Neutral Citation Number: [2018] EWHC 79 (Ch)

IN THE HIGH COURT OF JUSTICE **HC-2016-002408**

BUSINESS AND PROPERTY COURTS

OF ENGLAND AND WALES

BUSINESS LIST (CHD)

Royal Courts of Justice

The Rolls Building

Before

PENELOPE REED QC

Between

WEDGWOOD PENSION PLAN TRUSTEE LIMITED

Claimant

– and –

KEITH SALT

(Representative beneficiary of the Wedgwood Group Pension Plan) Defendant

MR ANDREW SPINK QC AND MR. SAUL MARGO (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Claimant**

MR JONATHAN HILLIARD QC (instructed by **Sacker & Partners LLP**) for the **Defendant**

Approved Judgment

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

Hearing dates: 7th to 10th November 2017

Judgment

Miss Penelope Reed QC:

Application

1. I have before me an application by the trustee ("the Trustee") of the Wedgwood Group Pension Plan ("the Plan") for directions as to whether a notice served by the employers in 2006 had the effect of closing the Plan to the future accrual of benefits for all members from 30 June 2006 and with there being no continued final salary link for those members.

2. There are a number of further issues raised in the Part 8 claim form, some of which, by the time of the hearing were no longer live and others which evolved as a result of discussions between the Trustee and the representative beneficiary joined to these proceedings ("the Representative Beneficiary"). Various issues also changed and evolved in the course of oral argument.

3. The Trustee was represented by Mr. Andrew Spink QC and Mr. Saul Margo and the Representative Beneficiary by Mr. Jonathan Hilliard QC. I am extremely grateful to them for their excellent written and oral submissions.

Background

4. The Plan was established by an Interim Trust Deed dated 20 February 1978 with effect from 1 April 1978. A Trust Deed dated 12 October 1983 adopted rules by which the Plan was to be governed ("the 1983 Rules"). A Deed was entered into on 19 March 1993 which adopted new rules from which the Plan was to be governed from 1 August 1988 ("the 1988 Rules"). On 27 March 1995 a composite version of the 1988 Rules as amended was adopted ("the 1995 Rules") and it is those rules which are significant for this application.

5. On 8 October 2001 a Replacement Definitive Deed and Rules were entered into ("the 2001 Rules") which were expressed to take effect from 6 April 1997. The 2001 Rules represented a complete re- write of the 1995 Rules. I will deal with the relevant provisions of the 1995 Rules which empowered the trustees to amend the rules and other significant rules below.

6. On 26 June 2006 the participating companies in the Plan ("the Participating Companies") served notices on the trustees under rule 62(a) of the 2001 Rules (to which I will come in a moment) terminating their respective liability to contribute to the Plan in respect of employees' currently in pensionable service ("the Employers' Termination Notice"). The notices were stated to come into effect from the end of June 2006. The notices provided as follows:-

> *"The principal employer of the Plan, Wedgwood Limited ("Wedgwood") has agreed to meet any future contributions in respect of those members and this letter has been signed on behalf of Wedgwood to confirm its agreement to this.*
>
> *The effect of this notice is that under Rule 5(e) of the Rules, the active members in respect of whom the Company terminates its liability to*

contribute will become deferred members of the Plan and their pensionable service will end immediately before 1 July 2006.

For the avoidance of doubt the Company is not terminating its liability to contribute to the Plan in respect of any employees or former employees who are already deferred or pensioner members of the Plan."

7. On 5 January 2009 Waterford Wedgwood plc, the parent company of the Participating Companies went into administration, as did Josiah Wedgwood & Sons Limited and Stuart & Sons Limited. Both those latter companies went into liquidation in May 2011. The entry into administration of those two companies in January 2009 was a "relevant event" for the purpose of section 75 of the Pensions Act 1995. As at that date the Plan had a difference between the value of its assets and the value of its liabilities for the purposes of section 75 of £139.1m. Only £167,680 was recovered by the Trustee of the Plan in 2015 as an unsecured creditor in the insolvency of these two companies.

8. The Plan is what is known as a "last man standing" pension scheme so that remaining Participating Companies became liable to fund the whole scheme. In this case that was the Wedgwood Museum Trust Limited. On 31 March 2010 the scheme actuary calculated Wedgwood Museum Trust Limited's liability at £134.7m. As a result, that company also went into administration. The assets held by the museum were sold (following an application to the court, see: *Re Wedgwood Museum Trust Ltd (in admin)* [2011] EWHC 3782). As a result the Trustee received £8,656,185.10 on 2 March 2015 and £107,078.43 on 29 June 2015.

9. The insolvency of the Wedgwood Museum Trust Limited was a "qualifying insolvency event" for the purposes of section 132 of the Pensions Act 2004 and the Plan commenced an assessment period for the purposes of the Pension Protection Fund ("PPF") in April 2010. It seems unlikely the Plan's assets will be sufficient to cover its "protected liabilities" for the purpose of section 131 of the Pensions Act 2004. Therefore I understand that the PPF will be likely to take over the assets and

liabilities of the Plan at the end of the period of assessment. Consequently the PPF is also interested in the outcome of this claim.

The Issues

10. The Plan has been administered since 30 June 2006 (the date specified in the Employers' Termination Notice) as closed to the future accrual of benefits. Members have not contributed to the Plan and, as stated above, the Plan is now in a period of PPF assessment. The question is whether the Employers' Termination Notice was effective to close the Plan to the future accrual of benefits for all members and with the calculation of those benefits not linked to the final salary of those members. That involves looking at whether rule 62 of the 2001 Rules was validly introduced or is effective subject to a limitation on its exercise, having regard to the scope of the power of amendment contained in rule 48(i) of the 1995 Rules.

11. The Trustee and the Representative Beneficiary have agreed the issues which arise out of that broad question:-

    Issue 1

    Was rule 62 of the 2001 Rules validly introduced in its entirety such that it allowed future accrual to be terminated by the Employers' Termination Notice in respect of all members with there being no continued salary link? The Trustee's position is that the rule was validly introduced and the Employers' Termination Notice was effective both to terminate future accrual to all members and to break the final salary link. The Representative Beneficiary takes the opposing view.

    Issue 2

    This issue arises if the answer to issue 1 is answered negatively. It was originally divided into two alternative parts but the Trustee in the end argued only the first limb of the issue, namely: whether future accrual was terminated and the final salary link broken by the Employers' Termination Notice on the basis that the

introduction and exercise of the rule 62 power was valid subject to an overriding limitation that brought it in line with the fetter on the amending power. This, the Trustee argues, can be achieved by construing rule 62 so that it provided whatever additional protection was required by rule 48 of the 1995 Rules. The Representative Beneficiary argues to the contrary.

Issue 3

This issue (which arose if the answers to issues 1 and 2 were no) was whether the Employers' Termination Notice was effective to terminate future accrual of benefits for some or all of the members but subject to the final salary link being maintained? This issue was not in fact argued before me because it was agreed between the Trustee and the Representative Beneficiary that if the Court found that the fetter was engaged, that would result in the Plan being closed to future accrual but the final salary link for existing members would not be broken.

Issue 4

This issue also only arises if I am not with the Trustee on issues 1 and 2 and is whether rule 62 was validly introduced in respect of members who joined the Plan on or after 8 October 2001 (that is, after the 2001 Rules came into effect)? The Trustee argues the rule was validly introduced in respect of those members (I shall refer to them as "New Members"); the Representative Beneficiary argues that it was not.

Issue 5

Issue 5 arises if any member is entitled to accrue benefits after 30 June 2006 (in other words the fetter in rule 48 protects future as well as existing rights of members) and subdivides into a number of issues:-

(a) Does the scope of rule 10 (or rule 28A) of the 2001 Rules permit the Claimant (i) to adjust the pensionable service and/or rate of accrual and to make some other actuarial adjustment to the benefits that would otherwise be payable to members who did

not pay their contributions for the period from 30 June 2006 up until the Termination Date (which is the earliest date of: the date the member left service with a participating employer; the date the member's participating employer ceased to make contributions following entering administration in accordance with rule 62 of the 2001 Rules or 27 October 2009 the date the trustee of the Plan resolved to wind up the Plan under rule 63 of the 2001 Rules). Both parties agree that rules 10 and 28A do permit this; (ii) permit the Claimant to deduct any outstanding contributions that have not been paid by a member at the time that their pension comes into payment from the benefits that would otherwise be payable to the member at the time of the payment of such benefits. Both parties agree that as a matter of scope rules 10 and 28A enable the Trustee to deduct contributions but subject to section 91 of the Pensions Act 1995 which prevents the Trustee from deducting outstanding contributions from members' pension benefits as this would amount to an impermissible set off.

(b) If the answer to issue 5(a) is yes, the next issue is whether rules 10 and 28A were validly introduced into the 2001 Rules and if not, whether they were validly introduced for New Members? The Trustee argues those rules were validly introduced for New Members; the Representative Beneficiary that they were not validly introduced for any member.

(c) If the answer to 5(b) is yes, the issue arises whether the Trustee can exercise the rule 10 and 28A powers in respect of any members who had not made contributions between 30 June 2006 and the Termination Date and if not, whether they could exercise those powers in respect of New Members? The Trustee says that it can exercise those powers in respect of New Members; the

Representative Beneficiary argues the powers cannot be exercised in respect of any members.

(d) If the answer to issue 5(c) is yes, would PPF compensation reflect any of the potential adjustments raised in issue 5(a)? The Trustee says that the compensation would reflect those adjustments in respect of New Members; the Representative Beneficiary says that it would not.

The Relevant Rules

12. The 1995 Rules provide for a member who retires at Normal Pension Age (normally 65 or between 60 and 70 as agreed) to receive a pension "equal to the aggregate of one sixtieth of his Final Plan Salary for each Year of Pensionable Service as an 'A' Member together with one seventieth of his Final Plan Salary for each year of Pensionable Service as a 'B' Member." There is therefore a link between the pension payable on retirement and the member's final salary. There are (as one would expect) provisions for calculating short service benefits.

13. The rule at the heart of this case is rule 48 of the 1995 Rules which provides as follows:-

> *"The Principal Company may at any time and from time to time by instrument under its Common Seal alter or modify all or any of the Rules for the time being in force or make any new Rules to the exclusion of or in addition to all or any of the existing Rules aforesaid and any Rules so made shall be deemed to be Rules of the same validity as if originally embodied herein and shall be subject in like manner to be altered or modified and any alteration modification or addition of or to the Rules which may be effected in exercise of the power contained in this Rule shall be notified to the Members by posting the same in some conspicuous place in all the works and offices of each of the Participating Companies* ***provided always that no alteration modification or addition shall be made which (i) shall prejudice or adversely***

affect *any pension or annuity then payable or* ***the rights of any Member****."* [my emphasis]

14. As stated above, the 2001 Rules were a complete re-write of the rules. Rule 62(a) which was the rule under which the Employers' Termination Notice was given reads as follows:-

"A Participating Employer

(a) *an stop contributing in respect of all or some of its employees by giving written notice to the Trustees*

(b) *will stop contributing*

(1)if it stops being a Qualifying Employer, from a date 12 months after it stops being a Qualifying Employer, unless the Board of the Inland Revenue has agreed it can contribute after that date,

(2) if it stops carrying on business because of liquidation or otherwise, or

(3) if it fails to observe and perform all or any of its obligations under the Plan and the Trustees give written notice to the Participating Employer that its participation in the Plan is to end

and, as soon as that happens, Member's Contributions in respect of any Members affected will stop.

If a Participating Employer stops contributing and Rule 63 (Winding Up) does not apply the provisions of Rule 17 (Benefits on leaving the Plan) will apply to each Member then in that Participating Employer's service and for whom contributions have been stopped. If a Member is not a Qualifying Member, the Principal Employer can direct the Trustees to treat him as a Qualifying Member for the purpose...."

15. The predecessor of this clause in the 1995 Rules was rule 45 which is headed "Winding up and determination of trusts" and which reads:-

> *"If an Order shall be made or an effective resolution passed for the winding-up (otherwise than for the purpose of reconstruction or amalgamation with any other Participating Company) of any Participating Company other than the Principal Company or if from any cause it shall at any time thereafter be found by any such Company other than the Principal Company to be impracticable or inexpedient for such Company to continue to participate in the Plan or if any Company for the time being participating in the Plan shall cease to be a Subsidiary or Associated Company (as defined in the Rules) such Company shall retire from the Plan and the following provisions shall apply..."*

16. The rule then goes on to look at length at the consequences of the above provisions applying to a Participating Company. The question therefore is whether the power to amend contained in rule 48 of the 1995 Rules could be exercised to change rule 45 to rule 62 without infringing the fetter on that power that no alteration modification or addition should be made which would prejudice or adversely affect the rights of any member.

17. That is a matter of construction of the rules and before turning to the specific issues raised which have been enumerated above, I will deal with the authorities which have been cited to me on the approach to construction.

Approach to Construction

18. The principles summarised in the following paragraphs can be derived from the case law. I do not understand them to be in dispute between the parties.

19. The rules of a pension scheme are to be interpreted in the same way as any other written instrument (*Buckinghamshire v Barnado's* [2016] EWCA Civ 1064).

20. As with any other document, the Court must focus on the meaning of the relevant words in their documentary, factual and commercial context and that meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii)

any other relevant provisions of the [instrument], (iii) the overall purpose of the clause and the [instrument], (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions." (*Arnold v Britton* [2015] UKSC 36; [2015] AC 1619; applied in *Buckinghamshire v Barnado's);*

21. Reliance on background and commercial common sense must not be allowed to undervalue the importance of the words of the instrument. In addition, commercial common sense cannot be invoked retrospectively *(Buckinghamshire v Barnado's*);

22. There are, however, at least three points of special relevance to the interpretation of pension schemes. First, all or almost all pension schemes are intended to be tax efficient and to comply with Inland Revenue requirements. So Inland Revenue requirements are relevant to their interpretation. Secondly, pension schemes should be interpreted to have reasonable and practical effect. Thirdly, since the rules of a pension scheme affect all those who join it (in some cases many years after its inception) other background facts have a very limited role to play (*Buckinghamshire v Barnado's)*.

23. The following principles are further taken from the judgment of Arden LJ in *Stevens v Bell* [2002] Pens. L.R. 247 as recently summarised by Morgan J in *British Airways Plc v Airways Pension Scheme Trustee Ltd.* [2017] PLR 16 at para 409.

    (a) Members of a scheme are not volunteers; the benefits they receive under the scheme are part of the remuneration for their services; the relationship of members to the employer is to be seen as running in parallel with their employment relationship;

    (b) A pension scheme should be construed so as to give a reasonable and practical effect to the scheme bearing in mind that the scheme has to be operated against a constantly changing commercial background;

(c) As a corollary of that point, it is important to avoid unduly fettering a power to amend the provisions of the scheme as it was important for parties to be able to make those changes which might be required by the exigencies of commercial life;

(d) Technicality in the consequences of a possible interpretation was to be avoided;

(e) The meaning of a clause in the scheme must be ascertained by examining the instrument as it stood when the clause was first introduced;

(f) In the case of an amending provision, the provision is to be construed against the background circumstances at the date when it was adopted;

(g) The relevant background circumstances include the practice and requirements of the Inland Revenue;

(h) The function of the court is to construe the instrument without any predisposition as to the correct philosophical approach;

(i) A pension scheme should be interpreted as a whole.

24. The Trustee particularly relies on the principles set out at sub-paragraphs (b) and (c) above that the rules should be construed so as to give a reasonable and practical effect of the scheme bearing in mind that the scheme has to be operated against a constantly changing commercial background and it is important to avoid unduly fettering a power to amend the provisions of the scheme as the amending party should be able to make those changes which might be required by the exigencies of commercial life (see Millet J in *Re Courage Group's Pension Scheme* [1987] 1 WLR 495 at 505 F).

Issue 1

25. Mr. Spink QC divided his argument on this issue into two parts. The first part of the argument relates to whether the fetter as a matter of construction applies to rights which a member has accrued by his service at the date of the amendment or whether it is also protects rights which would accrue following completion of future pensionable service which I will refer to as "future rights". The second part of the argument relates to whether the fetter is engaged in terms of the introduction of rule 62.

Part 1 of Issue 1

26. There are numerous reported cases which deal with the way in which fetters on powers of amendment in pension schemes should be construed. However, I was told by Counsel that there is no case which deals with a fetter in the terms of the proviso to rule 48. Many of the cases deal with fetters on powers of amendment which prevent interference with members' "accrued" or "secured" rights rather than just the reference to "the rights of any member" contained in rule 48.

27. The Trustee argues that the fetter prevents an amendment which results in accrued rights being prejudiced or adversely affected and accepts (for this first part of the argument at least) that those accrued rights are to be calculated on the basis of the link to final salary. Mr. Hilliard QC argues that not only are accrued rights protected by the fetter in rule 48, but also future rights acquired by future service with the Participating Company.

28. There is (it seems) only one English case where the Court has found that a fetter contained in a power of amendment protected future rights and that is *Lloyds Bank Pension Trust Corporation Ltd v Lloyds Bank plc* [1996] PLR 263. That case concerned a fetter with wording very substantially different from the words of rule 48. The power of amendment in question provided that no alteration could be effected "*which in the opinion of the Scheme actuary may have the effect of either increasing the contributions of any members who are: (a) employees who joined the Scheme before 1 November 1983; or (b) female employees who were*

members of the women's scheme and who joined the Scheme on 1 July 1983; or decreasing the pecuniary benefits secured to or in respect of such members under the Scheme will be made unless the sanction in writing of no less than three-quarters of those members is obtained;".

29. The focus of the judgment of Rimer J was quite clearly on the words "*pecuniary benefits secured....under the Scheme*". As he said in paragraph 42 of his judgment:-

> *"I regard it as a fair and natural use of language to describe the scheme under which the promised pension benefits are to be provided as 'securing' the benefits, including both those benefits which at any particular moment can be regarded as earned by past service and also those benefits which at the same moment are in the nature of promised future benefits. Moreover, I not only regard such word as a natural one to use in that context, I regard it as probably the most appropriate one. I have referred above to the benefits being 'promised' by the employer, and it is his promise which provides the essential commercial substratum to pension schemes such as the present one. But despite the fact that an important element in the trust which establishes the scheme is the employer's balance of cost promise. I agree with Mr McDonnell that an English lawyer would ordinarily hesitate before describing the benefits to which a beneficiary is entitled under a trust, even one such as that establishing the Scheme, as being 'promised' by it. 'Provided by the scheme' is an acceptable alternative, but 'secured by the scheme' is in my view even more appropriate. In suggesting this I do not think that I speak with a lone voice."*

29. Later on at paragraph 51 he said:-

> *"To describe the relevant benefits as being those 'secured … under the Scheme' is to use language which I regard as most naturally referring to all the benefits promised by the Scheme, both accrued and future."*

30. It is quite clear that Rimer J was heavily influenced by the wording of the fetter which referred to benefits and not rights; did not specify that the benefits were accrued and used the words "secured under the scheme" which he construed as meaning promised future benefits. Indeed Rimer J contrasted the clause he was construing with the fetter which applied to deferred members which referred to "*pecuniary rights of any member who has left pensionable service …*" At paragraph 53 of his judgment he said:-

> *"In my view the drafting differences between rules 9(1) and (3) convey an obvious distinction as to the types of interest with which the two sub-paragraphs are respectively concerned. The latter is in terms concerned with 'the pecuniary rights of [deferreds and pensioners]' being interests in the nature of rights which have truly accrued, in the sense that the beneficiaries have become entitled to defined rights. By contrast, the 'pecuniary benefits secured to or in respect of [actives]' in general rule 9(1) are not interests in the nature of accrued rights, either actual or notional, at all. The actives have periods of service to their credit, which will count towards the quantification of their eventual rights, but the determination of those rights is still dependant on future, and uncertain, events and in, for example, the event of an active's premature death in service the rights which will then crystallise may be enjoyed directly by others without even passing though his estate".*

31. The importance of this paragraph ought not to be overstated in the sense that all that deferred members have are accrued rights but the point Rimer J was making was that the draftsman in the *Lloyds* case took trouble to distinguish between the rights which the deferred members had and the benefits secured under the scheme for the active members.

32. Cited to Rimer J in the *Lloyds* case was the Australian case of *Gas & Fuel Corporation of Victoria v Fitzmaurice* [1991] PLR 197. The fetter to the power there was that no amendment "*shall have the effect of reducing any benefit then provided by or under this Trust Deed for or in respect of any contributor or pensioner unless the contributor or pensioner consents in writing thereto*". The

argument was whether the words "any benefit" captured future rights as well as those which had accrued. The decision turned on the wide meaning the Court gave to "any benefits" which it considered justified in the context of the scheme in question.

33. It seems to me that neither of these cases really assists me in construing the terms of rule 48. They both turned on the construction of very specific wording, quite different from the words used in rule 48.

34. On the other hand, neither is it of great assistance to say that there are other cases where the Courts have found that future rights are not protected by a fetter to an amendment clause where the wording is also significantly different. So for example in *Re Courage Group's Pension Schemes* [1987] 1 WLR 495 the fetters on amendment powers which the Court was considering were, in respect of one scheme, that the committee of management could not "*vary or affect any benefits already secured by past contributions in respect of any member without his consent in writing*"; and in the case of the other two schemes they must not "*reduce…the accrued pension of any employed member*" except in the circumstances specified. It was clear that the wording of the fetters clearly encompassed rights which had accrued and not future rights. The real question was whether the fetters prevented the pension which had accrued being linked to final salary. Millett J said:

> "*Accrued pensions" is defined in the rules to mean pensions based on salary at the relevant date. There was some dispute whether "benefits already secured by past contributions" means the same thing, or includes the prospective entitlement to pensions based on final salary. In the absence of express definition, I see no reason to exclude any benefit to which a member is prospectively entitled if he continues in the same employment and which has been acquired by past contributions, and no reason to assume that he has retired from such employment on the date of the employer's secession when he has not. The contrary argument places a meaning on "secured" (and "accrued)" which is not justified."* (The words "and accrued" do not appear in

the All England Reports version of the judgment and it seems likely that is the more accurate report).

35. Mr. Spink did not seek to argue before me that *Courage* was wrong as far as the final salary link was concerned (although he reserved his position if the matter went further) and accepted that a fetter which prevented interference with accrued rights, would also protect the link to final salary of those accrued rights. His argument in relation to the breaking of the final salary link in this case is that the fetter is not engaged which I will deal with in due course.

36. A similar conclusion to the *Courage* case was reached in *IMG Pension Plan, HR Trustees Limited v German* [2010] PLR 23 where the amendment was the conversion of a defined benefits scheme to a defined contributions scheme. The fetter in that case was that "*no amendment shall have the effect of reducing the value of benefits secured by contributions already made*". The Court found that the amendment was only permissible if the money purchase entitlement was underpinned to secure the final salary link. The wording in that case: "*contributions already made*" quite clearly excluded any future rights and the case is therefore not of great assistance as far as the construction of this fetter is concerned.

37. Mr. Spink also asked me to consider the rules which preceded rule 48 in considering its construction. I note that in the *Lloyd's Bank* case Rimer J resisted such an invitation from Counsel and confined himself to the wording of the scheme as it stood, stating that he would "*not attempt to find inspirational guidance in doing so by interpreting the earlier deeds or rules which they have superseded*" (paras 25-27 of his judgment). In *The National Grid Company plc v Laws* [1997] PLR 157 at first instance Robert Walker J considered Rimer J's approach but held that "*the superseded provisions did at one time stand as part of the scheme, and a comparison of the old and the new may sometimes help to explain the purpose and meaning of the new provision*." However, having concluded that the court could look at superseded provisions of a pension scheme, he said *"...the court should be slow to do so, both because of the*

inconvenience involved and because of the uncertainty (apart from exceptional cases) of deriving any useful assistance from the exercise".

38. While I accept that there is no bar on the court looking at previous incarnations of the rules (or the archaeology as Mr. Spink put it) I consider that only limited assistance can be derived from doing so. However, in this case consideration of the previous rules does throw at least some light on the situation. Mr. Spink in particular relies on the rules superseded by rule 48 in the 1995 Rules. In the 1983 Rules, the rule read as follows:-

    "no alteration modification or addition shall be made which i) shall prejudice or adversely affect any pension or annuity then payable or the rights of any member ***who is then excused from or not liable for contributions***"[my emphasis]

39. By the 1988 Rules, the words in bold above had been deleted. Those words limiting the fetter to the rights of any member who is then excused from or not liable for contributions referred to deferred members and pensioners and not active members. Somewhat surprisingly, therefore, there was no fetter on the power of amendment protecting the rights of active members. However, it seems clear that "rights" in the context of the 1983 Rules must have meant existing and not future rights because pensioners and deferred members were not in a position to acquire future rights.

40. Mr. Spink also relied on the judgment of Briggs J (as he then was) in *Naradas-Girdhar v Bradstock* [2016] 1WLR 2366 which involved using words which had been deleted in an individual voluntary arrangement proposal as an aid to construction on the basis that they demonstrated what the parties had not agreed. I am not sure that matters are taken much further by applying that principle here in very different circumstances.

41. However, these arguments do go some way to dealing with the point made by Mr. Hilliard that if the proviso to the amendment power had been intended to cover rights which had been already earned by past service, the word "accrued" would have been included. It seems to me that argument has less force because

it is clear that the amendment made to the 1988 Rules was by way of deletion of the final words in order to encompass amendments which affected active members.

42. Mr. Hilliard argued that without any reference to accrued rights, the natural meaning of the "rights of any member" included not only the rights to a pension which they had derived from previous years of service but also any rights which they might acquire as a result of future service. He argued that it was as much a "right" of the member to accrue a pension in the future when in continued service with the employer, as the right to receive a pension in the future commensurate with the period of service already accomplished.

43. He pointed to the fact that it was accepted by the Trustee that the proviso to rule 48 would not permit an amendment which would break the final salary link and therefore the rights which a member has under a pension scheme assume that member remains in employment. It seems to me, however, that there is a distinction between the rights to a pension which a member acquires as a result of past service and the method by which the rules of the pension scheme provide that the pension payable is to be calculated. The right which a member has to a pension by reason of past service includes the right to have that pension calculated by reference to final salary. That does not answer the question as to whether the member can be described as having a right to a pension which may accrue as a result of future service.

44. It seems to me that the natural meaning of the words "the rights of any member" in rule 48 is as contended for by Mr. Spink. They mean, at the time the amendment was introduced, the rights which had accrued to a Member as a result of past service. The word "rights" does not, in my view, naturally cover benefits which might in the future be obtained as a result of future service with the employer. It seems to me that this conclusion is consistent with the proper approach to construction of a pension scheme and in particular that the rules should be construed so as to give a reasonable and practical effect to the scheme bearing in mind that the scheme has to be operated against a constantly

changing commercial background. I also bear in mind that it is important to avoid unduly fettering a power to amend the provisions of the scheme as it is important for the parties to be able to make changes which might be required by the exigencies of commercial life. A power of amendment which prevented the employer from curtailing the right of existing members to continue to accrue benefits in circumstances where the employer was in financial difficulties and finding it difficult to fund the Plan makes far less sense than a construction which protects rights which members have gained through past employment but enables the employer to stop those benefits accruing in the future.

Part 2 of Issue 1

45. The second part of issue 1 is a question as to whether the fetter is engaged in any event by the introduction of rule 62. That question arises on the basis that the fetter, even if it did not protect future rights (as I have found), protected the final salary link. It involves a comparison of rule 45 of the 1995 Rules and rule 62 of the 2001 Rules to see whether the introduction of rule 62 enabling the Participating Companies to cease to continue contributions in respect of employees prejudiced or adversely affected the rights of any members.

46. Rule 45 and rule 62 are framed in different terms. The heading to rule 45 reads "Winding up and determination of trusts" and it is clear that if it were invoked, the Participating Company would retire from the Plan and the members' pensionable service would terminate. This would have the effect (it is common ground) of not only terminating future accrual of benefits but also of breaking the final salary link.

47. Mr. Hilliard argued for a construction of rule 45 which at first sight seemed to me to be very attractive. Rule 45 puts forward three situations in which the employer will retire from the Plan:-

    (a) Winding up (except for the purposes of amalgamation or reconstruction) of any Participating Company other than the Principal Company; or

(b) "if from any cause it shall at any time thereafter be found by any such Company other than the Principal Company to be impracticable or inexpedient for such Company to continue to participate in the Plan" (Mr. Hilliard's underlining)

(c) Any Company ceasing to be a subsidiary or associated company.

48. Mr. Hilliard argued that b. above was only engaged in circumstances where there had been a winding up of one of the Participating Companies and after that event one of the other Participating Companies found it impracticable or inexpedient to continue to participate. That construction clearly gives weight to the words "at any time thereafter". It also makes sense in that once a Participating Company is being or has been wound up, other Participating Companies may not find it practicable or expedient to continue to contribute to the Plan.

49. However, I am ultimately persuaded by the construction placed on rule 45 by Mr. Spink. He argued that "at any time thereafter" referred back to "any cause" which is a very wide expression if it only refers to the winding up of another Participating Company. He made the further point that it would be unnecessary to include the words "other than the Principal Company" for a second time if the reference to "such Company" was a reference back to the company being wound up.

50. Therefore rule 45 in my view enabled a Participating Company to retire from the Plan if, for any cause, it found that it was impracticable or inexpedient to continue to participate in the Plan. Mr. Spink suggested that the wording of rule 45 did not place any material restriction on the circumstances in which the Participating Company could retire from the Plan and it could do so legitimately on the basis of the Participating Company's own subjective reasoning.

51. It seems to me that latter point must be wrong. The cause which prompts the Participating Company is not restricted but in order to fall within the wording of rule 45 the Participating Company must find it impracticable or inexpedient by

reason of that cause to continue to participate. Impracticability has been said to be "*a conception different from that of impossibility; the latter is absolute, the former introduces at all events some degree of reason and involves some regard for practice*" (per Veale J. in *Jayne v National Coal Board* [1963] 2 All E.R. 220). It is therefore a high bar. As for "inexpedient", the dictionary meaning is "*not practical suitable or wise*" which, while a lower bar than impracticable, nevertheless requires there to be some appreciable difficulty in the way of the Participating Company continuing to participate in the Plan.

52. Having determined the meaning of rule 45, the question is whether rule 62 and in particular rule 62(a) is less restrictive than rule 45, thereby enabling the Participating Company to cease contributions to the Plan more easily. To recap, rule 62(a) provides that the Participating Company can stop contributing in respect of all or some of its employees by giving written notice to the Trustees. There is therefore nothing to prevent a Participating Company for whom it was both practicable and expedient to continue contributing, serving such a notice. Mr. Spink argued that it would be artificial to regard rule 45 as more restrictive than rule 62, as in practice it would make no commercial sense for the Participating Company to give notice unless it was inexpedient or impracticable to continue to participate.

53. I do not accept that argument. It seems to me that without implying some term into rule 62(a) to that effect (and nobody argued for such an implication) there is nothing to prevent a Participating Company from serving notice on the trustees that it no longer wishes to participate in the Plan and the notice would not be open to challenge. However, under rule 45 a Participating Company wishing to retire from the Plan would have to demonstrate that it met the conditions in the second part of rule 45, albeit more widely construed than Mr. Hilliard contends for. That, it seems to me, is an amendment to the rules which prejudiced or adversely affected the rights of any members because it made it easier for the Participating Companies to cease to contribute to the Plan.

54. Mr. Hilliard also argued that there is a clear difference between the way in which rules 45 and 62(a) operate in that rule 45 is "all or nothing". A Participating Company deciding to take advantage of rule 45 retires from the Plan and ceases to have any further legal relationship with the Plan. A Participating Company serving notice under rule 62(a) may choose (as was the case with the Employers' Termination Notice in this case) to stop contributions in respect of some only of its members with the effect that they would be treated thenceforth as deferred members with future accrual stopped and the final salary link broken. Mr. Spink argued that this was not necessarily prejudicial to the rights of members or adversely affected them because of the degree of flexibility imported. The question is whether the Participating Company would be more likely to serve notice under rule 62(a) than take the more draconian step of leaving the Plan altogether. It seems to me that the answer lies in the need for the Participating Company to have found it impracticable or inexpedient to participate. If it does so, its only option under rule 45 is to leave the Plan. Under rule 62(a) it has the option to serve notice in respect of only some of its members and it seems to me that is less prejudicial to the members than a retirement under rule 45.

Conclusions on Issue 1

55. I therefore consider that rule 62 was validly introduced such that it allowed future accrual to be terminated by the Employers' Termination Notice but that the introduction of rule 62 did engage the fetter that protected the final salary link for existing members because the lack of any requirement that the Participating Company find it impracticable or inexpedient to continue contributions prejudiced or adversely affected the rights of the members.

Issue 2(a)

56. Having found that the exercise of the power of amendment fell outside the scope of the rule 48 power, the next question is whether that invalidates the introduction of rule 62 in toto or whether, as the Trustee argues, the amendment should be held to be valid insofar as it does not infringe the fetter on the power

of amendment. The way in which it is suggested by the Trustee that the new clause 62 should be read so as to validate it in part is as follows:-

"A Participating Employer can stop contributions in respect of all or some of its employees [e.g. can stop contributions in respect of actives but retain its deficit repair obligations in respect of deferreds and pensioners] by giving written notice to the Trustees ***as long as it has first from any cause been found by the Participating Employer to be impracticable or inexpedient to continue to participate in the Plan rather than to cease to participate by stopping all deficit repair contributions i.e. deficit repair contributions in respect of actives, deferreds and pensioners."***

57. In other words, the Participating Company must be able to show when serving notice under rule 62(a) that it has met the bar set in rule 45. The starting point for this submission is the judgment of Neuberger J as he then was in *Bestrustees plc v Stuart* [2001] PLR 283 where he was considering amendments proposed to a pension scheme to equalise the normal retirement date for men and women to 65. Part of the amendment purported to be retrospectively disadvantaging female members of the scheme and engaging the fetter on the power of amendment. Neuberger J held, however, that the amendment was valid as regards its prospective effect albeit invalid insofar as it purported to have retrospective effect. He based his judgment on the following passage at paragraph 48:-

> *"To my mind, the correct approach is not one of language – it is one of concept. One is, after all, here concerned with equity. I consider, therefore, that one looks to see what is the valid exercise of the power and what is the invalid exercise. The valid exercise, if there was an exercise of the power, was to effect a variation with effect from 26 April prospectively. The invalid attempted exercise was to effect a variation retrospectively to 6 April 1994. To my mind, conceptually those two components of the single exercise are easily separable one from the other. It seems to me, however, that one must not only ask oneself whether they are easily severable conceptually, but also*

whether there is anything in the exercise of the power which leads one to believe that, had the trustee been told that it was not entitled to exercise the power retrospectively, it would not have exercised the power as it purported to do prospectively at all, or, in the alternative, in the way that it did. In that connection, it seems to me that that approach is consistent with the approach of the Court of Appeal in Re Hastings-Bass [1975] Ch 25 *, to which I shall refer in a little more detail shortly."*

58. It is quite clear that Neuberger J was approaching this as a case of excessive execution of a power, the invalid parts of which may, in appropriate circumstances, be severed from the good. He relied on various passages in Thomas on Powers, namely, that "*the effect of an excessive execution of a power is either that such execution is good in part and bad in part, or, alternatively, it does not amount to an execution at all*." [paragraph 45 of his judgment] and "*In order for the appointment to be valid, it must be distinct and absolute, and not so tied up with the whole series of limitations as to form one system of non-severable trusts"* [para 46].

59. There turned out to be some considerable debate between the Trustee and the Representative Beneficiary not foreshadowed by their skeleton arguments as to the precise nature of the jurisdiction being exercised by Neuberger J in *Bestrustees.* I permitted Counsel to put in further submissions in writing on the matter after the hearing had taken place. Mr. Spink argued in his oral reply that insofar as the test adumbrated by Neuberger J suggests that there is a second limb to be satisfied by the Principal Company (as the donee of the power), the case was wrong on that point. This "second limb", as it has been referred to by Counsel, is whether the Principal Company would have exercised the power of amendment in the way that he had purported to do, if it had known that it was in breach of the fetter? Mr. Spink argued that Neuberger J's requirement for the second limb had to be looked at afresh in the light of the Supreme Court's decision in *Pitt v Holt* [2013] 2 AC 108 which analysed the ratio of *Hastings-Bass* rather differently from the way in which it was generally understood and applied prior to that decision. Mr. Spink further argued that if one looked at the cases

which applied *Bestrustees* there was clearly no requirement for a second limb to be satisfied and that the matter had been approached as one of construction, implying into the exercise of the power a limitation in order to give it effect, rather than dealing with the question as a matter of severance.

60. Mr. Spink relied in particular on the decision of Lightman J in *Betafence Ltd. v Veys* [2006] Pens. L.R. 137 where he said (at paragraphs 68 and 69):

> *"68.The question is raised whether (assuming that the 1993 Amendment is otherwise valid) having regard to the proviso to Rule 23, which invalidates the consent requirement as regards benefits entitlements accrued prior to the 17th November 1993 (the date of the 1993 Deed), the consent requirements under the 1993 Deed are valid as regards benefits accruing thereafter (as the Claimant contends) or whether the consent requirements are incapable of severance and wholly invalid (as the Beneficiaries contend).*
>
> *69. The Claimant is plainly correct. The 1993 Amendment must be construed as having effect subject to the overriding limitation on the power of amendment contained in the proviso. Questions of severance do not arise, but if they did the principles governing severance in a case such as the present (as the cited authorities establish) lead to the same conclusion. There is no requirement or scope for application of the 'blue pencil' test deleting what is objectionable and leaving standing what is unobjectionable. All that is required is that the distinction between what is and what is not objectionable is clear and that the meaning and application of what is unobjectionable is clear."*

61. I note that *Bestrustees* does not appear to have been cited to Lightman J, but certainly in respect of general principles, I do not consider that he was operating in a different jurisdiction from Neuberger J. It seems to me that Lightman J was considering whether the exercise of the power was good in part because there had been an excessive execution of a power just as Neuberger J was in *Bestrustees.* He was approaching it on the basis that the answer was the same whether one approached the matter on the basis of construction of the

amendment so that it could take effect insofar as consistent with the limitations in the power, or severance in the sense of disregarding what could not be achieved when regard was had to the scope of the power. His reference to the blue pencil test perhaps gives some indication as to why he was not approaching this as a question of severance properly so called in that the exercise of the power could not be saved simply by the deletion of an objectionable part.

62. However, what Mr. Spink places most reliance on is the fact that Lightman J does not suggest that he had to be satisfied that the power would have been exercised in the way it had, if the trustees appreciated it went beyond the scope of their powers. That is clearly the case.

63. In *IMG Pension Plan, HR Trustees v German* [2010] Pens. LR 23 there does not appear to have been any consideration of what the trustees would have done had they taken the fetter into account and appreciated that the exercise of the power was subject to the implied underpin.

64. More recently in *IBM United Kingdom Holdings Ltd. V Dalgleish* [2017] EWCA Civ 171 the Court of Appeal considered an appeal against a decision of Warren J who had held that an exclusion power was validly introduced by a power of amendment but subject to a limitation that it could not be used to break a final salary link. Warren J based his decision on a consideration of *Bestrustees, Betafence* and *IMG* ([2014] PLR 335 at para 208). It should be noted that the primary argument by the beneficiaries in *IBM* was that the exercise of the power had been for an improper purpose, not that there had been excessive execution of the power. The reasoning of Sir Timothy Lloyd rewards setting out in full:-

> *"173 As regards the other part of Mr Stallworthy's argument, relying on IBM's intention, which it could not fulfil, to break the final salary link, this is a different kind of situation. It is not really a case of improper purpose at all but, at most, of what is sometimes called excessive execution, that is to say a purported exercise of a power which, for some reason, cannot take effect in full. That is quite unlike the classic cases of improper purpose where the defect*

lies not in the terms of the execution of the power but in the motive lying behind it. The judge considered this very line of authority earlier in his judgment when addressing the first issue, whether the exclusion power had been validly introduced into the Main Scheme trust deed at all. He referred at B199 and following to several authorities, including Bestrustees v Stuart: [2001] EWHC 649 (Ch), [2001] PLR 283, which Mr Simmonds also showed to us. The judge held that the Exclusion Power was validly introduced, but was subject to an implied limitation such that it could not be used to break the final salary link: B289(i) and (iii).

174 By the same reasoning, it seems to us that there is no reason why the exercise of the Exclusion Power by the notices actually given in this case should not be held valid to the extent permitted by the implicit limitation on the power. If one were to ask whether Holdings would have given the same Notices if it had been aware that it would not be able thereby to break the final salary link, the answer would have to be that it would. The object of terminating DB accrual was the principal reason for using the power. That it could not break the final salary link would perhaps have been seen as a disadvantage, but not at all as a reason for not exercising the power to the full extent available, not least because that feature was also to be dealt with by the NPAs as a separate element of Project Waltz.."

65. Returning to *Bestrustees* which the Court of Appeal was clearly following in *IBM,* It seems to me that there are two aspects to the test applied by Neuberger J. The first is as set out in the passage from Thomas on Powers on which he relies (paragraph 8.03) that where there is an exercise of a power which is excessive, the question arises as to whether it is good in part, or not an execution of the power at all and whether the bad part of the execution can be conceptually separated from the good in order to sever. That is the test which Lightman J applied in *Betafence* and Arnold J in *IMG.*

66. The second question which Neuberger J was considering, was the requirement that trustees take into account in exercising their powers relevant considerations

and disregard irrelevant considerations. At the time he decided *Bestrustees* that was of course regarded as the rationale of the so-called rule in *Hastings-Bass* rendering the exercise by trustees of their powers void if they had failed to undertake that exercise. Trustees who are exercising powers in ignorance of their true scope are not taking into account a highly relevant consideration. If, however, they would have exercised the power in any event (albeit with the excessive part of the exercise ineffective) then the rule in *Hastings-Bass* would not apply.

67. The law has of course moved on since *Bestrustees* as a result of the decision of the Supreme Court in *Pitt v Holt.* Mr. Hilliard suggested in his written submissions post hearing that Mr. Spink was arguing that *Bestrustees* had been overruled by *Pitt v Holt.* I did not understand Mr. Spink's submissions to go that far and his written submissions made it clear they did not. However, he argued that the second limb of the test had to be reviewed in light of the change in the law and the other cases such as *Betafence.*

68. It is clear since the decision in *Pitt v Holt* that the failure by trustees to take into account a relevant consideration will not render a decision void. However, it may amount to a breach of fiduciary duty on the part of the donee of the power which renders the exercise of the power voidable at the instance of the beneficiaries. Lord Walker expressly did not decide the question of whether the Court would only intervene if it was satisfied that the trustees would not have exercised their discretion as they did had they taken relevant considerations into account or not taken irrelevant considerations into account but he said in relation to Buckley LJ's statement of principle in *Hastings-Bass* :-

> *"Buckley LJ's statement of principle in the Hastings-Bass case ...cannot be regarded as clear and definitive guidance, since Buckley LJ was considering a different matter-the validity of a severed part of a disposition, the other part of which was void for perpetuity."* [Para 91]

69. Therefore, where the Court is considering whether the invalid part of the excessive exercise of a power can be severed from the good, or (to use the language of cases such as *Betafence* and *IBM*) the exercise of the power takes place subject to a limitation to keep it within the scope of the power, this factor does have to be taken into account. As the authors of Lewin on Trusts 19th edition say at paragraph 29-241:-

> *"Where there is an excessive execution, it is plain that such part of the exercise as is not warranted by the terms of the power or infringes some rule of law cannot stand. The principal question which then arises is whether the whole exercise is vitiated or whether it is possible to sever the invalid part from the remainder of the exercise and so allow the latter to take effect. That question will ordinarily arise in connection with dispositive powers. Severance is possible if, as a conceptual matter, it is possible to distinguish the boundary between the valid and the invalid; but in the case of a fiduciary power it is then material to enquire also whether the trustees would not have exercised the power at all, or would have exercised it differently, if they had been properly instructed as to the limits on the power, for otherwise, though the exercise will not be void, the so-called principle in* Re Hastings-Bass *may make it liable to challenge."*

70. *Bestrustees* is referred to in a footnote to the above passage. There is a similar view expressed in Thomas on Powers at para 8-04. When looked at in this way, it seems to me that this was the approach taken by the Court of Appeal in *IBM*. The Court first considered whether it was possible to import a limitation into the power which had been introduced by amendment into the scheme in order to save the valid parts and then, asked itself the question whether Holdings, if it knew that the exercise of the new power could not break the final salary link, would have gone ahead in any event and exercised the power. It concluded that Holdings would have done so on the facts of that case. I do not accept Mr. Spink's argument that this part of Sir Timothy Lloyd's judgment was obiter. It seems to me that he was dealing with an issue, which, if not dealt with, would have left the exercise of the power open to attack. I therefore consider that it is a requirement to show that the trustees would have exercised the power

notwithstanding the limitations on the scope of their power. It may be that in *Betafance* and *IMG* there was no argument but that the power would have been exercised notwithstanding the implied limitation.

71. The first question, therefore, I have to decide is whether the exercise of the power of amendment introducing rule 62(a) is valid in part. As set out above, the way it is suggested that it can be saved is by the implication of a limitation which means that the Participating Companies can only serve notice that they intend to stop contributing in respect of all or some of their members if it can be shown from any cause they have found it inexpedient or impracticable to participate in the Plan.

72. As Mr. Hilliard points out this is a very different case from others where a limitation has been implied in order to save the exercise of a power in the pension's context. He pointed out that cases such as *Bestrustees, Betafence, IMG* and *IBM* all dealt with limitations preserving the benefits of members of the scheme. This would be quite different, in that the limitation would be as to the process the trustees have to go through in order to terminate future accrual of benefits for some or all of its members.

73. However, it seems to me that this is not a good reason to reject the implication of a limitation into the rule 62(a) power requiring the Principal Company to establish that it was impracticable or inexpedient to continue participation in the Plan, in the sense of remaining liable for all contributions in respect of all members. The reason that the exercise of the power of amendment in this case was in breach of the fetter was that the Principal Company could cease to participate in the Plan without having any reason to do so under the new rule 62(a). That was what was prejudicial to the rights of the members. The thrust of the decided cases is that if a limitation can be implied with prevents the members being prejudiced, then the Court should not be slow to make that implication.

74. The next question is whether the Parties would have exercised the power to amend the rules in 2001 to introduce rule 62 had they been advised that they could only do so with a limitation on the Participating Companies' power to serve notice under rule 62(a) so that it was limited to situations where they found it impracticable or inexpedient to continue participation in the Plan. The question of what the relevant parties would have done in *Bestrustees* and *IBM* was rather easier to answer in that it could be easily inferred that they would have wished to go as far as they could in exercising the power in question in those cases.

75. In this case the answer to that question is not so easy, not least because the evidence, such as it is, does not focus on that question. Mr. Hilliard points to several factors which he says militate against the Principal Company wishing to include such a limited power:-

    (a) In 2001 the Plan was in surplus and nobody's mind would have turned to the possibility of financial difficulties which the Plan might face in the future; by 2004 the Plan was in deficit.

    (b) The amendment exercise in 2001 was regarded as a tidying up exercise;

    (c) Nobody was that concerned about the termination provisions or turned their mind to them;

76. It is clear that the terms of the proposed rule 62 were brought to the attention of the Principal Company but there is little, if any, contemporaneous evidence that anyone gave any real consideration to the matter. Mr. Spink submits that even subject to the implied limitation the new clause 62(a) imported flexibility into the rules and enabled the Participating Companies to make a more nuanced decision should there be financial difficulties so that it would not be "all or nothing". There was a clear advantage to their being able to decide to stop contributions for some or all of their members without leaving the Plan altogether. Mr. Spink relied on the fact that deficit repair contributions could continue to be paid if a

notice were served under rule 62(a) whereas the Participating Companies would simply leave the Plan if rule 45 were invoked.

77. On balance, I consider that the Principal Company would have included the rule 62(a) power if told of the necessary limitation because of the flexibility it would have afforded them compared to the rule 45 power. While the Plan was in surplus in 2001, the amended rules were designed to govern the Plan on a long term basis when matters might well change as indeed they did within a very short time frame.

78. The next question is therefore whether in exercising their powers in 2006 by serving the Employers' Termination Notice the Participating Companies can establish that they found it impracticable or inexpedient to participate in the Plan.

79. There is no doubt that nobody turned their minds to this specific question in 2006. Originally the Trustee had included in its submissions, an argument that if the rule 62 power had not been validly introduced, then the service of the Employers' Termination Notice was an exercise of the rule 45 power. That argument was sensibly not pursued but it was argued that rule 62(a) with its implied limitation had been complied with when the Employers' Termination Notice was served.

80. Mr. Spink argues that there is evidence before the Court from which it can be concluded that the Participating Companies in 2006 found that it was financially inexpedient for the Plan to remain open for future accrual. It is very clear that the Waterford Wedgwood Group was experiencing financial difficulties in 2006. There was a substantial refinancing exercise and a restructuring which led to job losses. Closure of the Plan to future accrual was part of the plan to turn the fortunes of the companies round. The Trustees considered at the time that it was in the interests of the Plan to close it to future accrual in light of the financial position of the Group. The actuarial report prepared shortly before the service of

the Employers' Termination Notice in 2006 showed contributions by the Participating Companies at 16% of Plan salaries.

81. It seems to me that these factors were sufficient for the Participating Companies to conclude legitimately in 2006 that it was impracticable and inexpedient for them to continue to participate in the Plan because of their difficult financial position. Continued participation in the Plan would have jeopardised the possibility of turning round the financial position of the Participating Companies. Under rule 45 of course they would have had no choice but to leave the Plan altogether. In 2006, they had the option of ceasing contributions in respect of active members while continuing to meet their deficit repair obligations, but it still seems to me that the financial position was such that they could equally have reached the conclusion that the financial position of the Participating Companies dictated that it was inexpedient to participate in the Plan at all.

82. Mr. Hilliard (who had not had a great deal of opportunity to explore these matters because they arose at a late stage) sensibly did not seek to say any of this was factually incorrect but argued that nobody had directed their minds to the question of whether it was inexpedient. That of course is right, but the exercise is being looked at in light of the scope of the power subject to the limitation which protects the rights of the members. There seems little doubt to me that the Participating Companies could have relied on their rule 45 power on these facts. Therefore it seems illogical that the exercise of the rule 62(a) power by the service of the Employers' Termination Notice in 2006 in circumstances which fell within the limitation ought not to be valid.

83. Therefore in respect of issue 2(a) I consider that the introduction and exercise of rule 62 is valid but subject to a limitation that notice cannot validly be served by the Participating Companies under rule 62(a) unless it has first from any cause been found by the Participating Company to be impracticable or inexpedient to continue to participate in the Plan. I further hold that the Principal Company would have exercised the rule 48 power to amend to the rule 62 power if it had realised the need to comply with the fetter. I also consider that there is evidence

to the effect that the Participating Companies in 2006 would have found it inexpedient to continue to participate in the Plan.

Summary

84. On that basis, I hold that the Employers' Termination Notice in 2006 was effective both to stop future accrual and to break the final salary link. That being the case, the remaining issues 3 (which was in any event agreed) and 4 and 5, do not arise. As all those issues involve questions of law and therefore I do not see any merit in expressing any views on them.

85. The Trustee and the Representative Beneficiary are invited to submit a form of order to reflect this judgment.