Neutral Citation Number: [2019] EWHC 35 (Ch)

Case No: CH-2018-000158

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

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

Date: 14/01/2019

Before:

MR JUSTICE MORGAN

- -

Between:

COATS UK PENSION SCHEME TRUSTEES LIMITED	**Appellant**
- and –	
(1) ALAN ROLAND STYLES **(2) RODERICK DONALD ARMITAGE** **(3) RICHARD EDWARD BROWN**	**Respondents**

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- -

Mr Paul Newman QC (instructed by **Linklaters LLP**) for the **Appellant**
The First Respondent did not appear and was not represented
The Second Respondent appeared in person
The Third Respondent did not appear and was not represented

Hearing date: 28 November 2018 with written submissions thereafter

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Approved Judgment

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

....

MR JUSTICE MORGAN:

Introduction

1. This is an appeal, with permission granted by Arnold J, from decisions dated 25 May 2018 and 5 June 2018 of the Deputy Pensions Ombudsman (Ms Karen Johnson), to whom I will refer as "the Ombudsman". The decision dated 25 May 2018 related to the First Respondent (Mr Styles) and there were two decisions dated 5 June 2018 relating to the Second and Third Respondents (Mr Armitage and Mr Brown). All three decisions were in the same terms. The basic point in dispute between the Appellant (the trustee of the relevant pension scheme) and the Respondents (three members of that pension scheme), which was the subject of the three decisions, related to the annual rate of increase which ought to have been applied to their pension payments since 4 February 2008.

2. Mr Newman QC appeared on behalf of the Appellant. Mr Armitage appeared in person and the other two Respondents did not appear and were not represented.

The rival positions

3. The position taken by the Respondents, which was upheld by the Ombudsman, is that the basic rules of the scheme which apply to them provide for pensions to be increased annually by 5%. The Respondents accept that while the schemes were approved by HMRC, in accordance with Chapter I of Part XIV of the Income and Corporation Taxes Act 1988 ("ICTA"), and while HMRC applied the Practice Notes on Approval of Occupational Pension Schemes (referred to as "IR12"), the rate of increase was capped at the higher of 3% or RPI. When the relevant provisions in ICTA were repealed by the Finance Act 2004, with effect from 6 April 2006 (known as "A-Day"), the Respondents argue that the cap was removed and the rules of the scheme again provided that the rate of increase was 5%. However, the Respondents appear to accept that, by reason of transitional provisions which were in force after A-Day, they were not entitled to an annual increase of 5% from 6 April 2006 but only from 4 February 2008 (a date which will be explained in the course of this judgment).

4. The position of the trustee is that since A-Day the rate of annual increase has remained at the higher of 3% or RPI. The trustee says that this is the result of the express rules of the scheme. Alternatively, this result was produced by two deeds, which were entered into in 2006 and 2008 respectively, the effect of which was to preserve the previous limit on increases pursuant to IR12. The trustee says that those deeds were fully effective and, in particular, are not potentially invalidated pursuant to section 67 of the Pensions Act 1995.

5. At the hearing of the appeal, Mr Armitage, one of the Respondents, raised a new point which was that the alteration to the rules of the scheme, purportedly made by the 2008 deed, was ineffective because it was not authorised by the relevant rule of the scheme (Rule 27 of the 2004 Rules) nor by a provision of an earlier trust deed and rules (clause 12 of the 1996 Trust Deed) which permitted certain alterations to be made to the scheme. Following the hearing, the trustee and Mr Armitage made written submissions in relation to this point. In its submissions, the Trustee contended that the 2008 Deed was validly made pursuant to the relevant power to alter the rules. In the alternative to this submission, the Trustee made a further point which had not been

mentioned at the hearing, namely, that the 2008 Deed should be treated as having been made pursuant to a power to modify the rules conferred by section 68 of the Pensions Act 1995 ("PA 1995"). The last of the various submissions was received by the court on 18 December 2018.

The Inland Revenue Limits

6. Before describing the pension scheme in this case and referring to the relevant rules of the scheme, it is helpful to summarise the requirements of the Inland Revenue which applied before A-Day for the purpose of obtaining Inland Revenue approval to a pension scheme.

7. In order to obtain favourable tax treatment, occupational pension schemes were required to be approved by the Inland Revenue, pursuant to Chapter 1 of Part XIV of ICTA. The vast majority of approvals, including the approval given in relation to this scheme, were given under the discretionary approval mechanism pursuant to ICTA, section 591 ("the ICTA Regime"). Favourable tax treatment meant that contributions were deductible for the purposes of income or corporation tax and the assets of the scheme were exempt from tax.

8. As a quid pro quo for favourable tax treatment, approved occupational pension schemes were subject to a series of limits on the benefits which could be provided to members of such schemes. I will refer to these limits as the "Inland Revenue Limits". Details of the Inland Revenue Limits, which the Inland Revenue required schemes to apply as a condition of initial and continued approval in accordance with ICTA, were set out in IR12, which was revised from time to time.

9. So far as relevant for current purposes, the key Inland Revenue Limits were as follows:

   i) the maximum annual pension which could be provided to a member at normal retirement age was 2/3rds of the member's "final remuneration" (as defined in IR12);

   ii) for a member receiving the maximum pension permissible under the Inland Revenue Limits, there was a limit on the annual increases to that pension during payment;

   iii) originally, the rate of annual increases was limited to RPI: see paragraph 9.1 of the 1991 version of IR12; this was amended to provide for the rate of the greater of 3% and RPI, with effect from 24 March 1997: see paragraph 9.1 of the 1997 version of IR12; this remained the position from 1997 until A-Day.

10. The scheme in this case was at all material times approved under ICTA and was therefore subject to the Inland Revenue Limits.

The Scheme

11. Until recently, the relevant scheme was known as the Staveley Industries Retirement Benefits Scheme ("SIRBS") and I will continue to refer to it as such. However, on 1 July 2018, that is after the decision of the Ombudsman and after this appeal had been

brought, SIRBS merged with two other pension schemes to form a new scheme called Coats UK Pension Scheme. The trustee of SIRBS has been replaced by the new trustee of the merged schemes. The new trustee is Coats UK Pension Schemes Ltd. At the hearing of the appeal, I gave permission to amend the proceedings so that the trustee of the merged schemes is now the Appellant in this case.

12. The dispute in this case has been by reference to the rules which applied prior to the merger of SIRBS into the Coats scheme. I was not shown the rules of the Coats scheme and it was not suggested by either side to this dispute that anything turned on those rules. Accordingly, I will only consider the rules which applied from time to time to SIRBS, or the relevant section of it.

The history of the rules

13. The relevant rules of SIRBS have changed on a number of occasions over the years. Although one might think that the relevant rules would be the rules which applied during the period covered by this dispute (i.e. from 4 February 2008), I was taken to earlier rules which had been replaced before 2008 and, indeed, the parties' submissions focussed on the earlier rules. In addition, the Ombudsman based her decision on her interpretation of the earlier rules. This appears to have been because of the terms of a Transfer Agreement dated 7 September 1998 (to which I refer below) ("the Transfer Agreement") which sought to preserve the position of members under the earlier rules notwithstanding a merger which took place at that time and which resulted in a new set of rules being promulgated. I will therefore refer to the position under the rules which were relevant from time to time.

14. SIRBS was established in 1954. It was a trust-based occupational pension scheme. Prior to the merger into the Coats scheme on 1 July 2018, it consisted of a Main Section and an Executive Section, each with its own set of governing rules. The Executive Section was originally constituted as a separate pension scheme called the Staveley Industries Senior Officials Superannuation Scheme established in 1945, which became known as the Staveley Executive Pension Scheme ("SEPS"). SEPS merged into SIRBS in 1998 when the Executive Section of SIRBS was created.

15. I was taken to the rules which applied to SEPS and then to the rules which applied to the Executive Section of SIRBS after 1998. The first set of rules I was shown were referred to as "the 1986 Rules". The 1986 Rules were amended in a relevant way in April 1992. The 1986 Rules were replaced by rules referred to as "the 1996 Rules". The 1996 Rules were amended by a Deed dated 3 April 1998 which introduced the role of a Protector and removed the functions of a Management Committee. Mr Newman submitted that, for the purposes of the issue which has now arisen, the court should consider the 1986 Rules (as amended in 1992) in the case of Mr Styles and Mr Brown and the 1996 Rules in the case of Mr Armitage. He also submitted that there was no material difference between the 1986 Rules (as amended in 1992) and the 1996 Rules for present purposes. I agree that the same point arises in the same way in relation to the 1986 Rules (as amended in 1992) and the 1996 Rules although the terms of the 1992 amendment and the terms of the 1996 Rules are not identical, as they reflected the different terms of IR12 current at the different times. The Ombudsman applied the 1996 Rules to the cases of all three Respondents. As the 1986 Rules (as amended in 1992) and the 1996 Rules give rise to the same point in

the same way, I will refer to the 1996 Rules and not the 1986 Rules in the discussion later in this judgment.

16. The merger of SEPS into SIRBS was the subject of the Transfer Agreement. Clause 8 of that agreement provided that, for pensioners or deferred members under SEPS, SIRBS would provide benefits which were the same as those that would otherwise have been provided under SEPS. Clause 8 applied to Mr Styles and Mr Brown. Clause 9 of the agreement dealt with the position of active members of SEPS and provided that benefits for pensionable service under SIRBS would be the same as the benefits which were accruing for pensionable service under SEPS and that SIRBS would provide benefits which were the same as those that would otherwise have been provided under SEPS. Clause 9 applied to Mr Armitage.

17. It is worth saying at this point that, on my reading of the Transfer Agreement, it did not freeze the rights of the Respondents by reference to the 1996 Rules at the date of the Transfer Agreement so as to preclude the possibility of those rules being altered or modified thereafter. The 1996 Rules were made pursuant to a 1996 Trust Deed which permitted the 1996 Rules to be altered. Accordingly, the Transfer Agreement did not contain any promise that the 1996 Rules would never be the subject of an alteration which was otherwise permitted by the 1996 Trust Deed. The same comment applies to any statutory power given to the Trustee to modify the relevant rules of the scheme. If that power were available to be exercised in relation to the 1996 Rules, then the Transfer Agreement did not contain any promise that such a power would not be exercised.

18. After the merger, the previous rules were replaced by rules referred to as “the 1999 Rules”. There was one set of 1999 Rules for the Main Section of SIRBS and another set for the Executive Section of SIRBS. Finally, the 1999 Rules were replaced by rules which were referred to as “the 2004 Rules”. At the hearing, I was told that the 2004 Rules were “identical” to the 1999 Rules but they are not identical. In particular, the important Rule 17.6 is different in the two sets of Rules.

19. The Respondents retired at various dates during the period of various changes to the rules of the scheme. Mr Styles retired in July 1992, Mr Brown retired in October 1994 and Mr Armitage retired in May 1999.

20. As mentioned earlier, A-Day was 6 April 2006. On 7 April 2006, the principal employer and the trustee of SIRBS entered into the deed to which I will refer as “the 2006 Deed” and on 4 February 2008, they entered into the deed to which I will refer as “the 2008 Deed”.

The 1996 Trust Deed and Rules

21. SEPS was the subject of the 1996 Trust Deed and Rules. Clause 12 of the Trust Deed, as originally drafted, conferred on the Trustee power by deed from time to time and with the consent of the Employer to alter the Trust Deed and Rules provided that no such alteration should:

> “diminish the accrued rights of any member in respect of benefits already secured for him under the Scheme.”

Clause 12 of the Trust Deed originally provided that the Trustee should not make any alteration without the prior written consent of the Management Committee.

22. By the deed dated 3 April 1998, the 1996 Trust Deed and Rules were altered so that the reference in clause 12 of the Trust Deed to the Trustee became a reference to the Protector and the reference to the Management Committee became a reference to the Trustee.

23. The 1996 Rules which are relevant in this case were in Part I of the Rules referred to in the Trust Deed. Rule 1(a) defined "Approval" by reference to Chapter I of Part XIV of ICTA. Rule 1(m) defined "Increase Percentage" as 5% in relation to a Category A member and 3% in relation to any other member. The Respondents in this case were Category A members. Rule 11 provided for the payment of pension benefits. Rule 11(b) provided that:

> "Every pension or annuity in course of payment under the Scheme shall be increased on each Pensions Increase Date [i.e. 1 January] by:
>
> (i) In the case of a pension payable to a member, the Increase Percentage of the total of such pension … immediately prior to such Pensions Increase Date;"

23. Rule 20 provided as follows:

> "<u>LIMITATION OF BENEFITS</u>
>
> The Scheme is designed for Approval.
>
> The Trustees will comply with all undertakings which the Inland Revenue require them to give as a condition of approving the Scheme. …
>
> The Appendix to these Rules forms part of these Rules. It restricts the benefits that can be provided under the Scheme and the contributions that members can pay to the Scheme. The Inland Revenue require benefits and contributions to be limited to the amounts described in the Appendix as a condition of approving the Scheme.
>
> … "

24. The Appendix to the Rules was headed "Inland Revenue Limits" and began with the general words: "[n]otwithstanding anything to the contrary in the Scheme provisions". The Appendix contained provisions, among others, which dealt with "Benefit Limits for Class A Members" and then with "Benefit Limits for Class B Members and Class C Members". Although the Respondents were Class A Members within the 1996 Rules generally, they were Class C Members as defined in the Appendix for the purpose of the Inland Revenue Limits. These parts of the Appendix provided that certain benefits "shall not … exceed the limits set out below …". Paragraph 1(a) of the Appendix, dealing with Class A Members, stated that the Member's Aggregate

Retirement Benefit "will not exceed" a pension of 1/60th of Final Remuneration of each year of Relevant Service (not exceeding 40 years) "or such greater amount as will not prejudice Revenue Approval of the Scheme". Paragraph 1(a) of the Appendix, dealing with Class B Members and Class C Members, was expressed in similar terms, using the phrase "or such greater amount as will not prejudice Revenue Approval of the Scheme". Indeed, this phrase is used a number of other places in the Appendix.

25. Another part of the Appendix was headed "Other limits on benefits relating to all Members". In this part of the Appendix, paragraph 1 provided that the lump sum death benefit should not exceed certain figures or rates; this paragraph did not contain the wording "or such greater amount as will not prejudice Revenue Approval of the Scheme", which wording had been used elsewhere in the Appendix. Paragraph 2 of this part of the Appendix provided that a Dependant's pension was not to exceed a certain amount; again, this paragraph did not contain the wording "or such greater amount as will not prejudice Revenue Approval of the Scheme".

26. Paragraph 3 of this part of the Appendix provided:

> "The maximum amount of a pension ascertained in accordance with the previous provisions of this Appendix, less any pension which has been commuted for a lump sum or the pension equivalent of any benefits in lump sum form and any pension surrendered to provide a Dependant's pension, may be increased by 3% for each complete year or if greater, in proportion to any increase in [RPI] since the pension commenced."

27. Paragraph 4 of this part of the Appendix dealt with the possibility of a member making voluntary contributions to supplement scheme benefits but where the Aggregate Retirement Benefit was restricted leading to repayment of the surplus additional voluntary contributions.

28. At the end of the Appendix there was a note headed: "Notes to this Appendix" which provided:

> "In any case when the Inland Revenue either generally or in any particular case permit payment of a higher sum by way of benefit or contributions than that described above, the Management Committee or the Member (as appropriate) may pay the higher sum."

29. The reference in the Notes to the Management Committee is to be read as a reference to the Trustee by reason of the deed of 3 April 1998, referred to above.

The 2004 Rules

30. Rule 1 of the 2004 Rules contained a number of definitions. In particular, clause 1 defined "Inland Revenue Limits" and "Revenue Approval" as follows:

> "“Inland Revenue Limits” means the limits that apply, at the date of these Rules, to contributions that can be paid to SIRBS and the benefits provided under SIRBS (see Rule 17.6 and the Appendix).
>
> “Revenue Approval” means approval under Chapter I of Part XIV of the Income and Corporation Taxes Act 1988.”

31. Rule 16.2 of the 2004 Rules provided that “[e]ach pension in payment will increase in each year by the lower of” 5% or RPI. However, in the case of the three Respondents, who were members of SEPS before the merger into SIRBS and who have the benefit of clauses 8 and 9 of the Transfer Agreement of 7 September 1998, it has been agreed that the rate of annual increase in pension attributable to them should not be less than the rate of annual increase provided by the 1996 Rules. Rule 11 of the 1996 Rules, as applied to these three Respondents, provided for a rate of annual increase of 5%. Accordingly, their position is as if clause 16.2 of the 2004 Rules provided for a rate of annual increase of 5%. On this basis, in the case of the Respondents, rule 16.2 should be read as providing:

> “**Pension Increases**
>
> Each pension in payment will increase in each year by 5%.”

32. Rule 17 of the 2004 Rules contains a number of general rules as to benefits. One of these is in clause 17.6 which provides:

> “**Revenue Approval**
>
> SIRBS is designed for Revenue Approval.
>
> The Trustees will comply with all requirements for Revenue Approval of SIRBS, including those of regulations 5 and (so far as applicable) regulation 6 of the Retirement Benefits Schemes (Restriction on Discretion to Approve) (Additional Voluntary Contributions) Regulations 1993 (which deal with the calculation and repayment of surplus additional voluntary contributions).
>
> The Appendix to these Rules forms part of these Rules. It restricts the benefits that can be provided under SIRBS and the contributions that Members can pay to SIRBS. At the date of these Rules, the Inland Revenue require benefits and contributions to be limited to the amounts described in the Appendix, as a condition of approving SIRBS. Greater amounts may be paid only if Staveley and the Trustees agree, and Revenue Approval of SIRBS would not be prejudiced.”

33. Rule 19 provided for discretionary matters in certain circumstances. Rule 19.1 provided for the possibility of commutation on the ground of serious ill-health. Rule 19.2 provided for the possibility of commutation of trivial pensions. Rule 19.3 provided for the possibility of the Trustees providing increased or additional benefits

to Members. Rule 19.3 provided that any benefits provided under that Rule should be consistent with, amongst other things, Revenue Approval of SIRBS.

34. Rule 27 of the 2004 Rules provided:

> "**Alterations to SIRBS**
>
> The Trustees may, with the written consent of [Staveley/the Employer], alter the Rules at any time (and, subject to Section 67 of the Pensions Act 1995 (restriction on powers to alter schemes), may do so retrospectively).
>
> No alteration may be made which would:
>
> …
>
> (c) diminish the accrued rights of any Member in respect of benefits already secured for him or her under SIRBS.
>
> Alterations to the Rules must be made or confirmed by Deed."

35. The Appendix was headed "Inland Revenue Limits" and contained a large number of references to various provisions of ICTA. The Appendix identified various limits on benefits and limits on contributions under SIRBS. There were different benefit limits for Class A members as distinct from Class B and Class C members. The three respondents were Class C members. The specific provision which imposed a limit on the pension for a Class B or a Class C member was in these terms:

> "Notwithstanding anything to the contrary in the provisions of SIRBS, the benefits payable to a Class B or a Class C Member … shall not … exceed the limits set out below:
>
> 1 The Member's Aggregate Retirement Benefit shall not exceed:
>
> 1.1 on retirement at or before Normal Retirement Age, a pension of 1/60th of Final Remuneration for each year of Relevant Service (not exceeding 40 years) or such greater amount as will not prejudice Revenue Approval of SIRBS;
>
> 1.2 … "

36. The Appendix also identified limits for the lump sum retirement benefit payable under SIRBS: see paragraph 2 of the text which related to Class B and Class C members.

37. The Appendix then set out "Other limits on benefits relating to all Members". Paragraph 3 of this part of the Appendix provided:

> "**Increases of pensions in payment**
>
> The maximum amount of a pension ascertained in accordance with the previous provisions of this Appendix, less any pension

> which has been commuted for a lump sum or the pension equivalent of any benefits in lump sum form and any pension surrendered to provide a Dependant's pension, may be increased by 3% for each complete year or, if greater, in proportion to any increase in [RPI] since the pension commenced. "

The Finance Act 2004

38. With effect from 6 April 2006 (A-Day), the Finance Act 2004 ("FA 2004") abolished the ICTA Regime; the relevant provisions are in FA 2004, section 326(1) and schedule 42, part 3. FA 2004, chapter 2 of part 4, replaced the ICTA Regime with a more mechanistic system of registration. Accordingly, occupational pension schemes no longer had to obtain Revenue approval or be subject to the Inland Revenue Limits in order to obtain favourable tax treatment, provided that the schemes otherwise complied with FA 2004.

The Regulations

39. FA 2004 schedule 36 introduced transitional provisions capable of applying to pension schemes which had been approved by the Inland Revenue before A-Day. Paragraph 3 of schedule 36 empowered the Inland Revenue to make regulations which modified the rules of existing pension schemes relating to (amongst other things) the Inland Revenue Limits applicable prior to A-Day. The modifications were to have effect during a transitional period. This period was originally defined in FA 2004 schedule 36 as ending on the earlier of the making of an amendment to the scheme terminating its application (paragraph 3(2)(a)) and the end of the tax year 2008-2009 (paragraph 3(2)(b)): the latter period was extended by paragraph 51 of schedule 10 to the Finance Act 2005 to the end of the tax year 2010-2011 or such later time as the Revenue by regulations prescribed. No such later date was prescribed.

40. The Registered Pension Schemes (Modification of the Rules of Existing Schemes) Regulations 2006 (SI2006/364) ("the Existing Schemes Regulations") were made pursuant to paragraph 3 of schedule 36 to FA 2004. This Regulation permitted schemes to continue, for a limited period, as if the ICTA Regime still applied to them.

41. It is also relevant to refer to The Occupational Pension Schemes (Modification of Schemes) Regulations 2006 (SI 2006/759) ("the Modification Regulations"). This Regulation was made pursuant to powers conferred by sections 67 and 68 of PA 1995 (amongst other powers).

42. A potential obstacle to the effective retention of the Inland Revenue Limits following the end of the transitional period was the application of the restrictions on the amendment of occupational pension schemes set out in section 67 PA 1995.

43. In summary, section 67 PA 1995 renders voidable, at the instance of the Pensions Regulator, amendments to occupational pension schemes which, on taking effect, would or might adversely affect any subsisting right of a scheme member, unless certain prescribed conditions were satisfied. "Subsisting right" is defined in section 67A(6) as any right which at that time had accrued to or in respect of a member to

future benefits under the scheme rules, or any entitlement to the present payment of a pension or other benefit which the member had at that time, under the scheme rules.

44. Thus, an amendment of a scheme, following the abolition of the ICTA Regime and the removal of the application of the Inland Revenue Limits, which sought to re-impose those limits, would be potentially caught by section 67 if members' rights or entitlements to benefits had otherwise increased by reason of the removal of those limits and those rights or entitlements were "subsisting rights" for the purposes of section 67.

45. Section 67(3)(b) provided that the effect of section 67 would not apply in relation to the exercise of an amendment power in a prescribed manner; and regulation 3 of the Modification Regulations provided that for the purposes of section 67(3)(b) of the 1995 Act, the prescribed manner of the exercise of any modification power in relation to a scheme to which section 67 does not apply, is any modification of a scheme

> "…
>
> (h) which has the same effect as any or all of the modifications in any or all of the modifications in regulations 3 to 8 of the [Existing Schemes Regulations], but without limitation to the transitional period;
>
> …"

46. Thus, the Modification Regulations removed the possibility that the restriction in section 67 would potentially invalidate amendments made to pension schemes in order to continue the Inland Revenue Limits beyond the statutory transitional period.

The 2006 Deed

47. The 2006 Deed provided, with effect from 6 April 2006 (A-Day), as follows (so far as material):

> "**Initial amendments**
>
> 3. The provisions of SIRBS shall operate as if:
>
> (a) SIRBS remained subject to the requirements (including limits on benefits and contributions) upon which its tax approved status was conditional on 5 April 2006 (as set out in legislation and in IR12 (2001) "Practice Notes on the Approval of Occupational Pension Schemes");
>
> …
>
> 6. The amendments in [clause 3] shall be effective only until 5 April 2011 and shall be construed so that:
>
> (a) they have the same effect as the [Existing Schemes Regulations], subject to subsequent amendment of SIRBS;

(b) they are not regulated modifications under section 67A of the Pensions Act 1995.

Disapplication of the [Existing Schemes Regulations]

7. The [Existing Schemes Regulations] are disapplied.

Relaxation of [Pre-A-Day Inland Revenue Limits]

8. The operation of [pre-A-Day Inland Revenue Limits] may be relaxed to any extent that the Principal Employer and the Trustees may agree, whether by:

(a) wholly or partly permitting any provision of SIRBS to operate as not being subject to [pre-A-Day Inland Revenue Limits];

(b) providing new rights or extending existing ones; or

(c) providing benefits that are different, or subject to different terms, from those set out elsewhere in the provisions of SIRBS;

but the Principal Employer and the Trustees may not exercise this power in a way that would contravene legislation relating to SIRBS."

48. The effect of the 2006 Deed was to disapply the automatic application of the Inland Revenue Limits pursuant to the Existing Schemes Regulations, but to reinstate the same Inland Revenue Limits until the end of the statutory transitional period, subject to a power for the Principal Employer and the Trustee to relax those limits by (for example) agreeing to the provision of benefits which would otherwise infringe those limits. In particular, the 2006 Deed permitted the provision to members of the more generous retirement lump sum benefits which were permitted after A-Day, but which would have been prohibited by the application of the Inland Revenue Limits.

The 2008 deed

49. During the voluntary application of the Inland Revenue Limits pursuant to the 2006 Deed, the Principal Employer and the Trustee entered into the 2008 Deed. The 2008 Deed was expressed to be made pursuant to Rule 27 of the 2004 Rules (which permitted alterations of the Rules). Clause 12 of the 2008 Deed altered the 2004 Rules with effect from 4 February 2008 by replacing the existing Rule 17.6 of the 2004 Rules with the following:

"**17.6 Tax status of SIRBS**

SIRBS is a "registered pension scheme" for the purposes of Part 4 of the Finance Act 2004. If (without this Rule) the Trustees would be required to make a payment under SIRBS that would be "unauthorised" by virtue of Section 160 of that Act (payments by registered pension schemes), the payment

> will be treated as discretionary and will not be made unless the Trustees and Staveley [the Principal Employer] agree otherwise (which they need not do).
>
> Before 6 April 2006, SIRBS was approved under Chapter 1 of Part 14 of the Income and Corporation Taxes Act 1988 (retirement benefit schemes). As a condition of this approval, SIRBS was subject to various requirements including limits on the benefits and contributions that could be paid. The details of these limits are contained in previous legislation, and in IR12(2001) "Practice Notes on the Approval of Occupational Pension Schemes".
>
> In spite of the changes made by the Finance Act 2004, the limits that previously applied to the amount and form of benefits under SIRBS, and to contributions to SIRBS, continue to apply, except where Staveley and the Trustees agree otherwise and subject to the following:
>
> **17.6.1** in applying these limits, the Trustees will ignore any benefits attributable to a Member's voluntary contributions to SIRBS;
>
> **17.6.2** the Trustees may allow a Member whose pension starts on or after 6 April 2006 to choose a retirement lump sum of any amount up to the maximum permitted as a "pension commencement lump sum" under Part 4 of the Finance Act 2004, so long as the Member keeps a pension at least equal to his or her GMP.
>
> The modifications made by [the Existing Schemes Regulations] no longer apply to SIRBS."

50. This alteration (if effective) made permanent the modifications to the Rules of the Scheme initially made by the 2006 Deed.

The decision of the Ombudsman

51. The Ombudsman did not construe the 2004 Rules but instead considered the 1996 Rules relating to SEPS. This was presumably because of the terms of the Transfer Agreement which provided, in effect, that members of SEPS would obtain benefits under SIRBS which would be the same as those that would have been provided under SEPS.

52. Having construed the 1996 Rules, the Ombudsman accepted the case put forward by the Respondents as I have summarised it at [3] above. She relied upon the description given by Lewison J as to the operation of the relevant provisions in an earlier case involving Mr Armitage and the employer: <u>Armitage v Staveley Industries plc</u> [2004] Pens LR 385. The Ombudsman referred to the Existing Schemes Regulations and held that they had a transitional effect so that the Respondents were not entitled to increases of 5% until the transitional provisions were brought to an end on 4 February

2008 by the 2008 Deed. She proceeded on the basis that the Trustee did not contend that the 2008 Deed took away from the Respondents their right to pension increases of 5% which she had held was a right conferred by the 1996 Rules.

53. For present purposes, the central part of the reasoning of the Ombudsman related to the Notes to the Appendix to the 1996 Rules. At [40]-[41] of her decision she said:

> "40. The language of the "Notes to the Appendix" uses the word "may", which in my view is somewhat misleading. This does not seem to me to be saying that the Management Committee would have a discretion to pay a sum greater than the 3%/RPI limit. Rather, the word "may" is used to indicate that the Management Committee would in those circumstances be permitted to pay the higher sum i.e. they would not be prohibited from doing so. The imperative to pay the higher sum does not come from the Appendix at all, but rather from rule 11.
>
> 41. I also do not consider that the use of the word "permit" in this context means that the restriction of the higher of 3% or RPI was to apply unless the revenue actively decided that a "higher sum" could be paid. Rather, in this context "permit" appears to me to mean only that the revenue does not prohibit the payment of a higher sum."

The construction of the 1996 Rules: the parties' submissions

54. The submissions of the parties on this appeal were directed principally to the 1996 Rules, rather than the 2004 Rules.

55. Mr Newman submitted that the Inland Revenue Limits which applied to the scheme before A-Day continued to apply after that date. This was said to be the clear effect of the express terms of the 1996 Rules. He made a number of submissions to rebut the possible contention that the provisions of FA 2004 had expressly overridden the clear express terms of the 1996 Rules. However, I do not consider that the Ombudsman had held that the express terms of the 1996 Rules were somehow overridden by the FA 2004. Instead she held that the express terms of the 1996 Rules, when properly construed, provided for members to have an entitlement to an annual increase of 5% and that entitlement was not downgraded to a discretion by the Notes to the Appendix to the 1996 Rules. Accordingly, I will focus on Mr Newman's submissions as to the meaning of the express terms of the 1996 Rules.

56. Mr Newman essentially asserted that the Notes to the Appendix to the 1996 Rules were clear and in his favour; on his approach, the Notes gave the Trustee a discretion (but not an obligation) to pay an annual increase above the higher of 3% or RPI, up to a maximum of 5%.

57. Expanding Mr Newman's submission somewhat and putting the Trustee's case in my own words, it can be expressed as follows:

i) the provision as to the payment of the Increase Percentage in Rule 11 is subject to Rule 20;

ii) Rule 20 can have the effect of restricting the amount of the increase payable under Rule 11;

iii) Rule 20 makes the terms in the Appendix a part of the Rules;

iv) paragraph 3 of the relevant part of the Appendix imposes a limit on the amount of the increase;

v) the limit on the amount of the increase is the higher of 3% or RPI;

vi) the Notes to the Appendix provide for a case where the Inland Revenue permit payment of a higher amount;

vii) the effect of FA 2004 from the end of the transitional period produced the result that the Inland Revenue permitted payment of a higher sum;

viii) in such a case, the Notes to the Appendix provided that the Trustee "may" pay the higher sum;

ix) the result of the above is that the Trustee has a power to pay the higher sum but the Trustee can decide not to exercise that power;

x) the existence of the power under the Notes to the Appendix does not mean that the Trustee is obliged to pay the Increase Percentage of 5% pursuant to Rule 11.

58. Mr Armitage submitted that the Inland Revenue Limits in the Appendix only applied while the Inland Revenue imposed such limits as conditions for its approval of the scheme. When the Inland Revenue ceased to impose such limits, the limits in the Appendix ceased to apply. What then applied, so far as pension increases were concerned, was Rule 11.

59. Mr Armitage submitted that the operation of the 1996 Rules was concisely and accurately explained in the earlier case involving himself and the principal employer in relation to SIRBS, <u>Armitage v Staveley Industries plc</u> [2004] Pens LR 385, where the judge (Lewison J) said the following at [9]:

> "9. … Paragraph 3 of the Appendix limited increases in pensions to 3 per cent for each complete year or if greater, in proportion to any increase in the Index since the pension commenced. The Index was the retail prices index ('RPI'). The limitation on annual increases was a cap. It did not provide an entitlement. The entitlement was 5 per cent under the SEPS rules. Thus if, for example, RPI in a particular year was 7 per cent, Mr Armitage would be entitled to a 5 per cent, not a 7 per cent, increase in his pension."

60. This earlier case concerned the true construction of a certain letter written to Mr Armitage in July 1992. Lewison J construed the letter in favour of Mr Armitage but

his decision was reversed by the Court of Appeal: see [2006] Pens LR 191. Both courts considered the 1996 Rules in some detail. However, the point which is now in issue was not argued in that case and, in view of the arguments addressed to me, I must reach my own conclusions in relation to them.

61. In summary, on the critical question of the effect of the Notes to the Appendix to the 1996 Rules, Mr Newman asserted that the Notes clearly gave the Trustee a discretion as to the payment of an increase greater than the higher of 4% or RPI and Mr Armitage asserted that this was clearly not the effect of the Notes; he supported the reasoning of the Ombudsman at [40]-[41] of her decision.

Construction of the 1996 Rules: discussion and conclusions

62. The correct approach to the construction of the rules of a pension scheme is not in dispute. I have the considerable benefit of the recent summary of the position given by Lord Hodge (with whom the other members of the Supreme Court agreed) in Barnardo's v Buckinghamshire [2018] UKSC 55 at [13]-[18]. At [14], Lord Hodge referred to several distinctive characteristics shared by many pension schemes. At [15], Lord Hodge explained the weight to be given to textual analysis and the fact that less weight was to be given to the background factual matrix (as compared with certain commercial contracts). At [16], reference was made to the need to avoid undue technicality and to have regard to the practical consequences of any construction. At [17], Lord Hodge referred to the relevance of the fiscal background to the scheme when considering any issue as to construction.

63. The real issue is as to the true construction of the Notes to the Appendix to the 1996 Rules. Both sides to this dispute asserted that the effect of the Notes was clear but, of course, they fundamentally disagreed as to what that effect was. I consider that the effect of the Notes is not clear and can only be determined by considering the Notes in the context of a number of other provisions in the 1996 Rules and against the background of the legislation which provided for Inland Revenue approval of pension schemes.

64. A number of the features of the 1996 Rules deserve specific comment:

i) The 1996 Rules are expressed so as to confer certain entitlements on a member; these provisions include terms as to the amount of the benefits payable to a member;

ii) Rule 11 provides, in effect, that a pension in payment will be increased by 5% per annum;

iii) Rule 20 makes it clear that the Trustee will comply with Inland Revenue Limits; Rule 20 also provides that the Appendix to the Rules form part of the rules and that they "restrict benefits"; from reading Rule 20 on its own, it is not clear how the Appendix will restrict benefits and, in particular, whether the restrictions are meant only to apply where that is necessary to conform to Inland Revenue Limits;

iv) The Appendix begins with the general words "[n]otwithstanding anything to the contrary in the Scheme provisions" which shows that the provisions of the Appendix prevail over other provisions in the Rules;

v) In a number of places in the Appendix, it is stated that the amount of the benefit "shall not exceed" specified amounts but the relevant provision goes on to refer to "or such greater amount as will not prejudice Revenue Approval of the Scheme"; this phrase indicates that the specified limit may be exceeded if such an excess would not breach Inland Revenue Limits; where there is no relevant Inland Revenue Limit, then this phrase would allow the Trustee to pay to the Member his full entitlement under the other Rules of the Scheme;

vi) Paragraph 3 of the Appendix is drafted differently from other parts of the Appendix; paragraph 3 does not say that the interest "shall not exceed" a specified amount; nor does it use the phrase "or such greater amount as will not prejudice Revenue Approval of the Scheme";

vii) The wording of paragraph 3 of the Appendix would, at first sight, appear to be permissive in that it provides that the pension may be increased by the higher of 3% or RPI; however, read in context, paragraph 3 must be understood as providing that the pension "may only" be increased by the specified amount; paragraph 3, when it operates, is a cap on the amount of the interest which is permissible; that was how paragraph 3 was understood in the earlier case concerning Mr Armitage; the parties did not argue the contrary before me;

viii) The cap imposed by paragraph 3 only applies to "the maximum amount of a pension"; before the pension in payment has reached "the maximum amount", the cap in paragraph 3 does not apply;

ix) The Notes to the Appendix refer to any case where the Inland Revenue permit payment of a higher sum by way of benefit than is otherwise described in the Appendix; this provision obviously applies to those cases where the provision used the phrase "or such greater amount as will not prejudice Revenue Approval of the Scheme" but it is probably unnecessary in such a case; the provision would also seem to apply to the operation of paragraph 3.

65. It may be helpful to consider examples of how Rule 11, paragraph 3 of the Appendix and the Notes were intended to operate together.

66. While there are Inland Revenue Limits on annual increases of the higher of 3% or RPI, there is no problem: paragraph 3 operates as a cap on the operation of rule 11 and the Notes do not apply. In such a case if RPI is 3% or lower, then paragraph 3 imposes a cap of 3% on Rule 11. Conversely, where RPI is above 5%, then Rule 11 provides for an annual increase of 5% and not more. What happens where there are Inland Revenue Limits which allow the payment of the higher of 4% or RPI and RPI is 3% or lower? In such a case, paragraph 3 and the Notes do apply. The Trustee cannot pay more than 4% because of the Inland Revenue Limits. The Trustee cannot pay less than 3% because of paragraph 3. Is the Trustee obliged to pay 4% or does the Trustee have a discretion to pay 4%?

67. Reading paragraph 3 and the Notes together, paragraph 3 provides that the Trustee may only pay 3% and the Notes provide that the Trustee may pay 4%. The answer to the above question turns on what is meant by "may pay". The Trustee submits that these words give it a discretion whether to pay so that it can decide not to pay the higher amount. The Ombudsman held, in effect, that the words mean that the Trustee is free to pay the higher amount in the sense that the Trustee is no longer limited to the lower amount.

68. The Trustee is entitled to submit that in many contexts, the use of the word "may" is intended to confer a power or a discretion and not a duty. However, the words "may pay" must be read in the context of the Rules and the Appendix as a whole. The purpose of the Appendix is to impose limits on benefits which are otherwise the Member's entitlement under the scheme. Paragraph 3 of the Appendix did not use general language which provided that the annual increase was to be in accordance with Inland Revenue Limits nor that the annual increase should not exceed the Inland Revenue Limits. Instead, paragraph 3 expressed the limit by reference to the version of IR12 which was current at the time of the relevant rules. Accordingly, the Notes were needed to provide for the possibility that the Inland Revenue Limits might be relaxed. I consider that the purpose of the Notes was to provide that, in a case where the limit was relaxed, the limit specified in paragraph 3 was no longer to be the relevant limit and that the Trustee was free to pay the higher amount permitted by the relaxed Inland Revenue Limit. If one then takes into account Rule 11 which provides that the annual increase shall be 5% and the Notes which provide that the Trustee is free to pay more than the higher of 3% or RPI, I consider that the right reading of the Rules and the Appendix is that the Trustee is obliged to pay "the higher amount" as referred to in the Notes, up to the rate of 5%.

69. If that is the correct answer to the question posed above, the same answer would seem to apply in a case where the Inland Revenue not only permit a higher rate of increase but also remove any Inland Revenue Limit on such an increase; such a case would come within the words which refer to the Inland Revenue "generally" permitting payment of a higher sum.

70. For the sake of completeness, I note that the provisions do not seem to deal with the possibility that the Inland Revenue might lower the limit for an increase below that referred to in paragraph 3. That point does not arise in this case. It may be that if it had arisen, the Trustee would be obliged to conform to the lower limit by reason of Rule 20.

71. The result of the above reasoning is that I agree with the decision of the Ombudsman as to the effect of the Notes to the Appendix to the 1996 Rules. This means that under those rules, the Respondents were entitled to annual increases of 5%, subject to any later Regulations and any later alteration or modification of the rules.

72. In view of the fact that Mr Armitage appeared in person and the other two Respondents were not represented, I have considered whether there are further arguments which I ought to address. There are two arguments which have occurred to me and which I should mention.

73. One argument might have been that the changes made by FA 2004 did not permit payment of "a higher amount" within the meaning of the Notes, as those changes

simply removed any limit on the amount of the increase and did not specify an amount which was higher than 3% or RPI. If that argument were right, then the Notes would not apply and the position would continue to be governed by paragraph 3. This argument was not put forward by the Trustee.

74. Another argument might have been put forward by the Respondents to the effect that the restriction imposed by paragraph 3 only applies to increases on "[t]he maximum amount of a pension ascertained in accordance with the previous provisions of this Appendix". Could it be said that the changes made by FA 2004 resulted in there no longer being a maximum amount of a pension ascertained in accordance with the Appendix with the result that there was nothing to which paragraph 3 applied? If the Appendix is given a literal construction, I consider that the effect of the changes made by FA 2004 is that the relevant provisions of the Appendix do provide for the maximum amount of a pension. The earlier provisions state that the pension can be "such greater amount as will not prejudice Revenue Approval of the Scheme". As there is no longer an Inland Revenue Limit on the amount which can be paid, the maximum amount is the amount to which the member is entitled under the Rules.

75. Having sought to assess these further arguments, I conclude that the Ombudsman was right to hold that on the true construction of the 1996 Rules, the Respondents were entitled to an annual increase of 5% subject, of course, to the Regulations and the 2006 and 2008 Deeds.

The construction of the 2004 Rules: the parties' submissions

76. It was accepted by the Trustee that if I held that the Respondents were entitled to an annual increase of 5% under the 1996 Rules, then the effect of the Transfer Agreement was that they were not to be worse off under the later rules of SIRBS, in particular the 2004 Rules. However, the Trustee made submissions in relation to the operation of the 2004 Rules and, for the sake of completeness, I will consider the position under those rules.

77. In relation to the construction of the 2004 Rules, the Trustee put forward essentially the same case as it put forward in relation to the 1996 Rules. Putting its case in my own words, it is:

i) the provision as to the payment of a pension increase in Rule 16.2 is subject to Rule 17.6;

ii) Rule 17.6 can have the effect of restricting the amount of the increase payable under Rule 16.2;

iii) Rule 17.6 makes the terms in the Appendix a part of the Rules;

iv) paragraph 3 of the relevant part of the Appendix imposes a limit on the amount of the increase;

v) the limit on the amount of the increase is 3% or RPI, whichever is the greater;

vi) Rule 17.6 provides for a case where the Inland Revenue permit payment of a greater amount (i.e. where Revenue Approval would not be prejudiced);

vii) the effect of FA 2004 from the end of the transitional period produced the result that the Inland Revenue permitted payment of a greater amount;

viii) in such a case, Rule 17.6 provides that the greater amount may be paid if the Employer and the Trustee agree to do so;

ix) the result of the above is that the Trustee has a power to pay the higher sum if the Employer and the Trustee agree but the Trustee or the Employer can decide against the exercise of that power;

x) the existence of the power under Rule 17.6 does not mean that the Trustee is obliged to pay the Increase Percentage of 5% pursuant to Rule 16.2.

78. Mr Armitage took the same position in relation to the 2004 Rules as he had in relation to the 1996 Rules and, in any event, he relied on the terms of the Transfer Agreement.

The construction of the 2004 Rules: discussion and conclusions

79. Many of the same comments which I made in relation to the position under the 1996 Rules apply also to the position under the 2004 Rules. The point which was not free from doubt in relation to the 1996 Rules arose from the words "may pay" in the Notes to the Appendix to the 1996 Rules. I held that those words meant that the Trustee was released from the previous limit and was free to pay an annual increase of 5% as required under Rule 11 of the 1996 Rules.

80. The Appendix to the 2004 Rules does not contain a Note in the same terms as appeared in the Appendix to the 1996 Rules. Instead, the relevant provision is now contained in the last sentence of Rule 17.6 of the 2004 Rules. Having referred to the limits on the amounts of the relevant benefits, Rule 17.6 provides:

> "Greater amounts may be paid only if Staveley and the Trustees agree, and Revenue Approval of SIRBS would not be prejudiced."

81. I find that it is much more straightforward to construe and to apply the last sentence of rule 17.6 of the 2004 Rules than it was to construe and to apply the Notes to the Appendix to the 1996 Rules. In the events which have happened on and since A-Day, if the Trustee was to pay an annual increase of 5% that would not prejudice the Revenue Approval of SIRBS. In those circumstances, the Trustee can pay a greater amount than 3% or RPI (whichever is the greater) "only if Staveley and the Trustees agree". I consider that it is clear that Staveley and the Trustee have a discretion as to whether to agree to pay an increase above 3% or RPI (whichever is the greater) but they are not under an obligation to do so.

82. However, by reason of the terms of the Transfer Agreement and notwithstanding Rule 17.6 of the 2004 Rules, the Respondents can rely on their entitlement to an annual increase of 5% under the 1996 Rules.

83. These conclusions mean that I now must consider the submissions as to the 2006 Deed and the 2008 Deed.

The effect of the 2006 Deed

84. I have described above the effect of the 2006 Deed which was made pursuant to the Existing Schemes Regulations.

85. As I understand it, the Respondents did not argue that the 2006 Deed was ineffective. The Ombudsman also proceeded on the basis that either the Existing Scheme Regulations or the 2006 Deed was effective until 4 February 2008 when the 2006 Deed was replaced by the 2008 Deed as she held that the period during which the Respondents were entitled to an annual increase of 5% began on 4 February 2008 and not before.

The effect of the 2008 Deed

86. I have described above the intended effect of the 2008 Deed. The Ombudsman believed that the Trustee did not contend that the 2008 Deed made a permanent modification to the scheme which provided for an annual increase of the higher of 3% or RPI and provided for Staveley and the Trustee to be able to relax this restriction by agreement. In fact, the Trustee contends that this is the effect of the 2008 Deed but this contention was in the alternative to the Trustee's earlier contention as to the true construction of the Notes to the Appendix of the 1996 Rules and Rule 17.6 of the 2004 Rules, even before the entry into the 2008 Deed.

87. The Ombudsman also expressed the view that if, as she held, the Respondents were entitled to an annual increase of 5% pursuant to the 1996 Rules (which continued to apply in this respect by reason of the Transfer Agreement of 7 September 1998), then the amendment to Rule 17.6 of the 2004 Rules was ineffective by reason of the subsisting rights provisions in section 67 PA 1995. However, that last reason ignored the effect of section 67(3)(b) of PA 1995 and Regulation 3(h) of the Modification Regulations.

88. At the hearing, it became clear that even if the Respondents succeeded on their contention as to their entitlement to an annual increase of 5% pursuant to the 1996 Rules, they had not up to that point put forward any arguable reason why I should not give effect to the 2008 Deed in the way described above. It may be that Mr Armitage wished to say that the Transfer Agreement prevented the Trustee altering or modifying the rules of the scheme but I have already explained that that was not the effect of the Transfer Agreement, where the alteration or modification could also have been made in relation to the 1996 Rules. When this emerged in the course of the hearing, Mr Armitage submitted that the amendment to Rule 17.6 could not have been made pursuant to Rule 27 of the 2004 Rules because that Rule did not permit an alteration to be made which would "diminish the accrued rights of any Member in respect of benefits already secured for him or her under SIRBS". Further, he submitted that such an alteration could not have been made pursuant to Clause 12 of the 1996 Trust Deed and he was entitled to say that, by reason of the Transfer Agreement, he was not to be worse off following the merger of SEPS with SIRBS. As the limitation on the power to amend contained in clause 12 of the Trust Deed and in Rule 27 of the 2004 Rules is effectively in the same terms, nothing turns upon the fact that the Respondents were originally subject to the 1996 Trust Deed and Rules and had the benefit of clauses 8 and 9 of the Transfer Agreement.

89. Mr Armitage's submission as to the limitation on the power to alter the 2004 Rules was not argued before the Ombudsman and was not raised by a Respondent's Notice on the appeal to the High Court. Nonetheless, Mr Newman on behalf of the Trustee, having taken instructions, invited the court to deal with the point. I then gave directions for written submissions on this point and both the Trustee and Mr Armitage subsequently provided me with their written submissions. In its further submissions, the Trustee sought to rely on section 68 of PA 1995.

The power to alter the 2004 rules

90. Rule 27 of the 2004 Rules permitted the Trustee with the written consent of the Employer to alter, by deed, the 2004 Rules provided that it was not possible to alter the rules in a way which would diminish the accrued rights of any Member in respect of benefits already secured for him or her under SIRBS.

91. Mr Armitage submitted that the 2008 Deed, in particular, took away a right which had accrued to him to have annual increases at the rate of 5% from the end of the transitional period created by the Existing Schemes Regulations. Accordingly, he submitted that the 2008 Deed could not be made pursuant to Rule 27 of the 2004 Rules. Similarly, he submitted that even if the 2008 Deed could have been made pursuant to Rule 27 of the 2004 Rules, it could not have been made pursuant to clause 12 of the 1996 Trust Deed and therefore he was protected from any adverse change made under the 2004 Rules by reason of the terms of the Transfer Agreement. In fact, this last point does not arise because the power to amend conferred by clause 12 of the 1996 Trust Deed is subject to the same restriction preventing alterations which diminished accrued rights. Further, although the power to amend conferred by clause 12 of the 1996 Trust Deed had not been exercised prior to the Transfer Agreement, the rights protected by the Transfer Agreement were the rights conferred by the 1996 Rules which were at all times subject to amendment to the extent permitted by clause 12.

92. In response to this submission, the Trustee took two points. The first was that even if I held (as I do) that the Respondents were entitled under the 1996 Rules to annual increases of 5% from the end of the transitional agreement, the entitlement under the 1996 Rules was subject to the Trustee deciding not to take away that entitlement so that the entitlement to increases of 5% were not "accrued rights of any Member in respect of benefits already secured for him or her under SIRBS" and, in particular, they were not "accrued rights".

93. The second point taken by the Trustee was that if I held that the relevant provisions of the 2008 Deed could not be made under Rule 27 of the 2004 Rules, those provisions could have been made (and should be treated as having been made) under section 68 of PA 1995.

94. As regards the Trustee's reliance on the power to alter the Rules conferred by Rule 27 of the 2004 Rules, the question is whether the Respondents had an accrued right to an annual increase of 5%. I do not think that it could be said that the Respondents had such an accrued right during the transitional period provided for by the Existing Scheme Regulations. So the question which I will consider is whether they had such an accrued right from the end of the transitional period.

95. Mr Newman submitted that the Respondents did not have at the date of execution of the 2008 Deed, an accrued right to an annual increase of 5% in the future. For the meaning of accrued right in Rule 27 of the 2004 Rules, he relied on the discussion in certain cases as to the words "any right which at that time has accrued to or in respect of him to future benefits under the scheme rules" in section 67A(6) of PA 1995. In particular, Mr Newman relied on what was said by Lewison LJ (with whom the other members of the court agreed) in the Court of Appeal in Barnardo's v Buckinghamshire [2017] Pens LR 2 at [56], as follows:

> "It seems to me that if a person has a right to "A" or "B" one cannot say that he has an accrued right to A. He has a right to one or other of them."

96. Mr Newman then submitted that the Respondents did not have an accrued right to an annual increase of 5% because (before FA 2004) any such entitlement depended upon the Inland Revenue deciding to alter the Inland Revenue Limits or, as in fact happened, discontinuing the system which involved Inland Revenue Limits. I agree that that was the position before FA 2004 but that does not help with the analysis of the position after FA 2004. Mr Newman also argued that the Respondents did not have an accrued right to an annual increase of 5% during the transitional period. I agree but that is why I am considering the position in relation to the period after the transitional period. He then submitted that during the transitional period the possible entitlement of the Respondents to an annual increase of 5% in the future was conditional on a decision by the Trustee to confer those increases by choosing not to alter the rules so as to alter the rules as to a 5% annual increase. Although Mr Newman's submissions on this point were somewhat opaque, he seemed to be saying that because the Trustee could alter the rules to take away the right to an annual increase of 5% after the transitional period, such a right was not an accrued right. If that was his submission, it puts matters back to front. The issue is whether the Trustee had a power under the rules to alter the rules. The Trustee did not have that power if the proposed alteration diminished an accrued right of a member. If the proposed alteration did diminish an accrued right, then the Trustee did not have a power to diminish that right. It is therefore not open to the Trustee to say that the right was not an accrued right because the Trustee had a right to alter it. Mr Newman made a somewhat similar point by reference to the power to modify the rules under section 68 of PA 1995. I will discuss section 68 in more detail later in this judgment. However, the fact that the Trustee may have had a statutory power to take away a right to which the member is otherwise entitled would not prevent that right being an accrued right when considering the meaning of the words "accrued right" in the power to alter the rules, conferred by Rule 27.

97. Accordingly, I conclude that the Trustee did not have power under Rule 27 of the 2004 Rules to alter the Rules so that the Respondents were not entitled to an annual increase of 5% after the transitional period.

98. This means that the validity of the relevant provisions of the 2008 Deed turns on whether they should be treated as having been made pursuant to section 68 of PA 1995.

99. Section 68(1) of PA 1995 conferred on the Trustee a power, exercisable by resolution, to modify the rules of SIRBS with a view to achieving any of the purposes specified

in section 68(2). Section 68(2)(e) included in the list of purposes "prescribed purposes".

100. The Modification Regulations were made pursuant to section 68(2)(e) of PA 1995, amongst other provisions. Regulation 6(1) of those Regulations provided that the trustees of a trust scheme had power by resolution passed before 6 April 2011 to modify the scheme for the purposes of:

> "(a) achieving the same effect as all of the modifications in regulations 3 to 8 of the [Existing Schemes Regulations], but without limitation as to the transitional period; and
>
> (b) amending the scheme rules so that the [Existing Scheme Regulations] no longer apply in relation to the scheme with effect from the date on which the modifications referred to in sub-paragraph (a) take effect."

101. Regulations 6(2) and 6(3) provided for the possible effective dates of such modifications. No point arises on those provisions in this case.

102. Regulation 6(4) provided:

> "Without prejudice to section 67 of the 1995 Act, modifications made by resolution under paragraph (1)(a) may be modified by exercise of any power conferred on any person by a scheme to modify the scheme."

103. The first question I will consider is whether the 2008 Deed could have been made under section 68 of PA 1995. Mr Armitage submitted that the 2008 Deed was not made for the purposes of achieving the same effect as all of the modifications in regulations 3 to 8 of the Existing Schemes Regulations. I find that the position in this respect is as follows:

i) Regulation 3 of the Existing Scheme Regulations provided that scheme rules which prior to A-Day would require payments to be made which would be unauthorised under the new tax regime would be construed as conferring a discretion on trustees so to do; this Regulation was given effect on a continuing and not transitional basis by clause 12 of the 2008 Deed;

ii) Regulations 4 and 5 of the Existing Scheme Regulations preserved the effect of the limits to benefits by reference to the "permitted maximum" as defined in section 590C of ICTA; this is the cap applied to members' remuneration for the purposes of calculating their final remuneration which in turn was used to calculate the maximum benefits permissible under the former tax regime as, for example, under paragraph 7.3 of IR12 (1991); this was given effect on a continuing and not transitional basis by clauses 9 and 12 of the 2008 Deed;

iii) Regulations 6 and 7 of the Existing Scheme Regulations continued the effect of existing scheme rules which restricted transfer and benefit entitlements by reference to the scheme's approval by the Inland Revenue, according to limits in IR12(2001); these were given effect on a continuing and not transitional basis by clause 12 of the 2008 Deed;

iv) Regulation 8 of the Existing Scheme Regulations provided that the rules of an existing scheme were to be read as authorising reduction of a member's benefits in respect of any liability of the scheme administrator to pay a "lifetime allowance charge" under FA 2004; this was given effect on a continuing and not transitional basis by clause 11 of the 2008 Deed.

104. Mr Armitage nonetheless submitted that regulation 6 of the Modification Regulations was not complied with because clause 12 of the 2008 Deed, introducing a new Rule 17.6 into the 2004 Rules, allowed the Trustee and the Employer to agree to relax the former limits. However, the 2008 Deed can be considered as doing two things in this respect. The first was to do what was permitted by regulation 6, namely, to achieve the same effect as the modifications in regulations 3 to 8 of the Existing Scheme Regulations and then, secondly, to relax those modifications. Regulation 6(4) of the Modification Regulations expressly contemplated that a resolution made under section 68 of PA 1995 could exercise any power of modification conferred by the rules of the scheme providing that such exercise did not contravene section 67 of PA 1995. In this case, the relaxations permitted by the new Rule 17.6, as compared with Regulations 3 to 8 of the Existing Schemes Regulations were potentially beneficial to members and did not contravene the subsisting rights provisions in section 67 of PA 1995. Further, the relaxations were within the power to alter the rules conferred by Rule 27 of the 2004 Rules.

105. Accordingly, I conclude that the 2008 Deed could have been made under section 68 of PA 1995.

106. Mr Armitage then submitted that the Trustee had never made a resolution as required by section 68 of PA 1995. I do not agree. The 2008 Deed was executed under the common seal of the Trustee indicating that the Trustee had resolved to enter into the Deed.

107. Mr Armitage further submitted that when the Trustee entered into the 2008 Deed, it was not purporting to exercise the power conferred on it by section 68 of PA 1995. It is correct that the 2008 Deed does not refer anywhere to the existence of the power conferred by section 68. The 2008 Deed does refer to the power to alter the rules conferred by Rule 27 of the 2004 Rules. Clause 5 of the 2008 Deed specifically states that the provisions of the deed were in exercise of the power conferred by Rule 27.

108. In response to the submission as to whether the Trustee was purporting to exercise the power conferred by section 68 of PA 1995, the Trustee relied on the legal principle applied by Scott J in <u>Davis v Richards and Wallington Industries Ltd</u> [1990] 1 WLR 1511 at 1530-1541. Both the Trustee and Mr Armitage referred to the summary of that principle which I provided in <u>Capital Cranfield Trustees Ltd v Beck</u> [2009] Pens LR 71 at [49], where I referred to:

> "49 … the beneficial principle applied by Scott J in *Davis v Richards & Wallington Industries Ltd [1990] 1 WLR 1511* (see at 1530-1531) and referred to by the Court of Appeal in Stannard v Fisons Pension Trust Ltd [1991] PLR 225 . In the

> first case, Scott J took the relevant principle from Farwell on Powers, 3rd ed (1916) pages 210 *et seq* and Sugden on Powers, 7th ed (1845) vol 1, pages 356, 358 and 421. In the second case, the Court of Appeal referred to passages in Farwell on Powers. Farwell refers to there being an intention to dispose of property to someone (who is an object of a power) and to the exercise of a power being the only means by which the intention can have effect. In such a case, it will be presumed that the person who has the power intended to exercise it. The intention will be presumed even where it is not proven that the intention actually existed. The intention will not be presumed where the evidence shows that the person had an intention not to exercise the power. In the first of these cases, Scott J applied the principle to a case which did not involve the disposal of property. He held that the principle applied where there was an intention to achieve a particular result and that result was something which was within the scope of an available power."

109. The principle identified in Davis v Richards and Wallington Industries Ltd was said to be subject to certain qualifications in Briggs v Gleeds [2015] Ch 212 but those qualifications are not material in the present case.

110. I will now seek to apply that principle in this case. The Trustee had the power under section 68 of PA 1995 to enter into the 2008 Deed. Indeed, that power was the only means by which the Trustee could give effect to the relevant provisions of the 2008 Deed. I ought therefore to be prepared to assume that the Trustee intended to exercise that power. I do not need to be given evidence by the Trustee of a positive intention to exercise this specific power. In this case, there is no sufficient evidence that the Trustee did not intend to exercise that power. What would be required in that respect would be positive evidence that the Trustee had the positive intention not to exercise the power: see the discussion on this point in Davis v Richards & Wallington Industries Ltd [1990] 1 WLR 1511 at 1531A-F. Accordingly, I hold that the 2008 Deed is to be treated as having been entered into pursuant to the power to do so conferred by section 68 of PA 1995 and that it is a valid and effective deed pursuant to that power.

111. Mr Armitage made further submissions about inequity and delay and the terms of certain letters he had received from the Trustee. Whilst I have reflected on all of those matters, I consider that there is nothing in the points raised which requires discussion in addition to the matters I have already referred to.

The overall result

112. I have dealt with the points which were raised at and after the hearing in the order in which the points were raised. It may be helpful now to state the result of my various conclusions in a more logical order as follows:

    i) The Respondents have the benefit of the 1996 Rules;

ii) Under the 1996 Rules, in the absence of any relevant modification of them the Respondents would have been entitled to annual increases of 5% from the end of the transitional period pursuant to the Existing Schemes Regulations;

iii) The 2008 Deed sought to alter the 2004 Rules pursuant to Rule 27 but the relevant alterations were not permissible under Rule 27 because they diminished the accrued rights of the Respondents;

iv) If the 2008 Deed had been effective under Rule 27 of the 2004 Rules, it could also have been entered into under clause 12 of the 1996 Trust Deed so that the protection given to the Respondents by the Transfer Agreement would not have been contravened;

v) If the 2008 Deed had been effective under Rule 27 of the 2004 Rules it would not have been potentially invalidated by the subsisting rights provisions in section 67 of PA 1995 because of Regulation 3(h) of the Modification Regulations;

vi) The 2008 Deed was valid and effective pursuant to the Trustee's power to modify the rules of the scheme conferred by section 68 of PA 1995; it did not contravene the protection conferred by the Transfer Agreement;

vii) Under Rule 17.6 of the 2004 Rules as modified by the 2008 Deed, the Respondents are not entitled to annual increases of 5%.

113. The overall result is that I will allow the appeal against the decision of the Ombudsman on the ground that, contrary to her decision, the Respondents are not entitled to annual increases of 5% with effect from 4 February 2008 because that is contrary to Rule 17.6 of the 2004 Rules as modified by the 2008 Deed which was validly made pursuant to section 68 of PA 1995.

Costs

114. In the absence of agreement between the parties, I may be asked to consider applications in relation to the costs of the appeal. If there are to be applications for costs, the parties are to make concise submissions in writing in support of any applications within 14 days of the hand down of this judgment with each party having the right to reply within 14 days thereafter.

115. I record at this point that at the outset of the hearing, Mr Armitage applied to me for an order in his favour pursuant to CPR 52.19. That rule applies in this case because the proceedings before the Ombudsman were proceedings in which costs recovery was "normally limited or excluded". Where the rule applies, the court may order that the recoverable costs of an appeal shall be limited to the extent to which the court specifies. CPR 52.19(2) specifies matters to which the court will have regard when considering what order to make. Mr Armitage invited the court to make an order that the costs recovery on appeal should be restricted to the costs which would be applicable in proceedings before the Ombudsman, which I understood to be a reference to there being no order for costs in favour of either party in any event. In written submissions in support of his application, Mr Armitage referred to the way, as

he described it, in which the issues had come forward for decision by the Ombudsman.

116. It was explained in JE (Jamaica) v The Secretary of State for the Home Department [2014] EWCA Civ 192 that an application for an order under CPR 52.19 should be made as soon as practicable in relation to the progress of the appeal. Mr Armitage put forward an explanation as to his initial delay in making his application. Normally such an application will be dealt with on the basis of written submissions so that the parties know in advance of incurring costs what order the court has made under CPR 52.19. However, in this case, Arnold J ordered that the application under CPR 52.19 should be considered at the hearing of the appeal.

117. At the outset of the hearing of the appeal, Mr Armitage orally presented his application under CPR 52.19 and Mr Newman addressed me in opposition to the application. I was told that the solicitors for the Trustee had made proposals as to costs which were not acceptable to Mr Armitage. It emerged that whatever order I made, or did not make, under CPR 52.19, Mr Armitage would continue to participate in the hearing of the appeal, on the basis that counsel for the Appellant stated that his clients agreed that the costs payable by Mr Armitage would not in any event exceed £15,000 (plus applicable VAT), and wished to make submissions in opposition to the appeal. In view of that fact, I directed that I would not deal with the application under CPR 52.19 as a freestanding application and give a ruling on it, as any such ruling would not affect the participation in the hearing of the appeal itself. I indicated that all of the points which had been made in relation to that application would be available to be considered in connection with any application for costs which was subsequently made following judgment on the appeal. That is now the stage which has been reached as described above.