Neutral Citation Number: [2024] EWCA Civ 98

Case No: CA 2023 00241

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES BUSINESS LIST: PENSIONS (ChD)
SIR JULIAN FLAUX, CHANCELLOR OF THE HIGH COURT
[2022] EWHC 3236 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 February 2024

Before:

LORD JUSTICE BEAN
LADY JUSTICE ASPLIN
and
SIR LAUNCELOT HENDERSON

- -

Between:

RAILWAYS PENSION TRUSTEE COMPANY LIMITED	**Claimant/ Respondent**
- and -	
(1) ATOS IT SERVICES UK LIMITED **(2) ATOS UK INTERNATIONAL IT SERVICES LIMITED**	**Defendants/ Appellants**

- -
- -

Andrew Spink KC and **Philip Stear** (instructed by **Baker & McKenzie LLP**) for the **Appellants**
Brian Green KC and Edward Sawyer (instructed by **Slaughter and May**) for the **Respondent**

Hearing dates: 12 – 14 December 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 9 February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Asplin:

1. This appeal is concerned with the proper interpretation of provisions in the Atos Section of the Railways Pension Scheme (the "RPS") and the Railway Pensions (Protection and Designation of Schemes) Order (SI 1994/1432) (the "Protection Order"). The underlying dispute relates to the way in which a deficit in the Atos Section of the RPS must be addressed.

Background

2. Before privatisation, British Rail was operated by a statutory undertaking, known as the British Railways Board (the "BRB") which was owned by the Government. There were various pension schemes for railway employees, the largest of which was the British Railways Pension Scheme (the "BRPS"). As part of the move to privatise the railway industry the Secretary of State for Transport was granted the power to establish a new pension scheme for railway employees under paragraph 2 of Schedule 11 to the Railways Act 1993 (the "Railways Act").

3. The RPS was established on 31 May 1994 by the Railways Pension Scheme Order (SI 1994/1433) (the "RPS Order"). So far as relevant for these purpose, the RPS was comprised of two instruments: the Pension Trust and the Shared Cost Arrangement Rules each of which has since been amended. The RPS is an industry-wide defined benefit occupational pension scheme. The assets and liabilities of the BRPS were transferred to it, and the BRPS was wound up on 2 October 1994.

4. BRPS pensioners and deferred pensioners who were transferred to the RPS were given a Government funding guarantee in respect of their benefits which had accrued in the BRPS. Active Members of the BRPS who were British Rail employees at the date of privatisation were transferred initially to an Open Section of the RPS together with the appropriate share of BRPS assets and liabilities and a share of the surplus. Thereafter, as parts of the rail industry were sold into private ownership each principal private sector employer created its own section within the RPS to which the pension rights of the employees who transferred to that employer, together with the appropriate share of the Open Section assets and liabilities in respect of those employees, were transferred. These Active Members did not receive a Government guarantee. Instead, certain protections were provided by the Protection Order and/or by the Pension Trust and the Shared Cost Arrangement Rules

5. The RPS has one hundred and six sections, of which the "Atos Section", with which this appeal is concerned, is one. The Respondent, the Railways Pension Trustee Company Limited, (the "Trustee") is the sole trustee of the RPS. Although the RPS is administered centrally, the assets and liabilities of each section are ringfenced and each has its own sponsoring and participating employers. In this case, the First Appellant, Atos IT Services UK Limited ("Atos IT") is the "Designated Employer" in respect of the Atos Section. The Second Appellant, Atos UK International IT Services Limited ("Atos UK") is the only Participating Employer in the Atos Section. Unless it is necessary to be specific, I will refer to both Atos IT and Atos UK as "Atos".

6. The Atos Section was established by Atos IT's predecessor, by a deed of adherence dated 31 January 1997. It incorporated the Pension Trust and the Shared Cost Arrangement Rules which had been prescribed under the RPS Order, as then amended.

The rules have been amended since. I shall refer to them as the "Atos Section Rules". The Atos Section was closed to new entrants in 1999 (except where Atos was legally obliged to provide entry to the RPS). In April 2022, there were 39 Active Members, 491 Deferred Members and 561 Pensioners in the Atos Section of the RPS. 20 of the Active Members and 657 of the Deferred Members and Pensioners were "Protected Persons". It is stated in the Trustee's skeleton argument for this appeal that by 30 June 2023, the Active membership had reduced to 25 of whom 15 are Protected Persons.

7. "Protected Person" is defined in paragraph 5 of Schedule 11 to the Railways Act. In essence, it means someone who was employed in the railways industry immediately prior to the enactment of the Railways Act on 5 November 1993, who had pension rights under the BRPS.

The Shortfall

8. The last actuarial valuation of the Atos Section was dated 31 December 2013. It revealed a shortfall of around £6 million. As a result of the issues with which these proceedings are concerned no actuarial valuation has been completed since then. Draft valuations revealed a deficit of £19 million as at 2016 and £18.1 million as at 2019, however. The draft valuations also disclosed deficits on the basis of the cost of providing benefits in line with Pension Protection Fund compensation. Since 2013, Atos has paid deficit repair contributions under a recovery plan established in 2013. £17.9 million of the £18.1 million deficit as at 2019 was attributable to past service benefits. The problem in relation to the deficit has become acute mainly as a result of the very small number of Active Members in the Atos Section, who are the only members available to pay contributions, the size of the deficit and the fact that, for the most part, it relates to past service liabilities.

Relevant provisions

9. The dispute centres around the meaning and effect of the deficit repair rule in the Atos Section Rules (Rule 21) and its interaction with Article 7 of the Protection Order. As one of the means of deficit repair is to increase contributions, it is helpful to have the contribution rules in mind as well. As with other sections of the RPS, normally contributions are payable by Participating Employers and Active Members in a ratio of 60:40.

The Relevant Rules

10. The relevant Atos Section Rules are as follows:

> "**3A Normal and Additional Contributions by Participating Employers**
>
> (1) … each Participating Employer shall (subject to Rule 21 (Shortfall)) contribute at a rate determined by applying the multiple of 1.5 to the amount contributed under Rule 3B … by those of its Employees who are Members. But the Designated Employer (acting on actuarial advice) can decide in respect of Employees in its Section that a higher multiple is appropriate.

…

3B Normal Contributions by Members

Subject to Rule 3E (Salary Sacrifice Contributions), a Member in Pensionable Service shall contribute:

(a) at whichever is the greater of—

(i) the greater of:

(I) 40% of the Future Service Joint Contribution Rate multiplied by the weekly equivalent of the Member's Section Pay; and

(II) 20% of the Future Service Joint Contribution Rate multiplied by the aggregate of the weekly equivalent of the Member's Pensionable Pay;

(ii) the rate applicable in respect of the Member in the Schedule of Contributions (as varied from time to time); and

(iii) such rate as may be determined by the Actuary in respect of the Member in accordance with **Rule 21**; or

(b) at such rate as the Designated Employer and the Trustee agree is appropriate subject to the Actuary's confirmation that the revised rates are sufficient to secure the solvency of the Section.

. . .

Rule 21 **Shortfall**

(1) If an actuarial valuation of the Section by the Actuary shows that the Section Assets together with future income and future contributions due under Rule 3 (Normal Contributions by Participating Employers and Members) … are unlikely to be sufficient to provide the benefits for Members and Ex-Spouse Participants of the Section then paragraph (i) below shall apply and subject thereto, unless the Designated Employer and the Trustee agree within 6 months of the signing of the valuation arrangements to make good the shortfall, (or such longer time as is determined by the Trustee pursuant to paragraphs (2) and (3) below), the shortfall shall be made good in the following way:

(i) the Actuary shall calculate the proportion of the shortfall that relates to liabilities in respect of Preserved Benefits and specify those liabilities as a percentage of total liabilities of the Section. Unless the Actuary determines that liabilities in respect of Preserved Benefits represent less [than] 2.5% of the shortfall, the Participating Employers shall make payments (on a proportionate basis considered by the Trustee to be equitable)

sufficient to meet in full the proportion of the shortfall referable to Preserved Benefits. If the Actuary at any time determines that liabilities in respect of Preserved Benefits represent less than 2.5% of the shortfall then this paragraph shall cease to apply for the purposes of the present and any future valuation;

(ii) unless the Actuary determines that the remaining shortfall is trivial, the multiple for Participating Employer contributions set out in Rule 3A (Normal and Additional Contributions by Participating Employers) shall, subject to paragraph (iii) below, initially revert to 1.5. Subsequently the contributions of Members shall be increased in accordance with Rule 3B (Normal Contributions by Members) and contributions of Participating Employers shall be increased in accordance with Rule 3A (Normal and Additional Contributions by Participating Employers) as determined by the Actuary but subject to a maximum Participating Employer contribution (excluding [salary sacrifice contributions]) of 130% of the Participating Employer's normal long term funding rate of the Section as determined by the Actuary at the date of the valuation, unless the Designated Employer agrees to a higher rate. The Actuary shall determine the rate and period over which the increased contributions shall apply after consulting the Trustee, the Pensions Committee and the Designated Employer;

(iii) where there are no Members (excluding, for the avoidance of doubt, pensioners and deferred pensioners) in the Section, contributions of Participating Employers shall be increased (without reference to Rule 3B (Normal Contributions by Members)) as determined by the Actuary. The Actuary shall determine the rate and period over which the increased contributions shall apply after consulting the Trustee, the Pensions Committee and the Designated Employer;

(iv) unless the Actuary determines that the remaining shortfall is trivial, if there is still a shortfall after Member and Participating Employer contributions have been increased under (ii) above the benefits of Members in respect of future service shall be reduced calculated on such reasonable basis as may be agreed between the Designated Employer and the Trustee (after considering actuarial advice) and which is consistent with Revenue Approval. If the Designated Employer and the Trustee are unable to so agree within 9 months (or, if 2 below applies, such longer period as the Trustee determines) of the signing of the valuation, the Actuary shall determine the basis of reduction of Members' benefits in respect of future service and shall notify the Trustee and the Designated Employer of his determination.

(2) The Trustee may, in its absolute discretion, extend the period before which paragraphs (i) to (iv) above shall apply in respect of any Section beyond the date that is 6 months after the signing

> of the valuation arrangements to make good the shortfall, provided that it does so before the 6 month period has elapsed…"

The second limb of what is now Rule 21(1)(iv) was introduced by amendment in September 1994 and what is now Rule 21(1)(iii) was added by amendment in 2006.

11. It is also relevant that Rule 16 (headed "Opting Out") provides that a Member may opt out of the Atos Section at any time by giving notice to the Trustee on such terms as the Trustee determines from time to time.

The Pension Trust

12. The Pension Trust which was made under the RPS Order and has since been amended, also contains a number of provisions which are directly relevant to this appeal. The Actuary is defined in clause 1 of the Pension Trust, in its amended form, as

> ". . . the actuary of the Scheme and of each Section thereof who shall be:
>
> (a) In any case where the **1995 Act** requires the appointment of an individual, a Fellow of the Institute or Faculty of Actuaries or who holds a qualification which is recognised by the Institute or Faculty of Actuaries as being adequate for the performance of the role of actuary to the Scheme and of each Section thereof and who shall be appointed pursuant to **clause 6B** (Actuarial Valuations); and
>
> (b) in any other case shall be the firm in which the individual referred to in (a) is a partner or the firm or company which employs the individual referred to [in] (a) . . ."

and "actuarial advice" means "advice given by the Actuary". Clause 6B provides that the Trustee and the Pensions Committee shall together appoint the Actuary in accordance with the 1995 Act and may remove the Actuary from such office if they think fit. It also provides that the Trustee shall obtain actuarial valuations of the RPS and any Section of the RPS from the Actuary at intervals of no more than every three years. It also states that:

> ". . . The actuarial valuation for the Scheme shall be drawn in such a way as to enable each Section to be considered separately. Before preparing the valuation the Actuary shall consult with the Trustee, the Designated Employers…and the Pensions Committees including consulting on the basis, methodology and assumptions for the valuation."

13. It is also of note that clause 2G of the Pensions Trust, as amended, (which is headed "Fiduciary Duty") makes no mention of the Actuary. It provides that: "Any power, duty or discretion conferred on the Trustee or on a Pensions Committee by or under the terms of the Pension Trust shall be exercised in accordance with its fiduciary duties to the beneficiaries of the Scheme or the Section concerned."

14. Further, clause 7H of the Pension Trust provides that in relation to a "Protected Person" where the provisions of the Pension Trust and the Rules (defined to refer to the rules of the particular section of the RPS, in this case, the Atos Section) do not satisfy the requirements of the Protection Order, they shall be operated in relation to the Protected Person in such a way as to ensure that they do comply.

The Protection Order

15. The provisions of the Protection Order with which this appeal is directly concerned are Articles 5 and 7. Articles 4 and 6 are also of some relevance. Article 4 is headed "Obligation to provide a scheme". Where relevant, it provides as follows:

> "(1) Any person who employs a protected employee shall provide an occupational pension scheme in which that employee may participate and to which the transfer value in respect of his relevant pension rights which he has acquired, other than any relevant pension rights acquired on the death of a protected person, may be transferred.
>
> (2) An occupational pension scheme which is provided in accordance with paragraph (1) shall include provision under which-
>
> (a) a protected employee may acquire-
>
> (i) relevant pension rights in respect of any transfer value paid to that scheme, which are no less favourable than his relevant pension rights in the scheme from which he is transferring in respect of which that transfer value has been paid; and
>
> (ii) relevant pension rights in respect of any participation by that employee in that scheme which are no less favourable than the relevant pension rights which he had under his designated scheme;
>
> …
>
> (3) For the purposes of this article, and articles 5 and 6, in making any determination as to whether any relevant pension rights in an occupational pension scheme are more or less favourable than any such rights in the designated pension scheme of the protected person in question (or, where the context requires, any other scheme) regard shall be had to the provisions of the schemes as a whole and the circumstances and manner in which that designated scheme permitted (or the other scheme in question permits or permitted) increases in contributions or reductions in accrued or accruing benefits."

It is not in dispute that the reference to "the designated pension scheme" is to the BRPS.

16. Article 5 provides as follows:

> "**5. Participation and acquisition of relevant pension rights**
>
> None of the persons mentioned in paragraph 7(2) (protection — supplementary provisions) of Schedule 11 nor any servant or agent of any such person nor, where any such person is a body corporate, any person who controls that body corporate, shall prevent a protected employee from—
>
> (a) participating in … an occupational pension scheme provided by his employer in accordance with Article 4 [i.e. a scheme for protected employees providing for the accrual of relevant pension rights, such as the Atos Section];
>
> (b) acquiring relevant pension rights in that scheme which are no less favourable than the relevant pension rights which he had under his designated scheme [the BRPS]."

Article 6 contains provisions which provide that an amendment of an occupational scheme which would have the effect of making the relevant pension rights of a Protected Person less favourable than under the relevant designated scheme, "shall have no effect in relation to those rights".

17. Article 7, where relevant, is as follows:

> "**7. Contributions**
>
> (1) Subject to the following paragraphs of this article, where any person mentioned in paragraph 7(2) (protection: supplementary provisions) of Schedule 11 [to the Railways Act] is under a duty to contribute to —
>
> (a) a section of an occupational pension scheme in which a protected person has relevant pension rights; …
>
> the contributions which that person shall make under that duty shall be not less than such amount as, in the opinion of the scheme actuary, shall be sufficient to make provision in respect of the rights specified in paragraph (2) after having taken into account all of the relevant matters, including the resources of the occupational pension scheme or the relevant section of it and any employee contributions.
>
> (2) The following rights are specified for the purposes of paragraph (1) —
>
> (a) the pension rights which, at the date in respect of which the scheme actuary gives that opinion, have been accrued under that scheme or section or been transferred to it in accordance with article 6;
>
> (b) any pension rights which are accruing in respect of current participation in that scheme or section; …

(3) No obligation to make contributions arises under paragraph (1) in any case where, in the opinion of the scheme actuary, the funds of the occupational pension scheme or section in question are sufficient for the purpose mentioned in that paragraph.

(4) Where relevant pension rights are transferred from one occupational pension scheme to another such scheme and the transfer value paid by the trustees of the transferring scheme under article 6(2) in respect of those relevant pension rights is less than the amount which, in the opinion of the scheme actuary of the transferring scheme, would have been required to provide no less favourable relevant pension rights under the transferring scheme as required under article 6(5)—

(a) the person who is required under article 4 to provide the scheme from which those rights are transferred shall pay or secure the payment to the trustees of the scheme to which those rights are transferred [any part of the transfer value calculated by the scheme actuary under article 6(2) and 6(3) which is not paid under that article; and]

(b) without prejudice to the obligation imposed by sub–paragraph (a), the person who is required under article 4 to provide the scheme to which those rights are transferred shall pay or secure the payment to the trustees of that scheme of [any part of any amount required to be paid under sub-paragraph (a) which is not paid . . .]

(5) The trustees of any occupational pension scheme, or any section of such a scheme, in which there are relevant pension rights shall not exercise any of their powers so as to—

(a) increase any contributions which are payable to that scheme or section by a protected employee; nor

(b) reduce any benefits which are payable in respect of any protected person;

unless that increase, or as the case may be reduction, is made in the circumstances and manner in which it could have been made under the designated scheme of the person in question and the scheme actuary has, within the period of 6 months which immediately precedes any such increase or reduction, advised the trustees that it may or should be made. …

(7) Where the opinion or advice of the scheme actuary has been given under this article, he shall (as soon as is reasonably practical) provide to the trustees of the scheme or section in question a schedule which specifies the contributions which are required, and the dates on which they are required, in order to meet the liabilities of that scheme or section."

The BRPS

18. Some reliance has also been placed upon Rule 45(5) of the BRPS. It provided as follows:

> "If the Actuary reports that there is a shortfall which is not attributable to Preserved Benefits, such shortfall shall be made good in the following way. The Principal Employer and Trustee may agree, within 3 months of the signing of the Scheme valuation, arrangements effected through amendment to the Rules . . . for (i) the payment of additional contributions; or (ii) the reduction of benefits; or (iii) a combination of (i) and (ii) or such other methods as the Principal Employer and Trustee may agree, to make good the shortfall. If no such agreement is reached within these 3 months, then the Actuary shall as soon as possible thereafter and, in any event, no later than 6 months after the signing of the Scheme valuation, having consulted the Principal Employer and the Trustee, determine the amount of such rate of increase in Employer and Member contributions as is necessary to make up such shortfall. The rate and time period over which the increased contribution rates shall apply shall be determined by the Actuary, after consulting the Trustee and the Principal Employer. . ."

Procedural Background

19. By an amended Part 8 Claim form, the Trustee posed a series of questions relating to the proper interpretation of Rules 3 and 21 of the Atos Section Rules and Articles 5 and 7 of the Protection Order. The Chancellor of the High Court, Sir Julian Flaux, addressed each of those questions in his detailed judgment and provided a checklist of answers at [120]. The citation for his judgment is [2022] EWHC 3236 (Ch).

20. The Chancellor also made representation orders, pursuant to CPR 19.7(2). The Trustee was appointed to represent all Active Members of the Atos Section of the RPS and those claiming under them and any other beneficiaries with a like interest in whose interests it is that the Atos Section Rules and the Protection Order should be interpreted in the way for which the Trustee contends. Atos was appointed to represent all, if any, other beneficiaries of the Atos Section in whose interest it is that the RPS and the Protection Order be interpreted in the way for which Atos contends. To the extent that it is necessary, we are content to continue those orders for the purposes of the appeal.

The Chancellor's judgment in outline

21. In outline, the Chancellor decided that:

    i) Rule 21 was not an exhaustive and comprehensive regime for eliminating the shortfall in the Atos Section of the RPS [92] - [95];

    ii) it was accepted that "so far as practicable" must be read into the opening part, or "stem" as it was called, of Rule 21(1) [95];

iii) the words "contributions . . . shall be increased . . . as determined by the Actuary" in Rule 21(1)(ii) give the Actuary a discretion whether to increase contributions at all, and, if so, by how much [96] – [98];

iv) the alternative construction of "as determined by the Actuary" leads to a "thoroughly uncommercial result" which would not eliminate the shortfall and would lead to Active Members opting out of membership of the Atos Section [99];

v) in any event, even if Active Members did not opt out at that stage and there were an increase in contributions, but only a limited reduction in the shortfall as a consequence, so that the shortfall was not trivial, Rule 21(1)(iv) would then "kick in". The first limb confers a discretion on the Trustee whether to agree a reduction in benefits, and, if so, on what terms. It contemplates actuarial advice being taken which would probably include advice to the effect that any reduction in benefits would lead to Active Members opting out because there would be no incentive for them to accept an increase in contributions if there were no benefits going forward. The Trustee would be bound to take account of such advice and would be entitled to exercise its discretion not to agree to a reduction in benefits [100];

vi) further, the wording in the second limb of Rule 21(1)(iv) connotes a discretion in the Actuary as to whether to reduce benefits and, if so, by how much [102] – [104];

vii) the provision only contemplates making good the shortfall "so far as practicable" and the use of "determining" imports an exercise of judgment and discretion which includes a discretion not to reduce benefits at all [103];

viii) the alternative construction of "shall determine the basis of reduction" being a mathematical calculation, would mean that future benefits would be reduced to zero which leads to a "thoroughly uncommercial result" [104];

ix) the Protection Order was intended to provide protection to Protected Persons in addition to that under the Pension Trust and the RPS, hence clause 7H of the Pension Trust and the Protection Order was the Order contemplated by paragraph 7 of Schedule 11 to the Railways Act which expressly contemplated that the Protection Order could impose a duty to make contributions upon the employer of Protected Persons [105];

x) Atos is caught by Article 7(1), being an employer of Protected Persons which was under a duty under Rules 3A and 21 to make contributions to the RPS [106];

xi) Article 7(1) contains a duty above and beyond that under the Atos Section Rules. It contains a balance of cost obligation which kicks in after Rule 21(1)(ii) has taken effect and not after either Rule 21(1)(iii) or (iv), Rule 21(1)(iii) being a provision of last resort [107], [111] and [114] – [117];

xii) Such a construction is borne out by the wording of Article 7(1) and (2) and Articles 7(4) and (7) [109]; and

xiii) Article 5 applies not just to initial participation in the Atos Section of the RPS in the 1990s "but continued participation thereafter for the whole period in which the employees had protected status" [118].

The Appeal

22. The Grounds of Appeal are lengthy and complex and it seems to me that it is best to address them and the additional reasons for upholding the Chancellor's judgment set out in the Respondent's Notice, in narrative form under the relevant headings below.

23. We heard complex and intricate submissions about the proper construction of Rule 21 of the Atos Section Rules and the meaning and effect of the Protection Order in the context of railway privatisation and the extent to which the Atos Section Rules and the Protection Order dovetail. Before turning to the documents themselves and the nuances of the submissions, it is helpful to have an overview.

24. The dispute remains essentially unaltered on appeal. It has two aspects: the first is the proper construction of Rule 21; and the second is the effect and operation primarily of Article 7, but also Article 5, to a lesser extent. In relation to Rule 21, the essence of the dispute remains whether: under Rule 21(1)(ii), the Actuary is given a "discretion" to decide that contributions of employers and active members combined should be set at a lower rate than 130% (the "Cap") (or, if the Cap has been lifted, at a lower rate than that which would make good the shortfall in full); and under Rule 21(1)(iv), whether either the Trustee and Designated Employer (by agreement) or the Actuary (in default of such agreement) may decide a basis for the reduction of benefits such that the aggregate actuarial value of the reductions would be less than that of the shortfall remaining after the application of Rule 21(1)(ii) (including even a zero reduction).

25. Mr Spink KC, who appeared with Mr Stear for Atos, submits that the terms of Rule 21 are such that the shortfall must be made good in full and that accordingly, under Rule 21(1)(ii) the Actuary is required to determine the contributions required to achieve that (subject to the Cap, unless it is lifted by the Designated Employer) and then to determine the rate and period over which those increased contributions shall apply after consulting the Trustee, the Pensions Committee and the Designated Employer. In other words, he says that determining the increase in contributions is an actuarial calculation in relation to which the Actuary has no choice and that contributions must be designed to satisfy the shortfall in full. Once the calculation is made, the contributions must be increased by that amount whether or not they are likely to be paid and the shortfall is made good as a result of the calculation.

26. Mr Green KC, who appeared with Mr Sawyer for the Trustee, submits that Rule 21 was never designed to be a complete whole. It always contemplated that the tools in Rule 21(1)(ii) and (iv) might be insufficient to make good the shortfall in full. In summary, he submits that when determining the contributions and the rate and period over which they shall apply under Rule 21(1)(ii), the Actuary must exercise his professional judgment and, in particular, must take into account whether the increased contributions will, in fact, be paid. As a result, Mr Green says that it is open to the Actuary to determine contributions and a rate of payment which is less than what would be necessary to make good the shortfall in full.

27. Mr Spink and Mr Green take the same opposing positions in relation to the interpretation of Rule 21(1)(iv) in relation to benefit reduction. Mr Spink submits that sub-rule (iv) admits of no choice. The future service benefits "shall" be reduced and in the light of the extent of the deficit and the number of Active Members, that inevitably means that future benefits will be reduced to zero. Mr Green, on the other hand, says that the Actuary has a choice in relation to the extent and basis of the reduction.

28. Further, the Trustee says that the Chancellor was right to decide that Article 7 of the Protection Order steps in to require the balance of the cost of funding benefits which are not met by contributions under Rule 21(1)(ii) to be paid by the employers. In oral submissions, Mr Green added a further nuance to the effect that it is also possible that the balance of cost obligation under Article 7 takes effect at the later stage after benefit reductions (if any) in accordance with Rule 21(1)(iv) rather than after contribution increases under Rule 21(1)(ii).

29. Atos, on the other hand, contends that if Article 7 takes effect after Rule 21(1)(ii), Rule 21(1)(iv) is redundant in any Shared Cost Arrangement Section with Protected Persons in it. In their original skeleton argument, Mr Spink and Mr Stear contended that Article 7 does not create a freestanding obligation to pay employer contributions at all. That contention has become known as Option A. In their supplementary skeleton argument they set out an alternative which has been referred to as Option B and which received more emphasis in oral submissions. It is to the effect that if Article 7 is freestanding, it applies only to the balance of cost of the outstanding liabilities in the Atos Section after it has been re-designed by a full increase in contributions under Rule 21(1)(ii) and full benefit reductions have taken place under Rule 21(1)(iv).

30. As to Article 5 of the Protection Order, Mr Spink submits that it applies only where the conduct of the Employer which leads to Protected Persons opting out is intentional or, alternatively, the conduct is unlawful. Mr Green submits that Article 5 cannot be construed in that way.

Principles of Construction

31. As both this court and the Chancellor before us were required to interpret the provisions of the Atos Section of the RPS in the light of the Protection Order, it is important to begin by setting out the relevant principles for the construction of pension scheme provisions. They are not in dispute, nor is it suggested that any different principles should have been applied in relation to the interpretation of Schedule 11 to the Railways Act and the relevant Articles of the Protection Order. The way in which the Chancellor applied those principles is the subject of a ground of appeal (Ground 4).

32. Lord Hodge addressed the relevant principles of construction applicable to pension trusts, at [13] to [16] of the judgment in *Barnardo's v Buckinghamshire & Ors* [2018] UKSC 55; [2019] ICR 495 in the following way:

> "13. In the trilogy of cases, *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900, *Arnold v Britton* [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] AC 1173, this court has given guidance on the general approach to the construction of contracts and other instruments, drawing on modern case law of the House of Lords since *Prenn v Simmonds* [1971] 1 WLR

1381. That guidance, which the parties did not contest in this appeal, does not need to be repeated. In deciding which interpretative tools will best assist in ascertaining the meaning of an instrument, and the weight to be given to each of the relevant interpretative tools, the court must have regard to the nature and circumstances of the particular instrument.

14. A pension scheme, such as the one in issue on this appeal, has several distinctive characteristics which are relevant to the court's selection of the appropriate interpretative tools. First, it is a formal legal document which has been prepared by skilled and specialist legal draftsmen. Secondly, unlike many commercial contracts, it is not the product of commercial negotiation between parties who may have conflicting interests and who may conclude their agreement under considerable pressure of time, leaving loose ends to be sorted out in future. Thirdly, it is an instrument which is designed to operate in the long term, defining people's rights long after the economic and other circumstances, which existed at the time when it was signed, may have ceased to exist. Fourthly, the scheme confers important rights on parties, the members of the pension scheme, who were not parties to the instrument and who may have joined the scheme many years after it was initiated. Fifthly, members of a pension scheme may not have easy access to expert legal advice or be able readily to ascertain the circumstances which existed when the scheme was established.

15. Judges have recognised that these characteristics make it appropriate for the court to give weight to textual analysis, by concentrating on the words which the draftsman has chosen to use and by attaching less weight to the background factual matrix than might be appropriate in certain commercial contracts: *Spooner v British Telecommunications plc* [2000] Pens. LR 65 paras 75–76 per Jonathan Parker J; *BESTrustees v Stuart* [2001] Pens. LR 283, para 33 per Neuberger J; *Safeway Ltd v Newton* [2018] Pens. LR 2 , paras 21–23 per Lord Briggs JSC, giving the judgment of the Court of Appeal. In *Safeway*, Lord Briggs JSC stated, at para 22:

> "the Deed exists primarily for the benefit of non-parties, that is the employees upon whom pension rights are conferred whether as members or potential members of the Scheme, and upon members of their families (for example in the event of their death). It is therefore a context which is inherently antipathetic to the recognition, by way of departure from plain language, of some common understanding between the principal employer and the Trustee, or common dictionary which they may have employed, or even some widespread practice within the pension industry which might illuminate, or give some strained meaning to, the words used."

> I agree with that approach. In this context I do not think that the court is assisted by assertions as to whether or not the pensions industry in 1991 could have foreseen or did foresee the criticisms of the suitability of the RPI, which later emerged in the public domain, or then thought that it was or was not likely that the RPI would be superseded.
>
> 16. The emphasis on textual analysis as an interpretative tool does not derogate from the need both to avoid undue technicality and to have regard to the practical consequences of any construction. Such an analysis does not involve literalism but includes a purposive construction when that is appropriate. As Millett J stated in *In re Courage Group's Pension Schemes* [1987] 1 WLR 495, 505 there are no special rules of construction applicable to a pension scheme but "its provisions should wherever possible be construed to give reasonable and practical effect to the scheme". Instead, the focus on textual analysis operates as a constraint on the contribution which background factual circumstances, which existed at the time when the scheme was entered into but which would not readily be accessible to its members as time passed, can make to the construction of the scheme."

33. The relevant principles were considered most recently in this court in *Britvic plc v Britvic Pensions Ltd & Anr* [2021] EWCA Civ 867, [2021] ICR 1648. That case was concerned with the construction of a rule governing the annual rate of increase to pensions in excess of the guaranteed minimum pension. The rule provided that the increase would be the percentage increase in the retail prices index for the previous year but subject to a capped Limited Price Indexation, "or any other rate decided by the Principal Employer". The question was whether those words meant "any higher rate" or "any other rate, whether higher or lower".

34. The Master of the Rolls, Sir Geoffrey Vos, (with whom Coulson and Nugee LJJ concurred) set out the most relevant authorities in relation to construction of pension schemes at [17] – [24]. For these purposes, it is important to note that at [22] – [24] the Master of the Rolls quoted from the judgment of Lord Hodge JSC in the *Barnardo's* case at [14] – [16] and highlighted Lord Hodge's focus on textual analysis and its effect as a constraint upon the contribution of the background factual matrix. The Master of the Rolls distilled the approach at [29] as follows:

> "As it seems to me, however, the approach indicated by, at least, *Rainy Sky* [2011] 1 WLR 2900, *Arnold v Britton* [2015] AC 1619, *Wood v Capita* [2017] AC 1173 and *Barnardo's* [2019] ICR 495 is clear. In construing a pension scheme deed, one starts with the language used and identifies its possible meaning or meanings by reference to the admissible context, adopting a unitary process to ascertain what a reasonable person with all the background knowledge reasonably available to the parties at the time would have understood the parties to have meant. If, however, the parties have used unambiguous language, the court must apply it (see Lord Clarke JSC at para 19 in *Rainy Sky*), and

> the context of a pension scheme deed is "inherently antipathetic to . . . [giving] some strained meaning to . . . the words used" (Lord Briggs JSC at para 22 in *Safeway* [2018] Pens LR 2, approved by *Barnardo's*, para 15)."

35. He went on to conclude that considerable weight should be given to the use of unambiguous wording [30], that it was not a case in which there had been sloppy or unclear drafting [31] but that giving full weight to the relevant factual matrix, one could only arrive at the conclusion that the phrase meant only "higher rate" if there had been a clear mistake, which there was not [32].

36. At [57] Coulson LJ noted:

> "In the absence of ambiguity, it should be unnecessary to consider those arguments which are conventionally parasitic upon ambiguity, namely commercial common sense on the one hand, and excessive literalism or undue technicality, on the other. As Lord Hodge JSC explained in *Arnold v Britton* at para 77, those issues only arise for consideration if there is "a basis in the words used and the factual matrix for identifying a rival meaning". If, as here, there is no such basis, those arguments do not arise."

Nugee LJ added further weight to this conclusion by reiterating at [70] that "one does not get into the question of choosing which interpretation is more consistent with business common sense unless there are two rival interpretations available". Having considered passages from the judgments of Lord Neuberger PSC and Lord Hodge JSC in *Arnold v Britton*, Nugee LJ added, also at [70]:

> ". . . These statements were all made in the context of construction of contractual provisions, but they apply at least as strongly to the construction of pension schemes where there are various factors which make the context "inherently antipathetic" to departing from the plain language of a provision (*Safeway Ltd v Newton* [2018] Pens LR2, para 22 per Lord Briggs JSC), and which justify giving weight to textual analysis (*Barnardo's* at para 15). It is true that Millett J said as long ago as 1987 in *In re Courage Group's Pension Schemes* [1987] 1 WLR 495, 505 that the provisions of a pension scheme "should wherever possible be construed to give reasonable and practical effect to the scheme", but the important words for present purposes are "wherever possible"."

37. Mr Spink submitted that despite setting out the relevant principles of construction and accepting that they applied at [91], the Chancellor failed to apply them properly because he erred in his understanding of the requirement to interpret pension scheme provisions so as to give "reasonable and practical effect to the scheme". This is Ground 4 of the Grounds of Appeal. Mr Spink says that the Chancellor's misapplication of this principle, amongst other things, led him to conclude that the phrase "as determined by the Actuary" in Rule 21(1)(ii) contains a discretion. I will return to Ground 4 where it arises below.

Rule 21

Approach

38. Applying the principles set out by Lord Hodge in the *Barnardo's* case and reiterated in *Britvic*, it is important to give proper weight to textual analysis by concentrating on the words which were used and to place less emphasis on the factual matrix. It is also important to keep in mind that there are no special rules for the interpretation of pension schemes. As Lord Hodge pointed out at [16] of the *Barnardo's* case, the emphasis on textual analysis does not require literalism but includes a purposive construction when that is appropriate. He expressly approved the dictum of Millett J in *In re Courage Group's Pension Schemes* [1987] 1 WLR 495, 505 that the provisions of a pension scheme "should wherever possible be construed to give reasonable and practical effect to the scheme". As Nugee LJ pointed out in the *Britvic* case, however, that applies only where it is possible.

39. It is necessary, therefore, to concentrate on Rule 21 in the context of the Atos Section Rules as a whole. Of course, the Pension Trust itself which established the RPS and forms the foundation for the Atos Section Rules is relevant. In addition, given the fact that the RPS was established as a result of privatisation of the railways and the Protection Order applies to the pension rights of Protected Persons who were transferred to the RPS and its many sections, one must also have Schedule 11 to the Railways Act and the RPS Order in mind and, as Mr Green put it, one should have the Protection Order "on the desk". One must not lose sight, however, of the importance of the words used in Rule 21 itself.

40. It seems to me, however, that the letter dated 31 March 1994 from Nick Montagu, the Deputy Secretary at the Department of Transport at the time, to Derek Fowler, the Chair of the BRPS Trustee, and its attachments, are of much less significance, if any. The Deputy Secretary sought to consult the Trustee upon the Minister of Transport's proposals in relation to post-privatisation pension arrangements set out in the letter and to obtain the Trustee's comments on draft documentation including the Pension Trust, the Rules of the Shared Cost Arrangement, the RPS Order and the Protection Order before they were laid before Parliament. The letter sets out the steps which were intended to be taken and contains the Deputy Secretary's understanding of what was intended to be achieved by the various draft documents which were attached. Accordingly, it seems to me that little or no weight should be attributed to it: *Bennion, Bailey and Norbury on Statutory Interpretation* (8th ed) Section 24.17 at 804-806, *R (on the application of East Riding Yorkshire Council) v Joint Committee for the Purpose of making Appointments to the Humberside Police Authority* [2001] LGR 292 at [19] – [20] and *BBC v Information Commissioner* [2009] EWHC 2348 (Admin) at [76]. The letter cannot detract from the emphasis on the words used in Rule 21 and the Orders as made. It follows that, to the extent that Atos contends that the Chancellor erred in failing to place sufficient weight upon the letter when construing Rule 21 and Articles 5 and 7, I disagree. This issue comprises part of Ground 3B of the Grounds of Appeal.

41. The same is true in relation to Rule 45(5) of the BRPS. Although it is of interest in that it contains similar but different provisions in relation to making good shortfall in that previous scheme, it is of little (if any) assistance when interpreting the words which the drafters chose to use in Rule 21. Rule 45 is of relevance, of course, when considering the effect of references to "the designated scheme" in the Protection Order. It is not in

dispute that that is a reference to the BRPS. This addresses Ground 3D of the Grounds of Appeal.

Is Rule 21 exhaustive and comprehensive? (Ground 1)

42. Ground 1 of the Grounds of Appeal is that the Chancellor erred in deciding that Rule 21 does not create an exhaustive and comprehensive regime for the elimination of shortfall. It has four separate aspects comprising Grounds 1A – D. In summary, they are that the Chancellor erred: in construing Rule 21(1), as originally enacted in the Schedule to the RPS Order, as never having been intended to be exhaustive and failed to recognise that it contained a trust power or discretionary trust; in failing to construe Rule 21(1) as providing for any shortfall to be objectively made good; in failing to construe Rules 20 and 21 as requiring the Atos Section to be funded on the basis of the prospective benefits method with the result that a shortfall would be made good by making alterations to future contributions prospectively payable and/or future benefits prospectively payable; and that he erred in his Reasons for refusing permission to appeal.

43. The Ground as a whole is significant for two reasons. First, it forms the basis for the submissions relating to the textual interpretation of Rule 21 to mean that the shortfall must be eliminated in full by the exercise of the tools in the sub-rules and, in particular, by sub-rules (ii) and (iv). Secondly, the submission that Rule 21 contains such a comprehensive regime is part of the bedrock of Atos' interpretation of Article 7 which is now referred to as Option A, to which I shall refer below.

44. I agree with the Chancellor that Rule 21 does not create an exhaustive and comprehensive regime for the elimination of shortfall in the Atos Section of the RPS. First, as the Chancellor pointed out at [92] of his judgment, the rule, as originally drafted, did not contain the equivalent of Rule 21(1)(iii) which places a balance of cost obligation upon the Participating Employers in the event that there are no Active Members left in the Atos Section. It was not until 2006 that such a provision was included. Secondly, it was not until September 1994 that the second limb of Rule 21(1)(iv) was added. Until its introduction it was possible that the Designated Employer and the Trustee might not be able to agree a "reasonable basis" in relation to the reduction of future service benefits. As originally drafted, therefore, Rule 21 did not create a comprehensive regime for complete elimination of a shortfall. This is Ground 1A.

45. What of the rule in its present form? It seems to me that the reference to "shall be made good" at the end of what has been referred to as the stem of Rule 21(1) cannot bear the weight which Mr Spink would give it. He relies upon that phrase together with the use of "shall" and "shall be increased" in Rule 21(1)(ii) and "shall be reduced" in Rule 21(1)(iv) as the basis for a construction of the rule which, subject to the 130% Cap in (ii), requires the Actuary to calculate contributions which cover the entirety of the shortfall and that once those contributions are calculated, the shortfall is made good there and then. Rule 21(1) must be read and interpreted as a whole, however. It must also be interpreted in the context of the Atos Section Rules as a whole.

46. The gateway to the sub-provisions of the Rule is set out in the stem. If an actuarial valuation shows that future income and future contributions due under Rules 3 and 4 are unlikely to be sufficient to provide the benefits, Rule 21(1)(i) applies. It is not

directly relevant here but it is pertinent to note two things. First, it provides that the Actuary "shall calculate" the proportion of the shortfall that relates to liabilities in respect of "Preserved Benefits". Secondly, it requires Participating Employers to make payments to "meet in full" the proportion of the shortfall referable to such Preserved Benefits. It is also of note that Rule 18E contains an express reference to meeting the "full cost" of discretionary benefits. Such wording is not found in either Rule 21(1)(ii) or (iv).

47. Subject to (i), unless the Designated Employer and the Trustee agree within a specified period to make good the shortfall, the mechanism in (ii) – (iv) applies. In my judgment, the words "shall be made good" in the phrase "shall be made good in the following way" at the end of the stem must be read in the context of the phrase as a whole. It must be interpreted, therefore, in the light of the "tools" which (ii) – (iv) provide. As soon as one looks to those sub-rules it is clear that "shall be made good" can only mean whatever can be achieved by means of the tools available to fulfil that requirement.

48. Before turning on to those sub-rules, I should add that it seems to me that there is nothing in the point that "make good the shortfall" in the stem of Rule 21(1) should be construed as a reference to making good in full. The phrase is used in the context of arrangements which may be agreed between the Designated Employer and the Trustee. As the Chancellor pointed out at [94] of his judgment, when agreeing arrangements, the Trustee is under a fiduciary duty owed to the members of the RPS to have regard to issues including affordability of contributions and the effects of the basis of the reduction in benefits.

49. Turning on to the "tools" in the sub-rules, it seems to me that it is apparent from the very nature of the words used in sub-rules (ii) and (iv) that it was not envisaged that they would necessarily create a complete regime for the elimination of a deficit. Of course, depending upon numerous factors, including the number of remaining Active Members, their pensionable salaries and the size of the deficit, it was always possible that a shortfall might be met in full by agreement under the stem or under sub-rule (ii), as a result of contributions determined by the Actuary. If one construes Rule 21 as a whole, however, it is clear that the rule itself envisages that it may be necessary to turn on from sub-rule (ii) to what is now sub-rule (iv). Sub-rule (iv) takes effect unless the Actuary determines that "the remaining shortfall" is trivial. It expressly envisages a situation, therefore, in which the increase in contributions has been insufficient for the task.

50. Further, the fact that the Cap applies to contributions determined by the Actuary under sub-rule (ii) (unless the Designated Employer agrees to a higher rate) is another indicator that the sub-rule itself was not expected necessarily to eradicate the shortfall in its entirety in all circumstances. In addition, both sub-rules (ii) and (iv) are in a different form from sub-rule (i) which makes express reference to meeting the liabilities with which it is concerned "in full". It is also inherent in the nature of the tool which may be utilised under sub-rule (iv) that it may not be sufficient to meet the full extent of the shortfall.

51. As I have already mentioned, I do not consider that Rule 45(5) of the BRPS is of assistance when seeking to interpret Rule 21. It is necessary to concentrate on the words which were used in Rule 21 itself. In any event, as an illustration only, the words used in Rule 21 may be contrasted with the use of the phrase "as is necessary to make up the

shortfall" in relation to the increase in Member and Employer contributions in Rule 45(5). That wording, which is more consistent with making up a shortfall in full, is absent from Rule 21.

52. Mr Spink submits, nevertheless, that although there are potential gaps, the regime is exhaustive in the sense that what he calls the "waterfall" is compulsory. He says that one needs to be able to tell objectively whether the shortfall is made good at the time at which the rule is operated in order to move from sub-rule (ii) to (iv). That, he says, is an indicator that the exercise under sub-rule (ii) is a calculation of what is necessary by way of contributions to meet the shortfall, taking account of the Cap, and that the certainty which that calculation provides on paper, enables one, if necessary, to move on to sub-rule (iv). He says that this is underscored by the very circumstances contemplated by Rule 21 which are themselves an indicator that the Actuary should use the prospective benefits method (Grounds 1B and C). He says that that leads to a conclusion that what is necessary is a calculation and determination of the required contributions, there and then. He says that a snapshot approach is necessary.

53. Mr Spink submits that the Chancellor's approach at [99] is contrary to that principle. This is a reference to the Chancellor's reasoning at [95] – [99]. In summary, the Chancellor reasoned that the Actuary has a "discretion" in sub-rule (ii) to determine the level of increase in contributions rather than being required, merely, to carry out a mechanistic calculation, the effect of which, in all probability, would lead to all the Active Members opting out of the Atos Section. The Chancellor concluded that far from eliminating the shortfall, such an exercise would lead to there being no actual reduction in it at all.

54. At Ground 1B, it is also stated that at [95] of his judgment, the Chancellor proceeded on the basis of a "significant irregularity" in apparently accepting a submission that Atos had agreed that the words "so far as practicable" should be read into the text of the stem of Rule 21 and then went on to use those words when construing the rule. It is submitted that there was no such concession.

55. As to the "significant irregularity" referred to in Ground 1B, Atos accepts that it did state at paragraph 10(d) of a document referred to as a "Manual" which was in an appendix to its skeleton for the hearing before the Chancellor, that one could read "so far as practicable" into the stem of Rule 21(1) as part of the construction process if those words carried a particular meaning. It was explained in the "Manual" that: " . . . the words in Rule 21(1) (stem) which read "*the shortfall shall be made good in the following way*" should be interpreted as meaning "*the shortfall shall, so far as practicable, be made good in the following way*" but with the understanding that the only way in which practicability could prevent the shortfall being made good in the relevant sense is if, in fact, the present value of benefit reductions taking all Active Members to nil accrual is exceeded by the present value of the Capped Shortfall . . ."

56. As I have already mentioned, at [95] of his judgment the Chancellor stated that it was accepted by Atos that the words "so far as practicable" were to be read into the closing words of the stem of Rule 21. He went on to state that once they are read in:

> ". . . that necessarily involves the conclusion that Rule 21(1) cannot be an exhaustive regime for eliminating the shortfall, since one of the ways in which it will not be "practicable" to do

> so is if issues arises as to affordability, value for money and collectability which, if ignored, will simply lead to Active Members opting out, so that the shortfall is not addressed at all or only to a limited extent."

It seems to me that this is a disagreement without any real substance. The wording of paragraph 10(d) could have been expressed more succinctly and clearly. It appears, however, that what was meant was that the stem of Rule 21(1) could be interpreted to include the phrase "so far as practicable" but the only circumstances in which the shortfall would not be made good as a matter of practicability would be if a shortfall remained even after future benefits had been reduced to nil.

57. Although the compass of the "concession" was expressed to be limited, I agree with the Chancellor that the effect is to drive a coach and horses through the argument that Rule 21 is a comprehensive code. Paragraph 10(d) was one illustration of the fact that Rule 21 cannot be an exhaustive code for the elimination of shortfall. It seems to me that the Chancellor was entitled to reason from that point and that there was nothing impermissible about doing so. Furthermore, it seems to me that the approach which was taken is part of a proper and permissible approach to the interpretation of the words used in Rule 21.

58. As to Ground 1C, it seems to me that the Chancellor was never concerned with the actuarial basis for either the actuarial valuation which threw up the likelihood of a Rule 21 shortfall in the first place, or the actuarial methodology used for the purposes of the various determinations by the Actuary. He was concerned with the proper interpretation of Rule 21 and the meaning to be attributed to "determine" and its cognates in that context. I consider, therefore, that this sub-ground of appeal is an entirely artificial construct and has no basis in the judgment at all. I do not propose to deal with it any further.

59. Ground 1D relates to the Chancellor's reasons for refusing permission to appeal and not his Order based on the reasons in his judgment. Accordingly, it is not appropriate to address it further. For the sake of completeness, I should also mention that in oral submissions, Mr Spink disavowed the proposition in his Ground 1A that the words "shall be reduced, calculated on such reasonable basis as may be agreed between the Designated Employer and the Trustee" created a trust power or discretionary trust. I will say no more about it.

Does the use of the words "determine" and "determined" confer a discretion on the Actuary in relation to the increase of contributions and the reduction of future benefits? (Ground 2)

Did the Chancellor err in his understanding of what is required when construing provisions to give "reasonable practical effect" to a scheme? (Ground 4)

60. The question of whether the Actuary has a discretion under sub-rules 21(1)(ii) and (iv) is raised in Ground 2. It is also inherent in Ground 4 which is concerned with whether the Chancellor erred in his understanding of what is entailed in construing pension scheme provisions so as to give "reasonable and practical effect" to a scheme.

61. For the purposes of Ground 2 the issue arises from the use of the words "determine" and "determined" in sub-rules 21(1) (ii) and (iv). As I have already mentioned, the

Chancellor concluded, at [96] – [100] and [102] – [104] respectively, that the Actuary has a "discretion" in relation to the increase in contributions under (ii) and the decrease in future benefits under (iv). It is said that he erred and was over-influenced in relation to the scope of the determinations required to be made by the Actuary by the separate and distinct "discretions" as to the rate and period of increased contributions under Rule 21(1)(ii) and as to the basis upon which benefits should be reduced under Rule 21(1)(iv). This encapsulates Grounds 2A, B and C.

62. Both Mr Spink and Mr Green used the word "discretion" in their written argument and sporadically in oral submissions. It seemed to me that Mr Spink's use of the concept was to contrast it with what he submits is the true interpretation of the word "determine" which he says is purely a matter of calculation.

63. To reiterate, Mr Spink submits that "determine" in sub-rule (ii) merely means decide what increase is necessary up to the Cap as a matter of calculation and has no flexibility which might permit consideration of whether the Members and the Designated Employer could afford those contributions and whether they might be paid. In the same way, he says that sub-rule (iv) mandates benefit reductions, if necessary, down to zero. He emphasises the use of "shall" and says that there is no discretion in that. He says that that is underpinned by the use of the phrase "shall be made good" in the stem of Rule 21.

64. He accepts, however, that the determination of whether the shortfall is "trivial" in both in sub-rules (ii) and (iv) requires an exercise of actuarial judgment, as does the fixing of the normal long term funding rate (referred to in (ii)), the determination of rate and period in respect of increased contributions in (ii) and the basis of the reduction of benefits in (iv). He maintains, however, that there is no room in the exercise of that professional actuarial judgment for taking into account whether the increased contributions would be unaffordable and therefore, unlikely to be paid. He says that if that were the case, the purpose and plain wording of the rule would be entirely frustrated.

65. Mr Green accepts that in ordinary language, "determine" means decide, settle, conclude or fix. He submits, nevertheless, that as used in Rule 21, it imports what he describes as a "discretion" involving professional judgment. He referred us to *In Re George Newnes Group Pension Fund* (1969) [2007] 25 PBLR (ChD), *Re Imperial Foods* [1986] 1 WLR 717 (ChD), *Re Airways Pension Scheme* [2001] Pens LR 99 (ChD) and *National Grid v Laws* [1997] Pens LR 157 which all contain dicta in relation to the role of the actuary in the respective schemes and under the particular rules in question and use the term "discretion".

66. He says, therefore, that all of the uses of "determine" and its cognates in Rule 21 import the professional judgment and a "substantive discretion" of the Actuary. Mr Green also pointed to the use of "determines" in Rule 20 which is concerned with surplus. It requires the Actuary to determine whether the surplus is trivial or, if not, whether in any event, it would be "prudent" to retain it within the Atos Section. He says that these decisions import professional judgment in the same way as in Rule 21.

67. He adds that there is no reason to interpret the use of the word differently within Rule 21. He says that there is no basis for concluding that the exercise in sub-rule (ii) is mechanistic but that professional judgment, including the use of assumptions, is

relevant to whether the shortfall is trivial and the rate and period of any increased contributions. The exercise of such a "substantive discretion", he says, inevitably includes issues such as whether contributions of a particular level will, in fact, be recoverable and therefore, whether the shortfall will be met by means of such contributions.

68. I agree with Mr Green and with the Chancellor that unless the context otherwise requires, "determine" should be given the same meaning throughout Rule 21. If sub-rules (ii) and (iv) are each read as a whole and interpreted in the light of Rule 21 as a whole, it seems to me that "determine" whenever used connotes an exercise of professional judgment, exercised in the light of all the relevant detailed knowledge the Actuary will have about the Atos Section of the RPS, having applied all relevant actuarial assumptions and methodology and subject to all relevant professional guidance. There is nothing to suggest that the Actuary should exercise professional judgment when determining whether the shortfall is trivial for the purposes of sub-rules (ii) and (iv) but adopt a different approach when determining the increase in contributions under (ii) or the reduction of benefits under (iv). I have already addressed and dismissed Mr Spink's reliance upon "shall" and "shall be made good" in this regard.

69. Determining the increase in contributions under sub-rule (ii) will inevitably include the use of assumptions as to the number of Active Members there are likely to be in the future which will include considerations as to mortality and the nature of the cohort as well as the likely level of future opt out, the level of the future pensionable payroll and whether the contributions are likely to be collected. I mention these factors merely by way of illustration and not with an intention to constrain or prescribe the proper exercise of the Actuary's professional judgment in the circumstances.

70. Such a construction also takes account of practical consequences. Rather than frustrate the rule as Mr Spink would have it, it seems to me that if matters which go to collectability and collectability itself are not taken into account, the rule is rendered a nonsense. To put the matter another way, if the Actuary is required to carry out a paper exercise and to place numbers in a schedule whether or not there is a likelihood of them being received into the Atos Section in order to "make good" the shortfall, the purpose of the rule is entirely undermined. Such an interpretation is also consistent with a common sense approach to Rule 21. Rather than distort the natural and ordinary meaning of the words used, it seems to me that such an interpretation gives them a proper meaning and function. The fact that the Actuary is required to determine not only the increase in contributions but also the rate and period over which they are to apply is an indication that an exercise of professional judgment is required. It seems to me that an interpretation which required professional judgment to determine the rate and period of an increase but not the increase itself is untenable.

71. This is not to engage in an impermissible exercise of construction. It is within the four corners of the task envisaged by Lord Hodge in the *Barnardo's* case: see, in particular, [16]. It takes account of the practical consequences of the construction and gives proper weight to the words used. In addition, it is consistent with a purposive approach. If one considers his reasoning as a whole, it seems to me that that was what the Chancellor was doing. His references to what would otherwise be a "thoroughly uncommercial result" at [99] and [104] should be understood in that light. He was considering the practical consequences of rival interpretations. He did not purport to find an ambiguity in the language used, and thereafter to apply business common sense. Nor did he

misapply the purposive approach first promulgated by Millett J *In re Courage Group's Pension Schemes* [1987] 1 WLR 495, 505 which was approved by Lord Hodge in the *Barnardo's* case at [16].

72. In this regard, I should mention that if a pure calculation is required, the evidence suggests that if the Cap is lifted, the Employee contribution rate would have to be increased from its present level of 11.38% to 74% of pensionable salary and the Employer rate would rise to 111%. If the Cap remains in place, the rates would be 13.36% and 20.05% respectively.

73. I must add a footnote to this aspect of the appeal. The Chancellor used the word "discretion" in relation to the exercise conducted by the Actuary, no doubt having been encouraged by both Mr Green and Mr Spink to do so. As a result, at [120] he went on to answer questions 1 and 7 by stating that the Actuary does have a discretion in relation to the increase in contributions under (ii) and the reduction of benefits under (iv) and to answer question 2 in terms which might be interpreted to mean that he considered that the Actuary would be acting as a fiduciary when carrying out his task under (ii) and/or (iv).

74. Although Mr Green and Mr Spink continued to use the term "discretion" they accepted that the Actuary is not a fiduciary in these circumstances. They also accepted that the "discretion" or "substantive discretion", as Mr Green termed it, was a reference to the choices that an actuary is required to make on the basis of his professional experience and expertise, based upon professional guidance, the application of appropriate assumptions and data and the exercise of professional judgment. I agree. None of this is surprising. The precise nature of what the actuary must do, depends upon the terms of his appointment and the particular rule under which he is required to carry out the particular function. It is not necessary to conduct a detailed analysis of the authorities in relation to the role of an actuary to which Mr Green referred us. They each turn on the particular rule in question.

75. In this case, it is relevant to note that the definition of "Actuary" in the Pension Trust is concerned with relevant qualifications and professional status and clause 6B makes clear that the Actuary is appointed by the Trustee and the Pensions Committees as a matter of contract. When performing those functions, the Actuary exercises professional skill and judgment. To describe the making of choices inherent in such a process as the exercise of discretion is misleading and liable to confuse. Accordingly, in this context, the language of discretion is better avoided.

76. Taking all of this into account, it seems to me that the Chancellor's judgment and his answers to questions 1, 2 and 7 should be read with care and with the gloss that the Actuary, in this case, was required to exercise professional judgment.

The Protection Order

The purpose of the Protection Order and Article 7 and their relationship with Rule 21 (Grounds 3A, B and C, 5 and 6)

77. The Chancellor's consideration of the effect of the Protection Order and Article 7, in particular, began at [101] of the judgment. He noted that as originally drafted, if there was no agreement to reduce benefits, the shortfall would remain and stated that this was

where Article 7 came into play. He stated that: "it was intended to provide protection to protected persons over and above that provided by the Pension Trust and it was imposing contribution obligations on the Employer beyond those imposed by the RPS itself" [101]; that this intention was supported by the terms of Clause 7H of the Pension Trust [105]; and that: "[n]one of that would have been necessary if the Protection Order was not providing protection in addition to that provided by the Pension Trust and the Rules". He also pointed out that the Protection Order was the Order contemplated by paragraph 7 of Schedule 11 to the Railways Act which expressly contemplated that the Order could impose on the employer of Protected Persons a duty to make contributions [105].

78. The Chancellor held that Articles 7(1) and (2) contain a duty beyond that under the RPS itself, and "it is a sufficiency of funding or balance of cost obligation which will be to cover whatever amount in the opinion of the Actuary is sufficient to make provision for those pension rights, having taken account of the resources of the scheme (i.e. the existing shortfall) and any employee contributions . . ." [107]. He went on to note that the obligation is to eliminate the shortfall and it was not qualified in any way. He also stated that it was irrelevant that the effect of the provision might be to provide Members with greater protection than they might have had under the BRPS and that the provision applied to all Members whether protected or unprotected because there was no separate section for protected members [108].

79. The Chancellor found support for his conclusion that Articles 7(1) and (2) impose a sufficiency of funding or balance of cost obligation from Articles 7(4) and 7(7). He held that Article 7(4) imposes a similar balance of cost obligation on the Employer if the relevant pension rights were transferred from the RPS to another scheme and that Article 7(7) demonstrates that the Article contains a freestanding obligation on the Employer. He held that the mechanism in Article 7(7) is completely inconsistent with the argument that Article 7 only provides limited protection [109]. Further, he considered that Article 7(5) underlines that the Actuary is exercising a discretion or judgment as to whether or not Members' contributions should be increased or their benefits reduced under Rule 21(1). He stated that:

> "The Actuary would not be giving advice as to whether the contributions may or should be increased or the benefits reduced if his determination under Rule 21(1) were the limited one of a mathematical calculation for which Atos contends." [113]

"Option A"

80. Although it was not expressly abandoned, Mr Spink did not actively pursue his Option A argument orally. It had been to the effect that Rule 21 is freestanding. Emphasis was placed upon the fact that Rule 21 was promulgated at the same time as the RPS Order and the Protection Order and it was argued that, therefore, it was likely that the Shared Cost Arrangement sections of the RPS were set up in such a way that compliance with Article 7 would not impose material additional burdens. Rule 21 would not have been intended to conflict with Article 7. It was natural that the Article 7 requirements be "baked in" to Rule 21 itself. Further, the Chancellor erred in holding at [107] that the Article 7(1) duty was a balance of cost funding obligation capable of increasing the scope of the Employer's contribution obligations under Rule 3A by increasing the proportion of the Shared Cost Arrangement sections' unfunded liabilities that it was

bound to fund, rather than requiring only that the proportion of the unfunded liabilities that it was bound to fund under Rule 3A be funded by contributions of a sufficient amount (Grounds 5B and C and 6A).

81. Attention was drawn to the fact that Article 7 applies where the employer is under "a duty" to contribute to the scheme or section and provides that further contributions shall be made "under that duty". Accordingly, it was said that Article 7 only applies in relation to the duty to pay contributions created by Rule 3A and Rule 21 because it relates to the amount of the "contributions which [it] shall make under that duty". Further, "not less than such amount . . ." when applied to the shared cost arrangements contained in Rules 3A, 3B and 21 means that the actuarial assumptions used by the Actuary in performing the Rule 21 valuation must be sufficiently robust that the construct of employer and member contributions in combination will, in the Actuary's opinion, be sufficient. Article 7, therefore, simply regulates the operation of the machinery for determining contributions under the Rules. It would prevent a scheme from being operated on the basis of excessively optimistic actuarial assumptions and Rule 21 had been drafted substantially to comply with the requirements because of the input required from the Actuary.

82. It is said that the Chancellor gave Article 7 too much emphasis, therefore failed to take account of the fact that Shared Cost Arrangement sections might not have Protected Persons in them and failed to attach any weight to the inherent unlikelihood that Shared Cost Arrangement sections, while retaining a "shared cost" label, had been designed to incorporate a radically different "balance of cost" funding mechanism (Grounds 3A, B and C).

83. In this regard, it was also stated in written argument that the requirements in Articles 4, 6 and 11 are relevant and that the Chancellor failed to identify the purpose of the Protection Order as a whole (Ground 5A).

84. To reiterate, in summary, Article 4 places a requirement on any person who employs a protected employee to provide an occupational pension scheme in which that person may participate and to which the transfer value in respect of his relevant pension rights may be transferred. That scheme shall include provisions under which a protected employee may acquire relevant pension rights which are "no less favourable" than the rights he had under the designated scheme (the BRPS). Under Article 6 any amendment to a scheme which would otherwise have the effect of making the relevant pension rights of a Protected Person less favourable than the relevant pension rights in his designated scheme shall have no effect. Article 11 provides that subject to the further sub-paragraphs of the Article, a Protected Person shall have the right to participate in a joint industry pension scheme.

85. I should mention that there is no dispute that the effect of having run the Atos Section as an unsegregated section some of the members of which are Protected Persons and others are not, is that the additional funding required by Article 7 cannot be targeted solely at Protected Persons and will apply to everyone within the Atos Section.

86. It is also common ground that the basis for Article 7 is paragraph 7(1)(f) of Schedule 11 to the Railways Act. It provides, amongst other things, that an order under paragraph 6 may impose a duty to make contributions upon a person within Article 7(2). That includes the employer of a Protected Person.

87. Article 7 is set out at [17] above. For ease of reference I set out the most important elements of it again here. Where relevant, Article 7(1) provides that where such a person is "under a duty to contribute" to a section of an occupational pension scheme in which a Protected Person has relevant pension rights, the contributions they shall make "under that duty" -

> ". . . shall be not less than such amount as, in the opinion of the scheme actuary, shall be sufficient to make provision in respect of the rights specified in paragraph (2) after having taken into account all of the relevant matters, including the resources of the occupational pension scheme or the relevant section of it and any employee contributions " (emphasis added).

There is no dispute that the "additional" Article 7 duty is expressed to arise under the duty to contribute which in the case of the Atos Section arises under Rule 3. Rule 3 itself dovetails expressly with Rule 21. Nor is there any dispute that in broad terms the rights in paragraph (2) to which reference is made are: (a) accrued rights; and (b) rights which are accruing.

88. In summary, Article 7(5) contains limits on the Trustee's powers to increase any contributions or reduce benefits in respect of Protected Persons unless the increase or reduction is made in the circumstances and manner in which it could have been made under the designated scheme (the BRPS) and the Actuary, in the period of six months before the increase or reduction, has advised the Trustee that it "may or should be made". Article 7(7) provides that where the opinion or advice of the Actuary has been given under Article 7, he shall supply a schedule specifying the contributions which are required and the dates on which they are required in order to meet the liabilities of the scheme or section.

89. It seems to me that Mr Spink was right not to give this argument prominence. I agree with the Chancellor that clause 7H of the Pension Trust, also promulgated at the same time, would be unnecessary if it had been considered that Rule 21 was all the protection that Protected Persons required. Furthermore, for example, Article 7(5) is clearly intended to operate in addition to the rules of any section of the RPS: see [88] above. The same is true of Article 7(4) which provides additional protection in relation to transfer values. It seems to me that the same is also true of Article 7(1). Although a balance of cost requirement was introduced in 2006 when Rule 21(1)(iii) was added to cover the situation where there are no Active Members, neither Rule 21(1)(ii) nor (iv) are drafted on a balance of cost basis. In my judgment, therefore, it is quite clear that the obligations in Article 7 are freestanding.

90. In my judgment, there is nothing in Ground 3B of the Grounds of Appeal. It is to the effect that in construing Rule 21(1) the Chancellor failed to attach any weight to the indications that the Shared Cost Arrangement Rules were designed to confer the protection enshrined by the Protection Order in and of themselves. It was said that those indications could be found in: clause 7H of the Pension Trust; the evidence contained in and appended to the letter from the Deputy Secretary of Transport dated 31 March 1994, to which I referred at [40] above; and the Articles of the Protection Order itself.

91. I also agree with Mr Green that the references to the requirement to provide a scheme with "no less favourable benefits" is a red herring. It is common ground that the benefit structure in the Atos Section of the RPS provides benefits that are no less favourable than those in the BRPS in accordance with Article 4. The wording in Article 7 with which we are concerned, is directed at funding rather than the benefit structure within the Atos Section. Articles 4 and 7 provide separate protections. This is clear, in particular, from paragraphs 6 and 7 of Schedule 11 to the Railways Act which created the power to make the Protection Order and Articles 4, 5, 6 and 11.

Option B

92. What of Option B? This alternative construction of Article 7, raised in Atos' supplemental skeleton, was the argument which Mr Spink pursued orally. It is inconsistent with Option A and proceeds on the basis that Rule 21 must be read subject to the overlay of Article 7 as a freestanding funding requirement. Under this head, Atos accepts that Article 7 is designed to provide additional funding protection for Protected Persons and that as a result it will come into play to fill the gaps. It says, however, that rather than coming in after the operation of Rule 21(1)(ii), as the Chancellor envisaged, it fits in after both Rule 21(1)(ii) and (iv) have operated to their full extent. In other words, one must increase contributions to maximum levels (subject to the Cap if it is not lifted) whether or not they will be recovered under Rule 21(1)(ii) and, if necessary, reduce future benefit accrual to zero under Rule 21(1)(iv) and take account of both those items when determining the extent of the remaining gap in funding which Article 7 is designed to fill.

93. Mr Spink submits, therefore, that the Chancellor was wrong to interpose Article 7 after the exercise of Rule 21(1)(ii) rather than after (iv) [107] (Grounds 6B and C). In support of this construction, he relies upon the fact that the contributions under Article 7(1) are not less than such amount as, in the opinion of the Actuary, is sufficient to make provision in respect of the rights in Article 7(2). They include not only pension rights which have accrued but also those which are accruing. Mr Spink submits that it would be contrary to the structure of Article 7(1) to impose the obligation it contains without having operated Rule 21(1)(iv) first. He also points to the use of the phrase "after having taken account of all relevant matters" in Article 7(1) which expressly include "employee contributions" and says that the exercise of Rule 21(1)(iv) is also a relevant matter. The top up is limited to what is left of the shortfall after the Actuary has calculated the necessary increase in contributions pursuant to Rule 21(1)(ii) and has determined the extent of the reduction of benefits under Rule 21(1)(iv). He says this construction is supported by the terms of Articles 7(5) and (7) and does the least damage to Rule 21 itself.

94. Mr Green was neutral about whether Article 7 fills the gap after Rule 21(1)(ii) or (iv). In part, this is because he considers that it makes little practical difference if one also accepts that the Actuary has professional judgment to exercise under (ii) and (iv) and would be very unlikely to increase contributions to the maximum and reduce the future accrual of benefits to zero. The circumstances in which Atos would "take credit" as Mr Green put it, for the value of those increases and reductions when having to top up the funding of the Atos Section, would not arise in any real way. In fact, it seems to be agreed that the outcome would be "value neutral" either way.

95. In my judgment, there are various pointers to the way in which the overlay of Article 7 applies. It is concerned with contributions and therefore, one might consider that it most naturally takes effect to make good the shortfall after Rule 21(1)(ii) has taken effect. Furthermore, Article 7(1) makes express reference to taking account of employee contributions. It also requires the Actuary to determine the contributions sufficient to make provision for the rights in Article 7(2) which include not only accrued rights and transferred rights under Article 7(2)(a) but also under (b), rights accruing in respect of current participation in the section.

96. Having taken all these matters into consideration, I agree with the Chancellor that the most natural place for the Article 7 obligation to take effect is after Rule 21(1)(ii) has operated. The Article 7 obligation itself arises where the employer is under a "duty to contribute" and is concerned expressly with the "contributions which that person shall make under that duty" (emphasis added). It is apparent from its own terms, therefore, that it feeds in to the existing obligation to contribute which in the Atos Section arises under Rules 3A and 3B. Those rules make express reference to Rule 21 and dovetail with it. In turn, Rule 21(1)(ii) makes express reference back to contributions under Rules 3A and B. It is those contributions which are increased under Rule 21(1)(ii). In those circumstances, and given the structure of the Article 7 obligation which requires an increase in contributions under what is Rule 21(1)(ii) in the Atos Section ("that duty"), it seems to me that the obligation takes effect after (ii) has operated.

97. In my judgment, the fact that the rights for which sufficient provision is to be made include pension rights which are accruing does not have the significance for which Mr Spink contends. His argument is self-fulfilling. It would be surprising if an obligation under Article 7(1) did not extend to such rights. It would be shorn of much of its importance in the post privatisation world of the railways, if it did not. Furthermore, I consider that he seeks to place too much weight upon "having taken into account all of the relevant matters . . ." The argument that this must mean that reductions in benefits under Rule 21(1)(iv) must occur before the Article 7 obligation arises is a non sequitur. Quite clearly, the Actuary must take into account all relevant matters including the resources of the Atos Section (or in this case the lack of them) and employee contributions. That has nothing to do with the application of Article 7 in the light of Rule 21. Article 7 refers expressly to contributions.

98. It follows that I also reject Mr Spink's submission that his construction of Article 7 is supported by Article 7(7). It seems to me that, having given advice under the Article, the obligation of the Actuary to produce a schedule of contributions and dates on which they are required, in order to meet the liabilities of the section, is neutral. It supports neither of the rival constructions of the Article 7 obligation.

Article 5 (Ground 7)

99. In the light of what I have already decided, it is not strictly necessary to address Ground 7 of the Grounds of Appeal which is concerned with Article 5 of the Protection Order. Nevertheless, I will consider it very shortly.

100. The Chancellor held that the prevention from participation of protected employees in the Atos Section which is prohibited under Article 5(a) must encompass not just initial participation in the 1990s but also continued participation for the whole period in which employees have protected status [118]. He also concluded that limb (b) of Article 5

supports that construction because it prevents the employer from sidestepping (a) by making amendments to the Atos Section which obstruct the continuing enjoyment or accrual of no less favourable pension rights than the protected employees had under the BRPS [119].

101. Mr Spink accepts that Article 5(a) applies not only to initial participation but to continued participation. He submits, however, that the use of "prevent" in Article 5(a) suggests that the action taken must be with "the deliberate object of securing prevention". He says that it should not cover conduct which, whilst not aimed at producing that result, contributes to circumstances in which it occurs. In other words, he says that it does not cover the situation in which the Cap is lifted and contributions are increased under Rule 21(1)(ii) to such an extent that Active Members make the rational choice to opt out of the Atos Section. Mr Spink says that they do so voluntarily. He goes on to add that even actions by the Employer which could be said to have objectives including causing Active Members to opt out, would not be caught. This is said to be because the voluntary action of opting out cannot be characterised as prevention, unless the Employer has used unlawful means such as a breach of the *Imperial Tobacco* duty of good faith or the conduct amounts to the tort of harassment.

102. I agree with Mr Green in this regard. Once it is accepted that Article 5(a) applies to Employer conduct which causes opt-out, there is no room for the construction for which Mr Spink contends. There is nothing in Article 5(a) to support the construction that the Employer must have a deliberate subjective intention to prevent participation by causing opt-out. If that had been intended, Article 5(a) could have included the word "intentionally" but it does not. Such a construction is also contrary to the purpose of Article 5 as a whole. The same is true of Mr Spink's second submission. There is no room for the inclusion of a gloss to the effect that the conduct which causes the prevention of participation must be unlawful.

Conclusion

103. For all the reasons set out above, I would dismiss the appeal.

Sir Launcelot Henderson:

104. I agree.

Lord Justice Bean:

105. I also agree.