head Office)* [2014] EWHC 1178 (Ch), [2015] Ch 212 (Newey J).

2 [2018] EWCA Civ 681.

- During this time the 'old' trustee did not participate (eg was not given notice of, and did not attend, meetings; did not execute relevant deeds).
- Conversely the 'new' trustee did participate in full.

LRT v Hatt[3] is a good example of this problem in the case law (and of how the defect was solved).

Similar issues can arise for a trustee company if there is a change of directors (although as we will see there are more protections here) or generally for a pension scheme if there was a 'change' in principal employer under the scheme, eg *Shannan v Viavi*.[4]

The big problem is that if the relevant change was not effective, then there is the potential for all later decisions/meetings/actions to be invalid (void). This may be an easy way for someone later to challenge a decision purportedly made by the new trustee board or principal employer, eg *Shannan v Viavi*[5] and *LRT v Hatt*.[6]

LRT v Hatt

A good example of this is the decision in the pensions case, *LRT v Hatt*.[7] In that case the three 'old' trustees had purported to resign in favour of a trustee company. A new definitive deed was then executed by the employer and the trustee company (and not the three old trustees). The validity of that deed was challenged.

One of the grounds of the challenge was that the three old trustees had remained in office (and therefore needed to be parties to any deed of amendment). Ultimately the retirement/resignation/cessation of the three old trustees was upheld by Knox J (on the basis that the deed of resignation operated as an implied use of the scheme's amendment power: see 'Potential easy fix 1' below) and so the challenge on this ground failed.

What goes wrong?

The defects can arise in a number of ways. Examples of the problem are:

Problem 1: no effective change of trustee

A trustee leaves employment. She is assumed to have 'resigned' as a trustee of the pension scheme as well, but there is no express power of resignation in the trust deed. There is statutory power of retirement for trustees, in ss 36 and 39 of the Trustee Act 1925 (TA 1925), but these are limited and require that after the retirement there must be either a trust corporation or 'two individuals' (from January 1997 'two persons') acting as trustees: ss 37(1)(c) and 39(1).

- In *LRT v Hatt*, there was only one continuing trustee – the trustee company (which was not a trust corporation). So ss 36 and 39 did not apply.

3 [1993] PLR 227 (Knox J).
4 [2018] EWCA Civ 681.
5 *Shannan v Viavi Solutions UK Ltd* [2018] EWCA Civ 681.
6 [1993] PLR 227 (Knox J).
7 *London Regional Transport Pension Fund Co Ltd v Hatt* [1993] PLR 227 (Knox J).

- In *Jasmine Trustees v Wells & Hind,*[8] there were two continuing trustees, but they were both trust companies (and neither was a trust corporation). Mann J held that the references in s 39 to 'individuals' did not include companies.

Problem 2: no deed

The relevant power, under the scheme (or statute[9]), provides for any change of trustees to be exercised by deed. Since August 1990, under English law,[10] deeds executed by individuals need to be attested by a witness: s 1(3) of the Law of Property (Miscellaneous Provisions) Act 1989. If there is no witness, then the instrument is not a deed, eg *Briggs v Gleeds.*[11]

Problem 3: Invalid use of the power to change

For pension schemes, it is common for there to be an express provision that the principal employer has the power to appoint or remove trustees. This is not a fiduciary power,[12] but still needs to be exercised:

- for a proper purpose – a principle recently discussed by the Supreme Court in *Eclairs*;[13] and
- (probably) considering all reasonable relevant factors – the test outlined by the Supreme Court in *Braganza.*[14]

A failure to exercise the relevant power in accordance with these tests may render the change invalid (but whether the change would be void or voidable[15] may be a tricky issue).

Problem 4: Trust Rules refer to statutory power only

For example, what happens if the scheme rules do not just say 'the Principal Employer may appoint or remove trustees,' but uses more elliptical wording on the lines of: 'the power to appoint or remove trustees is vested in the Principal Employer'.

The issue can arise as to whether this wording incorporates just to the limited powers of change under ss 34 to 40 of TA 1925. The statutory power in TA 1925, ss 34 to 40 is limited. For example, a retirement under ss 36 or 39 needs two trustees or a trust corporation continuing: ss 37(1)(c) and 39(1). Before amendment in January 1997, this

8 [2008] Ch 194 (Mann J).

9 The statutory power in Trustee Act 1925, s 39 requires a deed, but s 36 does not. A deed is commonly used even under s 36 as this gets the advantage of the statutory vesting of property in the new trustees under s 40.

10 Other laws can differ. An instrument governed by Scots law requiring the use of a 'deed' was construed as just needing any act without any particular formality: *Low & Bonar Ltd v Mercer Ltd* [2010] CSOH 47. The same seems to apply in the Channel Islands: *Oakley v Osiris Trustees Ltd* [2008] UKPC 2.

11 [2014] EWHC 1178 (Ch), [2015] Ch 212 (Newey J).

12 Save in very unusual situations (eg *Mettoy Pension Trustees v Evans* [1990] 1 WLR 1587): see Ch12 in Pollard *The Law of Pension Trusts* (OUP 2013) and *Blenkinsop v Herbert* [2017] WASCA 87. In private wealth trusts the position of a power of appointment or removal held by a 'protector' may differ: see eg *Jasmine Trustees Ltd v L* [2015] JRC 196; 19 ITELR 210.

13 *Eclairs Group Ltd v JKX Oil & Gas plc* [2015] UKSC 71, [2016] 3 All ER 641. See Pollard '*Exercising Powers: Proper Purposes rather than Best Interests: Fiduciaries and Eclairs'* (2016) 30 TLI 71.

14 *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 4 All ER 639.

15 See the discussion by Lord Walker in *Pitt v Holt* [2013] 2 AC 108 at [62].

required two individuals to be acting and two companies would not suffice: *Jasmine Trustees v Wells & Hind*.[16]

For example, in *Gleeds*[17] the relevant provision stated:

> 'The statutory power of appointing and removing trustees of the scheme by deed shall be vested in the principal employer …'

The question arose as to whether this meant that any appointment needed to be by deed, even though the statutory power in TA 1925, s 36 does not require a deed (see [55]). Newey J held that no deed was required:

> '58 … the better view, to my mind, is that clause 9(a) did not impose a requirement that appointments be made by deed. It seems to me that, had clause 9(a)'s draftsman been intending to impose a restriction on the section 36 power, he could have been expected to do so in much clearer terms. On the face of it, the first 20 words of clause 9(a) were concerned merely with whom the statutory power was to be vested in, not with modifying it in any way.
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> 59 In the circumstances, I agree with Mr Newman that the draftsman is best understood as having misdescribed the statutory power rather than limited it.'

Seven potential 'easier' fixes?

If something appears to have gone wrong (eg wrong form used, documents lost), there may be a potential 'easy' fix, in the sense that a remedy may potentially be found. There are perhaps seven such 'easy' fixes:

(1) Implied exercise of powers: *Davis v Richards & Wallington* (1990).
(2) Something is found? For example, an e-mail can be 'writing'.
(3) Majority rule? *HR Trustees v Wembley* (2011).
(4) Companies: *Duomatic*/ Rule in *Turquand's case*/ CA 2006, ss40 and 161.
(5) Presumption of regularity: for example *Sovereign v Glover* (2007).
(6) Equitable relief against accidents: *English v Keats* (2018).
(7) Ratification/confirmation: *Re Z Trust* (2016).

These seven fixes are discussed in more detail below.

Four more tricky fixes?

More complex (and hence not included in the seven easier fixes) are:

(1) rectification;
(2) beneficiary consent/estoppel;
(3) external contract; and
(4) court sanction.

16 [2008] Ch 194 (Mann J).
17 *Briggs v Gleeds (Head Office)* [2014] EWHC 1178 (Ch), [2015] Ch 212 (Newey J).

I do not deal with these in this paper, although obviously they may need to be considered in any particular case (if an 'easy' fix is not available). They are likely to depend on the facts and evidence available.

Fix 1: Implied exercise of powers

Case law provides a number of examples where a formal process was not followed, but the relevant action was upheld by the courts on the basis that there had been an implied use of another relevant power.

The leading pensions case is the decision of Scott J (as he then was) in *Davis v Richards & Wallington Industries Ltd*.[18] In that case, one trustee, Mr Parsons, purported to 'resign' by letter and did not sign the later new definitive deed as trustee (but he did witness the sealing by the company). His name was crossed out from the parties to the deed and the change initialled (at p 578f).

Scott J held that both (a) a power to resign as a trustee might be implied (at 581j); and that the employer had, by executing the deed, impliedly exercised its power to remove Mr Parsons as a trustee. Scott J referred (at 582h) to the general principle:

> 'A disponor (A) purports to make a disposition of property. This disposition cannot be effective unless associated with the exercise of a power vested in A and that A could properly have exercised in order to make the disposition. … A's intention to make the disposition justifies imputing to him an intention to exercise the power …'

Scott J held (at 583b) that this would apply to validate the new deed (and the removal of Mr Parsons) unless an intention not to exercise the power can be inferred.

Davis v Richards & Wallington has been followed in various pensions cases. It was agreed as applicable in *Stannard v Fisons Pension Trust Ltd*.[19]

In *LRT v Hatt,*[20] the deed of change of trustees was executed by the three retiring trustees, the new trustee company and the employer company. The change did not comply with the statutory implied change powers in TA 1925, ss 36 and 39 (see above), because the new trustee was not a trust corporation, nor was it two individuals. But the deed of change did comply with the requirements of the amendment power in the trust deed. Accordingly, Knox J followed *Davis v Richards & Wallington* and held (at [139]) that the change made was valid as an implied use of the amendment power (which could override the limits on the statutory power). This meant that the particular challenge to the later definitive deed, based on it not having been executed by the three old trustees, did not succeed.

In 2008, the Supreme Court of New Zealand in *Kain v Hutton*[21] considered *Davis v Richards and Wallington* in a family trust case but did not apply it. In *Briggs v Gleeds,*[22] Newey J referred to *Kain*, but held that he should follow *Davis v Richards & Wallington* in any event.

In *Briggs v Gleeds*[23] a problem had arisen with a purported new definitive deed. Newey J (as he then was) held that it had not taken effect (it had not been properly executed as a deed,

18 [1991] 2 All ER 563 (Scott J).
19 [1992] IRLR 27; [1991] PLR 225, CA at [9].
20 [1993] PLR 227 (Knox J).
21 [2008] NZSC 61, [2008] NZLR 589, 11 ITELR 130.
22 *Briggs v Gleeds (Head Office)* [2014] EWHC 1178 (Ch), [2015] Ch 212 (Newey J) at [95].
23 [2014] EWHC 1178 (Ch), [2015] Ch 212 (Newey J).

nor did it amount to a declaration). One issue following from this was whether a change in the pension increase rule took effect (it had been applied since the purported deed) on the basis that the purported deed could take effect on this point as an implied use of the augmentation power (for which no deed was needed).

Newey J considered *Davis v Richards & Wallington, LRT v Hatt* and *Kain v Hutton*. He considered that the reasoning in *Kain* was 'not wholly consistent' with that in *Davis* and *LRT*, which he held that 'I think I should follow'. But Newey J went on to mention two limitations. The principle in *Davis v Richards & Wallington*:

> At [95]: 'cannot be applied if there is doubt as to whether the trustees would have chosen to exercise the power in question had they taken into account matters relevant to its exercise which were not also relevant to the power they believed themselves to be exercising'
>
> At [96]: 'cannot normally … be used unless it allows the whole of what the relevant decision maker was trying to do to be achieved.'

In *Gleeds*, Newey J considered (at [97]) that it could not be assumed that the trustees and employer would have gone ahead with the pension increase change without the other changes to the scheme envisaged in the purported new deed. Accordingly, Newey J considered that the implied power argument failed.

However, Newey J did uphold the increase changes on the basis of a separate argument that the evidence was that the new increase had been paid since 1983 and that it could be inferred (despite the limited evidence) that the trustees must have exercised the power of augmentation (see [98] to [102]). This is another example of a presumption of regularity (although this term was not used in *Gleeds*) and is discussed below.

In *Shannan v Viavi Solutions,*[24] the power of amendment of a scheme was vested in trustees and the 'Principal Employer'. A new deed was executed by the parent company and the trustees, but not by the former principal employer (a subsidiary). The power to substitute 'Principal Employer' was exercisable by trustees, old employer and new employer. At first instance, the consent of the old principal employer was implied (at [100]) and Timothy Fancourt QC held that the new deed meant that this was effective under *Davis v Richards and Wallington* (at [102]). This decision was upheld on appeal[25] on other grounds – the implied exercise / *Davis v Richards & Wallington* argument was not considered by the Court of Appeal (see Asplin LJ at [80]).

There was a similar result on an implied removal by the Court of Appeal in *Liontrust v Flanagan*.[26] This was a case involving a limited liability partnership (LLP). One member, LIS, had power to appoint or remove members of the management committee by notice to the LLP. LIS served a notice on the LLP stating 'we hereby consent to all Individual Members being appointed as Committee Members'. There then followed a list of the names of various individual members but the list did not include Mr Flanagan's name. The Court of Appeal held that there had been an implied removal of Mr Flanagan as a member of the LLP management committee. *Davis v Richards & Wallington* was not referred to, but on this point the decision is to a similar effect.

24 [2016] EWHC 1530 (Ch), [2016] PLR 193 (Timothy Fancourt QC).
25 *Shannan v Viavi Solutions UK Ltd* [2018] EWCA Civ 681.
26 *Liontrust Investment Partners LLP v Flanagan* [2017] EWCA Civ 98 per Patten LJ at [60] and [61].

In *British Telecommunications Plc v BT Pension Scheme Trustees Ltd*,[27] a case on review of the index used in a pension scheme, Zacaroli J held that the fact that a new consolidated set of rules was adopted for the scheme did not mean that there had been an implied exercise of a power in the previous rules to determine which index was appropriate. He considered that the principle in *Davis v Richards & Wallington* would only apply to a relevant action if that action would not otherwise be effective unless there had been an implied use of the relevant power. If the action (here the implementation of new rules) would be effective anyway (without relying on the relevant power), then the action should not be impliedly taken to be an exercise of that power. Zacaroli J referred, at [55], to *Davis v Richards & Wallington* and held:

> 'That case stands for the proposition that where a disponor purports to make a disposition of property, but the disposition cannot be effective unless associated with the exercise of a power vested in the disponor, which the disponor could properly have exercised, then unless an intention not to exercise the power can be inferred, the disponor's intention to make the disposition justifies imputing to him an intention to exercise the power. The principle has no application here: the implementation of the 2016 Rules was not dependent upon an exercise of the power (under the 2009 Rules) to determine that RPI was appropriate.'

In *Re Epona Trustees*[28] it was held that there could be an implied exercise of the removal power under TA 1925, s 39 in multiple documents.

Was a deed actually needed?

A similar 'fix' can apply if the parties have attempted to do something by deed, but the document has for some reason failed to be a deed (for example it has failed to be witnessed) and the relevant power does not actually require a deed, but instead an instrument or a document in writing.

In such circumstances the purported (but failed) deed is likely to be considered to be enough. See for example *Windsor Refrigerator Co Ltd v Branch Nominees Ltd*[29] followed in *Byblos Bank SAL v Al-Khudhairy.*[30]

Fix 2: Something is found

Does the relevant power require a document 'in writing' or 'signed' or 'under hand'? In this context, 'under hand' will usually mean the same as signed: *Trustee Solutions v Dubery.*[31] In addition, it is very likely that an e-mail with the name of the sender will be enough to constitute a 'written document' or a 'signed document'. There is no general requirement for a 'wet ink' signature.

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27 [2018] EWHC 69 (Ch) (Zacaroli J).

28 *Re Epona Trustee's Representation, Concerning the T Discretionary Settlement* [2008] JRC 062, 11 ITELR 706. A Jersey case, but involving an English trust.

29 [1961] Ch 375, CA. See also *Nurisvan Investment Ltd v Anyoption Holdings* [2017] VSCA 141 (failed deed can operate as a contract) at [56] to [65].

30 [1987] BCLC 232, CA.

31 *Trustee Solutions Ltd v Dubery* [2006] EWHC 1426 (Ch), [2007] 1 All ER 308 (Lewison J) at [36], following earlier cases, including *Electronic Rentals Pty Ltd v Anderson* (1971) 124 CLR 27. Lewison J's decision was partially reversed on appeal, but not on this point.

In *Golden Ocean Group v Salgaocar Mining*[32] the Court of Appeal considered whether an e-mail could satisfy the provisions of Statute of Frauds 1677, s 4. This section requires a guarantee to be 'in writing and signed by the party to be charged therewith'. The Court of Appeal held (at [32]) that an e-mail was sufficient and that 'a first name, initials or perhaps a nickname will suffice'. The position is similar for a contract requiring any variation to be in writing and signed: *C&S Associates v Enterprise.*[33]

In Queensland, in *Perry v Nicholson*[34] Boddice J held that minutes of a meeting signed by the parties took effect as a removal of one trustee (under the power held by the settlor).

Resolutions?

In some cases, a 'resolution' of the relevant board is needed. There can be potential for the relevant instrument to envisage that a written agreement or resolution is enough for the relevant action. Sometimes there may need to be unanimity (eg all the board members agreeing), but in others a majority may be enough.

For pension trustees, Pensions Act 1995, s 32 provides a statutory provision allowing decisions by a majority. But it seems to be assuming that such decisions will be at a meeting (rather than in writing). For example, s 32(2)(b) requires that 'notice of any occasions at which decisions may be so taken must … be given to each trustee to whom it is reasonably practicable to give such notice'. There is no reason why a provision in the trust deed and rules allowing a unanimous (or even majority) written resolution should not be effective.

For directors, the articles of association will be relevant. A unanimous written resolution is allowed by article 8 in the 2006 Table A.[35]

Fix 3: Majority rule?

In *HR Trustees v Wembley PLC,*[36] Vos J held that a written resolution signed by four out of the five trustees was effective, applying the principle that: 'Equity deems that to be done which ought to be done'. This was considered in *Gleeds*[37] and in *Burgess v BIC UK Ltd*.[38] It seems, for this principle to apply, that there needs to be a specifically enforceable obligation: *BIC UK* at [114], *English v Keats*[39] at [57].

There is a separate line of case law holding that where a board resolution is passed, then all directors become under a duty to carry it out. In *Re Equiticorp International plc*,[40] a petition had been presented for the administration of the company, but the legislation required this to be by 'the directors'. Millett J held that the petition was valid on the grounds that its presentation had been mandated at a directors' meeting. He held:

> 'Once a proper resolution of the board has been passed, however, it becomes the duty of all the directors, including those who took no part in the deliberations of the board and those who voted against the resolution, to implement it'

32 [2012] EWCA Civ 265.
33 [2015] EWHC 3757 (Comm) (Males J) at [123].
34 [2017] QSC 163 (Boddice J).
35 Schedule 1 to the Companies (Model Articles) Regulations 2008 (SI 2008/3229).
36 [2011] EWHC 2974 (Ch) (Vos J).
37 *Briggs v Gleeds (Head Office)* [2014] EWHC 1178 (Ch), [2015] Ch 212 (Newey J) at [74].
38 [2018] EWHC 785 (Ch) (Arnold J).
39 [2018] EWHC 673 (Ch), [2018] WTLR 91 (HHJ Halcon).
40 [1989] 1 WLR 1010, [1989] BCLC 597 (Millett J). Note that only one counsel appeared in this case – it was effectively an ex parte application. See *Minmar (929) Ltd* [2011] EWHC 1159 (Ch) at [40].

But it seems that this may only apply to a resolution passed at a duly convened meeting: *Minmar (929) Ltd*.[41]

There seems to me to be no reason why this principle should not apply to trustees as well (at least where a majority vote provision applies – as will usually be the case for pension trustees).

Fix 4: Companies: Duomatic/Turquand/ss 40 and 161

Special rules can apply for companies (eg in a pensions context, the principal employer or corporate trustee). Three of these can be of help here:

(1) the *Duomatic* principle of a unanimous shareholder approval;
(2) the rule in *Turquand's case* dealing with indoor management; and
(3) statutory presumptions of validity in ss 40 and 161 of the Companies Act 2006.

Duomatic principle

Where a matter requires the approval of, or a resolution of, a company, this usually means that a resolution of the board of directors is required (as having the management of the company's affairs under the articles) or, potentially a decision by a person who has delegated authority to act on behalf of the company.

An example of delegation in a pensions context is the decision in *Libby v Kennedy.*[42] In this case, Jacobs J held (overturning a decision of the Pensions Ombudsman) that a decision (on distribution of a death lump sum) had properly been decided by the pensions manager and approved by a committee of the trustees (which had delegated authority to decide the issue in clear cases).

Approval can be by unanimous shareholder agreement in some cases. In *Re Duomatic,*[43] Buckley J held (at p 373):

> '[W]here it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be.'

Later in *EIC Services Ltd v Phipps*,[44] Neuberger J explained the basis of the principle:

> 'The essence of the *Duomatic* principle, as I see it, is that, where the articles of a company require a course to be approved by a group of shareholders at a general meeting, that requirement can be avoided if all members of the group, being aware of the relevant facts, either give their approval to that course, or so conduct themselves as to make it inequitable for them to deny that they have given their approval. Whether the approval is given in advance or after the event, whether it is characterised as agreement, ratification,

41 *Minmar (929) Ltd v Khalatschi* [2011] EWHC 1159 (Ch), [2012] 1 BCLC 798 (Morritt C).
42 [1998] OPLR 213 (Jacob J).
43 [1969] 2 Ch 365 (Buckley J).
44 [2003] EWHC 1507 (Ch); [2003] BCC 931 (Neuberger J) at [122].

> waiver, or estoppel, and whether members of the group give their consent in different ways at different times, does not matter.'

But these must be steps taken by the shareholders 'qua shareholder'. So in *Shannan v Viavi,*[45] the Court of Appeal disagreed with Henderson J at first instance and held that the agreement of the parent company (Management) to a change in principal employer could not be treated as the consent of the subsidiary (Viavi) under the *Duomatic* principle. Asplin LJ held at [87]:

> 'the *Duomatic* principle does not go as far as the Judge found that it did. There was no decision or assent on Management's part, qua shareholder to Viavi's consent to substitution, nor was there any evidence of its having applied its mind qua shareholder to the issue of Viavi's consent for the purposes of Rule 10.10. It is true that the relevant steps in relation to the execution of the 1999 Deed were taken by Mr Taylor but he did not do so qua shareholder of Management with the intention of 'ratifying' Viavi's consent.'

Turquand

In favour of an outsider without notice, there is a presumption that internal procedures have been followed: *Royal British Bank v Turquand*.[46] This is called the 'indoor management rule'. This has in the past only applied to companies. But I could speculate that the courts could perhaps extend this principle to cover commercial trusts (such as occupational pensions or unit trusts) as well. The same principles would seem to apply to such trusts as well as companies.[47]

Companies Act presumptions: CA 2006, ss 40 and 161

Various protections or presumptions apply under the Companies Act 2006 (CA 2006) in relation to persons (usually outsiders) dealing with a company.

CA 2006, s 40, contains a protection for persons dealing in good faith with directors (originally enacted as European Communities Act 1972, s 9).

> **'40 Power of directors to bind the company**
>
> (1) In favour of a person dealing with a company in good faith, the power of the directors to bind the company, or authorise others to do so, is deemed to be free of any limitation under the company's constitution.
>
> (2) For this purpose—
>
> (a) a person 'deals with' a company if he is a party to any transaction or other act to which the company is a party,
> (b) a person dealing with a company—
> (i) is not bound to enquire as to any limitation on the powers of the directors to bind the company or authorise others to do so,
> (ii) is presumed to have acted in good faith unless the contrary is proved, and

45 *Shannan v Viavi Solutions Ltd* [2018] EWCA Civ 681.

46 (1856) 6 E&B 327, 119 ER 474, Exch Ct.

47 A prospect raised by Lord Sales (extra-judicially) in his recent lecture to the Chancery Bar Association, 'Fraud on a Power: the interface between contract and equity', 2 April 2019 at 14. Available at https://www.supremecourt.uk/docs/speech-190402.pdf.

(iii) is not to be regarded as acting in bad faith by reason only of his knowing that an act is beyond the powers of the directors under the company's constitution.

(3) The references above to limitations on the directors' powers under the company's constitution include limitations deriving—

(a) from a resolution of the company or of any class of shareholders, or
(b) from any agreement between the members of the company or of any class of shareholders.

(4) This section does not affect any right of a member of the company to bring proceedings to restrain the doing of an action that is beyond the powers of the directors.

But no such proceedings lie in respect of an act to be done in fulfilment of a legal obligation arising from a previous act of the company.

(5) This section does not affect any liability incurred by the directors, or any other person, by reason of the directors' exceeding their powers.'

Section 40 can apply to an inquorate board: *Smith v Henniker-Major and Co*.[48]

CA 2006, s 161 is more longstanding and contains some protections on invalid appointments:

'161 Validity of acts of directors

(1) The acts of a person acting as a director are valid notwithstanding that it is afterwards discovered—

(a) that there was a defect in his appointment;
(b) that he was disqualified from holding office;
(c) that he had ceased to hold office;
(d) that he was not entitled to vote on the matter in question.'

Section 161 is derived from s285, CA 1985, which was itself derived from earlier provisions.

Reg 92 of Table A 1985 extends the validation to acts done by meetings of directors and committees of directors.

Section 161 is a machinery to avoid questions being raised on the validity of transactions. It covers a slip or irregularity in the appointment of a director.

It seems from the decision of the House of Lords in *Morris v Kanssen*[49] (on an earlier version of s 161) that it cannot be used for the purpose of ignoring or overriding the substantive provisions on the appointment of directors and will only apply where there has been a genuine attempt to appoint the director in question.

The other person involved must act in good faith: *Channel Collieries Trust Limited v Dover, St. Margaret's and Martin Mill Light Railway Company.*[50] The defect must be overlooked in good faith: *British Asbestos Co Ltd v Boyd*.[51]

48 [2002] EWCA Civ 762.
49 [1946] AC 459, HL.
50 [1914] 2 Ch 506, CA.
51 [1903] 2 Ch 439 (Farwell J).

Minuted meetings: ss 249 and 356

There are also (rebuttable) presumptions that minuted shareholder' and directors' meetings were regular: CA 2006, ss 249(2) and 356(5) (formerly Companies Act 1985, s 382(4)). Section 249 dealing with directors' meetings states:

> **'249 Minutes as evidence**
>
> (1) Minutes recorded in accordance with section 248, if purporting to be authenticated by the chairman of the meeting or by the chairman of the next directors' meeting, are evidence (in Scotland, sufficient evidence) of the proceedings at the meeting.
>
> (2) Where minutes have been made in accordance with that section of the proceedings of a meeting of directors, then, until the contrary is proved—
>
> (a) the meeting is deemed duly held and convened,
> (b) all proceedings at the meeting are deemed to have duly taken place, and
> (c) all appointments at the meeting are deemed valid.'

Fix 5: Presumption of regularity

After a period of time a rebuttable presumption arises that a meeting had been properly called and held etc. An example in a pensions context is *Sovereign Trustees v Glover*,[52] where one issue was whether a meeting had been properly called and held in 1998 to approve a resolution to amend the scheme. There was no evidence of notice of the meeting having been properly given to an absent trustee. Morritt C held that, after over nine years, the presumption of regularity applied: '*omnia rite esse acta praeumuntur*' (at [25]).

As already mentioned, a similar result came in *Gleeds*[53] in relation to a change in the increase rule. Having found that a deed adopting new rules was ineffective and that the purported deed did not operate as an implied use of the amendment power, Newey J upheld the increase changes on the basis of a separate argument that the evidence was that the new increase had been paid since 1983 and that it could be inferred (despite the limited evidence) that the trustees must have exercised the power of augmentation (see [98] to [102]). This is another example of a presumption of regularity (although this term was not used in *Gleeds*).

In *Shannon v Viavi*[54] in the Court of Appeal, Asplin LJ considered several earlier cases on the presumption, including *Entrust Pension Ltd v Prospect Hospice Ltd*[55] and *Scottish Solicitors Pension Fund v Pattison & Sim*,[56] and held at [84]:

> 'The presumption is no more than a rebuttable statement founded on common sense, of the inference it will normally be appropriate to draw in a given situation where primary evidence is lacking.'

And:

> 'it is directed at formality rather than intention.'

52 *Sovereign Trustees Ltd v Glover* [2007] EWHC 1750 (Ch) (Sir Andrew Morritt C).
53 *Briggs v Gleeds (Head Office)* [2014] EWHC 1178 (Ch), [2015] Ch 212 (Newey J) at [98].
54 *Shannan v Viavi Solutions Ltd* [2018] EWCA Civ 681.
55 [2012] EWHC 3640 (Ch), [2013] PLR 73 (Henderson J) at [38]–[40].
56 [2015] CSIH 96.

Fix 6: Equitable relief against accidents/defective execution

In a recent family trust case, *English v Keats*,[57] HHJ Halcon was dealing with a failure by all trustees to agree to an advancement. One trustee had been missed off the relevant deed by mistake. This trustee had now died and the question arose as to whether the advancement had been effective. Judge Halcon applied the old 1728 case, *Tollet v Tollet*,[58] to the effect that: 'Equity will in some cases aid a defective execution'

It is an old doctrine. In *Breadner v Granville-Grossman*[59] Park J had commented that 'a doctrine which was last applied in 1908 is falling into disuse'. In *English*, Judge Halcon distinguished the more recent pensions cases (*HR Trustees v Wembley*[60] and *Gleeds*[61]) as indicating that a specifically enforceable act was needed. Instead he followed the 2012 Jersey decision in *Re Shinorvic*[62] that what was needed was a formal defect in an attempted execution of power and also that the purported beneficiary fell within the category of 'persons for whom the appointor is under a natural or moral obligation to provide'.

This issue was briefly considered (but rejected) in the later pensions case, *Burgess v BIC UK*.[63] Arnold J at [115] referred to *Lewin*[64] at §29-206 as limiting the doctrine to cases 'in which the donee of the power, not the donor, owes some particular obligation, legal or moral, to those seeking to invoke the jurisdiction'. Arnold J continued at [116]:

> '116. In my judgment this jurisdiction cannot be invoked by the Claimants here. That would require an application by the recipients of the Pre-97 Increases against the Trustees. Moreover, the Trustees did not owe the recipients any legal or moral obligation to grant the Pre-97 Increases. I would add that it does not appear that the jurisdiction has ever been exercised in circumstances such as these (the nearest case perhaps being the recent decision of His Honour Judge Hacon sitting as a High Court Judge in *English v Keats* [2018] EWHC 673 (Ch)).'

Davis v Richards and Wallington[65] (discussed above) could perhaps also be an example: the subsidiaries did not sign new deed, although they were obliged to: see *Gleeds*[66] at [73].

Equitable relief on this basis is seemingly not available in pension schemes as there is no 'moral obligation' owed by the trustees to the beneficiaries. In my view it also seems difficult to distinguish the problems found in *Gleeds* (failure to witness a purported deed).

Accidents or disasters?

Is *Tollet* part of equitable doctrine of relief against accident or disasters? It is used as an example of this in the Australian book *On Equity*, by Young, Croft and Smith.[67]

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57 [2018] EWHC 673 (Ch), [2018] WTLR 91 (HHJ Halcon).
58 (1728) 2 Eq Cas Abr 663, 2 P Wms 489, 24 ER 828 and (1728) Mosely 46, 25 ER 262 (Jekyll MR).
59 [2001] Ch 523 (Park J) at 548.
60 [2011] EWHC 2974 (Ch) (Vos J).
61 *Briggs v Gleeds (Head Office)* [2014] EWHC 1178 (Ch), [2015] Ch 212 (Newey J) at [95].
62 *Re Shinorvic Trust*; *Bas Trust Corporation Ltd v MF* [2012] JRC 081.
63 *Burgess v BIC UK Ltd* [2018] EWHC 785 (Ch) (Arnold J).
64 *Lewin on Trusts,* 19th Edn (Sweet & Maxwell 2015).
65 [1991] 2 All ER 563 (Scott J).
66 *Briggs v Gleeds (Head Office)* [2014] EWHC 1178 (Ch), [2015] Ch 212 (Newey J) at [95].
67 P Young, Clyde Croft and Megan Smith, *On Equity* (Sydney: LawBook Co 2009) 293.

In the Australian High Court in *Tanwar Enterprises v Cauchi*[68] Kirby J commented at [118] that this principle is not a 'free-standing foundation for a new and so far unelaborated development of equitable principle'. Instead in order to apply it must be unconscionable or inequitable for an innocent party to rely on the default.

There are references to 'accident' as ground for relief against forfeiture in some cases. In *Tanwar Enterprises* various examples were cited by Kirby J (at [120]) in the case of a purchaser seeking to make payment on a due date (but failing):

- a party robbed on the way to discharging an obligation to pay money at a specified day and place: *Anonymous*;[69]
- prevention of payment caused by a flood or by the intervention of the Plague;
- accident caused by the effect of the weather: *Hill v Barclay;*[70] and
- a lessee delayed in the payment of rent because called away to active service during the English Civil War: *Cocker v Bevis.*[71]

And Kirby J also suggested, as instances more apt for today:

- an unforeseen 'crash' in the computer network at the Land Titles Office (facts in *Re Ronim Pty Ltd*[72]); or
- delay to a courier in a traffic accident or through heart attack of the purchaser's agent whilst on the way to deliver a payment that would otherwise have arrived on time.

Fix 7: Ratification

Once a relevant error has been discovered, if the relevant parties are still agreeable (contrast *Shannan v Viavi*), can the action be ratified? For example:

- a trustee 'resignation' not authorised under the relevant trust deed and rules or statute;
- can meetings and actions since the relevant date be ratified by a deed/resolution of confirmation and ratification by the new trustees and the principal employer? Such a deed could:
  - deem a backdated effect of the trustee change; and
  - 'approve ratify and confirm' acts since then based on the change.

Generally this would be more likely to be effective if executed complying with all relevant requirements for a change of trustees and a scheme amendment[73] (eg by deed if needed and with all the current trustees executing). It would be even better if any old ('resigned') trustee executed as well, but often this may be impractical.

Various issues can arise if it is necessary for any ratification to have retrospective effect? A ratification of the act of an acknowledged agent (by his or her principal) can clearly have retrospective effect, eg in relation to acts of an agent.[74] But even this has limits, in particular that

68 (2003) 217 CLR 315.
69 (1557?) Cary 1 [21 ER 1].
70 (1811) 18 Ves Jun 56 at 62.
71 (1665) 2 Freeman 129.
72 [1999] 2 Qd R 172.
73 See, eg the later confirming deed mentioned in *Shannan v Viavi* and discussed below.
74 See Watts and Reynolds, *Bowstead and Reynolds on Agency* (21st edn, Sweet & Maxwell 2018) 2-047.

it should not operate if it would cause unfair prejudice to a third party.[75] In a pensions trust context, it is possible that issues may arise if:

- accrued benefits are being reduced: Pensions Act 1995, ss 67, 91;
- act/change was time dependent eg which year for tax purposes/two-year time limit on death lump sum;
- the acts performed would otherwise be a breach of trust. For example a change in an investment power and ratification of an unauthorized investment? See *Dalriada v Faulds*[76] at [78], *Shannan v Viavi*[77] at [68].

There are various examples of ratification in pensions cases:

- *Libby v Kennedy*[78] (1998)
  Death lump sum decision delegated to committee. It was disputed whether the decision made was within the terms of delegation.
  Jacob J held that the decision was within the delegation terms, but even if it was not, the decision had been ratified by 'noting' at a later trustee meeting.
- *Municipal Mutual v Harrop*[79] (1998)
  The informal consent of five out of seven directors of the principal employer had been given to a change. Rimer J (as he then was) held that this was not a 'resolution' as required by the trust deed and rules. At a later board meeting the company had been told of the resolution; subsequent board minutes of that meeting were approved at second later board meeting.
  Rimer J held that this was a valid ratification, following the 1890 Court of Appeal decision in *Re Portuguese Consolidated Copper.*[80]
- *Dalriada Trustees v Faulds*[81] (2011)
  An amendment was made containing retrospective changes to the investment power purporting to validate loans to non-members (linked with reciprocal loans to members). Bean J (as he then was) held that the change was outside the amendment power and, at [78], could not:

  > 'validate retrospectively acts which at the time they were committed were breaches of trust.'
  >
  > '[It] is … a device to rewrite history and accordingly ineffective'

  Bean J referred to Lord Walker's comments on retrospection in the 2003 Privy Council decision in *Bank of New Zealand*.[82]
  But it is not clear in *Dalriada Trustees v Faulds* why the later amendment (if it had been allowed by the limits on the amendment power) was not effective as a waiver of any breach?

75 *Ibid*, at 2-089.
76 *Dalriada Trustees Ltd v Faulds* [2011] EWHC 3391 (Ch), [2012] 2 All ER 734 (Bean J).
77 [2016] EWHC 1530 (Ch) (Timothy Fancourt QC) at [68].
78 [1998] OPLR 213 (Jacob J).
79 *Municipal Mutual Insurance Ltd v Harrop* [1998] 2 BCLC 540 (Rimer J).
80 (1890) 45 ChD 16, CA.
81 *Dalriada Trustees Ltd v Faulds* [2011] EWHC 3391 (Ch), [2012] 2 All ER 734 (Bean J).
82 *Bank of New Zealand v Board of Management of the Bank of New Zealand Officers' Provident Association* [2003] UKPC 58, [2003] OPLR 281.

Perhaps such a waiver was seen as a breach of duty by the trustees or involved a conflict of interest? The company cases allow ratification by the shareholders of unauthorised transactions by directors. An example is *Bamford v Bamford* (see below).

- *Shannan v Viavi Solutions*
  Doubts having arisen about past changes in principal employer, the parties (trustees, holding company and subsidiary) executed in 2002 a deed of novation confirming the prior change in principal employer (from 1994) and ratifying all actions and decision since then. At first instance, the judge considered that the earlier deed was effective and so there was no need to consider the deed of novation. The same applied before the Court of Appeal.[83]
- *Baxendale-Walker v APL Management Ltd*[84] (2018)
  This was a private trust case. On a strike out action, Henry Carr J held at [94] that the confirming deed clarifying the exclusion of a beneficiary was not challengeable.

Effect of ratification: Re Z Trust

An important Jersey case from 2016 on ratification involving a family trust is *Re the Z Trust*.[85] There had been a purported change in trustees. Later, some of the beneficiaries wanted to reverse the change as there would be adverse tax consequences in the UK. The Jersey Court agreed and retrospectively set aside the appointments. This left an issue about the acts of purported trustees in the meantime? The court considered (at [64]) three ways to ratify or confirm:

(1) confirmation by perfection;
(2) confirmation by replacement with valid act; and
(3) confirmation by non-intervention.

The Court in *Re Z Trust* referred to an opinion of English counsel discussing these three forms and making the point that they may all 'have the same practical result, but which are conceptually distinct'. The three examples given by counsel were:

> '(i) Confirmation by perfection of an imperfect act or transaction. Examples he gave are confirmation by a principal of a contract entered into by an agent without authority, confirmation by a company of acts done by directors which are voidable by reason of an undisclosed interest, and confirmation by a donor of a gift made as a result of undue influence. In these cases a transaction which is capable of being set aside or otherwise impugned itself becomes fully valid and enforceable.
>
> (ii) Confirmation by replacement of a tainted or doubtful act or transaction by an effective one with a similar effect. An example he gave is where a power is conferred on the trustees of a settlement to appoint or apply capital or income of a trust fund for the benefit of any one or more of a class of beneficiaries, and following a purported appointment by trustees, whose appointment is in doubt, of part of the trust fund to a beneficiary absolutely, the validly appointed trustees exercise their powers so as to appoint the same part of the trust fund to the beneficiary absolutely and to resolve to apply all income of that part since

83 *Shannan v Viavi Solutions UK Ltd* [2018] EWCA Civ 681 at [47].
84 [2018] EWHC 543 (Ch) (Henry Carr J).
85 [2016] JRC 048, 19 ITELR 589.

> the date of the purported appointment to the beneficiary. In this type of case, the state of affairs which was intended to have been brought about by the tainted or doubtful act or transaction, is instead brought about by a second act or transaction which is fully effective.
>
> (iii) Confirmation by non-intervention in acts or omissions which were not or may not have been authorised but have nevertheless actually been acted upon, so that these acts or omissions remain undisturbed and the trusts are accordingly administered on the same footing as if those acts or omissions had been done or omitted by or with the authority of duly constituted trustees. An example is where trustees de son tort who have control over the trust assets, and mistakenly believe that they are the duly constituted trustees, operate a discretionary income trust so as to make distributions of trust income among a class of beneficiaries in a manner which would have been entirely proper had the trustees been duly appointed and those distributions are subsequently left undisturbed on the same footing as though they had been validly made.'

There is an example of a potential use of the second type in the comments of Ferris J in *Yudt v Leonard Ross & Craig.*[86]

Ratifying breaches of trust?

As mentioned above, *Dalriada Trustees v Faulds* includes statements that it is not possible for a breach of trust later to be ratified. But it is not clear from *Dalriada Trustees v Faulds* why the later amendment (if it had been allowed by the limits on the amendment power) was not effective as a waiver of any breach? Perhaps such a waiver was seen as a breach of duty by the trustees or involved a conflict of interest?

The company cases allow ratification by the shareholders of unauthorised transactions by directors. For example, in *Bamford v Bamford*[87] Harman LJ held at 237H:

> 'It is trite law … that if directors do acts, as they do every day, especially in private companies, which, perhaps because there is no quorum, or because their appointment was defective, or because sometimes there are no directors properly appointed at all, or because they are actuated by improper motives, they go on doing for years, carrying on the business of the company in the way in which, if properly constituted, they should carry it on, and then they find that everything has been so to speak wrongly done because it was not done by a proper board, such directors can, by making a full and frank disclosure and calling together the general body of the shareholders, obtain absolution and forgiveness of their sins; and provided the acts are not ultra vires the company as a whole everything will go on as if it had been done all right from the beginning. I cannot believe that that is not a commonplace of company law. It is done every day. Of course, if the majority of the general meeting will not forgive and approve, the directors must pay for it.'

There seems little reason not to follow a similar line and allow such a ratification (by a formal amendment) in a pension trust context where, for example, there has been a defect in a change of trustees or change in the scheme.

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86 (1998) 1 ITELR 531, [1998] Lexis Citation 3036, [1998] All ER (D) 375 (Ferris J) at 541.

87 [1970] Ch 212, CA per Harman LJ at 237H. A ratifying resolution of members of a company in relation to a breach of duty by a director must disregard any votes of the director in question (or any person connected with the director): CA 2006, s 239.

The caselaw on companies refers to a need for full and frank disclosure to the shareholders,[88] but this may not be relevant if all that is being ratified are decisions which would otherwise be defective (or a breach) merely because of an invalid change.

Ratification cannot apply to a breach of a statutory prohibition that the company could not carry out anyway, for example an unlawful reduction of capital.[89] The same would apply to trusts.

Ratification can operate both to approve a relevant act or transaction and also amount to a release of the relevant person (eg a trustee) from a claim for breach of duty.[90] The release concept (or a decision not to sue) may be within the powers of the actual trustees (and not need a formal scheme amendment): see Trustee Act 1925, s 15(f) providing that trustees may:

> 'compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to … the trust … without being responsible for any loss occasioned by any act or thing so done by him or them if … they have discharged the duty of care set out in section 1(1) of the Trustee Act 2000.'

88 For example, *Bamford v Bamford* [1970] Ch 212, CA per Harman LJ at 238A 'full and frank disclosure'. See also *Forge v ASIC* [2004] NSWCA 448 at [391].

89 *Ultraframe (UK) Ltd v Fielding* [2003] EWCA Civ 1805 at [39] and *Goldtrail Travel Ltd v Aydin* [2005] EWHC 1587 at [114].

90 See the discussion in relation to directors in *Buckley on the Companies Acts* (Lexis Nexis) at [4258].