Neutral Citation Number: [2022] EWHC 48 (Ch)

Case No: PE-2021-000007

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

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

Date: 14 January 2022

Before :

MR JUSTICE TROWER

- -

Between :

(1) De La Rue Plc
(2) De La Rue Holdings Ltd
(3) De La Rue International Ltd

Claimants

- and –

(1) De La Rue Pension Trustee Ltd
(2) Mark Crickett

Defendants

- -

KEITH ROWLEY QC and ELIZABETH OVEY (instructed by **Hogan Lovells International LLP**) for the **Claimants**
HENRY DAY (instructed by **Hogan Lovells International LLP**) for the **First Defendant**
ANDREW MOLD QC (Instructed by **Osborne Clarke** LLP) for the **Second Defendant**

Hearing dates: 15-16 December 2021

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Approved Judgment

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

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THE HONOURABLE MR JUSTICE TROWER

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the representatives of the parties by email. The date and time for hand-down is deemed to be 10.30 am on Friday 14 January 2022

Mr Justice Trower:

Introduction

1. These proceedings are concerned with the true meaning and effect of one of the Rules governing the final salary section ("FSS") of an occupational pension scheme known as the De La Rue Pension Scheme ("the Scheme"). The single issue that arises is whether a class of members who have accrued final salary benefits are entitled to have those benefits revalued whilst in deferment in accordance with the regime to be found in the Pension Schemes Act 1993 ("PSA 1993"), which I will refer to as "statutory revaluation", or by reference to the greater of (a) statutory revaluation and (b) a cost-of-living index subject to a cap of 5% per annum and, in respect of pensionable service prior to 1 April 2005, a floor of 3%.

2. The first claimant is the principal employer under the Scheme. The second and third claimants are participating employers under the Scheme. The claimants have been represented at the trial by Mr Keith Rowley QC. The first defendant is the trustee of the Scheme (the "Trustee") and is sued in its capacity as such. It has been represented at the trial by Mr Henry Day. The second defendant, Mr Mark Crickett, has been joined to the proceedings as a representative pensioner member of the Scheme entitled to benefits under the FSS. He has been represented at the trial by Mr Andrew Mold QC.

3. The Trustee is neutral on the questions of construction that have arisen. It is concerned to ensure that, in light of the uncertainty, the members' entitlements are determined and that it has sufficient clarity to know how it should be administering the Scheme. Accordingly, it has attended to draw the court's attention to a number of points and I am very grateful to Mr Day, as I am to all counsel, for the assistance they have given.

4. The first of the alternative constructions is called the "Narrower Construction" and is contended for by the claimants, who also seek an order that they represent all members and beneficiaries of the Scheme in whose interests it is to argue that the Narrower Construction is correct. This class includes members of the Scheme and persons claiming through them with defined benefit entitlements other than those in the FSS. It also includes those in the FSS who have or had deferred benefits referable to service that terminated before the date in November 2003 of the Scheme rules with which these proceedings are concerned and others whose benefits came into payment without any prior period of deferment.

5. The second of the alternative constructions is called the "Wider Construction" and is contended for by the second defendant. He is a member of the Scheme who became entitled to a deferred pension when his pensionable service terminated in 2010. His pension came into payment in 2020 and, as a result of that period of deferment, his benefits are directly affected by the outcome of these proceedings. The claimants seek an order that he should represent all members and beneficiaries of the Scheme in whose interests it is to argue that the Wider Construction is correct.

6. Representation orders of the types sought are a standard feature of many pensions claims. In a case such as the present they have the benefit of avoiding a multiplicity of individual claimants and defendants, which would unnecessarily and disproportionately

increase both the cost and the complexity of the proceedings, extend the time required for their resolution and, in doing so, take up a further share of the court's resources, see *e.g., Archer v Travis Perkins plc* [2014] EWHC 1362 (Ch), [2014] Pens LR 311 at [14]-[17] per Rose J.

7. I am satisfied that the members of the Scheme have been sufficiently notified of these proceedings, of the proposal that their interests be represented by the claimants or the second defendant as the case may be and that if representation orders are made they will be bound by the court's determination. I am also satisfied that the provisions of CPR 19.7(2)(d) apply for the purposes of the representation orders sought and that the claimants and the second defendant both understand and are willing to undertake the role of a representative. In my judgment the making of those orders will further the overriding objective and it is appropriate that they be made.

The Scheme

8. The Scheme was established in 1997 and is now governed by a restated Definitive Trust Deed and Rules dated 8 May 2008 ("the 2008 TDR") as amended. There are two further governing documents that have featured in the evidence: a Trust Deed and Rules dated 3 March 1997 ("the 1997 TDR"), which governed the Scheme at the time of its establishment and a restated Definitive Trust Deed and Rules dated 13 November 2003 ("the 2003 TDR"). For all material purposes the 2003 TDR and the 2008 TDR are in the same form. The case was argued by reference to the 2003 TDR, which was the first document in which the Rules in issue appeared in their present form, and I shall proceed on the same basis.

9. The Scheme is the result of the merger of six different pension schemes. As a result, it has a relatively complex benefit structure. It is in large part closed both to new joiners and to the further accrual of benefits. It has approximately 6,600 members and the benefits of 1,649 members (i.e., approximately 25% of the membership) will be affected by the outcome of these proceedings. Its total assets are in the region of £1 billion as are its total liabilities. As at the date of its last actuarial valuation (31 December 2019) it had a funding deficit of £142 million on a technical provisions basis and £353 million on a buy-out basis. To date, the Scheme has been administered on the basis that the Narrower Construction is correct. If the Wider Construction were to be correct it is estimated that the Scheme's liabilities would be increased by more than £20 million.

10. The Rules that govern the FSS, and in particular the benefits to which members and other beneficiaries are entitled under the Scheme, are to be found in the First Schedule to the 2003 TDR. Those benefits include:

    i) a pension payable to a member on their retirement in a number of different circumstances, i.e., Normal Retirement on the Normal Retirement Date ("NRD") which is 62 under the Scheme, Late Retirement, Early Retirement and Ill-health Retirement (Rule 7);

    ii) certain lump sum options in lieu of a pension (Rules 8 to 12);

iii) pension benefits payable to a member's spouse or other surviving beneficiaries, i.e., dependants or children ("survivors"), following the death of a member both before and after the time of their retirement (Rule 13);

iv) pension benefits payable to those leaving pensionable service before the NRD without an immediate retirement pension (Rule 15); and

v) the right of members and other beneficiaries to have their benefits and pensions revalued and increased (Rules 17 and 21).

Rule 17 and its statutory context

11. The Rule at the heart of the present dispute is Rule 17, which deals with increases to what are called deferred benefits, that is to say the revaluation of pensions before they come into payment. It is in the following form:

> "17. **INCREASES IN DEFERRED BENEFITS**
>
> In relation to a Member of the Final Salary Section only, short service benefits before they come into payment shall be revalued in accordance with Chapter II of Part IV of the Pension Schemes Act 1993.
>
> This Rule shall only apply if it would provide a greater increase in deferred benefits than that provided at Rule 21."

12. The part of Rule 17 which has caused particular difficulty is the second paragraph. To set it in its proper context it is necessary to explain a number of the references in the Rule as a whole. In particular, it is necessary to consider the construction of Rule 17 by reference to Rule 21 which also deals with increases, albeit what are called pension increases rather than increases in deferred benefits.

13. The first reference in Rule 17 which requires further explanation is the reference to "short service benefits", a phrase which is not defined in the 2003 TDR. It is, however, used in Chapter I Part IV of PSA 1993 (and defined in section 71(2)), which is concerned with protection for members of an occupational pension scheme who are early leavers, a phrase which is used in the heading to Part IV of PSA 1993 but is not a defined term. Although not defined, the meaning of early leaver is clear enough from the content of the Part itself. It is referring to scheme members whose pensionable service is terminated before normal pension age ("NPA"), which in the case of the Scheme is the age reached at NRD i.e., 62.

14. Section 71 of PSA 1993 provides that a scheme must make such provision that, where a member's pensionable service is terminated before NPA and (so far as relevant for present purposes) he has at least 2 years qualifying service, he has a statutory entitlement to "short service benefit". This is defined to mean benefit of any description which would have been payable under the relevant scheme as "long service benefit", whether for the member himself or others, and calculated in accordance with Chapter I (see section 71(1) and section 71(2) of PSA 1993).

15. At the time of the 2003 TDR, the phrase "long service benefit" was defined by section 70(1) of PSA 1993 to mean:

> "the benefits which will be payable under the scheme, in accordance with legal obligation, to or in respect of a member of the scheme on the assumption -
>
> (a) that he remains in relevant employment, and
>
> (b) that he continues to render service which qualifies him for benefits,
>
> until he attains normal pension age; and in this definition "benefits" means -
>
> (i) retirement benefit for the member himself at normal pension age, or
>
> (ii) benefit for the member's wife or husband, widow or widower, or dependants, or others, on his attaining that age or his later death, or
>
> (iii) both such descriptions of benefit."

16. It follows that section 71 preserves the rights of early leavers to any benefit they would have been entitled to as a long service benefit both for themselves and for their survivors. It was introduced to ensure that early leavers with what is now at least two years' qualifying service retain their benefits, whether payable to themselves or to spouses or other survivors, notwithstanding the ending of their pensionable employment. I was told by Mr Rowley that this was designed to address a problem arising out of the drafting of a number of schemes which had provided (somewhat surprisingly) that, if a member did not work through to NPA, he lost all of his pension benefits.

17. The underlying purpose of the provision is then reinforced by:

i) section 72(1) of PSA 1993 which provides that:

> "A scheme must not contain any rule which results, or can result, in a member being treated less favourably for any purpose relating to short service benefit than he is, or is entitled to be, treated for the corresponding purpose relating to long service benefit"

and

ii) section 74(1) of PSA 1993 which provides that:

> "… a scheme must provide for short service benefit to be computed on the same basis as long service benefit."

18. The way in which short service benefit is to be assured to the member is described in section 73(1) of PSA 1993. It is also stipulated in section 73(2) that a scheme may, instead of providing short service benefit, provide for such alternatives as may be prescribed. Those alternatives are prescribed by regulations 8 to 10 of the Occupational Pension Schemes (Preservation of Benefit) Regulations 1991 (SI 1991/167) (the "Preservation Regulations") which include in the case of early or deferred retirement

an amount equal to the value of the benefits that have accrued under the applicable rules.

19. It was not in issue that, although the phrase "short service benefits" is not defined in the 2003 TDR, the drafter of Rule 17 intended it to bear the same meaning as it does in section 71 of PSA 1993. It follows that the revaluation with which the first paragraph of Rule 17 is concerned is the revaluation of certain benefits which have not yet come into payment, being benefits which will be payable under the Scheme (whether for the member or the other beneficiaries referred to in section 70(1)(ii) of PSA 1993) where a member's pensionable service is terminated before NPA and he has at least two years' qualifying service.

20. The second Rule 17 reference for which some explanation is required is the reference to Part IV Chapter II of PSA 1993 ("Chapter II of Part IV"). This is referred to as the source of the manner in accordance with which the revaluation referred to in the first paragraph is to be carried out. Chapter II of Part IV is concerned with the inflation-linked revaluation of accrued final salary benefits in deferment, excluding guaranteed minimum pensions ("GMPs") and, like the short service benefit provisions, is also contained within that Part of PSA 1993 which is concerned with protection for early leavers. This type of protection had first been introduced by the Social Security Act 1985 with effect from 1 January 1986.

21. The scope of the revaluation provisions contained in Chapter II of Part IV is described in section 83(1)(a). They apply to benefits payable "to or in respect of a member", a phrase which includes any survivors of a member. In the case of benefits payable to members themselves, statutory revaluation applies where (i) their pensionable service ends on or after 1 January 1986 (ii) they have accrued rights to benefits under the scheme and (iii) the period between the termination of their pensionable service and their attaining NPA is at least 365 days. In the case of benefits payable to others in respect of a member (i.e., for present purposes, survivors), requirements (i) to (iii) must be satisfied but, additionally, a further requirement numbered (iv), viz. that the member has died after attaining NPA, must be satisfied as well.

22. The way in which benefits are revalued under Chapter II of Part IV, and therefore the method to be used for revaluing deferred benefits under the FSS, is prescribed by section 84(1) of PSA 1993. It is called the final salary method, the meaning of which is described in Schedule 3 of PSA 1993 (see section 84(4)). Ignoring those parts of the detail which are not relevant for present purposes, the final salary method involves adding a single amount equal to the "appropriate revaluation percentage" to the amounts that would otherwise be payable in respect of a member's pensionable service. In the case of an early leaver whose pensionable service terminates on or after 1 January 1991, statutory revaluation applies to the entirety of that service, whereas an early leaver with a termination date before 1 January 1991 enjoys statutory revaluation only in respect of pensionable service from 1 January 1985.

23. The appropriate revaluation percentage is quantified by reference to (i) the Secretary of State's assessment of the percentage which appears to him to be the percentage increase in the general level of prices in Great Britain in a reference period relating to the relevant revaluation period and (ii) what is commonly referred to as the "cap". The Secretary of State is permitted to estimate the percentage increase in such manner as he

thinks fit, and he then specifies the percentage increase in an annual revaluation order. RPI was used until 2011 and CPI has been used since then.

24. Importantly for present purposes, statutory revaluation does not operate either on an annual basis or by reference to the full period of a member's deferment. Instead, it adds a single lump sum to the member's deferred pension at their NPA immediately before it comes into payment. That lump sum is determined by reference to entire years of deferment only, and excludes parts of a year, so that a member who has (e.g.) 5 years and 9 months in deferment would receive revaluation in respect of 5 years only.

25. The cap was originally set at 5% and is a compounded annual ceiling applied to the statutory revaluation calculation. It is applied over the entire period of deferment on a cumulative basis. This means that, in any given year, the relevant figure is capable of being taken into account even though in one or more years it may exceed the cap while in others it may have a negative value.

26. The 5% cap was reduced by the Pensions Act 2008 to 2.5% for pensionable service from 6 April 2009, although in the case of the Scheme the original 5% cap has been retained and to that extent is more generous than the requirements of the legislation. Although the statutory provisions for revaluation of pensions in deferment are mandatory and override any provisions of a scheme to the extent of any conflict (section 129(1) of PSA 1993), nothing in Chapter II of Part IV precludes a scheme from being framed or managed more favourably for beneficiaries than is called for by those provisions (section 130(b) of PSA 1993).

27. Unlike Chapter I of Part IV, Chapter II contains no reference to short service benefits. However, Chapters I and II of Part IV are complementary, in that Chapter I provides that, subject to certain criteria being satisfied, early leavers are entitled to benefits which are preserved in the scheme by what are called the preservation requirements of that Chapter and Chapter II provides for their revaluation.

28. It follows that the first paragraph of Rule 17 provides for a revaluation of short service benefits which the law requires in any event. It seems to me that it is therefore an example of the first type of drafting technique described by Nugee J in *Carr v. Thales Pension Trustees Limited* [2020] EWHC 949 (Ch), [2020] Pens. L.R. 19, in relation to the drafting of a scheme's indexation rule:

> " One scheme might content itself with a rule which said that pensions accrued after 6 April 1997 should be increased as required by s. 51 PA 1995; another scheme might expressly provide that pensions accrued after 6 April 1997 should be increased by the rise in RPI over the 12 months to the previous 30 September, subject to a cap of 5%, not as the deliberate adoption of a different relevant percentage, but simply as an attempt to reproduce what was understood to be the practical effect of the statutory requirements. It was I think usually a matter of happenstance which technique was adopted …".

29. The third reference in Rule 17 that requires explanation is to the phrase "deferred benefits", which appears in both the heading to the Rule and in its second paragraph. This is not a defined term and in other contexts the 2003 TDR uses the phrase "deferred pension" to describe early leavers' entitlements to a Rule 15 pension on the occurrence of their NRD. It is, however, used in clause 16.4 of the 2003 TDR itself to describe the

obligations of the Trustee, in giving effect to the waterfall application of the assets of the Scheme on its termination, to secure deferred annuities payable at NRD equal in value to the "deferred benefits" to which members were entitled under Rule 15.

30. The phrase "deferred benefits" does not originate from PSA 1993 either. However, it is in common use to describe the benefits which are required by section 84(1) of PSA 1993 to be revalued by the final salary method. In that context they are called "relevant benefits", but the phrase "deferred benefits" is used to describe them in the Scheme's annual reports for many of the years ending both before and after the date of the 2003 TDR.

31. The fourth reference that requires explanation is the reference to Rule 21 made in the second paragraph of Rule 17. The relevant parts of Rule 21 are in the following form:

> "21. **PENSION INCREASES**
>
> 21.1 Subject to sub-Rule 21.2 each pension as hereinafter specified shall be increased at yearly intervals in accordance with the following provisions:
>
> 21.1.1 Other than as specified below, in the case of a pension payable to a Member under Rules 7 or 15, the amount of such pension shall be increased with effect from 1 April each year (or such other date as may be determined by the Principal Employer with the consent of the Trustees) by the greater of:
>
> (i) 3% per annum and
>
> (ii) the lesser of 5% per annum and an amount equal to the annual increase in the Index (based on the figure for the preceding September).
>
> 21.1.2 Other than as specified below, in the case of a pension payable under Rule 13 following the death of a Member who is in receipt of a pension, the initial amount of such pension shall be as stated in Rule 13 but increased in respect of the period from the date of retirement of the Member to the date of his death by the same percentage increase as applied to the Member's pension under sub-Rule 21.1.1 above; and following his death the amount of such pension shall be further increased on each subsequent 1 April (or such other date as may be determined under sub-Rule 21.1.1 above) by the greater of:
>
> (i) 3% per annum; and
>
> (ii) the lesser of 5% per annum and an amount equal to the annual increase in the Index (based on the figure for the preceding September).
>
> …
>
> 21.1.5 In the case of a pension payable under Rule 13 following the death of a Member who is not in receipt of a pension, the amount

> of such pension shall be increased in the manner described in sub-Rule 21.1.1 above on 1 April each year.
>
> 21.2 Except where specified at sub-Rule 21.1.4 above, the amount of pension to which this Rule applies shall exclude the guaranteed minimum pension in payment and any part of the pension commuted for a cash sum under Rule 8 or surrendered to provide a dependant's pension under Rule 9."

32. I have not set out Rules 21.1.3 and 21.1.4. They are specific to particular categories of member, some or all of whose benefit entitlements derive from their active membership of other schemes and whose accrued rights under those schemes have been transferred to the Scheme. No party suggested that those Rules have any bearing on the issues in these proceedings or the questions of construction which arise.

33. Unlike the increases with which the first paragraph of Rule 17 is concerned (increases arising out of the revaluation of benefits immediately before a pension comes into payment), the increases with which Rule 21 is primarily concerned are annual inflation-linked increases in pensions once they have come into payment. These provisions for increases to pensions in payment then deal with pensions payable to a member separately from those payable to any survivors following the death of a member: the former are dealt with in Rule 21.1.1 and the latter are dealt with in Rules 21.1.2 and 21.1.5.

34. The language used to describe increases to pensions in payment is "payable to a Member" (Rule 21.1.1) or "payable … following the death of a Member, who is in receipt of a pension" (Rule 21.1.2) or "payable … following the death of a Member, who is not in receipt of a pension" (Rule 21.1.5). It is also worth observing that, although clause 17 of TDR 2003 provides that headings to the Rules (in the case of Rule 17 "Increases in Deferred Benefits" and in the case of Rule 21 "Pensions Increases") cannot affect the construction of the Rules, those headings are at least consistent with the distinction between revaluation increases to benefits immediately before they come into payment and increases to benefits which have become payable.

35. Giving a little more detail to the nature of the increases with which Rule 21 is concerned, Rule 21.1 provides for increases at yearly intervals to pensions payable to a member under Rules 7 or 15, as to which:

    i) Rule 7 makes provision for the appropriate pension to be payable to an active member on and after four different categories of retirement the contexts of which I have already described and which are self-explanatory by their description: Normal Retirement at NRD, Late Retirement after NRD, Early Retirement with consent and Ill-health Retirement.

    ii) Rule 15 makes provision for the appropriate benefits to be payable to a member who left service before NRD without an entitlement to an immediate pension (i.e., a deferred member or early leaver). There are separate sub-Rules dealing with those early leavers' annual pension entitlements (a) as from NRD giving effect to the mandatory requirements of section 71 of PSA 1993 (Rule 15.1) (b) where they take early retirement either on account of ill-health or, with consent, at or after the age of 50 giving effect to the mandatory requirements of regulation

> 8 of the Preservation Regulations (Rule 15.5) and (c) where they take late retirement (Rule 15.6).

36. Irrespective of whether Rule 7 or Rule 15 is the source of the member's primary entitlement, the increases to which members are entitled under Rule 21.1.1 occur at yearly intervals and take effect from 1 April each year. They are based on a cost-of-living index (called "the Index") subject to a cap of 5% per annum and a floor of 3% per annum. The Index is defined as "the Index of Retail Prices published by the Central Statistical Office of the Chancellor of the Exchequer or any other suitable cost-of-living index selected by the Trustees and approved by the Board of Inland Revenue".

37. Rules 21.1.2 and 21.1.5 are concerned with increases in pensions payable under Rule 13 to survivors following the death of a member. Mr Rowley explained that, save in the case of a contracted-out scheme, there was and is no obligation on a pension scheme to provide any survivors' benefits although the same are almost invariably provided. The difference between Rule 21.1.2 and Rule 21.1.5 is that the former is concerned with pensions payable under Rule 13 following the death of a member who is already in receipt of a pension and the latter is concerned with pensions payable under Rule 13 following the death of a member who is not yet in receipt of a pension. Rule 13 contains detailed provisions which describe the differences in the benefits to which survivors are entitled depending on the status of a member at the time of their death.

38. Taking the second of these first, in the case of a survivor's pension payable under Rule 13 following the death of a member who is not then in receipt of a pension, Rule 21.1.5 provides for it to be increased in the same manner as the increase to a member's pension prescribed by Rule 21.1.1. It therefore takes effect at yearly intervals from 1 April each year and is based on a cost-of-living index subject to a cap of 5% per annum and a floor of 3% per annum.

39. The position is more complex in the case of a survivor's pension payable under Rule 13 following the death of a member who is already in receipt of a pension at the time of death. There is only one such category of pension. It is provided for by Rule 13.5 and grants a spouse's pension at one half of the pension to which the member became entitled under Rule 7 or Rule 15 at the date they ceased to be an active member:

> "13.5 On the death of a Member while in receipt of a pension under Rule 7 or Rule 15 leaving a surviving spouse, an annual pension shall be payable to the spouse (unless the Trustees exercise their discretion under sub-Rule 13.2). Subject to sub-Rules 13.8 and 13.9 the spouse's pension will be one half of the pension to which he became entitled under Rule 7 or Rule 15 at the date of ceasing to be an Active Member and before the exercise of any option under Rule 8 or Rule 9."

40. The member will have ceased to be an active member for the purposes of a Rule 7 pension when they retired and for the purposes of Rule 15 when they ceased pensionable employment. Mr Rowley characterised the survivor's pension as being frozen at that date although, as I shall endeavour to explain, the ability for it to be increased is at the heart of one of the arguments advanced by the claimants in these proceedings.

41. In the case of a Rule 13.5 survivor's pension, there are two stages in the Rule 21 increase calculation and they are both described in Rule 21.1.2. This staged approach

is clear both because of the use of the semi colon in the middle of the Rule and because of the phrase "further increased" when introducing stage two. The first stage is for the purposes of computing the initial amount, and is an increase to the amount representing the one half of the pension to which the member had become entitled at the date of ceasing to be an active member. This increase is given for the period from the date of the member's retirement (irrespective of whether or not he was then active) to the date of the member's death and is required to be at the same rate as is applied to the member's pension as prescribed by Rule 21.1.1. The percentage is therefore based on the Index subject to a cap of 5% per annum and a floor of 3% per annum. It does not matter that the drafter has chosen to deal with this increase in Rule 21.1.2, rather than building it into the original entitlement under Rule 13.5, because the underlying right is clear enough.

42. The second stage is the annual increase on each 1 April subsequent to the date of the member's death, which is also based on the Index subject to a cap of 5% per annum and a floor of 3% per annum. This second stage therefore makes provision for an increase in the survivor's Rule 13.5 pension at yearly intervals at the same rate of increase as is applicable to the pensions described in Rules 21.1.1 and 21.1.5.

43. The entitlements to increases under Rule 21 reflect, and in some respects enhance, the statutory indexation requirements for pensions in payment contained in section 51 of the Pensions Act 1995 ("PA 1995") in respect of pensionable service from 6 April 1997. There had been earlier statutory intervention to protect the value of GMPs, but the generally applicable PA 1995 statutory indexation requirements were introduced some time after the revaluation provisions for early leavers' benefits now contained in PSA 1993. The PA 1995 statutory indexation requirements mandate an annual increase by at least the appropriate percentage, a rate which, pursuant to section 54(3) of PA 1995, is the same annual measure for the increase of pensions in payment as had been used for the statutory revaluation regime contained in PSA 1993.

44. Although these are mandatory minimum requirements, it is recognised by section 53 of PA 1995 that a scheme may set its own indexation rate that is more generous than that required by section 51. The statutory indexation cap has now been reduced to 2.5% in respect of pensionable service from 6 April 2005, some four years before the analogous reduction in the statutory revaluation cap I have already mentioned. However, the Scheme has maintained a 5% cap. It follows that, as with the revaluation of the Scheme's short service benefits, the indexation regime applicable to the Scheme's pensions in payment is more generous than the applicable statutory indexation regime.

45. It can be seen from this description that there remain differences in the impact which the applications of the two statutory regimes have on increases to both deferred pensions and pensions in payment. Unlike the revaluation of deferred benefits, the statutory regime for the increase of pensions in payment operates annually (section 54(1) of PA 1995) and if necessary, on a part year basis (section 54(2)). Furthermore, the cap on increases to pensions in payment is applied annually and can never be exceeded, while, even in the case of a period of negative inflation, statutory indexation can never give rise to a negative figure, so the amount of a pension in payment can never be reduced.

The Law on Construction

46. I did not discern any significant differences in the parties' submissions on the correct approach to construction of contracts and other instruments. In the relatively recent decision of the Supreme Court in *Barnardo's* v *Buckinghamshire* [2018] UKSC 55, [2019] ICR 495 at [13] to [18], Lord Hodge summarised the law on the construction of pension schemes as follows:

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

> widespread practice within the pension industry which might illuminate, or give some strained meaning to, the words used."

I agree with that approach…

> 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.
>
> 17. It is nevertheless relevant to the construction of pension schemes that they are drafted to comply with tax rules so as to preserve the considerable benefits which the United Kingdom's tax regime confers on such schemes. They must be construed "against their fiscal backgrounds" …
>
> 18. Finally, a focus on textual analysis in the context of the deed containing the scheme must not prevent the court from being alive to the possibility that the draftsman has made a mistake in the use of language or grammar which can be corrected by construction, as occurred in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, where the court can clearly identify both the mistake and the nature of the correction."

47. In *Britvic Plc v Britvic Pensions Ltd* [2021] EWCA Civ 867, [2021] Pens LR 16, Sir Geoffrey Vos MR emphasised the importance in a pensions context of starting with the language used and avoiding if possible a strained meaning. He said at [29]:

> "As it seems to me, however, the approach indicated by, at least, *Rainy Sky*, *Arnold v Britton*, *Wood v Capita*, and *Barnado's* is clear. In construing a pension scheme deed, one starts with the language used and identifies its possible meaning or meanings by reference to the admissible context, adopting a unitary process to ascertain what a reasonable person with all the background knowledge reasonably available to the parties at the time would have understood the parties to have meant. If, however, the parties have used unambiguous language, the court must apply it (see Lord Clarke at [19] in *Rainy Sky*), and the context of a pension scheme deed is "inherently antipathetic to … [giving] some strained meaning to … the words used" (Lord Briggs at [22] in *Safeway*, approved by *Barnardo's* at [15])."

And at [33]:

> "Moreover, the process of corrective construction adopted, in the alternative, by the judge at [137] is only normally adopted where there really is an obvious mistake on the face of the document. There is no obvious mistake here as there was, for example, in *Mannai* as to the date or in *Doe d Cox v Roe* as to the name of the pub. The objective observer might well think that the power could have been more

> felicitously drafted, but that is not enough to allow the court to depart from the clear language, on the unequivocal authority of *Rainy Sky* and the later Supreme Court decisions I have cited. That is particularly so when the rules of a pension scheme are being interpreted."

48. The conclusions I draw from these authorities are that the rules of a pension scheme are a form of instrument in respect of which significant weight is to be given to textual analysis concentrating on the language that the drafter has chosen to use. As Lord Briggs stated in *Safeway*, the context is inherently antipathetic to giving a strained meaning to those words. That does not mean to say that literalism rules the day. A purposive construction may well be appropriate, particularly where it is required to give reasonable and practical effect to the scheme.

The Narrower and the Wider Constructions

49. The essence of the Narrower Construction advanced by the claimants is that the revaluation with which Rule 17 is primarily concerned is the statutory regime to be found in Chapter II of Part IV. All that the second paragraph of Rule 17 does is to make clear that the first paragraph's confirmation of the application of the statutory regime only applies if it leads to a greater increase in deferred benefits than would result from any application of the provisions of Rule 21 to those deferred benefits. Put another way, to the extent (but only to the extent) that Rule 21 provides for an increase in deferred benefits, the application of the Rule 17 revaluation to those deferred benefits will only apply if it leads to a greater increase than the Rule 21 increase.

50. In their evidence in support of the claim, the claimants did not draw out any specific circumstance in which the second paragraph of Rule 17 might be engaged. While reference was made to Rule 13.5 in the context of describing a spouse's benefit which would be increased in accordance with the first limb of Rule 21.1.2, the deponent did not articulate that this was the deferred benefit to which the comparison apparently contemplated by the second paragraph of Rule 17 might be said to apply, and so left unanswered the question of its purpose. The claimants simply asserted that the true meaning and effect of Rule 17 was to make provision for statutory revaluation rather than the annual increase applicable to pensions in payment in accordance with the formulae provided by Rule 21.

51. In their skeleton argument for the trial, the claimants adopted a rather different emphasis. They still said that, in the generality of cases, the first paragraph of Rule 17 is unaffected by the second paragraph, but they submitted that this is not always the position and identified a surviving spouse's Rule 13.5 pension as a restricted category of case in which it can be said that there are deferred benefits which both attract revaluation under the first paragraph of Rule 17 and increases under Rule 21. This was the purpose for which the second paragraph of Rule 17 had been inserted.

52. It was then said that, if the survivor's Rule 13.5 pension did not constitute the "deferred benefits" referred to, on the basis of the Scheme's benefit structure as it stood under both the 2003 and 2008 TDRs, the second paragraph to Rule 17 is not engaged because there are no such benefits to which Rule 21 applies. This means that the claimants' fall-back argument recognises that there may be no benefits which fall within the

contemplation of the second paragraph of Rule 17, in which case the paragraph will have no application at all, and therefore fulfils no purpose.

53. The Wider Construction argued for by the second defendant is that the second paragraph of Rule 17 provides an underpin so that the benefits referred to in the first paragraph (i.e., the short service benefits before they come into payment) fall to be revalued by the greater of statutory revaluation and the increase for which Rule 21 provides (i.e., the rate of increase referred to in Rule 21.1.1). It follows that, before Chapter II of Part IV is applied to the revaluation of short service benefits, it is necessary to quantify the extent of the increase that would be achieved if the Rule 21 annual rates of increase were to have been applied for the period of the deferment.

54. Once the extent of the Rule 21 increase is established, a comparison must then be carried out. If it appears from the comparison that the application of Rule 21 leads to a greater increase than the Chapter II of Part IV increase referred to in the first paragraph of Rule 17, the Rule 21 approach will prevail.

55. Mr Day for the Trustee confirmed that a comparison between the effects of Rule 17 and Rule 21 could be carried out if necessary. Such a comparison could be done both to reflect the full underpin which would be required by the Wider Construction and to reflect the more limited version required for Mr Rowley's primary case on the Narrower Construction. He pointed out, however, that it would not be a typical pension benefit calculation and it would lead to some additional complexity and cost.

The Claimants' Arguments

56. Mr Rowley submitted that the key to the construction of the second paragraph to Rule 17 is the use of the verb "provide". He said that this makes clear that the paragraph is drafted on the basis that a comparison is required between the increase for which the first paragraph provides and the increase provided to deferred benefits by Rule 21. He drew attention to the pronoun "that" as constituting a reference to an "increase in deferred benefits" and said that the use of the preposition "at" makes clear that the relevant increase is at Rule 21, thereby necessarily referring to an increase in deferred benefits provided at Rule 21 as being the increase with which the first paragraph increase is to be compared.

57. This meant, so Mr Rowley submitted, that the drafter has directed the reader of Rule 17 to see what Rule 21 has to say about increases in deferred benefits so that the appropriate comparison can then be made. The approach required by the Wider Construction would involve an exercise that was not comparing like with like, because the increase provisions for pensions in payment were based on the annual increase I have already explained not on the one-off revaluation of a deferred benefit for which Chapter II of Part IV made provision.

58. Mr Rowley did not submit that the comparison required by the Wider Construction could not be carried out, and accepted that there were cases such as *Unipart Group Ltd v UGC Pensions Trustees Ltd* [2018] EWHC 2124 (Ch) in which the drafting provided for just such an outcome. He said, however, that where it was done in the cases cited, the applicable drafting specifically identified the rates to be applied in the relevant

calculation (see e.g., *Unipart* at [13] specifically giving the member a revaluation increase calculated by reference to whichever of three specified methods would give a higher pension).

59. In any event, the claimants' primary case involved a comparison as well, albeit one which was less generalised in its application and less susceptible to an accusation that it was not comparing like with like. It too was not a straightforward exercise, because the substance of Rule 21 is really about increases to pensions in payment, not increases in deferred benefits. No part of the Rule makes any specific reference to deferred benefits, and it is self-evident that at least Rules 21.1.1 and 21.1.5 are concerned with increases to pensions in payment and nothing more.

60. Nonetheless, Mr Rowley submitted that, on a proper analysis, Rule 21.1.2 can be seen to be dealing with an increase in deferred benefits of the type contemplated by the second paragraph of Rule 17, once the two stage increase I have already described is fully understood. At the heart of this submission is an argument that the survivor's pension under Rule 13.5 is a deferred benefit before the application of stage one of the increase for which Rule 21.1.2 provides (i.e., the increase referred to in the first part of Rule 21.1.2, down to the semi-colon). This can be seen from the fact that stage one operates in the same manner as statutory revaluation at the time that the survivor's pension comes into payment. It can properly be regarded as an increase in a deferred benefit because it is an initial not an annual increase and it adds a lump sum to the survivor's pension in respect of the period from the date of the member's retirement to the date of their death, where it would otherwise have been frozen at the date the member ceased to be an active member. It is then only stage two that provides for the annual increase by applying the same formula as the one adopted for Rule 21.1.1.

61. It follows that, on the claimants' case, the second paragraph of Rule 17 requires a comparison to be made between the increase given effect by the first stage of Rule 21.1.2 and the increase that would be given effect by the first paragraph of Rule 17. It is only if the latter Rule 17 increase provides for a greater increase than the former stage one Rule 21.1.2 increase that the Rule 17 increase applies. In other words, Rule 17 does not apply to increase the deferred benefit to which the survivor is entitled under Rule 13.5 on the death of the relevant member unless it would provide for a greater increase than is provided by the first stage of Rule 21.1.2. If the survivor obtains a greater increase by operation of the first stage of Rule 21.1.2, the Rule 17 valuation does not apply.

62. It was submitted that the reasoning behind this approach was that the drafter was concerned that the survivor should only receive one increase in their deferred benefit, either under the first stage of Rule 21.1.2 or by way of revaluation under the first paragraph of Rule 17, but that the increase received was the one which (a) had the most beneficial effect and (b) satisfied the statutory requirements. The circumstances in which a problem of potential double recovery might otherwise arise is where an early leaver starts to draw his pension before NPA and then subsequently dies. There is then what Mr Rowley called a temporal overlap in the survivor's statutory revaluation entitlement and the operation of Rule 21.1.2 for the period between the time the member started to draw his own pension and NPA.

63. Mr Rowley then submitted that, even if the stage one increase required by Rule 21.1.2 is not what the drafter had in mind when he formulated the second paragraph of Rule

17, it did not follow that the Wider Construction was correct. He submitted that, if there is no increase in deferred benefits provided at Rule 21, the paragraph is simply not engaged.

64. While that is not a result which will always be palatable to the court because a drafter will not normally intend to include surplus wording apparently designed to deal with a situation which does not arise, Mr Rowley did not accept that it points to a conclusion that the construction contended for is wrong. In his submission it was an avoidance of doubt provision which led to a more palatable result than one in which an increase to benefits in deferment is achieved through the application of words in Rule 21 that were designed for the wholly different purpose of providing for the annual increase of pensions in payment.

65. In further support of the claimants' argument, Mr Rowley submitted that the Wider Construction required the second paragraph of Rule 17 to be reformulated so as to read:

> "*This Rule shall only apply if it would provide a greater increase in deferred benefits than ~~that provided~~ the application to such benefits of the rate of increase specified at Rule 21*."

This was not the language which the drafter chose to use and would involve the exercise of recalculating the amount of an increase to be applied to deferred pensions for which Rule 21 was to be treated as providing, but for which it did not in fact provide. In short, it required Rule 17 to be read as applying an annual rate of increase to be derived from Rule 21 in circumstances in which nothing in Rule 17 could be said to apply the annual rates of increase for which Rule 21 provided to the deferred benefits referred to in Rule 17, but which were not otherwise dealt with by Rule 21.

66. It was also said that the first way in which the claimants put their case made perfectly good commercial sense. It ensured that the survivor had the benefit of only one initial increase to their Rule 13.5 pension, but that they always had the benefit of the statutory revaluation entitlement, recognising all the while that, if the increase under Rule 21.1.2 was greater, they received that benefit instead. The economic value of the statutory revaluation would then be achieved, albeit by a different route from the route adopted through a direct application of Chapter II of Part IV, a result that was contemplated and permitted by sections 129 and 130 of PSA 1993.

The Second Defendant's Arguments

67. Mr Mold submitted that the natural and ordinary meaning of the words used in the second sentence of Rule 17 is clear and that the claimants' Narrower Construction cannot be said to be a 'rival' interpretation. He said that it would involve jettisoning the language used by the drafter and denuding the second sentence of Rule 17 of any meaning at all. That is not a permissible approach and does not give rise to an available interpretation of the language used.

68. In his skeleton argument, before he appreciated the extent of the claimants' reliance on their Rule 13.5 argument, Mr Mold also submitted that the only theoretical way in which the Narrower Construction could prevail would be if the court were to conclude

that the second sentence of Rule 17 had been included by mistake and that that mistake should be corrected by the second sentence being ignored, which he characterised as 'correction by construction'. He submitted that this was an exceptional form of interpretative tool the requirements for which were not remotely satisfied in the present case, both because the language is not on its face 'obviously garbled' or 'obvious nonsense' and because it cannot be said that the application of the Wider Construction makes 'no rational sense'.

69. In the light of the way that Mr Rowley put his case at trial, this submission was not developed in oral argument. However, I should say this. It does not seem to me that there is any need to adopt the principle of what Mr Mold called 'correction by construction' where a provision such as the second sentence of Rule 17 has been included to cover circumstances which do not in the event arise. Where that is the case, the language is more properly to be characterised as surplus to requirements than it is to be described as mistaken. The only mistake is that the drafter assumed that an eventuality did or might arise, which has not in the event arisen. If it proves to be the case that the eventuality for which the language was intended does not arise, that is some indication that the construction which leads to that result may not be correct, but it is not in my view a factor of great weight and does not in any event require the court to conclude that some form of correction by construction is required.

70. Mr Mold also relied on the fact that the primary way in which the claimants now put their case had escaped their attention until very late in the day. He also pointed out that the claimants and the Trustee have confirmed that the Scheme has always been administered on the basis that no comparison has been carried out so as to give any meaning to the second paragraph of Rule 17. There has not, in the case of any given survivor, been a testing of revaluation entitlements under Rule 21.1.2 and Rule 17. It follows that, although the claimants' first argument is that there is a limited situation in which the comparison is required to be made, no checks have in practice been carried out to identify whether in the case of a surviving spouse's Rule 13.5 pension, a greater increase is achieved by statutory revaluation or a Rule 21.1.2 increase.

71. Mr Rowley said that this submission was not justified because the evidence in support of the application made specific reference to Rule 21.1.2 in the context of Rule 13.5. In any event he said that there was nothing very surprising about the late discovery of what he contended to be the correct analysis. As he put it in his submissions in reply, these sorts of points can remain buried for many years, only emerging at the last minute. What matters is not what the position may have been thought to have been, but what it in fact is. In my view, this is the right approach.

72. Mr Mold submitted that the claimants were looking at matters from the wrong perspective. He said that this can be seen from the fact that they were obliged to accept that, if what he called "the particular slice of survivors' benefits" relied on by Mr Rowley were not the "deferred benefits" referred to in the second paragraph of Rule 17, that paragraph is utterly redundant, an outcome to which the court should not be attracted. This, he submitted, had driven the claimants to come up with a strained and artificial construction which covered only a very limited category of circumstance.

73. In approaching the words themselves, Mr Mold said that an underpin was the concept which the second paragraph of Rule 17 conveys. He said (correctly) that it was common ground that the benefits with which Rule 17 was concerned were to be increased by at

least the minimum statutory requirements of Chapter II of Part IV, but potentially subject to a higher amount. He also pointed out that the opening words of the second paragraph ("This rule shall only apply if …") suggested that priority was being given to another rule.

74. The extent of the underpin or the potential for a higher amount, being the subject matter with which the second paragraph is concerned was not (unlike the underlying concept of some form of underpin) common ground. Mr Mold submitted that the subject matter of the second paragraph is most naturally to be read as the same deferred benefits as those with which the first paragraph of Rule 17 is concerned, i.e., the short service benefits before they come into payment.

75. He then said that the word "that" was simply a reference to the increase for which provision was made by Rule 21. It did not require the "increase in deferred benefits" to be provided for by Rule 21. The exercise contemplated by the phrase "than that provided at Rule 21" was simply to take the increases which are provided at Rule 21 and apply them to deferred benefits subject to the statutory underpin. If the court were to agree that the natural and ordinary meaning of the words used in the second paragraph of Rule 17 is in accordance with the Wider Construction, the fact that it was accepted by the claimants that it is administratively workable means that there is no good reason to reject it. The court should guard against approaching the issue of construction with any preconceptions as to which it should favour.

76. In his oral submissions Mr Mold accepted that the drafter could have made the position clearer if the language had been something like:

> "This Rule shall only apply if it would provide a greater increase in deferred benefits than ~~that~~ applying to those benefits the increases provided at Rule 21"

77. Mr Mold also submitted that, on the claimants' construction of Rule 17.2, the wording of the second paragraph has no practical effect because, even without it, the survivors' pensions on which the claimants rely (those referred to in Rule 13.5) would still receive the increases stated in Rule 21.1.2 with a statutory revaluation underpin to the extent that it applies. This is because the statutory revaluation provisions I have already described (sections 129 and 130 of PSA 1993) mean that, if the increase provided for by Rule 21.1.2 did not meet the statutory requirements, those requirements would act as an underpin. It follows that, on the claimants' construction, the second paragraph of Rule 17.2 still has no substantive application or effect.

78. In arguing that the claimants' construction was no more than otiose, merely stating the position that would apply in any event, Mr Mold criticised Mr Rowley's submission that the second sentence of Rule 17 had been included for the avoidance of doubt. He said that this presupposed that there might be some doubt when the reality of the situation is that there could be none because of the operation of the statute (sections 129 and 130 of PSA 1993). The increase provided for by the statutory requirements for revaluation of deferred benefits are a mandated minimum and there can be no doubt that they will prevail. In the same way and to the same extent there can be no doubt that the first paragraph of Rule 17 would prevail if it were simply to be limited in its application to the revaluation of deferred benefits for which Chapter II of Part IV made provision in any event.

79. In this regard he relied on *Sterling Insurance Trustees Ltd v Sterling Insurance Group Ltd* [2015] EWHC 2665 (Ch) as an example of a case in which the fact that one of two rival constructions gave a very limited scope for the operation of the word in issue pointed strongly against that meaning being correct. In *Sterling*, Nugee J decided that the word "due" could be ignored in construing the proviso to the scheme's power of amendment ("no such alteration … shall operate so as to substantially reduce in aggregate the value … of the benefits accrued due in respect of any Member"), because statute already covered the same ground.

80. As to his argument that the claimants' primary submission meant that construction was artificial, with such a limited scope that it cannot have been what the drafter had in mind when including the second paragraph of Rule 17.2, Mr Mold went on to submit that the claimants started from the wrong point. They assumed that their own construction was correct and then sought to find a contrived circumstance in which it might be said that Rule 21 was dealing with an increase in deferred benefits. It would only arise in circumstances in which a member is an early leaver who starts to draw his pension before NPA, who dies after NPA, and whose spouse for whose benefit the relevant pension is to be paid survives the member.

81. Mr Rowley countered this submission by pointing out that the drafter was what he described as scrupulous in catering for quite remote possibilities. He drew attention to one of the sub rules to Rule 13 of the 2003 TDR which dealt with the consequences of a member contracting a polygamous marriage. He submitted that what Mr Mold had called the contrived circumstances were a rather more likely eventuality than the polygamy for which explicit provision was made. As to this, Mr Mold said that the polygamy rule was what he called a boilerplate provision and therefore was no indication that the drafter of the 2003 TDR was particularly focused on remote possibilities.

82. Mr Mold also submitted that what he called the particular slice of benefits in respect of which the comparison had to be made on the basis of the claimants' primary case as to the Narrower Construction was not naturally to be described as a deferred benefit. He said that this phrase was normally used to describe something that, while deferred or postponed, will actually become payable on the member's retirement. It is not normally used to describe something that is always contingent on the member's death and the survival of a spouse. He said that that is certainly the case in the 2003 TDR, where the word "contingent" not the word "deferred" is used to describe benefits payable to survivors contingent on a member's death. In support of this submission, he drew attention to a number of different contexts in the 2003 TDR where the drafter referred to the entitlements of non-member beneficiaries on the death of the member which were described as contingent, in contradistinction to a member's prospective entitlements which were referred to as deferred pensions or benefits.

83. Furthermore, even though in the context of the claimants' Narrower Construction the survivor's Rule 13.5 rights are wholly contingent on the death of the member, the Rule 21.1.2 first stage increase only applies in relation to the period in which the member is in receipt of a pension (the period between his retirement and his death) and is therefore dealing with a period of time during which the member's pension is in payment. Mr Mold submitted that it would be very odd in that circumstance to describe the survivor's rights as a deferred benefit when the member's pension that is payable in that period is in payment not in deferment.

84. He also submitted that there was an inconsistency at the heart of what he called the claimants' strained and contradictory approach. He pointed out that, while on the one hand the claimants relied on the fact that Rule 21 was dealing with increases to pensions in payment, on the other they were obliged by their construction of the second paragraph of Rule 17 to find something in Rule 21 which could be said to amount to an "increase in deferred benefits". There was no such inconsistency in the approach adopted by the second defendant because it simply required the increase provided for by Rule 21 to be applied to all benefits in deferment.

85. Mr Mold also submitted that there was one further textual indication that the drafter anticipated that the revaluation of deferred benefits was available generally under both Rule 17 and Rule 21. Rule 15.7 makes provision for the increase of an early leaver's pension paid in accordance with Rule 15.1 between his NRD and the date of his death so as to exceed or compare reasonably with the amount of his contributions. For the purposes of carrying out that comparison exercise the drafter has referred to the Rule 15.1 pension "inclusive of any increases under Rule 16, Rule 17 or Rule 21 …". This was said by Mr Mold to reflect the drafter's assumption that there could be an increase of a member's Rule 15.1 pension under Rule 21 before it comes into payment because it refers to Rule 17 or Rule 21. It was said that if Rule 15.7 only envisaged taking account of increases of pensions when in payment under Rule 21, the phrase "and Rule 21" not "or Rule 21" would have been used because pensions in payment would always have been in addition to not just as an alternative to increases under Rule 17.

86. Mr Rowley suggested that the reason for this was that the exercise with which Rule 15.7 was concerned was what he called a value for money test, comparing the actuarial value of the entirety of the member's bundle of rights (including therefore the prospective increases in pensions in payment with which Rule 21 was concerned once the pension came into payment) with the amount of the member's contributions. This appears to have derived from a value for money entitlement granted to early leavers by Regulation 26 of the Occupational Pension Schemes (Preservation of Benefit) Regulations 1984 (SI 1984/614), which required the same computation. Although this has now been revoked, Mr Rowley demonstrated that many schemes have retained provisions in this form, because full statutory revaluation only applies in respect of early leavers leaving from 1 January 1991.

87. It follows that "any increases under … Rule 21" as referred to in Rule 15.7 is simply reflective of the fact that the Rule 15.1 pension calculation is required to take into account an actuarial assessment of the prospective value of the member's pension once in payment for value for money purposes. It does not indicate that there is any general provision for revaluation of deferred benefits under Rule 21 such as to support the Wider Construction.

88. I agree that Mr Rowley's submissions on this point are likely to be correct. In any event, I am doubtful that the distinction between "and Rule 21" and "or Rule 21" has any real significance to the construction point I have to decide. It is well established (see e.g., *The Royal Devon and Exeter NHS Foundation Trust v ATOS IT Services UK Ltd* [2017] EWCA Civ 2196 at [37]) that the word "or" is quite capable of being used in a conjunctive as well as a disjunctive sense. Where reliance is placed on the use of the words as a textual indication of what might have been intended elsewhere in the same document, there is no reason to believe that the drafter did not intend to use "or" in a conjunctive manner.

The Significance of the 1997 TDR

89. In further support of his argument for the Narrower Construction, Mr Rowley relied on the earlier version of the Scheme's governing documentation in the form of the 1997 TDR. He pointed out that this contained no provision which was capable of being construed so as to have the same effect as the Wider Construction. He then went on to submit that it was inherently unlikely that benefits for deferred members given by the new Rule 17 of the 2003 TDR would have been improved to the extent of the Wider Construction.

90. The background to this submission is that the 1997 TDR included core benefit provisions that were very similar to those of the 2003 TDR. The pension increase rule in the 1997 TDR (Rule 17) was also in very similar form to its equivalent in the 2003 TDR (Rule 21). However, the revaluation rule in the 1997 TDR (Rule 23), although more extensive than its 2003 TDR equivalent (Rule 17) and drafted using a different style from that adopted for the 2003 TDR, contained nothing which had the effect of the Wider Construction for which the second defendant contended.

91. The revaluation rule in the 1997 TDR provided as follows:

> "*23. REVALUATION OF PENSIONS IN EXCESS OF GUARANTEED MINIMUM PENSIONS*
>
> *23.1 This Rule applies to the pensions hereinafter specified:*
>
> *23.1.1 the pension payable in accordance with sub-Rule 20.1 to a Member who has ceased to be in Pensionable Service before Normal Retirement Date;*
>
> *23.1.2 the pension payable under sub-Rule 15.5 to a spouse on the death of a Member as described in sub-Rule 23.1.1 above while in receipt of a pension under sub-Rule 20.1.*
>
> *23.2 Where a Member ceases to be in Pensionable Service and there are not less than 365 days in the period commencing on the day after leaving Pensionable Service and ending on Normal Retirement Date (disregarding any day which is 29th February) then any pension to which sub-Rule 23.1 refers (inclusive of any pension increases under Rule 25 but before the exercise of any option under Rule 10 or Rule 11) shall if necessary be increased to be at least equal to the sum of:*
>
> *23.2.1 the amount of the relevant pension, being:*
>
> *(A) in the case of a pension under sub-Rule 20.1, the amount of pension calculated in the manner specified in sub-Rule 20.1 as at the date on which the Member ceased to be in Pensionable Service; or*
>
> *(B) in the case of a pension under sub-Rule 15.5, the amount of pension calculated in the manner specified in sub-Rule 15.5; and*
>
> *23.2.2 an amount equal to A x (B – C), where:*

> *A is the revaluation percentage specified as being relevant in an order made under paragraph 2 of Schedule 3 to the Pension Schemes Act during the calendar year before the year in which the Member reaches Normal Retirement Date (or earlier date of death);*
>
> *B is the amount of the relevant pension as described in sub-Rule 23.2.1 above;*
>
> *C is the amount of any guaranteed minimum pension disregarding any revaluation of guaranteed minimum pension under Rule 6 of the Contracting-out Rules.*
>
> ...
>
> *23.4 The foregoing provisions of this Rule are intended to take account of the revaluation requirements of Chapter II of Part IV of the Pension Schemes Act and accordingly:*
>
> > *23.4.1 to the extent that there is any conflict between the provisions of this Rule and the provisions of Chapter II of Part IV of the Pension Schemes Act the latter shall prevail; and*
> >
> > *23.4.2 nothing in the Rule shall be taken as conferring any greater entitlement on a member or any other person than is necessary for the purpose of meeting the statutory requirements.*"

92. Rule 23 of the 1997 TDR was therefore drafted in a manner which restated the statutory provisions then in force, an approach which was emphasised by Rule 23.4 which stated in explicit terms that it was intended to do no more than give effect to members' and beneficiaries' statutory entitlements under Chapter II of Part IV of PSA 1993. Mr Rowley submitted that this made clear that what Rule 23 was concerned with was revaluation in accordance with the statutory entitlement and nothing more. It would be wholly inconsistent with this provision for the rules dealing with increases to pension in payment to be applied by a sidewind.

93. In making these submissions Mr Rowley relied on the ability of the court to consider what has been called the archaeology of the Scheme as part of the admissible factual matrix. He and Ms Ovey referred in their skeleton argument to the decision of Patten J in *Law Debenture Trust Corporation Limited v. Lonrho Africa Trade & Finance Limited* [2002] EWHC 2732 (Ch), [2003] Pens. L.R. 13 at [12]:

> "One discrete point which sometimes arises in pension scheme cases (and which arises in this one) is whether and to what extent the court can look at the history of the amendments to the scheme to assist it in construing the provisions in question. In the *National Grid* case Robert Walker J accepted that the archaeology of the scheme could be a legitimate aid to construction, because the superseded provisions undoubtedly form part of the matrix of fact surrounding the scheme at the relevant time, and may assist to explain the purpose and meaning of a new provision. He cautioned, however, against the practice on the ground that it was inconvenient and uncertain to provide any useful assistance. With these words of warning well in mind, I do, however, intend to say something of the history of the Scheme and its

> provisions, for reasons which will become apparent when I come to the specific questions raised by the application."

94. Patten J's reference to the National Grid case was to *National Grid Company plc v Laws* [1997] Pens LR 157, which eventually reached the House of Lords, *sub nom. National Grid Company plc v Mayes* [2000] UKHL 20, [2001] 1 WLR 864, at which stage Lord Hoffmann referred at some length (see [18] to [26] of his speech) to previous versions of the scheme documentation.

95. Nonetheless the caution with which any court must approach reliance on earlier versions of the rules of a pension scheme is exemplified by what Lord Hodge had to say on the subject in *Buckinghamshire v Barnardo's* [2018] UKSC 55, [2019] ICR 495 at [26]:

> "Sixthly, I do not derive any real assistance from the superseded 1978 scheme, in which the term "index" was defined in the introductory interpretation clause as: "the Government's Index of Retail Prices or any other official cost-of-living index published by authority in place of or in substitution for that index." This definition can provide little assistance because the 1988 rules involved a wholesale re-drafting of the earlier rules in which the draftsman may or may not have had regard to the wording of the earlier rules, with the result that there is no basis for assuming that the draftsman's use of different words points to an intention to achieve a different meaning. In any event, I agree with Lewison LJ in para 23 of his judgment that the nature of a pension scheme, which may have members who have no knowledge of the prior rules, makes it unprofitable to delve into the archaeology of the rules in this case."

96. Mr Mold submitted that the form of the 1997 TDR was not a legitimate aid to construction of the 2003 TDR. He said that there were a number of reasons for this, including the points made by Lord Hodge and in particular that there was no basis on which I could conclude that the parties did not intend to change the extent and effect of this particular benefit.

97. He also submitted that, on one reading of the 1997 TDR, there was not in fact any change between what was then included and the Wider Construction of Rule 17 of the 2003 TDR for which he contended. He said that the pension increase rule in the 1997 TDR (Rule 17) was capable of applying not just to increases to pensions in payment but also to deferred pensions as well. He made this submission, not for the purposes of advancing a positive case that the language of the 1997 TDR supported the Wider Construction, but in order to deflect Mr Rowley's argument that it was improbable that the 2003 TDR would have made provisions for an improvement to deferred members' benefits.

98. The basis of this submission was that Rule 17 of the 1997 TDR was said to be capable of applying to pensions that were "prospectively payable" as well as those that were already in payment. The reason for this was that the language used was that the entitlement to an increase was always expressed to be "In the case of a pension payable" under the relevant rules (Rules 9 and 20 of the 1997 TDR which provided for retirement pensions in the same form as those referred to in Rules 7 and 15 of the 2003 TDR). It was said that "payable" in this context covered both pensions that were already then in payment (whether originating from Rule 9 or Rule 20 of the 1997 TDR)

and pensions which, although payable in the future, were not yet in payment and were therefore deferred.

99. Mr Rowley said that this was an unlikely construction. He pointed out that the deferment rule (Rule 23 of the 1997 TDR) made no cross-reference to the pension increase rule (Rule 17 of the 1997 TDR), which itself contained no carve-outs relevant to deferred benefits. More specifically he submitted that the word "payable" as used in Rule 17 of the 1997 TDR was not capable of bearing the meaning which Mr Mold ascribed to it. He said that its natural meaning is by way of reference to a pension that has already come into payment, because it is used without distinction both in relation to pensions payable under Rule 9, where there is no period of deferment before the pension is drawn, and pensions payable under Rule 20 where there is, because the pension with which that rule is concerned is payable to an early leaver.

100. Mr Rowley also submitted that there were other indications in the 1997 TDR that, when the drafter used the word "payable", they were only concerned with a situation in which the obligation to pay had fallen due, i.e., that the pension was in payment. One such example was said to be Rule 16.2 which used the phrase "All pensions becoming payable under the Scheme shall be paid by monthly instalments … on such day of the month as the Trustees shall determine" which can only have meant that a pension was payable when it became due for payment. While he accepted that the same word was not always used in the same sense in a single document, particularly where the document is of the length and complexity of the 1997 TDR, the fact that payable can only have been referring to an accrued obligation that has fallen due for payment both elsewhere in Rule 17 and in the immediately preceding Rule 16 is a strong pointer to the fact that it has the same meaning throughout Rule 17.

101. Mr Mold also pointed to another indication that Rule 23 of the 1997 Rules operated in the same way as the Wider Construction of Rule 17 of the 2003 TDR for which he contended. This was the use of the phrase "if necessary" at the end of the opening paragraph to Rule 23.2. He submitted that, because the drafter had provided for deferred pensions with which the Rule was concerned only to be increased "if necessary", this was consistent with a pension in deferment already being subject to the pension increases for which Rule 17 of the 1997 TDR provided.

102. Mr Rowley submitted that this was not the case because the phrase "if necessary" was included for a different purpose. The opening words of Rule 23.2 of the 1997 TDR set the starting point to which the increase calculation set out in Rules 23.2.1 and 23.2.2 is to be applied. That starting point is the pension payable to a member ceasing pensionable service before NRD in accordance with Rule 20.1 and the pension payable to a spouse under Rule 15.5 on the death of a member while in receipt of a pension. If that were to be all, the increase in accordance with the Rule 23.2.1 and 23.2.2 formulae would always be necessary in order to comply with the requirements of Chapter II of Part IV (see also Rule 23.4), and there might then be some traction in Mr Mold's point.

103. However, Rule 23.2 of the 1997 TDR also refers to the pensions to which the increase provisions apply to be "inclusive of any pension increases under Rule 25", which is a reference to the Trustee's discretionary power (with the consent of the Employer) to augment any pension or other benefit payable under the 1997 Rules. Mr Rowley said that the words "if necessary" were needed to make clear that application of the increase in accordance with the formula would not always be necessary if the exercise of the

power of augmentation had already achieved the increase. In the light of Rule 23.4.2, the entitlement to an increase was not intended to give a beneficiary a greater entitlement than was given by the statute, and so an increase would not be necessary where the power to augment had been used.

104. To similar effect Mr Rowley also submitted that the phrase "if necessary" covered off the circumstances in which the statutory revaluation entitlement did not apply because a member's pensionable service terminated before 1 January 1986. In that situation there would be no entitlement to a revaluation under Chapter II of Part IV, the provisions of Rule 23.4 of the 1997 TDR prevented a revaluation from being applied and so it would not be necessary for the formula set out in Rules 23.2.1 and 23.2.2 to be used to increase the pension by way of the revaluation contemplated by Rule 23.2.

105. I think that Mr Rowley is correct in his submissions on the meaning and effect of the 1997 TDR. In my view the Wider Construction would not reflect the pension increase provisions in the 1997 TDR for the reasons that he gave.

106. Nonetheless, I take the view that the archaeology of the Scheme documentation is of limited assistance in the present case. While I did not find Mr Mold's arguments as to the effect of the 1997 Rules to be very persuasive, it is not possible to conclude with any degree of certainty that Rule 17 of the 2003 TDR was intended to be no more than a consolidation of the existing provisions. While much of the language of the 2003 TDR reflects the wording of the equivalent provisions in the 1997 TDR, the same cannot be said for Rule 17, where the language is very different. While that may simply be because of a difference in drafting style, it is not clear from the admissible factual matrix that this is the case. In my view this is a case in which the factors referred to in the passage from Lord Hodge's judgment in *Barnardo's* at [26] cited above apply. The most that can be said is that, if there was an intention to change the nature of the entitlement to a revaluation of short service benefits, which is what I am satisfied would be the case if the Wider Construction were to prevail, the drafter chose rather obscure language to achieve that result.

Post-2003 Conduct

107. I have reached the same conclusion in relation to Mr Rowley's reliance on *Dunlop Tyres Ltd v Blows* [2001] EWCA Civ 1032 in support of a submission that, if the court concluded that the terms of Rule 17 were ambiguous, it was permissible to consider consistency in the parties' course of conduct both before and after the instrument to demonstrate that no change was intended. It is, of course, well-established that subsequent conduct and views expressed in later documents should not affect the way in which the 2003 TDR is to be construed. However, as Lord Woolf explained in *Dunlop* at [22]:

> "… where there is a clearly established practice which continues before and after a contract is made, the evidence of what happened before becomes relevant in determining whether any change in the position has been made. If there is (as I believe there was here) real ambiguity as to the meaning of the contract, the absence of any change of practice would be a clear indication that the parties by their

> conduct which as part of the background circumstances against which the contract should be interpreted, intended no change in the contractual terms."

108. On any view, this principle must be treated with some caution, and it can only be engaged where the language is truly ambiguous. However, the main reason why I do not think that the principle assists in the present case is that the evidence is not consistent with the Scheme being administered, both before and after the 2003 TDR, in accordance with the construction for which the claimants now contend. True it is that the conduct pre- and post- the 2003 TDR is consistent with the Narrower Construction generally, but it is not consistent with what is now advanced as the primary way in which the claimants put their case. This seems to me to undermine the value of the exercise contemplated by Lord Woolf in *Dunlop*, even if it were otherwise to be a legitimate approach.

Conclusions

109. This is not a case in which practical questions as to how the Scheme will be operated if one or other construction is preferred played a significant part in the argument. Both parties accepted that the other's construction led to a workable, if inconvenient, solution. It is also not the case that either party was able to point to a significant reason as to why in principle their construction satisfied an evident purpose of the Rule more effectively than the other's.

110. However, I consider that Mr Rowley is correct to submit that the introduction of a separate set of calculations for the purposes of assessing the right means of increasing all deferred benefits is a pointer against the Wider Construction. There is no obviously good reason for taking the rather inconvenient course of doing it that way if the Wider Construction were to have been intended. I do not regard it as a point of central significance, but it is one of the factors to which I think it is appropriate to have some regard. Put shortly, because there is no obvious purpose for the introduction of this particular and rather unwieldy method of calculating whether or not a greater increase ought to be awarded, there are some grounds for thinking that the Wider Construction by which it would be impelled is wrong.

111. Nonetheless, the fact that the Wider Construction is workable and leads to no more than some inconvenience in the Scheme's administration means that the textual analysis remains, as indicated by the authorities I have cited above, central to the answer.

112. In my view, it is clear that Rule 17 is primarily concerned with increases in deferred pensions before they come into payment and Rule 21 is primarily concerned with increases in pensions once they have come into payment. It is also clear that the ways in which the two categories of increase are dealt with (treating revaluation as an increase for this purpose) are different. In applying Chapter II of Part IV, Rule 17 gives effect to a one-off increase by way of revaluation, while Rule 21 is primarily making a provision for an annual increase on an ongoing basis. A revaluation of short service benefits by way of one-off increase is conceptually different from an ongoing annual increase to pensions in payment.

113. However, the drafter clearly contemplated that there were or at least might be some circumstances in which a comparison between the consequences of the operation of these two distinct concepts was to be made. The first paragraph of Rule 17 requires something to be done ("short service benefits before they come into payment shall be revalued") while the opening phrase of the second paragraph ("This Rule shall only apply if …") operates so as to limit the circumstances in which the Rule, including the requirements of the first paragraph, would otherwise apply. As the limitation operates where one thing is greater than another, this can only be established by the carrying out of some form of comparative exercise.

114. Mr Mold's submission that the concept suggested by the second paragraph of Rule 17 was that priority was being given to another Rule reflects the concept of a comparative exercise which I accept was intended. However, it does not of itself mean that the comparison was intended to take the form of an underpin. The question is what are the circumstances in which and the extent to which the other Rule is to have that priority.

115. The Narrower Construction has the merit of seeking to compare two increases that have the same inherent characteristics in order to identify which one is greater than the other. The first is an increase of a deferred benefit to which Rule 17 applies. The second is any increase of a deferred benefit to which Rule 21 applies. The language of Rule 17 to achieve that result works in the sense that:

    i) the word "that" in the second paragraph of Rule 17 most naturally refers to "a greater increase in deferred benefits" because that is the only category of increase to which the paragraph refers; and

    ii) the word "provided", where it appears twice in the second paragraph of Rule 17, identifies that the rights to the two increases that are to be compared with each other derive from Rule 17 and Rule 21 respectively.

116. I agree with Mr Rowley's submission that this construction makes good commercial sense when applied to the Rule 13.5 survivor's pension for the reasons described in paragraph 66 above. It ensures that the survivor has the benefit of only one initial increase to their Rule 13.5 pension, but that they always have the benefit of the statutory revaluation entitlement, recognising all the while that, if the increase under Rule 21.1.2 was greater, they received that benefit instead. The same point would apply if there were to be any other deferred benefit that might be said to be increased as provided at Rule 21.

117. In my view, the Wider Construction is more difficult on the language of the second paragraph of Rule 17 and I do not accept, as Mr Mold submitted, that the wording clearly and unequivocally conveys the meaning that a member's benefits are to be increased during deferment by the greater of statutory revaluation or the rate of increases provided by Rule 21. While the Wider Construction accepts that the word "that" refers to the increases provided at Rule 21, it eschews the need for those increases to have the same inherent characteristics as those referred to in Rule 17. It simply requires the amount of the Rule 17 increase in deferred benefits to be greater than the increase that would be achieved if the rate and method of increase to be applied was the same as that provided for by Rule 21, even though (on the Wider Construction) Rule 21 is dealing with increases to pensions in payment not deferred benefits. It does not, however, stipulate the nature of the Rule 21 benefit with which the Rule 17 deferred

benefit is to be compared. On the Wider Construction, this must be a benefit other than the deferred benefit referred to in the earlier part of the paragraph.

118. In my view this construction would place a heavy burden on the word "that", and requires the carrying out of an exercise that is not comparing like with like. If an increase other than an increase in deferred benefits was intended to be encapsulated by the word "that", it would be much more natural for that other increase to be spelt out.

119. Another way of describing the problem is that the Wider Construction, arguing as it does for the application to deferred benefits of a rate and method of increase "provided at Rule 21" to pensions in payment, assumes an entitlement to the application of that increase to deferred benefits, but does not make express provision for it. Subject to the claimants' submissions on the first stage increase under Rule 21.1.2, the only increases to which members and other beneficiaries are entitled by way of provision "at Rule 21", are increases to pensions in payment, not increases in deferred benefits.

120. In my view, this makes it difficult to argue that the second paragraph of Rule 17 provides for an underpin. An application of the greater of the Rule 17 revaluation increase and the Rule 21 annual increase to deferred benefits assumes that a right to both is stipulated either in Rule 17 or in Rule 21. Although the second paragraph disapplies Rule 17 in circumstances in which it does not provide for a greater increase in deferred benefits, the second paragraph of Rule 17 does not spell out in terms that, in those circumstances, the deferred benefits are to be increased in accordance with the rates and method for which Rule 21 provides. The Wider Construction simply assumes that that is what will occur.

121. While the way in which Mr Mold accepted that the second paragraph should be read (see paragraph 76 above) would certainly have made it clearer that the comparison exercise contemplated by the drafter was between the statutory revaluation referred to in the first paragraph of Rule 17 and the increases provided for by Rule 21, even that wording does not spell out that the greater of statutory revaluation and a Rule 21 increase is required to be applied. It merely assumes that there are or at least may be some circumstances in which the two approaches can or may be applied, in which event the beneficiary of the deferred benefit is entitled to the greater. In my view the language of the second paragraph of Rule 17 would be a very obscure way of providing for a different form of general increase to deferred benefits (by way of underpin) than that for which Chapter II of Part IV provides. This is different from cases such as *Britvic*, where there was abbreviated language sufficient to give deferred beneficiaries the benefit of increases referred to elsewhere in the scheme documentation.

122. A conclusion that a textual analysis of the second paragraph of Rule 17 is more consistent with the claimants' Narrower Construction does not, however, provide a complete solution. As I have already said, I think it is clear that the drafter assumed that some form of comparison may be required, a consideration which means that the Narrower Construction requires that there are or may be circumstances in which Rule 21 provides for an increase in deferred benefits. It was this which caused Mr Rowley to identify the first stage Rule 21.1.2 increase as an increase in deferred benefits within the meaning of Rule 17. This was the only part of Rule 21 which was suggested as a candidate for the reference made in the second paragraph.

123. I accept that the pension described in Rule 21.1.2, being the "pension payable under Rule 13 following the death of a Member who is in receipt of a pension" would not normally be described as a deferred pension. That concept is used throughout the 2003 TDR to describe a pension to which a member is prospectively entitled under Rule 15 when he leaves pensionable employment before the occurrence of his NRD.

124. However, the phrase "deferred benefit" is not defined and does not appear to be exactly the same thing as a deferred pension. I accept Mr Rowley's submission that the phrase "increase in deferred benefits" is not inapposite to describe the process of applying a single initial increase immediately before the survivor's Rule 13.5 pension comes into payment. Although not identical, the application of the single initial increase has clear similarities to the revaluation process for which Chapter II of Part IV provides. True it is that the benefit to which the increase is applied is normally described in the 2003 TDR as a contingent benefit, but it is also "deferred" so far as the surviving spouse is concerned in the sense that their rights do not crystalise into a pension in payment until the occurrence of an event (the death of the member) in the same way that an early leaver's rights to a deferred pension do not arise until he reaches NRD.

125. Mr Mold's submission that the language of deferral rather than contingency was particularly ill-suited to the survivor's pension referred to in Rule 21.1.2, because the member's pension on which it was based was then in payment, caused me some pause for thought. However, on reflection I do not think that it is a good point, because it does not recognise that the drafter of the second paragraph of Rule 17 was looking at Rule 21 for the purpose of determining whether a beneficiary's benefits might be regarded as deferred so as to engage the possibility which needed to be avoided of any double recovery. So far as the potential survivor was concerned, their benefits were, until the date of death of the member, deferred. They have also been described as contingent, but the drafter was considering them in the context of any potential overlap with Chapter II of Part IV. In that context, it is not surprising that the survivor's benefits were described as deferred.

126. I am also unpersuaded by Mr Mold's submission that the Narrower Construction has no practical effect in circumstances in which the provisions of PSA 1993 would apply in any event. In my view, the way in which the second sentence of Rule 17 is drafted is wholly consistent with its operation as a provision included for the avoidance of doubt. It is to make clear that the statutory requirements for revaluation referred to in the first paragraph are only intended to supplement any other increase provisions where (having regard to section 130(b) of PSA 1993) they are required to do so, in order to comply with the terms of the statute. The starting point is to look at Rule 21 to see if there is anything in that Rule which provides for an increase in deferred benefits. If there is, that applies. It is only if that application leads to a smaller increase than would be achieved by Chapter II of Part IV that Rule 17 applies, because it is only then that it needs to do so in order to ensure that the provisions of the PSA 1993 are complied with. To that extent, both paragraphs operate as descriptive restatements of what the law provides, but no more.

127. In my view, this is also the reason why the opening words of Rule 17 provide that the obligation to revalue applies "in relation to" a member of the FSS. On one view this language is surplusage, because the whole of the First Schedule is dealing only with the FSS, but I think that it was included to make clear that the increases with which Rule 17 is concerned were capable of affecting both benefits that are payable to a member

and benefits that are payable to others in relation to a member, i.e., survivors. In my view this is one of those cases in which the effect of the whole of Rule 17 is directed at restating the practical consequences for which the mandatory provisions of the law would provide in any event. In a case such as the present that is not a result from which the court should shy away.

128. As is often the case in disputes of this sort, the language of the offending rule is obscure and poorly expressed. However, I have reached the clear conclusion that the Narrower Construction is to be preferred. Accordingly, I will grant the declaration sought by the claimants and invite the parties to agree the precise form that it should take.