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Case No: PE-2021-000001

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

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

Date: 23/01/2024

**Before**:

**THE HONOURABLE MR JUSTICE MICHAEL GREEN**

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**Between:**

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| **NEWELL TRUSTEES LIMITED** | **Claimant** |
| **- and –** | |
| **(1) NEWELL RUBBERMAID UK SERVICES LIMITED**<br>**(2) IAN LAWRENCE PUTLAND** | **Defendants** |

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**Keith Rowley KC and Wendy Mathers** (instructed by **Pinsent Masons LLP**) for the **Claimant**
**Paul Newman KC, Claire Darwin KC and Thomas Robinson** (instructed by **DLA Piper UK LLP**) for the **First Defendant**
**Richard Hitchcock KC and Lydia Seymour** (instructed by **Squire Patton Boggs (UK) LLP**) for the **Second Defendant**

Hearing dates: 30 June, 3-5 July, 10 and 13-16 November 2023

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# Approved Judgment

This judgment was handed down remotely at 10 am on 23 January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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**Mr Justice Michael Green:**

## A. INTRODUCTION

1. In 1992, the members of the pension scheme in question in these proceedings, which was only a final salary or defined benefits scheme at the time, were divided into three groups by reference to their age on 31 December 1991:

   (1) Those aged under 40 (the "**Under 40s**");

   (2) Those aged between 40 and 44 (the "**40-44s**"); and

   (3) Those aged 45 and over (the "**Over 45s**").

   The Under 40s were automatically transferred over to a new money purchase section of the scheme with their accrued final salary benefits converted into a cash amount that was credited to their money purchase personal accounts. The 40-44s had the option of staying in the final salary section or transferring over to the money purchase section. The Over 45s had no choice and remained in the final salary section.

2. This case is therefore concerned with two broad matters:

   (1) Whether the transfer and conversion of the Under 40s and 40-44s to a money purchase section was valid in terms of the factual execution of the necessary documents and as a matter of law ("**Transfer and Conversion Issues**");

   (2) Whether the Under 40s suffered and are suffering unlawful age discrimination as a result of their automatic transfer out of the final salary scheme into the money purchase section ("**Age Discrimination Issues**").

3. There are many issues that those two broad areas give rise to. These have been brought before the Court by the Claimant, Newell Trustees Limited, which is the sole trustee of the occupational pension scheme known as the Newell Rubbermaid UK Pension Scheme (the "**Trustee**" and the "**Scheme**" respectively). The Trustee issued a Part 8 Claim Form seeking directions from the Court regarding the pension entitlements of members of the Scheme, that is the Under 40s and the 40-44s, who were affected by the Transfer and Conversion Issues explained briefly above. The Trustee is represented by Mr Keith Rowley KC and Ms Wendy Mathers. As is entirely appropriate, they have adopted a neutral position on the issues in respect of which they seek my determination.

4. The First Defendant, Newell Rubbermaid UK Services Limited, (the "**Company**") is an employer under the Scheme. Neither it nor the Trustee were incorporated at the time of the relevant events, which was when a predecessor pension scheme, the Parker Pension Plan (the "**Plan**") was in place. The Company is sued as the representative of those members and employers, and others in whose interests it is to argue that the transfers to the money purchase section were valid and there was no unlawful age discrimination. Representation orders are sought under CPR 19.9 to such effect. The Company is represented by Mr Paul Newman KC, Ms Claire Darwin KC and Mr Thomas Robinson.

5. The Second Defendant, Mr Ian Putland (the "**RB**"), was a member of the Scheme until 22 June 2023 and is a former member of the Plan who transferred to the money purchase section pursuant to the conversion outlined above. The RB consented to be joined to the proceedings to represent all those members and others in whose interests it is to argue the contrary to the Company and those it represents. In other words, the RB argues that the transfers to the money purchase section were invalid; further or alternatively that there was unlawful age discrimination. The RB is represented by Mr Richard Hitchcock KC and Ms Lydia Seymour.

6. There are a large number of issues that I have to decide. There is also a dispute as to what the actual Age Discrimination Issues are. The parties have helpfully attempted to provide decision trees and flowcharts to plot a route through the interlocking issues. I am grateful to all parties, counsel and their legal teams for the clarity of their submissions and the effective way that the hearing was handled, particularly as we had to adjourn the trial after the evidence for a few months.

7. I heard oral evidence from two factual witnesses: Mr Steven Mark Southern, formerly a practising solicitor specialising in pensions law who is now a director of Vidett Pension Services Limited (formerly known as 20-20 Pension Services Limited), which is itself on the board of the Trustee; and Mr Stephen John Gover, who is also a director of the Trustee and was a member of the Plan and one of the Under 40s who was transferred on 1 January 1992 to the money purchase section, but was subsequently transferred into the final salary section and accrued benefits on the enhanced basis applicable to senior executives under the terms of the Plan rules. Both witnesses gave transparently honest and considered evidence, albeit of rather limited relevance, and I will deal with it as necessary below.

8. There were also witness statements that were admitted into evidence without cross-examination made by the following: Mr Robert Barnsley, who was a director of various companies in the Parker Plan Group at around the time of the transfer and a pensioner member of the Scheme – a hearsay notice under the Civil Evidence Act 1995 was served in respect of his evidence and no one sought to call him for cross-examination; Ms Kathryn Ford, from the Company's solicitors, describing the attempts by the Company to obtain relevant evidence; and Mr Putland, the RB, whose short statement merely deals with his employment history and his role as the RB.

9. The Company and the RB also provided expert actuarial evidence. Both experts have helpfully provided a joint statement and they were both cross-examined: Mr Bob Scott of Lane Clark & Peacock LLP for the Company; and Mr John Batting of XPS Pensions Group plc for the RB. I am grateful to them for their clear reports and evident expertise. Again I will deal with their evidence as necessary below.

10. There was also a report prepared by the Scheme's current actuary, Ms Sheila Murray of Aon Solutions UK Limited dated 18 December 2020. This was exhibited to Mr Southern's witness statement and was briefly commented on by both experts. Ms Murray was not called as a witness at the trial.

11. After setting out a brief factual background, I will explain the issues that are before me and then attempt to deal with those issues in the order they have been listed.

## B. FACTUAL BACKGROUND

12. All the issues before me arise out of the intended amendment of the Plan by an Interim Amending Deed dated 6 January 1992 (the "**1992 Deed**") which was expressed to be effective from 1 January 1992. Prior to the adoption of the 1992 Deed, all members had accrued final salary benefits under the Plan. At the date of the 1992 Deed, the Plan's governing document was a Supplemental Deed with scheduled Rules dated 18 September 1979 (the "**1979 Deed**").

Corporate history

13. The Plan was the pension scheme of a group of companies within the Parker Pen Group, the well-known manufacturer of writing instruments and inks. The principal employer under the Plan was Parker Pen UK Limited ("**PPUK**"). It was incorporated in 1924 as a subsidiary of the US parent, The Parker Pen Company. PPUK established the Plan in 1958.

14. In or around 1986, PPUK was acquired by a management buy-out team through a vehicle formed for this purpose, Parker Pen Limited ("**PPL**"), with financial assistance from Schroder Ventures, the private equity arm of (as it then was) J. Henry Schroder Wagg and which was represented (so far as material) by Mr Jon Moulton.

15. The Parker Pen Group's business was managed through the English Executive Committee ("**EC**"), which was a body that comprised both directors of PPL and PPUK and senior managers from the Group. Mr Barnsley and Mr Gover were members of the EC at the material time.

16. After various attempts to dispose of the Parker Pen Group, influenced by Mr Moulton, as Mr Gover stated in his witness statement, and which included an abortive stock market flotation that was thwarted by the October 1987 market crash, the UK Parker Pen Group was purchased by the Gillette Group in May 1993, after the transfer and conversion of the Plan had taken place.

17. The Parker Pen Group was then sold to Newell Rubbermaid Incorporated in 2000 and it remains part of the Newell Rubbermaid Group.

The 1979 Deed

18. As was commonly done, the Plan was first established by an Interim Trust Deed dated 30 May 1958. That anticipated a Definitive Trust Deed which was executed on 1 April 1960.

19. As I have already noted, the 1979 Deed was the relevant governing documentation of the Plan as at the date of the 1992 Deed. This was only a final salary ("**FS**") scheme, otherwise known as a defined benefit ("**DB**") scheme. Mr Hitchcock KC placed some emphasis on the fact that, until the 1992 Deed, all members were part of and entitled to expect that they would remain within the FS scheme.

20. Under the 1979 Deed, the Plan's benefit structure can be summarised as follows (terms with upper case first letters were defined terms):

(1) As was then common, male and female members had different retirement ages, of 65 and 60 respectively.

(2) Members accrued benefits at the rate of 1.75% of their Final Pensionable Salary for Pensionable Service prior to 1 June 1978 and from that date:

(a) at the rate of 1.25% of their Final Pensionable Salary up to the Upper Earnings Limit; and

(b) at the rate of 1.75% of their Final Pensionable Salary above the Upper Earnings Limit.

(3) Pensions in payment increased at the rate of 3% fixed per annum.

21. The 1979 Deed contained a common form clause (clause 5) granting a power of amendment in the following terms (underlining added):

> "The Principal Employer and the Trustees may jointly from time to time without the consent of the Members by Deed alter cancel modify or add to any of the provisions of this Deed and by memorandum under hand signed in the case of the Principal Employer by a director duly authorised, alter cancel modify or add to any of the Rules, provided that no such alteration cancellation modification or addition shall be such as would prejudice or impair the benefits accrued in respect of membership up to that time".

22. I will need to deal with the underlined proviso to this clause in greater detail later in this judgment. The Company and the RB disagree about the effect of the proviso on the transfer and conversion by the 1992 Deed. A number of first instance judgments have dealt with the effect of such a proviso on the exercise of the power of amendment, starting with the influential judgment of Millett J, as he then was, in *In re Courage Group's Pension Schemes* [1987] 1 All ER 528 ("***Courage***"). Such provisos are sometimes referred to as "*Re Courage* provisos". I will refer to the one in this case as the "**Proviso**".

23. *Courage* has been followed and applied in a series of later judgments at first instance, including two which have featured prominently in this case: *HR Trustees Ltd. v. German* [2010] Pens LR 23, a judgment of Arnold J, as he then was, (this is generally referred to as "***IMG***", after the name of that scheme's principal employer, and I will do likewise); and *Briggs v. Gleeds (Head Office)* [2015] 1 Ch 212 ("***Gleeds***"), a judgment of Newey J, as he then was. It has generally been accepted that, as regards whatever it decided in this context, *Courage* is binding at first instance – see *G4S Plc v. G4S Trustees Ltd.* [2018] Pens LR 16, a decision of Nugee J, as he then was. Mr Newman KC has, however, sought to distinguish *Courage* and the other cases, and has reserved the right to argue in the Court of Appeal that *Courage* was wrong.

The 1992 Deed

24. The 1992 Deed is at the centre of the Transfer and Conversion Issues. It purported to introduce by way of amendment to the 1979 Deed, a money purchase ("**MP**") section, otherwise known as a defined contribution ("**DC**") section. However the RB says that it was not effective to introduce the MP section; nor that it could convert the FS benefits

into MP benefits. This is partly to do with whether there is sufficient proof that it was properly executed. But also it concerns whether its terms were capable of such conversion.

25. The original signed 1992 Deed has not been found. The Trustee has what appears to be a copy of a certified copy of the original from Clifford Chance who were the solicitors who drafted it. I have also seen an original blue Clifford Chance file that contains a copy of the 1992 Deed, certified to be a true copy by Clifford Chance and which appears to be the original of the Trustee's copy document referred to above. The main issue on the facts is whether the two booklets apparently attached to the 1992 Deed were actually attached and signed by the individuals specified in the Deed as having signed them.

26. The 1992 Deed was dated 6 January 1992 but stated that it was to take effect from 1 January 1992. Clause 1 said that the 1979 Deed should be read and construed as if the alterations referred to in the annexed booklets and any further alterations which might be announced from time to time, were incorporated into the 1979 Deed. Its actual terms were as follows:

> "1. In exercise of the power conferred upon them by Clause 5 of the [1979 Deed] the Principal Employer and the Trustee hereby alter with effect from the First day of January 1992 (hereinafter called "the Effective Date") the provisions of the [1979 Deed] and of the Existing Rules to the intent that the [1979 Deed] and the Existing Rules shall be read and construed as if pending the execution of the Deed hereinafter referred to there were incorporated in the [1979 Deed] and the Existing Rules:-
>
> (i) all alterations referred to in the booklets copies of which are annexed hereto signed for the purpose of identification by Jacques Gerard Margry on behalf of the Principal Employer and by Robert Henry Barnsley on behalf of the Trustees and any further alterations which may be announced from time to time before the execution of the Deed referred to in Clause 3 hereof and
>
> (ii) provision for the determination resolution or removal by the trustee or trustees for the time being of the Plan of any doubt inconsistency or anomaly arising out of any of the alterations hereinbefore referred to and so that every such determination resolution or removal shall have effect according to its terms Provided that no such determination resolution or removal shall be inconsistent with the preservation requirements of the Social Security Act 1973 or the equal access requirement of the Social Security Pensions Act 1975 or shall prejudice the approval of the Plan by the Board of Inland Revenue for the purposes of Chapter I of Part XIV of the Income and Corporation Taxes Act 1988.
>
> 2. Pending the execution of the Deed hereinafter referred to and notwithstanding anything to the contrary in the [1979 Deed] and the Existing Rules the Trustees shall administer the Plan in accordance with the [1979 Deed] and the Existing Rules as if the trusts powers and provisions thereof had been altered to give effect to the alterations effected or intended to be effected by or pursuant to this Deed.

> 3. The Principal Employer and the Trustees hereby undertake to execute not later than the First day of January One thousand nine hundred and ninety-four a Deed for the purpose of giving effect to the alterations effected or intended to be effected by or pursuant to this Deed and to any determination resolution or removal by the trustee or trustees for the time being of the Plan in exercise of the power conferred upon them by Clause 1(ii) hereof and so that such further alterations shall have effect from the Effective Date."

27. So it can be seen that by clause 2 of the 1992 Deed, the Plan trustees were directed to administer the Plan in accordance with the 1979 Deed as if the same had been altered to give effect to the alterations effected or intended to be effected by or pursuant to the 1992 Deed. And by clause 3 of the 1992 Deed, PPUK and the Plan trustees undertook to execute, by no later than 1 January 1994, a deed for the purposes of giving effect to the alterations effected or intended to be effected by or pursuant to the 1992 Deed.

28. In accordance with the undertaking recorded in Clause 3 of the 1992 Deed, the Replacement Definitive Trust Deed with scheduled Rules dated 7 April 1993 ("**1993 Deed**") was executed. This instrument included separate sections containing the Rules of the FS section and the MP section respectively. There are a number of live issues concerning the 1993 Deed, if the 1992 Deed was ineffective.

Background to the 1992 Deed

29. There was some dispute between the Defendants as to the facts leading up to the adoption of the 1992 Deed and the motivation behind it. Mr Newman KC was right to point out that these are CPR Part 8 proceedings which are meant for claims that do not have substantial disputed areas of fact. He encouraged me to limit any findings of fact to those that are necessary to resolve the issues before me. On the Transfer and Conversion Issues, he said that there are only three findings of fact that he seeks:

    (1) That the original of the 1992 Deed had annexed to it a copy of the MP section booklet signed by Mr Barnsley and Mr Margry;

    (2) That the MP section booklet was sent to members before the 1993 Deed and was "*announced*" within the meaning of clause 1(i) of the 1992 Deed; and

    (3) All members who transferred to the MP section signed the booklet signature page at the back of the MP section booklet.

30. As can be seen all those issues revolve around the booklets that were annexed to the 1992 Deed and I will need to make findings in those respects in due course. There are also three findings of fact that the Company seeks on the Age Discrimination Issues which require in part looking at the reasons for the introduction of the MP section.

31. I will therefore endeavour, in this section, to give a neutral (ie what appears to be an undisputed) version of the facts leading up to the 1992 Deed and leave the contested issues of fact, or the parties' respective interpretations of the facts, to their appropriate section below.

32. I make the further obvious point that this time period is now over 30 years ago and it will be difficult for any witness to have any clear recollection of those events, save in

very general terms. There is a reasonably full (but by no means complete) set of contemporaneous documentation leading up to the 1992 Deed.

33. The first recorded mention of the consideration of moving to a DC scheme was in the minutes of a meeting of the Plan trustees on 5 February 1990. These state that Mr. Barnsley, who was both a trustee of the Plan and a director of PPL, then the parent of PPUK, suggested that consideration be given at a future meeting to "'*defined contributions' v 'final salary' pensions*". Mr. Barnsley's recollection in his witness statement is that this derived from a suggestion made by Mr. Moulton, who was a non-executive director at the time of PPL. He also thought that, at the time, a number of companies in the Parker Pen Group were starting to consider the matter of funding "*because of pension liabilities*".

34. This suggestion was apparently not taken further until the following year, suggesting perhaps that it was not a priority. In February 1991, the board of PPL agreed to "*a review of the UK pensions policy as regards the "defined benefits" method of providing a pension*." Mr Barnsley was to carry out this "*initial review*" together with two of his co-trustees: Mr Steve Beaumont (UK Finance Director) and Mr John Gill (the Group's UK Pension Administrator). This sub-committee's role was explained in a letter dated 18 March 1991 to Willis Consulting Limited ("**Willis**"), which were pensions benefits consultants, as being "*to investigate and report to the Group Main Board on the implications and costs involved in converting the current final salary scheme to a defined contribution scheme and to set out the details of the next stage of the project*".

35. In that letter of 18 March 1991 from Mr Gill to Willis, he was seeking Willis' advice on the conversion of the current FS scheme into a MP scheme and in particular "*the estimated contribution rate for the proposed scheme benefits as outlined below*." What was "*outlined below*" included: a new retirement age of 63 for men and women; the new scheme being non-contributory by employees; spouses' benefits in the event of death in service and death in retirement; and "*the benefits arising out of a maximum of thirty eight years pensionable service will be equivalent to two-thirds of final pensionable salary, when integrated with SERPS*" (the State Earnings-Related Pension Scheme). Mr Gover said in his oral evidence that it was PPUK's aim, when designing the MP scheme, to match the benefits provided under the FS scheme.

36. Willis provided a preliminary report on 2 April 1991. This included estimated contribution rates for the new MP scheme "*targeting the benefits currently provided by the final salary pension scheme, as requested by the Company, together with our suggested amendments*". The sub-committee had also sought advice from Bacon & Woodrow and they responded on 3 April 1991 in a similar way so as to provide "*benefits equivalent to a target level which is described in final salary terms.*"

37. Willis were engaged by the sub-committee to assist with its review and Clay & Partners ("**Clay**") were also retained to provide actuarial advice. Willis and Clay consulted together in June 1991. In a letter to PPL dated 21 June 1991, Willis described some "*principal agreed parameters*" for the new MP arrangements, which they advised could be incorporated within the framework of the existing Plan, including the fact that "*the Group contribution rates should be age-related, the rates being designed approximately to provide target benefits on the assumptions described in our report dated 3 April 1991 [sic]*" (I think this should have been 2 April 1991 – see previous paragraph).

38. By letter of 13 August 1991, Clay provided PPUK with estimates of transfer values for men and women at ages 26, 30 and 40. These were relevant to those members of the Plan who would transfer to the MP scheme. Clay stated that its calculations used the Plan's current transfer value basis, which was above the legal minimum.

39. Further work on these transfers was carried out by Clay, leading to their letter to Mr Gill of 14 October 1991. This calculated transfer values on various bases. PPUK then chose one, which was based on: Normal Retirement Age ("**NRA**") of 60, for both men and women; pension increases at the rate of RPI up to 5%; and full pensions for widowers as well as widows. As Mr Scott, the Company's expert, explained in his report, these were improvements to the benefits offered by the Plan at that time, and the transfer values that resulted were some 55% more expensive than if the transfer values had reflected only current benefits in the way that "*standard CETVs*" would have done ("*CETV*" is cash equivalent transfer value).

40. On 2 September 1991 Mr Barnsley circulated an internal memorandum which noted that "*a small working party has been reviewing the present pension benefits with a view to changing from a defined benefit (final salary) to a defined contribution (money purchase) scheme*". He invited the EC to a meeting on 4 September 1991 because it entailed "*a major change in the philosophy of an approach to pensions*".

41. At the meeting on 4 September 1991 the sub-committee reported to the EC and the other trustees. Mr Barnsley gave a slide presentation which suggested an implementation date for the proposed changes of either 1 March 1992 or 1 June 1992. The slides show that the proposal to change from an FS scheme to an MP scheme was part of wider changes, including equalising retirement ages at 63 and changing the rate at which pensions in payment increased, from 3% p.a. to the lower of RPI and 5% p.a. The sub-committee proposed that all members would transfer to the MP scheme, and that the FS scheme would be closed to new members. All those transferring would have a transfer sum. The sub-committee proposed some "*transitional arrangements*" for those members who were aged 45 and over. Such members were only 5 years away from being eligible for early retirement. Essentially those members would be permitted to remain in the FS scheme, albeit that some changes were also made to the benefits offered by that scheme. There was also reference in the slides to an "*Option*" for members aged between 40 and 45. This was the first time the split between the Over 45s, the 40-44s and the Under 40s had been identified.

42. The implementation date was subsequently brought forward to 1 January 1992. The Company points to the advice that was received from Clay on 25 September 1991 that "*Barber is operative from 17 May 1990 and therefore I recommend that you implement the changes as soon as possible*". ("*Barber*" is a reference to *Barber v Guardian Royal Exchange Assurance Group* [1991] QB 344, the well-known pension scheme equalisation case requiring changes to be implemented if members were being treated differently based on their gender.) A decision had been made to have an implementation date of 1 January 1992 by the time a timetable had been prepared by Mr Gill on 3 October 1991.

43. However the RB relies on Mr Barnsley's evidence and his memorandum of 22 October 1991 which said that the implementation date should be 1 January 1992 "*to avoid running beyond the period of the share sale process*." It went on to state that: "*In other words if we cannot achieve the change by 1 January we may have to postpone*

*indefinitely*." It therefore appears to be the case that if it could not have been done ahead of the sale process, the changes would have to have been postponed, indicating that the changes would not have been rushed if they could not reasonably have been done in that time.

44. The trustees approved the proposed changes at their meeting on 14 October 1991, subject to approval of the "*Main Board*". They noted that in their view the proposed changes were "*in the interest of both employees and the Company*". The changes were not only the change from an FS scheme to a MP scheme (subject to the transitional arrangements), but also: the equalisation of NRAs at 63; increasing life assurance benefits in the event of a member's death for those with FS and those with MP benefits; raising increases to pensions in payment to the lesser of 5% and RPI; and the introduction of unisex factors for calculating transfer values. PPL's board decided on 25 October 1991 to proceed with those changes.

45. On 14 November 1991 the changes were presented by the sub-committee to senior UK managers, together with slides. This was approximately six weeks before the changes were due to be made, and by this time the design of the scheme had been nearly finalised, including the form of the transitional arrangements whereby the Over 45s would remain in the FS scheme. Mr Barnsley said in his witness statement that the age 45 was probably based on actuarial advice and that the sub-committee felt that "*those aged 45 did not have sufficient working life to build up a pension pot in the new section, whereas the under 40s would clearly have time to build up a pot based upon the contribution levels that PPUKL was proposing"*. Mr Gover agreed with that explanation in his oral evidence.

46. By a memorandum from Mr Ian (known as "Robin") Wayman, PPUK's HR Director, to the sub-committee dated 19 November 1991, he attached "*draft communication documents to members*" and said that there should be insistence on an acceptance form from all current members. These were the two booklets: one for the under 45s who were joining the new MP scheme; and the other for the over 40s who were remaining in the FS scheme – the 40-44s, having the choice, would get both booklets. Mr Wayman said in the memorandum that "*it seemed sensible to kick off with a comprehensive explanation of all relevant changes*".

47. It was also on 19 November 1991 that there is a first reference to Clifford Chance becoming involved, in the form of Mr Cliff Leake. In his letter to PPL of that date, Mr Leake:

    (a) made reference to "*the draft replacement Definitive Trust Deed and Rules*" (although no copy of any such draft appears to have survived);
    (b) said that he had satisfied himself that "*the restrictions on the power of alteration … do not prohibit the conversion of the Pension Plan from one single "final salary" section to one with two sections*";
    (c) recommended deferring the execution of the replacement deed and the execution instead of a short "*interim amending deed*"; and
    (d) said that he had "*… expected members to have the choice of the section to which they would belong*" and expressed concern that there might be a successful claim for unequal treatment on the grounds of sex if the employee did not have the choice of which Plan section to join (the concept of age discrimination was then not recognised in English law,

and EC law did not then require domestic law to prohibit age discrimination).

48. The advice from Mr. Leake in his 19 November 1991 letter was apparently heeded, as he wrote to Mr. Gerard Lloyd of PPL (PPL's Company Secretary and Group Legal Counsel) on 12 December 1991 enclosing "*a draft interim amending deed*" with an explanation of its contents, stating that he assumed that "*copies of all announcements material will be annexed*". He also mentioned the possibility of the "*annexed copies*" being signed for the purposes of identification.

49. Mr. Lloyd replied on 17 December 1991 saying that the two "*leaflets*" would be distributed to all members on 19 December 1991, there would be presentations to members in early January 1992 and that the leaflets would be signed for the purposes of identification by Mr. Barnsley on behalf of the Plan trustees and by Mr. Jacques Margry (Chief Executive of PPUK, but also a Plan trustee) as a director of the Principal Employer, PPUK.

50. The (unfortunately incomplete) minutes of a meeting of the Plan trustees on 18 December 1991 record those trustees reviewing and approving "*the two booklets prepared to inform Members of the new structure of the Plan from 1st January 1992*", and the same being signed by Mr. Beaumont and Mr. Wayman on behalf of PPUK and Mr. Barnsley and Mr. Gill on behalf of the Plan trustees.

51. A memorandum dated 18 December 1991 from Mr. Wayman to "*All Managers*" evidences that he provided the booklets to them for distribution to "*your staff*". The covering letter to the booklets dated 19 December 1991 explained that the way that the change from an FS scheme to an MP scheme was being implemented was that the Plan "*is dividing into two sections*": with the Under 40s being in the MP section; the Over 45s being in the FS section; and the 40 to 44s having a choice of whichever section they wanted to be in. The version of the covering letter dated 19 December 1991 which is in evidence must have been sent to only the 40-44s as they were told that each member would receive a comparison of their benefits under each section, based on estimates, and would be provided with access to a financial adviser if requested. Mr Gover confirmed in his oral evidence that many members did indeed take independent financial advice on this issue.

52. Mr Barnsley stated in his witness statement that there were then presentations to all staff members "*to ensure that they were fully informed of all the changes that were occurring and to give them an opportunity to ask any questions of the Trustees*". According to Mr Gover, there was also a "Pensions Enquiry Point" set up to deal with any queries.

53. On 24 December 1991, Mr Leake provided a further letter of advice to PPL. Continuing the concern expressed in his 19 November 1991 letter about potential equal pay claims, he made clear that Clifford Chance's main concern was the Over 45s were not being given the opportunity of transferring to the MP section, whereas under 45s were and new joiners, even if over 45 years old, would automatically go into the MP section. It was presumably thought to be potentially disadvantageous to have to stay in the FS section, which is the opposite of the position taken by the RB on the Age Discrimination Issues.

54. In the letter, Mr Leake also advised on the transitional arrangements as follows:

> "The transitional arrangements flow from your decision to adopt what would hitherto have been regarded as "good employer practice", namely not to deprive the older employees of their final salary expectation by requiring them to transfer into the money purchase section along with the younger employees. Strictly, therefore, it is not something which (in your words) you have to endure, since you could have decided not to maintain the final salary expectations of the older employees."

The same letter noted Clifford Chance's understanding that *"the difference in benefits (between the MP Scheme and FS Scheme) is unlikely to be substantial"*.

55. The 1992 Deed was executed on 6 January 1992. It is accepted that it was validly executed as a deed. It was signed on behalf of PPUK by Mr Margry and Mr Wayman; and it was signed by all the then trustees, including Mr Barnsley and Mr Margry. It could not be executed before 6 January 1992 because Mr Margry was away on holiday until then. But it was stated to take effect as from 1 January 1992.

56. The engrossed instrument is recorded as having been sent to Clifford Chance by Mr. Lloyd under cover of a letter dated 7 January 1992. This was acknowledged by Mr. Leake and on 15 January 1992 he returned the original, after being dated by him, together with four certified copies. By letter dated 22 January 1992, Mr Lloyd acknowledged receipt of the original 1992 Deed together with the four copies.

57. The factual issue as to the signing of the booklets by Mr Margry and Mr Barnsley will be dealt with under Issue 1 below, as will all the other Issues concerning the validity and effect of the 1992 Deed and the 1993 Deed.

Events following the 1992 Deed

58. After the adoption of the 1992 Deed, the presentations to members commenced on 6 January 1992.

59. The comparisons of benefits were sent to the 40-44s on 16 January 1992, under cover of a memo stating they were not a guarantee of future benefits. The statements themselves said that members' pension benefit under the FS section was "*GUARANTEED*" at a particular percentage of Final Pensionable Salary, while the MP section "*does not incorporate the same GUARANTEES as the [FS section] since the pension ultimately payable depends on various unknown factors including future investments returns and salary increases*". The RB said that this was misleading in suggesting that there were guarantees in a MP scheme.

60. The minutes of the meeting of the Plan trustees on 18 February 1992 record that the "*final transfer values for members participating in the Money Purchase section of the scheme had now been completed and would be passed to the Actuary for completion of the actuarial valuation as at the 31st December, 1991*". The minutes also record that there had been one over 45-year-old member who had asked to join the MP section, but this had been refused on the basis that all the Over 45s would have to have been given that option.

61. The minutes of the meeting of the Parker trustees on 12 March 1992 record that the transfer values had been calculated and totalled £2.96m out of total Plan assets of £26m.

62. The booklets had signature pages. In relation to the MP section booklet which was sent to the Under 40s and the 40-44s the final page was headed "*Pension Equalisation and Enhancement*" and then "*Money Purchase Section*", below which the following appeared:

> "1. I have received your leaflet dated 19th December 1991 outlining the changes to the Parker Pension Plan.
>
> 2. I accept, that from 1 January 1992, my pension benefits under the Parker Pension Plan will arise from the Money Purchase section of the Plan.
>
> 3. I agree to the changes as described in the leaflet and explained to me at subsequent meetings and I have no outstanding queries."

Immediately below that text were spaces for the member to sign, state their name and department and date the same.

63. There is an issue under the 1993 Deed as to whether there was "*consent in writing*" from those members who were transferring to the MP section. That partly depends on whether all such members signed their booklets. The Company says that they all did, as evidenced by a memorandum from Mr Wayman dated 28 February 1994 which records that "*all eligible members signed the acceptance form on the back page*".

64. In that same memorandum Mr Wayman described the MP section booklet as a "*sales pitch*" that was "*successful*". It is unclear what he meant by that but it is relied upon by the RB to suggest that the booklets were not really booklets that set out the terms of membership but rather were temporary leaflets designed to "*sell*" the changes that PPUK wanted to make to the Plan and therefore could not remove substantive rights that members had under the 1979 Deed. The Company disputes that and says that Mr Wayman's reference to a successful "*sales pitch*" was to the fact that all members had engaged with the process and had signed their acceptance slips. As evidence of that, Mr Newman KC said that of the 89 members in the 40-44s and who had not since died or transferred out, some 57 had opted to transfer to the MP section and 32 decided to remain in the FS section. This showed that not all 40-44s had been persuaded by the "*sales pitch*" to join the MP section. But it also showed that 57 of 89 of the 40-44s (64%) found the MP section to be sufficiently attractive to join it.

65. Revised booklets for the MP section and the FS section were produced in May 1992, but nothing turns on that.

66. After a certain amount of (immaterial) toing and froing with the Inland Revenue over the terms of the intended replacement trust deed and rules – both Clay and Clifford Chance were involved in this - the 1993 Deed was executed on 7 April 1993. It was expressed to be retrospectively effective from 1 January 1992. It cancelled the then current governing provisions of the Plan, ie the 1979 Deed, and the existing rules.

67. Sections I and II of the Schedule to the 1993 Deed contained the Rules relating to the FS section and the MP section, respectively.

(1) Rule 2(3) of the FS section Rules provided that, subject to paragraph 4 of that Rule, all persons who were members under the "*Old* [*i.e.*, pre-1 January 1992] *Rules*" should be members of the FS section;

(2) Rule 2(4)(i) then excepted from Rule 2(3) "*all persons who consented to become members of the Money Purchase Section with effect from 1st January 1992*" (The RB says that no such members validly consented to or contractually agreed to become members of the MP section and so they remained members in the FS section);

(3) Rule 2 of the MP section Rules, entitled "*ELIGIBILITY AND MEMBERSHIP*", provided as follows:

> "(1) An Eligible Employee who fulfils all of the following conditions:-
>
> (i) on the 31 December 1991 he has not attained the age of 45 years; and
>
> (ii) on the 31 December 1991 he has already been admitted to membership of the Plan and
>
> (iii) he consents in writing to become a member of this Section
>
> shall become a member of this Section on the 1 January 1992."

(4) Rule 6 provided for an MP section member to have what was referred to as a "*Personal Account*" which, by Rule 6(1)(ii), would include (*inter alia*):

> "in the case of a Former Final Salary Member so much of the amount which the Trustees determine to be the amount of the Money Purchase Fund as at 1st January 1992 as the Trustees determine to be in respect of the Member."

(5) Rule 8 then provided for a member's Personal Account to be applied at his Pension Date (there was no fixed NRA in the MP section) so as to provide a retirement lump sum and an annuity or annuities.

68. The Plan's final set of governing documentation, before the transfer to the Scheme in 2007, was a Second Definitive Trust Deed and Rules dated 10 March 1997 (the "**1997 Deed**"). It is not necessary to refer to the provisions of the 1997 Deed which, so far as material, were in the same terms as the corresponding provisions of the 1993 Deed and no issues arise on it distinct from those which arise under the 1992 Deed and the 1993 Deed.

The Scheme

69. The Scheme was established by the Company, which was then known as Newell Limited, by a Definitive Deed dated 1 February 2007 (the "**2007 Deed**") in anticipation of the transfer to it, on a sectionalised basis, of the assets and liabilities of seven existing schemes in the Newell Rubbermaid Group (their governing documentation being referred to as the "***Preceding Documents***"), including the Plan, and on terms that benefits and contributions should be calculated in accordance with the Preceding Documents. In the case of the Plan that meant the 1997 Deed.

70. The anticipated transfer of the assets and liabilities of the Plan was effected by a Transfer Agreement dated 1 March 2007 (the "**2007 Transfer Agreement**") under which, by Clause 2 ("*TRANSFER OF MEMBERS TO THE NEW SCHEME*"), the Trustee confirmed that:

(a) it would treat all transferring active members as active members of the Scheme and grant benefits for pensionable service from 1 March 2007 in accordance with the 2007 Deed (*i.e.*, in accordance with the Plan's 1997 Deed (Clause 2.1); and

(b) it would assume responsibility for all liabilities of the Plan, whether or not the Trustee or the Plan trustees were aware of the same (Clause 2.2).

Further provisions to analogous effect were also at Clause 8 of the 2007 Transfer Agreement ("*PENSION AND OTHER BENEFITS TO BE PROVIDED BY THE NEW SCHEME*").

71. Therefore, the effect of the 2007 Transfer Agreement was that the Trustee became liable (i) under the Scheme for any past underpayment of benefits by the Plan trustees under the Plan; and (ii) to provide to transferring active members in respect of their future pensionable service benefits which reflected their true legal entitlement under the Plan, whether or not the Plan had historically been administered on a legally correct basis.

72. By two further instruments also dated 1 March 2007:

(a) PPUK became a participating employer in the Parker Section of the Scheme (Deed of Adherence);

(b) The Trustee was appointed the trustee of the Plan in place of the Plan's then individual trustees, who included Mr. Gover (Deed of Confirmation, Removal and Appointment).

73. Subsequently:

(a) By a Deed of Reorganisation dated 23 November 2007 the assets and liabilities of the Scheme's Sanford Section were transferred to the Parker Section, which was renamed "*the Combined Parker and Sanford Section*" and under which PPUK and the Company were the participating employers.

(b) By a Deed of Dissolution of Scheme and Discharge of Trustee dated 30 June 2008 the Plan and 6 other schemes, the assets and liabilities of which had also been transferred into the Scheme, were expressed to terminate and their

respective trustees (including the Trustee as the sole trustee of the Plan) removed from office and discharged.

(c) By a Deed of Amendment dated 30 March 2018 (and so far as material) the Combined Parker and Sanford Section closed to the further accrual of benefits with effect from 31 March 2018.

(d) As Mr. Southern explained in his second witness statement, the effect of these proceedings has been to halt progress towards buying out the Combined Parker and Sanford Section's final salary liabilities and winding-up that section, until members' true legal entitlements have been determined.

74. Mr Rowley KC confirmed on behalf of the Trustee that from 1 January 1992 and subsequently, the Plan and the Scheme have both been administered on the footing that the amendments intended to be made by the 1992 Deed were legally effective. This is evidenced by various Trustees' reports and Actuarial Valuation reports that have been produced over the years.

75. Mr Southern confirmed in his oral evidence that the current Trustee's powers are exclusively derived from the 2007 Deed and that the only basis on which the Trustee has acted is pursuant to that Deed. Mr Southern also said that, since 1 March 2007, the Trustee has proceeded on the basis that members are in the correct section of the Scheme and has provided any benefits on the basis of that assumption. He confirmed that the Trustee has not had to take any positive decisions about whether the members should be in the MP section or the FS section. That was irrespective of when members might have joined the MP section, because all new members joining after 1 January 1992 had no choice but to go into the MP section.

## C. THE ISSUES FOR DETERMINATION

76. I have already identified the two main areas in which there are issues for my determination: the Transfer and Conversion Issues; and the Age Discrimination Issues. Additionally there are two limited generic issues which arise in the event that I conclude that pensions in payment have been historically under-calculated (the "**Generic Issues**"). These are the application of the forfeiture provisions in the Plan Rules and the rate of interest payable to members. I had no oral submissions on the Generic Issues but they were dealt with in writing.

77. At the time the Claim Form was issued in January 2021, only the Transfer and Conversion Issues and the Generic Issues were raised. As Mr Southern explained, these issues had been identified by the Trustee in around 2014 when it was seeking to wind up the Combined Parker and Sanford Section.

78. It was only after the factual evidence had been completed and a trial date fixed for June 2022 that the RB intimated in December 2021 that he would like to argue the Age Discrimination Issues. Following discussions between the parties, by his Order dated 5 April 2022, Trower J granted permission to the Trustee to amend the Claim Form to raise the Age Discrimination Issues. The first trial date was however vacated.

79. There was then a somewhat tortuous process for trying to agree the Age Discrimination Issues, the details of which do not matter for the purposes of this judgment. The Company and the RB had already agreed the Transfer and Conversion Issues and the Generic Issues but the Company never agreed to the Age Discrimination Issues as drafted on behalf of the Trustee. The RB did agree those issues and in accordance with an Order of Miles J dated 2 March 2023, the Trustee filed its Composite List of Issues. The Company has filed its own list of age discrimination issues. Those issues have still not been agreed, despite the parties being encouraged to do so by an Order dated 25 April 2023 by Richards J.

80. When I come to consider the Age Discrimination Issues, I will endeavour to resolve the substantive issues that arise, despite not having an agreed list of issues. As these are CPR Part 8 proceedings there are no pleadings, but the Company's and the RB's arguments were set out in Position Papers, directed by the Court, on all the issues, now perhaps overtaken by their helpful written submissions.

81. I will set out the issues for my determination in the respective sections of this judgment to which they apply.

## D. TRANSFER AND CONVERSION ISSUES

82. The Composite List of Issues on the Transfer and Conversion Issues are as follows:

1 Did the 1992 Deed validly establish a money purchase section of the Parker Plan? As to which:

1.a) Whether the booklets referred to in cl. 1.(i) of the 1992 Deed were annexed to that Deed and, if so, which booklets they were?

1.b) Did the terms of those booklets and cl.1 of the 1992 Deed validly establish a money purchase section of the Parker Plan?

2.a) If not, did the 1993 Deed validly establish a money purchase section of the Parker Plan and, if so, from what date?

2.b) If not, did the Under 40s and the 40-44s, who were purportedly transferred into a money purchase section, remain entitled after the date of adoption of the 1993 Deed to accrue pensionable service in the Parker Plan on a final salary basis?

3. Whether any amendments to the 1979 Deed that established a money purchase section of the Parker Plan are affected by the proviso to cl. 5 of the 1979 Deed ("the Proviso")? If so, how? In particular, does the conversion of final salary benefits to money purchase benefits under the Plan fall within the scope of the Proviso?

4. Whether the Proviso permitted final salary accrual to be terminated with effect from 1 January 1992 for the Under 40s and the 40-44s who elected to transfer to the money purchase section?

5.a) Did all 40-44s opt to transfer into the money purchase section?

5.b) Did all those 40-44s who purportedly transferred into the money purchase section validly opt to do so?

5.c) Without prejudice to issues 5(a) and 5(b) above, did all Under 40s who signed and returned a form in the terms of that attached to the "Notice to Staff – December 1991 Money Purchase Section" booklet as purportedly annexed to the 1992 Deed thereby consent or contractually agree to:

i. the conversion of their accrued final salary benefits into money purchase benefits; and/or

ii. joining the money purchase section for future accrual

whether with effect from 1 January 1992, 7 March 1993 or some other (and if so what) date?

5.d) Without prejudice to issues 5(a) and 5(b) above, did all 40 – 44s who signed and returned a form in the terms of that attached to the "Notice to Staff – December 1991 Money Purchase Section" booklet as purportedly annexed to the 1992 Deed thereby consent or contractually agree to:

i. the conversion of their accrued final salary benefits into money purchase benefits; and/or

ii. joining the money purchase section for future accrual whether with effect from 1 January 1992, 7 March 1993 or some other (and if so what) date?"

6. Whether the transfer sums payable to the Under 40s and the 40-44s who transferred into the money purchase section were such as to preserve the final salary benefits accrued by those members up to the date of their transfers? In particular, did the Proviso require the transfer sums to take account of changes in pensionable salary post 1.1.92?

7. Are the 40-44s who chose to transfer to the money purchase section precluded from claiming more than the transfer sums paid to them?

8. Should a final salary underpin be applied to the benefits of the Under 40s and / or the 40-44s who transferred into the money purchase section? If so, how should it and any arrears of benefits in respect of those members be calculated (including arrears arising from payments of lump sums, purchases of annuities or the making of transfer payments as part of transfers out of the Parker Plan or the Scheme)?

83. I will not deal with the issues in that order. It seems to me to be more convenient to deal with them in the following broad way and order (and this will hopefully cover all those issues):

(1) 1992 Deed – Issue 1;

(2) 1993 Deed – Issue 2;

(3) Members' consent – Issue 5

(4) Extrinsic contracts for the 40-44s – Issue 7

(5) The effect of the Proviso – Issues 3, 4 and 6

(6) Consequences of a breach of the Proviso – Issue 8

This essentially follows Mr Newman KC's decision tree and Mr Hitchcock KC's flowcharts, both of which I have found to be very helpful.

## (1) 1992 Deed Issues – Issue 1

84. The issues in relation to the 1992 Deed that I need to consider are as follows:

(a) Were the booklets attached to the 1992 Deed and signed by Mr Margry and Mr Barnsley?

(b) If they were not, were the booklets "*further alterations…announced*" within the meaning of cl.1(i) of the 1992 Deed?

(c) If the answer is yes to either (a) or (b) above, did the terms of the 1992 Deed including the booklets validly establish the MP section of the Plan and replace the FS benefits with MP benefits for the Under 40s and those of the 40-44s who chose to transfer to the MP section?

85. If the answer is yes to (c) above, then the 1992 Deed validly established the MP section and the Under 40s and those of the 40-44s who opted for the MP section were validly transferred over to it. I would then have to consider the effect of the Proviso and the issues around the 1993 Deed would not affect matters. If, however, the answer is no to (c), or to (a) and (b) (in which case, I do not get to (c)), I would then have to consider the 1993 Deed issues.

*(a) Were the booklets attached to the 1992 Deed and signed by Mr Margry and Mr Barnsley?*

86. This is a purely factual issue and somewhat extraordinary that it is being disputed over 30 years after the 1992 Deed was executed. The issue only arises because the original 1992 Deed has apparently been lost and the copies that have survived did not include signed copies of the booklets.

87. That being so, the RB, in his Position Paper, put the Company to proof that the signed booklets were annexed to the 1992 Deed. He did not put forward a positive case on this. In his submissions, Mr Hitchcock KC argued that the Company had failed to establish on the balance of probabilities that any booklets were annexed to the 1992 Deed; alternatively that if the booklets were annexed, they were not those that had been described in the 1992 Deed because they were not signed by Mr Margry and Mr Barnsley.

88. As I indicated above, there is one surviving certified copy of the original 1992 Deed that was kept by Clifford Chance, in the original blue file that I was shown by Mr Newman KC in his opening submissions. The Trustee appears to have a photocopy of

that certified copy. Mr Southern has confirmed in his witness statement that the copy of the 1992 Deed in the Trustee's files included copies of both booklets, that is: the FS section booklet which went to the Over 40s; and the MP section booklet which went to the Under 45s. Those booklets are dated 19 December 1991 and are the ones that were approved at the trustees' meeting on 18 December 1991 (see [50] above).

89. The certified copy of the 1992 Deed in Clifford Chance's blue file indicates that the same booklets had been bound together with the 1992 Deed. That is because both the 1992 Deed and the booklets have many pre-punched holes down their side, which would have enabled them to be bound together with a wire threaded through all the documents. The binding had been removed before the documents were placed in the blue ring-binder file.

90. This is consistent with the instructions to the Clifford Chance print room dated 14 January 1992 to: "*Please DO NOT photocopy booklets. Please bind in to each copy a pair of booklets – 5 pairs attached.*" The instructions specified that 5 copies were required and that they should be bound with "*Wire O'Binding*" which would be the form of binding that would require all the pre-punched holes down one side.

91. The copy of the 1992 Deed in the blue file was certified as a true copy of the original by Clifford Chance. On the front, there was a Clifford Chance stamp stating: "*We hereby certify this to be a true copy of the original. Signed…*" And it was signed in blue ink manuscript "*Clifford Chance*". The booklets that were apparently bound together with the copy of the 1992 Deed, also had manuscript annotations at the top of the first page in the same blue ink, and similar handwriting: *"(Sgd) J G Margry (Sgd) RH Barnsley*". (On the MP section booklet Mr Rowley KC pointed out that the "*J*" seems to have been written over an "*R*" and he had a theory about that. I do not think it is necessary to speculate about this.)

92. It will be recalled that cl.1(i) of the 1992 Deed included the following words: "*all alterations referred to in the booklets copies of which are annexed hereto signed for the purpose of identification by Jacques Gerard Margry on behalf of the Principal Employer and by Robert Henry Barnsley on behalf of the Trustees*." So there was a direct reference in the body of the 1992 Deed to the booklets that were annexed to it and which had been signed by Mr Margry and Mr Barnsley for identification purposes. Mr Margry and Mr Barnsley were two of the signatories to the 1992 Deed. They therefore signed the 1992 Deed which expressly referred to them having signed the annexed booklets.

93. Furthermore, on 7 January 1992, Mr Lloyd sent a letter to Mr Leake of Clifford Chance enclosing the signed original of the 1992 Deed stating as follows: "*The signatories each signed yesterday, 6 January 1992. The two booklets have also been signed for identification purposes.*" That is strong contemporaneous evidence that the booklets had been signed in accordance with the terms of the 1992 Deed. He then went on to say that they would need five copies – one for Clifford Chance's files, two for the trustees/PPUK, one for the Superannuation Funds Office and one for Clay – and therefore: "*I am attaching a further five copies of each of the two booklets*."

94. As the printing instructions make clear, Clifford Chance made five photocopies of the original signed 1992 Deed and attached to each copy a pair of the booklets provided by Mr Lloyd. The person at Clifford Chance who certified them as true copies of the

original, probably also wrote on each of the booklets that they had been signed by Mr Margry and Mr Barnsley. On 15 January 1992, Mr Leake returned the original 1992 Deed "*together with four copies, two of which I understand that you will be sending to Helen James, one for her to keep and one for her to send to the SFO.*" This was acknowledged by Mr Lloyd by letter dated 22 January 1992.

95. It seems to me fairly clear what happened, and I so find on the balance of probabilities:

(a) The 1992 Deed was signed and executed on 6 January 1992, including by Mr Margry and Mr Barnsley;

(b) As per cl. 1(i) of the 1992 Deed, the two booklets were annexed to the 1992 Deed and they were each signed by Mr Margry and Mr Barnsley, for identification purposes;

(c) The trustees and PPUK required five copies of the 1992 Deed including the annexed booklets and they asked Clifford Chance to do this; however Mr Margry and Mr Barnsley did not sign a further five pairs of booklets;

(d) Instead, five pairs of booklets were provided to Clifford Chance to attach them to the certified copies of the 1992 Deed;

(e) To make it clear that the booklets annexed to the original 1992 Deed were signed by Mr Margry and Mr Barnsley, Clifford Chance made the annotations on the booklets that were bound together with the certified copies of the 1992 Deed.

96. In my view the points that were taken by the RB after this passage of time were opportunistic. He relied on the fact that the original 1992 Deed had been lost and that there were therefore no signed booklets. Mr Hitchcock KC suggested that the booklets annotated with the names of Mr Margry and Mr Barnsley in that way were either intended to be substitutes for signed booklets or to have been copies which it was intended that they would sign but in the event they did not. He also suggested that this was all being done in a considerable hurry and it simply "*slipped through the net*" that the booklets had to be signed by Mr Margry and Mr Barnsley. Furthermore there was no evidence from Mr Barnsley and Mr Margry (he died in 2021) about whether they signed; nor was there any evidence of who made the annotations.

97. I do not accept this at all. The annotation "*(Sgd)*" is past tense and indicates something that had already been done. And the letters in January 1992 concerning the signatures and copies, while they do not refer expressly to Mr Margry and Mr Barnsley, do clearly state that the booklets had been signed and we know that Mr Margry and Mr Barnsley signed the 1992 Deed on 6 January 1992. While it is perhaps strange that Mr Barnsley did not deal with this in his witness statement (this was obtained by the Trustee), I do not think that this would have added greatly to the evidence that does exist.

98. There was also a debate between the parties as to whether there is a presumption, because of their reference in the 1992 Deed, that the booklets were signed and annexed. The Company relied on *Hodgson v Toray Textiles Europe Ltd* [2006] Pens LR 253, a decision of Lewison J, as he then was. Because of my findings as set out above, I do not need to deal with whether there is such a presumption, save to say that, in the circumstances of this case and after all this time without the point having been taken, I would be minded to accept that such a presumption should apply.

99. I should also add that Mr Hitchcock KC sought to rely on *Bestrustees v Stuart* [2001] PLR 283 ("***Bestrustees***"), a decision of Neuberger J, as he then was, for the proposition that the formalities required by a pension deed should be strictly observed because of the impact on members who are not parties to it. I have found that the wording in the 1992 Deed was complied with, so this does not come into play on the present question. I do consider *Bestrustees* in the context of interpreting the 1992 Deed, as to which it is more obviously relevant.

100. Accordingly I answer this issue in the affirmative and find that the booklets were annexed to the 1992 Deed and they were signed as stated in the body of the Deed.

*(b) If no, were the booklets "further alterations…announced" within the meaning of cl.1(i) of the 1992 Deed?*

101. As I have answered (a) yes, this now does not arise. In any event, I would have found that, if the booklets had not been signed by Mr Margry and Mr Barnsley and then attached to the 1992 Deed, the booklets were "*announced*" to the members by being distributed to them on 19 December 1991. Mr Hitchcock KC conceded that the booklets were all sent to the members on that day. They were therefore capable of being "*alterations*" within the meaning of cl.1(i) of the 1992 Deed that had been "*announced*" before the execution of the 1993 Deed.

*(c) Did the terms of the 1992 Deed including the booklets validly establish the MP section of the Plan and replace the FS benefits with MP benefits for the Under 40s and those of the 40-44s who chose to transfer to the MP section?*

102. As I have answered both prior questions in the affirmative, this more substantive issue arises. Mr Hitchcock KC submitted that the 1992 Deed and the booklets were inadequate to establish the MP section of the Plan and, perhaps more importantly, to remove certain members' entitlements to FS benefits and replace them with MP benefits, both for past and future service. Mr Hitchcock KC emphasised that this was an interference with existing rights under the Plan and that required there to be very clear language in both the 1992 Deed and the booklets in order to effect that fundamental change to the members' rights. He relied on *Bestrustees* and other cases on the interpretation of pension fund documents.

103. By way of response, Mr Newman KC submitted that the close textual analysis of the 1992 Deed and the booklets was a mistaken approach to this question and that the 1992 Deed, as its title of "*Interim Amending Deed*" would suggest, was intended to operate as an executory trust pending the execution of the definitive deed, which was the 1993 Deed. He said that this was a normal way of doing things at that time in relation to pension trust deeds and that therefore there should not be the sort of strictly literal and technical interpretative process that would be applied to a definitive deed.

104. In support of the textual analysis, Mr Hitchcock KC referred to a number of cases, in particular the Supreme Court decision in *Buckinghamshire v Barnardo's and others* [2018] UKSC 55; [2019] ICR 495 at [13]-[18] where Lord Hodge set out the principles

of construction in relation to pension schemes. The governing documents of pension schemes are prepared by skilled lawyers and they are intended to operate in the long term, granting and affecting the rights of members who are not parties to the governing instruments. Building on Lord Hodge's analysis, Trower J put it succinctly in *De La Rue Plc v De La Rue Pension Trustee Ltd* [2022] EWHC 48 (Ch) at [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."

105. In *Bestrustees* at [31], Neuberger J said as follows:

> "I bear in mind that a pension scheme is likely to continue for a substantial period of time and that those most affected by them and entitled to protection from the trustees, the employer and indeed the Court, will be people who are comparatively poor, who will not have easy access to expert legal advice, and who will not know what has been going on in relation to the management of the Scheme. In those circumstances, it seems to me that protection of the beneficiaries requires the Court to be very careful before it permits a departure from the plain wording and plain requirements of the trust deed."

106. Mr Hitchcock KC's core argument was that all existing members had rights under the 1979 Deed and Rules to be part of and to receive FS benefits and they had been accruing those benefits since they became members under the Plan. He said that where such fundamental rights were being removed, it was necessary for the 1992 Deed to set that out clearly and to spell out precisely the terms and rules of the new scheme that they would thereafter be members of and into which their existing entitlements would be transferred. He said that a careful textual analysis of the 1992 Deed and the booklets shows that they were incapable of being construed as having done that and therefore did not do so.

107. As to the 1992 Deed itself, Mr Hitchcock KC submitted as follows:

(1) Cl.1(i) of the 1992 Deed required the existing Rules, that is the 1979 Deed and Rules in which there was only a FS scheme, to have incorporated into them "*all alterations referred to in the booklets*".

(2) The 1992 Deed did not therefore purport to "*cancel*" any of the existing Rules – even though there was power to do so under cl. 5 of the 1979 Deed, subject to the Proviso, and this power was referred to in Recital D of the 1992 Deed – as it only referred to "*alterations*" and these would be inapt to remove and replace members' FS entitlements.

108. Mr Hitchcock KC then embarked on his textual analysis of the booklet that was provided to the Under 45s as it concerned the new MP section. He said as follows:

(1) There was no language in the booklet that said that it was altering members' existing rights to accrue FS benefits;

(2) Even though it is called a booklet, it was nothing like a members' booklet that one would normally find in relation to an occupational pension scheme. It was originally described as a "*leaflet*" and Mr Hitchcock KC referred to Mr Wayman's memorandum of February 1994 (over 2 years later) in which it was described as a "*sales pitch*" (see [64] above);

(3) As such its purpose was not to set out in clear terms what members' rights would be but it was to sell a package of changes, which the Court should therefore be slow to find removed substantial rights under a trust;

(4) The booklet says in terms that it is "*not a complete statement of the rules*" but before the 1993 Deed there were no other "*rules*" in relation to the new MP section;

(5) Therefore, as the booklet was intended to persuade and possibly explain how an MP scheme worked, it cannot be construed as sufficient to extinguish members' existing FS entitlements.

109. Mr Newman KC responded to these points in the following way:

(1) The reference to "*alterations*" in the 1992 Deed rather than "*cancellations*" was entirely appropriate; if a provision is cancelled it is not normally replaced with something; whereas the booklet was referring to a number of "*alterations*" whereby the existing benefit structure was being replaced with something new; this included other changes such as equalising NRA, introducing unisex factors for transfer values and moving escalation of benefits to 5% or LPI;

(2) It was also therefore appropriate to refer to the introduction of the MP section as an "*alteration*" to the existing benefit structure;

(3) If there was any doubt about that the trustees could resolve it under cl.1(ii) of the 1992 Deed;

(4) As to the MP section booklet, it contained an acceptance form to be signed by the member transferring to the MP section that stated: "*I accept, that from 1 January 1992, my pension benefits under the Parker Pension Plan will arise from the Money Purchase section of the Plan*."

(5) The statement in [108(4)] above that the booklet was "*not a complete statement of the rules*" had been taken out of context and it was only a part of the full quote which was that the booklet "*is not a complete statement of the rules – it is confined to the changes that are in the process of implementation"*; therefore it is not referring to another document containing the new rules; instead it is clarifying that the booklet is only giving details of changes to the rules;

(6) To the extent that the RB relies on the "*sales pitch*" purpose of the booklet and while that characterisation is disputed (see [64] above), it is in any event irrelevant to the construction of the terms of the 1992 Deed and the booklet.

110. As indicated above, Mr Newman KC also submitted that there should not be a close textual analysis of the 1992 Deed and the booklets because of the more liberal approach to construction of an interim amending deed which was only temporarily in effect pending the execution of a definitive deed. He submitted that the 1992 Deed was intended to operate as an executory trust.

111. *Underhill and Hayton, Law of Trusts and Trustees* (20th Ed., 2022) defined an executory trust at [6.1]:

> "An executory trust is one where the trust property is vested in trustees or personal representatives but the interests to be taken by the beneficiaries remain to be delimited in some subsequent instrument pursuant to the settlor's clear general intention or where the property intended to be subjected to trusts is the subject of an enforceable agreement to create a trust whether for delimited beneficiaries or beneficiaries that remain to be delimited."

112. Pension schemes were often set up by way of an interim deed which provided for a definitive deed setting out all the detailed terms and rules of the pension scheme to be executed at some point in the future. Indeed that is the way the Plan was first established in this case with an Interim Trust Deed executed on 30 May 1958 and a Definitive Deed then executed on 1 April 1960.

113. Mr Hitchcock KC submitted that there is a crucial point that the Company has ignored namely that pension schemes can be set up using this process of an interim and then definitive deed (as happened in this case) but an existing pension scheme that is already subject to detailed rules set out in a definitive deed cannot be amended in this way, including in particular purporting to remove entitlements that are provided for in the existing rules. Mr Hitchcock KC even went so far as to suggest that the 1992 Deed was a "*fudge*" and could not possibly have the momentous effect that the Company was suggesting.

114. In my view, this is stretching the point too far and overlooks the fact that the 1992 Deed was drafted by Clifford Chance who suggested that it be done in this way. Furthermore Mr Hitchcock KC provided no authority to suggest that an amendment to a pension scheme could not be effected in this way. Mr Newman KC showed me an authority which had an interim amending deed that was effective to set up a new MP section – *Kemble v Hicks* [1999] Pens LR 287, a decision of Rimer J, as he then was.

115. The authorities that Mr Newman KC relied on were concerned with showing that, in the case of an executory trust it is more important to look at the parties' intentions than to perform a technical legal analysis of the words used. He took me back to the 18th century with the cases of *Earl of Stamford v Hobart* (1710) 3 Bro PC 31 and *Lord Glenorchy v Bosville* (1733) Cas Temp Talbot. And he referred to the House of Lords decision in *Sackville-West v Viscount Holmesdale* (1869-70) L.R. 4 HL 543, in which Lord Westbury said at p.565: "*In construing the words creating an executory trust a Court of Equity exercises a large authority in subordinating the language to the intent*".

116. Moving to more modern times and specifically in relation to pension schemes, Mr Newman KC referred to *Davis v Richards & Wallington Industries Ltd* [1991] 1 WLR 1511 where Scott J, as he then was, considered the status of an interim deed where the definitive deed had not been validly executed. Scott J held that the interim deed

constituted an executory trust which could have been enforced subject to other conditions being complied with.

117. Mr Newman KC also referred to *Imperial Foods Ltd v Jeeves* (unreported, 27 January 1986) [2007] 08 PBLR, a decision of Walton J, which explored the relationship between interim and definitive deeds. There was the same position as in this case (and in most cases) where the definitive deed purported to take effect from the date of the interim deed. Walton J said as follows at [23]:

> "What, after all, is the purpose of an interim trust deed and pension scheme? It is by its very nature not clearly to define fully the trust upon which the fund is to be held, but to get the fund started. The analogy with the situation in *Attorney General v Mathieson* appears to me to be very close. Of course, the machinery for the drafting of the final trust deed is quite different, and it may very well be that in both cases a person who had contributed to the fund in question would be in a position to object to some provision which was never contemplated, but which was put or attempted to be put into the final trust deed. For examples, provision for a different charity or, in our particular case, for the payment of pensions to totally different classes of person. That situation can be met when it arises. But in a case where it does not, it appears to me that the obvious intention of all parties from start to finish is that the pension fund should throughout be held upon the same trusts and that those trusts should be the trusts as defined in the definitive trust deed. After all, is it not definitive and intended to be definitive of the trust? If not, why is it so called?"

118. In this context, Mr Newman KC was not relying on this case for the retrospectivity of the 1993 Deed (which is a later issue). That is perhaps the controversial aspect of the case – see *The Trustee Corporation Ltd v Nadir* [2001] BPIR 541. But what it does show is that an effective interim deed does not need to have all of its substantive terms in it because they can be introduced and finalised later in the definitive deed, which Walton J held would apply to the period between the execution of the two deeds.

119. In my judgment it is clear that the 1992 Deed was intended to operate as an executory trust pending the execution of the 1993 Deed which set out the detailed Rules of the MP section. This is so for the following reasons:

(1) As I said earlier, Clifford Chance advised that the changes to be made to the Plan should be introduced by an interim amending deed; whether that was because of some urgency or not does not matter, because it was done on the basis of legal advice that this was an appropriate way to set up a MP section and to transfer members into it, amongst other changes;

(2) The 1992 Deed is called an "*Interim Amending Deed*";

(3) The 1992 Deed recognises the existing governing Rules of the Plan, namely the 1979 Deed and Rules and states in cl.1 that that Deed and Rules should be read and construed as if, pending the execution of the definitive deed, the alterations set out in the booklets were incorporated within them;

(4) Cl.1(ii) permitted the trustees to resolve any inconsistencies or anomalies arising out of the alterations during the period before the definitive deed was

executed; the fact that the power was never exercised is beside the point because its existence shows the intent that the 1992 Deed should effect those alterations from 1 January 1992;

(5) The Trustee has confirmed that the Plan was administered since 1 January 1992 on the footing that the alterations in the 1992 Deed and booklets were legally effective; this was what the trustees were obliged to do by cl.2;

(6) By cl.3, the parties undertook to execute the definitive deed to give "*effect to the alterations effected or intended to be effected by or pursuant to this Deed*".

120. The general intention behind the 1992 Deed is reasonably clear: to establish an MP section of the Plan; that transferring members would have their accrued FS benefits converted into MP benefits; and that thereafter they would accrue MP benefits in the MP section. Mr Hitchcock KC complained that the booklets did not set out in detail the new rules of the MP section and did not clearly indicate that members were giving up their FS benefits under the Plan.

121. I do not think that any reader of the MP section booklet could have been in any doubt about what was happening. It contained the following:

(1) the first page of the MP section booklet stated that "*the company has decided to set up a new 'Money Purchase' Section of the Parker Pension Plan for younger members. Younger members are those under the age of 45. (Those members age 45 or over will remain within the existing final salary Section of the Plan). This leaflet is designed to put you in the picture about how a Money Purchase Section works.*"

(2) Under **"*A. What is a Money Purchase Plan?*"**, it described the FS scheme that "*hitherto you have been a member of*" and then the objective of the MP section to which the member was being transferred to build up their own individual fund starting with the "*transfer sum*" from the contributions already paid and then "*the contributions paid by the company each month from 1st January 1992 for your future service*";

(3) After setting out how the Personal Account works and the contributions that the company would be making, under the heading **"*E. What about my Past Service?*"**, it defined the transfer sum: "*If you are a member of the existing Plan, your Personal Account will be credited with an amount which takes account of your past service and present pensionable salary …*";

(4) Under the heading **"*G. When Do I join?*"**, it stated that: "*Members will transfer to the Money Purchase Section on 1st January 1992*."

(5) The acceptance form at the end of the MP section booklet recorded the members' acceptance that "*… from 1 January 1992, my pension benefits under the Parker Pension Plan will arise from the Money Purchase section of the Plan*."

122. In this case, the definitive deed in the form of the 1993 Deed with detailed rules as to the operation and administration of both the FS section and the new MP section was

executed, and validly so. The 1992 Deed was therefore only in force for that interim period until the 1993 Deed was executed. The question for me is whether its terms were sufficiently certain that they would have been enforced if the 1993 Deed had not been entered into. For the reasons set out above, it is my view that they were and that they evinced the general intent to establish the MP section of the Plan and for the transferring members to have their FS benefits converted into MP benefits and for them to accrue MP benefits thereafter. I do consider that the 1992 Deed took effect as an executory trust and that therefore it is inappropriate to subject it and the annexed booklets to a close textual analysis of the sort that one would apply to a definitive deed. The intent is plain and anyone reading the 1992 Deed and booklets could have been in no doubt as to what was happening and that a new MP section was being introduced into which some members were going to be transferred.

123. Accordingly, I answer this question in the affirmative and declare that, subject to the issues discussed below on the Proviso, the 1992 Deed was valid and effective to set up the MP section of the Plan and to transfer the Under 40s and those of the 40-44s who chose to do so into the MP section.

## (2) 1993 Deed Issues – Issue 2

124. My conclusions on the 1992 Deed above mean that the issues around the 1993 Deed do not arise. That includes the Members' consent issues (Issue 5) that are dealt with in the next section. It also means that the extrinsic contracts issue applicable only to the 40-44s has more limited application.

125. Therefore before getting to the Proviso, which I see as the main substantive area of dispute on the Transfer and Conversion Issues, I will deal with those other issues which do not now affect the outcome as the 1992 Deed was effective to establish the MP section and to convert the transferring members' FS benefits into MP benefits. The issues have been raised before me, and in case this matter goes further, I will deal with them, although more shortly than I otherwise would have done.

126. I start with the 1993 Deed and will assume that I was wrong about the 1992 Deed and that it was invalid and ineffective for whatever reason. Therefore it did not establish the MP section; nor did members transfer to it by converting their FS benefits into MP benefits. Did the 1993 Deed therefore do so and did it work retrospectively so as to transfer members to the MP section as from 1 January 1992?

127. So far as I could tell, I believe that Mr Hitchcock KC did not challenge that the 1993 Deed and its Rules was apt to establish a MP section. That must be right, as the 1993 Deed is a comprehensive definitive deed that was contemplated by the 1992 Deed and which acted as a complete replacement of the 1979 Deed and Rules. It therefore had different sections of the Rules dealing with the FS section and the MP section.

128. Mr Hitchcock KC's main points on the 1993 Deed were around whether the eligibility provisions in the MP section required members to consent in order to join the MP section and the effect of the Proviso, both of which are dealt with below. Apart from those two issues, I think there is only one disputed question, which is whether the 1993 Deed operates retrospectively so as to take effect from 1 January 1992 and so be taken

to have converted transferring members' FS entitlements to MP entitlements from that date. If it does not work retrospectively then those members will be entitled to FS benefits for the period from 1 January 1992 to 7 April 1993.

129. The structure of the 1993 Deed, that it was to take effect from the 1 January 1992, is what would be expected where there is an interim deed, followed by a definitive deed, as explained in the section above and in *Imperial Foods v Jeeves.* But this is a situation where the interim deed, the 1992 Deed, has been found to be invalid, so for the period up to the 1993 Deed, all members would have remained in the FS section – indeed there was only a FS section of the Plan - and would have been accruing further FS benefits during that period. If the 1993 Deed worked retrospectively in those circumstances, Mr Hitchcock KC said that it would be an "*attempt to re-write history*".

130. Mr Newman KC referred to the Court of Appeal decision in *Burgess v BIC UK Ltd* [2019] Pens LR 17 (and he pointed out that there was a particularly strong panel of former pensions specialists, Henderson LJ and Nugee J, as he then was, together with Sir Geoffrey Vos C). In that case, Henderson LJ held that it was possible to adopt rules with retrospective effect and for the parties to agree that the relationship should be treated as having departed from historical reality in certain specified respects. Mr Newman KC therefore submitted that it was open to the parties in this case to agree not only the basis for their legal relationship going forwards, but also the basis of their past legal relationship, even if that conflicted with what had actually been happening during that prior period.

131. I agree with Mr Newman KC and consider that the 1993 Deed was intended by the parties to take effect from 1 January 1992, consistent with the intention behind the 1992 Deed. Even if the 1992 Deed has been found to be invalid, that does not affect the intention behind it, nor the fact that the members were well aware that the changes were intended to take effect from 1 January 1992. Accordingly it is not re-writing history for the 1993 Deed to take effect from that date; it is what was agreed and intended and it is not prejudicial to members in the way that retrospective changes can sometimes be.

132. So I would have found that the 1993 Deed was effective, subject to the Proviso issues and consent, to establish the MP section and to convert the transferring members' FS entitlements to MP entitlements with retrospective effect as from 1 January 1992.

### (3) Members' consent Issues – Issue 5

133. Again this only arises if the 1992 Deed did not establish the MP section. If it did, as I have found, then it is agreed that the transferring members joined the MP section under the 1992 Deed as from 1 January 1992 and there is no need for their consent to have been given (although the 40-44s would have had to agree to transfer as they had the choice). Actually Mr Hitchcock KC did seem to suggest during the course of the closing submissions that even if the 1992 Deed was effective to establish the MP section and the transfer of members, that by the terms of the 1993 Deed there would still have had to have been some form of consent by the Under 40s to their transfer out of the FS section into the MP section. This was not apparent from the RB's written submissions but in any event it does not affect the outcome.

134. I have set out the relevant terms of Sections I and II of the Schedule to the 1993 Deed, being the eligibility rules of the FS and MP sections, in [67] above. In short, unless a

member "*consented to become [a member] of the [MP section] with effect from 1st January 1992*", r.2(4)(i) of the FS section rules, which appears to require "*consent in writing*" (see r.2(1)(iii) of the MP section rules), they will remain a member of the FS section.

135. Mr Newman KC said that the signed acceptance forms on the MP section booklet amounted to "*consent*" for the purposes of the 1993 Deed eligibility requirements. There is a factual issue as to whether all the acceptance forms were signed. Mr Hitchcock KC, while accepting that the booklets were sent to all the relevant members, did not admit that they were all signed by those members. Mr Newman KC relied on Mr Wayman's memorandum of 28 February 1994 which said that all the acceptance forms had been signed. Furthermore Mr Wayman had been keeping track of the acceptance forms and had noted that 105 were outstanding as at 12 March 1992 and 47 outstanding three weeks later on 2 April 1992. I have no reason to doubt his later statement that all such acceptance forms had been signed, particularly as any that had not been would have been chased and, if anyone had decided not to sign, it would be most unlikely that they would have sat back over all these years and accepted the MP benefits that they were receiving. On the balance of probabilities, I find that all eligible members had signed the acceptance forms.

136. That then leads to the effect of so signing the forms and whether that constitutes "*consent*" within the meaning of the rules. Mr Hitchcock KC submitted that the requirement for consent was particularly important as a member was agreeing to give up their rights to be a member of the FS section. He made four points:

(1) That it is inherent in the concept of "*consent*" that the giving or withholding of it would influence an outcome;

(2) That the giving of "*consent*" must be unambiguous;

(3) That sufficient information must be provided so that the person can exercise an informed choice;

(4) That there must be an actual choice for there to be consent.

137. Mr Hitchcock KC submitted that the Under 40s had no choice; they were simply presented with a fait accompli, without any information, and were effectively told to sign on the dotted line. This could not be sufficient consent. As to the 40-44s, Mr Hitchcock KC said that they too were not provided with adequate information to make their so-called choice between the two sections and that their choice was not a real one, thus undermining their consent. He also said that the wording of the acceptance form was inapt to evidence a member's consent to the extinguishment of their existing rights under the FS section.

138. It is important to remember that this issue is only relevant if I had found the 1992 Deed to be invalid, which I did not (and leaving aside Mr Hitchcock KC's last minute dispute about whether consent was still required if the 1992 Deed was valid). Therefore, on the assumption that the Under 40s did not transfer automatically to the MP section by virtue of the 1992 Deed, their consent would have affected the outcome under the 1993 Deed. In other words, if any Under 40s member had not consented to joining the MP section, they would have remained in the FS section.

139. What really lies beneath the position adopted by Mr Hitchcock KC on this issue is the fact that there was no real choice for the Under 40s and they were effectively forced into the MP section. However, that is undermined by the fact that they did have a choice, if they were not automatically transferred by the 1992 Deed.

140. As to whether there was "*informed consent*", this is problematical to being resolved in CPR Part 8 proceedings with representative parties, as it would depend on particular features in relation to each individual member. Mr Newman KC referred to *Burgess v BIC UK Ltd* [2018] Pens LR 13, a decision of Arnold J, as he then was, in which he refused to allow a defendant in representative proceedings to raise defences such as laches and estoppel that were dependent on individual circumstances and not suitable for determination on a group basis. (This point was not considered by the Court of Appeal in the judgment I referred to in [130] above.) Whether consent was provided on an informed basis clearly depends on what an individual member was told at presentations or by an advisor and/or on what they read. There is no evidence before me on which I could possibly make findings on such matters.

141. But the point is also perhaps relevant to whether "*informed consent*" and the sufficiency of the information provided is required for there to be "*consent*" in the context of the 1993 Deed. The 1993 Deed was put in place on the basis that the 1992 Deed had been effective in establishing the MP section and transferring members over to it as from 1 January 1992. The requirement for the members' "*consent in writing*" must be construed in a way that is consistent with the fact that the Under 40s had already been automatically transferred to the MP section. In other words, it looks much more likely to be an administrative requirement to enable the trustees to be able to identify who are the members of the MP section of those who were originally in the FS section. There is no point having an extra layer of consent imposed by the 1993 Deed when no such consent was required under the 1992 Deed, save insofar as it was a purely administrative function for the trustees' records.

142. If there was a substantive requirement of "*informed consent*", the trustees would have had to assess the sufficiency of the information given to each member before they signed the acceptance form so as to confirm their status as a member in the MP section. Not only would this put a considerable burden on the trustees when the transfer was thought to have happened automatically, but also it would create much uncertainty as to who was transferred and who was not. I therefore reject Mr Hitchcock KC's suggested interpretation of the requirement for consent in the eligibility rules of the 1993 Deed.

143. My interpretation of the consent requirement also fits with the wording of the acceptance form at the end of the MP section booklet. Mr Hitchcock KC submitted that the acceptance form referred only to the "*changes*" to the Plan and there were no real "*changes*" described in the booklet. However, I think the booklet was clearly describing substantial changes to the Plan, including that a new MP section was being set up to which members would be transferring as from 1 January 1992. The member signed in the following terms that: "*I agree to the changes as described in the leaflet and explained to me at subsequent meetings and I have no outstanding queries*". I have little doubt that that was an effective consent within the meaning of the 1993 Deed's eligibility requirements, such that all the Under 40s and all the 40-44s who signed the MP section booklet "*consented*" to become members of the MP section with effect from 1 January 1992.

144. Accordingly, if the 1992 Deed was invalid and ineffective, I find that the 1993 Deed was, subject to the Proviso issues, effective for the Under 40s and those of the 40-44s who signed the MP section booklet to transfer and convert their FS entitlements to MP entitlements.

## (4) Extrinsic contracts for the 40-44s – Issue 7

### *(a) Introduction*

145. There is a still further issue if I had found against the Company on all the above issues, but this only concerns the 40-44s. The slight difficulty I have with this issue is that it does seem to me to be partially dependent on what my findings might have been on the above issues. For example, if I had found that there had not been a valid "*consent*" for the purpose of the eligibility rules in the 1993 Deed, I would need to go on to consider whether the signing of the acceptance forms by the 40-44s nevertheless constituted their agreement to a contract with PPUK to transfer to the MP section.

146. Furthermore, while it provides a potential backstop argument for the Company in relation to the 40-44s if it had lost on the effectiveness of the 1992 and 1993 Deeds, it also seems to me that it could actually provide a way round one of the issues on the Proviso, which therefore assumes that the 1992 Deed or the 1993 Deed is effective. In other words it is possible that, if this extrinsic contracts argument is correct for the 40-44s, then there would not even need to be a consideration of the Proviso issues in relation to them.

147. As has been explained above, the 40-44s had a choice of staying in the FS section or moving into the MP section. Mr Newman KC emphasised that those that chose to transfer to the MP section received enhanced terms of pension entitlement. In particular, the Company offered to those members to include an "*additional sum*" to be added "*as if the Plan granted increases to pensions in payment by the annual increase in the rate of the Retail Price Index each year up to 5%, rather than the current 3% each year".* It also offered a widower's pension for the first time, and benefits on the event of a member dying in service whereas the 1979 Deed had made no such provisions. The additional sum on the transfer value was relied upon by Mr Newman KC as being good consideration passing from PPUK.

148. So this part of the Company's case is about whether a valid and enforceable contract was formed between those 40-44s who chose to transfer to the MP section and PPUK, such contract being "*extrinsic*" to the Plan's governing trust documentation. It is therefore necessary to look at whether the basic elements of a contract are present in this case. That means: offer and acceptance; intention to create legal relations; consideration; and certainty of terms. Or as Leggatt J, as he then was, put it in *Blue v Ashley* [2017] EWHC 1928 (Comm) at [49]:

> "The basic requirements of a contract are that: (i) the parties have reached an agreement, which (ii) is intended to be legally binding, (iii) is supported by consideration, and (iv) is sufficiently certain and complete to be enforceable: …."

And at [63], Leggatt J said:

> "In determining whether an agreement has been made, what its terms are and whether it is intended to be legally binding, English law applies an objective test. As stated by Lord Clarke in *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH and Co KG* [2010] UKSC 14; [2010] 1 WLR 753:-
>
> > "The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations ."

149. Before turning to examine whether such contracts came into existence, there are some legal issues to resolve concerning whether extrinsic contracts can arise in pensions cases.

*(b) Relevant Law*

150. The notion that there can be extrinsic contracts affecting pension scheme entitlements arose for the first time in *South West Trains Ltd. v Wightman* [1998] Pens LR 113, a decision of Neuberger J, as he then was ("***SWT***"). *SWT* concerned members of the British Rail Pension Scheme ("**BRPS**"). That scheme provided for pensions to be paid to members in accordance with a formula whereby each year's service gave rise to a certain proportion of "*Final Average Pay*", which was defined by reference to the member's "*Pay*" (i.e. their fixed rate of pay) in their last year of service.

151. A number of the members of the BRPS were employed by South West Trains which had carried out a renegotiation of the terms and conditions of those members, as part of a restructuring. Part of the renegotiation included a provision that, following the restructuring, a member's "*Pay*" was to be treated as £18,000 p.a. and not their actual pay in their last year of service (which would increase to £25,000 p.a. as part of the restructuring).

152. These proposals were accepted on behalf of the members as part of a process of collective bargaining. However when it came to incorporating them into the BRPS by way of a deed of amendment, objection was taken by the trade union that this change to the amount of "*Pay*" appeared to worsen the position of the members. South West Trains accordingly sought a declaration from the Court that those members were debarred from seeking pensions at a higher rate than the agreed proposals.

153. Neuberger J found that there was a binding agreement between South West Trains and the members, including that their pensions would be calculated using pensionable pay of £18,000 p.a. from the date of the restructuring. He found that it was implicit in that agreement that the members would not seek from the trustee payment of their pensions on a more generous basis than they had agreed with South West Trains. And he accepted that South West Trains could enforce the agreement, although the trustee was not party to it, and added "*even without the intervention of [South West Trains], it may well be that the Trustee could refuse to pay the drivers a pension at a higher rate than that agreed with [South West Trains]*".

154. Mr Hitchcock KC explained *SWT* as being a case where there was a clear and certain contractual agreement between South West Trains and the members and they had plainly intended to enter into such a legal relationship separate from the tripartite legal relationship under the pension scheme. The members were receiving an increase in their overall remuneration, and an increase in their pensionable pay, but not to the full extent of the increase in the overall remuneration. So there was consideration in the form of an increase in overall remuneration but this was only available if the term restricting pensionable pay was also accepted as part of the package. Members therefore had a genuine choice as to whether to accept the full package. Furthermore, there was no provision in the BRPS which would have prevented the trustees from executing a deed of amendment that would give effect to the contractual agreement on pensionable pay.

155. Mr Hitchcock KC said that, since *SWT*, pension scheme employers have sought to rely on it in the very different situation where amendments to the scheme's governing documentation have been found to be defective in some way. Such employers, as in this case, have sought to rely on various forms of communications between members and the employer prior to the purported amendment to establish the existence of a contract by which the purported amendment can take effect. He said that these have generally failed and he pointed to *IMG* as an example. However the argument did partially succeed in *Gleeds*, and Newey J disagreed with part of the legal basis for Arnold J's rejection of the extrinsic contracts in *IMG*. Mr Newman KC submitted that as *Gleeds* is later in time and it specifically considered *IMG* on this, it should be followed.

156. I will come back to deal with *IMG* in more detail on the Proviso issues, but at this stage I am concerned with Arnold J's conclusions on the extrinsic contracts argument that was run before him. The employer in *IMG* relied upon memoranda dated November and December 1991 provided to members, presentations by the scheme actuary in which members were told that they would receive transfer payments from the "*old scheme*"" and enhanced by special contributions from the employer, a booklet for the new MP scheme and an application form in which members were required to answer "*yes*"" or "*no*" in relation to the statement "*I wish to participate in the IMG Pension Plan with effect from 1 January 1992*" and to sign to confirm that they had received and read the new booklet. It was accepted that all members completed and signed the application forms prior to 1 January 1992.

157. The employer argued that each of the members entered into a binding contract with it under which they consented to the changes to the plan set out in the November 1991 Memorandum and the scheme actuary's presentations and impliedly agreed not to claim benefits from the trustees of the plan on a different basis to that set out in those documents.

158. Arnold J found that no contract had been entered into between the employer and the members for two primary reasons: (i) there had been no intention to enter into contractual relations; and (ii) a lack of informed consent that the members were thereby overriding the protection provisions, mainly the proviso, in the scheme's governing trust deed. Arnold J did find that, except for those two points, there would have been an extrinsic contract. In particular he rejected the argument that there was no consideration moving from the employer because the employer was promising to pay a transfer value and an additional top-up amount as part of the move to MP benefits. This was held by Arnold J to be good consideration at [171]. Mr Newman KC said that this approach to consideration is directly applicable to this case.

159. As to the intention to create contractual relations, Arnold J specifically found that it was insufficient to intend merely to create *legal* relations, in particular such as would be regulated by the scheme's trust documents. There must be an intention to create *contractual* relations such that the contract thereby created would be "*binding even if its terms differ from those of the applicable trust documents*" [163]. Newey J agreed with that proposition in *Gleeds* at [148] but he went on to find that because the salary increase that was offered to members as part of the contract was separate from and outside the terms of the scheme, there was such an intention to create contractual relations.

160. As to the second finding that there was no informed consent because members had not been told about the proviso to the amendment power, or been advised about it, and thus could not be said to have agreed to forego its protection, Arnold J found that an extrinsic contract could not trump a contrary provision in the pension scheme, such as the proviso, unless that was explicitly raised and agreed. He relied on the fact that in *SWT* there was no bar on the amendment being made in the scheme documentation whereas in *IMG* there was the proviso that would prevent the amendment being made. For his conclusion he relied on the trust case of *In Re Pauling's Settlement Trusts* [1962] 1 WLR 86, a decision of Wilberforce J, as he then was. At [173] and [174] Arnold J said as follows:

> "173. In support of this argument, the Existing Members contend that there was no informed consent on the part of the Existing Members which would preclude the Existing Members from asserting a breach of trust applying the principles laid down by Wilberforce J in *Re Pauling's Settlement Trusts* [1962] 1 WLR 86 at 108:
>
> > 'the court has to consider all the circumstances in which the concurrence of the cestui que trust was given with a view to seeing whether it is fair and equitable that, having given his concurrence, he should afterwards turn round and sue the trustees: that, subject to this, it is not necessary that he should know that what he is concurring in is a breach of trust, provided that he fully understands what he is concurring in, and that it is not necessary that he should himself have directly benefited by the breach of trust.'
>
> 174. I accept these arguments. It is one thing to hold that an extrinsic contract may be enforced to supplement a trust deed where the deed does not contain any contrary provisions. It is quite another to say that an extrinsic contract may override contrary provisions in a trust deed unless the extrinsic contract amounts to consent on the part of the beneficiaries"

161. In *Gleeds*, Newey J disagreed with this last proposition as set out below. In *Gleeds* there were three suggested extrinsic contracts, but only one of those was found by Newey J to have been proved to exist. That was a contract between the employer and 103 current members of the scheme who had signed a letter explaining that the accrual of final salary benefits would cease and members who so chose could transfer their benefits to the MP section or another pension arrangement. This concerned the changes proposed to be effected by what was called the 2006 Deed of Amendment, which Newey J had found to be invalidly executed. The letter to members had said as follows:

> "We would urge you to attend one of the scheduled sessions if you have a question that has not already been answered by a previous session. We would then ask you to sign and return the enclosed extra copy of this letter to confirm that you have received this letter and understand and accept the changes set out within it to Sheila Bell by no later than 30 May 2006."

103 out of 106 active members signed and returned the letter. They therefore received the promised one-off salary increase that was part of the employer's offer to encourage members to agree to transfer.

162. On behalf of the members, it was argued that no contracts arose in this situation because: (i) members were presented with a "*fait accompli*"; (ii) the salary increase was an *ex gratia* payment; and (iii) the contracts would deprive members of a final salary link, which could not have been removed by amendment to the scheme and thus could not be removed by contract (or at least not without members' informed consent, relying on *IMG*).

163. Newey J rejected these arguments. He held that the letter made specific reference to members "*accepting the changes to the scheme*", and that by signing the letter the 103 members bound themselves to accept those changes (and received the salary increase as a result of that acceptance, not as an *ex gratia* payment: it was conditional on signing the letter).

164. As regards argument (iii), Newey J made clear that he disagreed with Arnold J's conclusion on this in *IMG* at [170]:

> "170 I take a different view from Arnold J. *In re Pauling's Settlement Trusts* [1962] 1 WLR 86 , which Arnold J cited, was concerned with the circumstances in which a beneficiary's concurrence will prevent him from complaining of a trustee's conduct. I do not myself see why the same criteria should govern whether a beneficiary can contract with a third party not to enforce rights he has under a trust. Contracts can, of course, sometimes be unenforceable for reasons of illegality or public policy, but, the *HR Trustees* case apart, I was not referred to any authority for the proposition that a contract not to enforce rights under a trust can be impugned on such a basis".

165. Mr Hitchcock KC submitted that it was incorrectly put to Newey J that Arnold J had made his decision in *IMG* on the basis of a lack of informed consent. On that basis, Newey J's decision was unsurprising. Mr Hitchcock KC said however that the finding in *IMG* followed *SWT* and was that an extrinsic contract cannot change the terms of a scheme if the provisions of the scheme prevented that change being made under the amendment power. He said that if Newey J had appreciated this point, namely that such an amendment could not have been made to the scheme trust documents, he would have found differently.

166. I, like Mr Newman KC, do not accept that that is a fair reading of Newey J's judgment in *Gleeds*. In [170] he does not mention the need for "*informed consent*". That comes from *Re Pauling's Settlement Trusts*. What I think that Newey J was really basing his disagreement with Arnold J on was the distinction between the trust law concept explained in *Re Pauling's Settlement Trusts* and whether as a matter of contract law, such a contract has come into existence. As Newey J rightly said, *Re Pauling's*

*Settlement Trusts* was concerned with the circumstances in which a beneficiary's concurrence will prevent him from complaining (after the event) of a trustee's breach of trust in which the beneficiary concurred. Newey J said that those criteria should not govern whether a beneficiary can contract with a third party not to enforce rights he has under a trust.

167. I think that Newey J properly understood Arnold J's decision on this in *IMG*, and disagreed with it. There had been no breach of trust and no alleged concurrence by the beneficiary in such breach. It was a completely different situation and the issue is simply one of contract formation and whether all the elements of that, described above, are present. There is no ordinary requirement of contract formation that there be informed consent. Contracts can be vitiated after they have been entered into on the grounds of misrepresentation, mistake, undue influence etc. But that is not the inquiry that applies in determining whether contracts have been formed.

168. In any event, and as Mr Rowley KC also submitted, as a matter of precedent, I should follow the later decision where there has been consideration of the earlier authority, unless I am convinced that the later decision is plainly wrong. Far from that, I think that Newey J was correct on this.

169. I should refer to one more case in this area and it appears to be the most recent case on the issue of extrinsic contracts. It is *Univar UK Ltd v Smith* [2020] Pens LR 23, a decision of Trower J. Unusually, it was the representative beneficiary arguing for the extrinsic contract and the employer opposing it. The claim sought rectification of a 2008 deed of a pension scheme. This made explicit reference to using RPI for revaluation of pensions in deferment; the predecessor deed had simply required compliance with applicable statutory requirements, which had come to use CPI.

170. As part of his defence, the representative beneficiary in that case argued that representations as to the rate of revaluation had been made to certain members when they opted out of the scheme's FS section in exchange for a promise that they would be admitted to the DC section. The relevant material on which these contracts were said to arise were an "*Opt-Out Form*" and covering letter. Both were sent to certain members in 2010 and both described options of: (1) opting out of the FS section and becoming entitled to join the DC section; and (2) remaining in the FS section but with no further pensionable service and a distinct possibility of no future pay rises. As part of option (1), members were told they would receive revaluation "*broadly in line with inflation (as measured by the retail prices index) up to a maximum of 5% each year for most of my pension*". In reliance on this representation, the representative beneficiary argued that for those members who chose option (1) an extrinsic contract arose, binding the company to use RPI for revaluation.

171. Mr Hitchcock KC said that Trower J had held that the representative beneficiary had not established the requisite intention to create legal or contractual relations. I do not read the judgment that way. Trower J did not accept the representative beneficiary's argument in full, namely that a contract arose containing terms requiring the scheme's trustee to use RPI for revaluation purposes, but he also did not accept the company's submission that there was no intention to create legal relations. At [320] and [321], Trower J said as follows:

> "320 …In my view the position is that, from signature of the Opt-Out form there was a contract in place between the Company and the member ...
>
> 321 …I consider that once the Closure Date had occurred .. the Company was contractually bound to provide the consideration for which the electing member had agreed to become an Opter-Out. In short, the Company made a contractual promise to procure the admission of the member to the money purchase section … In my judgment, therefore, there was a contract between the Company and each member electing for Option 1 by which, in return for becoming an Opter-Out, each member would be entitled to join the money purchase section of the Scheme, but the terms of the contract were far more limited in their scope than the contract contended for by the Representative Beneficiary."

172. *Univar* shows that extrinsic contracts can arise on the basis of documents such as a covering letter and "*Opt-Out Form*". The question in each case is one of fact: what contractual offers were made by the relevant documents? Mr Hitchcock KC relied further on Trower J's statement as to the precision of the language used so as to constitute it as a binding contract – at [322]:

> "322 …all of the statements relating to the members' benefits under the final salary section were explanatory (to a greater or lesser degree of precision) or descriptive of the legal consequences of opting out of the final salary section or joining the money purchase section of the Scheme. They did not constitute freestanding contractual offers operating independently from the legal entitlements which members had as a result of becoming Opters-Out under the terms of the 2008 DDR."

173. A further legal point that Mr Hitchcock KC made was the extent to which representative proceedings such as these under CPR Part 8 are suitable for determining the existence of extrinsic contracts given that an individual contract is said to have been formed with each individual member and there may be circumstances personal to that individual member that may provide a defence to that claim. He recognised that in the cases I have just been considering (all of which were similar representative proceedings), the Judges did not seem to have any difficulty in coming to conclusions on the existence of extrinsic contracts. The point is also the opposite of what he was arguing in relation to the member's consent issues above, although the same could be said for Mr Newman KC's submissions on this in reverse.

174. As is clear from the quotation from Leggatt J's judgment in *Blue v Ashley* above, and in many other authorities, whether a contract has been entered into is determined objectively. Mr Newman KC submitted that whether there were extrinsic contracts binding the 40-44s who opted for the MP scheme can be determined from the documents, namely the MP section booklet and the signed acceptance forms attached to it, and there is no need to look at individual circumstances, which would now, in any event, be difficult.

175. Furthermore as Mr Newman KC made clear, the Court will only be answering the question whether the member "*contractually agreed*" to the conversion of their benefits and joining the MP section and that would not preclude an individual member raising defences in due course against the enforcement of that contract. Mr Newman KC was

content, if necessary, for that to be made express in the terms of any order that would be made.

176. I will therefore turn to consider the particular elements of contract formation.

*(c) Offer and acceptance*

177. One of Mr Hitchcock KC's points about offer and acceptance was that this was a *fait accompli* presented to the Under 40s because they were going to be forced to join the MP section whether they agreed or not. But this issue only concerns the 40-44s who did have a genuine choice as to whether to agree to join the MP section and transfer their FS benefits over.

178. Mr Hitchcock KC also suggested that the terms of the MP section booklet were not sufficiently clear to constitute an offer capable of acceptance. I disagree. The MP booklet set out the essential terms of the offer. The fact that some terms may be a little vague or ambiguous does not mean they cannot be agreed and become binding. The terms of the acceptance form show what the member was agreeing to, namely that, from 1 January 1992, their pension benefits would arise under the MP section together with the changes as described in the MP booklet.

*(d) Intention to create contractual relations*

179. Mr Hitchcock KC again raised the *fait accompli* point under this heading but that is clearly inapplicable to the 40-44s who had the choice.

180. I have dealt with the legal position as to whether the intention has to be to create *contractual* relations. As in *Gleeds,* the existence of an extrinsic contract is only being considered on the basis that the 1992 and 1993 Deeds are ineffective. Mr Hitchcock KC argued that because the members thought that the changes were going to be implemented anyway through the amendment of the Plan's trust documents, they could not have intended to create contractual relations.

181. Mr Newman KC responded by saying that this situation is the same as in *Gleeds,* where the enhancement offered by way of consideration for the contract, the salary increase, was not included in the proposed amendments to the scheme documentation. In this case, the enhancement was the higher pension increases that would be fed into the transfer sums for converting the FS benefits to the MP section Personal Accounts. These were not part of any amendment to the Plan's trust deeds; rather it was a separate obligation on PPUK as to the way the transfer sums would be calculated. Therefore, Mr Newman KC submitted that there was therefore an intention to create contractual relations.

182. I agree with that analysis and see no basis for distinguishing the situation in this case from that in *Gleeds.* There was, therefore, an intention to create contractual relations.

*(e) Consideration*

183. The same issue also determines the question of whether there was good consideration from PPUK. The consideration was the enhanced transfer sums that PPUK agreed to pay to those of the 40-44s who chose to join the MP section. By the 1979 Deed and

Rules, members were entitled to a 3% p.a. increase to their pensions in payment. As the MP section booklet made clear, there would be an additional sum added to the transfer sum on the basis that pensions in payment would increase by RPI up to 5%. That enhancement is not in the 1993 Deed or Rules; it was a specific offer to those who chose to transfer to the MP section. In my view that is good consideration from PPUK.

*(f) Conclusion*

184. For the reasons set out above, I conclude that there were extrinsic contracts between those of the 40-44s who chose to transfer to the MP section and PPUK and that they are binding on those parties and those claiming under them. Therefore, if I had found that the 1992 and 1993 Deeds were invalid and ineffective, and that the Under 40s therefore remained entitled to FS benefits, I would have found that those 40-44s who chose to transfer to the MP section are bound by their contracts, subject to any personal defences they may have to enforcement, and would have remained in the MP section and only entitled to MP benefits.

## (5) The effect of the Proviso – Issues 3, 4 and 6

*(a) Preliminary*

185. The issues concerning the effect of the Proviso are at the centre of the Transfer and Conversion Issues. In saying that I mean that they seem to encapsulate the real complaint of the RB that the extinguishment of the FS rights and transfer into the MP section was inherently prejudicial. That depends on whether it infringed the Proviso which was there to protect members' accrued benefits. (*Courage* provisos are sometimes referred to as fetters on the power to amend.)

186. For convenience I set out again the power of amendment in clause 5 of the 1979 Deed with the Proviso underlined:

> "The Principal Employer and the Trustees may jointly from time to time without the consent of the Members by Deed alter cancel modify or add to any of the provisions of this Deed and by memorandum under hand signed in the case of the Principal Employer by a director duly authorised, alter cancel modify or add to any of the Rules, provided that no such alteration cancellation modification or addition shall be such as would prejudice or impair the benefits accrued in respect of membership up to that time".

This was in virtually the same form as the proviso in *Gleeds*.

187. There are two main issues to the RB's case on the Proviso:

(i) did the Proviso prevent the conversion of members' FS benefits to MP benefits? If it did, members are entitled to be reinstated into the FS section and to receive FS benefits;

(ii) if the Proviso did not prevent such conversion, did it prevent the link to a member's final pensionable salary from being broken?

188. These issues appear to cover the Trustee's Issues 3, 4 and 6. If the answer to (ii) above is yes, there are difficult issues, hardly addressed by the RB, but to which the Trustee is seeking directions, as to how the breaking of the final pensionable salary link can be remedied. This is dealt with in the next section and it is the Trustee's Issue 8, referring to the "*final salary underpin*". It is important to note, that unlike the issues around the 1992 Deed and the 1993 Deed, which if ineffective would lead to a complete restoration back into the FS section, if the RB succeeds on the Proviso issues, this would only affect members' accrued benefits as at 1 January 1992. The Proviso cannot affect members' future pension benefits and so they remain in the MP section for all benefits accrued since 1 January 1992 (subject to the single conceptual change issue, dealt with below).

189. But first I must deal with issues (i) and (ii) above and I start by considering some of the relevant case law.

*(b) Relevant case law on Courage provisos*

190. It is the now familiar trio of cases, *Courage*, *IMG* and *Gleeds*, that I need to look at in this respect. It is important to emphasise at the outset that none of these cases had to consider issue (i) above, that is whether the conversion from FS benefits to MP benefits falls foul of the Proviso. But they all in one way or another endorse the position that provisos which protect accrued benefits must prevent the breaking of the final pensionable salary link.

191. *Courage* concerned three different pension schemes each with their own power of amendment. For the first scheme, the power said that amendments "*must not "vary or affect any benefits already secured by past contributions in respect of any member without his consent in writing*"" (underlining added). For the second and third schemes, the amendments "*must not "reduce…the accrued pension of any employed member" except in the circumstances specified*" (underlining added), where "*accrued pensions*" was defined in the rules as pensions based on salary at the relevant date.

192. Millett J was considering whether the proposed amendments were within the powers to amend and he found that they were not. At 543g of the report at [1987] 1 All ER 528, he said as follows:

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

193. The last sentence in this All England Law Report version of the judgment only referred to the word "*secured*". However in the Weekly Law Reports version at [1987] 1 WLR 495, the words "*and "accrued*"" appear after "*secured*". This difference was noted in both *IMG* and *Gleeds*, and both Arnold J and Newey J preferred the All England Law Report version. Newey J also referred to some materials provided by Macfarlanes that indicated that Millett J had excised the words "*and "accrued*"" from the final version,

which Newey J concluded was "*presumably because "accrued" pensions were specifically defined in the rules with which he was concerned*" - see [117]. Those materials were provided to me by Mr Rowley KC on the last day of the trial and they were a note from Millett J's clerk attaching a revised version of the relevant page. In any event, and despite the removal of the reference to "*accrued*", Newey J relied on *Courage* and found that there was no real difference in the meaning of "*secured*" and "*accrued*".

194. While the mystery of the missing words has perhaps been solved, it does not appear to have made much difference to the outcome in *Courage*. The question that Millett J asked himself was, in relation to all three rules, as to the effect that the proposed amendments would have on benefits already secured and whether the powers they introduced "*would reduce the benefits currently secured by past contributions*" - see p.544a. Mr Newman KC therefore submitted that Millett J was reading a prohibition on "*varying*" benefits as a prohibition on reducing their amount.

195. The next case in the series is *IMG*. This was a conversion case but it was common ground that the proviso in that case did not preclude conversion. The case therefore was only about issue (ii) and how the final pensionable salary link should be preserved. The proviso was somewhat different to the present case and was in the following terms: "*no amendment shall have the effect of reducing the value of benefits secured by contributions already made*" (underlining added). The express reference to "*value*" may be a distinguishing feature, and was heavily relied on as such by Mr Hitchcock KC, but as Mr Newman KC correctly pointed out, Arnold J himself did not seem to think that this "*made a fundamental difference to the construction of the Fetter*" [136].

196. At [140] and [141] Arnold J explained how the final salary link should be protected by an underpin. He said as follows:

> "140 … the Fetter contains an absolute prohibition on reducing the objective value of the benefits. Accordingly, I see no basis for reading the Fetter as merely preventing reduction of an actuarially-assessed value of the benefits, still less one predicated upon the false basis that the Plan has been terminated, or the member has left Service, on the date of the amendment. It is true that this means that the value of a member's benefits could not be determined at the date of the amendment, but in my view that is the inevitable consequence of protecting the value of a benefit, such as a final salary benefit, which is inherently prospective in nature.
>
> 141 Drawing these threads together, I conclude that the effect of the Fetter is to render ineffective amendments which reduce the value of benefits, and in particular the future final salary benefits, which have accrued to members by virtue of their Service down to the date of the amendment. An amendment to convert such benefits from a final salary entitlement to a money purchase entitlement is permissible, but only subject to an underpin which preserves the future monetary value of the proportion of Final Pensionable Pay which the member has accrued in respect of pre-amendment Service."

197. The third case is *Gleeds*. As I said above, the proviso in *Gleeds* was materially identical to the Proviso. However even though there was a purported conversion of FS benefits

to MP benefits, that was invalid because the deed was not properly executed. The discussion about the proviso was therefore in relation to a different amendment which sought to break the link to final salary of the remaining members of the scheme's FS section. The only live issue was about the meaning of "*accrued*" (hence the discussion about the different versions of Millett J's judgment in *Courage*) and it did not consider the meaning of, for example, "*would prejudice or impair*", which is of some significance in this case. It is therefore of somewhat limited relevance.

198. After reviewing some Canadian authorities, Newey J concluded that the proviso did protect the link to final pensionable salary. At [128] he said as follows:

> "(iii) … it seems to me that, as a matter of language, a right to a pension of "one-seventieth part of … Final Pensionable Salary" can fairly be described as "accruing" with each year's service. The word "accrued" can be read as referring to rights that have already been gained or arisen, regardless of whether any payment has yet fallen due or necessarily will;
>
> (iv) I cannot see a compelling reason for taking "accrued" to have a narrower meaning than "secured" in the present context, and Millett J considered that benefits that had been "secured" included "the prospective entitlement to pensions based on final salary."

Members therefore accrued benefits in respect of particular periods of membership of the scheme in the sense that they accrued rights to particular amounts of benefit even where that amount was expressed as part of a formula.

199. Mr Newman KC also referred to the Court of Appeal's decision in *FDR Ltd v Dutton & Ors*. [2017] Pens LR 14 in which the relevant proviso stated that "*no such alteration or addition shall (1) operate so as to affect in any way prejudicially (a) any pension already being paid in accordance with the Rules of this Deed at the date such alteration or addition takes effect or (b) any rights or interests which shall have accrued to each prospective beneficiary in respect of pension benefits secured under the Scheme up to the date on which such alteration or addition takes effect*". Lewison LJ focused on the prejudicial effect being, in this context, a reduction in the actual monetary amount received. At [15] he said:

> "The terms of the proviso are such that any change in the rules must not prejudicially affect any pension in payment or any accrued pension rights. How would a pension in payment be prejudicially affected? In my judgment by the pensioner receiving less money in her pocket than she would have done but for the change in the rules. Likewise, in my judgment, a pensioner's accrued right would be prejudicially affected if, when the pension came on stream, she received less money in her pocket than she would have done if the change had not been made."

200. It has been accepted – see *Sterling Insurance Trustees Ltd v Sterling Insurance Group Ltd* [2015] EWHC 2665 (Ch) – that *Courage* and *Gleeds* represent the law at first instance in relation to provisos protecting secured and accrued benefits. Mr Newman KC accepted that it is now well established at first instance that provisos that protect accrued benefits prevent the breaking of the final pensionable salary link. He has argued otherwise, in *Gleeds* for example, that this should not be the law but the issue has never been tested in the Court of Appeal and he has therefore reserved the right to argue that

the Proviso does not have that effect. I will deal with his arguments shortly below in the link to final pensionable salary section.

201. But I can say at this stage that it is unclear to me what the juridical basis for the imposition of an underpin by the Court is. If the conversion breaches the Proviso, it means that there was no power to make those amendments to the Plan and they were *ultra vires*. However, if the conversion was permissible but the amendments broke the final pensionable salary link, *IMG* in particular suggests that the amendments can be saved by the Court imposing an underpin that preserves the link to the final pensionable salary. In other words, the Court can rewrite the amendments by including an underpin in certain terms that would mean the amendments were within the power and not *ultra vires*. Millett J in *Courage* did not need to do that because he was being asked to approve or reject proposed amendments to the schemes' documentation. It was only in *IMG* that Arnold J gave effect to the proviso by reading in an underpin. While it makes perfect sense to have done so, thereby saving the amendments to the scheme, it does not explain how the Court has the power to do this nor why the amendments were not simply *ultra vires* and therefore ineffective. This point may be relevant to Mr Newman KC's reserved arguments on the final pensionable salary link.

*(c) Did the Proviso prevent the conversion of members' FS benefits to MP benefits?*

202. The RB contends that the Proviso prohibited the conversion of FS benefits into a cash sum that would be used to provide MP benefits. There was a certain amount of overlap in Mr Hitchcock KC's submissions between this issue and the breaking of the final pensionable salary link, but he recognised that they are two distinct issues.

203. Mr Hitchcock KC's main argument on conversion being a breach of the Proviso is that the Proviso protects not just the "*value*" of the accrued FS benefits but the "*benefits*" themselves. By that he meant that the FS benefits are defined by a formula, or method of calculation, and it is that that is protected by the Proviso. He said that in *IMG*, there was no challenge to the conversion as such because the proviso there specifically protected the "*value*" of the benefits, as compared to the Proviso that only refers to the "*benefits accrued*". However, as I said above, Arnold J did not think that the reference to "*value*" affected the meaning of the proviso and therefore what it covered.

204. Mr Hitchcock KC sought to expand on what he meant by the FS "*benefits*" that he said would inevitably be prejudiced or impaired by conversion into MP benefits. He said that there are two key points: (i) the amount of pension that would be earned each year; and (ii) the level of security.

205. As to the pension earned, under an FS scheme, it is a formula based on the number of years of pensionable service times the fraction of final pensionable salary earned in each year. That fraction is then applied to the member's final pensionable salary. Obviously the exact amount of the pension will not be known until the final pensionable salary is known. That is the essence of the Proviso protecting the link to the final pensionable salary, which at the time of the amendment cannot be known. In an MP scheme, the benefits that are earned depend initially on how much the member and their employer pay into the scheme and then the investment performance of that pension pot over the relevant period. The amount that the member will receive by way of pension depends upon the annuity that can be purchased with the resulting sum. It is impossible

to know what that will be but estimates can be made on the assumption that contributions continue at the same rate.

206. As to the level of security, Mr Hitchcock KC submitted that so far as the amount of the FS benefit was concerned, the member is guaranteed the pension derived from the formula set out above. It does not depend on investment performance or any other unknown factor. The employer is obliged to pay to the trustees whatever is needed to ensure that the benefits promised to the members could be fulfilled. The Plan was a "*balance of cost*" scheme with that obligation on the employer. He compared that to MP benefits, the amount of which cannot be known and it was not guaranteed in any sense. There is no formula to rely on, no balance of cost covenant and no protection in relation to contributions. And the investments might perform poorly.

207. These points came in for sustained criticism from Mr Newman KC. He said that just because there are differences in the method of calculating FS benefits and MP benefits does not mean that one is inherently better or worse than the other. Under the Proviso, he said that it is necessary to show that the MP benefits "*would*" be worse than the FS benefits. That could not be said to be the case at the time of the conversion. And it can be seen from the fact that there are a number of members who are actually better off in the MP section than they would be if they were entitled to FS benefits. About 19% of the Under 40s and about 39% of the 40-44s who transferred to the MP section are better off. For this purpose they are represented by the Company. If I were to find that the conversion falls foul of the Proviso, then those members would be forced to lose out by being put back to their FS benefits. This would be contrary to various announcements made to members about this litigation that all members would be "*no worse off*" as a result of it.

208. Mr Newman KC also challenged the notion that there was any real guarantee of FS benefits. He said that under the 1979 Deed, PPUK was obliged to contribute to the Plan in order to fund benefits but that was still dependent on its willingness and ability to do so. It was able to terminate its liability to pay contributions on three months' notice and the trustees could not have required it to make up any shortfall in the funding of FS benefits. Therefore, members' benefits might be reduced on a winding up of the Plan. The position has now changed markedly because of the intervention of legislative protections for FS benefits, including the Pension Protection Fund. But at the time that it is necessary to look at whether the Proviso was being breached, namely as of 1 January 1992, Mr Newman KC said that members had no real guarantee in respect of the payment of their FS benefits. That meant that it could not be said that the security of receiving MP benefits was necessarily worse than FS benefits. It was only a change in risk.

209. These arguments seem to me to be really about whether one looks purely at the value or amount of the respective benefits or whether one should have regard to the somewhat more amorphous concept of "*benefit*" for which Mr Hitchcock KC was advocating. Under the Proviso, it is accrued benefits that are protected and Mr Hitchcock KC maintained that this protected the formula defining the FS benefits and that could not be removed in relation to those benefits that had accrued by 1 January 1992.

210. I do not read the Proviso in that way and I do not think that Newey J read the identical proviso in *Gleeds* to mean that. Members can accrue particular amounts of benefits in respect of their periods of membership of the scheme, even if the exact amount cannot

be known until the other variable in the formula is known, namely the final pensionable salary. In other words, the formula is protected and the first two elements of it known: the years of pensionable service; and the fraction of final pensionable salary earned in each year. Because the final pensionable salary is not known at the time of the amendment, the authorities say that any proposed amendment to the scheme must respect the link to final pensionable salary. But that can only sensibly be so as to protect the amount of a member's benefit rather than the method of calculation contained in the formula.

211. Mr Newman KC focussed on the actual words used in the Proviso and asked whether the conversion to MP benefits "*would prejudice or impair the benefits accrued*". That first of all raised the question whether it can be said that at the time of the conversion a member will be better or worse off in terms of the financial value of the benefits they are to receive. That will depend on the amount of the transfer sum and the investment performance of the MP pot. Both experts agreed that the members who converted to MP benefits might end up better or worse off than if they had retained their FS benefits. This has been borne out by the evidence from the Scheme Actuary who said that 19% of the Under 40s and 39% of the 40-44s were better off with their MP benefits than they would have been if they had retained their FS benefits. Mr Newman KC pressed the point that if conversion is prohibited as a matter of principle by the Proviso, then those members will be made worse off by such a result.

212. Mr Hitchcock KC said that this gave an unnatural meaning to "*prejudice*" and "*impair*" and that because of the prospective nature of FS benefits, they should be taken to mean "*to have a harmful influence on*" (prejudice) and "*to damage or weaken something so that it is less effective*" (impair). But even if those words are to be understood in that way, it still comes back to whether one is looking at value or the vaguer concept of the FS formula which has to be protected.

213. The other point of construction on the Proviso is the use of the word "*would*" rather than "*might*". Mr Newman KC submitted that it is therefore insufficient for the RB to say that members "*might*" end up worse off as a result of the conversion. He compared the wording of the Proviso to s.67(2) of the Pensions Act 1995 in the form originally enacted (this is not applicable to this case because it came after the amendments). This was headed, and dealt with, "*Restriction on powers to alter schemes*". It provided that a power to alter a pension scheme:

> "cannot be exercised on any occasion in a manner which would **or might** affect any entitlement or accrued right, of any member of the scheme acquired before the power is exercised unless the requirements under subsection (3) are satisfied" (emphasis added).

214. That wording was recently relied on by Morgan J in *Punter Southall Governance Services Ltd v Hazlett* [2022] Pens LR 1 to compare to the proviso before him that prevented amendments "*which would diminish the benefits ... already accrued ... under the Plan to the Member*". Morgan J distinguished between events which "*would*" happen and those that "*might*" happen.

215. This latter distinction was also drawn by Warner J in *Mettoy Pension Trustees Ltd v Evans* [1990] Pens LR 9. The proviso in issue in that case prohibited amendments that *"shall"* lead to a payment or transfer of the pension fund to the employer company.

The relevant amendment concerned powers to deal with a surplus in the fund. The amendment replaced a rule that provided for surplus to be used to purchase annuities for members and then to be paid to the employer, with a rule that provided for a surplus to be applied "*at the absolute discretion*" of the company to secure further benefits for pensioners within the limits stated in the rules and any further balance remaining was to be paid to the employers.

216. Warner J held that:

> "The consequences of the alteration are imponderable. In certain circumstances it might lead to a greater part of the surplus being applied to augment benefits, because of the wider class of objects of the discretion. In other circumstances it might lead to a lesser part of it, or to no part of it being so applied. Such possible consequences are not in my opinion within the prohibition in the provisos."

217. Mr Newman KC submitted that, as in Morgan J's case, the "*amount*" of the accrued benefits is not prejudiced by converting it to a cash sum. It might turn out that that cash sum is insufficient to provide the same or better than the FS benefits that would have been received, but that does not mean that, as of 1992, it could be said that it "*would*" not at least match the FS benefits.

218. Mr Hitchcock KC said that this was to construe "*would*" as meaning "*definitely would*" and is to make the Proviso almost valueless and artificial as, for example, all pension rights could be replaced with "*a sum to be determined*" without the Proviso being breached. He went on to say that "*would*" should mean "*probably would*".

219. I agree with Mr Newman KC that these points are unconvincing. There is a clear difference, it seems to me, between saying something "*would*" happen and that something "*would probably*" happen. There might be questions as to how probable the prejudice would have to be – more than 50%, or 60% or 70%? - for the amendment to breach the proviso. It is much safer to stick to the words actually used, which is whether prejudice "*would*" be suffered. It is important that this can be judged at the time of the amendment with some certainty as the administrator of the Plan needs to know if the amendment is valid or not.

220. As to whether that more certain approach would render the Proviso valueless, I do not see that. While it is true to say that the Proviso is there to protect members' interests, it is not the only protection that members have. The trustees have to be parties to any amendment made under the 1979 Deed, as they were in relation to the 1992 Deed and the 1993 Deed. The trustees owe fiduciary duties to the members of the Plan to act in their best interests. They could not put their names to an amendment that would potentially put them in breach of their duties to the members. The Proviso would clearly prevent an attempted reduction in the rate of FS accrual or the level of pensionable salary. So it does have a place and can provide protection against attempts to do that sort of thing.

221. I think it is also necessary to read the Proviso in the context of the 1979 Deed as a whole. Rule 9.3 of the 1979 Deed provided for the analogous case of a member wishing to transfer their FS benefits from the Plan to another pension arrangement. It expressly provided for those benefits to be converted to a cash sum in the following terms (insofar as were relevant):

> "If any member ceases to be eligible or leaves the employment of the Employer before the Normal Retirement Date or contributions in respect of his cease … and he thereupon becomes a member of any fund or scheme … (hereinafter collectively referred to as the "Other Scheme"), the Trustees may, subject to the provisions below and to the consent of the Employer, instead of granting the Member the benefits to which he is entitled under the Scheme transfer to the Trustees of the Other Scheme a cash sum or other assets calculated as hereinafter provided. ..
>
> The amount transferred shall be determined by the Trustees but shall not exceed an amount which in the Trustee's opinion is the value of the Member's benefits …"

222. The Plan's governing provisions therefore provided for the conversion of a member's FS benefits into a cash sum on transfer to another pensions arrangement, which could be used to provide MP benefits if that was the type of benefits provided by that arrangement. This was a right that the members had in the 1979 Deed and so its exercise did not engage the Proviso. Nevertheless, it shows that it was contemplated that FS benefits could be converted into a cash sum. That seems to me to be quite a strong indicator that the Proviso was not intended to prevent such a conversion *per se*.

223. In all the circumstances and for the reasons set out above, I do not consider that the conversion of FS benefits to MP benefits was itself prohibited by the Proviso.

*(d) Did the Proviso prevent the link to a member's final pensionable salary from being broken?*

224. The Company accepts, as do both experts, that the transfer sums that were paid into members' MP Personal Accounts did not take account of future pay rises, which would have been necessary to maintain the link with the final pensionable salary. Mr Scott, the Company's expert, said that this meant that the transfer sums did not avoid prejudice to the transferring members' accrued benefits. That must be because he recognised the link to the final pensionable salary as inherent in the calculation of accrued benefits.

225. Nevertheless, as I indicated in [200] above, Mr Newman KC disputed that there should be such a link in this case, although he recognised that the weight of first instance authority is against this position and it can only realistically be challenged in the Court of Appeal. He had four arguments in such respect:

(i) He made the same point as to the meaning of "*would*" in the Proviso as discussed above. He said that breaking the final pensionable salary link only "*might*" prejudice accrued benefits, depending on investment returns and whether the member had left the Plan well before NRA or their pensionable salary did not increase as expected.

(ii) He said that the final pensionable salary link was not broken by the transfer and conversion process. He based this on an analysis of the definitions of "*Final Pensionable Salary*" in the 1979 Deed and the lack of definition of "*pensionable employment*", concluding that a member's pensionable employment for the purpose of determining their FS benefits ceased on their transfer to the MP section on 1 January 1992. The analysis was challenged by Mr Hitchcock KC.

(iii) He asserted that any prejudice to accrued benefits from breaking the final pensionable salary link was not caused by the amendments themselves. The transfer sum was a matter for the trustees to determine under Section E of the MP section booklet which became rule 6 of the MP section rules in the 1993 Deed. As it was not done under the amendments it could not be a breach of the Proviso and the only remedy may have lain against the trustees.

(iv) He also said that the Proviso could not apply to the 40-44s who had chosen to transfer to the MP section because the amendments did not cause the breaking of the final pensionable salary link.

226. I understand these points and see the force of them. It also seems to me that they have not been properly considered on the authorities that I have discussed above. Nevertheless, the final pensionable salary link is now too well-established at first instance that it is not for me to say that this is not the inevitable effect of the Proviso. I therefore find that the Proviso did not permit the final pensionable salary link to be broken for members transferring to the MP section. The difficult question that follows, considered in the next section, is how that should best be given effect to in this case.

*(e) Single conceptual change*

227. There is one further point that I should deal with. It was hardly referred to in the RB's opening submissions but Mr Hitchcock KC made some submissions on it in closing. It was based on what Neuberger J said in *Bestrustees* and whether there could be severance between a valid and an invalid exercise of a power.

228. Mr Hitchcock KC submitted that even though the Proviso could only render invalid the conversion of FS benefits to MP benefits, that is those FS benefits that had accrued by 1 January 1992, the other aspect of the 1992 Deed that established the MP section should also be rendered invalid because it was part of a single conceptual change. Neuberger J had severed the valid and invalid parts in *Bestrustees* because "*conceptually those two components of the single exercise are easily separable one from the other*". Therefore I think that Mr Hitchcock KC was suggesting that if I found that the Proviso prevented the conversion of FS benefits to MP benefits, it also prevented the establishment of the MP section. Quite how that would fit with the 1993 Deed was not explained.

229. I have found that the conversion was not itself prohibited by the Proviso, so I do not think this can be an issue in relation to the final pensionable salary link. But in any event I accept Mr Newman KC's submissions about whether the single conceptual change can properly be applied to this case. He accepted that both aspects of the change – the conversion of benefits and the establishment of the MP section – were necessarily brought in together at the same time. But he said that they were conceptually separate exercises and one can see that the MP section has been operating since 1992 including for new members. He also showed me that this was the way the RB had looked at this matter by referring to the two aspects separately and calling them the "*Past Service Amendment*" and the "*Continuing Service Amendment*". Basically one was a change in relation to past service; and the other was in respect of future service, and there is no difficulty in distinguishing between those two concepts.

230. I therefore do not think that there is anything in this point that is relevant to the issues I have to decide.

### (6) Consequences of a breach of the Proviso – Issue 8

231. This is what the Trustee described colloquially as the "*remedies*" issue. And it is the Trustee that is particularly interested in this issue and has requested the Court, if it were able, "*to give the most comprehensive as possible directions as to how any underpin should operate*." I will endeavour to do so as my findings above are to the effect that it is inevitable that some sort of final pensionable salary underpin needs to be applied.

232. There has been a curious lack of engagement on this issue by the RB with it hardly being touched on in his written submissions and Mr Hitchcock KC only dealing with it in his reply closing submissions. Even more surprising was his attack on the approach taken by the Company to examine this issue, describing it as "*regrettable"* and suggesting that the Company was only doing this to minimise its liability. As Mr Newman KC said, this was specifically raised by the Trustee, and the Company was, in my view, dealing with this issue entirely appropriately.

233. This approach of the RB can probably be explained by the fact that he is seeking reinstatement of the members into the FS section or the cash equivalent top up to their MP pots so as to provide the FS benefits that they were entitled to in respect of their pre-1992 service. This was further elaborated upon in Mr Hitchcock KC's reply submissions as being a comparison at the time the member's benefit becomes payable, what Mr Batting described as the "*crystallisation date*", between the value of the member's FS benefit and the value of the relevant part of the member's MP pot. If the MP value is less than the FS benefit value, then the MP pot would have to be supplemented in order to provide the FS benefits to which the member is entitled.

234. The trouble with this approach it seems to me is that it makes no distinction between a finding that the conversion to MP benefits was itself a breach of the Proviso and so invalid (which I did not find) and a finding that there should be an underpin to protect the final pensionable salary link (which I have found). In the former case, I can see that reinstatement could be the appropriate remedy, although this would also mean that those who are better off with their MP benefits would potentially be forced to lose that advantage. Alternatively, as Mr Hitchcock KC was proposing in his oral submissions, the equivalent to reinstatement would be their version of the underpin which provides that the member is guaranteed, as a minimum, their FS benefits. At least that would enable those members who have done better with their MP benefits to retain those.

235. But there is a fundamental legal issue at the heart of this. That is that the remedy must fit the breach. Actually it is not accurate to describe it as a breach (or a remedy). I referred above to my concerns as to the juridical basis for the imposition of an underpin, while recognising that it is a sensible way to save the amendments. The remedies issue brings this into focus. The critical aspect is the time at which the underpin is to apply: whether it is at the time of the amendment, 1 January 1992; or whether it should be now or at Mr Batting's crystallisation date.

236. It seems to me that the logic of applying an underpin to preserve the final pensionable salary link is that it is being implied into the amendments that were otherwise valid to effect the conversion from FS benefits to MP benefits. It therefore needs to be something that could have applied at the time of the amendments. The calculation of the transfer sum should have reflected the value of the accrued benefits which means it should have taken account of the final pensionable salary. It should have been possible at the time to amend the Plan and provide for the conversion to MP benefits but without breaking the final pensionable salary link. The conversion could have validly taken place at the time so long as the final pensionable salary was taken into account in calculating the value of the FS accrued benefits for the purposes of the cash transfer sums. Now that it is 30 years later, it may be appropriate to take into account what has actually happened in that time and in particular the actual final pensionable salary for individual members (and I explore the various suggestions of the experts below) but it does seem to me that an implied limitation in the amendments that preserves the final pensionable salary link must be capable of working from the time of the amendment. Otherwise, I do not understand the legal basis for the imposition of the final pensionable salary link.

237. I recognise that Arnold J in [140] and [141] of *IMG* may have thought differently and considered that an "*actuarially-assessed value of the benefits…on the date of the amendment*" would be insufficient to save the amendment and that it would be necessary to wait until the actual final pensionable salary is determined. In the circumstances of this case I respectfully disagree that the Court can impose such an underpin by way of remedy, effectively guaranteeing the receipt of FS benefits, and eliminating any investment risk from the MP benefits. That would amount to the same as reinstatement in the FS section even though I have found the conversion to MP benefits to be valid. The focus, it seems to me, should be on whether the conversion of the FS accrued benefits to cash was in the appropriate amount.

238. The next question is how to determine whether such an underpin applies. Both experts were agreed that a comparison needs to be done between two capital values on a cash equivalent basis: the value of the member's accrued FS benefits as at 1 January 1992; and the value of the MP pot. The issue really is what items go into the valuation of the accrued FS benefits and the date of valuation. The Company says that the date should be the date of conversion (1 January 1992) and so the comparison is with the transfer sum paid into the member's MP pot. The RB says that it should be compared at the crystallisation date when the actual final pensionable salary is known together with the actual value of the relevant portion of the MP pot.

239. Mr Newman KC said that the RB's expert, Mr Batting's approach which he calls a "*value test*" is based on members being entitled to be reinstated into the FS section. Indeed the instructions to Mr Batting assumed that members were entitled to be reinstated. But, as I have explained above, this could only have been the consequence if I had found that the Proviso prevented the conversion to MP benefits. When this was put to Mr Batting in cross examination he agreed that that was the basis for his approach. Furthermore he accepted that the approach of the Company's expert, Mr Scott, where conversion is permitted but subject to the final pensionable salary link, was a valid approach to take.

240. Mr Scott identified two possible approaches: a retrospective and a prospective approach. The latter is similar to Mr Batting's "*value test*" in terms of the data used but

it adopts a slightly different approach to valuing FS benefits when the member's pension has not yet fallen due for payment (see below).

241. Mr Newman KC, however, favoured the retrospective approach and said that it had not been criticised by the RB. The retrospective approach calculates the transfer sum that would have been required in 1992 to provide an amount which was not less than the actuarial value of the converted FS benefits but using known data as to the subsequent salary increases and the final pensionable salary together with dates of service and current status (ie retired, transferred out, deferred etc.). This would therefore reflect what the accrued FS benefits should, albeit with the benefit of hindsight, have been valued at in 1992 using the cash equivalent transfer basis. If that value is higher than the actual transfer sum, then Mr Scott suggested the difference should be accounted for by topping up the member's MP pot.

242. Both Mr Batting and the Trustee referred to the fact that, while the retrospective approach uses actual data for a member's final pensionable salary, retirement date and number of years' service, it does not take into account other known factors such as the increase in life expectancy since 1992 and the general reduction in gilt yields which has resulted in an increase in the valuation of FS liabilities. Mr Newman KC's response to this was to say that those are not part of a member's accrued benefits; instead they are part of the cost of funding those benefits, as Mr Batting accepted.

243. In this respect Mr Newman KC referred to *IBM UK Holdings Ltd v Dalgleish* [2014] EWHC 980 (Ch) in which Warren J considered how an underpin would work in relation to an amendment to pension scheme rules allowing for the exclusion of members from the scheme. He held that because of the fetter on the amendment power akin to the Proviso, the introduction of such an exclusion power had to preserve members' final pensionable salary link. That in turn required an underpin and he said as follows at [289(iii)]:

> "the Exclusion Power was subject to an implied limitation to preserve the final salary link. I perceive that limitation as one to be implied into the 1990 Trust Deed and Rules (and subsequent iterations) so that the benefits applicable on the exercise of the Exclusion Power are the greater of (i) the ordinary leaving service benefits (based on salary at the date of exercise of the Exclusion Power and carrying statutory or scheme revaluation) and (ii) an underpin based on salary at the date when the Member concerned actually leaves service or reaches NRD but not carrying revaluation between the time of the exercise of the Exclusion Power and the date just referred to."

244. Warren J therefore took into account, so as to "*preserve the final salary link*", the member's actual salary when they left service or reached NRD instead of assumptions as to how that salary would change (i.e. the assumption in the revaluation rate). He therefore replaced the assumed salary increases with the actual salary change over time. But apart from those factors, Warren J retained the other actuarial assumptions that were used at the time of the exclusion.

245. Mr Newman KC described the retrospective approach as being the appropriate way to award equitable compensation to members who have lost out because they have been underpaid benefits in breach of trust. As the Trustee pointed out, this is not really about compensation. It is about whether members were entitled to different benefits from 1

January 1992. I prefer the analysis set out above that members are entitled to have had their FS accrued benefits properly valued at the time so as to take into account the final pensionable salary link. Once that is understood to be the proper application of the underpin, it is clear that the retrospective approach is appropriate and that it would have the effect of re-calculating the transfer sums to what they should have been had the final pensionable salary link been maintained. The other factors such as life expectancy and gilt yields were not part of the calculation at the time of the conversion and so should not now be. They only affect the cost of providing the accrued benefits and are not a part of the accrued benefits themselves.

246. There is a further disagreement between the experts as to the comparison date for members whose benefits have yet to come into payment: Mr Scott would value their benefits as of now; whereas Mr Batting would wait until each member's benefit had actually become payable. The Trustee highlighted a possible administrative difficulty with Mr Batting's approach due to the delay this might occasion to the buying out and winding up of the Combined Parker and Sanford Section of the Scheme. Currently the financial conditions for such buyouts are very favourable, as Mr Batting agreed. However such a buyout and winding up requires certainty as to the benefits payable, because they will be "*bought out*" with an insurer. If the last comparison date is to be the date when the last of the deferred members retires or leaves the Scheme, then the buyout and winding up will be delayed until after that date because only then will there be certainty as to benefits. Mr Southern had explained in his witness statement that these proceedings came about because in 2013 discussions took place about a possible winding up of the Combined Parker and Sanford Section, and an initial target date for completion of that winding up was 31 December 2014.

247. In my view the approach of Mr Scott is to be preferred. The Scheme Actuary adopted a prospective approach similar to Mr Scott which did not involve waiting for actual dates of retirement, performing a present day calculation of members' relevant MP and FS benefits on the assumption that deferred members will retire on their 63rd (for men) or 60th (for women) birthdays. For those small number of remaining deferred members, it is appropriate that their benefits are valued now so that the Trustee can achieve the certainty provided by a buy-out and particularly at the currently favourable rates.

248. I understand that Mr Scott's retrospective approach will result in a less generous result for the members represented by the RB and I know that they will be disappointed. But I do not, and cannot, base my judgment on discretionary grounds. Nor do I rely on the points made by Mr Newman KC as to the principle of "*minimum interference*". I am simply bound to give effect to what I consider are the members' legal entitlements that were protected by the Proviso.

249. In conclusion therefore I adopt the retrospective approach of Mr Scott. The Trustee should calculate whether the transfer sum was lower or higher than the accrued FS benefits as at 1 January 1992, valued by taking into account the actual salary increases and final pensionable salary. If it was lower, then the amount of the shortfall should have been included in the transfer sum and it should be accumulated with the investment returns it would have earned had it been invested in the MP section's default strategy. That amount therefore would need to be added to each member's MP pot, together with interest for the period until payment. If the transfer sum is higher than the revalued FS accrued benefits, then no further sum need be paid to the member.

## (7) Summary of my Conclusions on the Transfer and Conversion Issues

250. My overall conclusion, from the above, is that the transfer and conversion from FS benefits to MP benefits was valid under the 1992 Deed but it is subject to the underpin to augment the transfer sums of the Under 40s and the 40-44s who are represented by the RB if they would have been higher taking into account actual salary increases and final pensionable salary, as described in the previous section.

251. Insofar as it is necessary to answer the specific issues in the Trustee's Composite List of Issues, I apply my answers in bold to the abbreviated issues, following the same numbering, set out below:

1. Did the 1992 Deed validly establish a money purchase section of the Parker Plan? **Yes**

2. If not, did the 1993 Deed validly establish a money purchase section of the Parker Plan and, if so, from what date? **Yes, from 1 January 1992**

3. Whether any amendments to the 1979 Deed that established a money purchase section of the Parker Plan are affected by the proviso to cl. 5 of the 1979 Deed ("the Proviso")? In particular, does the conversion of final salary benefits to money purchase benefits under the Plan fall within the scope of the Proviso? **Yes, but not the conversion itself**

4. Whether the Proviso permitted final salary accrual to be terminated with effect from 1 January 1992 for the Under 40s and the 40-44s who elected to transfer to the money purchase section? **Yes**

5.c) Did all Under 40s who signed and returned a form in the terms of that attached to the "Notice to Staff – December 1991 Money Purchase Section" booklet as purportedly annexed to the 1992 Deed thereby consent or contractually agree to:

i. the conversion of their accrued final salary benefits into money purchase benefits; and/or

ii. joining the money purchase section for future accrual

whether with effect from 1 January 1992, 7 March 1993 or some other (and if so what) date? **Yes, they consented, with effect from 1 January 1992. The issue of contractual agreement only affects the 40-44s.**

5.d) Did all 40 – 44s who signed and returned a form in the terms of that attached to the "Notice to Staff – December 1991 Money Purchase Section" booklet as purportedly annexed to the 1992 Deed thereby consent or contractually agree to:

i. the conversion of their accrued final salary benefits into money purchase benefits; and/or

ii. joining the money purchase section for future accrual whether with effect from 1 January 1992, 7 March 1993 or some other (and if so what) date?" **Yes, they**

**consented, and if I had found the 1992 and 1993 Deeds to be invalid, I would have found there to have been contractual agreements to that effect, with effect from 1 January 1992.**

6. Whether the transfer sums payable to the Under 40s and the 40-44s who transferred into the money purchase section were such as to preserve the final salary benefits accrued by those members up to the date of their transfers? **No**

   In particular, did the Proviso require the transfer sums to take account of changes in pensionable salary post 1.1.92? **Yes**

8. Should a final salary underpin be applied to the benefits of the Under 40s and / or the 40-44s who transferred into the money purchase section? **Yes, for both the Under 40s and 40-44s.**

   If so, how should it and any arrears of benefits in respect of those members be calculated (including arrears arising from payments of lump sums, purchases of annuities or the making of transfer payments as part of transfers out of the Parker Plan or the Scheme)? **See above**

## E. AGE DISCRIMINATION ISSUES

### (1) Introduction

252. Age discrimination became unlawful in England and Wales from 1 December 2006 by the Employment Equality (Age) Regulations 2006, SI 1031 (the "**2006 Regulations**"). Those regulations were made under the European Communities Act 1972 in order to implement Council Directive of 27 November 2000 (2000/78/EC) establishing a general framework for equal treatment in employment and occupation (the "**Framework Directive**").

253. The current law is now to be found in the relevant provisions of the Equality Act 2010 (the "**EqA 2010**") and the Equality Act (Age Exceptions for Pension Schemes) Order 2010, SI 2133 (the "**2010 Order**") made thereunder and effective from 1 October 2010.

254. My first instinct, and I suspect this was the same for the parties, including the Trustee, when they looked at this case, was that the relevant decision to differentiate on the grounds of age was taken in 1992 when it was lawful to do so and that therefore there was no issue as to unlawful age discrimination. It was only about a year after the Claim Form was issued that the RB first raised the prospect that he may wish to argue that there was unlawful age discrimination. That was on the basis that, although the decision was made in 1992, the current basis of the administration would mean that the Trustee will be obliged to pay benefits under the Scheme that were less favourable to the Under 40s than the over 40s. The issue having been raised has led to further complicated issues as to the impact of Brexit on retained EU law and therefore consideration of the intricacies of the European Union (Withdrawal Act) Act 2018 (the "**Withdrawal Act**") and even the Retained EU Law (Revocation and Reform) Act 2023 (the "**Retained EU Law Act**"), which recently took effect on 1 January 2024.

255. An equal amount of time was spent arguing the Age Discrimination Issues as on the Transfer and Conversion Issues, and I received excellent submissions on those Issues from Ms Claire Darwin KC on behalf of the Company and Ms Lydia Seymour on behalf of the RB. But by the end of the submissions, and in particular the clarification by Ms Seymour on the last day of the trial that the RB's case on age discrimination was a "*rules*" case under s.61(3) of the EqA 2010, and therefore not being brought under s.61(2) of the EqA 2010, I realised that my, and the parties', instinct had been correct, and there was no age discrimination either in the rules of the Scheme itself or in the way that the Trustee is bound to act. While I can well see that what happened in 1992 could have been unlawful if it had happened after 1 December 2006 (and I note that the Company and the Trustee were not even incorporated in 1992 and so could not have been party to any such discrimination), there is nothing in the current Rules of the Scheme that contravenes the non-discrimination rule or which obliges the Trustee to act in contravention of such a rule.

256. I will explain this conclusion in more detail below. It does mean that the claim is fatally flawed at the first stage and, as Ms Darwin KC said, there would therefore be no need to resolve all the other complicated issues. The Trustee's Composite List of Issues on Age Discrimination is incredibly granular, as Mr Rowley KC accepted, and in the light of my conclusion on the first overarching issue, it is completely unnecessary to go through those Issues, line by line. In any event, as I have said above, some of those issues are questioned by the Company as to their form, and that in itself has led to

unnecessary argument. Mr Rowley KC suggested that I adopt a slightly modified version of the RB's "*six questions*" set out in his opening skeleton argument. But they too seemed to have evolved as the trial went on, through various flowcharts, and finally in Ms Seymour's reply submissions, to a list of 13 points by way of "*Case Summary*".

257. As I have done with the Transfer and Conversion Issues, and because I did receive full argument on them, I will set out my conclusions on some of them, albeit in summary form. But I will not do that by reference to the List of Issues; rather I will deal with those issues that seem to me to be most relevant in case there is a successful appeal against my main finding.

## (2) The Legislative Framework

258. Before turning to the main issue, I should explain the legislative framework. The law in this area is almost entirely derived from legislation. As stated above, the 2006 Regulations made age discrimination unlawful. These were revoked by Paragraph 1 of Schedule 27 to the EqA 2010 (save for Schedules 6 and 8 to the 2006 Regulations, neither of which has any relevance to this claim).

Definition of discrimination

259. Under the EqA 2010, "*key concepts*" include the "*protected characteristics*" defined in Chapter 1 of Part 2 of the EqA 2010. The nine protected characteristics are listed at s.4 EqA 2010. The protected characteristic of age is defined at s.5 EqA 2010.

260. Chapter 2 of Part 2 of the EqA 2010 then defines and explains "*prohibited conduct*" in relation to these protected characteristics, which includes direct and indirect discrimination, harassment, and victimisation. Section 13 of the EqA 2010 prohibits direct discrimination. This occurs when A (a defined category of persons who are caught by the EqA 2010) treats a person B less favourably than another person because of a protected characteristic that B has or is thought to have, or because B associates with someone who has a protected characteristic. The material parts of s.13 of the EqA 2010 are:

> "**13 Direct discrimination**
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
>
> (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim."

261. Section 13 of the EqA 2010 requires the Court to focus on the treatment of B by A (which in this case would be the Trustee). To succeed in a claim of this type, there must have been a discriminator, i.e. a legal person or persons, A, who decided to treat B less favourably because of age i.e. the protected characteristic must be the reason for the less favourable treatment. Accordingly, the Court must focus on the treatment of members, B, by the Trustee, A. The cause of action (direct discrimination) only arises if the members were treated less favourably by the Trustee.

262. Ms Darwin KC submitted that it is fundamental to the scheme of the EqA 2010 that the alleged perpetrator of the act of discrimination must themselves have been motivated by the protected characteristic. The question whether an alleged discriminator acted "*because of*" a protected characteristic requires an investigation into their reasons for acting as they did. It has been coined the "*reason why*" question. Accordingly, when considering complaints of direct discrimination, save in very obvious cases, the Court will need to consider the mental processes of the alleged discriminator.

263. Direct age discrimination is unique in that it is the only form of less favourable treatment because of a protected characteristic which can be justified. If the less favourable treatment is justified within s.13(2) EqA 2010, then no act of discrimination has occurred for the purposes of the EqA 2010 or at all. Guidance on the potential justification of direct age discrimination is contained in the Supplement to the Equality and Human Rights Commission's Statutory Code of Practice on Employment.

264. An *ex post facto* justification (reasons given after the event) suffices for s.13(2) EqA 2010, even if the justification relied upon had not been articulated or even appreciated by the alleged discriminator at the time of the discrimination complained of. In the pensions context, it is generally accepted that trustees can rely on the employer's objective justification of a discriminatory practice. After all, pensions are part of members' remuneration package earned by working for their employer and a pension scheme is merely the mechanism for providing them.

265. The rest of the EqA 2010 then defines the contexts (or "*areas of activity*") in which prohibited conduct is unlawful, such as premises and education. Different areas of activity are covered under different parts of the EqA 2010. Unless "*prohibited conduct*" in relation to a "*protected characteristic*" falls within those areas of activity, it falls outside of the EqA 2010 and is not unlawful.

Discrimination and Occupational Pension Schemes

266. The work-related provisions are contained in Part 5 (ss.39-83) of the EqA 2010. Chapter 2 of Part 5 of the EqA 2010 deals with discrimination in the context of occupational pension schemes.

267. Section 61 of the EqA 2010 materially provides as follows:

> **"61 Non-discrimination rule**
>
> (1) An occupational pension scheme must be taken to include a non-discrimination rule.
>
> (2) A non-discrimination rule is a provision by virtue of which a responsible person (A) –
>
> (a) must not discriminate against another person (B) in carrying out any of A's functions in relation to the scheme;
>
> (b) must not, in relation to the scheme, harass B;
>
> (c) must not, in relation to the scheme, victimise B.

(3) The provisions of an occupational pension scheme have effect subject to the non-discrimination rule.

(4) The following are responsible persons –

(a) the trustees or managers of the scheme;

(b) an employer whose employees are, or may be, members of the scheme;

(c) a person exercising an appointing function in relation to an office the holder of which is, or may be, a member of the scheme.

…

(7) A breach of a non-discrimination rule is a contravention of this Part for the purposes of Part 9 (enforcement).

(8) It is not a breach of a non-discrimination rule for the employer or the trustees or managers of a scheme to maintain or use in relation to the scheme rules, practices, actions or decisions relating to age which are of a description specified by order by a Minister of the Crown.

(9) An order authorising the use of rules, practices, actions or decisions which are not in use before the order comes into force must not be made unless the Minister consults such persons as the Minister thinks appropriate.

…"

268. Therefore s.61(1) of the EqA 2010 provides that all occupational pension schemes include a non-discrimination rule from 1 October 2010. That is then defined in s.61(2) of the EqA 2010, and the reference to "*discrimination*" in s.61(2)(a) is a reference back to s.13 EqA 2010 in respect of direct discrimination. I think Ms Seymour is right to say that s.61(2) EqA 2010 does define the non-discrimination rule in s.61(1) but it is also clear that, as Ms Darwin KC submitted, it is a self-standing provision that can operate independently of s.61(3) EqA 2010 where trustees, say, act in breach of the non-discrimination rule, even though there is no rule in the scheme requiring them to do so. An example of this was provided by paragraph 211 of the Explanatory Notes to the EqA 2010:

**"Example**

A disabled person is refused membership of an occupational pension scheme because the trustees believe it is not in her best interest to join. This is because she has a short life expectancy and is unlikely to build up a reasonable pension. Although the trustees believe they are acting reasonably, they may be liable to challenge because they have breached the non-discrimination rule."

269. But that is not the case that is advanced by the RB. He relies on ss.61(1) and (3) EqA 2010 which automatically imposes a non-discrimination rule into all occupational pension schemes and for such rule to take precedence over any other rule that is inconsistent with it. As Sir Alan Wilkie said in *London Fire Commissioner v Sargeant* [2021] ICR 1057 at [112] ("***Sargeant II***"), when faced with a submission as to whether

the Fire and Rescue Authorities ("**FRAs**") could rely upon an exception to discrimination law that arose if they were doing something they were compelled to do by statutory authority:

> "In my judgment, these provisions, by their proper construction, operate by making the non-discrimination rule a part of the scheme by operation of law i.e. by virtue of a statutory provision. Subsection (1) says so in terms. Such a scheme "must be taken to include" such a term. Furthermore, subsection (3) says in terms that the non-discrimination rule, which the scheme must be taken to include by reason of this statutory provision, overrides the provisions of the scheme. They are expressly stated to be subject to it".

270. The way that s.61(3) EqA 2010 works was further explained in a leading practitioner textbook on EqA 2010, *the IDS Handbook on Discrimination at Work* at paragraph 30.38:

> "The provisions of an occupational pension scheme have effect subject to the non-discrimination rule — S.61(3). This means that where there is a conflict between the non-discrimination rule and a rule of the scheme that would otherwise require the trustees or managers to act in a discriminatory way, the non-discrimination rule prevails, and the scheme must be read as if the discriminatory provision did not apply. In *London Fire Commissioner and ors v Sargeant and ors 2021 ICR 1057, EAT,* the EAT confirmed that this applies to discriminatory pension scheme rules contained in legislation — a discrimination claim by a pension scheme member cannot be defended on the basis that the discrimination is a statutory requirement, since the legislation setting out the scheme rules must be read as including the non-discrimination rule in S.61." (Emphasis added.)

271. As Sir Alan Wilkie said in *Sargeant II* at [113]:

> "…thus if…a provision of an occupational pension scheme… would oblige a responsible person to discriminate against another person on the ground of age, that provision is subject to the non-discrimination rule, which the scheme must be taken to include. That rule obliges the responsible person not to discriminate.."

272. *Sargeant II*, like the "***McCloud***" litigation, was concerned with the public sector pension reforms in 2015. In both, it was conceded that the pension scheme required the responsible person in question to discriminate. At paragraph 42 of the first ET judgment in *McCloud – McCloud and ors v Ministry of Justice and ors* EAT 2201483/2015 and ors, it states:

> "It is conceded by the respondents that the [New Judicial Pension Scheme], as drafted, contains prima facie age-discriminatory provisions at paragraph 8 of Schedule 2 to the [Judicial Pensions Regulations 2015]."

273. Ms Darwin KC submitted that all that the Court needs to ask itself is whether the rules of the Scheme that the RB relies on obliges the Trustee to discriminate. I explain the rules relied upon below.

274. Just to complete the relevant statutory provisions, s. 62 of the EqA 2010 provides that the Trustees or others have the power to make '*non-discrimination alterations'* to an occupational pension scheme, and is in the following terms:

> "**62 Non-discrimination alterations**
>
> (1) This section applies if the trustees or managers of an occupational pension scheme do not have power to make non-discrimination alterations to the scheme.
>
> (2) This section also applies if the trustees or managers of an occupational pension scheme have power to make non-discrimination alterations to the scheme but the procedure for doing so—
>
> (a) is liable to be unduly complex or protracted, or
>
> (b) involves obtaining consents which cannot be obtained or which can be obtained only with undue delay or difficulty.
>
> (3) The trustees or managers may by resolution make non-discrimination alterations to the scheme.
>
> (4) Non-discrimination alterations may have effect in relation to a period before the date on which they are made.
>
> (5) Non-discrimination alterations to an occupational pension scheme are such alterations to the scheme as may be required for the provisions of the scheme to have the effect that they have in consequence of section 61(3)."

275. Mr Southern was asked in his oral evidence by Ms Darwin KC whether the Trustee had used this power to make non-discrimination alterations to the Scheme (see further below). He said it had not.

Breach of a Non-Discrimination Rule

276. Section 61(7) of the EqA 2010 provides that a breach of a non-discrimination rule is a contravention of Part 5 of the EqA 2010 for the purposes of Part 9 (enforcement) (ss.113 – 141 of the EqA 2010). The Explanatory Notes to EqA 2010 explain at paragraph 206 that:

> "Where there has been a breach of a non-discrimination rule, proceedings may be brought against the person responsible for the breach under Part 9 of the Act. The provisions in Part 9 do not prevent the investigation or determination of any matter in accordance with Part 10 of the Pension Schemes Act 1993 (investigations: the Pensions Ombudsman) by the Pensions Ombudsman as the Ombudsman's investigations are not legal proceedings."

277. Similarly, s.120(5) of the EqA 2010, which prescribes the procedure in the Employment Tribunal on a s.61 EqA 2010 complaint, refers to *'proceedings before an Employment Tribunal on a complaint relating to a breach of a non-discrimination rule'.*

### (3) The alleged discrimination

278. The RB alleges that the discriminatory treatment on the grounds of age will occur when members take their benefits on retirement or transfer. Ms Seymour said that, in accordance with the current basis of administration as set out in the rules of the Scheme, that will require the Trustee to pay benefits that are less favourable to the Under 40s who were excluded from the FS section for all pensionable service from 1 January 1992 and whose FS benefits were converted to MP benefits at the same time, than the benefits payable to the over 40s, who were not so excluded.

279. Ms Seymour said that, by the terms of the representation order that is sought, the RB represents only those Under 40s in whose interests it is for the Court to conclude that there has been age discrimination. Therefore it will only be those who stand to gain financially from having their FS benefits reinstated. Any of the Under 40s who have done better despite the alleged less favourable treatment, like those who did better in the Transfer and Conversion Issues, are represented by the Company.

280. Ms Seymour said that the alleged discrimination was very straightforward and it can be demonstrated by the individual position of the RB. The RB's expert, Mr Batting, compared the actual pension benefits that the RB will be entitled to from his MP pot and the pension benefits that he would have been entitled to had he remained in the FS section for all of his pensionable service and without his accrued FS benefits converted to MP benefits. Mr Batting calculated this as at the date of these proceedings, 15 January 2021. Mr Batting found that the RB had almost exactly half the pension entitlement that he would have received if he had remained in the FS section.

281. The Company did not challenge these figures. Ms Seymour submitted that the question of whether there has been discrimination on the grounds of age is therefore plain to see. The RB will be receiving half the pension that he would have been entitled to under the FS section and he has therefore been treated less favourably than his colleagues in the Over 45 category who stayed in the FS section.

282. There is a superficial attractiveness to this analysis but I agree with Ms Darwin KC that it really does not address the issues raised by the EqA 2010 and in particular, s.61, and the timing of the alleged discrimination. This was also the problem with the heated, but not very enlightening, debate about the wording of the first substantive issue on the Age Discrimination Issues, a debate that it is not productive for me to resolve in this judgment. The differences between the parties, it seems to me, is that the RB's version (which is the one in the Trustee's Composite List of Issues) seeks to capture the alleged discrimination set out above without tracking the legislative tests; whereas the Company's version does seek to reflect the legislative requirements and identify the Trustee as the person who must be shown to have unlawfully discriminated against the Under 40s. This was to cover whether the RB was proceeding under both ss.61(2) and (3) of the EqA 2010.

283. As it is now known that the RB is only proceeding under s.61(3) EqA 2010, the issue has become, it seems to me, whether there is a rule in the Scheme that would require the Trustee to contravene the non-discrimination rule. The Company says that there is no such rule in the Scheme and the only possible discrimination happened in 1992, some 14 years before such age discrimination became unlawful. Ms Seymour submitted

that there are provisions in the current rules of the Scheme that are incompatible with the non-discrimination rule.

**(1)**

**(2) The main issue: Are the rules or provisions of the Scheme in conflict with the non-discrimination rule?**

284. As it has emerged, the RB relies on the following rules of the Scheme: clause 1.3 of the 2007 Deed, which Ms Seymour submitted incorporated the eligibility rules in the 1993 Deed, principally rule 2(1)(i), which was then repeated in the 1997 Deed.

285. Clause 1.3 of the 2007 Deed says as follows:

> "**1.3 Calculation of Benefits etc**
>
> Subject to the terms of this Deed, benefits and Member contributions (and Employer contributions in respect of Members who are entitled to money purchase benefits) in respect of each Section of the Scheme shall be calculated in accordance with and governed by the provisions of the Preceding Documents for the corresponding Preceding Scheme, until such time as new rules for that Section of the Scheme are adopted in accordance with clause 2.3."

286. As can be seen, there is nothing on the face of that clause that can be said to be discriminatory. Furthermore it is specifically limited to the calculation of benefits and it says that benefits should be calculated and governed by the "*Preceding Documents*". The Preceding Documents include the 1997 Deed as that was the then governing document of the Plan. There were no new rules, so the 1997 Deed remained in force for the purpose of calculating the benefits to which members are entitled.

287. Ms Darwin KC submitted that this meant that for those members who were in the MP section the Trustee would have to look at the rules of the 1997 Deed relating to the MP section to see what benefits should be paid. She also made the further valid point that it is not just the Under 40s who are in the MP section; it will include those of the 40-44s that chose to transfer to it in 1992; and also all members who joined after 1992, including those who may have otherwise been in the Over 45s if they had been members of the Plan on 1 January 1992. Therefore, the Trustee could not tell just from the age of a member which section they were in and it is obvious that the Trustee could not thereby be discriminating against the Under 40s.

288. It is also pertinent that Mr Southern, a highly experienced pensions lawyer, gave evidence that he was not aware of any provisions in the 2007 Deed that obliged him and the other Trustees to discriminate against any group of members because of age. He said that the existence of any discriminatory provisions in the relevant Deeds had not been raised with him, and that the Trustee had therefore not considered using its power under s.62 EqA 2010 to alter these provisions which he said he would have done had he known of any discriminatory provisions. Mr Southern explained that the Trustee has not had to decide which section of the Scheme members should be in. As Ms Darwin KC put it, that was a matter of historical fact, which was not a concern of the Trustee.

289. Ms Seymour relied on the eligibility provisions of the 1993 Deed and the 1997 Deed as being discriminatory. In fact the discrimination, if it happened at all, was first pursuant to the 1992 Deed and the booklets attached thereto that required all the Under 40s to convert to MP benefits and thereafter only to accrue MP benefits. So the actual act of age discrimination, if anything, was pursuant to the valid 1992 Deed.

290. I have dealt above with the consent requirement in the rules of the 1993 Deed. The FS section rules in the 1993 Deed made clear that with effect from 1 January 1992 the FS section was closed to new members, subject to certain exceptions. Clauses 2(3) and 2(4)(i) provided an exception for the following (I set this out in [67] above but it is convenient to set it out again here):

> "(3) Subject to the exceptions mentioned in paragraph (4) of this Rule the Members for the purposes of this Section shall be all persons admitted to membership of the Plan in accordance with the provisions of the Old Rules [ie the 1979 Deed]
>
> (4) The exceptions referred to in paragraph (3) of this Rule are the following:
>
> (i) all those persons who consented to become members of the Money Purchase Section with effect from 1st January 1992…"

291. The MP section rules mirrored those eligibility requirements. Clause 2 said as follows:

> "2. ELIGIBILITY AND MEMBERSHIP
>
> (1) An Eligible Employee who fulfils all of the following conditions:-
>
> (i) on the 31 December 1991 he has not attained the age of 45 years; and
>
> (ii) on the 31 December 1991 he has already been admitted to membership of the Plan and
>
> (iii) he consents in writing to become a member of this Section
>
> shall become a member of this Section on the 1 January 1992."

292. As can be seen, the 1993 Deed FS section rules do not refer to age. That only appears in the MP section rules but Ms Seymour said that the reference to "*consent*" is, in the circumstances of this case, a proxy for age. That may be so, but what I think is more significant is that these eligibility conditions took effect on 1 January 1992 such that, as has been said many times above: the Over 45s stayed in the FS section; the Under 40s were automatically converted and transferred to the MP section; and the 40-44s had the choice of which section to stay in or go into. The rules do not require any further eligibility test based on age to be carried out after 1 January 1992. I think it is accurate for Ms Darwin KC to say that they were merely recording "*historical fact*".

293. That is even more the case in relation to the rules of the FS and MP sections in the 1997 Deed, which are in identical terms to those in the 1993 Deed and continue to state what happened to the members on 1 January 1992.

294. Ms Seymour submitted that these rules are incorporated into the 2007 Deed by clause 1.3 and are contrary to the non-discrimination rule that is now included in the 2007 Deed. She said that if one compares two active members as at 31 December 1991, one born before 1947 and one born after 1951, purely on the grounds of age, one will be getting FS benefits and the other less favourable MP benefits. As the Trustee is bound to pay those benefits when their respective pensions become due, this is discriminatory. She said that if instead of age the members had been divided into two groups on the grounds of race or religion (assuming it was lawful to do so at the time), there would be no difficulty in seeing that the Trustee would be contravening the non-discrimination rule when it came to pay those benefits to the different groups, divided in that way.

295. I disagree with that analysis and way of looking at this. Section 61 of the EqA 2010 concerns how a trustee or other responsible person must act in relation to a pension scheme that they are administering. More particularly, s.61(3) EqA 2010, with which this case is solely concerned, steps in to prevent the Trustee being obliged to discriminate under the rules of the pension scheme. It is only relevant where those rules would or might require the Trustee to discriminate. The rules that Ms Seymour relies on in this respect, the eligibility rules in the 1993 and 1997 Deeds, do not require the Trustee to do anything. They merely explain how members might have got to or remained in either section. This can be contrasted with the *McCloud* litigation in which there were express provisions of the scheme, introduced after the EqA 2010 came into force, which required a responsible body to discriminate because of age.

296. I therefore do not think that the eligibility rules of the 1997 Deed relied upon by the RB were incorporated into the 2007 Deed by clause 1.3 thereof as they do not affect the calculation of benefits or anything else that the Trustee has to do.

297. As Mr Southern explained in his witness statement, the MP section rules in the 1993 Deed, "*did not distinguish between the members who had been under 40 as at 31 December 1991 and those who had been aged between 40 and 44*." It is a matter of complete irrelevance to the Trustee how any member got into the MP section and there could be members of any age in it, because new members, including those over 45 but joining after 1 January 1992, could only join the MP section.

298. This was a one-off decision by PPUK and the trustees of the Plan in 1991/2 to create an MP section which was made subject to transitional provisions that determined which groups of members would be admitted to each section of the Plan. Even if that amounted to a form of age discrimination, it was lawful to do so at the time it was done. The Trustee will be obliged to pay benefits in accordance with the relevant section's rules, irrespective of how the member became a member of that section and irrespective of their age.

299. This brings me back to the fundamental point. In order to get his case on age discrimination off the ground, the RB has to show that the Trustee has or will be obliged to act in a discriminatory way towards the Under 40s. The real complaint is over the decision that was taken in 1991/92 and not what the Trustee is or will be doing in relation to its administration of the Scheme in accordance with the rules of the Scheme. There may have been an historical injustice, but that decision cannot be visited upon or be said effectively to have been made or re-made by the Trustee.

300. Ms Seymour sought to bolster her argument by reference to the Supreme Court decision in *Walker v Innospec Ltd* [2017] UKSC 47 ("***Walker***"), which is more relevant to the question of whether temporal limitation provisions should be disapplied as being incompatible with EU law. But Ms Seymour also relied on *Walker* for the proposition that the unlawful discrimination in a pensions case only happens on payment of the benefits (in that case it was death benefits which were not yet due because Mr Walker had not yet died) and it does not matter if the alleged discriminatory rule came in before that form of discrimination was made unlawful.

301. *Walker* concerned discrimination on the grounds of sexual orientation which became unlawful under the Framework Directive only after Mr Walker had retired after 23 years of pensionable service. In 2006, Mr Walker and his male partner registered a civil partnership and shortly thereafter he sought confirmation from the company that in the event of his death his civil partner would receive a spouse's pension. The Company refused to provide the confirmation as they relied on a temporal limitation exception. Mr Walker and his partner later married and Mr Walker challenged the Company's refusal to confirm that it would pay the spouse's pension, saying it was discriminatory. He succeeded in the Employment Tribunal, then lost in the Employment Appeal Tribunal and the Court of Appeal, but won again in the Supreme Court.

302. Most of the discussion in the case is about whether the temporal limitation provisions should be disapplied, which would mean that all the years of pensionable service would go to calculating the spouse's pension. There is no real analysis of the alleged discrimination or s.61 of the EqA 2010. Ms Seymour relied on Lord Kerr holding that the time when the pension becomes due, that is on Mr Walker's death so long as that is at a time when he remained married to his surviving partner, "*is the time at which denial of a pension would amount to discrimination on the ground of sexual orientation*" [61]. But that is only because the company, and presumably the trustees had already decided they were not going to pay the spouse's pension, albeit that this was on the basis of the temporal limitation provisions. That decision was made after that form of discrimination had become unlawful.

303. That is the distinguishing feature with this case. Here, the decision was taken in 1991/2 to split the members into groups on the grounds of their age. There is no further decision for the Trustee to take in relation to the section of the Scheme that each member should be in. The Trustee only has to pay the pension benefits to each member in accordance with the rules of the section they are in. The fact that those benefits may be lower for those in the MP section than those who were able to remain in the FS section as a result of the decision taken in 1991/2 by PPUK and the trustees is not because of any decision or action taken by the Trustee after age discrimination became unlawful. In particular the payment of benefits by the Trustee does not involve the Trustee making any age-related decision that might be considered discriminatory.

304. Accordingly, in my judgment, there is no rule of the Scheme that is in conflict or incompatible with the non-discrimination rule and so the Trustee cannot be acting, or will not be obliged to act, in contravention of the non-discrimination rule. The RB's case brought under ss.61(1) and (3) of the EqA 2010 fails and no remedy is required.

## (3) Other Issues

305. As I said above, technically I do not need to consider any of the other Age Discrimination Issues that are before me. There were very few factual issues that I was asked to find, as is appropriate for a CPR Part 8 claim, but I will make such findings as are necessary in case my decision is appealed.

306. Ms Darwin KC raised various issues on the appropriateness of considering these matters on an application for directions by the Trustee and whether the High Court, as opposed to the Employment Tribunal, has jurisdiction to consider these matters. I do not think it is necessary for me to deal with such issues; nor do I attempt to resolve the dispute about the Trustees' Composite List of Issues.

307. I have found that there is no rule in the Scheme that is discriminatory or which will require the Trustee to act in contravention of the non-discrimination rule. For the purpose of considering the other issues before me, I will have to assume that I am wrong about that and that there is such a rule in the Scheme and that therefore s.61(3) EqA 2010 is in play. If I make that assumption, it involves the RB succeeding in establishing that there is a rule that requires the Trustee to treat the Under 40s less favourably than the over 40s and that this is because of their age. While less favourable treatment is therefore being assumed, I will still say something about that below. So the issues I propose dealing with shortly on that assumption are as follows, (with their vaguely corresponding Issue number from the Trustee's Composite List of Issues):

(a) Less favourable treatment – Issues 8B and 8C;

(b) Justification – Issue 8D;

(c) Whether the temporal limitation provisions apply to restrict relevant pensionable service to after 1 December 2006? – Issues 8J, 8K, 8L, 8M and 8N.

*(a) Less Favourable Treatment*

308. On the assumption I have made, the eligibility provisions in the 1997 Deed will have been incorporated into the 2007 Deed by clause 1.3 and, when the Trustee comes to pay pension benefits to the Under 40s represented by the RB, these will inevitably be lower than what they would have received had they stayed entitled to FS benefits. While that is obviously correct as a result of the representation orders that I will be making, it is an over simplistic answer to what would have been a difficult question.

309. As I have said many times above, the relevant decision was that taken in 1991/92 by PPUK and the then trustees to transfer everyone over to a new MP section but subject to transitional arrangements whereby the Over 45s stayed in the FS section. That all happened in 1992 and the categorisation was inherited by the Trustee in 2007 which took over and assumed all the liabilities of the previous trustees under the Plan. What those trustees did was not unlawful at the time, so the Trustee cannot be liable for anything done by the trustees of the Plan when the transfer and conversion was effected.

310. So the RB argued that the Trustee will be treating the Under 40s less favourably when benefits are paid. But the timing gives rise to all sorts of contortions in trying to establish whether there has been discrimination within the meaning of the EqA 2010. For instance are the relevant comparators the whole cohort of the over 40s, or only those who have fared better with FS benefits? There may be some who remained entitled to

FS benefits who would have done better if they had converted. As is known there are some of the Under 40s who did do better under the MP section. Therefore is it as simple as Ms Seymour suggested that one can see that the members that she represents are, by definition, worse off and that is good enough?

311. The other contortion that is required is in relation to the "*because of age*" requirement in s.13(1) EqA 2010. It is clear that the Trustee will not itself be discriminating on the grounds of a member's age because it is indifferent as to how the member became entitled to MP benefits or FS benefits. There will be over 40s in the MP section, and indeed there will be members who were over 45 as at 31 December 1991 who joined the Plan after 1 January 1992, and so the Trustee will not be making any decision to treat the Under 40s less favourably "*because of age*". The assumption that I have to make is that there has been such less favourable treatment because of age but I do not feel comfortable with it for that reason. Perhaps that only goes to demonstrate further why my conclusion on the main issue is that there is no discriminatory rule in the Scheme.

*(b) Justification*

312. As noted above, direct age discrimination is the only protected characteristic that can be justified if "*A can show A's treatment of B to be a proportionate means of achieving a legitimate aim*" (s.13(2) EqA 2010). Indirect discrimination also has a justification defence in similar terms (see s.19(2)(d) EqA 2010) but there is a slightly lower threshold that the employer has to satisfy in this respect. There is no dispute that the burden is on the Company to establish justification and that it is an objective test. That means that it does not have to have featured in the discriminator's mind at the time of the relevant decision and there can be an *ex post facto* justification (as I explained above in the legal framework section).

313. There are therefore two elements to justification: the concept of "*legitimate aim*" which it is accepted must be of a social policy nature; but even if there is such a "*legitimate aim*", the means of achieving it must be proportionate and that involves balancing the importance of the legitimate aim with the discriminatory effect of the treatment – see *Seldon v Clarkson Wright & Jakes* [2012] ICR 716 at [50] ("***Seldon***").

314. What has to be justified is the less favourable treatment complained about. So this again runs into the difficulty of the assumption I have to make in considering this issue, namely that there is a rule in the Scheme that will require the Trustee to act in contravention of the non-discrimination rule. So the less favourable treatment will only occur when the pension benefits are to be paid. However Ms Seymour submitted that justification must be considered at two stages: first in 1991/92 when the transfer and conversion took place; and second when the allegedly discriminatory rule was maintained and applied by the Trustee when the benefits came into payment. The problem is exacerbated by Ms Seymour's insistence that there needed to be evidence from the Trustee as to why it is maintaining and intending to apply the discriminatory rule, when it is fairly obvious that the Trustee itself has never considered that it has maintained and will be applying a discriminatory rule and it had no involvement in the original introduction of the changes in 1991/92, indeed it did not even exist then.

315. Ms Darwin KC submitted that this is all a bit of a fiction as what the RB is seeking to do is rely on an alleged lack of evidence as to justification in relation to the Trustee and

the present time when his real complaint is about what happened in 1991/92, when there could not have been any less favourable treatment because age discrimination was not unlawful, and therefore there was nothing to justify. This temporal conundrum plagues the issues I am now considering because of the assumption that I have to make in order to consider them.

316. It is important to distinguish between the transitional provisions by which the Under 40s were treated differently to the 40-44s and the Over 45s in being required to move to the MP section and the general switch from an FS scheme to an MP scheme. As Ms Darwin KC submitted, if PPUK had moved all of the members of the Plan from an FS scheme to an MP scheme, there could be no question of age discrimination. Therefore, it seems to me that it can only properly be the transitional arrangements that have to be justified, not the entire change from FS benefits to MP benefits.

317. There are two broad bases that the Company sought to justify the transitional arrangements: (1) inter-generational fairness, by which it meant acting fairly and consistently between the generations by securing comparable benefits for everyone; and (2) cushioning the blow for older members, who might find it harder to build up their pension pots closer to retirement, by retaining their access to a FS scheme.

318. As to inter-generational fairness, Ms Darwin KC referred to Mr Barnsley's witness statement in which he explained that: "*we felt that those aged 45 did not have sufficient working life to build up a pension pot in the new section, whereas the under 40s would clearly have time to build up a pot based upon the contribution levels that PPUKL was proposing*". He also explained that it is likely that the age 45 was "*a product of the Sub-Committee with the benefit of actuarial advice".* Mr Gover explained in his witness statement that the pension advisers had been asked by PPUK to recommend levels of contribution which *"were intended to give comparable benefits in comparable cases to those benefits available to members of the FS Scheme*". He said in his oral evidence that it was PPUK's aim in 1991/92, when designing the MP section to match the FS benefits provided under the Plan.

319. It is also clear from the documentation available from this time, which I have summarised in [35] to [55] above, that PPUK, based on the advice it was receiving, was concerned to ensure that the MP benefits would be the equivalent or at least comparable to the FS benefits that members would have been entitled to under the Plan. However, PPUK believed that it may not be possible to secure broadly comparable benefits for the 40-44s and the Over 45s if they were moved to the MP section and Mr Gover confirmed in his oral evidence that this was the key reason for the transitional arrangements that were put in place and for not moving the Over 45s out of the FS section and for giving the 40-44s a choice. Essentially they were perceived as having the most to lose by moving to the MP section.

320. I accept the Company's case that PPUK introduced the transitional arrangements in order to secure broadly comparable benefits for all employees. It originally wanted to move all members to a new MP scheme but it also wanted to ensure that members received comparable benefits and it seemed to PPUK that there was a danger that the 40-44s and the Over 45s might not be able to receive comparable benefits as they were closer to retirement. Further, PPUK had been consistently advised by its pensions advisers that this was the effect of the changes that they had made.

321. It is well-established that inter-generational fairness is a legitimate aim for the purposes of justifying direct age discrimination – see [56] of Lady Hale JSC's judgment in *Seldon*. The attempt to achieve consistency between employees in a FS scheme and those in a MP scheme has been held by the Court of Appeal to be "*a legitimate social aspect of inter-generational fairness*" – see *Air Products plc v Cockram* [2018] IRLR 755 at [35] per Bean LJ.

322. As to the other justification of cushioning the blow for older employees, Ms Darwin KC referred to what Clifford Chance had advised in their letter of 24 December 1991, as follows:

> "The transitional arrangements flow from your decision to adopt what would hitherto have been regarded as "good employer practice", namely not to deprive the older employees of their final salary expectation by requiring them to transfer into the money purchase section along with the younger employees, Strictly, therefore, it is not something which (in your words) you have to endure, since you could have decided not to maintain the final salary expectations of the older employees."

323. This is really another aspect of the inter-generational fairness aim in that it is based on the perceived problem of the 40-44s and Over 45s not having enough time to build up their pension pots if they were moved to the MP section, and that this was why PPUK did not compel them to do so.

324. In *Seldon* at [50(4)], Lady Hale JSC listed the legitimate aims which have been recognised in the context of direct age discrimination claims including: "*cushioning the blow for long-serving employees who may find it hard to find new employment if dismissed*." Prior to *Seldon,* but cited in argument in the Supreme Court, is the Employment Tribunal case of *Bloxham v Freshfields Bruckhaus Deringer* [2007] Pens LR 375 in which the employer undertook wholesale reform of its pension scheme. When doing so, the employer put in place transitional arrangements which had the specific aim of ameliorating the effect of closing the scheme on those closest to retirement and this was upheld as a legitimate aim. And in *Lockwood v Department of Work and Pensions* [2013] IRLR 941 the Court of Appeal considered an age-banding formula whereby redundant employees aged 35 or under received lower termination payments than those over 35. The Court of Appeal upheld the Employment Tribunal's finding on justification, holding that it was a legitimate aim to provide older workers with more of a financial cushion.

325. Ms Seymour did not really challenge that these were at least considerations at the time that the changes were made in 1991/92, but she made the point that these justifications were not relied upon by the Trustee. However she submitted that the real reason why the changes were made was because PPUK wanted to remove the contingent risks inherent in an FS scheme from its balance sheet in order to make it more attractive to a potential purchaser. That is to a certain extent borne out by the evidence and the Company did not deny that that was why PPUK wanted to move to a MP scheme. Indeed Ms Darwin KC submitted that it was a legitimate aim of the general change to a MP scheme to obtain certainty about PPUK's pension liabilities, for it to live within its means and for there to be greater succession planning and recruitment incentives.

326. In my view, the Company would have established that the transitional arrangements, rather than the entire changes to a MP section, had the legitimate aim of inter-generational fairness and of cushioning the blow for older employees. While PPUK's overall motive for effecting the changes was to improve its balance sheet, I believe that it sought to achieve that while continuing to provide comparable benefits to all members irrespective of age. The transitional arrangements were the means, as it seemed at the time, of ensuring that those comparable benefits would be paid. I find it difficult to see what other purpose the transitional arrangements could have.

327. As to whether the means of achieving these legitimate aims were proportionate, this comes down to whether the age chosen strikes the right balance between achieving the aim and the impact on those I have to assume were treated less favourably. Ms Seymour complained that there was no evidence that the potential discriminatory effect was modelled or analysed. However, there was actually quite a lot of actuarial advice taken by PPUK and the then trustees so as to attempt to achieve comparable benefits for everyone. They may not have been that sophisticated in those days but in my view PPUK and the then trustees acted responsibly and on the basis of professional advice in proceeding as they did. Because of the view taken as to the impact on older employees, they necessarily had to draw the line at a particular age and I cannot conclude that they did not choose the right age or that on the balancing exercise that I have to carry out, this meant that this had a disproportionate effect on the Under 40s.

328. Accordingly, on the unusual basis that I am considering this matter, I would have found the Company to have proved that there was justification for the alleged less favourable treatment of the Under 40s.

*(c) Whether the temporal limitation provisions apply to restrict relevant pensionable service to after 1 December 2006?*

329. I do not deal with the period between 2006 and 2010, when the 2006 Regulations were in force and whether they can still be applied to that period despite being revoked by the EqA 2010. What I am going to deal with, albeit briefly, is whether the temporal limitation exceptions provided for by s.61(8) EqA 2010 and Article 3 of the 2010 Order should be disapplied by EU law. I deal with it because it occupied quite a large amount of the submissions at the trial. If they are disapplied, and assuming I am wrong about all of the issues dealt with above and there was unlawful age discrimination, it would mean that the Under 40s represented by the RB would be entitled to equal treatment in respect of all their pensionable service. It would not be limited to post 1 December 2006 (if the 2006 Regulations still apply) or 1 October 2010 (if they do not) pensionable service.

330. The issues before me were largely dealt with recently by Eady J sitting as President in the Employment Appeal Tribunal ("**EAT**") in *Secretary of State for Work and Pensions v Beattie* [2023] Pens. L.R. 3 ("***Beattie***"). As Mr Rowley KC submitted, a judgment of the EAT has the same status as that of a judge of the High Court and, unless I am convinced it is wrong, I should follow it. That I propose to do. Both Ms Seymour and Ms Darwin KC relied on some parts of *Beattie* but said I should not follow other parts of it.

331. Article 3 of the 2010 Order provides as follows:

> "It is not a breach of the non-discrimination rule for the employer, or the trustees or managers of a scheme, to maintain or use in relation to the scheme; .. rules, practices, actions or decisions as they relate to rights accrued, or benefits payable, in respect of periods of pensionable service prior to 1st December 2006 that would breach the non-discrimination rule but for this paragraph."

332. On the face of it, Article 3 of the 2010 Order prevents there being any sort of retroactivity in relation to pensionable service prior to 1 December 2006. This has been found to be contrary to general principles of EU law in respect of materially similar temporal limitation provisions in *Walker* and *Ministry of Justice v O'Brien (No.2)* [2019] ICR 505, a decision of the Court of Justice of the EU. These were followed in *Beattie*. Ms Darwin KC disputed that the temporal limitation provisions were incompatible with EU law's general principle of equal treatment and non-discrimination, but I will follow the above-mentioned authorities and would have held, if it were relevant, that Article 3 of the 2010 Order would be disapplied, subject to the impact of the Withdrawal Act.

333. The Withdrawal Act was the main battleground here, as it was in *Beattie.* The Withdrawal Act attempted to define the provisions of EU law that should be retained as part of the UK's domestic law after IP completion day, which was 31 December 2020. There are transitional provisions in the Withdrawal Act, some of which apply to proceedings commenced before IP completion day and some of which apply to a 3-year period from IP completion day.

334. Eady J in *Beattie* held that Article 3 of the 2010 Order fell to be disapplied in favour of two member claimants who had commenced proceedings before IP completion day, relying on para. 39(3) of Schedule 8 to the Withdrawal Act. However, these proceedings were begun after IP completion day, so para. 39(3) of Schedule 8 cannot be relied upon by the RB, although he does rely on the finding in *Beattie* that Article 3 of the 2010 Order is incompatible with EU law.

335. There were also 15 claimants in *Beattie* who commenced their proceedings after IP completion day and Eady J held that they could not rely on that incompatibility and she rejected their argument that para.39(5) of Schedule 8 to the Withdrawal Act enabled them to do so. Para. 39(5) of Schedule 8 to the Withdrawal Act provides as follows:

> "Paragraph 3 of Schedule 1 does not apply in relation to any proceedings begun within the period of three years beginning with [IP completion day] so far as—
>
> (a) the proceedings involve a challenge to anything which occurred before [IP completion day], and
>
> (b) the challenge is not for the disapplication or quashing of—
>
> (i) an Act of Parliament or a rule of law which is not an enactment, or
>
> (ii) any enactment, or anything else, not falling within sub-paragraph (i) which, as a result of anything falling within that sub-paragraph, could not have been different or which gives effect to, or enforces, anything falling within that sub-paragraph."

Para. 3 of Schedule 1 to the Withdrawal Act prevents a court from disapplying any enactment because it is incompatible with a general principle of EU law. But as can be seen, that itself can be disapplied by para. 39(5) of schedule 8.

336. At [140] of *Beattie*, Eady J held as follows:

> "Even if the claims are not understood to be a challenge to the EqA (albeit the effect of the claimants' challenge might be seen to relate to section 61(8) EqA ), I agree with Ms Darwin that the challenge to the 2010 Order must fall within sub-paragraph (ii) paragraph 39(5) schedule 8: it is something that, as a result of section 61(8) "*could not have been different*", alternatively, "*which gives effect to, or enforces*" section 61(8) EqA".

337. Ms Seymour said that Eady J had misconstrued para. 39(5) of schedule 8 to the Withdrawal Act and that the condensed reasoning in [140] was inadequate. As I indicated above, I am not prepared to depart from Eady J's conclusions in *Beattie* and I therefore would have found that the RB could not have relied on para.39(5) of schedule 8 to the Withdrawal Act.

338. By way of alternative, and even though it was not included in the Composite List of Issues, the RB also relied on para. 39(6) of schedule 8 to the Withdrawal Act. This provides as follows:

> "Paragraph 3(2) of Schedule 1 does not apply in relation to any decision of a court or tribunal, or other public authority, on or after [IP completion day] which is a necessary consequence of any decision of a court or tribunal made before [IP completion day] or made on or after that day by virtue of this paragraph."

Ms Seymour sought to argue that *Beattie* could therefore be relied upon because, even though it was made after IP completion day, it was made "*by virtue of this paragraph*" which she submitted included any of the subparagraphs in para. 39 of schedule 8. She therefore relied on the fact that the two claimants who succeeded in *Beattie* did so because of para.39(3) in that they had begun their claims before IP completion day.

339. I find that difficult to follow, because para. 39(6) of schedule 8 depends on my decision being a "*necessary consequence*" of an earlier decision. If *Beattie* is that earlier decision and more particularly the decision based on para. 39(3), I do not see how my decision, which would not be based on para. 39(3), can be a "*necessary consequence*" of it. I would therefore have rejected the RB's reliance on para.39(6) of schedule 8 to the Withdrawal Act.

340. And finally on this subject, Ms Darwin KC referred to the Retained EU Law Act which is now in force as of 1 January 2024 and which significantly reduces the ability to rely on EU law in most respects. It was thought at one stage that it may have made a difference if I had delivered my judgment before the end of the year, but that is not thought to matter now and in any event I have found that the RB would not have been able to rely on EU law under the Withdrawal Act.

341. Section 2 of the Retained EU Law Act repeals s.4 of the Withdrawal Act and s.4 abolishes general principles of EU law that had hitherto been retained in domestic law. These are subject to transitional provisions in s.22(5) which says that those sections 2,

3 and 4 "*do not apply in relation to anything occurring before the end of 2023*." Ms Darwin KC therefore submitted that from 1 January 2024 there is no doubt that the 2010 Order could not be disapplied because of incompatibility with EU law.

342. Mr Rowley KC referred me to the explanatory notes to s.22(5) of the Retained EU Law Act which he said meant that for the purposes of the issues I would have had to decide in relation to disapplying the temporal limitation provisions, there is no significance to my delivering judgment before the end of 2023. These are however explanatory notes and they cannot take precedence over the words of the statute itself. Ms Darwin KC suggested that it depends on when the underlying acts in question have occurred, not the timing of my judgment. It is the RB's case that the underlying acts of discrimination have yet to occur because they will only happen on the payment by the Trustee of benefits.

343. I do not need to decide the full effect of the Retained EU Law Act and would prefer not to do so. The purpose of the Government and Parliament on EU law seems clearly to be that they want the UK to be rid of it as soon as possible, save for that which has been specifically retained. So the presumption would be that it has gone in most respects. It only really confirms my conclusions on the Withdrawal Act which is that those principles of EU law, insofar as they might have required the disapplication of article 3 of the 2010 Order, went before the Retained EU Law Act came into force.

344. In conclusion then on this issue, I would have found that Article 3 of the 2010 Order was not disapplied as being incompatible with EU law because of the effect of the Withdrawal Act and following *Beattie*. Accordingly I would have held that the non-discrimination rule would not have required equal treatment in relation to pensionable service before age discrimination became unlawful on 1 December 2006.

## (4) Summary of Conclusions on the Age Discrimination Issues

345. Given what I have said above and because it appears to be controversial, I do not think it is sensible to go through the Trustee's Composite List of Issues with my answer on each and it is not necessary to do so in order to assist the Trustee in its administration of the Scheme. My overall conclusion is that there is no rule in the Scheme that is in conflict with the non-discrimination rule and therefore that the Trustee will not be obliged to act in contravention of the non-discrimination rule if it administers the Scheme in accordance with its existing rules. In short, there has not been any unlawful age discrimination against the Under 40s; nor will there be any such discrimination if the Trustee continues to administer and pay benefits according to the rules of the Scheme.

346. If I am wrong in that conclusion, I would, in any event have found the alleged less favourable treatment of the Under 40s at the time of the transfer and conversion from FS benefits to MP benefits to be justified in accordance with s.13(2) EqA 2010. And if I was also wrong on that and there was unlawful age discrimination from 1 December 2006, I would have found that the 2010 Order would not have been disapplied because the Withdrawal Act prevented such disapplication based on incompatibility with EU law. Therefore the relevant pensionable service for the purposes of equal treatment would have been limited to that occurring after 1 December 2006.

## F. GENERIC ISSUES

347. Issues 9 and 10 concern respectively forfeiture and interest.

### (1) Forfeiture

348. Issue 9 is as follows: "*Are any such arrears that would be payable to members forfeit by reason of the provisions identified in para. 13.6 of the Details of Claim?*" There are forfeiture rules in both the 1993 and 1997 Deeds covering both the FS section and the MP section. They provide that the Trustee "*shall not be under any obligation to recognise the claim of any person to any moneys payable from [the relevant section] not claimed within six years after they have fallen due*."

349. All parties seem now to be agreed that those provisions create a discretion exercisable by the Trustee in respect of the payment of arrears which have been unclaimed for more than six years. The somewhat arid debate between the RB and the Company was whether such arrears of benefits were forfeited but subject to the Trustee's discretion to recognise the claim (the Company's position) or whether they were not forfeited but were within the Trustee's discretion to recognise or not (the RB's position). Whichever way one looks at it, it is up to the Trustee to decide whether to recognise such claims.

350. The Trustee does not seek any guidance on the exercise of its discretion and understandably considers that it will take professional advice and will be able to decide how the discretion should be exercised in any particular case. I need say no more than that on forfeiture.

### (2) Interest

351. The RB and the Company contend for different rates of interest to be paid on arrears due to members of the Scheme. In this case and because of my judgment, this only arises in relation to the situation where the underpin applies to require the transfer sums to be topped up in the manner described above. It seems to me that Mr Newman KC is correct to say that this is only applicable to members who have already taken a transfer of their pension or whose pension is already in payment. For those members who are still in the Scheme, their top up payment will be calculated and paid at the current time so no issue of interest should arise.

352. The Company contends for the rate prescribed by Parliament for successful complaints to the Pensions Ombudsman in respect of underpayments, which is Bank of England base rate – see regulation 6 of the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996. The RB seems to be arguing for base rate to 3 December 2008 and base rate plus 1% thereafter, relying on *Lloyds Banking Group Pensions Trustees Ltd v Lloyds Bank plc* [2019] Pens LR 5 and *Punter Southall Governance Services Ltd v Hazlett* [2022] Pens LR 1; alternatively for interest calculated on the investment rate of return of the Plan and then the Scheme on the basis that the Scheme has had the benefits of the underpayments all that time.

353. There was no development of the parties' positions from their written arguments at the trial. In the circumstances, I would prefer to leave the question of the rate of interest to

be ordered to be dealt with by way of consequential matters in the light of my judgment. There may be only limited application of interest in any event. But the award of interest is to some extent dependent on the findings that have been made and I will therefore give the parties a further opportunity to address that question, whether in writing or at a further hearing, after this judgment has been handed down.

## G. CONCLUSION

354. As will be apparent from my judgment, the Company has succeeded on most of the important issues before me. I suspect that the RB and those he represents, namely those who, as it has turned out, have been left worse off than if they had retained their FS benefits, will be disappointed with this outcome. I sympathise with them but it is important to recognise that it is now more than 30 years since the transfer and conversion took place and to a certain extent the RB's insistence on pursuing all possible objections to its validity has been somewhat opportunistic.

355. I do not think that, at the time, there was any malign motive on the part of PPUK; on the contrary I believe that it was trying to ensure that the changes it wished to make were fair and reasonable to all its employees. It took all necessary professional advice, both legal and actuarial, and the method adopted was approved by all concerned, including the then trustees. The fact that it wanted to make the changes so as to improve its balance sheet is actually irrelevant to whether it was carried out lawfully, fairly and properly, including without misleading anyone or pressuring the members to do one thing or another. There was no opposition from any quarter at the time and it was only when the Scheme was being prepared for a buy-out that these possible attacks on the transfer and conversion were appreciated.

356. It is inevitable that after 30 years the evidence may simply not be available to establish that every 'i' was dotted and 't' crossed. But this does not mean that the Deeds were invalid or that they should now be set aside. The fact that the evidence appeared incomplete should not mean that every issue is taken to trial, at the expense of the Company, and there should in my view have been more concentration on the more realistic issues, such as the effect of the Proviso. I think this stemmed from a deep conviction that PPUK and now the Company were doing everything to deprive the Under 40s of their rightful pension benefits. But I do not think that charge can be fairly levelled at them and they were entitled to do what they did and defend their position in the way they have.

357. In conclusion therefore I find that the 1992 Deed validly established the MP section and that the transfer and conversion of the FS benefits of the Under 40s and those of the 40-44s who chose to transfer to MP benefits was valid. The conversion itself did not breach the Proviso but the RB and those he represents are entitled to the final pensionable salary underpin to operate in the manner I have described above.

358. I find against the RB on all relevant Age Discrimination Issues and the Trustee is not required to make any adjustments to benefits in such respect.

359. Finally I thank counsel and their legal teams again for their helpful and insightful submissions and for the manner of their conduct of this trial. I hope that an order can

be agreed between the parties as a result of my findings in this judgment but if there are other matters consequential on the judgment, such as interest, which I have left open for the time being, I would be happy to hold a further hearing to resolve them, if they cannot be dealt with on paper.