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Case No: PE-2018-000023

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

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 17/6/2021

Before :

MR JUSTICE MORGAN

- -

IN THE MATTER OF THE AXMINSTER CARPETS GROUP RETIREMENT BENEFITS PLAN

Between:

PUNTER SOUTHALL GOVERNANCE SERVICES LIMITED (As Trustee of the Axminster Carpets Group Retirement Benefits Plan)	**Claimant**
- and -	
JONATHAN HAZLETT (as a representative defendant)	**Defendant**

- -
- -

Henry Legge QC and **Thomas Robinson** (instructed by **Gowling WLG (UK) LLP**) for the **Claimant**
Andrew Short QC and **Stephen Butler** (instructed by **Osborne Clarke LLP**) for the **Defendant**

Hearing dates: 16-19, 22-23 March 2021

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Approved Judgment

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

Covid-19 Protocol: This judgment is to be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be 17 June 2021.

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MR JUSTICE MORGAN:

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Introduction

1. These proceedings raise a number of issues in relation to the Axminster Carpets Group Retirement Benefits Plan ("the Plan"). The Plan is an occupational pension scheme which provides defined benefits to, or in respect of, former employees of the participating employers in the Plan, namely, Axminster Carpets Ltd and Buckfast Spinning Co Ltd. The Plan is registered under section 153 of the Finance Act 2004. It was closed to new entrants in 2000, save in relation to exceptional cases.

2. The Plan was established by an interim trust deed with effect from 5 September 1961. Thereafter, it was the subject of further deeds made in 1963, 1969 and 1978. Relevantly to some of the issues raised in these proceedings, the Plan was then governed by definitive trust deeds and rules made in 1983, 1992 and 2001. I will refer to these as the 1983 DDR, the 1992 DDR and the 2001 DDR, respectively.

3. In the course of this judgment, I will refer to various statutes dealing with pensions, including the Pension Schemes Act 1993 ("PSA 1993"), the Pensions Act 1995 ("PA 1995") and the Pensions Act 2004 ("PA 2004"). In the case of the 2001 DDR, there was a certificate that the alterations made thereby complied with section 67 PA 1995. However, there was no confirmation under section 37 PSA 1993 in relation to the 2001 DDR and the absence of such confirmation has given rise to some of the issues raised in these proceedings.

4. The Plan referred to a Principal Employer and to other Employers. The Principal Employer was Axminster Carpets Ltd and there was one other Employer, namely, Buckfast Spinning Company Ltd.

5. Axminster Carpets Ltd entered administration on 18 February 2013 and later went into voluntary liquidation. It is now known as ACL 123 Ltd and is insolvent. The claims against it under the Plan and section 75 PA 1995 represent nearly all of the unsecured claims against it. Its section 75 debt is estimated to be £69 million. Buckfast Spinning Co Ltd is also in voluntary liquidation and is insolvent. Its section 75 debt is estimated to be £18.3 million.

6. Axminster Carpets Ltd and Buckfast Spinning Co Ltd are not parties to these proceedings but they have been given notice of them under CPR r. 19.8A.

7. The current trustee is the Claimant, Punter Southall Governance Services Ltd, which was appointed on 5 March 2013. When I wish to refer to the current trustee specifically, I will refer to it as "PSGS". I will also use the term "Trustee" or "Trustees" to refer to the trustee or trustees for the time being in relation to the Plan.

8. In accordance with the provisions of PA 2004, the Plan is in an assessment period where the assessment date is 5 March 2013. It is expected that in due course the Plan will transfer to the Pension Protection Fund ("the PPF") pursuant to section 161 PA 2004. The PPF is not a party to these proceedings and has stated that it does not wish to be joined as a party. The PPF is aware of these proceedings and it has been consulted on certain matters arising in them from time to time.

9. The Defendant is an experienced pensions solicitor. At the hearing, I stated that I would appoint the Defendant to be a representative Defendant in relation to certain issues. I will also appoint PSGS to be a representative party effectively to argue the opposite case to that argued by the Defendant. I will refer to the terms of the appropriate representation orders later in this judgment.

10. When the proceedings were issued, the issues raised by them principally concerned the validity and effect of certain deeds and other documents which purported to fix the rates of increases for pensions under the Plan. These issues have been referred to as "pension increase issues". When the proceedings were issued, PSGS was concerned about the possible consequences of the absence of confirmation under section 37 PSA 1993 for the validity of certain provisions of the 2001 DDR. Those concerns led PSGS to raise further issues in relation to the 2001 DDR which did not concern pension increases. These further issues have been referred to as "the non-increase issues".

11. Before the hearing, the parties had reached agreement which was acceptable to them to compromise the pension increase issues and the non-increase issues. Accordingly, in relation to the pension increase issues, the court is not asked to determine those issues but instead is asked to give its approval to the compromise of those issues. In relation to the non-increase issues, the court is asked to give declaratory relief (which is not opposed) and to give relief under the jurisdiction recognised in *re Benjamin* [1902] 1 Ch 723 and also, so far as is necessary, to give its approval to the compromise of those issues.

12. The result of the compromises, if approved by the court, will be that difficult questions as to the effect of non-compliance with section 37 PSA 1993 no longer arise in these proceedings.

13. The compromise of the pension increase issues is on the basis that different categories of members of the Plan were entitled to various specified increases in their pension benefits in previous years. The sums which have been paid to members in the past did not satisfy their entitlement in full (in accordance with the compromise) so that the members are now owed arrears of payments. This fact has given rise to further issues between the parties which have been introduced by amendments to the claim form. The further issues include questions as to limitation, forfeiture of unpaid pensions and

interest. The same or similar questions as to limitation, forfeiture and interest arise in relation to two other categories of arrears of benefits.

14. There are therefore now three categories in relation to arrears of benefits. The first category has been called "pension increase arrears" and that is the category which I have earlier described. The total pension increase arrears are estimated to be about £2.0 million, not including any interest. If the pension increase arrears were restricted to those arising in the period of six years before the issue of these proceedings on 12 November 2018, the pension increase arrears would be reduced to about £1.0 million, not including any interest. The second category of arrears arises because the benefits under the Plan were not equalised to take account of the differences between men and women in relation to guaranteed minimum pensions ("GMP"s), in accordance with the decision in *Lloyds Banking Group Pension Trustees Ltd v Lloyds Bank plc* [2019] Pens LR 5 ("*Lloyds No. 1"*); this category has been called "GMP arrears". The total of the GMP arrears is somewhere between £1.0 million and £2.0 million. The third category of arrears arises because male and female Normal Pension Dates for members who had joined the Plan before 1 October 1992, in respect of pensionable service on and from 17 May 1990, were not equalised at age 65 until 17 November 1994; this category has been called "NPD arrears". The NPD arrears are thought to be about £100,000.

15. The result of the above is that I am now asked to approve the compromise of the pension increase issues, to grant relief of various kinds in relation to the non-increase issues and to decide the further issues as to limitation, forfeiture and interest.

The compromise of the pension increase issues

16. Over the years, various documents have been entered into which have dealt with, or purported to deal with, the rates of increase of pensions payable to various classes of members of the Plan. PSGS has examined these documents and has investigated whether their provisions dealing with increases have been valid. PSGS has also considered the effect of the relevant provisions, if valid. This investigation identified possible issues as to the validity and/or the effect of those documents.

17. The Re-Amended Claim Form has identified a large number of issues which were thought to arise in relation to the validity and/or the effect of the documents dealing with increases in pensions under the Plan. It is not necessary for the purposes of this judgment to identify all of those issues nor to set out the rival contentions on every issue. The following description of what was involved will suffice.

18. The documents referred to in the formulation of those issues included the following (described here as defined in the Re-Amended Claim Form):

(1) the 1983 DDR;
(2) the 1990 Approval;
(3) the 1992 DDR;
(4) the January 1995 Announcement;
(5) the June 1995 Deed;
(6) the June 1997 Announcement;

(7) the 2001 DDR.

19. At the hearing, I stated that I would make the following representation orders to enable the court to consider the issues as to pension increases under the Plan. I stated that I would appoint the Defendant to represent all those persons (including persons who are unborn or unascertained) in whose interests it would be to argue that the rate of increase applicable to pensions payable from time to time under the Plan was as high as possible and that I would appoint the Claimant to represent all those persons (including persons who are unborn or unascertained) in whose interests it would be to argue that a lower rate of increase applied.

20. The various issues which arose can be divided into three groups. The first group concerned the effect of various documents, the validity of which was not disputed. This group of issues concerned the 1983 DDR, the 1992 DDR, the January 1995 Announcement and the June 1995 Deed, insofar as those documents dealt with increases in pensions. There was room for argument as to the way in which the rates of increase specified in those documents were to apply. The Defendant argued that the rates applied to the pension arising from periods of service after the effective date of the various documents. The Claimant argued that the specified rates merely set the rate of increase which applied to pensions in payment from time to time.

21. The second group of issues concerned the effect of the 1990 Approval. It was thought to be clear that a rate of increase of 5% per annum had been agreed and it was to apply to pensions then in payment. It was also thought to be clear that future pensions were to be paid as if they had been subject to a rate of 5% per annum since retirement but that no arrears were to be paid to pensioners based on the difference between this rate and the previous rate of 3%. What was not clear was whether the rate of 5% was to apply to periods of service as distinct from pensions in payment. On that issue, the Defendant argued that the rate of 5% applied to pensions then accruing (including the GMP element of those pensions); the Claimant argued that the rate of 5% applied only to pensions in payment.

22. The third group of issues concerned whether the 2001 DDR reduced the applicable rate of increase for the members to whom the 2001 DDR applied, referred to as "the 2001 Actives". This question only arose if it were held that the various rates of increase applied to pensions as they accrued rather than being rates of increase for pensions then in payment. If the rates of increase applicable to pensions arising for periods of service before April 1997 were merely discretionary (as the Claimant argued) then the 2001 DDR would have been effective to change the rates of increase for the pensions for the 2001 Actives. However, if the 2001 Actives had an accrued right to the relevant rates of increase (as the Defendant argued) then any amendment to the rates in the 2001 DDR would have been contrary to section 67 PA 1995 and possibly also the proviso to the power of amendment in clause 4 of the 1992 DDR, unless the Trustee could show that the members potentially affected had given their informed consent to the amendment. There was a dispute as to whether the Trustee had given the members affected by the amendment sufficient information so that the resulting consent of those members was properly informed so as to be effective.

23. The parties have negotiated a compromise acceptable to them in relation to all of the pension increase issues. Due to the number of issues and of the possible outcomes in relation to those issues, the agreed compromise is complicated. The rate of increase which will be appropriate under the compromise depends on three criteria, namely, class of member, period of service and year of payment.

24. Under the compromise, members have been split into five possible classes, as defined in the compromise, namely:

    (1) pre-1992 members;
    (2) 1992 members;
    (3) 1992-1995 members;
    (4) post-1995 members;
    (5) 2001 Actives.

25. In relation to the pension increase issues, I was provided with a Joint Opinion by Mr Legge QC and Mr Robinson for PSGS and a Joint Opinion by Mr Short QC and Mr Butler for the Defendant. In the usual way, neither party has seen the other party's Opinion. Both of the Opinions identified the various issues and the arguments in relation to each issue. The Opinions also described the course of the negotiations which had led to the agreed compromise. The parties had agreed a table which set out in boxes the rival rates for the different classes of members for each period of disputed accrual for each year of payment. The parties then sought to agree upon a compromise figure in relation to each box and they succeeded in doing so, having regard to the perceived strengths of the rival arguments. The Opinions also considered the advantages for each party of entering into the compromise as compared with continuing to litigate the issues. At the hearing, I heard oral submissions from Mr Legge for PSGS in the absence of the representatives of the Defendant and I heard oral submissions from Mr Short for the Defendant in the absence of the representatives of PSGS.

26. I am asked to approve the proposed compromise pursuant to CPR r. 19.7(5) and (6). For that purpose, I must be satisfied that it is for the benefit of all the represented persons. I am satisfied that the compromise rates of increase are a fair reflection of the perceived strengths of the rival arguments in relation to each issue. The compromise also properly takes into account the amounts at stake in relation to the various points which were in contention. I am also satisfied that the certainty of outcome achieved by the compromise as compared with the uncertainty involved in continuing to litigate the pension increase issues is highly desirable. It is also of benefit to all parties that the compromise produces an immediate resolution of the issues, simplifies the administration of the Plan and avoids the delay involved in continued litigation. The compromise also involves a saving of legal costs both in relation to the litigation and the future administration of the Plan. In these circumstances, I am satisfied that the proposed compromise is for the benefit of all the represented persons and I will approve it. The parties have submitted an agreed form of order which I am also able to approve.

The compromise of the non-increase issues

27. The non-increase issues concerned the effect of certain alterations in the rules of the Plan made by the 2001 DDR. With effect from 6 April 1997, section 37(1) PSA 1993 imposed certain restrictions on the alteration of the rules of a contracted-out pension scheme. One of those restrictions required the actuary to consider proposed alterations and give a certain confirmation to the Trustee of the Plan. There was no such confirmation in relation to the alterations made by the 2001 DDR. There was therefore a concern that, for that reason, certain alterations made by the 2001 DDR might be invalid.

28. In summary, section 37(1) PSA 1993 provides that the rules of a contracted-out scheme cannot be altered unless the alteration is of a prescribed description. Section 37(1) was supplemented by regulation 42 of the Occupational Pension Schemes (Contracting-out) Regulations 1996; I will refer to the version of the 1996 Regulations in force at the relevant time. Regulation 42(1) provided that the alterations prescribed for the purposes of section 37(1) were any alterations which were not prohibited by regulation 42(2) or (2A) or (2B). The relevant sub-regulation was 42(2). It referred to alterations in relation to "any section 9(2B) rights under the scheme" and provided that the rules could not be altered in relation to such rights without the actuary considering the proposed alteration and confirming to the trustees that the scheme would continue to satisfy the statutory standard in accordance with section 12A PSA 1993. "Section 9(2B) rights" were defined in regulation 1(2) of the 1996 Regulations and referred to "rights to the payment of pensions and accrued rights to pensions" under a contracted-out scheme, so far as attributable to an earner's service in contracted-out employment; the reference is to section 9(2B) PSA 1993.

29. In relation to the non-increase issues, I stated at the hearing that I would make a representation order under CPR r.19.7 in the following terms: subject to a proviso which deals with the position of a Mrs Hodge, to whom I refer later in this judgment, the Defendant is appointed to represent all those persons (including persons who are unborn or unascertained) in whose interests it would be to argue that the various parts of the 2001 DDR pleaded in the Schedule to the Claim Form were invalid as a result of a failure to comply with section 37 of the PSA 1993 and the Claimant is appointed to represent all those persons (including persons who are unborn or unascertained) in whose interests it would be to argue that those parts of the 2001 DDR were not invalid for that reason.

30. The parties have reached a compromise agreement in relation to the non-increase issues, subject to the approval of the court. The proposed compromise invited the court to make three different types of order, namely:

(1) declarations as to the validity of certain provisions in the 2001 DDR;

(2) orders under the jurisdiction recognised in *re Benjamin* [1902] 1 Ch 723; and

(3) approval of the compromise under CPR r. 19.7(5) and (6).

31. In relation to the declarations which are sought, I have to be satisfied that the declarations are correct and that it would serve a useful purpose to make such declarations when the matter is not in dispute between the parties who are before the court.

32. As regards the *re Benjamin* jurisdiction, I am not asked to make determinations as to matters of fact but instead to permit the Trustee to administer the Plan on a particular footing. On such an application, the court has regard to the evidence which exists as to relevant facts and matters. The court requires the evidence to show a high degree of likelihood of the existence, or non-existence, of the facts material to that footing and it also looks at matters in a practical way. The purpose of such an order is not to relieve the Trustee of any and all difficulties which might arise in the administration of a trust. Instead, the court balances any potential unfairness to beneficiaries against the real need to allow the trust to be administered without putting the Trustee to difficulty and expense which will probably not benefit anyone. A *re Benjamin* order does not vary or negate any beneficial interests which there might be in the trust property but it protects the Trustee who cannot thereafter be accused of a breach of trust when it has acted under the authority of an order of the court.

33. In other respects, the court can approve a compromise under CPR r. 19.7(5) and (6) where it is satisfied that it is for the benefit of all the represented persons.

34. The first declaration which is sought concerns rule 20.1 of the 2001 DDR which deals with death benefits. Apart from the possibility that section 37(1) might apply to the alteration effected by rule 20.1, there was no other question raised as to the validity of that rule. However, the death benefits which are the subject of rule 20.1 are not within the definition of section 9(2B) benefits and therefore an alteration in relation to them did not require to be considered by the actuary. It follows that rule 20.1 was valid. I am persuaded that it will be of assistance to the parties for the validity of rule 20.1 to be the subject of a declaration to that effect. Accordingly, I will make a declaration that the amendment made to the 5-year guarantee on death in retirement payments at rule 20.1 of the 2001 DDR was valid and took effect according to its terms.

35. The second declaration which is sought concerns rule 20.2 of the 2001 DDR which also deals with death benefits, in different circumstances from rule 20.1. Apart from the possibility that section 37(1) might apply to the alteration effected by rule 20.2, there was no other question raised as to the validity of that rule. However, the death benefits which are dealt with in rule 20.2 are not within the definition of section 9(2B) benefits and therefore an alteration in relation to them did not require to be considered by the actuary. It follows that rule 20.2 was valid. I am persuaded that it will be of assistance to the parties for the validity of rule 20.2 to be the subject of a declaration to that effect. Accordingly, I will make a declaration that the amendments made to lump sum death benefits when a member retired due to ill health and died before Normal Retirement Date at rule 20.2 of the 2001 DDR were valid and took effect according to their terms.

36. The third declaration which is sought concerned the Inland Revenue limits at Appendix 1 to the 2001 DDR. The 1992 DDR had restricted benefits to maximum limits which

were the Inland Revenue limits at the time of the 1992 DDR. The 2001 DDR replaced those limits with the Inland Revenue limits applicable at the time of the 2001 DDR. Apart from the possibility that section 37(1) might apply to the changes in the limits, there was no other question raised as to the validity of the changes. The differences between the references to Inland Revenue limits in the 1992 DDR and the 2001 DDR were largely, if not exclusively, matters of expression only. The only change which might have gone beyond a matter of expression was a change in relation to death benefits which are not section 9(2B) benefits and so the changes were not invalidated by section 37. It follows that the references to the Inland Revenue limits at Appendix 1 of the 2001 DDR were valid. I am persuaded that it will be of assistance to the parties for the validity of those limits to be the subject of a declaration to that effect. Accordingly, I will make a declaration that the amendments made to the Inland Revenue limits at Appendix 1 of the 2001 DDR were valid and took effect according to their terms.

37. The fourth declaration which is sought concerned rules 20.3 and 21.2 of the 2001 DDR. Apart from the possibility that section 37(1) might apply to the alterations effected by rules 20.3 and 21.2, there was no other question raised as to the validity of those rules. The alterations made by those rules related to survivors' benefits. Survivors' benefits, beyond those payable to widows or widowers, are not section 9(2B) benefits. It follows that rules 20.3 and 21.2 were valid save insofar as they could adversely affect widows or widowers. I am persuaded that it will be of assistance to the parties for the validity of rules 20.3 and 21.2 to be the subject of a declaration to that effect. Accordingly, I will make a declaration that the amendments made by rules 20.3 and 21.2 of the 2001 DDR were valid and took effect according to their terms save insofar as they could adversely affect widows or widowers (for the purposes of the PSA 1993). The position of widows and widowers under these rules is further referred to below.

38. In relation to the next group of non-increase issues, I am not asked to grant declaratory relief but instead to exercise the *re Benjamin* jurisdiction. The parties have agreed that the *re Benjamin* orders should expressly provide that where any person considers that he or she has been treated less favourably as a result of those orders and considers those provisions not to have been validly adopted, or if the Trustee identifies any such person to whom those orders have been applied to that person's disadvantage, the Trustee or that person has permission to seek directions as to the benefits that should be paid in relation to him or her on condition that any person making such an application gives 42 days' notice of the proposed application and the grounds thereof to the Trustee. For the avoidance of doubt, the costs of any such application will not be covered by any agreement or order as to the Defendant's costs of this litigation. I confirm that I will include that provision in any order that I am persuaded to make.

39. The first relevant matter concerns rule 27.4 of the 2001 DDR. That rule amended the position under the 1992 DDR and conferred on the Trustee a discretion in relation to a spouse of a pensioner where the pensioner had married that spouse after his pension began and within six months of the date of his death. Despite a detailed investigation in relation to this point, no evidence has come to light that the Trustee at any time ever purported to exercise the discretion conferred by rule 27.4 and it is most unlikely that it ever did so. I consider that it is a proper exercise of the *re Benjamin* jurisdiction to

permit the Trustee to administer the Plan on the footing that the discretion to restrict payments of benefits to spouses of members (in circumstances where the marriage took place after retirement and within six months of the member's death) purportedly conferred by rule 27.4 was never exercised. Between the date of the court's order and the entry of the Plan into the PPF, the Trustee will no doubt be able to avoid purporting to exercise the discretion conferred by rule 27.4. On the entry into the PPF, the future administration of the Plan will be governed by the PPF rules.

40. The second such matter concerns rules 24.2, 24.3 and 18.4 of the 2001 DDR. The amendments effected by these rules changed the mechanism for setting actuarial factors for early and late retirement and for commutation. The detailed evidence before me shows that the changes amounted to changes of expression only and would not have led to any different practical outcome. I consider that it is a proper exercise of the *re Benjamin* jurisdiction to permit the Trustee to administer the Plan on the footing that no person is worse off by the application of actuarial factors set pursuant to the mechanism for setting actuarial factors at Rules 24.2, 24.3 and 18.4 of the 2001 DDR rather than as governed by the 1992 DDR and on the footing that, in the absence of further order, it will not recalculate any of the benefits paid just because those actuarial factors set pursuant to the Rules 24.2, 24.3 and 18.4 of the 2001 DDR were applied.

41. The third such matter concerns rule 16.1(b) of the 2001 DDR. This introduced a new requirement for some members seeking to retire late, i.e. to begin taking benefits after the normal pension date, to obtain the permission of the employer in order to do so. The evidence is that no-one was ever refused permission pursuant to this rule. I consider that it is a proper exercise of the *re Benjamin* jurisdiction to permit the Trustee to administer the scheme on the footing that no person was refused permission to retire late so as to be worse off because of the purported introduction of a requirement for consent to late retirement than they would have been if the adoption of the restriction had been invalid and the position governed by the 1992 DDR.

42. The fourth such matter concerns the positions of widows and widowers under rules 20.3 and 21.2 of the 2001 DDR. I considered these rules earlier in this judgment in relation to survivors who were not widows or widowers. A comparison of these rules of the 2001 DDR with their predecessors in the 1992 DDR shows that it is theoretically possible that, if the 2001 rules were invalid but were applied, then there might have been persons who received something to which they would not have been entitled under the 1992 rules and, conversely, there might have been persons who would have been entitled under the 1992 rules but who did not receive that entitlement. Whether those theoretical possibilities ever occurred depends on a combination of possible facts.

43. The period of time which might be relevant if one were to attempt to assess whether these theoretical possibilities had actually occurred is the period from 2001 to the date of assessment for the purposes of the PPF, namely, 5 March 2013. This is because in relation to deaths after the assessment date, the PPF will apply its regulations and not the 2001 DDR. As regards the possibility that some persons were overpaid, there would be real evidential difficulties in determining the position. Further, in relation to overpayments, it is not likely that there were overpayments. Yet further, there would be real difficulties in recovering any overpayments which there might have been. As

regards the possibility of underpayments, there would be real evidential difficulties in determining the position and it is not likely that there were underpayments.

44. In these circumstances, I consider that it is a proper exercise of the *re Benjamin* jurisdiction to permit the Trustee to administer the Plan on the footing that the purported amendments to the test for eligibility for the payment of pensions to spouses and children of members at rules 20.3 and 21.2 of the 2001 DDR were not applied so as to make any widow or widower (for the purposes of the PSA 1993) worse off.

45. The fifth such matter concerns rule 27.2 of the 2001 DDR. This was an alteration of the position under the 1992 DDR in relation to a spouse of a member who was more than 10 years younger than the member. The evidence shows that rule 27.2 was used in only one case after 2001. In that case, the spouse was Mrs Hodge. The amount of the reduction in her case was £142 per annum and the pension subject to the reduction was in payment for 29 months. It is not clear whether she was worse off under rule 27.2 than she would have been under the previous rule in the 1992 DDR as the 1992 rule involved the exercise of a discretion. The Trustee considers that the sums potentially at stake are so modest that it would not be a proper use of time and expense to ask the court to determine whether the alteration made by rule 27.2 of the 2001 DDR was valid. I am asked instead to permit the Trustee to administer the Plan on the footing that the purported introduction by rule 27.2 of the 2001 DDR of a limit on the maximum reduction which can be applied to the pension of the spouse of a member (in circumstances where the spouse is more than ten years younger than the member concerned) did not affect the calculation of any person's benefits (other than Joan Elizabeth Hodge) and on the footing that, in the absence of further order, it will not recalculate any of the benefits paid which could have been so affected had rule 27.2 been operated provided that nothing in the court's order shall affect any entitlement of the estate of Joan Elizabeth Hodge to any claim for additional benefits under the Plan. I consider that it is a proper exercise of the *re Benjamin* jurisdiction to permit the Trustee to act in this way.

46. In view of my conclusions as to the granting of declaratory relief and as to the making of *re Benjamin* orders, it is not necessary to consider the effect of the non-compliance with section 37 PSA 1993 in relation to those matters.

47. I am also satisfied for the purposes of CPR r. 19.7(5) and (6) that the settlement which the parties have made, in relation to the above matters, and to which I will give effect in the form of the above declarations and orders, is for the benefit of all the represented persons.

48. There is one further order which I am asked to make in relation to the non-increase issues. I am asked to make an order that the Trustee has permission to administer the Plan on the footing that clause 25 of the 1992 DDR, and not rule 36 of the 2001 DDR, will be applied when considering whether any arrears arising from pensionable service on or after 6 April 1997 are forfeit and/or should be applied to the purposes set out in that clause.

49. I will refer to clause 25 of the 1992 DDR and to rule 36 of the 2001 DDR later in this judgment. Issues 3, 4 and 5 concern the meaning and effect of these two provisions and I will decide those issues which have not been compromised. Accordingly, the direction which I am asked to give in the compromise relating to the non-increase issues does not relate to these issues. Instead, the compromise deals with another possible argument as to these two provisions. That other possible argument is based on section 37 PSA 1993. In the absence of the compromise on the non-increase issues, there would be scope for argument as to whether clause 25 and rule 36 would be within the scope of section 37 and as to what would be the effect of any non-compliance with section 37. There is considerable uncertainty in the pensions industry as to the effect of non-compliance with section 37. Various possibilities have been identified such as non-compliance rendering the alteration void or only void in various respects. There is also scope for argument as to whether section 37 can be satisfied retrospectively.

50. The direction which I am asked to make relates to 2001 Actives and that is because the 2001 DDR only applies to them. Further, that direction only applies to arrears arising from pensionable service on or after 6 April 1997 and that is because the section 37 issue cannot arise in relation to accrual before 6 April 1997.

51. At the hearing when the parties agreed to ask the court to make this direction, the parties did not know what the court would decide as to the meaning and effect of clause 25 and rule 36 and what the court would decide in relation to Issues 3, 4 and 5. Later in this judgment, I will make my determination of Issues 3, 4 and 5 and at this stage I know that I will decide that clause 25 does not provide for forfeiture of arrears of pension, that rule 36 does provide for an automatic forfeiture of unclaimed arrears but subject to the Trustee having a discretion to pay the arrears to the beneficiary notwithstanding the forfeiture and that rule 36 is not invalidated by clause 4 of the 1992 DDR. I consider that I ought to take those findings into account when I decide whether to make the draft direction. The result of my findings is that, subject to them being reversed on any appeal, the draft direction is favourable to the 2001 Actives.

52. I understand that one of the principal reasons for the parties agreeing this draft direction, subject to the approval of the court, is that it avoids the need to litigate the issues as to section 37 PSA 1993. The parties would prefer to avoid the costs and the delay involved in litigating that issue. They consider that it is not worth their while to incur that cost and suffer that delay if the only relevance of the section 37 issues relates to whether clause 25 or rule 36 applies to 2001 Actives and arrears arising from pensionable service on or after 6 April 1997.

53. Having reviewed the submissions made to me on this point and the material provided to me, I am not yet satisfied that it would be appropriate to give the direction which is sought. Conversely, I am not deciding that I will refuse to give that direction. Following the hand down of this judgment, I will give the parties a further opportunity to make the case as to why it is appropriate for me to approve a compromise in accordance with the draft direction.

The further issues

54. Apart from the issues which have now been compromised, the parties agreed a list of further issues which they wish the court to determine. A number of the issues originally included in the list of issues has now fallen away. I will now set out the parties' list of issues but I will remove the issues which have fallen away and I will renumber the issues accordingly.

55. The agreed issues are:

"**Limitation**

1. Is a claim by a member or other beneficiary under the Plan (a "Beneficiary") to arrears of pension increase payments (the "**pension increase arrears**") subject to a limitation period under s.21(3) or any other section of the Limitation Act 1980 ("the 1980 Act")? Or is any limitation period disapplied by s.21(1)(b) of the 1980 Act?

2. Whether any limitation period in relation to anyone who was a deferred or pensioner member in June 2000 would be postponed pursuant to section 32(1)(b) and 32(2) of the 1980 Act.

Forfeiture: Scope of Power

3. Do pension increase arrears fall within the scope of the powers in (i) clause 25 of the 992 DDR ("**clause 25**") and (ii) rule 36 of the 2001 DDR ("**rule 36**")? As to which:

a. Are they "monies" or a "benefit" within the meaning of those provisions?

b. Have they been "claimed" within the meaning of those provisions and if so when?

c. Do clause 25 and rule 36 allow forfeiture in circumstances where the underpayment might be characterised as a breach of trust by the trustees of the Plan?

d. Would the forfeiture of the pension increase arrears fall within the proper purpose of clause 25 or rule 36 in the circumstances of this case?

e. Does s.92(5) of the Pensions Act 1995 prevent clause 25 and/or rule 36 from making provision for the forfeiture of pension increase arrears or interest due thereon?

f. Do the Occupational Pension Schemes (Contracting-Out) Regulations 1984 and their successor provisions prevent clause 25 and/or rule 36 providing for the forfeiture of pension increase arrears on Guaranteed Minimum Pension ("GMP"), and interest due thereon?

4. Is the effect of the proviso to clause 4 of the 1992 DDR that rule 36 is ineffective in relation to benefits earned prior to the date on which rule 36 took effect?

5. Do the purposes to which the Trustee may put monies that fall within the scope of the powers in clause 25 and / or rule 36 include:

a. Reducing Axminster Carpets Limited's liability to pay the debt due from it to the Trustee under s.75 Pensions Act 1995?

b. Paying expenses of the management and administration of the Plan that have been:
   i. incurred and paid,
   ii. incurred but not paid, and /or
   iii. not yet incurred?

Exercise of powers

6. What factors have to be taken into account in exercising any discretion under clause 25 and rule 36 (in the sense that failure to take those factors into account would vitiate an exercise of the power)? Do they include:

a. Any Pension Protection Fund policy re payment of arrears of pension?

b. The fact that any incorrect payment of pension increases is not the fault of members?

c. The fact that the Trustee received advice as to its obligations in relation to deferred members and pensioners in 2000?

d. The nature of the information given to members as to the nature of the 'consent' that they were giving in 2000?

e. Whether or not members could reasonably have been expected to make claims for pension increase arrears sooner?

7. What factors should not be taken into account in exercising the discretion (in the sense that taking those factors into account would vitiate an exercise of the power)? Do they include:

a. Any administrative difficulties in paying specific categories of pension increase arrears?
b. Any Pension Protection Fund policy re payment of arrears of pension?
c. The fact that any incorrect payment of pension increases is not the fault of members?
d. The fact that the Trustee received advice as to its obligations in relation to deferred members and pensioners in 2000?
e. The nature of the information given to members as to the nature of the 'consent' that they were giving in 2000?
f. Whether or not members could reasonably have been expected to make claims for pension increase arrears sooner?

8. Would it be perverse for the Trustee now (i) to exercise any discretion it has under clause 25 to treat pension increase arrears as forfeit and/or (ii) not to exercise any

discretion it has under rule 36 to apply pension increase arrears to the Beneficiaries to whom they should have been paid?

9. If a claim by a Beneficiary to pension increase arrears would be time-barred under the Limitation Act 1980, would the Trustee be acting in breach of duty in declining to pay pension increase arrears on that basis?

Interest

10. Does interest fall to be paid on pension increase arrears and, if so, what rate should be applied?

Other issues

11. Do the issues of limitation and/or forfeiture apply differently to arrears caused by the need to equalise for the effect of GMP, following *Lloyds Banking Group Pension Trustees Limited v Lloyds Bank plc and others* [2018] EWHC 2839?

12. Do the issues of limitation and/or forfeiture apply differently to arrears caused by the fact that male and female Normal Pension Dates for members who had joined the Plan before 1 October 1992 were, in respect of pensionable service on and from 17 May 1990, equalised at age 65 on 17 November 1994?”

Issue 1: section 21 of the 1980 Act

56. Issue 1 asks:

> “Is a claim by a member or other beneficiary under the Plan (a "Beneficiary") to arrears of pension increase payments (the “**pension increase arrears**”) subject to a limitation period under s.21(3) or any other section of the Limitation Act 1980 (“the 1980 Act”)? Or is any limitation period disapplied by s.21(1)(b) of the 1980 Act?”

57. Issue 1 refers to section 21 “or any other section” of the 1980 Act. However, as the case was presented, the only relevant section of the 1980 Act, for the purposes of Issue 1, is section 21. The issue turns on the true construction of section 21 and, in particular, the meaning of the phrase “an action by a beneficiary under a trust … to recover from the trustee trust property … in the possession of the trustee” in section 21(1). Section 21 deals with trusts generally and is not restricted to the position in relation to pension trusts. Accordingly, the true construction of section 21 is a matter of some importance in the law of trusts.

58. As it happens, I had to consider the meaning of the relevant phrase in section 21 in *Lloyds No. 1* and I construed the phrase in a way which is in accordance with the submissions of the Defendant in the present case. However, Mr Legge on behalf of PSGS submits that my decision was wrong and that I should now decide the issue in the opposite sense.

59. In some circumstances, it might be appropriate for a judge at first instance simply to follow the decision made in an earlier case at first instance and to leave the disappointed party to appeal to the Court of Appeal where it could make its case that the first decision and the one which followed were wrong in law. Although the first decision was my own decision, it would be open to me to react to it in the same way as any other judge at first instance. Mr Legge nonetheless submitted that I should permit him to put forward the full range of his submissions at this stage, that I should consider the issue entirely afresh and reach the conclusion which was justified by the balance of the arguments now before me.

60. Having conducted a pre-trial review in this case and having pre-read the papers before the trial began, I considered what course I should take in response to Mr Legge's invitation to consider the limitation issue afresh. I decided that I would do so. The limitation issue is an important one and ought to be decided by a court having heard full argument. In *Lloyds No. 1*, the limitation issue was one of many issues raised in that case. In that case, the employers did not rely on section 21 as such but they relied on section 134 of the Equality Act 2010 and it was suggested that the position under section 21 of the 1980 Act was relevant to the application of section 134 of the 2010 Act. As it happened, I only heard brief argument as to the meaning of section 21. That is not a criticism of the counsel who appeared in *Lloyds No. 1* as they were subject to time constraints in the presentation of their submissions. Following the hearing in *Lloyds No. 1*, I did carry out certain researches of my own but I recognise that when I reached my decision in that case as to section 21 of the 1980 Act, I did not have in mind all of the considerations and possibilities which Mr Legge and Mr Short wish to rely on in the present case. These considerations led me to the conclusion that I should permit full argument in this case as to section 21 of the 1980 Act and that is what has occurred. With the considerable benefit of that argument, I have considered the limitation issue afresh.

61. Section 21 of the 1980 Act is in these terms:

> "**21. Time limit for actions in respect of trust property.**
>
> (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or (b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use.
>
> (2) Where a trustee who is also a beneficiary under the trust receives or retains trust property or its proceeds as his share on a distribution of trust property under the trust, his liability in any action brought by virtue of subsection (1)(b) above to recover that property or its proceeds after the expiration of the period of limitation prescribed by this Act for bringing an action to recover trust property shall be limited to the excess over his proper share. This subsection only applies if the trustee acted honestly and reasonably in making the distribution.

> (3) Subject to the preceding provisions of this section, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued. For the purposes of this subsection, the right of action shall not be treated as having accrued to any beneficiary entitled to a future interest in the trust property until the interest fell into possession.
>
> (4) No beneficiary as against whom there would be a good defence under this Act shall derive any greater or other benefit from a judgment or order obtained by any other beneficiary than he could have obtained if he had brought the action and this Act had been pleaded in defence."

62. Section 23 of the 1980 Act provides that an action for an account shall not be brought after the expiration of any time limit under the 1980 Act which is applicable to the claim which is the basis of the duty to account.

63. Section 38(1) of the Limitation Act 1980 contains definitions of certain terms which apply unless the context otherwise requires. In particular, section 38(1) defines "trust" and "trustee" as having the same meanings respectively as in the Trustee Act 1925.

64. Section 68(17) of the Trustee Act 1925 provides that, subject to immaterial exceptions, the expressions "trust" and "trustee" extend to implied and constructive trusts and to the duties incident to the office of a personal representative, and "trustee", where the context admits, includes a personal representative.

65. The claims which might be brought by beneficiaries for arrears of pension would be primarily claims to recover from the Trustee the amount of the previous underpayments of pension. Such claims could be expressed as claims to an account together with an order for payment of all sums due on the taking of the account and/or could be expressed as claims for compensation for breach of trust where the breach of trust would be the failure of the Trustee to pay the correct amount of pension at the time when it fell due. The present proceedings do not consist of such claims but I am asked to rule on how section 21 of the 1980 Act would apply if such claims were to be brought.

66. Mr Short submitted that a claim of the kind now being considered would be "an action by a beneficiary under a trust" within the opening words of section 21(1). Mr Legge did not dispute that. It was common ground that the Trustee of the Plan held the assets of the Plan on trust and that the members of the Plan were beneficiaries under that trust. Mr Short cited *Edwards v Warden* (1876) 1 App. Cas. 281 where it was held that the pension and annuities scheme in that case created a trust under which the members and their dependants were beneficiaries. That case concerned a claim by a widow of a member to recover sums which had not been paid to her and where the defendants relied on a defence of limitation. The defence of limitation failed in the House of Lords on the ground that the claim was by a beneficiary under a trust against a trustee and, on the law as it then stood, there was no relevant limitation period in relation to such a claim.

67. Mr Legge submitted that a claim of the kind now being considered would come within section 21(3). That subsection refers to two types of claim. The first is an action by a beneficiary to recover trust property and the second is an action by a beneficiary in respect of any breach of trust. Mr Legge submitted that the claim now being considered would be a claim by a beneficiary in respect of any breach of trust; the relevant breach of trust would be the failure of the Trustee to make a payment to the beneficiary at the time that the payment fell due under the terms of the Plan. This meant, said Mr Legge, that the claim was subject to a six-year period of limitation pursuant to section 21(3). Mr Legge went on to submit that the claim would not be a claim to recover trust property within section 21(3) and he developed that submission in greater detail in relation to his case in respect of section 21(1). Mr Short accepted that the claim could be a claim by a beneficiary in respect of any breach of trust but he submitted that it could also be a claim by a beneficiary to recover trust property. This difference between counsel may not matter as to the application of section 21(3) but is of critical importance as regards section 21(1).

68. Section 21(3) imposes a limitation period of six years from the date on which the right of action accrued. It was accepted that in the present case, the right of action in respect of an underpayment of pension accrued on the date when the correct amount of the payment ought to have been made.

69. Section 21(3) is expressly subject to section 21(1). Section 21(1) provides that no period of limitation applies in relation to two types of action which might be brought by a beneficiary under a trust. The result is that in relation to the two relevant types of action, section 21(3) is disapplied and there is no period of limitation prescribed by the 1980 Act. The first type of action within section 21(1) is an action in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy: see section 21(1)(a). There is now a considerable body of authority as to the scope of section 21(1)(a) but that part of the subsection is not relied upon by Mr Short in the present case.

70. The second type of action within section 21(1) is an action by a beneficiary under a trust "to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee or previously received by the trustee and converted to his use". Mr Short submitted that the claims now being considered come within these words. The beneficiary's claim would be for a payment to which he is entitled under the terms of the Plan and which the Trustee is obliged to make out of the assets of the Plan. Mr Short submitted that the assets of the Plan are trust property in the possession of the Trustee and the beneficiary's claim would be to recover from the Trustee trust property. Mr Legge submitted that such a claim was not a claim "to recover trust property" because, he said, that phrase applies, and applies only, to a proprietary claim brought by a beneficiary against a trustee. Mr Legge submitted that the claims now being considered would not be proprietary claims by a beneficiary against a trustee. He submitted that the beneficiaries' rights under the pension scheme are not proprietary rights and the beneficiaries do not have proprietary interests in the trust property.

71. Mr Short accepts that the beneficiaries' rights under the pension scheme are not proprietary rights and that the claims being considered would not be proprietary claims. I referred earlier to *Edwards v Warden* (1876) 1 App. Cas. 281. In that case, it was said

by Lord Cairns that, although the widow was a beneficiary under a trust and, as such, was entitled to be paid the sums which she claimed, she was not a cestui que trust in relation to any specific sum of money until it was set aside to answer her claim (see at page 293) and she could not say that any part of the fund had been hers prior to it being set aside in that way (see at page 294). I also note that, in *Wrightson Ltd v Fletcher Challenge Nominees Ltd* [2001] Pens LR 207 at [28], Lord Millett described the general position in relation to a defined benefit pension scheme as one where the members did not have proprietary interests in the scheme funds which were merely security for the payment of the benefits due to the members.

72. These statements that a beneficiary under a pension trust has no proprietary interest in the assets of the trust are to be understood as meaning that the beneficiary has no proprietary interest in the narrow sense of having no proprietary interest in specific assets. However, a beneficiary under a pension trust is entitled to enforce the trust and that right can be asserted against the trustees and others into whose hands the trust assets can be followed or traced. That right could be considered to be a proprietary interest in a broader sense of the term.

73. Mr Short submitted that the words "an action … to recover from the trustee trust property" were not restricted to proprietary claims but extended to the types of claim now being considered. This therefore was the central issue which divided the parties as to the operation of section 21(1).

74. The parties made further detailed submissions which I will deal with in my later discussion of this Issue. Before that discussion, I will deal with the legislative history and any relevant case-law.

The legislative history and the case-law

75. It is permissible to consider the historical position as to limitation in relation to actions against trustees in an attempt to derive assistance as to the construction of section 21. That was the approach taken by the Supreme Court in *Williams v Central Bank of Nigeria* [2014] AC 1189 when it decided two issues arising in relation to section 21, namely, the meaning of "trustee" and whether section 21(1)(a) only applied to a claim against a trustee.

76. The position as to limitation in relation to actions against trustees before the coming into force of section 8 of the Trustee Act 1888 was described in Brunyate, Limitation of Actions in Equity (1932) ("Brunyate"), at page 50, as follows:

> "Suits by *cestuis que trust* against trustees have always been outside the Statutes of Limitations. The Act of 1623 did not of course refer to them and the Courts of Equity, although they applied that Act by analogy in many cases within neither its words or its spirit, did not apply it to suits for breach of trust or for recovering trust property. These suits have also been excluded from all the later Statutes of Limitations except the Trustee Act of 1888."

77. The position before the Trustee Act 1888 was also described by Lord Sumption in *Williams v Central Bank of Nigeria,* at [12]-[13], as follows:

> "12. Before the Trustee Act 1888 (51 & 52 Vict c 59), no statutory time bar applied to a claim by a beneficiary against a trustee. The practice of equity was to apply statutory limitation periods by analogy to equitable claims, in addition to its own doctrines of laches and acquiescence. But by way of exception statutory limitation periods were not applied, even by analogy, to claims by a beneficiary against a trustee for breach of trust. Trustees were accountable to their beneficiaries without limitation of time.
>
> 13. It is important to understand why equity adopted this rule, for its rationale will not necessarily apply to every kind of constructive trust. The reason was that the trust assets were lawfully vested in the trustee. Because of his fiduciary position, his possession of them was the beneficiary's possession and was entirely consistent with the beneficiary's interest. If the trustee misapplied the assets, equity would ignore the misapplication and simply hold him to account for the assets as if he had acted in accordance with his trust. There was nothing to make time start running against the beneficiary. It will be apparent that this reasoning can apply only to those who, at the time of the misapplication of the assets have assumed the responsibilities of a trustee, whether expressly or de facto. Persons who are under a purely ancillary liability are in a different position. They are liable only by virtue of their participation in the misapplication of the trust assets itself. Their dealings with the assets were at all times adverse to the beneficiaries, and indeed to the true trustees holding the legal interest."

78. Lord Sumption specifically referred to *Hovenden v Lord Annesley* (1806) 2 Sch & Lef 607 in this summary of the position. The facts in *Hovenden v Lord Annesley* were complicated and the judgment of Lord Redesdale, Lord Chancellor of Ireland, is long. In that case, the claim was brought in 1806 for an order setting aside a deed of 1726, dealing with title to land, on the ground that the deed involved a fraud on the predecessor of the plaintiff. Lord Redesdale considered various points as to limitation and in particular considered submissions as to whether there could be a defence of limitation to a claim in equity based on fraud. In that context he distinguished between a claim by a beneficiary against a trustee under a pre-existing trust and a claim against a third party who by reason of his fraud would be considered to be a constructive trustee for the party bringing the claim. Lord Redesdale stated that, in the case of a trustee in possession under a trust, "the possession of the trustee is the possession of the cestui que trust". That statement has been repeatedly cited in later cases. However, that reasoning did not apply to a person who came into possession otherwise than pursuant to a pre-existing trust and in a way adverse to a person who challenged the taking of possession. That case did not involve a claim by a beneficiary against a trustee under a pre-existing trust.

79. The distinction made in *Hovenden v Lord Annesley* was applied in *Metropolitan Bank v Heiron* (1880) LR 5 Ex D 319, which was cited by Mr Legge. That was a claim by a company against a former director who had accepted a bribe from a debtor of the company. The case considered the nature of the claim which the company had against

the director. The actual decision in that case was overruled by the Supreme Court in *FHR European Ventures LLP v Cedar Capital Partners LLC* [2015] AC 250, see at [50]. However, Mr Legge relied on what was said by Cotton LJ at page 325 as to when the defence of limitation was not open to a trustee. Cotton LJ referred to a claim by a beneficiary against a trustee and explained that there was no defence of limitation in relation to such a claim because the money or property which was in the possession of the trustee was considered as being in the possession of the beneficiary until the trustee discharged himself. I do not see that that statement adds anything to what had been said in *Hovenden v Lord Annesley*. Later on page 325, Cotton LJ contrasted the claim to recover the bribe from the director as being different from "the case of a cestui que trust seeking to recover money which was his own before any act wrongfully done by the trustee." However, I do not read this description of the situation as being an exhaustive statement of the circumstances in which a trustee did not have a defence of limitation to a claim brought by a beneficiary.

80. The way in which matters had been described in *Hovenden v Lord Annesley*, referring to the trust property being in the possession of the beneficiary, might have suggested the argument that the only case of a claim by a beneficiary against a trustee, in which the trustee did not have a limitation defence, was a claim where the beneficiary had a proprietary interest in the trust property. However, that argument would be inconsistent with the decision in *Edwards v Warden* where there was no limitation defence available in relation to a non-proprietary claim. Thus, I do not read the relevant passage in *Hovenden v Lord Annesley* as stating that the only case in which a trustee did not have a limitation defence to a claim by a beneficiary was where the claim was a proprietary one.

81. The inability of a trustee to rely on limitation as a defence to a claim brought by a beneficiary was made statutory by section 25(2) of the Supreme Court of Judicature Act 1873, which provided:

> "Statutes of Limitation inapplicable to express trusts
> No claim of a cestui que trust against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations."

82. Section 25(2) of the 1873 Act referred to a claim "for any property", which might be confined to proprietary claims, but also referred to a claim in respect of any breach of trust, which would not appear to be so confined. The result was that the trustee had no defence of limitation, whether the claim was proprietary or otherwise.

83. The law was significantly altered by section 8 of the Trustee Act 1888, which provided:

> "**8. Statute of limitations may be pleaded by trustees.**
> (1) In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply: —

> (a) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him:
>
> (b) If the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession.
>
> (2) No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding and this section had been pleaded.
>
> (3) This section shall apply only to actions or other proceedings commenced after the first day of January one thousand eight hundred and ninety, and shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing statute of limitations."

84. Section 8 of the 1888 Act is arranged differently from section 21 of the 1980 Act. It has been said that section 8 was not well drafted: see Brunyate at page 114. There was doubt as to the relationship between section 8(1)(a) and 8(1)(b) and as to which cases came within which paragraph: see Brunyate at pages 115-120. It was clear that section 8(1)(b) was subject to the qualification that time did not begin to run against any beneficiary unless and until the interest of such beneficiary should be an interest in possession but it was not wholly clear whether this qualification governed section 8(1)(a) also: see Brunyate at page 121.

85. Under section 8 of the 1888 Act, the general rule was that a trustee under a pre-existing trust, when sued by a beneficiary under that trust, could rely on a defence of limitation. In particular, section 8(1)(b) provided that, in relation to an action to recover money or other property from a trustee or a person claiming through him, the trustee was entitled to plead the lapse of time as a bar to the action, as if the claim had been an action for money had and received. The general rule was not expressly restricted to claims by a beneficiary (unlike section 21 of the 1980 Act) and would extend to claims by a trustee brought on behalf of beneficiaries. Section 8(1)(b) referred to an action to recover money or other property and did not expressly refer to a claim in respect of a breach of trust. Brunyate, at page 120, stated that whatever way section 8(1)(a) was to be interpreted, as to which there were conflicting decisions, section 8(1)(b) applied to all actions for breach of trust which were not within section 8(1)(a) and were not themselves subject to a specific limitation provision. The general rule in section 8(1)(b) was subject to the qualification that time did not run against "any beneficiary" unless

and until the interest of that beneficiary was an interest in possession; this was not identical to the proviso to section 21(3) of the 1980 Act which only applies to "any beneficiary entitled to a future interest".

86. The general rule provided by section 8(1)(b) was subject to two exceptions set out in the opening words of section 8(1). The first exception was where the claim was founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy; this is the same exception as is now contained in section 21(1)(a) of the 1980 Act. The second exception was where the claim was to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use; this is essentially the same exception as is now contained in section 21(1)(b) of the 1980 Act.

87. If section 8 of the 1888 Act were still in force and one had to consider how it would apply to the type of claim by a beneficiary now being considered, a number of questions would arise, such as:

(1) would the claim be a claim to recover money or other property within section 8(1)(b)?

(2) would time not run against the beneficiary because he did not have an interest in possession; is it necessary to have a proprietary interest in specific trust property to have an interest in possession for this purpose?

(3) would the claim be within the second exception as a claim to recover trust property still retained by the trustee?

88. Section 8 of the 1888 Act was considered in a large number of cases and it is useful to refer to some of them.

89. In *Thorne v Heard & Marsh* [1894] 1 Ch 599 and [1895] AC 495, it was held that the second exception in section 8(1) which refers to trust property, or its proceeds, "still retained" is confined to cases where, at the date of the issue of the claim, the trustee still retains in his hands or under his control the trust property, or its proceeds, sought to be recovered.

90. *How v Earl Winterton* [1896] 2 Ch 626 was analysed in detail in the course of submissions. In that case, under a will which came into operation in May 1875, the plaintiff became entitled some 14 years later, in May 1889, to an annuity of £50 for her life. The annuity was charged on certain lands of which the defendant became the sole trustee. It was his duty as trustee for the period of 14 years from 1875 to 1889 to receive the rents, to pay some other annuities out of them and to invest the rents and, prior to any investment, to accumulate the rents. The annuity was also charged on the fund to be accumulated. The annuity was paid from 1889 to 1895. In August 1895, the plaintiff brought proceedings against the trustee claiming an account of the rents he ought to have accumulated. It was held that the plaintiff was entitled to an account of the monies in the hands of the trustee on the date which was six years before the commencement of the action and to an account of the rents and profits subsequently received which

ought to have been accumulated. Those claims, relating to matters within the six years before the commencement of the action, were not statute barred. However, the plaintiff also sought an account from 1875 together with interest on all the rents received by the trustee and not invested or accumulated. It was held by Kekewich J and the Court of Appeal that the claim to an account from 1875 was statute barred.

91. In *How v Earl Winterton*, Kekewich J, at page 632, described the claim to an account as an action to recover trust property within section 8(1)(b). As the annuity was charged on the trust property, the claim was in principle capable of being a proprietary claim but much of the property which ought to have been available to pay the annuity had not been accumulated. In the Court of Appeal, section 8(1)(a) was considered at length. It is not necessary in the present case to discuss section 8(1)(a) in any detail. Lindley LJ said, at pages 640-641, that section 8 was cumbrously worded but the short effect of it was that (subject to the express exceptions) a trustee who had committed a breach of trust was entitled to the protection of the various statutes of limitations as if actions and suits for breaches of trust were enumerated in them. Lopes LJ agreed with Lindley LJ. Rigby LJ considered the operation of section 8(1)(b) at pages 642-643. He said that the words "action to recover money" in section 8(1)(b) did not mean "money as belonging to the person". He referred to the claim in that case as a claim to make the trustee pay money into a fund as against which the plaintiff had a claim. That description would appear to refer to a claim to restore the trust fund. In that case, the plaintiff was not entitled to be paid the amount of the fund but was entitled to an annuity of £50 charged on that fund. Rigby LJ held that the claim to restore the fund was a claim to recover money within section 8(1)(b).

92. In *In re Timmis* [1902] 1 Ch 176, the will provided for a quarter share of the estate to be held by trustees for the niece of the testator for life and thereafter for her children. The trustees paid the quarter share to the niece outright and on her death they no longer had the quarter share to hold on trust for her children. A child of the niece claimed an account in relation to the one quarter share. The judge (Kekewich J) described the claim as action to recover money within section 8(1)(b). This was a case where, before the breach of trust in question, the plaintiff had a proprietary interest in the assets of the trust. The main point which was argued was whether "no existing statute of limitations applie[d]" within section 8(1)(b). The judge rejected the argument that the claim was a claim to a legacy within section 8 of the Real Property Limitation Act 1874. This meant that, subject to the possible exceptions in section 8(1), section 8(1)(b) applied. The right of action accrued in 1892 when the niece died and the action was brought in 1900 so that if section 8(1)(b) applied, the claim was statute barred. The plaintiff then relied on the second exception in section 8(1) which referred to trust property retained by the trustee or previously received by the trustee and converted to his use. There were three trustees and the will had provided that at a certain stage three quarters of the trust fund were to be divided between the three trustees beneficially and that had occurred. However, the three trustees did not receive any part of the quarter which ought to have been held for the niece for life and thereafter for her children (including the plaintiff). The judge held that the case was not within the second exception in section 8(1) as the trustees had only received what they had been entitled to. He said at page 186:

> "The intention of the statute was to give a trustee the benefit of the lapse of time when, although he had done something legally or technically wrong, he had done nothing morally wrong or dishonest, but it was not intended to protect him where, if he pleaded the statute, he would come with something he ought not to have, i.e., money of the trust received by him and converted to his own use."

93. Kekewich J's description of the purpose of the statutory provision has been quoted with approval in subsequent cases: see *JJ Harrison (Properties) Ltd v Harrison* [2002] 1 BCLC 162 per Chadwick LJ at [40] and *Burnden Holdings (UK) Ltd v Fielding* [2018] AC 857 per Lord Briggs at [17].

94. In 1936, section 8 of the Trustee Act 1888 was considered by the Law Revision Committee in its Fifth Interim Report, *Statutes of Limitation* (Cmd 5334); see at para. 11. The Committee regarded section 8 as generally satisfactory but went on to recommend a change in the law in relation to executors who were not express trustees. The recommendations of the Committee in that respect were considered in detail in *Williams v Central Bank of Nigeria* at [24].

95. Section 8 of the Trustee Act 1888 was repealed and replaced by section 19 of the Limitation Act 1939. Section 19(1) and (2) were in substantially the same terms as section 21(1) and (3) of the 1980 Act.

96. *How v Earl Winterton* was considered by the Supreme Court of New South Wales in *Re Flavelle* [1969] 1 NSWLR 341, cited by Mr Legge. In that case, the trustees were guilty of serious maladministration of the trust over a long period. The beneficiaries brought proceedings in March 1967 seeking the replacement of the trustees, an account and an order for payment of all sums due on the taking of the account. The judge replaced the trustees and ordered an account. An issue arose as to the period of time which was to be the subject of the account. The position was governed by section 69 of the Trustee Act 1925 (in Australia) which had been based on section 8 of the Trustee Act 1888. The beneficiaries relied on the part of section 69(1) of the Trustee Act 1925 which provided that no limitation period applied to a claim to recover trust property still retained by the trustee. As I understand the judgment in that case, the position was as follows. The trustees had trust assets in their hands when the action was brought and those assets were plainly within the relevant part of section 69(1). Thus, the trustees could not resist an order that they distribute the trust assets in their hands even though their earlier failure to distribute was a breach of trust that might have occurred more than six years before the action was brought. The judge ordered an account for the six years before March 1967. Any breaches of trust in that six year period would not be statute barred. An account which related to an earlier period might have revealed earlier breaches of trust but a claim in relation to those breaches of trust would have been statute barred except in relation to assets in the possession of the trustees when the action was brought. Accordingly, the judge ordered an account for the period of six years up to March 1967 only. Perhaps inconsistently with that approach, the judge held that it would be open to the beneficiaries to challenge the account as to the accuracy of the assets in the possession of the trustees in March 1961 on the ground that the trustees had wrongly disposed of assets or lost them prior to March 1961: see at page 366.

97. Subject to the possible inconsistency to which I have referred, the reasoning in *Re Flavelle* appears to be entirely orthodox and does not bear on the issue before me. However, at page 366, the learned judge (Helsham J) referred to the position where trust property was held by the trustee at the date of the claim and where the trustee admitted that it was liable to distribute that trust property in accordance with the terms of the trust. He said that a claim in relation to that trust property would not be a claim to recover trust property within the relevant provision. He explained his view that there would be an action to recover trust property where the trustee held the property and made an adverse claim to it or neglected to transfer it to the beneficiary. The judge's point appeared to be that a beneficiary did not need to bring a claim to recover trust property where the trustee admitted that he held the property subject to the trust and that he would distribute the trust property in accordance with the trusts. I do not read the judge's comments as to when the relevant provision applied as being an exhaustive statement of the scope of the provision.

98. In 1977, section 19 of the Limitation Act 1939 was considered in the Twenty-first Report of the Law Reform Committee at paras. 3.81-3.84. The Committee did not recommend any changes to the general rules in section 19(1) and (2) but did recommend an amendment which became section 21(2) of the 1980 Act.

99. *In re Loftus, Green v Gaul* [2007] 1 WLR 591 considered section 22 of the 1980 Act as well as section 21(1)(b). In that case, the deceased died intestate in August 1990 leaving an estate comprising real and personal property. The claimants commenced proceedings in January 2003 against the administratrix of the estate on the ground that she had failed to provide any or any adequate accounts, had failed to complete the administration of the estate and had failed to make distributions. They sought an order replacing her as administratrix and an account of the administration. The administratrix asserted a limitation period of 12 years pursuant to section 22 of the 1980 Act. Section 22 refers to a claim to the personal estate of a deceased person or to any share or interest in any such estate and the 12 year limitation period runs from the date on which the right to receive the share or interest accrued. Section 22 is expressed to be subject to section 21(1) and (2). The trial judge held that section 22 applied but that the earliest date from which the 12 years would run was the end of the executor's year, August 1991, so that the proceedings were not out of time. He went on to hold that most of the claim (apart from the claim to replace the administratrix) fell within section 21(1)(b) so that there was no relevant limitation period. On appeal, the judge's conclusion was upheld on other grounds, the lead judgment being given by Chadwick LJ (with whom Thomas and Lloyd LJJ agreed). At [19], Chadwick LJ stated that he found it hard to understand why a claim against an administrator for an account of the assets of an unadministered estate which have come into his hands should not fall within section 21(1). At [31]-[32], Chadwick LJ said:

> "*Whether the claims to an account and payment fall within sections 21(1)(b) and 23 of the 1980 Act*
>
> . 31. Section 21(1)(b) of the Limitation Act 1980 applies to an action by a beneficiary under a trust to recover from the trustee "trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and

> converted to his use". In that context "trustee" includes a personal representative and "trust" includes the duties incident to the office of personal representative- section 68(17) of the Trustee Act 1925 and section 38(1) of the Limitation Act 1980 . Section 23 of the 1980 Act is in these terms: "An action for an account shall not be brought after the expiration of any time limit under the Act which is applicable to the claim which is the basis of the duty to account."
>
> 32. In my view there can be no doubt that the claims against Mrs Gaul to an account and payment are claims in respect of property, real and personal, which came into her hands as administratrix of the deceased's estate; that those claims fall within section 21(1)(b) of the 1980 Act-either directly or indirectly, by reason of section 23 of that Act; and that having regard to the opening words of section 21 "No period of limitation prescribed by [the 1980 Act] shall apply" to those claims. Further, because they are claims within section 21(1)(b) of the Act, they are not claims to which section 22 of the Act has any application."

100. Earlier in his judgment, Chadwick LJ had explained that the better view was that time did not run under section 22 until the administrator had paid the costs, funeral and testamentary and administration expenses, debts and other liabilities properly payable out of the assets in his hands and provided for the payment of any pecuniary legacies. It was not until then that the residuary estate of the deceased could be identified.

101. It could be said that *In re Loftus* is an important decision in the present context. The Court of Appeal held that section 21(1)(b) applied to the claim by a beneficiary in relation to an intestate estate for an account of the administration and for payment on the basis that such a claim was a claim to recover from the administrator "trust property or the proceeds of trust property in the possession of the trustee". It is long established that a beneficiary in relation to an intestate estate does not have a proprietary interest in specific assets: see *Commissioner of Stamp Duties (Queensland) v Livingstone* [1965] AC 694. That proposition is an example of a more general point that if assets are in the course of administration and debts have to be paid out of them before the trust property is ascertained, then the beneficiaries have no interest or ownership in a particular asset: see Lewin on Trusts, 20th ed., para 1-008. It can therefore be seen that the Court of Appeal in *In re Loftus* applied section 21(1)(b) to a claim to an account and payment brought by a claimant who did not have a proprietary interest in specific trust assets. However, Mr Legge submitted that the case involved a claim by a beneficiary for an order restoring the trust fund where he had always accepted that, with a claim of that kind, the beneficiary did not have to have a proprietary interest in the trust assets. Mr Short did not challenge that analysis of the case. I have some reservations about that analysis in view of the way in which Chadwick LJ described the matter when he held that the claim by the beneficiary to an account and payment was a claim to recover property within section 21(1)(b).

102. The parties cited *First Subsea Ltd v Balltec Ltd* [2018] Ch 25 but I did not find anything in that case which bears on the issue arising in the present case as to the application of section 21(1)(b).

103. *Burnden Holdings (UK) Ltd v Fielding* [2018] AC 857 was a claim by a company against directors for breach of fiduciary duty where the directors sought to rely on a defence of limitation under section 21(3) of the 1980 Act. As Lord Briggs explained, at [11], a director of a company who misappropriates a company asset is regarded as a trustee for all purposes connected with section 21. By the same token, the company is regarded as the beneficiary of the relevant trust for all purposes connected with section 21. Complications had arisen in other cases where the director's breach of duty did not involve the misapplication of company property but those complications did not arise in *Burnden* itself. In that case, the directors could in principle rely on the defence of limitation pursuant to section 21(3) subject to the two exceptions in section 21(1).

104. In *Burnden*, the company's claim was for an account of profits or alternatively equitable compensation for the directors' misappropriation of the company's property. The company relied on section 21(1)(b) for the contention that there was no period of limitation for its claim. As I understood him, Mr Legge analysed this case as one where the claimant was entitled to seek the restoration of the trust fund and elected to do so by means of a claim for equitable compensation. I do not analyse the case in quite that way. As appears from the lead judgment of David Richards LJ in the Court of Appeal, the claimant in that case contended that the defendants had received trust property and had then converted it to their use: see [2017] 1 WLR 39 at [33]. That was how the case was analysed by the Court of Appeal: see at [36]. The argument for the defendants was that they had never received the trust property because it was always vested in some other entity. That argument was rejected: see at [37]. In the Court of Appeal, the directors contended that a claim for an account of profits or equitable compensation was not a claim to recover trust property within section 21(1)(b). In his judgment, at [38], David Richards LJ stated that he was inclined to agree that an account of profits was not within section 21(1)(b) but that the claim to equitable compensation appeared to be an appropriate remedy within section 21(1)(b), particularly where the trustee's indirect interest in the trust asset had been converted to the use of the trustee. Therefore, the Court of Appeal held that a claim to equitable compensation for the conversion of trust property was a claim to recover trust property which had been converted within section 21(1)(b).

105. On appeal to the Supreme Court, the defendants argued that the trust property had never been received by them and converted to their use: see [2018] AC 857 at [13]. If they were wrong about that, they did not argue that a claim for equitable compensation was not a claim to recover trust property within section 21(1)(b). The Supreme Court held, at [22], that the defendants had received trust property and converted it so that the appeal on that point was dismissed. At [17], Lord Briggs giving the lead judgment in the Supreme Court said that the "starting point in the construction of section 21(1)(b) is to pay due regard to its purpose" and he then approved what had been said by Kekewich J in *In re Timmis* (which I have quoted earlier) as to the purpose of the provision.

106. In *Lloyds No. 1*, for a number of years, members of a pension scheme had not received the full amount of the benefits to which they were entitled. One point which was argued related to the possible application of section 21 of the 1980 Act to a claim by a member against the trustee to recover the amounts which ought to have been paid. The argument in that case as to the operation of section 21 was fairly limited. I held that the members

could rely on section 21(1)(b) of the 1980 to defeat an attempt by the trustee to rely on a six year limitation period pursuant to section 21(3). I held that the claim by a member for the amount of the underpayments of pension was a claim to recover trust property which was in the possession of the trustee. This was the position even if the member did not have a proprietary interest in the assets of the trust and even if the pension scheme was actuarially assessed to be in deficit: see [2019] Pens LR 5 at [434]-[437].

107. In *Lloyds Banking Group Pensions Trustees Ltd v Lloyds Bank plc* [2020] EWHC 3135 (Ch) *("Lloyds No. 2*"), there was argument as to how section 21(1)(b) applied to a claim by a member, who had transferred out of the pension scheme, for an order that the trustee of the transferring scheme make good a deficiency in the transfer payment which it had made to the receiving scheme. In *Lloyds No. 2*, the trustee and the employers did not dispute my ruling in *Lloyds No. 1* as to the operation of section 21(1)(b) but submitted that the order being sought was not pursuant to a claim to "recover" trust property from the trustee and, for that reason, such a claim was not within section 21(1)(b).

108. In *Lloyds No. 2*, I held that the claim being considered would be in respect of a breach of trust within section 21(3). To assist in construing the word "recover" in section 21(1)(b), I referred to other provisions in the 1980 Act where that word was also used. I also considered whether the policy behind section 21(1)(b) assisted with the construction of the word "recover" in section 21(1)(b). I held that the claim being considered in that case would be a claim to recover trust property from the trustee within section 21(1)(b).

109. In *Hughes v Board of the Pension Protection Fund* [2021] Pens LR 2, which concerned claims to compensation under schedule 7 to the PA 2004 and where it was considered relevant to refer to the decision in *Lloyds No. 1*, the parties proceeded on the basis that a claim by a member of a scheme against the trustee for underpayment of benefits fell within the scope of section 21(1)(b): see at [208].

Section 21: discussion and conclusions

110. The specific issue as to the application of section 21 is whether an action brought by a beneficiary against the Trustee for arrears of pension, at a time when the Trustee is in possession of trust property, would be an action within section 21(1)(b). The argument on this point was not specific as to the precise type of claim being considered. In these circumstances, I ought to address two possible types of claim. The first would be a claim for an account of the sums due from the Trustee to the beneficiary under the trust together with an order for payment of the sums found due on the taking of the account. The second type of claim would be a claim for equitable compensation for breach of trust, where the relevant breach of trust would be the failure by the Trustee for the time being to pay the correct amount of pension as it fell due. In the first instance, I will seek to apply section 21(1)(b) to the first type of claim, a claim to an account and an order for payment. At the end of this section of the judgment, I will comment on the second type of claim, a claim for equitable compensation for breach of trust.

111. Mr Short contends that a claim for an account and payment would be an action to recover trust property within section 21(1)(b). He says that the beneficiaries are entitled to the arrears pursuant to the terms of the trust, the arrears are to be paid by the trustee out of "trust property" and the action to recover those arrears is an action to "recover" trust property. Mr Legge says that a claim for an account and payment would not be within section 21(1)(b) because it would be a simple claim for money due and it would not be a proprietary claim. He contends that, where the claim is for a payment to be made to the claimant, in order for the action to qualify as "an action … to recover … trust property" within section 21(1)(b), it must be a proprietary claim, that is, pursuant to a pre-existing proprietary right to the specific property which is claimed.

112. It is common ground that the type of action being discussed would be an action by a beneficiary under a trust against a trustee. It is also accepted that the Trustee is in possession of trust property, namely the substantial assets of the Plan. That is accepted even though the Plan is in deficit.

113. For present purposes the key words in section 21(1)(b) are "to recover … trust property". The issue is one of statutory interpretation. Both sides say that their interpretation gives effect to the ordinary meaning of the statutory wording. Neither party says that there is any previous case which has directly addressed this issue with the exception of my own decisions in *Lloyds No. 1* and *Lloyds No. 2* and I have been asked to look at the issue afresh with the benefit of the more extensive arguments in the present case.

114. In putting forward his explanation as to the operation of section 21, Mr Legge referred to two types of case which, he said, came within section 21(1)(b). The first type of case was where a beneficiary claimed an order that a trustee restore the assets of the trust. The property which was the subject of the claim would be trust property and the claim would be "to recover" that trust property. Mr Legge accepted that the claim would be "to recover" the trust property even where the trust property was not transferred to the beneficiary but was to be held by the trustee on the original trusts. Mr Legge then submitted that a beneficiary could bring such a claim where he had sufficient locus to do so. A beneficiary who was entitled to require the due administration of the trust would have sufficient locus. In particular, a discretionary beneficiary would have sufficient locus for this purpose. Mr Legge accepted that, with this type of case, it was not necessary for the beneficiary to show that he had a proprietary interest in the trust property which was the subject of the claim.

115. The second type of case which would come within section 21(1)(b) would be a claim by a beneficiary to have trust property transferred to him. In such a case, the claim would be to "recover" trust property. Mr Legge submitted that a claim of this type would only be within section 21(1)(b) if it were a proprietary claim, that is a claim in which the beneficiary claims that he has a pre-existing proprietary interest in the trust property being claimed.

116. Mr Legge then submitted that a claim by a beneficiary under the Plan for arrears of pension would not be either of the two types of claim referred to above. It would plainly not be a claim of the first type which involved a claim for an order restoring the trust

fund. It would not be a claim of the second type either. Although it would be a claim by a beneficiary to be paid a sum of money out of trust property, the beneficiary could not show that he had a pre-existing proprietary interest in that sum of money.

117. I will now comment on Mr Legge's division of cases into two types. Although Mr Legge is right that the two types of case to which he referred are within section 21(1)(b), that does not really advance his argument. What he needs to show is that those two types of case are the only types of case within section 21(1)(b). He can only show that if that is what section 21(1)(b), on its true construction, provides.

118. The principal type of case which is within section 21(1)(b) is a claim by a beneficiary against a trustee for an order that the trustee transfer property to the beneficiary or make a payment to the beneficiary. The issue therefore which I have to decide is whether, in relation to that type of case, the claim would only be within section 21(1)(b) where it is a claim to property in which the claimant has a pre-existing proprietary interest. I regard Mr Legge's other type of case which involves a claim to an order restoring the trust fund as being less obviously the subject of section 21(1)(b) because it might be said that it requires one to give the word "recover" a wider meaning than usual. Nonetheless, I see no reason not to accept Mr Legge's submission that such a claim would indeed be within section 21(1)(b) and I note his acceptance that, in the case of such a claim, the claimant would not need to show that he had a pre-existing proprietary interest in the property which was the subject of the claim.

119. Mr Legge's division of cases into two types, his acceptance that a claimant for an order restoring the trust fund does not have to show a pre-existing proprietary interest in the property the subject of the claim coupled with his insistence that a claim by a beneficiary to be paid a sum or money or to receive property is only within section 21(1)(b) if the beneficiary has a pre-existing proprietary interest in the money or property, might be said to produce an odd result demonstrated by the following example.

120. Assume a beneficiary who has an entitlement to be paid out of the trust property but who does not have a proprietary interest in specific trust property, for example, an annuitant where the annuity is not charged on the trust property or a pensioner under a trust-based pension scheme. Assume that more than six years earlier the trustee misappropriated the trust fund (i.e. he converted it to his use) and stopped paying the annuity or the pension. On Mr Legge's approach, the beneficiary would be entitled to an order that the trustee restore the trust fund; the trustee would not have a limitation defence under section 21(3) because the case would come within section 21(1)(b). Assume then that the beneficiary obtained an order that the trustee restore the trust fund and that the trustee did so. If the beneficiary were then to claim the arrears of annuity or the arrears of pension, the beneficiary could not recover the full amount of the arrears but would be restricted to arrears within the six years before the claim to recover the arrears was brought; the trustee would have a limitation defence under section 21(3) and the case would not, on Mr Legge's approach, be within section 21(1)(b).

121. Mr Legge submits that the requirement of a pre-existing proprietary interest in the trust property which is claimed is imposed by the wording of section 21(1)(b) and, in

particular, the words “to recover trust property”. It is therefore necessary to construe that phrase in the context of section 21 as a whole and having regard to the purpose of the provision. It may be helpful to construe the words “trust property” and then to construe the word “recover” and then to stand back and construe the whole phrase “to recover trust property”.

122. The relevant phrase is “to recover trust property”. As I have explained, Mr Legge submits that a beneficiary can “recover trust property” in one of two ways. The principal way would be where the beneficiary obtains an order that the trustee pay money or transfer property to the beneficiary. The other way would be where the beneficiary obtains an order that the trustee restore the trust fund but not necessarily pay anything or transfer anything to the beneficiary. Mr Legge accepted, indeed positively submitted, that in the second case “trust property” meant property held on trust and it was not necessary for the beneficiary to show that he had a proprietary interest in the trust property. He gave the example of a claim by a discretionary beneficiary to restore the trust fund; a discretionary beneficiary does not have an entitlement to anything from the trust fund and certainly does not have a proprietary interest in specific trust property. It seems to me to follow that in section 21(1)(b), “trust property” means property held on trust and those words do not impose a requirement that the beneficiary has a proprietary interest in the trust property and that is the case whether the claim by the beneficiary is a claim to have a payment out of trust property or an order that the trustee restore the trust fund. The words “trust property” must have the same meaning for the purposes of both types of claim.

123. I will now consider the meaning of the word “recover” to see if that word imposes a requirement that the beneficiary must have a proprietary interest in the property being recovered.

124. The word “recover” in section 21 must be read in the context of the 1980 Act as a whole. In *Lloyds No. 2*, I referred to other sections of the 1980 Act which used the verb “recover”. In that case, at [377], I said:

> “It is reasonably plain that the word “recover” in the 1980 Act is not limited to a case where the claimant was at an earlier point in time in possession of the relevant property, had lost it and was now seeking to “recover” it. It is perfectly permissible to speak of a claimant “recovering” damages.”

125. In *Lloyds No.* 2, the issue I had to decide, as to the meaning of the word “recover” in section 21, was whether a claim to recover trust property meant a claim for an order that the trust property be transferred to the claimant, rather than a third party (in that case, the transferee pension scheme). I held that it was appropriate to hold that a claim for trust property to be transferred to a third party could in some circumstances be a claim to recover trust property. Mr Legge said that he accepted that *Lloyds No. 2* was correctly decided on that point. He suggested that the approach in *Lloyds No. 2* was in line with his own submission that a claim by a beneficiary for an order that a trustee restore the trust fund would be a claim by the beneficiary to recover trust property, even

though the trust property would not be transferred to, or vested in, the beneficiary but to, or in, the current trustee.

126. Mr Legge did not in terms challenge the view expressed in [377] of *Lloyds No. 2*. Neither party before me in the present case carried out the exercise I had done in *Lloyds No. 2* as to the way in which the verb "recover" is used in the 1980 Act. However, I consider that the point is worth examining a little further.

127. In many places in the 1980 Act, the statute refers to an action to recover something where it is clear that what the claimant has to show is that he has an entitlement to what he claims but not that he has a proprietary interest in it. I refer, by way of example, to section 6(3) (recover the debt), section 9 (recover any sum recoverable), section 10 (recover contribution), section 12 (recover damages), section 19 (recover arrears of rent), section 20 (recover money), section 22(b) (recover arrears of interest), section 27A (recover proceeds of unlawful conduct) and section 37 (recover tax or duty or interest). Conversely, there are other sections where it may be that the claimant must show a pre-existing interest (possessory or proprietary) in the thing sought to be recovered: see section 3 (recover possession of a chattel) and section 15 (recover any land). This survey of the use of the word "recover" in the 1980 Act indicates that the word does not itself suggest a requirement that a claimant must have a proprietary interest in the thing sought to be recovered.

128. The words "to recover trust property" in section 21(1)(b) apply not only to trust property which is in the possession of the trustee but they also apply to trust property which is no longer in his possession, where he has previously received the trust property and converted it to his use. In a case of conversion, the trust property may have been transferred to a bona fide purchaser without notice or may simply have been dissipated. In such a case, the beneficiary would no longer have a proprietary claim in relation to the trust property. It is therefore necessary to consider how the words "to recover trust property" would apply to such a case. In *Burnden Holdings (UK) Ltd v Fielding*, it was held that a claim by the beneficiary to be paid equitable compensation for the breach of trust involved in the conversion of the trust property was a claim to recover trust property converted by the trustee to his use.

129. The reasoning of the Court of Appeal in *Burnden Holdings* in relation to the words "to recover trust property" is brief. However, the Court of Appeal held that the claim to equitable compensation for conversion came within the words even though the beneficiary no longer had a proprietary claim to the trust property (as one director in particular had parted with her interest in the trust property) and the beneficiary did not have a pre-existing proprietary interest in the equitable compensation which was claimed. It sufficed for the beneficiary to show that the property which had been converted was trust property and that the beneficiary had an entitlement to equitable compensation. Thus, *Burnden Holdings* does not provide any support for Mr Legge's contention that in order to qualify as a claim "to recover trust property" the claim must be made on the basis of a proprietary interest in the property being claimed and, indeed, provides support for the opposite contention.

130. Having separately considered the meaning of "trust property" and "recover", I will now consider the meaning of the phrase "to recover trust property". If as I have indicated

neither the words "trust property" nor the word "recover" imposes a requirement that the beneficiary has a proprietary interest in the thing being recovered, then I find it difficult to see any reason to hold that such a requirement is imposed by the entire phrase. So far, this assessment of Mr Legge's submission does nothing to suggest to me that it is right.

131. As the issue is one of statutory construction, I have considered whether other parts of section 21 throw any light on the operation of section 21(1)(b). Section 21(2) qualifies the operation of section 21(1)(b) in one specific case. Section 21(2) deals with a distribution of trust property, including the estate of a deceased person. Before the distribution, it may be that the beneficiary who later becomes a claimant does not have a proprietary interest in specific property but only a right to have the trust, or the administration of the estate, properly carried out. It might be said that section 21(2) contemplates that such a person would be able to bring a claim under section 21(1)(b). However, it might also be said that section 21(2) contemplates that a distribution has happened so that the trust or the administration might have been carried out so that the property to be distributed had become ascertained and the beneficiary would then have a proprietary right in specific property. In view of these possibilities, I doubt if I can derive much assistance in the present case from section 21(2).

132. I have also considered whether section 21(3) might throw some light on section 21(1)(b). The proviso to section 21(3) states that a right of action is not to be treated as having accrued to any beneficiary entitled to a future interest in the trust property until the interest fell into possession. It was not submitted that this proviso shows that section 21(3) contemplates that all "beneficiaries" for the purposes of section 21 must have either a future interest or an interest in possession. If that had been the contemplation of section 21(3), it would mean that a beneficiary with rights under a trust but without a proprietary interest in the trust property (either future or in possession) would not be caught by section 21(3) and no period of limitation would apply to a beneficiary claiming to enforce such rights.

133. I asked the parties whether I would derive any assistance from the proviso to section 21(3). Only Mr Short suggested that the proviso might provide assistance in that it was the only place in section 21 where there was a reference to the relationship of the beneficiary with the trust property; he suggested that that showed that section 21(1)(b) did not impose a requirement that the beneficiary had to have a proprietary interest in the trust property.

134. There are authorities which discuss the operation of the proviso to section 21(3). Although not cited to me, I have considered them. They all deal with the possible application of the proviso to a discretionary beneficiary. The cases are *Armitage v Nurse* [1998] Ch 241, in particular per Millett LJ at page 261, *Johns v Johns* (2004) 8 ITELR a decision of the New Zealand Court of Appeal, *Lemos v Coutts (Cayman) Ltd* (2006) 9 ITELR 616 a decision of the Cayman Islands Court of Appeal and *Wong v Grand View Private Trust Co Ltd* (2019) 22 ITELR 190 a decision of the Supreme Court of Bermuda. The cases in the other jurisdictions concerned statutory provisions in the same terms as section 21 of the 1980 Act. These cases show there is judicial disagreement as to the operation of the proviso to section 21(3).

135. The analysis of the proviso to section 21(3) by Millett LJ in *Armitage v Nurse* does not have a direct application in the present case. In *Lemos v Coutts (Cayman) Ltd*, the Cayman Islands Court of Appeal held, at [22], that *Armitage v Nurse* established the propositions "that discretionary beneficiaries are excluded from the scope of the limitation provision" and, further, "that the limitation applies only to beneficiaries who have a proprietary beneficial interest in the trust property which discretionary beneficiaries are not taken to have". The earlier cases were considered by the Supreme Court of Bermuda in *Wong v Grand View Private Trust Co Ltd*. It was held that time did not run against a discretionary beneficiary either because such a beneficiary had a future interest for the purpose of the relevant proviso or because such a person was not a "beneficiary" within the meaning of the statutory provision: see at [146] and [152](a).

136. As I have indicated, Mr Short positively submitted that the members of the Plan, who were entitled to be paid the correct amount of their pensions, were "beneficiaries" within section 21 of the Limitation Act 1980. Mr Legge agreed. Neither of them argued, as was held in *Lemos v Coutts (Cayman) Ltd*, that the reference to "beneficiary" in section 21 was restricted to a case where the beneficiary had a proprietary interest in the trust property.

137. Although I have considered the proviso to section 21(3) to see if it might throw light on the operation of section 21 as a whole, it emerges that there is judicial disagreement as to the operation of that proviso. In the end, in view of the common ground before me that the members of the Plan are beneficiaries within section 21 and they cannot rely on the proviso to section 21(3), I will proceed on the basis of that common ground.

138. It is also relevant to refer to the purpose of section 21(1)(b) and of the other provisions in section 21. Indeed, in *Burnden Holdings (UK) Ltd v Fielding* at [17], Lord Briggs said that the starting point in the construction of section 21(1)(b) was to pay due regard to its purpose and he approved the following statement of Kekewich J in *In re Timmis* at [186] which I have quoted earlier but which it is convenient to set out again here (Lord Briggs added the word "off" in the phrase "come off with something"):

> "The intention of the statute was to give a trustee the benefit of the lapse of time when, although he had done something legally or technically wrong, he had done nothing morally wrong or dishonest, but it was not intended to protect him where, if he pleaded the statute, he would come off with something he ought not to have, i.e., money of the trust received by him and converted to his own use."

139. On the face of it, Mr Legge's submission runs contrary to the policy as articulated in *In re Timmis*. Assume an annuitant who did not have a proprietary interest in any specific property held on trust, or a pensioner under a trust-based pension scheme, who is owed seven years arrears of annuity or pension. Assume also that the trustee remains in possession of the trust property from which the annuity or the pension ought to have been paid. If the annuitant or pensioner sued for the seven years arrears, then on Mr Legge's submission section 21(1)(b) would not apply and the trustee could defeat the claim for one of the years of arrears (the arrears which were due more than six years

before the action was brought). The trustee could then retain one year's arrears and not pay them to the beneficiary entitled to them.

140. Mr Legge submitted that that would not necessarily be the position as the trustee would have to make a decision whether to rely on the limitation defence. It was suggested that the trustee might decide not to rely on that defence and pay the one year's arrears to the beneficiary after all. However, the policy as articulated in *In re Timmis* is not really compatible with the idea that the trustee could make a decision not to pay the arrears to the beneficiary entitled to them and decide to use them in some other way or even possibly retain them for himself. I consider that these policy considerations cause me to be cautious before accepting Mr Legge's submission.

141. I have also considered the legislative history of section 21 of the 1980 Act. Section 8 of the Trustee Act 1888 is in many ways similar to section 21 of the 1980 Act, but it is not identical to it. When creating the general limitation defence, section 8 refers to an action "to recover money or other property" but when creating an exception to this defence it refers to an action "to recover trust property". Further, the general limitation defence is subject to the qualification that time does not begin to run against any beneficiary until the interest of the beneficiary is an interest in possession. There is no authority as to the meaning of an interest in possession in section 8. If it means a proprietary interest in specific trust assets, then a beneficiary in relation to a pension scheme like the widow of the member in *Edwards v Warden* would not have had such an interest so that time would not run against her.

142. Mr Legge submitted that his interpretation of section 21 was supported by section 92(5)(a) PA 1995. That subsection permits an occupational pension scheme to contain a rule which permits forfeiture by reference to a failure by any person to make a claim for pension where the forfeiture was in reliance on any enactment relating to the limitation of actions. He submitted that section 92(5)(a) was drafted on the assumption that section 21 of the 1980 Act gave to a trustee of a pension scheme a limitation defence even where the trustee was in possession of trust property which could be forfeited pursuant to a rule of the scheme. I do not derive any real assistance from section 92(5)(a) PA 1995 which is not restricted to trust-based pension schemes.

143. Mr Legge also submitted that in relation to some pension schemes, a member's right to a pension did not depend on the trustee holding assets. The trustee might have limited assets or even no assets and would rely on its right to call on the employer to contribute to the liabilities of the scheme. He submitted that in such a case there would not be a connection between the rights of the member and the existence of assets held by the trustee at any particular time. However, even ignoring a possible analysis that the trustee's right to call on the employer to contribute would be a trust asset, I do not see how this submission really bears on the present issue. In the present case, the beneficiary's entitlement to a pension is provided by the terms of the trust which also provide for the Trustee to hold a fund and to pay benefits out of that fund and, further, the relevant part of section 21(1)(b) only applies in this case where the Trustee is in possession of trust property.

144. Both parties provided examples to test the rival interpretations of section 21(1)(b).

145. Mr Short referred to the case of an income beneficiary to whom Mr Legge had referred. The example given by Mr Legge was of a sole income beneficiary who had a proprietary interest in the income in accordance with the decision of the majority of the House of Lords in *Baker (Inspector of Taxes) v Archer-Shee* [1927] AC 844. Mr Short changed the example to a case where there were several beneficiaries entitled to share in the income. Three members of the House of Lords in *Archer-Shee* had said that, in such a case, each one of the beneficiaries, with a several right to share in the income of the trust, would not have a proprietary interest in the income: see per Viscount Sumner at page 853, per Lord Carson at page 869 and per Lord Blanesburgh at page 877. The other two members of the House did not discuss the case of several beneficiaries entitled to share in the income but there was no reason to conclude that they took a different view. Viscount Sumner and Lord Blanesburgh were in the minority as regards the actual decision in that case (dealing with a sole income beneficiary) but Lord Carson was in the majority in that case holding that a sole income beneficiary had a proprietary interest in the income. Further, there is a later case in the Supreme Court of Victoria, *In re Young* [1942] VLR 4, which considered *Archer-Shee* and which held that, in the case of several persons entitled to share a residuary estate, even where the estate had been administered and the residue ascertained, none of them had a proprietary interest in the residue.

146. Based on *Archer-Shee* and In *re Young*, Mr Short submitted that Mr Legge's example of an income beneficiary having a proprietary interest and being able to rely on section 21(1)(b) would not apply if there were several income beneficiaries. On Mr Legge's approach, a trustee who had not paid the income to the several beneficiaries would have a limitation defence under section 21(3), which would not be overridden by section 21(1)(b); the result would be that the trustee could retain the income for himself and refuse to pay it to the beneficiaries entitled to it.

147. Mr Legge accepted that a several income beneficiary would not have a proprietary interest in the income of the trust. This would produce the result, if Mr Legge's submission were correct, that a sole income beneficiary could rely on section 21(1)(b) but a several income beneficiary could not. It is not obvious to me why Parliament would have intended to make that distinction. Mr Legge submitted that the problem could be solved if all of the several income beneficiaries joined together to bring a claim for arrears of income and they then collectively could rely on section 21(1)(b). I am not persuaded he is right about that but even if he were, a several beneficiary may not be able to arrange matters so that all of the several beneficiaries join in the claim. Mr Legge also submitted that if they did not all join in the action as claimants they could be joined against their will as defendants. Again, I am not persuaded that that would change the way in which section 21(1)(b) would be applied if Mr Legge were right in his basic contention.

148. Mr Legge put forward some examples of his own in support of his submissions as to section 21(1)(b). His first example was of a beneficiary under a trust who made a contract with the trustee whereby the trustee would be liable to pay a sum of money to the beneficiary and could draw on the trust assets in order to make the payment. I do not find that example of any assistance. The example would involve a claim in contract for the payment of monies due. The claim would not be governed by section 21 because

it would not be an action by a person in the capacity of a beneficiary under a trust against a person in the capacity of a trustee.

149. Mr Legge's second example was of a trust where there was an income beneficiary and a capital beneficiary and where the trustee in breach of trust had used the income for other purposes and had not paid the income beneficiary. The example assumed that the trustee no longer retained the income of the trust but he did retain the capital. The example also assumed that the income could not be traced into other property in the possession of the trustee and there was no case of conversion against the trustee. For simplicity, I will also assume that all of the arrears of income accrued more than six years before the income beneficiary sued to recover them. The question in such a case would be as to how section 21(1)(b) ought to be applied. If the income beneficiary had to show that he had a proprietary interest in the property which he claimed then he would not be able to do so because the trustee no longer had the income or the traceable proceeds of the income. On that basis, section 21(1)(b) would not apply and the trustee would have a limitation defence to the claim. If the income beneficiary did not have to show that he had a proprietary interest in the property which he claimed, then the question would be whether the claim was to recover trust property in the possession of the trustee. The income beneficiary would, perhaps, argue that the trustee was in possession of the capital of the trust and that brought the case within section 21(1)(b). The trustee would argue that the capital of the trust was not the relevant trust property because the trustee was not entitled to pay the income beneficiary out of the capital of the trust. Those arguments would then have to be resolved in such a case if it were ever to arise. I do not think it is inevitable that the court would find for the income beneficiary in such a case. The fact that the question would arise and would need to be answered, if the income beneficiary did not have to show he had a proprietary interest in the property claimed, does not of itself show that Mr Legge is right in submitting that a proprietary interest is necessary.

150. Mr Legge gave two other examples where the trust property in the possession of the trustee was not sufficient to meet the claim made by the beneficiary or, where there is more than one claim, all of the claims of the beneficiaries. As will be seen, these examples do raise real questions as to the operation of section 21(1)(b). However, the examples were not fully explored in the course of argument and the submissions on these examples amounted to brief assertions as to the position. Mr Legge's submission appeared to be that these problems only arose if the court did not accept his submission as to the need for the claimant to show a proprietary interest in the property which was claimed. Mr Short submitted that the problems were not problems as to limitation but arose in any event because the trust property in the possession of the trustee was not sufficient to meet all of the claims on the trustee. If these examples were to arise in an actual case and had to be decided, much more analysis of the position would be required. I will refer to these examples as the third and fourth examples. I will put the examples in my own words.

151. The third example was where the arrears due to a beneficiary were £10,000 and, at the date of the claim, the trust property in the possession of the trustee was only £5,000. Mr Short submitted that this was not a problem of limitation. However, a limitation issue would arise if some of the arrears accrued more than six years before the claim was

brought. An extreme version of the example would be where all of the arrears accrued more than six years before the claim was brought. It is to be assumed that there are no other proceeds of trust property and no act of conversion by the trustee. I will consider this example first on the basis that section 21(1)(b) only applies where the beneficiary has a pre-existing proprietary interest in the property which is claimed and then on the alternative basis that section 21(1)(b) is not so restricted. On the first basis, the beneficiary will have a proprietary claim to the £5,000 in the possession of the trustee. As to the remaining arrears of £5,000, it seems most likely that the court would say that that part of the claim was not within section 21(1)(b) and was statute barred. On the alternative basis, the most likely outcome would again seem to be that the claim to £5,000 was within section 21(1)(b) but the balance of the claim was not. Although I am not deciding the position in relation to this example on the alternative bases, it does not seem that a problem only arises if I do not accept Mr Legge's basic submission as to the need for the claimant to have a proprietary interest in the property which is claimed.

152. The fourth example was where there are arrears owed to three beneficiaries of £10,000 each and, at the date of the claim, the trust property in the possession of the trustee was only £15,000. Mr Short submitted that this was not a problem of limitation. However, a limitation issue would arise if some of the arrears accrued more than six years before the claim was brought. An extreme version of the example would be where all of the arrears accrued more than six years before the claim was brought. It is to be assumed that there are no other proceeds of trust property and no act of conversion by the trustee. I will consider this example first on the basis that section 21(1)(b) only applies where the beneficiary has a pre-existing proprietary interest in the property which is claimed and then on the alternative basis that section 21(1)(b) is not so restricted. On the first basis, there are three claims totalling £30,000 to a fund of £15,000. There were no submissions as to the right approach in such a case. Assuming that the claims are put as proprietary claims, the result may be that they rank equally and the fund is split equally between the three beneficiaries. On that basis, each beneficiary is entitled to receive £5,000. Each beneficiary is still owed the balance of £5,000. Can each beneficiary say that when his claim for £10,000 was brought, the trustee was in possession of £15,000 of trust property so that section 21(1)(b) applied and no part of the claim is statute barred? I will now consider the example on the alternative basis that no claimant has a proprietary claim. Each has a claim for £10,000 and the trustee is in possession of £15,000. Can each beneficiary say that when his claim was brought the trustee was in possession of trust property the value of which exceeded the claim and section 21(1)(b) applied? I do not consider that this example clearly establishes that a problem only arises in such a case if I reject Mr Legge's basic submission as to the need for the claimant to have a proprietary interest the property which is claimed.

153. I note that Mr Legge did not submit that the fourth example actually arises in the present case. Although the Plan is in deficit, that is on the basis of an actuarial assessment of the liabilities of the Trustee under the Plan including all future liabilities. That is not the situation contemplated in the fourth example.

154. As to the case-law, Mr Legge did not submit that any previous case established that section 21(1)(b) only applied where the claimant beneficiary had a proprietary interest in the subject matter of the claim. It may be that all of the cases where section 21(1)(b)

was applied to a claim by a beneficiary to receive trust property or to be paid out of trust property were cases where the beneficiary had a proprietary interest in trust property but that circumstance does not establish that section 21(1)(b) is limited to such cases. Mr Legge in fact submitted that with conventional trusts, most beneficiaries with an entitlement to a benefit out of trust assets do have a proprietary interest in the trust assets. A discretionary beneficiary does not have a proprietary interest in specific trust assets but then a discretionary beneficiary does not have any entitlement to a benefit. It may be that a pension trust where a member has an entitlement to receive a payment out of trust assets but no proprietary interest in specific assets is unusual as compared with conventional trusts.

155. I have also considered the implications of the decision in *In re Loftus, Green v Gaul*. In that case, Chadwick LJ in the Court of Appeal proceeded on the basis that, by reason of section 21(1)(b), an administrator did not have a limitation defence to a claim by a beneficiary under an unadministered estate who would have had no proprietary interest in specific assets. That approach might be said to be inconsistent with the suggestion that section 21(1)(b) only applied where the claimant beneficiary had a proprietary interest in the property the subject of the claim. Mr Legge pointed out that when that case was considered by Lawrence Collins J at first instance, he analysed the claim as a claim by a beneficiary to restore the trust fund. Chadwick LJ did not specifically refer to how the claim should be analysed but simply did not refer to the question whether the beneficiary had a proprietary interest and whether such an interest was necessary for the purposes of section 21(1)(b). It might have been possible to regard the decision of the Court of Appeal in *Green v Gaul* as indicative that section 21(1)(b) did not require the claimant beneficiary to have a proprietary interest in specific assets but Mr Short did not so submit.

156. I explained earlier that I would, in the first instance, consider the operation of section 21(1)(b) in relation to a claim by a beneficiary, against the Trustee, for an account and an order for payment of a sum of money to which the beneficiary was entitled under the terms of the trust. The only argument raised by Mr Legge as to why such a claim was not within section 21(1)(b) was that that provision required the beneficiary to show that it had a pre-existing proprietary interest in the subject matter of the claim. I am not able to find any words in section 21(1)(b) which impose that restriction on its operation. There is no authority which supports the suggested restriction. I also find that such a restriction would be contrary to the purpose of section 21(1)(b). I therefore conclude that the provision is not to be construed so as to be subject to such a restriction. In the absence of such a restriction, I find that a claim by a beneficiary against the Trustee for payment of arrears of pension would be "an action to recover from the trustee trust property" within section 21(1)(b) and it being admitted that the Trustee is in possession of the trust property, the beneficiary is able to rely on section 21(1)(b) so that there is no period of limitation in relation to such an action.

157. Having considered the operation of section 21 in relation to a claim for an account and for an order for payment of pension arrears, I will now consider the alternative type of claim to which I referred earlier, namely a claim for equitable compensation for breach of trust.

158. If a beneficiary wished to frame his claim as a claim for equitable compensation for breach of trust, for example to improve his position as regards the award of interest (the subject of Issue 10 discussed later in this judgment), further questions might arise on the facts of this case. There was, at most, only passing reference to such further questions in the course of argument. In these circumstances, my discussion of these further questions will be somewhat tentative.

159. I will start by considering the position of the current Trustee, PSGS, and then consider the position of its predecessors as Trustees. PSGS has been the Trustee since 2013 and I was told that PSGS has made the concession that the six year period under section 21(3) can be measured backwards from the issue of the present proceedings on 26 November 2018. Assuming that that concession was in terms which extended to either a claim for an account and an order for payment or a claim for equitable compensation for breach of trust, then the six year period goes back to 26 November 2012 so that any breach of trust committed by PSGS itself is within the limitation period imposed by section 21(3). In these circumstances, it is not necessary to consider whether a claim against PSGS (who is in possession of the trust property) for equitable compensation for breach of trust would also be within section 21(1)(b), relying on the approach in *Burnden Holdings* as to the meaning of "to recover trust property".

160. As regards the possibility that a beneficiary might bring a claim against a predecessor of PSGS as Trustee for equitable compensation for breach of trust, any such claim would relate to a breach of trust before PSGS became the Trustee in 2013. The concession by PSGS as to the six year period for the purposes of section 21(3) would not, so far as I can see, be binding on its predecessors as Trustees. As we are now in 2021, even if an action for breach of trust was commenced soon, the six year period imposed by section 21(3) would only go back to 2015. A beneficiary would not be able to rely on section 21(1)(b) against a predecessor Trustee because, when the claim would be brought, the predecessor Trustee would not be in possession of the trust property. In this judgment, I am not considering whether the limitation period for a claim against a predecessor Trustee would be postponed pursuant to section 32 of the 1980 Act.

Issue 2: section 32 of the 1980 Act

161. Issue 2 asks:

> "Whether any limitation period in relation to anyone who was a deferred or pensioner member in June 2000 would be postponed pursuant to section 32(1)(b) and 32(2) of the 1980 Act."

162. The Defendant contended that if a Trustee of the Plan was entitled to rely on a limitation defence under section 21(3) of the 1980 Act by way of answer to the claims by beneficiaries to an account of and an order for payment of the pension increase arrears and/or for breach of trust, then the Defendant would wish to rely on section 32 of the 1980 Act, in relation to certain beneficiaries. Section 32(1)(b) of the 1980 Act provides that where a fact relevant to a claimant's right of action has been deliberately concealed from him by the defendant, then the period of limitation does not begin to run until the claimant has discovered the concealment or could with reasonable diligence have

discovered it. This provision is supplemented by section 32(2) which provides that deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.

163. For the purposes of his case as to section 32, the Defendant relied on certain events which took place in 2000 when the then Trustees received legal advice. I was provided with documents which gave some information as to those events and with a witness statement from a solicitor who gave that legal advice in 2000.

164. In the course of the hearing, I was told that the parties had discussed the position in relation to section 32 of the 1980 Act which meant that the court would not have to decide Issue 2. After I had reserved judgment, I was sent a draft order which provided for the court to give permission to the Trustee to administer the Plan on the footing that certain beneficiaries (but not all beneficiaries) were entitled to rely on section 32(2) of the 1980 Act in relation to their claims for pension increase arrears. I was told that I would receive submissions on the appropriateness of the court making the draft order after the hand down of this judgment.

165. In view of the position agreed between the parties, I will not decide Issue 2 in this judgment although I will refer later in this judgment to some of the events of 2000 when I make certain comments as to their possible relevance when PSGS comes to consider the exercise of its discretion under rule 36 of the 2001 DDR.

Issue 3: clause 25 of the 1992 DDR and rule 36 of the 2001 DDR

166. Issue 3 asks:

"Do pension increase arrears fall within the scope of the powers in (i) clause 25 of the 1992 DDR ("**clause 25**") and (ii) rule 36 of the 2001 DDR ("**rule 36**")? As to which:

a. Are they "monies" or a "benefit" within the meaning of those provisions?

b. Have they been "claimed" within the meaning of those provisions and if so when?

c. Do clause 25 and rule 36 allow forfeiture in circumstances where the underpayment might be characterised as a breach of trust by the trustees of the Plan?

d. Would the forfeiture of the pension increase arrears fall within the proper purpose of clause 25 or rule 36 in the circumstances of this case?

e. Does s.92(5) of the Pensions Act 1995 prevent clause 25 and/or rule 36 from making provision for the forfeiture of pension increase arrears or interest due thereon?

f. Do the Occupational Pension Schemes (Contracting-Out) Regulations 1984 and their successor provisions prevent clause 25 and/or rule 36 providing for the forfeiture of pension increase arrears on Guaranteed Minimum Pension ("GMP"), and interest due thereon?"

167. Issue 3 raises a number of sub-issues as to the meaning and effect of clause 25 of the 1992 DDR and rule 36 of the 2001 DDR.

Clause 25 of the 1992 DDR

168. Clause 25 of the 1992 DDR is in these terms:

> "25. POWER TO APPLY UNCLAIMED MONIES
> ANY monies payable out of the Plan and not claimed within six years from the date on which they were due to be paid may (at the Trustees' discretion) be applied:-
>
> (i) in augmenting the benefits of those Members still in Service;
> (ii) in reducing the Employer's contributions to the Plan, or
> (iii) in payment of the expenses of the management and administration of the Plan."

169. It is also relevant to refer to clause 23 of the 1992 DDR which provides:

> "23. NON-ASSIGNABILITY
> THE assignment by a Member (or any other person entitled to Relevant Benefits under the Plan) of any benefit under the Plan is prohibited, and if any Member or other person either wholly or partially assigns or charges any present or future benefit arising under the Plan or attempts or purports to do so, or if any other act is done or event happens, with the result that such benefit, if belonging absolutely to the Member (or other person), would be vested in or payable to (or charged in favour of) any other individual, firm or company, the Member or other person shall forfeit all rights whatsoever to such benefit
>
> EXCEPT THAT a Guaranteed Minimum Pension payable to a Contracted-out Member or to his widow (or her widower) shall not be forfeited in this way, but shall remain payable to the Member or to the widow (or widower) as the case may be, unless such payment is suspended in accordance with Rule 14(a).
> If any benefit is forfeited in this way, the Trustees shall, as from the date on which they receive notice of the act or event causing such forfeiture, hold the forfeited benefit upon trust for the general purposes of the Plan, but with power (if they so think fit) to pay or apply that benefit (or any part of it) at their sole and absolute discretion in case of hardship to, or for the benefit of, all or anyone or more (to the exclusion of the other or others) of the Member and his Dependants or, if a person other than a Member is concerned, such other person and the persons who bear the same relationships to him as Dependants bear to a Member, but so that in no circumstances shall any payment be made to a purported assignee or chargee."

170. Clause 25 applies where there are monies which are payable out of the Plan and which were not claimed within six years from the date on which they were due to be paid. In such a case, clause 25 gives the Trustee a power to use the unclaimed monies for the purposes specified. Mr Legge submitted that if the Trustee exercised the power conferred by clause 25, then the monies would be applied to the specified purpose and

would no longer be available to be paid to the person, who at one time had been entitled to be paid, but who had not claimed the money within six years from its becoming due. He said that the application of the money to one of the purposes specified in clause 25 could not be reversed to produce the result that the money applied to such a purpose would cease to be applied for that purpose and would again become available to be paid to the person who had previously been entitled to be paid. He said that the irreversibility of the application of the monies was particularly clear in the case of the first specified purpose where the money was applied in augmenting the benefits of other members. It necessarily followed that if the Trustee exercised the power conferred by clause 25, then the person previously entitled to be paid must cease to be entitled to be paid. Otherwise, clause 25 would be unworkable. It cannot have been envisaged that a Trustee would only be able to exercise the power conferred by clause 25 when it was prepared to take a risk that the person previously entitled to be paid would not subsequently require the Trustee to pay him. Clause 25 did not use the word "forfeit" to describe the position in relation to the previous entitlement of a member to be paid but that was the necessary result of the Trustee being given a power to apply the money previously due to a member for an alternative and inconsistent purpose. Clause 25 could also be considered to be a time-bar clause; under the clause the Trustee was entitled to apply monies which had not been claimed for six years from becoming due so it inevitably followed that a claim by a member to be paid benefits more than six years after they were due was time-barred. A time-bar clause was a sensible and practical provision to include in a pension scheme and the court could find that the Plan provided for a time-bar even without some heightened level of clarity in the words used.

171. Mr Legge submitted that a Trustee might wish to rely on clause 25 in various circumstances. One set of circumstances was where there were missing beneficiaries who had not been paid benefits for more than six years. Another set of circumstances was where the Trustee had administered the Plan on the wrong basis resulting in underpayment of benefits. In some circumstances, the amounts involved might be large and clause 25 should not be construed on the basis that it only applied to modest sums of money.

172. Mr Short referred to recital (D) to the 1992 DDR which stated that the primary objective of the Plan was and had always been the provision of relevant benefits for members. That objective was fundamental to the Plan. The members were not volunteers. He submitted that there had to be clear words to take away a member's entitlement to benefits under the rules. Clause 23 contained clear words which provided that a member or other beneficiary would forfeit their rights under the scheme in specified circumstances. Clause 23 also specified what the Trustee was entitled to do in relation to the benefit which had been forfeited. Clause 25 was strikingly different from clause 23. Clause 25 did not contain any words, let alone clear words, which provided that a beneficiary's omission to claim a payment within six years of it becoming due meant that his right to that payment was forfeited. The result was that clause 25 did not effect a forfeiture of that right. Clause 25 fell to be construed against that background. If the Trustee wished to exercise the power conferred by clause 25, particularly in an irreversible way, the Trustee would have to think carefully about the possibility that monies payable to a member which had gone unclaimed might later be claimed and

would have to be paid. Clause 25 was workable on that basis. There was no justification for reading words into clause 25 to effect a forfeiture of a member's rights.

173. Mr Short submitted that there would not be many missing beneficiary cases which involved large sums of money. As regards cases where the Plan had been administered on the wrong basis and beneficiaries were underpaid their benefits, the Trustee would not know until later that that was the situation. When the Trustee did discover that it had underpaid benefits, the duty of the Trustee would be to arrange to make good the underpayments and not to forfeit the rights to benefits in relation to the period more than six years before the Trustee's discovery of the position. Further, the Plan would have been funded on the wrong basis and not on the basis that the beneficiaries would be underpaid and a fund would be built up which could either be forfeited under clause 25 or paid belatedly to beneficiaries entitled to be paid. Where the Plan had been administered on the wrong basis, there would not be a fund of orphaned money which would be freed up by the Trustee exercising the power under clause 25. The construction contended for by Mr Legge was a most unattractive one where the Trustee had administered the Plan on the wrong basis as it would allow the Trustee simply to forfeit the arrears of benefits which had accrued due more than six years earlier when it ought to pay all the arrears of benefits to the beneficiaries.

174. The approach to be adopted to the construction of a provision in a pension scheme was considered by the Supreme Court in *Barnardo's v Buckinghamshire* [2019] 2 All ER 175, at [13]-[18] per Lord Hodge, with whom the other members of the court agreed. A pension scheme has distinctive characteristics which are relevant to its interpretation by the court. It is a formal legal document prepared by skilled and specialist legal draftsmen. It is not the result of a commercial negotiation between parties with conflicting interests under pressure of time. The document is intended to operate in the long term. The scheme confers rights on persons who were not parties to the instrument creating the scheme. It is appropriate to give weight to a textual analysis, concentrating on the words used. The court should avoid undue technicality and have regard to the practical consequences of any construction. The court can adopt a purposive construction when that is appropriate. It is sometimes possible to identify a mistake in drafting and to correct it. It is relevant that pension scheme documents are drafted to comply with the relevant tax rules conferring tax benefits on such schemes. It was not suggested in the present case that, apart from the possible relevance of legislation dealing with the forfeiture of pension benefits, I should construe clause 25 in the light of background factual circumstances.

175 I do not accept Mr Legge's submission that clause 25 operates as a forfeiture clause or a time-bar clause. The clause does not contain any wording which directly deals with the forfeiture of an entitlement to be paid arrears of benefits. Similarly, the clause does not contain any wording which operates as a time-bar on claims for payment of arrears of benefit. It is likely that the clause was intended to deal with orphaned money which ought to have been paid, but which could not be paid, to a missing beneficiary. In such a case, the Trustee would have surplus funds which it might wish to apply for a useful purpose rather than simply retain them indefinitely. It may be that the draftsman of the clause assumed, rightly or wrongly, that after six years from a payment accruing due, a claim to arrears would be statute barred and the clause was drafted on that basis. In any

event, clause 25 does not in terms provide for a forfeiture or a time-bar. The absence of wording providing for forfeiture is particularly striking in view of the references to forfeiture in clause 23. It is difficult to think that the draftsman of clause 25 thought that he was providing for forfeiture of unclaimed payments but did not need to say expressly that was what he wanted to achieve.

176. If clause 25 were to be construed so that it dealt only with sums due to missing beneficiaries, then the case for reading in words of forfeiture or a time-bar would be stronger. However, Mr Legge submits that clause 25 also deals with cases where the Plan has been administered on the wrong basis and members have been underpaid for a considerable period of time. Mr Legge makes that submission because he wishes to rely on clause 25 in this case which is not a case of missing beneficiaries. In a case where the Plan has been administered on the wrong basis and arrears have built up, I am certainly not persuaded that words should be read into clause 25 to give the Trustee a power to forfeit the arrears of pension due more than six years earlier or to allow the Trustee to rely on a time-bar to claims for such arrears. There is considerable force in Mr Short's submissions that where the Plan has been administered on the wrong basis for a considerable period of time, the Plan will not have been funded on a different basis which has generated a fund to be applied pursuant to clause 25. The likelihood will be that there will be no such fund. The construction contended for by Mr Legge would involve changing a clause dealing with the application of a fund to a clause which does not deal with the application of a fund but which instead provides for forfeiture of, or a time-bar in relation to, the rights of the beneficiaries.

177. I conclude that clause 25 does not permit the Trustee to take steps to apply monies to one of the purposes specified in the clause and then to say that beneficiaries have thereby lost their rights to be paid arrears of payment which accrued due more than six years earlier.

Rule 36 of the 2001 DDR

178. Rule 36 of the 2001 DDR provided:

"**36 Unclaimed Money**

36.1 If a Beneficiary fails to claim a benefit within six years of its becoming due, it shall be forfeited but the Trustees may at their discretion subsequently apply all or any part of such benefit:

(a) to the Beneficiary notwithstanding the forfeiture;

(b) in augmenting the benefits of Members still in Service;

(c) in reducing the Employer's contributions to the Scheme under Rule 10; or

(d) in payment of the expenses of the management and administration of the Scheme under Rule 41."

179. Rule 37 of the 2001 DDR was headed "Forfeiture of benefits" and contained terms which reflected the provisions in sections 91-93 PA 1995. Rule 37.2 provided for the case where a beneficiary incurred a monetary obligation to any of the employers arising out of certain acts or omissions on the part of the beneficiary. Rule 37.2 provided that the beneficiary's entitlement or accrued right to a pension under the Plan would be forfeited, if the employer so directed, "to the extent that it does not exceed the monetary obligation". Rule 37.3 was a similar provision dealing with the beneficiary incurring a monetary obligation to the Plan where the beneficiary's entitlement or accrued right to a pension under the scheme could be forfeited by the Trustee "to the extent that it does not exceed the monetary obligation".

180. Unlike clause 25 of the 1992 DDR, rule 36.1 of the 2001 DDR does expressly provide for forfeiture of a benefit due to a beneficiary. Such a forfeiture can only occur where the beneficiary "fails to claim a benefit within six years of its becoming due". In the course of submissions, counsel made elaborate and detailed submissions as to the meaning of "a benefit", "to claim", "fails" and "within".

181. Mr Legge submitted that rule 36 was intended to produce the result that if a beneficiary was not paid or was underpaid, then the beneficiary had six years to claim what was due and unpaid and if he did not do so, rule 36 provided that the sum unpaid was forfeit but the Trustee then had a discretion to pay all or any part of the unpaid sum to the beneficiary in any event, as well as having a discretion to apply the same for the other specified purposes.

182. Mr Short put forward a number of separate submissions as to the effect of rule 36. He submitted that "a benefit" did not include a part of a benefit; the benefit referred to in rule 36 was the entitlement to the pension provided for in the rules.

183. Although the rules provided for the relevant benefit to be conferred on the member or other beneficiary, without there being a need to claim the benefit, Mr Short submitted that the reference to "claim" was to a notification by the member or other beneficiary of their wish to be paid the benefit to which they were entitled. I was shown over 100 pages of typical communications between the Trustee and members dealing with their retirements and the payment of their pensions. It is not necessary to refer to the detail of those communications. Typically, the member was told he had the option of taking an annual pension without a lump sum or a smaller annual pension with a lump sum. That was because rule 18 of the 2001 DDR gave the member a right to elect for the smaller annual pension with a lump sum. The member was then asked to inform the Trustee of which option he chose. Further, there were other communications where the member or other beneficiary would discuss the practical arrangements needed to enable payments of the pension to be made. Mr Short submitted that these communications amounted to the making of a "claim" to "a benefit" for the purposes of rule 36.

184. Mr Short submitted that the word "within" had a range of possible meanings and one possible meaning was "before the end of". That meaning should be adopted in this case in relation to rule 36 and so rule 36 required that the claim be made before the end of six years from the benefit becoming due so that the claim could be made before the benefit became due.

185. As to the meaning of "fails", Mr Short submitted that, in the present context, the word "fails" requires there to be fault on the part of the beneficiary. On the facts of this case, any fault lay with the Trustee and not with the beneficiary. The Trustee administered the Plan on the wrong basis and did not pay to the beneficiary the full amount of his entitlement. The beneficiary was not in a position to know that he was being underpaid. If he had known, then he would have been likely to have claimed to be paid in full. However, not knowing the true position, he did not object to what the Trustee had done. Now that the Trustee had belatedly recognised that it had underpaid beneficiaries, the Trustee should not be allowed to say that the beneficiaries had lost their rights to arrears of payment which accrued more than six years before because the beneficiaries had "failed" to claim those arrears in time.

186. I accept the argument for PSGS as to the operation of rule 36. That argument is in accordance with the natural meaning of the words used in rule 36 and with the purpose of the rule.

187. Rule 36 refers to a failure to claim a benefit within six years of its becoming due. The period of time which is relevant for rule 36 begins with the date on which a benefit becomes due. The reference to "a benefit" is to the sum which is payable on a certain date, whether it is a lump sum or more usually an instalment of pension. The reference to "a benefit" is not to the right to a pension from retirement (or some other date) during the lifetime of the pensioner. If an instalment was due on a certain date and part of the instalment was paid but part was not, the benefit which is relevant for rule 36 is the part that was not paid. Rule 36 refers to the Trustee applying "all or any part of such benefit". "Such benefit" must be the part that it is not paid as it cannot include the part of the instalment which is paid.

188. To be a "claim" for the purpose of rule 36, the claim must be within the period of six years from the due date of payment. A claim which is before the due date will not suffice unless it could be treated as a continuing claim which, because it continues into the six year period, is treated as having been made within the six year period. The choice which the member makes on retirement between an annual pension with no lump sum and a reduced annual pension with a lump sum is not a claim to a benefit for the purposes of rule 36. Similarly, a discussion between the Trustee and the beneficiary at the time when the pension comes into payment as to the practical arrangements for transferring payments to the beneficiary is not a claim to a benefit for the purposes of rule 36. Further, such a claim would be before the due date for payment of the benefit that went unpaid and would not qualify as a claim for rule 36, unless the claim could be considered to be a continuing claim.

189. The word "fails" in rule 36 describes a situation where no claim is made. The word "fails" has a range of possible meanings in various different contexts. It can mean that a person "fails" where he has not done something that he had a responsibility to another party to do. It can mean that a person has attempted to do something but has not succeeded in doing it. But the word "fails" can also simply refer to a state of affairs where something did not occur, even where a person had no obligation to do anything or even where he did not attempt to do anything. Rule 36 confers on the Trustee a

power. The Trustee must be able to know when the power is available to be exercised. It would be unworkable to hold that the power only arose where the beneficiary has been at fault or has not done something which he had a responsibility to do. Further, the context indicates that "fails" does not require there to have been an unsuccessful attempt to make a claim. The workable interpretation of "fails" is that, if there is no claim within the six year period, then the power under rule 36 is available to be exercised.

190. Accordingly, I interpret "a benefit" for the purposes of rule 36 as being the sum which is unpaid on the date on which it fell due. A "claim" must be a claim by the beneficiary to be paid the sum which has not been paid. The claim must come after the time when the sum was due and was not paid unless it was made earlier and is a continuing claim. The word "fails" means simply that a claim was not made and does not require the Trustee to show that the beneficiary was at fault in some way, or that the Trustee was free from fault in all ways. Mr Short's submissions on the specific circumstances of this case where the Trustee did not administer the Plan correctly and the beneficiaries could not be expected to be aware that they were underpaid does not cause me to change my view as to the meaning of rule 36 or as to the meaning of "fails" but those circumstances will be a relevant consideration when the Trustee comes to exercise its discretion as to how to apply the sums in question and, in particular, whether all or any part of such sums should be paid to the beneficiaries notwithstanding the forfeiture.

191. Mr Short made a submission in relation to clause 25 of the 1992 DDR on the assumption that clause 25 conferred on the Trustee a power to forfeit unclaimed monies. The submission was that even if the case initially came within clause 25 on the grounds that the monies payable out of the fund had not been claimed within six years from becoming due, the beneficiaries had now claimed the monies before the power has been exercised. It was submitted that the belated claim to the monies prevented the Trustee from now exercising the power to forfeit. As I have held that clause 25 does not confer a power to forfeit it is not necessary to consider this point. I did not understand Mr Short to make the same point in relation to rule 36, where the wording is different. However, if Mr Short did intend to advance this argument in relation to rule 36, I would not accept it. The effect of rule 36 is that if a beneficiary fails to claim a benefit within six years of its becoming due then the benefit is automatically forfeited; the forfeiture does not depend upon the Trustee exercising a power to forfeit. The power conferred on the Trustee is a different one. It is a power which is to be exercised following the forfeiture to apply all or any part of such benefit for the purposes specified in rule 36.

192. If clause 25 had conferred a power to forfeit arrears of benefits, I would need to deal with submissions made by the parties as to the purpose of such a power and whether it could be used for the purpose of forfeiting arrears of benefits in the circumstances of the present case. However, since I have held that clause 25 did not confer a power to forfeit, it is not necessary to consider whether the purpose of the power meant that there were limitations on the circumstances in which the power could be exercised. These submissions were not relevant to rule 36 which does not confer on the Trustee a power to forfeit but provides for an automatic forfeiture subject to the power to apply the forfeited monies in accordance with the further provisions of rule 36.

193. I was taken on a tour of the pensions legislation in so far as it contained provision for forfeiture in relation to pensions or parts of pensions. In particular, I was shown sections 33, 36 and 39(4) of the Social Security Pensions Act 1975 and the Occupational Pensions Schemes (Contracting-out) Regulations 1975 and 1984, sections 13, 16, 21 and section 78 PSA 1993 and the Occupational Pension Schemes (Contracting-out) Regulations 1996, regulation 61(2) and sections 92-94 PA 1995. I will deal with the PA 1995 separately below. As regards the earlier legislation, Mr Short submitted that the legislation formed the background to the 2001 DDR and could be relied upon as an aid to the interpretation of rule 36. Having considered that legislation, I did not find anything in it which provided any real assistance when interpreting rule 36.

194. It was not clear whether there were any cases where the earlier legislation might apply on the facts of those cases and whether it was necessary to construe that earlier legislation. However, Mr Short made a specific submission in relation to regulation 61(2)(d) of the 1996 Regulations, made pursuant to section 21(2) PSA 1993, with which I will deal. Section 21(2) permitted a scheme to provide for a guaranteed minimum pension ("GMP") to be forfeited in such circumstances as might be prescribed. Regulation 61(2) prescribed circumstances for the purposes of section 21(2) and so referred to circumstances where a scheme could provide for a GMP to be forfeited. Paragraphs (a), (b) and (c) of regulation 61(2) appear to refer to forfeiture of the GMP rather than to the forfeiture of instalments of GMP. However, regulation 61(2)(d) is in these terms:

> "in the case of any payment of guaranteed minimum pension for which a claim has not been made, that a period of at least 6 years has elapsed from the date on which that payment became due."

195. Notwithstanding the wording of section 21(2) and the opening words of regulation 61(2), I consider that regulation 61(2)(d) is referring to forfeiture of a payment of GMP rather than forfeiture of the GMP. Mr Short submitted that the reference in the regulation to "a claim" meant a claim for the GMP and not a claim for the instalment of payment. I do not accept that submission. The natural reading of the regulation is that the reference to "a claim" is to a claim for the instalment of the payment.

196. Before deciding whether rule 36 is an effective provision, it is necessary to construe and apply section 92 of PA 1995 which imposes restrictions on the provisions which might be included in an occupational pension scheme. The parties addressed me on the meaning and effect of rule 36 before addressing me on the effect of section 92 and I have followed their example in dealing with rule 36 before dealing with section 92. However, after considering section 92, I will need to stand back and consider whether rule 36 as construed in the way I have construed it is a provision which is permitted by section 92.

197. Section 92(1) of PA 1995 contains a general prohibition on the forfeiture of an occupational pension. Section 92(1) provides:

> "(1) Subject to the provisions of this section and section 93, an entitlement to a pension under an occupational pension scheme or a right to a future pension under such a scheme cannot be forfeited."

198. Section 92(1) is subject to section 92(2) which permits forfeiture by reference to a transaction or purported transaction which is of no effect pursuant to section 91, dealing with the inalienability of an occupational pension. Section 92(1) is also subject to section 92(4) which permits forfeiture in circumstances where the member has committed one of a number of specified serious offences before the pension becomes payable.

199. Relevantly, section 92(1) is subject to section 92(5) which provides:

> "(5) Subsection (1) does not prevent forfeiture by reference to a failure by any person to make a claim for pension—
>
> (a) where the forfeiture is in reliance on any enactment relating to the limitation of actions, or
>
> (b) where the claim is not made within six years of the date on which the pension becomes due."

200. Section 92(1) is also subject to section 92(6) which refers to circumstances to be prescribed. The Occupational Pension Schemes (Assignment, Forfeiture, Bankruptcy etc) Regulations 1997, regulation 6, prescribes such circumstances. Regulation 6 refers to cases of criminal offences, negligent or fraudulent acts and breach of trust.

201. Section 92(7) provides that references to "forfeiture" in sections 92 and 93 include any manner of deprivation or suspension.

202. Section 94(2) provides:

> "(2) In [sections 91 to 93], *"pension"* in relation to an occupational pension scheme, includes any benefit under the scheme and any part of a pension and any payment by way of pension."

203. Mr Short submitted that the opening words of section 92(5), "by reference to a failure by any person to make a claim for pension" were an important limitation on what was permitted by section 92(5). He submitted that "failure" should be construed in the context of section 92 as a whole. He relied on the fact that section 92(4) required there to be serious wrongdoing on the part of the beneficiary before his pension could be forfeited. That indicated that "failure" should be construed to require fault on the part of the beneficiary and would not be satisfied by the mere absence of a claim. On the facts of the present case, the beneficiary was not at fault and a provision such as rule 36 which permitted forfeiture in the absence of fault (if that is how rule 36 is to be construed) would not be valid pursuant to section 92(1) and (5).

204. Mr Short had a separate submission as to the operation of section 94(2). He pointed out that that subsection referred to "any benefit" as well as to "any part of a pension" and "any payment by way of pension". He accepted that the matters referred to in section 94(2) were to be read in, as an expansion of, the word "pension" in the opening words of section 92(5) and in section 92(5)(b). It is helpful to set out section 92(5), as expanded, as follows:

> "(5) Subsection (1) does not prevent forfeiture by reference to a failure by any person to make a claim for [any benefit under the scheme and any part of a pension and any payment by way of pension] —
>
> (a) where the forfeiture is in reliance on any enactment relating to the limitation of actions, or
>
> (b) where the claim is not made within six years of the date on which [the/any benefit under the scheme and the/any part of a pension and the/any payment by way of pension] becomes due."

205. In relation to the expanded version of section 92(5), Mr Short considered the situation where the beneficiary had not made a specific claim for the sum which had not been paid or which had been underpaid but instead the beneficiary had made a claim, most likely at the time of his retirement, to the pension to which he was entitled under the scheme. Mr Short submitted that in such a case, the pension to which the beneficiary was entitled was a "benefit" within section 92(5). The opening words of section 92(5) refer to a failure by the beneficiary but, in this example, the beneficiary had not failed, as he had made a claim to the benefit of the pension. Therefore, there was no relevant failure and section 92(5) would not permit a provision in a pension scheme to result in a forfeiture in such circumstances.

206. Mr Legge submitted that the opening words in section 92(5) referring to a "failure" were introductory words and referred to the circumstances set out in more detail in subparagraphs (a) and (b) and did not introduce a further requirement which had to be satisfied. He also submitted that section 92(5), as expanded by section 94(2) required one to identify the thing which was to be forfeited pursuant to the relevant provision in the pension scheme and then to ask whether that thing was statute barred under subparagraph (a) or whether a claim to that thing had not been made for the purposes of subparagraph (b).

207. I can now express my conclusions as to section 92(5). The opening words of section 92(5) which refer to "failure" are in general terms. They are followed by the two specific cases permitted in subparagraphs (a) and (b). It is helpful to consider what is involved in the two specific cases and then to ask whether the reference to "failure" in the opening words is explained by the two specific cases or whether, in order for there to be a "failure", there must be other circumstances in addition to those specified in (a) or (b).

208. Subparagraph (a) refers to the forfeiture being in reliance on any enactment relating to the limitation of actions. The way in which limitation generally works is well understood. Generally, and subject to exceptions which are not relevant here, limitation

bars the claim but does not extinguish the right. Subparagraph (a) is not needed to create a time bar to an action as that result will already be provided by the relevant enactment as to limitation. Subparagraph (a) goes further and has the effect of extinguishing the right by way of a forfeiture of the right. It is also well understood that limitation generally applies where no action is brought within a specified period pursuant to the relevant right. The operation of the statutory limitation period is not avoided by the claimant making a claim out of court. Accordingly, subparagraph (a) refers to a provision in a pension scheme which permits a forfeiture where no action is brought within the limitation period whether or not there was a claim otherwise than by way of an action. I consider that where the facts of the case satisfy subparagraph (a), there is no further requirement to the effect that there also had to be a failure to claim a pension. That is not the natural meaning of the wording which is introductory wording and which is elaborated in subparagraphs (a) and (b). It is subparagraphs (a) and (b) which tell one what amounts to a "failure" within the introductory words. The reference to a "failure" does not impose a further requirement in addition to the requirements in subparagraphs (a) and (b).

209. The above reasoning as to subparagraph (a) also applies to subparagraph (b). If the circumstances come within subparagraph (b) and there was no claim within the relevant period, it is not necessary to ask whether the absence of a claim was the result of a "failure" involving fault on the part of the member, or not.

210. Mr Short submitted that the word "failure", read in the context of the other provisions in section 92, was inserted to make it clear that a pension could only be forfeited if the member had been at fault and therefore section 92(5) should be construed as imposing the separate requirement of a "failure" and, specifically, a failure involving fault on the part of the member. Of course, if the reference to "failure" does not impose a separate requirement in addition to the circumstances specified in subparagraph (a) and (b), there is no separate need to consider what is meant by a "failure" and "failure" will be construed as referring to the specific circumstances in subparagraphs (a) or (b).

211. I conclude that section 92(5) permits a provision in a pension scheme to result in a forfeiture of a pension where the circumstances come within subparagraphs (a) or (b) and if the circumstances do so then there is no separate requirement that those circumstances in addition qualified as a failure involving fault on the part of the beneficiary.

212. As to Mr Short's submissions in relation to section 94(2), I consider that the right construction emerges clearly if one expands section 92(5) in the way required to give effect to section 94(2). One has to apply section 92(5) to a provision in a pension scheme which provides for a forfeiture. The first step is to identify the thing which is to be forfeited in accordance with that provision. If the thing to be forfeited is a part of a pension or a payment by way of pension, then the second step is to ask whether the enactment relating to limitation has barred the right to bring an action for that part of a pension or that payment or whether a claim to that part of a pension or that payment was not made within six years of the date on which it became due. It should be remembered that most pension plans provide for a pension to be paid by instalments and the references to statutes of limitation or claims will most likely fall to be applied

in relation to instalments of a pension. I reached essentially the same conclusion as to the operation of section 94(2) in *Lloyds No. 1* at [417] where, however, the submissions were much more limited than in the present case.

213. Mr Short had a separate point about the meaning of "within" in subparagraph (b). I interpret "within" in that subparagraph in the same way as I interpreted "within" in rule 36. There is no mismatch between the two provisions which might have meant that rule 36 provided for a forfeiture in circumstances which did not also come within subparagraph (b).

214. The result is that rule 36 as I have construed it provides for a forfeiture in circumstances which are permitted by section 92(5)(b).

Issue 4: clause 4 of the 1992 DDR

215. Issue 4 asks:

> "Is the effect of the proviso to clause 4 of the 1992 DDR that rule 36 is ineffective in relation to benefits earned prior to the date on which rule 36 took effect?"

216. Clause 4 of the 1992 DDR provided:

> "4. AMENDMENT OF TRUST DEED/RULES
>
> THE Trustees may at any time, with the Principal Employer's consent, by deed executed by the Principal Employer and the Trustees amend (or add to) all or any of the trusts, powers or provisions of this deed or the Rules, and any such amendment or addition shall have effect from such time as may be specified in that deed and so that the time so specified may be the date of that deed or any reasonable time previous or subsequent to it, so as to give the amendment or addition retrospective or future effect (as the case may be)
>
> PROVIDED THAT no such amendment or addition shall be made which would diminish the benefits (unless such diminution is made prior to the date of the Member's retirement or earlier date of leaving Service and the Trustees resolve that such diminution is reasonable having regard to any increase in the level of benefits provided outside the Plan for (or in respect of) the Member pursuant to any legislation) already accrued (as determined by the Actuary) under the Plan to the Member without his previous written consent, …"

217. It is common ground that rule 36 of the 2001 DDR was an amendment or an addition to the trusts, powers or provisions of the 1992 DDR. Rule 3.1 of the 2001 DDR provided that the 2001 DDR had effect from 16 March 2001. Rule 3.2 of the 2001 DDR provided that the 2001 DDR did not affect the benefits payable to or in respect of any member who ceased to be an Active Member before 16 March 2001. As the 2001 DDR only applied to persons who were Active Members as at 16 March 2001, rule 36 did not apply to arrears of pension which were due and payable before 16 March 2001. However, rule 36 applies to payments which fall due after 16 March 2001 where the

amount payable is affected by pensionable service before 16 March 2001; on the facts of this case, rule 36 could apply to pension earned by service before April 1997 by members who were Active Members on 16 March 2001.

218. The issue between the parties as to clause 4 of the 1992 DDR related to the proviso to clause 4 and whether the amendment, whereby clause 25 of the 1992 DDR was replaced by rule 36 of the 2011 DDR, was an amendment or an addition which would "diminish the benefits … already accrued … under the Plan to the Member".

219. Mr Legge submitted that the change from clause 25 to rule 36 would not diminish accrued benefits. He made his submissions on various alternative bases depending on what the court would hold as to the effect of the two provisions. Now that I have construed the two provisions, I have to address the proviso to clause 4 on the basis that clause 25 does not provide for a forfeiture of unclaimed arrears and rule 36 does provide for an automatic forfeiture of unclaimed arrears, subject to a discretionary power to restore all or part of the arrears to the beneficiary. On that basis, Mr Legge made two points. First, he said that the benefits were not "diminished" by rule 36 as the beneficiaries were entitled to the identical benefits before and after the 2001 DDR. He contrasted the proviso to clause 4 with section 67(2) PA 1995, as originally enacted, which referred to an alteration of a scheme which "would or might affect any entitlement … of any member of the scheme acquired before the power is exercised". Mr Legge's second submission was that because rule 36 only applied if the beneficiary failed to claim the arrears for six years and, further, rule 36 conferred on the trustee a discretion to pay the forfeited arrears to the beneficiary, one could not say that rule 36 produced the result that the benefits "would" be diminished but only that they might be; again he compared the proviso to clause 4 with section 67(2).

220. Mr Short submitted that the change from clause 25 to rule 36 would diminish accrued benefits. Under clause 25, benefits which went unclaimed for six years after becoming due were not liable to be forfeited whereas, under rule 36, they were automatically forfeited, subject to the Trustee having a discretionary power to restore all or part of the unclaimed benefits.

221. The point is a short one and not entirely an easy one. If the proviso had stated that it prevented alterations which might adversely affect the position of a beneficiary, then I would hold that the change from clause 25 to rule 36 might adversely affect his position. However, I have reached the conclusion that the change from clause 25 to rule 36 is not an alteration which "would diminish the benefits … already accrued" as the result of two points, operating in conjunction; first, the amount of the benefits to which the beneficiary is entitled are unaffected and not "diminished" and, secondly, rule 36 only results in a forfeiture of arrears where the beneficiary fails to claim the arrears for six years and while that might happen it cannot be said that it "would" happen.

Issue 5: the application of monies pursuant to rule 36

222. Issue 5 asks:

"Do the purposes to which the Trustee may put monies that fall within the scope of the powers in clause 25 and / or rule 36 include:
a. Reducing Axminster Carpets Limited's liability to pay the debt due from it to the Trustee under s.75 Pensions Act 1995?

b. Paying expenses of the management and administration of the Plan that have been:

i. incurred and paid,
ii. incurred but not paid, and /or
iii. not yet incurred?"

223. In view of my conclusion that clause 25 does not permit forfeiture of the pension increase arrears, I will only consider Issue 5 in relation to rule 36. Issue 5 raises two sub-issues, the first relating to rule 36.1(c) (dealing with reducing the Employer's contributions under rule 10) and the second relating to rule 36.1(d) (dealing with the expenses of management and administration under rule 41).

Reducing the Employer's contributions under rule 10

224. Rule 36(1)(c) provides that the monies forfeited pursuant to rule 35 may be applied "in reducing the Employer's contributions to the Scheme under Rule 10".

225. Rule 10 of the 2001 DDR provides:

"**10 Employers' Contributions**

10.1 Each Employer shall procure that each Active Member in its Service pays contributions to the Scheme at the rate applicable under Rule 11.

10.2 The Trustees shall ensure that with effect from the signing of the first actuarial valuation made in respect of the Scheme pursuant to section 56 of the Pensions Act [1995] (minimum funding requirement) a Schedule of Contributions payable by the Employers to the Scheme is prepared, maintained and from time to time revised.

10.3 Each Employer shall pay to the Fund the contributions shown in the current Schedule of Contributions (if any) as payable by it on or before the dates shown in the Schedule of Contributions. The rate payable by one Employer may be different from that payable by another.

10.4 Employers shall pay such further annual or other contributions to the Scheme (including contributions payable before a Schedule of Contributions has been prepared) as the Actuary may determine (on a basis agreed between the Trustees and Principal Employer) in relation to each Employer as being necessary to secure the benefits under the Scheme in respect of its employees and former employees.

10.5 The Principal Employer shall procure that each Employer pays the contributions due from it under this Rule.

10.6 The Principal Employer may pay, or may cause another Employer to pay, additional contributions under the Scheme.

10.7 The Principal Employer may by written notice to the Trustees terminate its liability to contribute to the Scheme or the liability of any other Employer to contribute to the Scheme.

10.8 An Employer may by written notice to the Trustees terminate its liability to contribute to the Scheme.

10.9 A notice of termination does not affect a liability to pay contributions which have become payable in respect of any period before the effective date of the notice."

226. Rule 62 provides for the closure of the Plan. Under rule 62.1, the Plan shall be closed in certain circumstances. One such circumstance is where the Principal Employer enters into liquidation where there is no reasonable expectation of a new Principal Employer being substituted for it. Another circumstance is where the Trustee so resolves on the ground that the assets of the Plan are less than its liabilities. If the Plan is closed under rule 62.1, then it continues as a closed fund and rule 62.2(d) applies to it. Rule 62.2(d) provides:

"(d) an Employer shall have no liability to make further contributions to the Scheme other than contributions that have accrued but remain outstanding in respect of its participation in the Scheme prior to the Closure Date or under section 75 of the Pensions Act [1995] (deficiencies in the assets);"

227. The issue which arises as to the operation of rule 36(1)(c) is whether it permits the monies forfeited pursuant to rule 36 to be applied in reducing the Principal Employer's "liability" to pay the debt due from it to the Trustee under section 75 PA 1995.

228. When the 2001 DDR was entered into, the relevant provision was section 75 PA 1995, as originally enacted. In that form, section 75(1) provided that, in the case of a scheme such as the present, if the value at the applicable time of the assets of the scheme was less than the amount at that time of the liabilities of the scheme, an amount equal to the difference should be treated as a debt due from the employer to the trustees or managers of the scheme. Where an employer, which was a company, went into liquidation, the applicable time was immediately before the commencement of the liquidation. For the purposes of section 75(1), the liabilities and assets to be taken into account, and their amount or value, had to be determined, calculated and verified by a prescribed person and in the prescribed manner. The debt due under section 75(1) was provable in the liquidation of the employer but was not a preferential debt for the purposes of the Insolvency Act 1986.

229. Section 75 of PA 1995 was amended by the PA 2004. As amended, so far as relevant for present purposes, section 75 contains the same basic provisions as the original section. For the purpose of section 75, as enacted, the prescribed person who was to determine, calculate and verify the liabilities and assets, and the resulting debt, was the

scheme actuary. The current position in this respect, pursuant to the current version of the Occupational Pension Schemes (Employer Debt) Regulations 2005, is that the assets of the scheme are determined, calculated and verified by the trustee and the liabilities of the scheme are determined by the trustee and calculated and verified by the actuary. The basis of the calculation has been altered from the original basis but that is not material for present purposes.

230. I was told that, pursuant to section 75, two debts will be payable, one by Axminster Carpets Ltd and one by Buckfast Spinning Co Ltd. I was also told that the procedures required by section 75 have not, as yet, been completely followed through but that the two section 75 debts are estimated to be approximately £69 million (Axminster Carpets Ltd) and £18.3 million (Buckfast Spinning Co Ltd). It is possible that these figures will be revised for two reasons. The first reason was that they did not take account, or full account, of the extra liabilities that will be due pursuant to the pensions increase compromise that I have approved in these proceedings. Secondly, an accurate figure will have to reflect the legal position as to whether a claim for arrears which accrued more than six years before 2018 was statute barred (I have held they are not) and what sums are forfeited under rule 36 (there being no forfeiture under clause 25). In the course of argument, the figure of £70 million was used for the sake of illustration as the section 75 debt of Axminster Carpets Ltd. I was also told that the present estimated outcome of the liquidation of Axminster Carpets Ltd is that the liquidators will end up paying a dividend of 3p in the pound in relation to its section 75 debts.

231. For the sake of illustration and for ease of calculation, I will take the sums forfeited under rule 36 as being £1 million (in fact, it is a much smaller sum but that was the figure used in the course of argument when dealing with both clause 25 and rule 36). Mr Legge and Mr Robinson submitted that the Trustee could use the power conferred on it by rule 36.1(d) in one of two ways. Assuming that the sum which is relevant for the purposes of rule 36 is £1 million, the first way was to reduce the section 75 liability of £70 million to £69 million. Because the expected dividend is about 3p in the pound, the dividend paid by the employers to the Trustee would be reduced by £30,000 from £2.1 million to £2.07 million. The other way put forward was, in the first instance, to maintain the section 75 debt at £70 million and to receive a dividend of £2.1 million but then to rely on rule 36.1(d) to reduce the undischarged debt of £67.9 million to £66.9 million. Mr Legge and Mr Robinson submitted that either of these ways would be an exercise of the power conferred by rule 36.1(d) to reduce the Employer's contributions to the scheme under rule 10.

232. In relation to the issue as to how the Trustee could reduce the contributions of the Employer for the purposes of rule 36.1(d), Mr Short made submissions based on the fact that the current estimate of the section 75 debt was not prepared on the correct basis. However, for the purposes of construing the rules of the 2001 DDR, I have to assume that the section 75 debt is correctly calculated on the basis of the compromise in this case and on the basis that rule 36 (but not clause 25) has resulted in a forfeiture of some of the arrears. As I indicated earlier, I will proceed on the basis that the Principal Employer's section 75 debt is £70 million and the amount forfeited under rule 36 is £1 million.

233. Using the above figures, Mr Short pointed out that the Trustee's first suggestion as to the exercise of the power under rule 36.1(d) was to use the sum of £1 million forfeited under rule 36 to reduce the actual contribution from the Principal Employer by £30,000 (i.e. a reduction from £2.1 million to £2.07 million). The Trustee's second suggestion involved no reduction in the actual contribution received of £30,000 but was a wholly theoretical reduction from £67.9 million to £66.9 million in the amount of the unrecoverable but undischarged debt due from the Principal Employer which debt would effectively disappear when the Principal Employer was dissolved at the end of the liquidation.

234. Rule 36 refers to the Employer's contribution to the Plan under rule 10. Mr Legge accepted that the Principal Employer's liability under section 75 was not a liability to make a contribution under rule 10.3 or rule 10.4. However, he submitted that the section 75 liability came within rule 10.6. He also submitted that the fact that the Principal Employer was in liquidation and that it would only pay a dividend, estimated at 3p in the pound, in respect of the section 75 liability did not mean that it did not owe the full amount of that liability. In relation to a possible question as to whether the contributions within rule 10 could extend to contributions made pursuant to statutory provisions, Mr Legge said that the amount of a contribution payable pursuant to a schedule of contributions (within rule 10.2) could be determined by the Pensions Regulator: see section 231(2)(c) of PA 2004.

235. Mr Short submitted that the Principal Employer's liability to pay a section 75 debt was not a contribution to the Plan under rule 10. It was not a contribution under rule 10.3 as it was not a contribution shown in a Schedule of Contributions. It was not a contribution under rule 10.4 as it was not on a basis agreed between the Trustee and the Employer. It was not a contribution under rule 10.6 which refers to additional contributions which the employer "may" pay. Mr Short referred to rules 10.7 and 10.8 which referred to the Principal Employer and the Employer terminating their liability to contribute to the scheme; he pointed out that they could not rely on rules 10.7 and 10.8 to terminate their liability under section 75 and that, he said, indicated that the liability under section 75 was not a liability to make a contribution under rule 10. Mr Short also referred to rule 62.2(d) which, he submitted, distinguished between contributions to the Plan and the liability under section 75.

236. I will now set out my reasoning in response to these submissions. I consider that I need to deal with two questions. The first is: what is meant by a reduction in contributions under rule 10 in a case where the section 75 debt is £70 million but the expectation is that the sum which will actually be paid by the Principal Employer to the Trustee will be £2.1 million? The second question is whether a sum of money paid by the Principal Employer to the Trustee in accordance with section 75 is a contribution under rule 10.

237. The first question arises because there is a disparity between the Principal Employer's liability to make a payment and the amount of the payment which is expected to be made. Issue 5(a), asks whether the power in rule 36.1(c) can be used to reduce the Principal Employer's "liability" to pay the section 75 debt whereas rule 36.1(c) does not refer to reducing a "liability" but to reducing a "contribution". In many cases, but not the present case, the liability and the contribution will be in the same amount as the

employer will pay what it is obliged to pay. It is also right to acknowledge that in a normal case, what the Trustee will wish to do is to reduce the liability with the result that the Employer will pay a lesser contribution.

238. For the purposes of rule 36.1(c), what matters is a reduction in a contribution under rule 10. Mr Legge does not contend that the liability to pay the section 75 debt comes within any provision in rule 10 apart from rule 10.6. However, rule 10.6 does not create a liability to make a contribution. Instead, it permits the Principal Employer to choose to pay a contribution. The only thing which is a contribution under rule 10.6 is a sum of money which is actually paid. On that basis, if the section 75 debt is £70 million and the payment made (as a dividend of 3p in the £) is £2.1 million, I do not see how it can be said that £70 million is a contribution or a reduced figure of £69 million is a contribution within rule 10.6. The Principal Employer does not pay, for the purposes of rule 10.6, the £70 million or the £69 million. Mr Legge and Mr Robinson submitted, as their second possibility, that the £1 million which is the subject of rule 36 would be applied to reduce the undischarged debt of £67.9 million to £66.9 million to which they referred but neither of these figures is a contribution under rule 10.6 because neither of those figures is paid within the meaning of rule 10.6.

239. Accordingly, the literal answer to Issue 5(a) is that the Trustee cannot apply monies for the purposes of rule 36.1(c) to reduce the Principal Employer's "liability" to pay the section 75 debt.

240. Notwithstanding this literal answer to Issue 5(a), I ought to consider further the first possibility identified by Mr Legge and Mr Robinson. That involves reducing the Principal Employer's liability under section 75 from £70 million to £69 million and thereby reducing the payment of a dividend from £2.1 million to £2.07 million, a reduction of £30,000. The questions then are: is the £2.07 million a contribution under rule 10, in particular a contribution within rule 10.6 and has that contribution been reduced within rule 36.1(c).

241. On balance, I consider that the payment of £2.07 million would be a contribution which is actually within rule 10.6 and that, in the example, the Trustee has caused that contribution to be reduced from £2.1 million for the purposes of rule 36.1(c).

242. When PSGS comes to consider how to exercise the power conferred by rule 36 and it has to decide whether to produce the result in the last paragraph (reducing the contribution from £2.1 million to £2.07 million), it will obviously have to decide on the appropriateness of producing that outcome. As the Principal Employer is in insolvent liquidation, the reduction in question does not have any real relevance for it. The unsecured creditors of the Principal Employer will be advantaged to some extent as its total indebtedness will be reduced by £1 million. Finally, the position of the PPF will be adversely affected to the extent of £30,000 although Mr Legge may seek to argue that the exercise of the power under rule 36.1(c) also reduces the liability of the Plan to the extent of £1.0 million.

243. I did not receive any specific submissions as to why PSGS might wish to behave in this way. It is possible that Issue 5(a) was raised in order merely for it to understand the

options open to it. It may have been assumed that if it did act in this way, then it would use up the entirety of the £1 million available to be used under rule 36. I did not receive any submissions as to whether the sum used up would in fact be £1 million or only £30,000. Further, I did not receive submissions as to whether the power conferred on the Trustee by rule 36 was a power which the Trustee was under a duty to exercise or a power which it could choose not to exercise. Could it, for example, simply choose not to use the power in rule 36 so that there would be no exercise of the power under rule 36.1(a) but the Trustee did not have to decide on some alternative use of the monies under rule 36? In the absence of submissions on these points, I will not discuss them further.

Expenses of management and administration under rule 41

244. Rule 36.1(d) provides that following a forfeiture of unclaimed monies, the Trustee may at its discretion subsequently apply all or any part of such monies "in payment of the expenses of the management and administration of the Scheme under Rule 41".

245. Rule 41 of the 2001 DDR provides:

> "**41 <u>Expenses</u>**
> 41.1 Subject to Rule 41.2, all costs, charges, tax and expenses properly incurred by the Trustees and their delegates and agents in connection with the Scheme (including the winding up of the Scheme) and any remuneration of the Trustees shall be payable by the Employers in such proportions as the Principal Employer may decide, and either paid separately and/or included in the Employer's contributions under Rule 10.
> 41.2 If the Employers fail to pay all or any part of the liabilities mentioned in Rule 41.1 or the Trustees otherwise agree, they shall be payable out of the Fund, in priority to all other claims falling to be met out of the Fund.
> 41.3 All administration expenses relating to the AVCs of Members shall be payable out of those AVCs unless the Trustees and the Principal Employer agree otherwise.
> 41.4 An Employer's liability to pay expenses under this Rule shall cease on its ceasing to be liable to pay contributions under Rule 10 (except to the extent accrued or arising before the date of cessation or as otherwise agree with the Trustees)."

246. The principal question which I am asked to decide in relation to rule 36.1(d) is whether this rule permitted the Trustee to pay the expenses of the management and administration of the Plan which have been:

(1) incurred and paid;
(2) incurred but not paid, and/or
(3) not yet incurred.

247. At the hearing, Mr Short raised a further point as to the possible effect of rule 41.4 on the exercise of the power pursuant to rule 36.1(d).

248. Mr Legge submitted that the power in rule 36.1(d) may be used for all three categories of expenses referred to above. He said that it would be impractical to limit the power to

pay expenses which had been incurred by the date on which the power was exercised (category (2) above) and not to include expenses incurred thereafter (category (3)). Further, the power to pay extended to expenses previously incurred and paid (category (1)); the words "in payment of" in rule 36.1(d) were not to be restricted to the case of direct payment of an expense. Mr Legge relied on *In re Banbury* [1951] Ch 1 as authority for the proposition that the making of a provision in an account could be a "payment". He submitted that in a case where the Trustee had paid an expense in the past, and in circumstances where the Trustee now had a fund of unclaimed money pursuant to rule 36, the Trustee could apply a part of that fund in payment of the earlier expense so that, in accounting terms, the Trustee could describe the earlier expense as paid out of the fund and not from the original source which was used to make the payment. Mr Legge referred to rule 41.2 which provided that where the Employer failed to pay an expense payable by it under rule 41.1, then such an expense was payable out of the fund. He suggested that, reading rule 41.2 and rule 36.1(d) together showed that it was possible under rule 36.1(d) to treat, in accounting terms, the monies made available on forfeiture pursuant to rule 36 as having been used in payment of a liability which at an earlier time had been paid out of the assets of the Plan under rule 41.2.

249. In his skeleton argument, Mr Short agreed that the power in rule 36.1(d) could be used in relation to categories (2) and (3) above. As to category (1), if the sums in question had already been paid, he submitted that the unclaimed monies could not be used "in payment of" an expense which had already been paid; rule 36.1(d) did not contemplate a process of allocation or accountancy under which sums which have already been paid in one way are treated as having been paid in a different way. Mr Short referred to the Occupational Pension Schemes (Scheme Administration) Regulations 1996, regulation 12(1)(b)(iv), which requires trustees of a trust scheme to keep books and records relating to payments made by or on behalf of the trustees to any person including a professional adviser and such records were to include the name and address of the person to whom payment was made and the reason for that payment.

250. At the hearing, Mr Short raised a further issue. He referred to rule 41.4. He said that ever since the Principal Employer and the Employer went into liquidation, they ceased to be liable to pay contributions under rule 10 with the result, under rule 41.4, that they had also ceased to be liable to pay expenses under rule 41. He submitted that the consequence was that since the point when rule 41.4 first applied to the Principal Employer and the Employer, there were no longer any expenses "under Rule 41" for the purposes of rule 36.1(d). Mr Legge countered by submitting that rule 36.1(d) cross-refers to rule 41 and that included rule 41.2.

251. Subject to the point belatedly raised by Mr Short in relation to rule 41.4, there was no dispute that the monies made available to the Trustee on a forfeiture pursuant to rule 36 could be used to meet liabilities that had been incurred and remained to be paid and liabilities that had not yet been incurred (categories (2) and (3)). In the case of liabilities not yet incurred (category (3)), the power to apply the monies made available pursuant to rule 36 could only be exercised when the liability was incurred.

252. As to rule 41.4, it was not disputed that the effect of that rule, on the facts of this case, was that the Employers' liability to pay expenses under rule 41 had ceased on the

liquidation of the Principal Employer and the Employer. However, rule 36.1(d) does not refer to expenses which the Employers are liable to pay under rule 41; it refers more generally to expenses under rule 41. Mr Legge relied on rule 41.2 which refers to the Employers failing to pay "the liabilities mentioned in Rule 41.1". That gives rise to the question: are "the liabilities mentioned in "Rule 41.1" the costs and expenses and the remuneration mentioned in rule 41.1. or does the phrase refer to the liabilities of the Employers to pay those costs and expenses and remuneration? As a matter of language, either construction might be possible; indeed, it could be said that rule 41.2 is dealing with the liabilities of the Employers because it refers to the Employers failing to pay those liabilities. However, that construction would produce the result that if the Employers ceased to be liable under rule 41.4 then, for the purposes of rule 41.2, there would be no liabilities as mentioned in rule 41.1 and there would be no failure by the Employers to pay those liabilities and the Trustee would not have the benefit of rule 41.2, enabling it to pay the liabilities out of the fund in priority to other claims. I do not consider that such a result would have been intended. That suggests that "the liabilities mentioned in Rule 41.1" are the costs and expenses and remuneration mentioned in rule 41.1. That reading is also the more literal one. It is appropriate to refer to "paying" costs and expenses and remuneration but it is much less appropriate to refer to paying a liability. It is also appropriate to hold that an Employer "fails" to pay when it does not pay even though its liability to pay has ceased pursuant to rule 41.4. Accordingly, I hold that the costs and expenses and remuneration which are within rule 41.2 are also within rule 36.1(d).

253. The remaining issue as to rule 36.1(d) relates to expenses previously incurred and previously paid. If those expenses had been previously paid, they must have been paid from some source or other. In view of rules 41.2 and 41.4, it seems likely that since the liquidation of the Employers, they have been paid out of the assets of the Plan. Can the Trustee now use the monies made available to it under rule 36 to prepare accounting entries to show that the sums previously paid were not paid at a date in the past out of trust assets but were paid out of the monies made available under rule 36? In my view, plainly not. When rule 36 refers to applying monies in payment of expenses it presupposes that before the power is exercised there is a liability to pay and the exercise of the power results in the discharge of that liability. That is not the position when a liability arose earlier and was discharged by payment earlier. Even if it were open to the Trustee to rewrite the accounting position and make things appear otherwise as a matter of accountancy, any such rewriting would not affect the fact that the power was not exercised to make a payment to discharge a then existing liability. I did not find anything in *In re Banbury* which was relevant to this question.

Issues 6 and 7: relevant factors for rule 36

254. Issues 6 and 7 ask:

> "6. What factors have to be taken into account in exercising any discretion under clause 25 and rule 36 (in the sense that failure to take those factors into account would vitiate an exercise of the power)? Do they include:
>
> a. Any Pension Protection Fund policy re payment of arrears of pension?

b. The fact that any incorrect payment of pension increases is not the fault of members?

c. The fact that the Trustee received advice as to its obligations in relation to deferred members and pensioners in 2000?

d. The nature of the information given to members as to the nature of the 'consent' that they were giving in 2000?

e. Whether or not members could reasonably have been expected to make claims for pension increase arrears sooner?

7. What factors should not be taken into account in exercising the discretion (in the sense that taking those factors into account would vitiate an exercise of the power)? Do they include:
a. Any administrative difficulties in paying specific categories of pension increase arrears?
b. Any Pension Protection Fund policy re payment of arrears of pension?
c. The fact that any incorrect payment of pension increases is not the fault of members?
d. The fact that the Trustee received advice as to its obligations in relation to deferred members and pensioners in 2000?
e. The nature of the information given to members as to the nature of the 'consent' that they were giving in 2000?
f. Whether or not members could reasonably have been expected to make claims for pension increase arrears sooner?"

255. In view of my conclusions as to clause 25 of the 1992 DDR, these issues arise in relation to rule 36 of the 2001 DDR only. I have discussed the operation of rule 36 earlier in this judgment. In summary, where a benefit falls due but is not paid or is not paid in full and the beneficiary does not claim the payment which remains unpaid for six years from it becoming due, then the beneficiary's right to that payment is automatically forfeited but a discretion arises in relation to the Trustee to apply all or part of such benefit in one or more of four specified ways. The first of the specified ways is to apply all or part of the benefit to the beneficiary notwithstanding the forfeiture. The three other specified ways are applying all or part of the benefit in augmenting benefits to members still in service, in reducing the employer's contributions under rule 10 or in payment of certain expenses under rule 41.

256. These issues concern how PSGS should go about the exercise of its discretion under rule 36. It is important to stress that the discretion is conferred on PSGS, not on the court. PSGS has made it clear in this case that it does not surrender its discretion to the court. Further, PSGS has not yet decided how to exercise its discretion and so it does not apply to the court for approval in the sense of the court ruling that a specific proposed manner of exercise of that discretion is one which a trustee, taking into account all relevant considerations and ignoring all irrelevant considerations could properly choose. I must therefore be careful to observe the limits on my jurisdiction. All that I am asked to do

for the purposes of Issues 6 and 7 is to rule, as a matter of law, whether a factor is a relevant or an irrelevant consideration. I must not direct PSGS to act in a particular way even though that might be the way that I would exercise the discretion if it had been conferred on me. That is subject to the qualification that, in relation to Issue 8, the Defendant submits that as a matter of law, there is only one possible way in which the discretion could be exercised and that any other way would be perverse. As that submission is put forward as a matter of law, I will deal with it on that basis.

General remarks

257. I have considered whether there is any established body of legal principle which might provide useful guidance to PSGS when it comes to consider how to exercise its discretion under rule 36. In this way, I have considered the position in relation to other types of forfeiture provisions and other types of time bars. As will be seen, neither of these matters is a perfect analogy for rule 36 but it is possible that each of them will indicate something useful as to the exercise of the relevant discretion.

258. In other contexts, the courts have considered the equitable principles which apply to forfeiture clauses and to the grant of relief from forfeiture. Typically such cases involved forfeiture of rights following a breach of obligation by the holder of those rights. In some of those cases, the courts had an equitable jurisdiction to grant relief from forfeiture. That kind of forfeiture and the jurisdiction to grant relief from it is discussed in *Shiloh Spinners Ltd v Harding* [1973] AC 691, in particular per Lord Wilberforce at 723-724 in these terms:

> " … it remains true today that equity expects men to carry out their bargains and will not let them buy their way out by uncovenanted payment. But it is consistent with these principles that we should reaffirm the right of courts of equity in appropriate and limited cases to relieve against forfeiture for breach of covenant or condition where the primary object of the bargain is to secure a stated result which can effectively be attained when the matter comes before the court, and where the forfeiture provision is added by way of security for the production of that result. The word 'appropriate' involves consideration of the conduct of the applicant for relief, in particular whether his default was wilful, of the gravity of the breaches, and of the disparity between the value of the property of which forfeiture is claimed as compared with the damage caused by the breach."

259. The description in *Shiloh Spinners* as to the jurisdiction of a court of equity to grant relief from forfeiture applies to a case where there is some measure of fault on the part of the holder of the rights which are being forfeited and, typically, no element of fault on the part of the other party who is claiming the forfeiture. There are many examples of relief from forfeiture being granted to a party who has been at fault but where an unrelieved forfeiture would be disproportionate to the fault. It can be said that if a court of equity is ready to grant relief from forfeiture in such a case, it would be even more ready to grant relief from forfeiture where the rights holder was not at fault in any way and where the party claiming the forfeiture is itself open to criticism. Indeed, in such a case, a court might take the view that relief from forfeiture should be the obvious outcome unless there are some compelling reasons to the contrary.

260. I have also considered the analogy of limitation pursuant to the 1980 Act. The law as to limitation is considered to be in the public interest in that it prevents the assertion of stale claims. However, there are provisions of the 1980 Act which recognise that that public interest should give way where the claimant did not have the means of knowing that he had a claim: see, for example, section 14A, where time runs for three years from the time when the claimant had the knowledge required for bringing an action for damages in respect of the relevant damage and a right to bring such an action, subject to an overriding time limit of fifteen years pursuant to section 14B. In addition, section 32 of the 1980 Act postpones the limitation period in the case of fraud, concealment or mistake. It should be noted that rule 36 goes beyond imposing a time bar on claims in that it does not just bar the ability to claim the right by court action but it also extinguishes the right.

261. Turning from these possible analogies to the wording of rule 36 itself, it is relevant to consider the purpose of rule 36 and, in particular, the purpose of rule 36.1(a). Why was it thought to be appropriate to provide for an automatic forfeiture of the unclaimed benefits but yet permit the Trustee to apply all or part of the relevant benefits to the beneficiary, notwithstanding the forfeiture?

262. It is perhaps obvious that the draftsman of rule 36 would have had in mind, in particular if not exclusively, the case of the missing beneficiary. In such a case, if benefits had gone unclaimed for a substantial period of time, it was thought to be desirable to allow the Trustee to use those benefits rather than to keep them as orphaned assets within the Plan. If the Trustee used those benefits in one of the ways permitted by rule 36.1 (b), (c) or (d), then the power under rule 36.1(a) would cease to be available. If the Trustee had not yet used those benefits in one of the other ways permitted by rule 36, and the missing beneficiary turned up, then it would be open to the Trustee to apply all or part of the benefits to that beneficiary. It must have been contemplated that the Trustee could nonetheless decline to exercise the power conferred by rule 36.1(a). The possible reasons for such a refusal would seem to be where the case for exercising the power under sub-paragraphs (b), (c) or (d) would be regarded as more compelling or where the exercise of the power under sub-paragraph (a) would face administrative difficulties, such as uncertainty in calculating the sum which might be paid to the beneficiary. It might also be relevant that in some cases of a missing beneficiary, it would be the beneficiary himself who had created the difficulty by effectively going "missing".

263. I have held that, as a matter of construction, rule 36 is not confined to the case of the missing beneficiary. Rule 36 also applies to a case where the Plan has been administered on the wrong footing and beneficiaries have been underpaid but where they are not to be criticised because they had no reason to know that they were being underpaid. In such a case, the beneficiaries are not in any sense at fault and the Trustee is open to some degree of criticism. In such a case, both the analogy of relief from forfeiture and the law of limitation would indicate that the first reaction of the Trustee should be to make good the earlier underpayments without further delay. However, rule 36 does not impose an obligation on the Trustee to act in that way and the Trustee retains a power

to act, or not to act, in that way. As before, the Trustee could choose not to act that way if the other uses of the money permitted by rule 36 were considered to be more compelling or there were administrative difficulties to such an extent as to justify not exercising the power under rule 36.1(a).

264. It is obviously relevant to the exercise of the discretion under rule 36.1(a) for the Trustee to consider how the situation has arisen and the consequences of the discretion being exercised or not exercised. On the topic of how the situation has arisen, it is relevant to refer to the position of the beneficiaries and to the position of the Trustees from time to time. As to the legal position, I consider that the absence of fault on the part of beneficiaries and/or the presence of fault on the part of the Trustees are capable of being relevant factors when PSGS comes to consider how to exercise its discretion under rule 36.

265. As to the position of the beneficiaries, subject to possible qualifications, the general position is that the beneficiaries were not in a position to know that they were being underpaid over the years. Therefore, they were not in a position to make a claim to prevent time running under rule 36. It can therefore be said that the forfeiture of their benefits under rule 36 is wholly undeserved. It can then be said that the Trustee ought to exercise its discretion to restore those benefits under rule 36.1(a) unless there are other considerations which override that approach.

266. As to the position of the Trustees from time to time, the starting point is that the situation has arisen because the Trustees did not do what they ought to have done. In order for the court to identify precisely what the Trustees did wrong would require the court to try out the dispute as to the validity of the steps taken by the Trustees which has now been compromised; it is not suggested that the court should do that exercise just to deal with the present issues. I consider that the court has to proceed on the basis that the beneficiaries were always entitled to the rights which are now established pursuant to the compromise and to hold that the Trustees' failure to make payments in accordance with those rights was a breach of trust. I also consider that PSGS should take the same approach when it decides how to exercise its discretion. It does not necessarily follow from this that PSGS should conclude that the breach of trust was a knowing or a wilful breach of trust. I consider that fault on the part of the Trustees in the past is capable of being a relevant factor when PSGS comes to consider how to exercise its discretion under rule 36.

The events of 2000

267. I referred earlier to Issue 2 which concerned section 32 of the 1980 Act. For the purpose of Issue 2, the Defendant was intending to contend that any limitation period imposed by section 21(3) of the 1980 Act was postponed pursuant to section 32(1)(b) and 32(2) of the 1980 Act because the Trustee had deliberately committed a breach of duty, which was unlikely to have been discovered for some time, and that was to be treated as deliberate concealment of the beneficiaries' cause of action. For the purpose of establishing that the Trustee's breach of duty was deliberate, the Defendant wished to refer to the events of 2000 when the Trustee was given some legal advice about the entitlement of the members of pension increases.

268. As I have already explained, the parties now wish to compromise Issue 2 and I will not determine that Issue in this judgment. However, I was given some documentary material and a witness statement from a solicitor as to the events of 2000 and I am in a position to comment on that material.

269. At the hearing, Mr Legge on behalf of PSGS explained that PSGS would prefer not to be in a position where it had to investigate and make a determination as to the culpability of the Trustees in 2000. As to that, I can make the following comments:

(1) the need for PSGS to make findings of fact as to the events of 2000 will depend on what way PSGS would wish to exercise its discretion under rule 36 on the assumption that the Trustees in 2000 were not knowingly at fault;

(2) if, on the assumption that the Trustees in 2000 were not knowingly at fault, PSGS concludes that it is appropriate to apply all of the monies under rule 36.1(a) in favour of the beneficiaries notwithstanding the forfeiture, then it will not be necessary for PSGS to make findings of fact as to the fault of the Trustees in 2000 as those findings will not affect the decision;

(3) although PSGS has expressed concern as to the difficulty of investigating and finding the facts as to the events of 2000, I consider that I can make observations as to what the material before me shows and it may be that those observations will be sufficient for PSGS to act upon without it being necessary to conduct a further investigation and without further findings of fact.

270. I will now make my observations on the material before me as to the events of 2000.

271. By January 2000, the Trustees had instructed a Mr Hosford, an associate solicitor at Burges Salmon, Solicitors, to advise on matters which brought to light a possible problem as to pension increases. On 27 January 2000, Mr Hosford wrote to the scheme actuary with a draft note on that subject. I will not refer to the draft note in detail as Mr Hosford later prepared a detailed advice on the same subject to which I will refer. It is sufficient to say that the draft note identified a suggested problem with the June 1995 Deed in relation to its treatment of pension increases.

272. On 2 March 2000, Mr Hosford met the scheme actuary in advance of a planned meeting of the Trustees on 6 March 2000. Mr Hosford expressed the view that the then practice in relation to pension increases did not accord with the legal position. He discussed the position of active members, deferred members and pensioners. As regards active members, he advised that the current practice could continue if they gave their informed consent to it. He thought there would be difficulties in obtaining informed consent to the current practice from deferred members and pensioners. He also discussed other options.

273. Also on 2 March 2000, Mr Hosford signed a four page note containing his advice as to pension increases. As I understand it, Mr Hosford was concerned in relation to one point. That point related to the validity of the June 1995 Deed and the alteration

purported to be made by it to the rates of pension increases under the 1992 DDR. Mr Hosford advised that the June 1995 Deed was invalid and ineffective and the fixed rate increase of 5% pursuant to the 1992 DDR continued to have effect. Mr Legge pointed out that in the light of more recent authority this advice went too far. Mr Hosford ought to have distinguished between the invalidity of the June 1995 Deed as regards its purported retrospective effect and the validity of that Deed as regards the future. Mr Hosford advised that if a pensioner member did not receive the increases to which he was legally entitled, then the Trustees would commit a breach of trust. The advice then distinguished between active members, deferred members and pensioner members. Mr Hosford recommended that active members be asked to give informed consent to the treatment of pension increases. He suggested a similar approach to deferred members but he saw difficulties in that approach and he advised that, in the absence of informed consent, the deferred members would in due course be entitled to the higher pension increases. As to pensioner members, he considered four options, one of which was to do nothing except to obtain an indemnity for the Trustees from the Principal Employer.

274. Mr Hosford's advice was given to the Trustees at their meeting on 6 March 2000. The subject of pension increases was later described as being a highly sensitive one. There is not a full minute of what was discussed. The first draft of the minutes of that meeting recorded what had been agreed in relation to active members, which was to seek informed consent to allow the pre-existing practice to continue. The first draft of the minutes left a blank space to record other matters which had been discussed and agreed. The draft minutes were later revised to remove the reference to the position of active members and instead to record that the Trustees had considered Mr Hosford's advice, discussed "the intended effect" of the rules and the announcements and resolved to put into effect "the intention, namely to pay increases at the rates determined in line with their existing practice". This draft of the minutes was approved by the Trustees at their meeting on 2 May 2000.

275. The Trustees then started a process to obtain the informed consent of the active members to the current practice as to pension increases. That process included presentations to the active members and the signature by them of a consent form. As I understand it, the active members did sign the consent form they were asked to sign. There was no process of seeking informed consent from the deferred members or the pensioner members.

276. At their meeting on 6 November 2000, the Trustees received further advice from Mr Hosford. He referred to the new DDR which he had been asked to draft and which became the 2001 DDR. He stated that the new DDR would not apply to deferred members and pensioner members and that their entitlement to pension increases was as set out in the pre-existing documents. He said that the practice as to pension increases was not in line with those documents. It was left to the Trustees to decide what to do. The minute of the meeting contains an acknowledgment by the Trustees that the practice "may not be strictly in line with legal advice" but it had always been the intention to maintain the present practice. The Principal Employer had agreed to indemnify the Trustees if a member subsequently made a claim against them.

277. Based on the above material, I can make the further observations:

(1) if Mr Hosford had been right in the advice he gave as to the invalidity of the June 1995 Deed, then the Trustees had been told that the continuation of the current practice was not in accordance with the rights of the members and would involve a breach of trust, absent informed consent;

(2) the minutes of 6 November 2000 stated that the practice as to pension increases "may not be strictly in line with legal advice"; Mr Legge suggested that this wording indicated that the Trustees were not told that they would be acting in breach of trust but only that they might be; I consider that the advice given to the Trustees has to be read as a whole; read in that way, there is really no doubt that the Trustees were advised that the continuation of the pre-existing practice would be a breach of trust;

(3) the Trustees were influenced by the consideration that they had not intended that the members should have the entitlement that the trust documents gave to them; it was suggested that this consideration reduced any element of culpability on the part of the Trustees; if it were a matter for me, my view would be that this consideration has very little weight in the light of the fact that the Trustees were advised that the continuation of the pre-existing practice would be a breach of trust;

278. In view of the compromise of the pension increase issues and the fact that those issues were not the subject of argument and of the fact that the issues in relation to section 32 of the 1980 Act were also not fully argued, I am not in a position to make determinations in the respects which follow but I make the following comments:

(1) in the light of more recent authority, Mr Hosford's advice as to the validity of the June 1995 Deed went too far and should have been confined to the purported retrospective effect of that Deed; the compromise in relation to pension increase issues raised several issues as to the validity and effect of various documents which were not the subject of Mr Hosford's advice;
(2) Mr Hosford's advice to the Trustees that the continuation of the pre-existing practice would be a breach of trust, absent informed consent, does not relate to these other issues which have been compromised; in relation to those other issues, the events of 2000 do not show that the Trustees knew that they were committing breaches of trust.

279. The above comments discuss the relevance of the events of 2000 in relation to the position of the Trustees. Those events might also be material to the position of some of the beneficiaries. I was told that some of the Trustees in 2000 were also members of the Plan. I understand that in some cases, persons in that position now have an entitlement to substantial pension increases subject to the forfeiture under rule 36 of arrears due more than six years before any claim for such arrears. The position of those members might give rise to further considerations which do not apply to members generally. These considerations might include:

(1) if the Trustees in 2000 are considered to have knowingly committed a breach of trust and that is considered to be a factor in favour of exercising the discretion under rule 36.1(a) in favour of members generally, should it also be a factor in favour of those members who were Trustees in 2000?

(2) insofar as the compromise has reflected the Defendant's arguments that the consent given by active members in 2000 did not qualify as an effective informed consent, should that element of the compromise be available to the members who were Trustees in 2000 who had the benefit of Mr Hosford's advice as to the legal position?

(3) should these persons be treated differently as regards interest on arrears of pension?

280. In relation to the possible issues in the last paragraph, the Defendant was not appointed to represent the interests of those persons and there may be a conflict of interest between those persons and those who are represented by the Defendant. In these circumstances, I consider that I ought not to determine those possible issues in proceedings in which those persons have not been informed that these issues were to be determined and where they are not represented.

Other matters

281. I now turn to consider the consequences of the discretion conferred by rule 36.1(a) being exercised, or not being exercised. The consequence of the discretion being exercised would be that the beneficiaries would receive the benefits to which they had always been entitled. They would receive them later than they otherwise should have done but, as I will explain later in this judgment, they will be entitled to some interest on the arrears of benefits. In effect, the exercise of the discretion would go a long way to restore the beneficiaries to the position they should always have been in under the Plan. If the discretion under rule 36.1(a) is not exercised, then the beneficiaries will have lost the entitlement they had under the Plan in relation to benefits which accrued before 26 November 2012. The non-exercise of the relevant discretion would therefore result in the beneficiaries losing something of real value to them. This is subject to the point that the sums involved vary from case to case; I will set out some of the relevant figures later in this judgment. I also note that PSGS can exercise its discretion under rule 36.1(a) in relation to a part of the benefits even if not in relation to all of the benefits.

282. As regards PSGS, if it exercises the discretion under rule 36.1(a), then it will not have any monies which would be available to it to apply to one of the other purposes specified in rule 36. Earlier in this judgment, I considered the meaning of the purposes specified in rule 36.1(c) and (d).

283. In relation to a possible exercise of the power under rule 36.1(c), the effect of the exercise would be to confer a very modest benefit on the unsecured creditors of the Principal Employer and to impose a modest disadvantage on the PPF. If the purpose of exercising that power was to produce a situation whereby a sum of money would not be available to be paid to the beneficiaries under rule 36.1(a), that should only be done where it is a proper exercise of the discretion under rule 36.1(a) not to pay that sum to the beneficiaries; rule 36.1(c) ought not to be used as a back-door way of producing that result unless that result is independently justified.

284. As regards rule 36.1(d), I have held that that paragraph gives PSGS the power to use the monies forfeited under rule 36 to pay expenses which it has incurred and which so far have not been paid rather than paying the beneficiaries under rule 36.1(a).

The sub-issues

285. With these observations, I can address the specific matters referred to in Issues 6 and 7. I will deal first with the sub-issues which I have already dealt with to some extent above.

286. Issues 6(b) and 7(c) refer to the fact that the underpayment of benefits was not the fault of the members. For the reasons given earlier, that is a relevant consideration.

287. Issues 6(e) and 7(f) refer to the question whether the members could reasonably have been expected to make claims sooner. For the reasons given earlier, that is a relevant consideration.

288. Issues 6(c) and 7(d) refer to the fact that the Trustee received advice as to pension increases in 2000. For the reasons given earlier, that is a relevant consideration.

289. Issues 6(d) and 7(e) refer to the nature of the information given to members as to the nature of the "consent" they were giving in 2000. For the majority of the members, I do not see this as being a relevant consideration for the following reason. The 2001 Actives under the 2001 DDR gave consent to certain matters in 2000. The Defendant submitted that their consents were not informed consents and were ineffective so that they should receive their entitlement without regard to the consents. That was an issue between the parties but it has now been compromised in a way which reflects the rival arguments. The 2001 Actives will now be entitled to be paid benefits in accordance with that compromise. The arguments as to whether the consents were fully informed and effective have been fully taken into account in the compromise and do not need to be given consideration in a different way as regards the exercise of the discretion under rule 36.1(a). These comments deal with the majority of the beneficiaries but do not deal with a possible exception in the case of members who were Trustees in 2000. I referred earlier to the possibility that PSGS might treat those members in a different way whereby they are not given the full benefit of the compromise in relation to the issue of consent.

290. Issue 6(a) and Issue 7(b) ask whether the Trustee should, or should not, take into account what was described as any PPF policy in relation to the payment of arrears of pension. The position of the PPF, so far as relevant to this issue, was described in a witness statement of Mr Bruce-Gardner, a director of PSGS. In the context of any future discretionary decisions that PSGS may make under rule 36, the PPF has not issued any direction or instruction to PSGS as to how it should exercise any discretion. Further, the PPF has stated that it does not propose to indicate whether PSGS should (or should not) exercise any discretion it has to forfeit or disapply forfeiture. Rather, the PPF expects PSGS to reach its own decision having considered all relevant factors. However, the PPF has stated that it would not object if PSGS ultimately decided to exercise any discretion it has (or not to exercise any discretion it has) in such a way that all of the arrears are paid in full. The PPF was also asked whether it had a policy on

whether arrears should be paid if it transpires, after a scheme had entered the PPF, that members had been underpaid. In response, the PPF stated that such a situation arises very rarely in practice because any historic underpayments are almost always identified and resolved during the assessment period as part of the benefit audit and rectification work that the PPF requires all schemes to undertake before entry into the PPF. However, the PPF also stated that, if such a situation were to arise in practice, it would generally take the following approach, which the PPF would not characterise as a formal policy:

(1) the PPF would consider whether there is a forfeiture provision in the scheme's rules and, if there is, whether that provision gave the scheme's trustees a discretion to forfeit; if the provision did give the Trustee a discretion to forfeit, the PPF would try to establish whether or not the Trustee had applied the forfeiture provision in the past when underpayments had been identified;

(2) the PPF would generally look to follow the approach the Trustee had taken.[1]

291. In the light of the PPF's reference to following the approach taken by the Trustees, Mr Bruce-Gardner reviewed the minutes of Trustee meetings that took place from when the 2001 DDR was executed until 2013 and took account of his general knowledge of the Plan; as a result he is not aware of any other instance in which a beneficiary might have been underpaid in such a way as to engage clause 25 or rule 36, apart from the instances which are the subject of the present litigation.

292. In the light of the evidence as to the attitude of the PPF, it cannot be said that the PPF has a policy which PSGS needs to take into account when it exercises its discretion under rule 36. The PPF's statement was that, if the occasion were ever to arise, it would follow the approach taken by the Trustee in the past. The Trustee has not had to consider its approach in the past so that the exercise of the discretion under rule 36 which is now contemplated will be the first occasion when the Trustee adopts any such approach. Accordingly, the position of the PPF in this respect is entirely neutral as to how PSGS should go about the exercise of its discretion on this occasion.

293. While on the subject to the PPF, Mr Legge submitted that PSGS should take into account the fact that the Plan will transfer into the PPF. I agree that in so far as that might affect the way in which PSGS exercises its discretion under rule 36, there is no reason to leave that fact out of account. There is nothing in this case, as there was in *Independent Trustee Services Ltd v Hope* [2009] Pens LR 379, which would require that fact to be disregarded. Further, if PSGS wishes to exercise its discretion pursuant to rule 36 in order to produce a result that the assets of the Plan are greater than they would be if the discretion were exercised in some other way and if that is a permissible exercise of the discretion it is not rendered impermissible because in due course the assets of the Plan will be taken over by the PPF.

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[1] After I had released this judgment in draft, the PPF asked PSGS to make it clear that its approach would also include deciding whether to rely on any applicable limitation period which might be a different period from that applicable to a predecessor trustee because the PPF's obligation to pay arrears was said to arise under statute (section 166 PA 2004) and not by a reason of a trust obligation. I note this comment but this point was not raised at the trial and I will say no more about it.

294. Issue 7(a) asks whether any administrative difficulties in paying specific categories of pension increase arrears should be left out of account. The type of administrative difficulties which might arise were described in a witness statement from Mr Bruce-Gardner. In giving this evidence, Mr Bruce-Gardner relied on advice from Spence & Partners LLP ("Spence"), which provides actuarial and administration services in relation to the Plan, and from PSGS's solicitors. Mr Bruce-Gardner said that implementing the compromise agreed in this case would be a substantial exercise and, in some respects, difficult to administer. The difficulties would be likely to be caused by the following factors:

(1) missing or inconsistent information about the status of members of the Plan, which might make it difficult to confirm that a member was in receipt of a pension on any particular date;

(2) missing or inconsistent information about when members joined or left the Plan, which might make it difficult to "categorise" a pensioner for the purposes of applying the agreed pension increases and thereafter difficult to split out the different tranches of pensions increases that would then apply;

(3) missing information about the base level of pension due at retirement, which would make it difficult to confirm the starting pension on which agreed pension increases should be applied;

(4) missing information about historic pension payments that have been made, which would make it difficult to calculate accurately the arrears due to the pensioner;

(5) dependants' pensions which have been paid but that have not been linked to the deceased member, making it difficult to confirm that any underpaid pension should be paid to a surviving spouse or other dependant.

295. Previous data audit and rectification work had concentrated on the population of members, around 340, who will transfer to the PPF. Data in relation to those members is good. However, even for those members, there are around ten for whom Spence does not have historic pension amounts and there may be gaps in other records where Spence will need to recommend to PSGS how it should proceed. Particular difficulties will be experienced in calculating the NPD arrears. This is because it will be necessary for Spence to calculate the pension that individuals affected ought to have received on retirement. The uplift to which members will be entitled will then be calculated by comparing this calculation to the inherited pre-commutation pension at retirement. Spence has stated that there are large gaps in the pre-commutation data available for pensioners. The further back Spence has to go, the more gaps there will be in the data.

296. The difficulties referred to above arise in part due to the fact that the administration services for the Plan have, since 1990, been provided by a number of service providers, including Mercer, Watson Wyatt, SBJ Benefits Consultants, Capita and now Spence, as a result of which data is likely to have been lost in transitioning between those service providers.

297. Mr Short submitted that many of these difficulties will have to be dealt with in any event to calculate the amount of the benefits now payable under the Plan. PSGS is still obliged to calculate the sums which ought to have been paid from 2012 in any case. This means that PSGS cannot decline to exercise its power under rule 36.1(a) on the basis of suggested administrative difficulties if those difficulties have to be dealt with in any event. Mr Short also submitted that the administrative difficulties involved are commonplace but even if that is the case it does not mean that they can be ignored if they are otherwise relevant.

298. Mr Short further submitted that the administrative difficulties had to be assessed on a case by case basis. He said that just because there might be administrative difficulties in relation to one beneficiary, that did not justify PSGS in declining to exercise its power under rule 36.1(a) in relation to another beneficiary or a class of beneficiaries. As a general observation, that submission would appear to be correct. However, what is required is a rational and proportionate response to the suggested administrative difficulties and I am not in a position to say that every case has to be examined individually in all circumstances. I can see that it might be appropriate for PSGS to say that the difficulty involved in examining a particular case on an individual basis to see if it presents the same generic difficulties as other cases might be such that a case by case examination is not considered appropriate.

Issue 8: rule 36 and perversity

299. Issue 8 asks:

> "Would it be perverse for the Trustee now (i) to exercise any discretion it has under clause 25 to treat pension increase arrears as forfeit and/or (ii) not to exercise any discretion it has under rule 36 to apply pension increase arrears to the Beneficiaries to whom they should have been paid?"

300. As I explained earlier, PSGS has not made a decision as to how to exercise its powers under rule 36. Accordingly, I am not asked to examine a decision which has actually been made, to investigate the reasons for the decision and to hold that an actual exercise of a power was perverse. Effectively, Mr Short has to submit, and he does submit, that in all of the circumstances of this case, there is only one possible way in which the power under rule 36 could be exercised. The circumstances he contends for are: (1) the beneficiaries were at all times entitled to the benefits which are now in arrears; (2) the reason they did not claim those arrears (triggering an automatic forfeiture under rule 36) was that they had no reason to believe they had an entitlement to claim them; and (3) the Trustee was at all times in breach of trust in not paying the correct sums by way of benefits.

301. I agree that the circumstances contended for by Mr Short appear to be established on the facts and that the combination of those circumstances is a powerful reason for the exercise of the power under rule 36.1(a). However, as against that, PSGS will need to consider any administrative difficulties which there might be in exercising the power under rule 36.1(a). I do not know what those difficulties will amount to in practice. I do

not know what the cost would be of dealing with those difficulties nor the comparison between that cost and the amount of the benefits involved in individual cases. Those are matters which PSGS has yet to consider and determine. I am not attempting to provide an exhaustive statement of all of the matters which it might be proper to take into account. I am not able to rule as a matter of law that any decision made by PSGS which does not exercise the power under rule 36.1(a) in the case of every beneficiary and for every year during which there were underpayments would be perverse in that it would be a decision which no reasonable trustee acting lawfully could arrive at.

Issue 9: limitation and duty/discretion

302. Issue 9 asks:

> "If a claim by a Beneficiary to pension increase arrears would be time-barred under the Limitation Act 1980, would the Trustee be acting in breach of duty in declining to pay pension increase arrears on that basis?"

303. Issue 9 was considered in submissions on the basis that Mr Legge was right that section 21(1)(b) did not apply in this case and that the effect of section 21(3) would be that a beneficiary was only entitled to sue for pension increase arrears for a period of six years before action brought. However, that is not the position which I have arrived at in this judgment.

304. The position in accordance with this judgment is that PSGS does not have a limitation defence pursuant to section 21(3) in response to a claim by a beneficiary for an account and for an order for payment of the sum found due on the taking of an account. As regards a claim against PSGS for breach of trust, PSGS is only liable for any breach of trust since 2013 and it does not assert a limitation defence in relation to any such liability.

305. I have made some tentative comments as to the ability of a beneficiary to claim compensation from predecessor Trustees for breaches of trust before 2013 where I have said that those Trustees could rely on section 21(3) as a limitation defence to such claims. If so, I do not see that it could be said that their reliance on section 21(3) would amount to a breach of duty for the purposes of Issue 9 because they are no longer Trustees and, further, they are not in possession of trust property.

306. For the sake of completeness I will refer briefly to what the position would be if PSGS could rely on section 21(3) in response to a claim for an account and for payment of the sum found due in relation to arrears accruing more than six years before action brought. Mr Legge submitted that the answer to Issue 9 did not involve a binary choice between PSGS being under a duty to rely on the limitation defence and PSGS being in breach of duty by relying on that defence.

307. Instead, Mr Legge submitted that if a limitation defence under section 21(3) had been available to PSGS, then PSGS would have to decide what course to take. Section 21(3) did not require PSGS to rely on the limitation defence but it could choose to do so where that was a proper course for it to adopt as a Trustee in relation to the Plan. Indeed, the

discretion which PSGS would have to exercise in that respect would be somewhat similar to the decision it has to make under rule 36 which provides for automatic forfeiture of certain arrears but confers on PSGS a power to apply the arrears to the beneficiary notwithstanding the forfeiture.

308. Mr Short made the general submission that section 21(3), if it applied, barred the beneficiary from seeking a remedy by an action in the courts but did not extinguish the entitlement to the pension increase arrears. This meant that the beneficiary retained his entitlement and PSGS remained under a duty to give effect to it. In the particular circumstances of this case, rule 36 of the 2001 DDR applied to some of the arrears and that rule led to a forfeiture of the beneficiary's entitlement but was subject to the power under rule 36.1(a) to apply the arrears to the beneficiary. However, rule 36 did not apply to all of the arrears and clause 25 of the 1992 DDR did not provide for forfeiture.

309. In the absence of authority, I would prefer the submission of Mr Legge. Parliament has decided to give trustees the benefit of section 21 of the 1980 Act. If section 21(1)(b) were to be construed as Mr Legge contended so that it did not apply in this case, then it would follow that Parliament had intended that result and therefore intended that a trustee should have the ability to rely on section 21(3) in a case like the present. Mr Legge's description of the choice which would then have to be made by the Trustee appears to be a proper reflection of the tension which would exist between the availability of a limitation defence and the general duties of a trustee.

310. Mr Short relied on what had been said by Eve J in *In re Thomson's Mortgage Trusts, Thomson v Bruty* [1920] 1 Ch 508, at 514, where the judge commented, obiter, on an argument as to whether a trustee of a fund could rely on a limitation defence against a beneficiary in relation to the fund. The judge commented that the limitation defence did not extinguish the right of the beneficiary or the duty of the trustee and that as the beneficiary could asserts its right without bringing an action, the court would give effect to that right. That comment is entirely in accordance with the general law as to limitation which is that the limitation defence generally bars the remedy but does not extinguish the right.

311. If I had to decide Issue 9 in the circumstances of this case, I would have been inclined to say that *Thomson v Bruty* does not say in terms that a trustee is always disabled from relying on a limitation defence to bar the remedy of the beneficiary or to distinguish that decision on the ground that, as I understand the limitation defence in that case (the relevant section is not set out in the report), that defence was not specific (as section 21 of the 1980 Act is) to the case of a trustee. However, as Issue 9 does not need to be decided in this case, I will not discuss it further.

Issue 10: interest on pension increase arrears

312. Issue 10 asks:

> "Does interest fall to be paid on pension increase arrears and, if so, what rate should be applied?"

313. Mr Legge submitted that Issue 10 was different from the issue as to interest considered in *Lloyds No. 1*. In that case, the parties had agreed that interest was payable on the arrears of benefits. Mr Legge explained that that agreement was appropriate because an award of interest was required by EU law when assessing compensation to restore equality of treatment: see *Marshall v Southampton and South West Hampshire AHA* [1994] QB 126. By way of contrast, he submitted that EU law did not apply to the decision as to whether the pension increase arrears should bear interest.

Can the court award interest?

314. The arguments on this Issue, as they were set out in the skeleton arguments for the trial, were short and relatively straightforward.

315. The basic position taken by Mr Legge was that the court is bound by House of Lords authority to hold that the pension increase arrears do not bear interest. He cited *Torre v Browne* (1855) H.L. Cas 555, *Booth v Coulton* (1861) 2 Giff 514, *Edwards v Warden* (1876) 1 App Cas 281 and *In re Berkeley (Earl of) (Decd)* [1968] Ch 744 for that proposition.

316. *Torre v Browne* concerned the late payment of an annuity under a will trust. Lord Cranworth L.C. said, at page 577-578, that the general rule was that arrears of an annuity did not carry interest. There were exceptions where there was a contract for interest, or some legal security which led to the annuitant being able to claim interest, or misconduct of the party bound to pay. Mere delay in payment was not a ground for giving interest.

317. *Booth v Coulton* was another case of late payment of an annuity under a will trust where *Torre v Browne* was followed. Stuart V-C said, at 520, that interest was not allowed except under extraordinary circumstances.

318. *Edwards v Warden* (1876) 1 App Cas 281, to which I referred earlier, concerned an annuity payable under a pension trust. Lord Cairns said, at 294, that no part of the fund had belonged to the annuitant and was not bearing interest and was not making a profit for her benefit. Lord Hatherley said, at 302, that it was clear on the authorities that it was impossible to grant interest on the annuity. Lord O'Hagan said, at 304, that authority had disposed of the question of interest. Lord Selborne said, at 305, that the claim to interest was clearly excluded by the authorities which included *Torre v Browne*.

319. *In re Berkeley (Earl of) (Decd)* was another case of the late payment of an annuity under a will trust. Harman LJ (with whom Russell and Widgery LJJ agreed) held that no interest was payable. He said, at 760-761, that *Torre v Browne* was the leading case and that the rule laid down in that case could only be altered by the highest tribunal in the land.

320. The basic position taken by Mr Short was that the failure by the Trustee to pay the pension increase arrears was a breach of trust and the beneficiaries are entitled to

compensation for breach of trust and to interest assessed in accordance with equitable principles on such compensation.

321. When he addressed me in relation to section 21 of the 1980 Act, Mr Legge had positively submitted that a beneficiary's claim for arrears of pension was a claim for a breach of trust and was not a claim to recover trust property within section 21. In the context of the issue as to interest, Mr Legge continued to accept that the claim for arrears of pension was a claim for a breach of trust. Further, he accepted that where a beneficiary claimed compensation from a trustee for breach of trust, the court had power to award interest pursuant to its equitable jurisdiction. However, in the context of the issue as to interest, he distinguished a claim for compensation for breach of trust from a claim to arrears of annuities. He submitted that "it would be wrong for a court to allow a beneficiary to be better off by framing their claim as compensation for breach of trust in order to avoid the well-established rule that governs whether interest should be payable on arrears of annuities".

322. The authorities cited by Mr Legge clearly establish that an annuitant does not have a pre-existing entitlement to interest on late payment of instalments of an annuity. However, those authorities do not say in terms that the annuitant is either disabled from framing his cause of action as a claim for a breach of trust or that the court lacks the power to award equitable compensation and interest for that breach of trust.

323. Insofar as Mr Legge insisted that the court should treat the claim for arrears as a claim for monies due under a trust and should not allow the beneficiary to bring a claim for breach of trust, that insistence is reminiscent of the old common law rule that a claimant who was owed money under a contract was confined to an action in debt and could not claim damages for the breach of contract involved in the failure to pay the debt. That old rule is no longer the law: see *Wadsworth v Lydell* [1981] 1 WLR 598 and *Sempra Metals Ltd v Inland Revenue Commissioners* [2008] 1 AC 561.

324. I conclude that it is open to a beneficiary who is owed arrears of pension to bring a claim against the Trustee for equitable compensation for breach of trust and the court has its usual jurisdiction in equity to award interest on the compensation ordered to be paid.

325. In addition to its jurisdiction to award interest in equity, the court has power to award interest under section 35A of the Senior Courts Act 1981 in proceedings for the recovery of a debt or damages. Mr Short did not expressly rely on this jurisdiction. It was not submitted that a claim by a member for arrears of pension fell outside the reference to "a debt or damages" in section 35A. However, there is a limitation on the operation of section 35A which should be noted. The section does not apply if the debt or damages are paid before the action is brought.

326. This reasoning means that, in principle, a beneficiary will be entitled to ask the court for an award of interest, under the equitable jurisdiction, if he brings proceedings against the Trustee for equitable compensation for breach of trust or, under section 35A of the Senior Courts Act 1981, if he brings a claim for the recovery of a debt or damages at a time before he is paid the arrears of pension.

Interest on what arrears?

327. Issue 10 does not ask me to determine the period of time for which interest might be awarded. However, the above reasoning as to the power of the court to award interest will be relevant if that question were to be asked. It would also be relevant to consider the nature of the cause of action and the persons who might be defendants to a claim when considering the period for which interest might be awarded. At the end of the earlier discussion as to Issue 1, I made some tentative comments on the nature of the cause of action and the identity of the relevant defendants. Mr Short's submissions on the subject of interest appeared to assume that beneficiaries would be entitled to claim interest on the full amount of the arrears for the full period since those arrears fell due. I am not convinced that would be the position. It may assist if make some tentative comments on that question, building on the earlier tentative comments at the end of my discussion of Issue 1. If the parties wish to challenge these comments, I will hear further submissions on this subject following the hand down of this judgment.

328. I will first consider the position of PSGS and then the position of its predecessors as Trustees. It seemed to be accepted that a beneficiary could sue PSGS for an account and an order for payment of the sum found due on the taking of the account. As Mr Legge submitted, a beneficiary does not have a pre-existing entitlement to the addition of interest on the taking of an account. However, if section 35A of the Senior Courts Act 1981 were available (because PSGS had not paid the sum due before the claim was brought) then the court would have jurisdiction under that section to award interest on all of the sum found due for the full period since each instalment of that sum became due.

329. Assuming that a failure by PSGS since 2013 to pay the sums due to the beneficiaries amounted to a breach of trust by PSGS, notwithstanding that the Plan was in an assessment period under PA 2004, if a beneficiary sued PSGS for equitable compensation for any such breaches of trust since 2013, the court would have its equitable jurisdiction to award interest on such compensation.

330. For the reasons given earlier when I discussed Issue 1, a claim against predecessor Trustees for breach of trust prior to 2013 would appear to be statute barred under section 21(3) of the 1980 Act so that there would be no award of equitable compensation, with or without interest, in respect of breaches in that period. This is subject to the possibility of the limitation period under section 21(3) being postponed pursuant to section 32 but I am not asked to deal with section 32 in this judgment.

The rate of interest

331. Mr Legge submitted that the appropriate rate of interest in relation to the pension increase arrears was 1% over base rate. Mr Short submitted that the appropriate rate was 2% over base rate. It was agreed that the interest awarded should be simple and not compound interest.

332. Both parties referred to what I had said as to the appropriate rate of interest in *Lloyds No. 1* and *Lloyds No. 2* and I will therefore summarise my approach in those two cases.

333. In *Lloyds No. 1*, I was asked to award interest on underpayments of pension where the underpayments had come about because the trustee in that case had failed to take steps to achieve equalisation of treatment as between men and women. The beneficiaries submitted that the appropriate rate of interest was compound interest at 2% above base rate. The employers submitted that the appropriate rate was simple interest at base rate. I held that I should award simple interest rather than compound interest. I referred to *Carrasco v Johnson* [2018] EWCA Civ 87 at [17] and [27] as describing the court's approach to the selection of an appropriate rate of interest in a non-commercial case. The right approach was not to inquire into the detailed financial position of the party receiving the award of interest. At [457] and [461], I said:

"457 In that light of that guidance, I was (rightly) not given any evidence as to the financial position of any individual beneficiaries. I was also not given any evidence which would help me identify the general or typical circumstances of the beneficiaries who had been underpaid pension in this case. I was therefore not given evidence as to what such typical beneficiaries would have done if they had been paid the full amount of the pension when it was due. So far as I can tell from the illustrations which were provided to me, the amount of the underpayments were relatively modest and would not have made a major difference to the lives of the pensioners over the years. There was no evidence which would enable me to find that the underpayments led to a typical pensioner borrowing money at overdraft rates of interest. It is possible that a typical pensioner might have saved more money (at very modest rates of interest) if the full payments had been made but it is more likely still that a typical pensioner would have spent the further sums which he ought to have received."

334. I can now express my conclusions. I consider that the equitable result is that interest should be paid at 1% above base rate. If base rate had been a significantly higher rate, then I would not have gone above base rate. However, since base rate has been historically low in recent years, I reach the conclusion that such a low rate of interest is inadequate to compensate the pensioners for being kept out of their money. Conversely because the amounts of the arrears are likely to be modest in an individual case, I am not persuaded to award more than 1% above base rate."

335. In *Lloyds No. 2*, the dispute related to cases where members of the pension scheme had transferred to a new pension scheme and the transferring scheme had paid to the receiving schemes an inadequate transfer payment in transferring members. I held that the transferring scheme was liable to make a top-up payment to the receiving schemes. I was asked to award interest on the amount of the top-up payments. The employers submitted that the top-up payments should bear simple interest at 1% above base rate. The transferring members submitted that the interest should be equivalent to the investment returns made by the transferring schemes on the sums they had not initially transferred and that in the absence of more specific evidence, the interest should be at a rate which reflected the increases in pensions paid by the transferring scheme. The employers relied on my decision in *Lloyds No. 1* and the transferring members sought to distinguish that case on the ground that the top-up payments would have been

invested in the receiving schemes so that interest should be assessed to reflect the value of the lost investment or, in the absence of more specific evidence, the increases in pensions paid by the transferring scheme. At [263], I said:

336. I conclude that the top-up payment should bear interest at 1% above base rate. I have considered whether to say that that rate should be only a default rate and that it should be open to the transferring member to produce evidence of actual loss in which case the actual loss should be awarded. There is something to be said in principle for that possible approach. However, I am also entitled to take into account the practicalities of the situation. In the majority of cases, the amount of the top-up payment will be modest. The calculation of that top-up payment will involve considerable expenditure of time and involve considerable cost. In many cases, the cost of the exercise will exceed the amount of the top-up payment. I am therefore reluctant to provide for a procedure which will increase the cost of administration and involve only modest sums of interest. I have considered whether to permit this possibility in a case where the top-up payment exceeds a certain limit but I prefer to have administrative simplicity and to adopt a procedure which will apply across the board. As to the suggestion that I adopt the revaluation rate from time to time, I am not clear as to what, if any, practical difficulties that might entail as compared with a formula which uses 1% above base. Again, in view of the comparatively modest sums involved, I prefer to adopt a method which is well used and well understood. Accordingly, the rate of interest will be 1% above base rate."

337. Since my decision in *Lloyds No. 1*, the Court of Appeal in *Watson v Kea Investments Ltd* [2019] 4 WLR 145, at [68] and [78], has commented that the decision in *Carrasco v Johnson* did not concern interest in relation to equitable compensation. Nonetheless, in the present case, it was not submitted that the approach I adopted in *Lloyds No. 1* was invalidated on that account.

338. Both sides approached the issue on the basis that the purpose of an award of interest in this case would be to compensate pensioners for being kept out of their money. It was not said that the court should award interest to take from the Trustee the gains it might have made by retaining monies which ought to have been paid to the pensioners.

339. As in *Lloyds No. 1*, I was not given evidence as to the financial position of beneficiaries. I was left to speculate as to whether beneficiaries would have saved the extra pension which they ought to have received or would have used it to reduce their borrowings or would simply have spent it. I was however given evidence as to sums payable as pension increase arrears. Ignoring the possible application of a limitation period and possible forfeitures, the arrears amounted to some £2.0 million. Of this figure, some £1.6 million was the subject of clause 25 of the 1992 DDR (which I have held did not result in a forfeiture) and £0.4 million was the subject of rule 36 of the 2001 DDR (where there would be an automatic forfeiture of about £200,000 of those arrears). Using the figure of £2.0 million for the arrears, there were 219 members who were owed these arrears. Of these 219, 27 (some 12.3%) were owed less than £500, 48 (some 21.9%) were owed less than £1,000, 126 (some 57.5%) were owed less than £5000 and 166 (some 76%) were owed less than £10,000. 37 were owed between £10,000 and £25,000, 11 were owed between £25,000 and £50,000, 3 were owed between £50,000 and £100,000 and 2 were owed more than £100,000. I was also given information about the cases

involving the five largest amounts. The individuals were not named and were referred to by letters, A to E. The relevant figures were: A - £252,000, B - £132,000, C - £79,000, D - £68,000 and E - £67,000.

340. As I understand it, the total arrears of £2.0 million accrued over a lengthy period of time. If I take the 76% of members who were owed less than £10,000 each, it seems likely that the amount of the underpayment on each instalment would have been quite modest. Even with the beneficiaries who are now owed much larger total sums, I bear in mind that those figures do not tell me how much a typical underpayment might have been.

341. As to the period for which interest is to be payable, I have made tentative comments about that. As to the claim to interest under the equitable jurisdiction, the claim would appear to be restricted to underpayments since 2013 so that the sums on which interest can be awarded are very much more modest than the total figures for arrears referred to above. I recognise that the position might be different under section 35A of the Senior Courts Act 1981 but that section might not apply depending on when a beneficiary brings a claim against PSGS.

342. The difference between the parties as to the rate of interest is a very narrow one involving a choice between 1% and 2% above base rate. I consider that the approach which I adopted in *Lloyds No. 1* and *Lloyds No. 2* remains valid, certainly as regards the vast majority of the pensioners to whom arrears are payable. I have considered whether I should award a higher rate of interest to the beneficiaries to whom larger amounts of arrears are due. However, as I have explained, the total sum due to a beneficiary does not tell me very much as to the amount of the underpayment on individual instalments. In the end, I conclude that the appropriate order is to provide for interest at 1% above base rate for all beneficiaries.

343. Following the release of a draft of this judgment to the parties, Mr Legge raised a number of new points in relation to the award of interest. I have concluded that I should deliver the judgment in accordance with the draft dealing with the points argued at the trial. It may be that I will hear further submissions following the hand down of this judgment as to whether Mr Legge's new points are open to him and, if so, how they should be dealt with.

Issues 11 and 12: GMP arrears and NPD arrears

344. Issues 11 and 12 ask:

"11. Do the issues of limitation and/or forfeiture apply differently to arrears caused by the need to equalise for the effect of GMP, following *Lloyds Banking Group Pension Trustees Limited v Lloyds Bank plc* [2018] EWHC 2839?
12. Do the issues of limitation and/or forfeiture apply differently to arrears caused by the fact that male and female Normal Pension Dates for members who had joined the Plan before 1 October 1992 were, in respect of pensionable service on and from 17 May 1990, equalised at age 65 on 17 November 1994?"

345. Issue 11 refers to the above issues as to limitation and forfeiture as applied to the GMP arrears rather than the pension increase arrears. Issues 12 refers to the same issues as to limitation and forfeiture as applied to NPD arrears.

346. I understand that the parties are agreed that my conclusions as to limitation and forfeiture in respect of pension increase arrears will also apply to GMP arrears and NPD arrears.

347. Issues 11 and 12 do not refer to the question of interest on the GMP arrears and the NPD arrears and I understand that the parties accept that my decision in *Lloyds No. 1* as to interest will apply to these two categories of arrears.