Neutral Citation Number: [2022] EWHC 3236 (Ch)

Case No: PE-2021-000017

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

Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 16/12/2022

Before :

THE CHANCELLOR OF THE HIGH COURT

- -

Between :

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

- -
- -

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

Hearing dates: 9 and 10 November 2022

- -

Approved Judgment

This judgment was handed down remotely at 10:30am on 16 December 2022 by circulation to the parties or their representatives by email and by release to The National Archives.

Sir Julian Flaux C :

Introduction

1. In this Part 8 claim the claimant (hereafter referred to as "the Trustee") which is the sole trustee of the Railways Pension Scheme ("the RPS") seeks the directions of the Court on a number of questions arising in the administration of the RPS which is an industry-wide defined benefit occupational pension scheme established on privatisation of the railways for those employed in the railways industry.

2. The RPS was established as of 31 May 1994 by the Railways Pension Scheme Order (SI 1994/1433) ("the RPS Order") made pursuant to Schedule 11 of the Railways Act 1993 which provided expressly by para 2(3) that any occupational pension scheme established under the paragraph: "shall be treated for all purposes as if it were a pension scheme established under an irrevocable trust". The RPS comprises 106 Sections (of which the Atos Section with which this case is concerned is one) which are distinct and ring-fenced from the other Sections, although with the same trustee administration, each with a sponsoring Participating Employer or Employers The defendants are the Participating Employers for the Atos Section, the first defendant being the Designated Employer or principal employer and the second defendant the only other Participating Employer for this Section. I will refer to them hereafter compendiously as "Atos". The individual sections have the common characteristic that they are Shared Cost in that contributions payable by Participating Employers and Active Members are normally payable in the ratio 60:40.

3. Each Section is governed by the pension trust deed as originally established by statute ("the Pension Trust") and by the individual Section's Rules. The Atos Section Rules have been amended from time to time. They provide for defined benefit pensions based on a fraction of pensionable salary at retirement in turn based on the number of years of pensionable service. The present claim is concerned in particular with the deficit contribution rule, Rule 21 (the terms of which are set out below), in the current version of the Atos Section Rules.

4. The Pension Trust and the Rules of each Section are required to be operated in such a way as to ensure that they comply with the Railway Pensions (Protection and Designation of Schemes) Order (SI 1994/1432) ("the Protection Order") which also came into force on 31 May 1994. Clause 7H of the Pension Trust provides:

   > "Where, in relation to a Protected Person, the provisions of this Pension Trust and the Rules do not satisfy the requirements of the Protection Order, then the Pension Trust and the Rules shall be operated in relation to that person in such a way as to ensure that they do comply with that Order."

   "Protected Person" is defined in para 5 of Schedule 11 to the Railways Act 1993 but in broad terms means someone employed in the railways industry immediately prior to the passing of the Act on 5 November 1993 who had pension rights under the British Rail Pension Scheme ("the BRPS").

5. The Questions which the Court is asked to determine are set out at [18] below. They relate in particular to the interpretation and operation of Rule 21 and of provisions of the Protection Order in circumstances where there is a shortfall in Section funding as

determined by the RPS actuary appointed by the Trustee ("the Actuary") on his valuation pursuant to clause 6B of the Pension Trust of the assets and liabilities of the Section. Answers to the Questions are required to enable the Actuary to complete his outstanding 2016 and 2019 valuations of the Atos Section.

Factual and procedural background

6. Prior to privatisation in 1994, British Rail was operated by a statutory undertaking, the British Railways Board ("the BRB"), owned by the Government. It was government funded and provided railway employees with various pension schemes, of which the largest was the BRPS, which thus enjoyed implicit Government funding support.

7. Following the passing of the Railways Act 1993 the industry began to be privatised during 1994. Schedule 11 of the Act dealt with railway pensions. Para 2 granted the Secretary of State for Transport power to establish a new pension scheme for railway employees. Paras 5 to 7 introduced protections for railway employees' accrued and future accruing rights under the existing pre-privatisation pension schemes which British Rail provided (specifically the BRPS) and under the RPS going forward. Para 7(1) provided that an order to protect such employees could impose on the employer various duties including a duty with respect to: "(f) the making or refunding of contributions".

8. The assets and liabilities of the BRPS were transferred to the new scheme, the RPS, and the BRPS was wound up on 2 October 1994. The pensioner and deferred pensioner members of the BRPS (i.e. those who were former British Rail employees at the date of privatisation) together with a share of BRPS assets representing liabilities (and a share of the surplus) in respect of them were transferred to the 1994 Pensioners Section of the RPS which continued to benefit from a Government solvency guarantee. The then Active Members of the BRPS (i.e. those who were British Rail employees at the date of privatisation) together with a share of BRPS assets representing liabilities (and a share of the surplus) in respect of them were transferred initially to a holding Open Section of the RPS, then as parts of the rail industry were progressively sold into private ownership, each of the private sector employers would create their own Section within the RPS, to which the pension rights of the employees taken on by them, together with a share of the Open Section assets representing liabilities in respect of those employees, were transferred.

9. The ex-British Rail employees in the RPS Open Section and the subsequent sections set up did not have the benefit of Government support but their employers were required to provide them with the protections set out in the Protection Order made under Schedule 11, which amplified and confirmed the protections provided by paras 5 to 7 of Schedule 11. The private sector employers could also admit new post-privatisation employees either to the same Section as the ex-public sector employees or to a separate Section or to a wholly different pension scheme as they chose. The Protection Order did not apply to those new employees. In practice, the private sector employers (including Atos) did not introduce separate segregated Sections for protected employees and new employees, almost certainly because, when each Section was constituted, substantial assets were transferred over so the Section was extremely well-funded from the outset, making it attractive for employers and future employees. In contrast, starting and funding a new Section was inherently unattractive, giving rise to duplication of administrative costs. At the time of privatisation, the BRPS was in surplus, enabling payment of reduced contributions.

10. Article 5 of the Protection Order provides as follows:

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

11. Article 7 of the Protection Order provides as follows:

> "**Article 7 Contributions**
>
> (1) Subject to the following paragraphs of this article, where any person mentioned in paragraph 7(2) (protection: supplementary provisions) of Schedule 11 [RA 1993] is under a duty to contribute to —
>
> (a) a section of an occupational pension scheme in which a protected person has relevant pension rights; […]
>
> the contributions which that person shall make under that duty shall be not less than such amount as, in the opinion of the scheme actuary, shall be sufficient to make provision in respect of the rights specified in paragraph (2) after having taken into account all of the relevant matters, including the resources of the occupational pension scheme or the relevant section of it and any employee contributions.
>
> (2) The following rights are specified for the purposes of paragraph (1) —
>
> (a) the pension rights which, at the date in respect of which the scheme actuary gives that opinion, have been accrued under that scheme or section or been transferred to it in accordance with article 6;
>
> (b) any pension rights which are accruing in respect of current participation in that scheme or section; […]
>
> (3) No obligation to make contributions arises under paragraph (1) in any case where, in the opinion of the scheme actuary, the funds of the occupational pension scheme or section in question are sufficient for the purpose mentioned in that paragraph.
>
> (4) Where relevant pension rights are transferred from one occupational pension scheme to another such scheme and the transfer value paid by the trustees of the transferring scheme under article 6(2) in respect of those relevant

pension rights is less than the amount which, in the opinion of the scheme actuary of the transferring scheme, would have been required to provide no less favourable relevant pension rights under the transferring scheme as required under article 6(5)—

(a) the person who is required under article 4 to provide the scheme from which those rights are transferred shall pay or secure the payment to the trustees of the scheme to which those rights are transferred the difference (if any) between the amounts calculated under article 6(2) and 6(5)(a); and

(b) without prejudice to the obligation imposed by sub–paragraph (a), the person who is required under article 4 to provide the scheme to which those rights are transferred shall pay or secure the payment to the trustees of that scheme of such part of any difference between the amounts calculated under article 6(2) and 6(5)(a) as is not paid to the trustees of that scheme under that sub–paragraph.

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

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

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

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

…

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

12. The Atos Section was established by a deed dated 31 January 1997 and adopted the rules of the Shared Cost Arrangement under the Pension Trust. Atos are members of the Atos corporate group, a multi-national provider of IT and consulting services. The Atos Section is part of the RPS because many of Atos' employees used to provide IT services to the UK rail industry. The Atos Section was closed to new entrants in 1999 (except where Atos were legally obliged to provide entry to the RPS). Since then, the number of its members in pensionable service has declined as the members themselves have got older. This decline has been accelerated by the separation in 2013 of Atos' Worldline hi-tech transaction services business from their other business.

13. When the Amended Claim Form was served in April 2022, the Atos Section had 39 members in pensionable service ("Active Members"), 491 members entitled to deferred

benefits ("Deferred Members") and 561 members in receipt of pensions ("Pensioners"). 20 of the Active Members and 657 Deferred Members and Pensioners are Protected Persons under the Protection Order.

14. Under Clause 6B of the Pension Trust, the Trustee is required to obtain actuarial valuations of the RPS and the Atos Section from the Actuary at intervals of no more than every three years. Clause 6B provides, inter alia:

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

15. The last completed actuarial valuation of the Atos Section was dated 31 December 2013. At that time, there was a shortfall of approximately £6 million, as calculated under Clause 6B and by reference to the Atos Section's "technical provisions" as defined in section 222 of the Pensions Act 2004. The recovery plan agreed at the time of the 2013 Valuation provides for deficit repair contributions of 7.4% of Section Pay. It was projected to eliminate the deficit by 31 December 2023. Since December 2013, no actuarial valuation has been completed because of the unresolved questions at issue in this case. However, discussions between the Trustee and Atos proceeded on the basis of a technical provisions deficit of around £19 million in 2016 (the "Draft 2016 Valuation") and a consistent deficit of around £18 million in 2019 (the "Draft 2019 Valuation"). The parties have not agreed or completed these valuations, and the time limits prescribed for them have expired. All of these three valuations considered the Atos Section's funding position by reference to the cost of providing benefits in line with Pension Protection Fund compensation. At all material times, there has been a deficit on that basis. Absent any completed actuarial valuations since 2013, Atos have been required to pay, and have paid, deficit repair contributions under the 2013 recovery plan.

16. The dispute between the parties essentially centres around the meaning and effect of Rule 21 of the Atos Rules, although it is necessary to consider Rules 3A and 3B as well. These Rules provide:

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

(i) the greater of:

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

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

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

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

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

Rule 21 **Shortfall**

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

(i) The Actuary shall calculate the proportion of the shortfall that relates to liabilities in respect of Preserved Benefits and specify those liabilities as a percentage of total liabilities of the Section. Unless the Actuary determines that liabilities in respect of Preserved Benefits represent less 2.5% of the shortfall, the Participating Employers shall make payments (on a proportionate basis considered by the Trustee to be equitable) sufficient to meet in full the proportion of the shortfall referable to Preserved Benefits. If the Actuary at any time determines that liabilities in respect of Preserved Benefits represent less than 2.5% of the shortfall then this paragraph shall cease to apply for the purposes of the present and any future valuation;

(ii) unless the Actuary determines that the remaining shortfall is trivial, the multiple for Participating Employer contributions set out in Rule 3A (Normal and Additional Contributions by Participating Employers) shall, subject to paragraph (iii) below, initially revert to 1.5. Subsequently the contributions of Members shall be increased in accordance with Rule 3B (Normal Contributions by Members) and contributions of Participating Employers shall be increased in accordance with Rule 3A (Normal and Additional Contributions by

[1] It was common ground that these words should be read into what Mr Spink KC called the "stem" of Rule 21(1).

Participating Employers) as determined by the Actuary but subject to a maximum Participating Employer contribution (excluding [salary sacrifice contributions]) of 130% of the Participating Employer's normal long term funding rate of the Section as determined by the Actuary at the date of the valuation, unless the Designated Employer agrees to a higher rate. The Actuary shall determine the rate and period over which the increased contributions shall apply after consulting the Trustee, the Pensions Committee and the Designated Employer;

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

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

(2) The Trustee may, in its absolute discretion, extend the period before which paragraphs (i) to (iv) above shall apply in respect of any Section beyond the date that is 6 months after the signing of the valuation arrangements to make good the shortfall, provided that it does so before the 6 month period has elapsed…"

17. There has been sharp disagreement between the parties as to the interpretation of these provisions, the inability to resolve which led to this Part 8 Claim Form being issued originally on 30 November 2021. It is to be noted that the Pensions Regulator has an interest in this matter but has agreed to suspend any regulatory investigation pending the outcome of these proceedings.

The Questions to be determined by the Court

18. The Questions to be determined are in a list appended to the Amended Claim Form. They are as follows:

"**(A) General Questions Concerning Operation of Rule 3B and Rule 21(1)(ii)**

1. Subject to the effect (if any) of the Protection Order (as to which see Qs 3 to 7 below), in determining the rate and period over which an increase in

contributions of Members in Pensionable Service shall apply (after consulting the Trustee, the Pensions Committee and the Designated Employer) in accordance with rule 3B and rule 21(1)(ii):

(1) does the Actuary have a discretion as to whether

(a) to determine a normal contribution rate for Members in Pensionable Service in an amount which – although 40% of total contributions – is less than that required, when taken together with 60% contributions from the Compan[ies], to make good the shortfall in the Atos Section in full, and/or

(b) to seek the Compan[ies'] agreement to disapply the cap of 130% of the Participating Employer's normal funding rate as determined by the Actuary ("the 130% cap"),

taking account, in each case, of the factors referred to in sub-paras (i) (ii) and (iii) below; or

(2) is the Actuary obliged to determine a normal contribution rate for Members in Pensionable Service which is 40% of total contributions required from Members and the Compan[ies] to make good the shortfall in the Atos Section in full without reference to the factors referred to in sub-paras (i) (ii) and (iii) below, subject and without prejudice to the application of the 130% cap unless the Employer agrees to a higher rate?

(i) the extent to which an increase in Members' contributions under rule 3B(a)(iii) would, in the opinion of the Actuary, as a result of consequential Member opt-out of Pensionable Service, not be expected to be collected;

(ii) the extent to which an increase in Members' contributions under rule 3B(a)(iii) would, in the opinion of the Actuary, as a result of consequential Member opt-out of Pensionable Service, be expected to increase the shortfall;

(iii) the operation of Rule 21(1)(iv).

2 In the light of the answer to Q1, what matters (if any) fall within the scope of the Actuary's discretion?

(B) Protection Order

Article 7 of the Protection Order

3 Does Article 7(1) of the Protection Order, which requires the Compan[ies] to make contributions which shall not be less than such amount as, in the opinion of the Actuary, shall be sufficient to make provision in respect of the rights specified in Article 7(2), pursuant to a schedule of contributions to be provided by the Actuary under Article 7(7), after having taken into account all relevant matters, including the resources of the scheme or the relevant section of it and any employee contributions, apply:

(a) when the normal contributions of Members in Pensionable Service for the purposes of rule 21(1)(ii) have been determined by the Actuary in accordance with rule 3B(a)(iii), and not so as to cause additional contributions to become payable by Members in Pensionable Service as a result (irrespective of whether such normal contributions of Members have been determined by the Actuary (i) at a level below or equal to 40% of the 130% cap or (ii) at a level above 40% of the 130% cap and the Employer has agreed such higher rate); or

(b) so as to require the Compan[ies] to contribute at a higher 60:40 shared cost rate in a case where the 130% cap would otherwise apply, so causing additional contributions to become payable by Members in Pensionable Service as a result irrespective of whether normal contributions of Members in Pensionable Service at a rate of 2/3rds of Compan[ies'] contributions would, in the opinion of the Actuary, as a result of consequential Member opt-out of Pensionable Service, be expected to be collected; or

(c) otherwise in conjunction and consistently with any or all of the sub-paragraphs of rule 21(1).

Article 5 of the Protection Order

4 Does Article 5 of the Protection Order apply to:

(a) the Compan[ies], and/or

(b) the Trustee, and/or

(c) the Actuary,

so as to prohibit or otherwise limit (and if so how) any of such persons in the exercise of any such power as they may have under rule 21(1) (including in the case of the Actuary under rule 3B(a)(iii)) insofar as the effect of any such exercise would or might "prevent a protected employee from" continuing to participate in or continuing to acquire "relevant pension rights" in the Atos Section, whether by causing Member opt-out of Pensionable Service or otherwise?

Consequential Protection Order Questions

5 If and to the extent that the answer to any of the questions raised in (1) para 3(a) (b) or (c), and/or (2) para 4(a) (b) or (c), is in the affirmative, does Article 7(1):

(a) require the Compan[ies] to make good

(i) the balance of the shortfall to the extent that the same has not otherwise been made good (or to some lesser extent, and if so what extent), or

(ii) the balance of the shortfall as relates to protected persons to the extent that the same has not otherwise been made good (or to some lesser extent, and if so what extent); or

(b) impose some other, and if so what, obligation?

6 In light of the answer to Q5, given that the Atos Section is not sub-segregated between protected and non-protected persons, how is the part of the shortfall as i[t] relates to:

(a) protected persons to be provided for in full to the extent that the same has not otherwise been made good (or as the case may be to some lesser extent);

(b) non-protected persons to be provided for to the extent that the same has not otherwise been made good?

(C) Rule 21(1)(iv)

7 Under rule 21(1)(iv) (as affected, if at all, by the answer to Q4 above), in deciding whether to agree on the reasonable basis on which the benefits of Members in respect of future service shall be reduced (in the case of the Designated Employer and the Trustee) and in the absence of such agreement in determining the basis of reduction of Members' benefits in respect of future service (in the case of the Actuary) is:

(a) the Trustee, and/or

(b) the Compan[ies], and/or

(c) the Actuary

entitled or obliged to take into account

(i) the extent to which a reduction in Members' future service benefits may be expected to make good the shortfall; and/or

(ii) the extent to which a reduction in Members' future service benefits may be expected to increase the shortfall; and/or

(iii) further or other and if so what matters."

The parties' submissions

19. In relation to the applicable principles of construction (of which a great deal was made in Atos' skeleton argument but very little in oral submissions) Mr Brian Green KC on behalf of the Trustee submitted that whether the Court approached the matter through the prism of statutory construction (applicable to the Protection Order) or of contractual construction (applicable to the RPS itself) made little if any difference to determination of the correct construction of the provisions in dispute. In any event, he submitted that the effect of para 2(3) of Schedule 11 of the Railways Act 1993, quoted at [2] above, was an invitation to apply the same principles of construction to the RPS as to any other occupational pension scheme, notwithstanding that the RPS was established by a schedule to a statutory instrument.

20. As regards the principles of construction applicable to pension trusts, Mr Green KC referred to what was said by Lord Hodge JSC at [13] to [16] of the judgment in *Barnardo's v Buckinghamshire County Council* [2018] UKSC 55; [2019] ICR 495:

> "13. In the trilogy of cases, *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900, *Arnold v Britton* [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] AC 1173, this court has given guidance on the general approach to the construction of contracts and other instruments, drawing on modern case law of the House of Lords since *Prenn v Simmonds* [1971] AC 1381. That guidance, which the parties did not contest in this appeal, does not need to be repeated. In deciding which interpretative tools will best assist in ascertaining the meaning of an instrument, and the weight to be given to each of the relevant interpretative tools, the court must have regard to the nature and circumstances of the particular instrument.
>
> 14. A pension scheme, such as the one in issue on this appeal, has several distinctive characteristics which are relevant to the court's selection of the appropriate interpretative tools. First, it is a formal legal document which has been prepared by skilled and specialist legal draftsmen. Secondly, unlike many commercial contracts, it is not the product of commercial negotiation between parties who may have conflicting interests and who may conclude their agreement under considerable pressure of time, leaving loose ends to be sorted out in future. Thirdly, it is an instrument which is designed to operate in the long term, defining people's rights long after the economic and other circumstances, which existed at the time when it was signed, may have ceased to exist. Fourthly, the scheme confers important rights on parties, the members of the pension scheme, who were not parties to the instrument and who may have joined the scheme many years after it was initiated. Fifthly, members of a pension scheme may not have easy access to expert legal advice or be able readily to ascertain the circumstances which existed when the scheme was established.
>
> 15. Judges have recognised that these characteristics make it appropriate for the court to give weight to textual analysis, by concentrating on the words which the draftsman has chosen to use and by attaching less weight to the background factual matrix than might be appropriate in certain commercial contracts: *Spooner v British Telecommunications plc* [2000] Pens. LR 65 paras 75–76 per Jonathan Parker J; *BESTrustees v Stuart* [2001] Pens. LR 283, para 33 per Neuberger J; *Safeway Ltd v Newton* [2018] Pens. LR 2 , paras 21–23 per Lord Briggs JSC, giving the judgment of the Court of Appeal. In *Safeway*, Lord Briggs JSC stated, at para 22:
>
>> "the Deed exists primarily for the benefit of non-parties, that is the employees upon whom pension rights are conferred whether as members or potential members of the Scheme, and upon members of their families (for example in the event of their death). It is therefore a context which is inherently antipathetic to the recognition, by way of departure from plain language, of some common understanding between the principal employer and the Trustee, or common dictionary which they may have employed, or even some widespread practice within the pension industry which might illuminate, or give some strained meaning to, the words used."

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

Mr Green KC submitted that what Lord Hodge said at [14] about the nature of a pension scheme was absolutely on point and irresistible.

21. In relation to the construction of Rule 21(1) Mr Green KC pointed out that Rule 21(1)(i) is concerned with preserved benefits. This has happened in the past and as the last sentence of that sub-paragraph makes clear, the Actuary only does that exercise once, so that provision is of no relevance.

22. At the heart of the submissions made by Mr Green KC is that the use of the words: "the Actuary determines" in Rule 21(1)(ii) connotes that the Actuary has a discretion and is entitled to exercise a judgment in relation to Active Member contributions as to the affordability and value for money and as to the collectability of the contributions set. The Actuary is also entitled to take into account that, if contributions were set without regard to affordability, value for money and collectability, Active Members would simply opt out and thereby increase the shortfall under the Section rather than address it.

23. He submitted that, in each case, the words "the contributions…shall be increased" are qualified by "as determined by the Actuary", which connoted that the Actuary had a discretion as to whether to increase contributions at all and, if they were increased, by how much, up to the 130% cap. If this was intended to be a mechanical calculation exercise, the provision would have said the contributions "shall be increased by the Actuary".

24. Rule 21(1)(iv), which contains two limbs, operates if there is still a shortfall after an increase in contributions under (ii). The first limb contemplates agreement between the Designated Employer and the Trustee as to a reduction in benefits of Active Members in respect of future service, calculated on a reasonable basis. Leaving aside the operation of the Protection Order, Mr Green KC accepted that the Designated Employer could act in its own interests under the first limb subject to the duty to act in good faith and not do anything to fundamentally breach its relationship of trust and confidence with its employees. However, given that in deciding whether to make such an agreement, the Trustee in the exercise of its fiduciary duty was obliged to take account of value for

money and not driving Active Members out of the scheme, whatever the Designated Employer might want to do, the Trustee would not make any agreement unless it complied with that fiduciary obligation.

25. The second limb arises if the parties are unable to reach agreement within nine months of the valuation (or such longer period as the Trustee determines under Rule 21(2)) in which case the Actuary determines the basis of reduction in Members' benefits in respect of future service. Again Mr Green KC submitted that the words: "the Actuary determines" connoted a discretion and exercise of judgment by the Actuary as in the case of (ii). Again the words were: "the Actuary shall determine the basis of reduction of Members' benefits", connoting that discretion, not "the Actuary shall reduce the Members' benefits".

26. He submitted that, on Atos' argument, the "determination" by the Actuary in each case involved no discretion, just a mechanical calculation. So, under (ii), the Actuary increases the contributions up to the 130% cap and unless the Participating Employer agrees to a higher rate than that cap, that is the end of (ii). If the Participating Employer agrees to a higher rate then the contributions go up above the cap, but again it is a mechanical calculation by the Actuary with no discretion. Likewise with the Actuary's role under (iv), on Atos' case, if there is no agreement under the first limb, if the remaining shortfall after the operation of (ii) exceeds the value of the future service benefits, the Actuary is required to reduce the value of those benefits to address the shortfall, if necessary to nil, without any discretion.

27. Mr Green KC submitted that the words "so far as practicable", which it is common ground are to be read into Rule 21(1) stem immediately before (i) to (iv): "the shortfall shall so far as practicable be made good in the following way", did not mean, as would follow from Atos' case, that there was a straightforward mathematical calculation to increase contributions or reduce benefits to the fullest extent possible to remove the shortfall. "So far as practicable" meant rather in accordance with the discretion as to affordability, value for money and collectability which is afforded to the Trustee and Designated Employer in seeking to reach agreement under the first limb of Rule 21(1)(iv) and which the Trustee contends is afforded to the Actuary under Rule 21(1)(ii) and the second limb of (iv).

28. He submitted that the mechanistic interpretation of the Rule for which Atos contend, which gave the Actuary no control over contributions or the sacrifice of future service benefits, was not a reasonable and practical interpretation of the scheme, adopting the test set out by Lord Hodge at [16] of *Barnardo's* derived from Millett J, but that the Trustee's interpretation which gave the Actuary the full discretion for which it contends was a far more reasonable, practical and commercial interpretation. That discretion included a discretion not to increase the contributions or reduce the benefits at all. Mr Green KC relied on the judgment of Sir Geoffrey Vos MR in *Britvic Plc v Britvic Pensions Ltd* [2021] EWCA Civ 867; [2021] Pens. LR 16 at [44] to [46].

29. Mr Green KC pointed out that, on Atos' case, the Rule 21 shortfall would not in reality be reduced at all. Atos were no longer arguing that the contributions should be at a rate above the 130% cap. The effect of the 130% cap not being lifted was that increased contributions, even if they were collected at all, would only make up a small proportion of the overall shortfall, especially given the reducing numbers of Active Members. The Actuary's assessment is that of the £18.1 million shortfall, increased contributions up to

the 130% cap would only produce £0.9 million, leaving £17.2 million of the shortfall to be addressed. Accordingly, as Mr Green KC put it, on Atos' case, Rule 21(1)(ii) was simply an academic arithmetic stepping-stone to the operation of Rule 21(1)(iv). On Atos' case, (iv) would reduce future benefits to zero and all Active Members would simply opt out, as they could do under Rule 16 without any notice period, in which case the £18.1 million shortfall was not made good at all. As became clear during the course of the submissions on behalf of Atos by Mr Andrew Spink KC, Atos' answer to that conundrum in their case was that once the Active Members had all opted out, Rule 21(1)(iii) kicked in. I will deal with that argument later, but as Mr Green KC pointed out in reply, there are a number of reasons why that is not a satisfactory answer.

30. As Mr Green KC said, in the original version of Rule 21, there was no (iii) and only the first limb of (iv), then numbered (iii). The second limb of what is now (iv) was introduced by a scheme wide amendment in October 1994, but what is now (iii) was not introduced until 2006. In support of the case that the application of Rule 21 did not necessarily involve a 60:40 shared cost, he compared Rule 21 as it now is with Rule 20, the surplus provision which does not provide for a 60:40 sharing of surplus. He also asked the Court to note that the Rule 21 stem contemplates the possibility of arrangements being agreed between the Trustee and the Designated Employer to make good the shortfall on some other basis than a 60:40 shared cost. That was borne out by the words in the first two lines of Rule 3A "(subject to Rule 21 (Shortfall))". Furthermore the second limb of Rule 21(1)(iv) did not operate on a 60:40 basis either but made Members suffer 100% of the consequences.

31. Mr Green KC emphasised that Rule 21 had never been exhaustive or comprehensive in its operation as regards eliminating a shortfall. It had not contained the second limb of (iv) when originally drafted and the 130% cap meant that increasing contributions was only ever going to make a very limited inroad into a past service deficit under (ii). Furthermore, even cutting back future service benefits to nil under (iv) as now drafted was not going to cure past service deficits to any significant degree.

32. He made the point that Rule 21 had never provided that the Actuary's determination had to be of the contributions necessary to make good the shortfall in full. The drafter could clearly have so provided as was the case in Rule 45(5) of the BRPS which had provided:

> "If no such agreement is reached within these 3 months, then the Actuary shall as soon as possible thereafter and, in any event, no later than 6 months after the signing of the Scheme valuation, having consulted the Principal Employer and the Trustee, determine the amount of such rate of increase in Employer and Member contributions as is necessary to make up such shortfall."

Mr Green KC also drew attention to the fact that other provisions of the Atos Section Rules do require the Actuary to determine in full the amount required, for example Rule 18E dealing with Discretionary Benefits which requires the Actuary to certify "the amount required to meet the full cost of providing the benefits."

33. As for the meaning of "determine", Mr Green KC accepted that one meaning of "determination" is calculation but in the context of Rule 21 its meaning was not so narrow. The word "determine" at the end of Rule 21(1)(ii): "The Actuary shall determine

the rate and period etc" clearly involved the exercise of a discretion, so that, as I pointed out in the course of argument, unless "determine" means something different in different parts of the same provision, which is inherently unlikely, the use of the word "determine" earlier in the provision suggests that there is the same degree of discretion. He asked the Court to note that the closing words of Rule 21(1)(iii) also speak of the Actuary determining the rate and period over which the increased contributions from the Employer should apply. He submitted that there was no doubt that employers to whom this sub-rule applied would be seeking the longest possible period for their contributions and asking the Actuary to exercise his discretion in that way. This would not be a mechanistic determination.

34. He also relied on the use of the word "determines" elsewhere in the Rules where that clearly connoted the exercise of a discretion, such as in Rule 20 or Rule 22C which talks about the Trustee determining the allocation of surplus under (4) in circumstances where (2) and (3) have referred expressly to the Trustee exercising a discretion.

35. Mr Green KC submitted that Atos' interpretation of Rule 21 was commercially unrealistic. Their mechanical calculation approach would place the Actuary in the absurd position of being required to set contributions or benefits to make good the shortfall when he knew that it would have no such effect, indeed would have the opposite effect. The ultimate absurdity is that their approach would leave the last Active Member having to bear 40% of the entire shortfall, which cannot have been the intention of those who established the RPS in 1994. This approach was divorced from reality, adopting the words of Warren J in *The PNPF Trust Company Ltd v Taylor* [2010] EWHC 1573 (Ch); [2010] Pens. LR 261 at [685] in cavilling at a recovery plan that would have increased contributions by Active Members that would have driven them out of the scheme: exactly what would occur here if Atos' construction were correct. The construction which mandated future service benefits being extinguished altogether under Rule 21(1)(iv) whilst Active Members were having to continue to make substantial contributions is unreal. The Active Members would simply opt out as Atos accept.

36. In relation to Rule 3B, Normal Contributions of Members, Mr Green KC pointed out that because, even after deduction of 1.5 times the basic state pension, Section Pay was always going to be more than twice Pensionable Pay, it was (a)(i)(I) which applied i.e. contributions at 40% of the Future Service Joint Contribution Rate i.e. the normal long term funding rate. He also pointed out that in practice the Actuary aligns (a)(i)(I) and (ii) in running the scheme. (a)(iii) is determination by the Actuary of a rate in respect of the Member under Rule 21 which is obviously referring to Rule 21(1)(ii) which deals with contributions. (b) was clearly a reference to agreement between the Trustee and the Designated Employer under Rule 21(1) stem.

37. Turning to the issue of protection, Mr Green KC asked the Court to note that, under Schedule 11 para 6 of the Railways Act 1993, the Secretary of State could make an order to protect the interests of protected persons in respect of their pension rights. Under para 6(3), "relevant pension rights" included pension rights acquired under the BRPS and pension rights acquired during employment by Atos under the RPS and those rights were not qualified by any provision that they should be "no less favourable" than under the BRPS. Para 7 provided that, without prejudice to the generality of para 6, such an order could impose on an employer of a protected person duties with respect to, inter alia, the making or refunding of contributions.

38. The Protection Order was the order in question. When Article 7(1) referred to "any person mentioned in paragraph 7(2)" of Schedule 11, that included Atos as employer of protected persons. In relation to the construction of Articles 5 and 7 of the Protection Order, Mr Green KC had ten points:

(1) There is no question but that the Protection Order was considered as providing something in addition to the Pension Trust, otherwise it would not have been necessary.

(2) There was no need for the Protection Order to duplicate the contribution obligations on the Employer under Rule 3A so it was imposing an additional obligation.

(3) Article 7(1) imposes a duty on the Employer alone to contribute in an amount sufficient to provide for the benefits specified in Article 7(2) after account is taken of Active Member contributions. Thus it imposes an obligation supplementary to the Employer's Rule 3A obligations.

(4) Article 7(1) imposed this obligation on the Employer not the Actuary, contrary to the submission in Atos' skeleton argument that it was concerned with the actuarial process.

(5) Article 7 cuts in after Rule 21 has done its work.

(6) Atos' point about shortfall-induced flex in the benefits under the scheme is of no relevance to the Article 7 obligation on the Employer. What Article 7 provides for cannot be discounted on the basis that at some point in the future Rule 21 may apply and impact the benefits. They are not ephemeral but have to be treated as fully fledged rights.

(7) The Employer contribution obligations under Article 7(1) are a Protected Person counterpart to what is now provided for in Rule 21(1)(iii) which imposes a potential balance of cost liability on the Employer when there are no longer any Active Members. There is thus nothing inherently objectionable in a balance of cost liability under this scheme. There was also such a balance of cost liability under Article 7(4) where there was a transfer to another occupational pension scheme.

(8) Atos make the point that the Protection Order preceded by a few years the coming into force of the Minimum Funding Requirements ("MFR") in the Pensions Act 1995 which had been recommended by the Goode Committee but that Articles 7(1) and (2) were made with the forthcoming MFR provisions in mind. Mr Green KC did not dispute this, but made the point that unlike the MFR provisions, Article 7 is not prescriptive of the Actuary's solvency calculation. It is a matter for him how he calculates the sufficiency of assets under Article 7(1). In any event, he submitted that this point was really against Atos because under the MFR provisions in a case of serious shortfall all the contribution liabilities are placed upon the employer unless the trustee agrees otherwise. This point was clearly made by Warren J at [703] to [706] of his judgment in the *PNPF* case.

(9) In relation to the "no less favourable" point, that was a floor not a ceiling. Merely because the RPS contained no less favourable pension rights than the BRPS, it did not follow that either the RPS or, *a fortiori*, the Protection Order, did not confer more

favourable pension rights than the BRPS. In any event, even on Atos' case Rule 21(1) itself is a more favourable provision than under the BRPS because of the 130% cap and the fact that under (iv) only future service benefits of Active Members can be reduced, neither of which constraints was present in Rule 45(5) of the BRPS. Mr Green KC submitted that the "no less favourable" point was a red herring.

(10) Atos in their skeleton sought to make much of the shortfall-induced flex of benefits point, even going so far as to describe the benefits as flawed assets. Mr Green KC drew attention to the definition of flawed assets in Professor Goode's *Commercial Law* in the section on restrictions on the right to withdraw deposits from a bank and submitted that this was of no possible relevance to the present case. Unlike the bank depositor there, in the case of the RPS a member can at any time call for the transfer of his accrued benefits to another scheme and what is transferred is those accrued benefits which are fully vested assets. The fact that Rule 21 might operate in the future does not detract from that position. In the event, Mr Spink KC eschewed reliance on the concept of flawed assets in his oral submissions.

39. On the basis of those ten points, Mr Green KC submitted that it was perfectly plain from the wording of Article 7(1) and (2) that the provision was imposing a sufficiency of funding obligation on the Employer in the case of a Section where there is a Protected Person with relevant pension rights and that obligation was intended to be met where there was a Rule 21 Shortfall. Furthermore, the provision has a knock-on effect in relation to Unprotected Persons. Since the Atos Section is unsegregated within itself between Members who are protected and those who are unprotected (because of Atos' commercial choice to admit all employees to a single section), the funding obligation imposed on the Employer by Article 7(1) and (2) to ensure Protected Persons' benefits are 100% funded also entails 100% funding of Unprotected Persons' benefits, since otherwise the funding of Protected Persons' benefits will be diluted by a proportion thereof having to be allocated to and shared with Unprotected Persons' benefits. This was the submission of Christopher Nugee QC in the *PNPF* case accepted by Warren J at [162] to [170] and [186]. The point was not disputed by Atos. Mr Green KC pointed out that of the 1,096 Members in the Atos Section, a total of 677 were Protected Persons.

40. Mr Green KC also submitted that Article 7(1) and (2) applied to all Members of the scheme irrespective of whether they are Active Members who may have a shared cost obligation or pensioners or deferred members who no longer have a shared cost obligation. Shared cost does not come into the obligation under the provision. The sufficiency of funding obligation on Atos as employers was imposed in respect of the pension rights which have accrued and pension rights which are accruing. The trigger for the application of Article 7(1) is that there are Protected Persons in the scheme but the sufficiency of funding obligation then applied to all Members.

41. He submitted that the closing words of Article 7(1) referred to the Employer making contributions which were not less than the amount which, in the opinion of the Actuary, shall be sufficient to make provision in respect of those pension rights, having taken account of all relevant matters, including the resources of the Atos Section and any employee contributions. This pointed to this provision coming into effect after the operation of Rule 21(1)(ii). Mr Green's alternative case was that it came into effect after the operation of Rule 21(1)(iv).

42. Mr Green KC also submitted that Article 7(4), which dealt with a situation where pension rights were transferred out of the Atos Section into another occupational pension scheme, was imposing a balance of cost obligation on the Employer if the transfer value actuarially is not sufficient to provide for the relevant pension rights which are protected.

43. He submitted that Article 7(5) was an important provision in the context of Rule 21 because its effect was that the Trustee could not exercise any power vested in it to increase the contributions or reduce the benefits of protected persons under Rule 21(1) stem or reduce the benefits of protected persons under the first limb of Rule 21(1)(iv) unless the Actuary has advised that such increase or reduction may or should be made, which was a clear indication that the Actuary had a power exercisable in his judgment and discretion. It was only consistent with that discretion under Article 7(5) that the Actuary had a similar discretion when it came to exercising his own powers under Rule 21(1)(ii) or the second limb of Rule 21(1)(iv).

44. In support of the case that the Actuary had such a discretion, Mr Green KC submitted that Rule 21(1)(iv) did not distinguish between cases where the remaining post-Rule 21(1)(ii) shortfall is greater than the value of future service benefits and cases where the value of future service benefits is greater than the remaining shortfall and yet Atos seemed to accept that the Actuary had a discretion in the latter situation. Furthermore, it was clear that the first limb of Rule 21(1)(iv) conferred a discretion on the Trustee and the Designated Employer to agree to a reduction of future service benefits calculated on a reasonable basis. It was also clear that they might agree that no reduction in future service benefits or only a limited reduction falling short of the whole of the remaining shortfall was warranted. The second limb was expressly conferring power on the Actuary as to the determination of the basis of any reduction in the absence of an agreement under the first limb. This was a single power whose operation was not qualified in any way. It was accepted by Atos that it conferred a discretion when the value of future service benefits exceeded the remaining shortfall, but that discretion was denied in any other case. Mr Green KC submitted that this construction of Rule 21(1)(iv) was untenable.

45. In relation to Article 5 of the Protection Order, it had two limbs. Under limb (a), the Employer could not prevent a protected employee from participating in the Atos Section of the RPS and under (b) the Employer could not prevent a protected employee from acquiring relevant pension rights under the Atos Section which are no less favourable than the relevant pension rights which he had under his designated scheme i.e. the BRPS. Mr Green KC submitted that the prevention prohibited by (a) must encompass not only initial participation (which under Schedule 11 para 1(1) of the Railways Act 1993 means active membership) when the Atos Section was set up, but continuing participation thereafter for the whole period that the employee had protected status.

46. Limb (b) was making the point that, even if the Employer had not prevented participation in the Atos Section under (a), he could not sidestep (a) by making amendments to the Atos Section which obstructs continuing enjoyment or accrual of no less favourable pension rights than under the BRPS.

47. Mr Green KC accepted that Article 5 was now marginal in relation to Rule 21(1) because Atos accepted that the 130% cap should not be lifted. However, it would apply to prevent the Employer or, for that matter, the Trustee, from preventing participation of protected persons in the scheme by engineering opt out, such as was happening here.

48. On behalf of Atos, the central submission as to the construction of Rule 21(1) by Mr Andrew Spink KC was that, contrary to the Trustee's submission, it did not give the Actuary the wide discretion alleged but required him to calculate the contributions on a 60:40 basis (subject to the 130% cap) and the reduction of benefits so as to make good the shortfall in full. He submitted that if the Actuary had the discretion for which the Trustee contends, it follows as night follows day that the shortfall will not be made good either at the Rule 21(1)(ii) stage or the Rule 21(1)(iv) stage, which was contrary to the requirement to make good the shortfall. Mr Spink KC submitted that the provisions of Rule 21(1), which he described as a "waterfall", were intended to ensure that any shortfall was made good in full.

49. The problem with the Section was that it was closed to new entrants in about 1999, so that fewer and fewer Active Members have to share the burden imposed by the scheme of making contributions or facing a reduction in their benefits, in order to fund the past service benefits accrued by them and by other Members, in so far as the assets of the scheme do not permit that to happen. Mr Spink KC described this as a built-in ticking timebomb whereby the reduction in benefits under (iv) would lead to all remaining Active Members opting out, so that Rule 21(1)(iii) was engaged. Although Mr Spink KC submitted that this would all happen at the same time as Mr Green KC had accepted, Mr Green KC confirmed that he had not accepted that Rule 21(1)(iii) would cut in automatically when the Active Members all opted out, but said that there would be a delay with the matter being dealt with at the next valuation. That was a point on which Mr Green KC elaborated in reply, as summarised below.

50. In relation to the correct construction of Rule 21(1), Mr Spink KC submitted that the agreement between the Designated Employer and the Trustee "to make good the shortfall" in the stem, was an agreement which would make good the shortfall in full. If no agreement is reached, the alternative is that the waterfall provisions in (i) to (iv) apply, which must achieve the same objective of making good the shortfall in full. It is not good enough if the arrangements agreed attempt to make good the shortfall, but without any guarantee of success. He submitted that the existence of a shortfall was a matter of objective fact which did not require the Actuary to form a separate opinion from his valuation and calculations. The shortfall is the output of the valuation process. It arises if all expected calls on the fund from time to time in the future exceed the present and future assets, so that unless there is some corrective action, the fund will run out of money while still having liabilities for future benefits. Making good the shortfall means stopping the fund from being projected to run out of money in that sense, which Mr Spink KC submitted could be achieved by two measures: increasing contributions which will increase the value of future assets or reducing future service benefits, reducing the value of future benefits or both. Doing one or the other or both will bring the value of present and future assets into balance with the value of future benefits, thereby making good the shortfall.

51. Mr Spink KC accepted that the determination by the Actuary of whether the remaining shortfall (after any application of (i)) was "trivial" at the outset of Rule 21(1)(ii) involved the exercise of his professional judgment. Assuming the shortfall is non-trivial, (ii) then requires the contributions from the Employer to "revert" to 1.5 (i.e. the 60:40 split) because at the previous valuation the Employer may have agreed to pay at a greater rate than 1.5 times the Active Members' contributions. The sub-Rule then provides that contributions "shall be increased…as determined by the Actuary". Mr Spink KC

submitted that "determination" in that case meant determination of the amount of increase required to make good the shortfall- in other words, to meet the objective set out in the stem.

52. The increase in contributions is limited by the 130% cap "unless the Designated Employer agrees to a higher rate." Mr Spink KC submitted that this meant unilateral agreement by the Employer and did not require any agreement or consultation with the Trustee or the Actuary, other than for the Actuary to identify that, unless the cap is lifted, the shortfall will not be made good by an increase in contributions. He submitted that any decision to lift the cap was a difficult one both for Atos and for the Active Members whose contributions would also increase in the 60:40 ratio.

53. On the assumption that the cap is not lifted and the contributions are not sufficient to make good the shortfall to a non-trivial extent, then Rule 21(1)(iv) comes into play. Mr Spink KC submitted that because Rule 21(1) was a waterfall or cascade the purpose of which is to make good the shortfall in full, once there is a non-trivial remaining shortfall after Rule 21(1)(ii) has been applied, the provisions of Rule 21(1)(iv) have to be applied so as to make good the shortfall in full by reducing the future benefits to do so, if necessary to zero. The Actuary will inform the Designated Employer and Trustee of the extent of the remaining shortfall. They may reach an agreement to make good the full amount of the shortfall under the first limb. The words: "calculated on such reasonable basis" mean reasonable in how the total amount of the shortfall is going to be spread among the Active Members and which part(s) of their benefits are going to be reduced. The word "reasonable" does not permit some reduction in the total amount of the shortfall. Mr Spink KC submitted that confirmation that the "reasonable basis" was focused on how the reduction in benefits to make good the whole of the remaining shortfall was applied between the Members was borne out by the additional words: "and which is consistent with Revenue approval", which is referring to the fact that the division between the Members has to be one approved by the Revenue. In terms of different ways in which an individual's benefits might be reduced, in relation to which any discretion arose, Mr Spink KC drew attention to the possibility of reducing the pension increase element to zero or a lesser sum (Rule 18A) or leaving the underlying pension accrual of 1/80 intact (Rule 5(2C)). Until the passing of the Finance Act 2004, Revenue approval of how benefits were shaped was required, but even after Revenue approval was swept away it was still the case post-2006 that certain steps were not permitted, such as that it is not possible to have pension increases remaining but the pension to which they attach reduced. He submitted that it was to such matters that the need for any calculation to be on a reasonable basis was directed.

54. If no agreement could be reached under the first limb, then the second limb, introduced by amendment, gave the Actuary what Mr Spink KC referred to as a tie breaker role. Before the second limb was introduced, if agreement could not be reached under what is now the first limb, there would have had to be an application to the Court to sort out the impasse and enforce the Trust. That has been swept away by the second limb which gives the actuary the same job as the Court would have had. Mr Spink KC submitted that such discretion as either limb gave went only to the shape of the reduction in benefits, not to the amount of the reduction required to make good the whole of the shortfall.

55. If the shortfall was not made good under Rule 21(1)(iv) because all the Active Members opted out, then Rule 21(1)(iii) came into play as a fallback. Mr Spink KC submitted that, as a matter of practical reality, that would always happen, since if the remaining Active

Members had no future service benefits because they were reduced to zero under (iv) and they were being asked to make significantly increased contributions under (ii), they will not want to stay in the scheme and will opt out. Rule 21(1)(iii) would then be engaged by an immediate further valuation and then there would be an employer balance of cost obligation. This was the fourth step in the waterfall which will inevitably be gone through and which will make good the shortfall.

56. In relation to Article 7(1) of the Protection Order, Atos' primary case was that it gives rise to no freestanding duty on Atos to fund, on a balance of cost basis, all of the shortfall which is not funded by employee contributions under Rule 21(1)(ii). Mr Spink KC submitted that the purpose of the Protection Order was to ensure that employees who had been in the BRPS continued, whatever occupational pension scheme they were in in the future, to have no less favourable rights than under the BRPS. All Article 7(1) was doing was saying that, where the Employer was under a duty to contribute under a scheme in which a protected person had pension rights, then an actuary had to be involved in assessing how much had to be paid by the employer. It so happened that under the RPS there was a scheme actuary, but that was not always so with schemes at the time the Protection Order was passed in 1994. He submitted that this had one eye on the impending legislation in the Pensions Act 1995 which created the role of scheme actuary and gave the scheme actuary significant responsibilities in all schemes to which it applied.

57. Atos were under a duty to make contributions if there was an agreement with the Trustee under Rule 21(1) stem and under Rule 21(1)(ii). Mr Spink KC submitted that, in each case, Article 7(1) required that an actuary was involved in ensuring the contributions were sufficient. However, he submitted that, until one got to Rule 21(1)(iii), there was no duty on the Employer to contribute to the entirety of the shortfall without employee contributions coming in either in increased contributions or reduced benefits. Where Rule 21(1)(iii) kicks in, it is clear what pension rights have to be sufficiently funded under Article 7(1) and (2): only past service accrued rights because there are now no Active Members and thus no further benefits accruing.

58. Whilst Mr Green KC's preferred case was that Article 7(1) kicked in after the Rule 21(1)(ii) stage, he saw the force of the alternative position that it kicked in after the Rule 21(1)(iv) stage and Mr Spink KC submitted that he was right to do so, because Article 7 was not creating some freestanding obligation independent of the Atos Section Rules that the Employer should pick up the entirety of the tab. Mr Spink KC submitted that the Article only applied once you had been through the waterfall provisions of the Rule, including Rule 21(1)(iii).

59. Mr Spink KC submitted that, even if Article 7(1) were to intervene after the Rule 21(1)(iv) stage because, for some illogical reason, a Member had not opted out despite future benefits being reduced to zero, so that Rule 21(1)(iii) did not apply because the benefits had been reduced in that way, under Article 7 you would only be looking at the sufficiency of contributions being made by the Employer in respect of pension rights under Article 7(2)(a) i.e. accrued rights, not accruing rights under (b), because by definition and by operation of the scheme, there are no rights accruing. In answer to a question from the Court as to whether, on this construction, Article 7 gave any more protection than under the scheme, Mr Spink KC said that it did not. It provided limited protection, only requiring that an actuary certify that the amount of contribution by the Employer pursuant to its duty under the scheme is sufficient. Whilst it was true that,

under Rule 21(1) of this scheme, there was already an actuary, that might not be the case under other schemes.

60. In support of his case as to the correct construction of Article 7, Mr Spink KC relied upon Article 4(3) which provides:

> "(3) For the purposes of this article, and articles 5 and 6, in making any determination as to whether any relevant pension rights in an occupational pension scheme are more or less favourable than any such rights in the designated pension scheme of the protected person in question (or, where the context requires, any other scheme) regard shall be had to the provisions of the schemes as a whole and the circumstances and manner in which that designated scheme permitted (or the other scheme in question permits or permitted) increases in contributions or reductions in accrued or accruing benefits."

61. He submitted that this contemplated that Article 4 schemes into which protected persons might be transferred might very well have rules under which shortfalls are to be met by increasing contributions payable by members or by reduction in benefits, including accrued benefits, because at that time in 1994, there was no statutory prohibition on taking away accrued rights. Indeed, the BRPS permitted the removal of accrued rights by agreement between the employer and the trustee.

62. In relation to Article 7(5), on which Mr Green KC placed considerable reliance, Mr Spink KC submitted that it had two parts of relevance. The first was a gateway provision: "is made in the circumstances and manner in which it could have been made under the designated scheme of the person." For that one had to go back to the BRPS and, specifically, Rule 45(5) and ask whether the trustee is trying to do something which was not permitted by the BRPS. If he is, then that is an end of it; the trustee cannot exercise those powers. If the gateway is satisfied, the second part was the advisory provision: "the scheme actuary has…advised the trustees that [the increase or reduction] may or should be made". Mr Spink KC submitted that this simply provided for the actuary to give actuarial advice as part of the process by which the trustee makes funding decisions. It did not give the actuary a power exercisable in his judgment and discretion or a power to tell the trustee how to exercise his discretion. Thus the provision does not alter the scope of the power given to the Trustee under Rule 21(1) stem or (iv).

63. If anything, he submitted that, properly understood, Article 7(5) told against the Trustee's construction of Rule 21(1) as giving the Trustee a discretion or power under the stem or (iv) to agree to only make good part the shortfall because of issues such as affordability or value for money. Under the gateway provision that power could not be exercised because the Trustee did not have any such power under Rule 45(5) of the BRPS which either required the Trustee to reach an agreement to make good the shortfall in full or not make an agreement, in which case the Rule proceeded to full contributions from employees and members. Not only was there no 130% cap, but there was no discretion in the trustee to ameliorate the flex in members' pension rights through potential reduction in benefits to meet anything less than the full shortfall. There was nothing in Mr Green KC's point that Rule 45(5) had a provision that the full amount of the shortfall had to be made up because "shall make good the shortfall in the following way" in Rule 21(1) had the same effect of requiring the shortfall to be made good in full.

64. In relation to Article 7(4), Mr Spink KC submitted that, whilst it imposed a balance of cost obligation on the Employer to top up, that was in relation to a scheme into which a protected person was transferred, not the existing scheme such as the Atos Section. Since this was not a case of transfer to another scheme the provision was simply not relevant.

65. Mr Spink KC returned to detailed issues of construction of Rule 21(1) later in his submissions. He emphasised his built in flex point, that the pension rights under the Atos Section are subject to increased contributions and reducing benefits in respect of accruing rights. He then made what he described as three takeaway points. First, the Rules were put in place through statutory provisions promulgated to give those who had been British Rail employees in pensionable service under the BRPS no less favourable rights. Second, the Rule was put in place in 1994 before the statutory funding overlay, the scheme funding legislation under the Pensions Act 2004. It cannot be said to have changed its meaning because of the statute. Third, Rule 21(1) needs to be able to function in a Shared Cost Section in which there are no protected persons. Atos could have set up a segregated Section for unprotected persons to which Rule 21(1) would apply, but the Protection Order would have no effect at all. Mr Spink KC submitted that his construction of Rule 21(1) provided a solution to making good the shortfall where the Protection Order did not apply, particularly after the amendment to introduce Rule 21(1)(iii) in 2006.

66. Mr Spink KC accepted that it did not really matter whether the Court adopted contractual or statutory principles of construction. He did not refer to or rely in his oral submissions on the extraneous materials which filled a number of the bundles before the Court other than the Government consultation in 1993 referred to below.

67. In relation to the meaning of "determine", he submitted that it was a sufficiently wide word to bear different meanings even within Rule 21(1), depending on the context. It may simply mean calculate or it may mean something broader with a discretion attached to it. The word itself does not provide an answer to the question whether there is a discretion. It all depends on the context. In many of the examples given by the Trustee of instances in the Rules where it is said "determine" connotes a discretion, that is obvious from the nature of the task the Actuary is given.

68. He submitted that in Rule 21(1), the Actuary has a number of matters to determine:

(1) In both (ii) and (iv), whether the remaining shortfall is trivial, which includes some discretion;

(2) The increase in contributions determined under Rule 21(1)(ii) up to the 130% cap, which he submitted was just a calculation.

(3) Determining the Employer's normal long-term funding rate which is needed to make Rule 21(1) work. That would have been already calculated as part of the actuarial valuation, which Mr Spink KC accepted involved discretion and judgment.

(4) Determination of the rate and period of increased contributions by the Employer under Rule 21(1)(iii), which he submitted does import some discretion but within confined parameters, because the Actuary has already determined what the total amount required to fund the shortfall is, so the discretion here is just as to how to divide up that global amount.

(5) The increase in contributions of the Employer "as determined by the Actuary" referred to earlier in Rule 21(1)(iii). Mr Spink KC submitted that this does not involve any discretion because the Actuary is targeting making good the shortfall in full, without any discretion to let the Employer off with a halfway house. This supports the case that when the same words were used in Rule 21(1)(ii) they had the same meaning and that determination was just calculation.

(6) Determination of the basis of reduction of Members' benefits under the second limb of Rule 21(1)(iv). Mr Spink KC submitted that the only discretion there was as regards the shape of the overall reduction.

69. Mr Spink KC submitted that the governing factor in relation to all these matters was the words at the end of Rule 21(1) stem: "the shortfall shall be made good in the following way", which connoted making good the shortfall in full. Accordingly the contrast which Mr Green KC sought to draw with the wording of Rule 18E, which referred expressly to meeting the full cost of discretionary benefits was simply wrong because, although the language was different, the meaning was the same. The words at the end of the stem meant the shortfall had to be met in full.

70. Mr Spink KC sought to answer the Trustee's point that the effect of Atos' approach would be that the shortfall was not made good at all because the Active Members would opt out, by submitting that Rule 21(1) requires the shortfall to be balanced at each valuation, which would be done by setting the future contribution rates and reduction in benefits at a value that will meet the liabilities going forward. In doing that exercise, you do not take account of what the Active Members will do after that has happened, on this hypothesis opt out, so that the shortfall has gone up. That is simply picked up at the next valuation.

71. In relation to the agreement of the Employer under Rule 21(1)(ii) to a higher rate than the 130% cap, Mr Spink KC disagreed with Mr Green KC's suggestion that the Employer can only agree this if there has first been a proposal from the Actuary for a higher rate. "[A]grees" was not being used in a binary sense in this provision. I should say immediately that I accept that the words "unless the Designated Employer agrees a higher rate" does not connote any requirement of prior agreement by the Actuary or, for that matter, the Trustee. The word "agrees" is used in the sense of a unilateral contract. However, at least as matters currently stand, the point is academic because Atos have neither agreed nor sought to exceed the cap.

72. So far as the reliance by Mr Green KC on the principles set out by Lord Hodge in *Barnardo's* and, in particular, the citation from Millett J in [16] are concerned, Mr Spink KC made two points. First, that the reasonable and practical effect of a pension scheme is a key element in construing it and second that, although Lord Hodge suggested that little weight should be given to certain matters as part of the admissible background, one still had to look at the circumstances of the particular scheme. He submitted that the RPS was not only temporally the successor to the BRPS, but effectively joined to it by statute in the various statutory provisions to which reference has already been made. In those circumstances, he submitted that the BRPS Rules had significant weight in the process of construction of the Atos Section.

73. In relation to commerciality, Mr Spink KC submitted that the commercial sense of provisions was to be tested by reference to the time when they were introduced and it was no help to look at supervening uncommerciality arising from some extraneous

reason. He submitted that this is what Mr Green KC was doing by relying on the figures produced by the Actuary today, when the Rule was drafted in 1994 at a time when the scheme was not in deficit. The idea that there might be a tiny number of Active Members because the scheme had closed to new entrants rather than there being natural wastage over time would not have been in the minds of the draftsmen. Mr Spink KC submitted that the Rules and the scheme as a whole were produced in 1994 after a long process of consultation between the Government, the BRB and the unions, so that the idea that the outcome for which Atos contended was uncommercial or unreal was far-fetched.

74. Mr Spink KC relied upon a post-White Paper consultation by the Government in 1993 headed Railway Pensions after Privatisation, at [12] and [13] of which in the section on Funding, it was stated:

> "12. The open schemes are 'Group Deferred Pay (Final Salary) Schemes'. Unlike many other pension schemes (including BR's closed schemes) which are 'Balance of Cost Schemes', BR as the employer does not undertake to provide specific amounts of benefit, although it does guarantee preserved benefits. BR's commitment is to pay a specified level of contribution which is currently set at 1½ times the level of members' contributions (which are set at 5% of 'Scheme Pay'), although BR at present enjoys a contribution holiday. (see Paragraph 15 below).
>
> 13. With the contributions from BR and the active members, the schemes themselves expect to be able to provide the specified levels of benefit laid down in their rules. BR's open schemes are thus unlike balance of cost schemes in which the employer effectively guarantees specified benefits whatever the cost."

75. Mr Spink KC submitted that it was always contemplated that, if there were a shortfall, members could potentially be significantly affected. He also drew attention to [26] and following, where it was set out that the Government's proposals were to create a hybrid of two approaches, first a joint industry scheme and second employers required to provide a broadly comparable successor scheme. He submitted that the intention was that the employees should get no less favourable rights than under the BRPS, but broadly comparable with the rights they had under the BRPS, whereas if the Trustee's construction of Rule 21(1) were right, what the employees actually got were significantly enhanced rights.

76. He submitted that this material was admissible, relying on *Craies on Legislation* 12th edition [27.1.11] to support the proposition that consultation papers such as this were clearly admissible as evidence of the legislative intent of legislation. If one were looking at the issue of admissibility through the prism of contractual construction and *Barnardo's* he relied on [10] of the judgment of Lord Hodge in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173:

> "The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to

> that objective meaning. In *Prenn v Simmonds* [1971] 1 WLR 1381, 1383H–1385D and in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen)* [1976] 1 WLR 989, 997, Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations."

Mr Spink KC submitted that the 1993 consultation paper did demonstrate objectively the genesis and aim of the transaction, using the expression used by Lord Wilberforce in *Prenn v Simmonds*.

77. In relation to the point about reasonable and practical effect, Mr Spink KC submitted that the Trustee's approach, that the Actuary had a discretion as to affordability across the Active Members, ran into the difficulty that what was affordable would differ widely according to the personal circumstances of individual Members of which the Actuary will have no personal knowledge.

78. Mr Spink KC dealt finally with Article 5 of the Protection Order which he accepted was fairly marginal in this case. The issue was whether, if the 130% cap were lifted, imposing contribution requirements so high that the Active Members opt out, that prevents a protected employee from participating in the scheme. He submitted that it did not for two reasons. First, participating in the scheme was looking at not being prevented from participation at the time a member joins the scheme, not later. When the Protection Order is referring to continuing to participate it can and does say so expressly, as in Article 11(1). He submitted that, second, if Atos raised the cap and as a result a member voluntarily opted out, that is an entirely recognised concept and potential consequence under the Rules, as expressly contemplated by Rule 21(1)(iii). Merely operating the Rules could not amount to a prevention of participation under Article 5.

79. In reply, Mr Green KC submitted that Atos' submission that, in effect, the BRPS and RPS were joined at the hip was simply wrong. The significance of the relationship between the BRPS and RPS was twofold. First for the "no less favourable" point: the RPS had to be no less favourable than the BRPS, which it was, so that point had been dealt with. Second, it was the designated scheme referred to in the first part of Article 7(5), what Mr Spink KC had called the gateway. Mr Green KC accepted that it was the gateway, but that did not begin to answer the point about the second part of Article 7(5), that the Article is conferring a substantive discretion on the Actuary to say whether something may or should occur.

80. In relation to the January 1993 Government consultation paper on which Mr Spink KC had relied, Mr Green KC pointed out that this was a document from very early days in the proposed privatisation. It was also 15 months before the letter of 31 March 1994 from Mr Montagu, the Deputy Secretary at the Department of Transport, which referred to an absolute solvency guarantee for pensioners and appended the first draft of the Protection Order which ultimately came into force on 31 May 1994, 17 months after the consultation. The consultation paper contained no hint of any of that and was describing the situation at an earlier stage. He submitted that the consultation paper was of no weight, even if it were admissible.

81. As for the suggestion referred to at [77] above that the Actuary could not express an opinion about affordability or value for money, Mr Green KC pointed out that the

Actuary clearly thought he could, as evidenced by his Note on Rule 21 of 24 November 2021 at [7.4], in which he said:

> "I calculate that, using a consistent process as that underlying the rates set out in paragraph 6.13 above, the resulting required member contribution rate would be around 50% of Section Pay. While this is lower than the rates set out in paragraph 6.13 above, it is at a level at which I would expect the vast majority of members to choose to cease participation, which in turn would mean that I would be unable to certify the Schedule of Contributions. This is because it is a level that I would not consider reasonable and would expect to be unaffordable and not value for money for most of the remaining active members of the Atos Section."

82. Mr Green KC submitted that, whilst it was true that each individual member was in an individual situation, when the Actuary is dealing with an occupational pension scheme and setting contribution rates, he is doing so globally by reference to an average cohort of employees. As I pointed out in argument, it is unlikely that within the cohort of employees under the Atos Section there will be a great disparity of wealth and, as Mr Green KC correctly submitted, an employee would have to be incredibly rich to be happy with losing 50% of his or her pay.

83. Mr Green KC then dealt with Rule 21(1)(iii) which, as he put it, was portrayed by Atos as the white knight which comes riding in to salvage Rule 21(1) and as something which provides a complete answer in relation to a regime which he described as manifestly non-comprehensive. He submitted that it did not. He asked the Court to note that Rule 21(1)(iii) was only referred to on a handful of occasions in Atos' lengthy skeleton argument with appendices. In each case, those references made the point that Rule 21(1)(iii) was not actually on point in relation to the present valuation of the Atos Section because there are Active Members. Mr Green KC pointed out that the sub-Rule was now being used to knock out the Trustee's case on the construction of Rule 21(1) and on Article 7. What was being said to the Court was that it did not need to worry and there would be no problem because there would be another Rule 21(1) valuation in short order and then Rule 21(1)(iii) would kick in.

84. However, he submitted that there was a big problem. He repeated the point he had made in opening that, on Atos' construction of Rule 21(1), although it was said that the whole purpose of the stem and the waterfall was to eliminate the shortfall, its construction did not address it at all but made it larger. Whilst mathematically the Actuary might make good the shortfall, in reality their approach has the opposite effect.

85. Mr Green KC submitted that there were good reasons why Atos had not raised Rule 21(1)(iii) before. First, its argument ignores the fact that the sub-Rule was not in Rule 21(1) until 2006 and the meaning of Rule 21(1)(ii) and both limbs of (iv), all of which have been in the Rules since the outset or later in 1994, did not change as a result of the introduction of Rule 21(1)(iii). Pre-2006, Atos' mechanistic interpretation of Rule 21(1)(ii) and (iv) would have led to a completely unaddressed and enlarged black hole in relation to the current Rule 21(1) shortfall because of opt out. In truth its argument still left that black hole in relation to the shortfall today. Mr Green KC noted that Mr Spink KC accepted that one could not use the MFR or Part 3 of the Pensions Act 2004 to construe Rule 21(1)(ii) and (iv). In relation to Mr Spink KC's point that Rule 21(1)(ii) and (iv) had to address the case of unprotected members, Mr Green KC made the point

that, on Atos' case, the black hole in relation to unprotected members existed between 1994 and 2006.

86. Furthermore, there was nothing in the introduction of Rule 21(1)(iii) in 2006 which disapplied Article 7 of the Protection Order, which was there from the outset for the benefit of protected persons and, on the basis of the so-called Nugee point, for unprotected persons as well, as Atos accept. As Mr Green KC submitted, in 1994, pretty much everyone who joined the RPS was a protected person, an ex-British Rail employee, and it was only over time that that became diluted. He submitted that it was remarkable that even though admission to the Atos Section closed in 1999, 677 out of 1,050 members are protected persons.

87. The second reason why Rule 21(1)(iii) had not been raised before was that its presentation as a necessary solution was simply wrong because from the creation of the Atos Section, the Active Members were almost exclusively protected persons for whom Article 7(1) was there to impose a balance of cost liability on Employers. Rule 21 and Article 7(1) had to be read together and Clause 7H of the Pension Trust made it clear that, in relation to protected persons, the Rules had to be operated in such a way as to comply with the Protection Order. Article 7 had as its origin para 7(1)(f) of Schedule 11 of the Railways Act referred to in [7] above. Whilst para 6(2) of Schedule 11 talked about a protection order securing that the protected persons' rights were no less favourable as a result of transfer, para 7 stated that the order may impose on the Employer duties in respect of, inter alia, the making of contributions and was not restricted to being no less favourable than under the BRPS.

88. Mr Green KC submitted that Article 7 has been there throughout since the outset of the RPS and it has at all times ensured that there is no black hole in relation to a given Rule 21(1) shortfall valuation where there are protected persons in the Section. He submitted that, in contrast, Atos' case, which did not give Article 7 its proper meaning and effect, involved there being a black hole until the next valuation, when the shortfall would be made up under Rule 21(1)(iii). Atos' approach was impractical, uncommercial and unrealistic because waiting until the next Rule 21 valuation will involve a very substantial time lag during which the existing black hole remains unaddressed. The Section funding will have got worse in the meantime because of opt out, so the black hole will be enlarged. The next valuation will be some way off because Clause 6B of the Pension Trust provides that, before preparing the valuation, the Actuary has to consult with the Trustee and the Employers on the basis, methodology and assumptions for the valuation. The requirement to consult means a proper consultation, not just paying lip service. In that context, the scope for the Employer to delay the day of judgment under Rule 21(1)(iii) is substantial. The fact that the Trustee and Atos have not been able to reach an accommodation about Rule 21 matters since 2016 is an indication of the impossibility of reaching conclusions about the valuation.

89. Furthermore, this would in any event not be a short process. Even if a Clause 6B valuation were agreed, you do not proceed straight to Rule 21(1)(iii) but go first to Rule 21(1) stem which provides for a six month period over which the Trustee and the Designated Employer seek to come to some sort of agreement as to how they are going to meet the shortfall. Only then, assuming no such agreement, would you get to Rule 21(1)(iii) which then provides for another consultation process. Mr Green KC submitted that a Rule 21(1)(iii) resolution would be potentially several years down the line. In contrast, on the Trustee's case, opt out is not forced on the Active Members but Rule 21(1)(ii) and (iv)

are operated fairly and reasonably with Article 7(1) cutting in after the operation of Rule 21(1)(ii) or Rule 21(1)(iv) so as to deal with the current Rule 21 shortfall. Accordingly, through Article 7(1) providing the solution to the non-comprehensive nature of Rule 21(1), the Trustee's interpretation delivers that solution in one valuation cycle.

90. Mr Green KC submitted that the contention advanced by Atos in relation to Article 7 that it was only adding to Rule 21 that the Actuary was going to certify the sufficiency of the contributions was obviously wrong when one considered Article 7(7) which provided that the Actuary shall provide to the Trustee a schedule which specifies the contributions that are required. This was a freestanding provision and Article 7 added to Rule 21(1) rather than, as I said in the course of argument, providing for a vague certification process which was implicit in Rule 21(1) in any event.

Discussion

91. The Questions which the Court is asked to resolve turn on the correct construction of the Atos Section Rules, particularly Rule 21(1), and of the Protection Order, particularly Article 7. So far as the approach which should be adopted to the construction of the Rules is concerned, I accept Mr Green KC's submission that the correct approach is that set out by Lord Hodge JSC in *Barnardo's* at [13] to [16] quoted at [20] above. I also agree with Mr Green KC that, in construing the statutory provisions such as the Protection Order, the Court should adopt essentially the same approach. As I have said, although Atos sought in its written submissions to rely upon a whole raft of material which preceded the Protection Order, ultimately in oral submissions Mr Spink KC only placed any emphasis on one document, the 1993 Government consultation paper. However, I agree with Mr Green KC that that document was at an early stage of the process, some fifteen months before the first draft of the Protection Order was produced and therefore of little or no assistance in the construction of that Order, even if the document was admissible.

92. In relation to Rule 21(1), it seems to me that the starting point is to consider whether the Rule provides an exhaustive and comprehensive regime for eliminating any shortfall, as Atos contend. In my judgment, Mr Green KC is right that it does not. As originally drafted (in the Schedule to the RPS Order which came into effect on 31 May 1994 before the Atos Section was established) the Rule contained neither what is now Rule 21(1)(iii) nor the second limb of what is now Rule 21(1)(iv). The former was only introduced in 2006 and the latter in October 1994. Clearly, therefore, as originally drafted, the Rule was never intended to be exhaustive.

93. Consideration has to be given first to whether, under Rule 21(1) stem, the Designated Employer and the Trustee could agree, within six months of the valuation, arrangements to make good the shortfall. Although Mr Spink KC sought to argue that "make good" here meant the same as the wording of Rule 45(5) of the BRPS, the relevant part of that Rule, set out at [32] above, was in materially different terms, talking of determining the rate of increase of contributions: "<u>as is necessary</u> to make up such shortfall" (my emphasis) which is consistent with making up the shortfall in full whereas "arrangements to make good the shortfall" seems to me consistent with the arrangements agreed not being such as would necessarily eliminate the shortfall completely. If it had been intended that Rule 21(1) should operate to eliminate the shortfall in full, the provisions could and would have used the words "in full" as for example in Rule 18E. Furthermore, the reference in Rule 21(1)(ii) to "the remaining shortfall" supports the proposition that the arrangements agreed may not have eliminated the shortfall.

94. In seeking to agree such arrangements, the Employer can act in its own interests, as Mr Green KC accepted, subject to its obligations of good faith towards its employees. The Trustee, on the other hand, owes a fiduciary duty to the Members of the Scheme and, in my judgment, that duty must include an obligation, in considering whether to increase contributions or reduce benefits, to have regard to issues such as affordability, value for money and collectability. It is also to be noted that any agreement made between the Employer and the Trustee can be on a basis of apportionment other than 60:40, which demonstrates that arrangements to make good the shortfall do not have to be on some immutable 60:40 shared cost basis, as Mr Spink KC's argument seemed to suggest.

95. In the absence of such an agreement, the closing words of the stem provide: "the shortfall shall [so far as practicable] be made good in the following way" and (i) to (iv) (originally without (iii) or the second limb of (iv)) then follow. As already noted, it is accepted by Atos that the words: "so far as practicable" are to be read into that provision. In my judgment, once they are read in, that necessarily involves the conclusion that Rule 21(1) cannot be an exhaustive regime for eliminating the shortfall, since one of the ways in which it will not be "practicable" to do so is if issues arise as to affordability, value for money and collectability which, if ignored, will simply lead to Active Members opting out, so that the shortfall is not addressed at all or only to a limited extent. In other words, the words: "so far as practicable" connote that the Actuary has a discretion as to what practicable steps can be taken to reduce the shortfall as much as possible which necessarily involves consideration of the issues of affordability, value for money and collectability.

96. Leaving aside Rule 21(1)(i) which deals with Preserved Benefits and which, having been operated in the past, is no longer relevant, if there was no such agreement as is referred to in the stem and/or any remaining shortfall is non-trivial, then Rule 21(1)(ii) kicks in. In my judgment, the words: "contributions…shall be increased…as determined by the Actuary" do give the Actuary a discretion as to whether to increase the contributions at all and, if so, by how much and do not simply require a mechanical mathematical calculation as Atos contend, for three related reasons. First, as I have said, the inclusion of the words: "so far as practicable" immediately before (i) to (iv) connote a discretion for the Actuary in relation to all these following provisions as to what increases or reductions are practicable in the sense of likely in practical terms to reduce the shortfall, which necessitates consideration of issues such as affordability and value for money.

97. Second, I agree with Mr Green KC that the use of the words "as determined by the Actuary" import a determination which involves the exercise of judgment and discretion. If it had simply been intended that the Actuary engage in a mathematical calculation the provision could and would have said: "the contributions shall be increased by the Actuary." The use of the words "shall be increased" actually used in the sentence are qualified by "as determined by the Actuary". The discretion given to the Actuary includes a discretion not to increase contributions at all: see *Britvic* referred to in [28] above.

98. Furthermore, the word "determine" in the last sentence of Rule 21(1)(ii): "The Actuary shall determine the rate and period over which the increased contributions shall apply" etc clearly connotes the exercise of discretion and judgment as to the rate and period. Whilst there is some force in Mr Spink KC's point that the word "determine" used in other provisions in other contexts may not mean the same as in Rule 21(1), it is inherently unlikely that the word "determine" or "determined" means two different things when used in the same provision in close juxtaposition.

99. Third, Atos' case that "as determined by the Actuary" means no more than a calculation leads to a thoroughly uncommercial result which would not eliminate the shortfall: quite the reverse. Given the 130% cap which was not present in Rule 45(5) of the BRPS, then, unless the Employer agrees a higher rate, as Mr Green KC said, increasing contributions even to the 130% maximum would only ever make a limited inroad into a shortfall, as is demonstrated in the present case by the assessment of the Actuary that, as matters now stand, increasing contributions up to the 130% cap would only reduce the £18.1 million deficit by £0.9 million. However, if the Actuary were simply required to make a mechanical calculation, because as a matter of arithmetic increasing contributions up to the 130% cap would reduce the shortfall, albeit only to that limited extent, no account would be taken of whether the Active Members could afford the increase or whether it would give them value for money. The academic arithmetic stepping-stone, as Mr Green KC described a mechanical calculation of that kind, would in all probability lead to the Active Members opting out rather than accept an increase up to the cap. In those circumstances, far from eliminating the shortfall, the Atos approach would lead to there being no actual reduction in the shortfall at all. Accordingly, the mathematical calculation construction of Rule 21(1)(ii) for which Atos contend is thoroughly uncommercial and does not, in the words of Millett J in *Courage*, give reasonable and practical effect to the scheme.

100. Even if the Active Members did not opt out at that stage and there were an increase in contributions, but only a limited reduction in the shortfall as a consequence, so that the shortfall was non-trivial, then what is now Rule 21(1)(iv) kicks in. Under that provision as originally drafted, then the shortfall would only be reduced further if there was an agreement to reduce benefits under the first limb of what is now Rule 21(1)(iv). In my judgment that first limb does confer on the Trustee a discretion as to whether to agree a reduction in benefits and if so on what terms. It contemplates the taking of actuarial advice which could and probably would include advice to the effect that any reduction in benefits would lead to Active Members opting out because there would be no incentive for them to have accepted an increase in contributions (which they would have done on this hypothesis) if there were no benefits going forward. The Trustee would be entitled to take account of such advice (indeed he would be bound to do so in view of his fiduciary duty to the Members) and to exercise his discretion not to agree any reduction in benefits. The existence and scope of that discretion is unaffected by the fact that Mr Spink KC is probably right that the reference to calculation on a reasonable basis consistent with Revenue approval was concerned with how any reduction is going to be allocated between the Members.

101. Under the provision as originally drafted, if there were no agreement between the Trustee and the Employer to reduce the benefits under what is now the first limb of (iv), then the balance of the shortfall would remain. This is where Article 7 of the Protection Order would come into play. I will deal with the correct construction of that provision later in this judgment, but for the present it suffices to say that Mr Green KC was correct to submit that it was intended to provide protection to protected persons over and above that provided by the Pension Trust and it was imposing contribution obligations on the Employer beyond those imposed by the RPS itself.

102. What is now the second limb of Rule 21(1)(iv) was added to what was then Rule 21(1)(iii) by an amendment which came into force at the beginning of October 1994. In my judgment, the words of that second limb: "the Actuary shall determine the basis of

reduction of Members' benefits in respect of future service and shall notify the Trustee and the Designated Employer of his determination" connote a discretion in the Actuary as to whether to reduce the benefits and, if so, by how much, essentially for the same reasons, mutatis mutandis, as I gave at [96-97] and [99] above in relation to Rule 21(1)(ii).

103. First, the provision overall only contemplates making good the shortfall "so far as practicable" which, as I have said, connotes a discretion in the Actuary in relation to the following provisions as to what increases or reductions are practicable in the sense of likely in practical terms to reduce the shortfall. That necessitates consideration of issues such as affordability and value for money. Second, the words of the second limb and, specifically, the reference to the Actuary "determining" the basis of reduction of Members' benefits, import a determination which involves the exercise of judgment and discretion. If it had simply been intended that the Actuary engage in a mathematical calculation, the provision could and would have said: "the Members' benefits shall be reduced by the Actuary." The discretion given to the Actuary includes a discretion not to reduce benefits at all: see *Britvic* again. It is also striking in that context that, as referred to in [44] above, Atos appear to accept that if the value of future service benefits were greater than the remaining shortfall, then the Actuary would have a discretion in relation to the reduction in benefits. However, as Mr Green KC submitted, it is difficult to see any tenable basis for the contention that the discretion should be available in some situations but not in others.

104. Third, Atos' case that "shall determine the basis of reduction" involves a mathematical calculation which, as Atos accept, would mean that the future benefits would be reduced to zero, leads to a thoroughly uncommercial result which, as Mr Green KC submitted, is divorced from reality and certainly does not give reasonable and practical effect to the scheme. Were the Actuary to adopt that mechanical approach, the Active Members would inevitably opt out, even if they had not already done so as a consequence of an increase in contributions up to the 130% cap under Rule 21(1)(ii). The consequence would be that whilst, theoretically or on paper, the increase in contributions and reduction of future benefits to zero would eliminate the shortfall, in reality it would not be reduced to any appreciable extent, let alone eliminated. Mr Spink KC accepted that this was the consequence of what he submitted was the correct construction of these provisions, but submitted that the answer was that at this point Rule 21(1)(iii) came into effect. I will consider the various arguments in relation to that provision when I have considered the correct construction of the Protection Order and, specifically, Article 7.

105. The background to the Protection Order is set out at [4] and [9] above. It was clearly intended to provide protection to protected employees in addition to that provided by the Pension Trust and the RPS: hence the terms of Clause 7H of the Pension Trust which made it clear that, if the terms of the Pension Trust or the RPS Rules did not satisfy the requirements of the Protection Order, they were to be operated in such a way as to ensure they did comply with the Order. None of that would have been necessary if the Protection Order was not providing protection in addition to that provided by the Pension Trust and the Rules. The Protection Order was the Order contemplated by para 7 of Schedule 11 of the Railways Act 1993, which expressly contemplated that the Order could impose on the employer of protected persons a duty to make contributions.

106. It is clear that Atos is the Employer of protected persons within the meaning of para 7(2) and that Atos was under a duty pursuant to Rules 3A and 21 to make contributions to the

RPS, an occupational pension scheme in which the protected employees had relevant pension rights, so Atos is caught by Article 7(1). The pension rights which are protected under Article 7(2) are both accrued and accruing rights (in other words both the accrued rights of all Members and the future rights of Active Members). The contributions which Atos is obliged to make under Article 7(1) are to be: "not less than such amount as, in the opinion of the scheme actuary, shall be sufficient to make provision in respect of the rights specified in paragraph (2) after having taken into account all of the relevant matters, including the resources of the occupational pension scheme or the relevant section of it and any employee contributions."

107. This is clearly a duty above and beyond that under the scheme itself and it is a sufficiency of funding or balance of cost obligation which will be to cover whatever amount in the opinion of the Actuary is sufficient to make provision for those pension rights, having taken account of the resources of the scheme (i.e. the existing shortfall) and any employee contributions, which suggests, in accordance with Mr Green KC's primary case, that this provision kicks in after Rule 21(1)(ii), rather than after Rule 21(1)(iv), although ultimately it may not matter when it kicks in, given that it is a sufficiency of funding or balance of cost obligation imposed on the employer. It is to be noted that the obligation is one to eliminate the shortfall and that it is not in any way qualified, in the sense that it does not say that the Employer is to protect the relevant pension rights so that they are no less favourable than the rights under the BRPS. It is irrelevant that the effect of the operation of the provision may be to give the Members greater protection or greater rights than they would have had under the BRPS. In my judgment, Mr Spink KC's attempt to limit the protection provided by Article 7 by reference to the BRPS is misconceived.

108. The other matter to be noted is that, because Atos did not set up separate sections under the RPS for protected and unprotected employees, the protection provided by Article 7 extends to all the Members whether or not they were protected persons. This the so-called Nugee point accepted by Warren J in *PNPF* which Mr Spink KC accepted must follow in the present case.

109. That the Article imposes the sufficiency of funding or balance of cost obligation which I have described is clear from the wording of Articles 7(1) and (2) themselves but the correctness of that construction is also borne out by other provisions within the Article. Article 7(4) imposes a similar balance of cost obligation on the Employer if the relevant pension rights were transferred from the RPS to another occupational scheme. Article 7(7) demonstrates that the Article imposes a freestanding obligation on the Employer in that, where the Actuary has given his opinion under Article 7(1) that the Employer should make up the funding required for the scheme, he will provide the Trustee with a schedule specifying the contributions required and when to meet the liabilities of the scheme. I agree with Mr Green KC that this is completely inconsistent with Mr Spink KC's argument that Article 7 was only providing the limited protection that an actuary had to be involved and to provide certification of amounts due.

110. In my judgment, it is impossible to construe the clear words of Article 7(1) and (2) in that narrow way as providing merely for the involvement of an actuary at a time in 1994 when it was not common for actuaries to be involved. Whatever the historical position was, the RPS and its various Sections, including Rule 21 dealing with shortfall, provided for the involvement of the Scheme Actuary throughout. Whilst it is true that protected persons might have ended up in other occupational pension schemes which did not involve an actuary, the RPS was clearly the principal scheme to which the Protection

Order, which came into effect on the same day, related. It follows that, on Atos' case, the Article does not in reality provide the vast majority of protected employees who transferred from the BRPS to the RPS with any additional protection over and above that provided by the RPS itself. That construction is completely unsustainable.

111. Equally unsustainable is Mr Spink KC's argument that Article 7(1) somehow only kicks in after Rule 21(1)(iii) has operated, in other words Article 7(1) only applies to past service accrued rights because there are no longer any Active Members, as they have all opted out. This construction would in effect give the Members no greater rights and protection than under Rule 21(1)(iii). However, it ignores that Article 7 and the protection it provides came into effect in 1994, twelve years before Rule 21(1)(iii) was introduced. Clearly, between 1994 and 2006 the Article kicked in either after Rule 21(1)(ii) or Rule 21(1)(iv), there being no provision equivalent to Article 21(1)(iii) at that time. It is difficult to see how when Article 7 kicked in could have changed when that provision took effect in 2006, without some amendment to the words of the Article, which did not occur. Furthermore, the fact that the pension rights protected under Article 7(2) include pension rights accruing under current participation in the scheme is a very clear indication that Article 7(1) was intended after 2006 to kick in whilst there were still Active Members in the scheme, not after they had all opted out, which was when Article 21(1)(iii) might apply.

112. Mr Spink KC's reliance on Article 4(3) is equally misplaced. Article 4 is about the obligation to provide a scheme into which pension rights would be transferred from the protected person's designated scheme, i.e. the BRPS. It says nothing at all about the Employer's obligation to make contributions under Article 7. It is also to be noted that the wording of Article 4(3) contemplates the possibility that the pension rights in the new scheme may be more favourable than under the BRPS, a further indication that the "no less favourable" concept is a floor not a ceiling.

113. So far as Article 7(5) is concerned, its effect is that the Trustee cannot increase Members' contributions or reduce their benefits unless the increase or reduction is made in the circumstances and manner in which it could have been made under the BRPS <u>and,</u> within the six months prior to the increase or reduction, the Actuary has advised the Trustee that the increase or reduction may or should be made. In my judgment, that second limb underlines that the Actuary is exercising a discretion or judgment as to whether or not Members' contributions should be increased or their benefits reduced under Rule 21(1) which confirms the correctness of the Trustee's case as to the discretion conferred on the Actuary under Rule 21(1)(ii) and (iv). The Actuary would not be giving advice as to whether the contributions may or should be increased or the benefits reduced if his determination under Rule 21(1) were the limited one of a mathematical calculation for which Atos contends.

114. Given that the correct construction of Article 7(1) and (2) is to impose on Atos a sufficiency of funding or balance of cost obligation to protect the accrued and accruing pension rights of the Members (whether deferred Members, pensioners or Active Members and both protected and unprotected) by eliminating the shortfall if that is what in the Actuary's opinion is required, it is clear that Rule 21(1)(iii) is not the panacea or "white knight" which Atos suggests, but a provision of last resort. It would only become relevant in the event that there were no longer any Active Members in the Section, which would be the case for example if in the future, the current Active Members had all retired or left Atos' employment.

115. I agree with Mr Green KC not only that there is no question of the introduction of Rule 21(1)(iii) in 2006 having led to Article 7 being disapplied or diminished in some way, but that Rule 21(1)(iii) neither provides nor was intended to provide the same level of protection. To begin with, as I just indicated, it only comes into effect when there are no longer any Active Members, so that it cannot possibly provide protection for the Active Members in respect of the current shortfall. Indeed, it is striking that, on Atos' case, Rule 21(1)(iii) would only come into play when all the current Active Members had opted out because continued participation in the RPS was neither affordable nor value for money.

116. Rule 21(1)(iii) would require a further valuation by the Actuary and, although Mr Spink KC sought to argue that this could be immediately after the current Active Members had opted out, I agree with Mr Green KC that there would in reality be a significant delay, since Clause 6B of the Pension Trust provides that, before preparing any valuation, the Actuary has to consult with the Trustee and the Employer on the basis, methodology and assumptions for the valuation. The failure to reach agreement about the matters arising under Rule 21(1) since 2016 would not bode well for any consultation being swift and painless.

117. Furthermore, as Mr Green KC pointed out, even if a valuation were agreed, Rule 21(1) stem then provides for a period of six months for the Trustee and the Employer to seek to agree arrangements to make good the shortfall. It would only be if such agreement was not reached in that timeframe that Rule 21(1)(iii) would kick in. As he correctly submitted, it followed that a resolution of the problem of the shortfall via Rule 21(1)(iii) would be potentially several years away and during that period of significant delay, the black hole in the Section would remain unresolved. In contrast, on the basis of the correct construction of Rule 21(1) as advocated by the Trustee, none of the Active Members would be forced to opt out and Rule 21(1)(ii) and (iv) would be operated fairly and reasonably, with Article 7(1) coming in to deal with the current Rule 21 shortfall and thus providing a solution to that shortfall in one valuation cycle.

118. So far as Article 5 of the Protection Order is concerned, I agree with Mr Green KC that the prevention from participation of protected employees in the Atos Section which is prohibited under (a) must encompass not just the initial participation in the Section, when it came into effect in the 1990s, but continued participation thereafter for the whole period in which the employees had protected status. It is significant that the words used are not "joining" but "participating in" and participation in a scheme is a continuing process. Limiting the prohibition to prevention of initial participation as Atos suggests would render the protection provided of little effect, since it would not prevent the employer from forcing the employees to opt out of the RPS within days or weeks of joining it.

119. I also agree with Mr Green KC that limb (b) of Article 5 supports that construction of (a), as it prevents the employer from sidestepping (a) by making amendments to the Atos Section which obstruct the continuing enjoyment or accrual of no less favourable pension rights than the protected employees had under the BRPS.

Answers to the Questions

120. The Answers to the Questions set out at [18] above are as follows:

(1) Question 1: The Actuary does have a discretion to determine a contribution rate from Active Members which is less than that required to make good the shortfall in full

and that discretion includes taking account of the factors set out at sub-paragraphs (i) to (iii).

(2) Question 2: I agree with the Trustee's Answer that the Actuary is required to come to a rational determination taking account of relevant matters and ignoring irrelevant matters. This includes taking account of the factors set out at (i) to (iii) but that is not an exclusive list of the matters he would be entitled to take into account in the exercise of his discretion.

(3) Question 3: Article 7(1) of the Protection Order applies when the normal contributions of Active Members for the purposes of Rule 21(1)(ii) have been determined by the Actuary in accordance with the Answers to Questions 1 and 2 above.

(4) Question 4: Article 5 of the Protection Order precludes Atos from agreeing to lift the 130% Cap (in relation to both Protected and Unprotected Active Members) and precludes Atos and the Trustee from agreeing to reduce future service benefits under Rule 21(1)(iv) in so far as, in either case, this would be likely to cause Active Members to opt out.

(5) Question 5: Article 7(1) of the Protection Order requires Atos to make good the Rule 21 shortfall to the extent that the shortfall has not already been made good by an application of Rule 21(1)(ii) in accordance with the answers to the previous Questions.

(6) Question 6: The obligation imposed on Atos under Article 7(1) of the Protection Order applies to both protected and unprotected persons because of the unsegregated nature of the Atos Section.

(7) Question 7: Under Rule 21(1)(iv) in determining whether future service benefits should be reduced and if so by how much, the Actuary has a discretion which encompasses taking account of the matters referred to in sub-paragraphs (i) and (ii), but those are not exhaustive and in exercising the discretion, the Actuary can take account of any other matters he regards as relevant.