Neutral Citation Number: [2020] EWHC 949 (Ch)

Case No: CH-2020-000010

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**APPEALS (ChD)**

**On appeal from the Pensions Ombudsman**
**Determination of Mr Anthony Arter dated 12 December 2019**

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

Date: 22 April 2020

**Before** :

**MR JUSTICE NUGEE**

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**Between :**

| | |
|---|---|
| **Robert Allan Carr** | **Complainant and Respondent to Appeal** |
| **- and -** | |
| **(1) Thales Pension Trustees Ltd** | **Respondent to Complaint and to Appeal** |
| **- and -** | |
| **(2) Thales UK Ltd** | **Respondent to Complaint and Appellant** |

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**Nicolas Stallworthy QC** and **Lydia Seymour**
(instructed by **Allen & Overy LLP**) for **Thales UK Ltd**

No appearance for **Mr Carr** or **Thales Pension Trustees Ltd**

Hearing date: 31 March 2020

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# Approved Judgment

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

Covid-19 Protocol: this judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be at 10 am on Wednesday 22 April 2020.

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MR JUSTICE NUGEE

## Mr Justice Nugee:

*Introduction*

1. This is an appeal against a Determination of the Pensions Ombudsman, Mr Anthony Arter, (**"the Ombudsman"**) dated 12 December 2019 in which he decided in favour of the complainant, Mr Robert Carr. Mr Carr is a pensioner member of the Thales UK Pension Scheme (**"the Scheme"**). Mr Carr's complaint concerned the rate of annual increases to be applied to his pension.

2. The answer to this question depends on the construction of a rule dating from 2000. This provided that pensions in payment should be increased on 1 April in each year, and that the rate of increase should be:

> "[1] the percentage increase in the retail prices index over the year ending 30 September in the calendar year prior to that in which the increase is due to take place subject to a maximum of 5 per cent [2] as specified by order under Section 2 of Schedule 3 of the Pension Schemes Act".

(numbers added). The reference to the Pension Schemes Act is to the Pension Schemes Act 1993 (**"PSA 1993"**), and at the time this provision was drafted the orders made under schedule 3 to that Act (used for the purposes of revaluation of deferred pensions and usually referred to as **"Revaluation Orders"**) were indeed based on the increase in the Retail Price Index (**"RPI"**) over the year ending 30 September in the previous calendar year, subject to a maximum of 5%. It did not matter therefore whether one applied the part of the rule which I have labelled [1] (**"Limb 1"**) or the part I have labelled [2] (**"Limb 2"**) as they produced the same result.

3. Revaluation Orders continued to be based on RPI up to the 2009 Order, but in mid-2010 the Government decided to switch to the Consumer Price Index (**"CPI"**) for a number of purposes, including Revaluation Orders. As is by now well known, there is a noticeable difference between RPI and CPI rates, with CPI typically being about 0.5% pa to 1% pa lower than RPI. The reasons for this do not matter in the present case (although they can be found set out in a number of cases, including a recent one of my own, *Atos IT Services UK Ltd v Atos Pension Schemes Ltd* [2020] EWHC 145 (Ch) (***"Atos"***)); the practical effect is that a pension that increases in line with CPI rates is likely to grow at a lower rate than one that increases in line with RPI rates, something that can make a significant difference to the total amount received over the lifetime of the pension; and, conversely, that if pensions under a scheme increase in line with RPI rather than CPI the liabilities of the scheme which have to be funded are correspondingly greater. In the present case I was told that the question will make about £20m difference to the liabilities of the Scheme (on a technical provisions or funding basis).

4. Once CPI started to be used for Revaluation Orders, it did matter whether one used Limb 1 or Limb 2 of the relevant rule to find the rate of increase, as Limb 1 referred to RPI and Limb 2, by cross-referring to the Revaluation Orders, referred in effect to CPI. The question of construction which arises can therefore be simply stated: is Limb 1 or Limb 2 of the rule to be given primacy? Although easy to state, the question is not however entirely easy to resolve. After some years in which the

trustee of the Scheme, Thales Pension Trustees Ltd (**"the Trustee"**), stuck with RPI, in 2016 it decided (on advice) that it ought to be giving primacy to Limb 2 and therefore switched to CPI. It did not seek to recover from pensioners what (on this view) had been overpayments, but it did freeze the level of pensions in payment until they had caught up to their correct level.

5. There is another potential consequence of giving primacy to Limb 2, although this was not the subject of any oral argument. The Trustee decided that the effect was also to incorporate by reference a cap of 2.5% rather than 5% for that part of the pension which was attributable to pensionable service from 6 April 2005, applicable only to increases applied on or after 6 April 2009. Since (as explained below) the relevant rule only applies to accruals up to 31 December 2007, and in many years the CPI figure has been under 2.5% in any event, it is likely that for most people this has only a small impact on their overall pension, and is a much less significant question than the question of using CPI in place of RPI, but it does raise some distinct issues.

6. Mr Carr, who had himself been a trustee both of a predecessor scheme and of the Scheme (strictly a director of the Trustee in the latter case), complained to the Ombudsman that the Trustee was wrong to adopt CPI and should have continued to use RPI. The Ombudsman agreed and upheld his complaint.

7. The respondents to the complaint were the Trustee and Thales UK Ltd (**"Thales UK"**), the principal employer of the Scheme. An appeal lies against a determination of the Ombudsman to the High Court on a point of law, with permission, and Thales UK now appeals and contends that on the true construction of the relevant provision the Trustee was right to adopt CPI, a question of construction being of course regarded in English law as a question of law. Permission to appeal was granted by me on 16 January 2020.

8. Thales UK appeared by Mr Nicolas Stallworthy QC, together with Ms Lydia Seymour. Mr Carr neither took part in the appeal himself nor was represented. He explained that that was because he did not wish to run a costs risk by participating: he said that for obvious reasons he accepted the Ombudsman's decision and had nothing else to contribute. The Trustee did not appear either, being content to abide by the decision of the Court.

9. I therefore only heard from Mr Stallworthy on behalf of Thales UK. The hearing was conducted, as is becoming standard practice in the present circumstances, as a remote hearing using skype for business (and electronic bundles). This proved, as it has done in other cases I have heard, a perfectly satisfactory way to hold the hearing, and I do not think that the Court's ability to test the argument and identify the true construction of the relevant provision was impaired in any way.

*Facts*

10. There was no relevant dispute of fact and the Ombudsman's Determination contains very little in the way of background facts. But I asked Mr Stallworthy to explain how the question applied to Mr Carr, and after the hearing he very helpfully sent me the relevant rules which explain the position. From these, and the other material before me, it appears that the facts are as follows.

11. Mr Carr was formerly a member of a pension scheme called the Thales Optronics Pension Scheme (**"TOPS"**). Mr Carr was also in fact a trustee of TOPS, certainly by 21 December 2007 when he was one of the trustees who executed a deed of amendment referred to below, although I was not told when he became a trustee. TOPS had been established in 1961 as the Barr & Stroud Limited Pension Scheme. By 2000 it was called the Pilkington Optronics Pension Scheme. On 31 May 2000 the then trustees adopted a replacement set of rules with effect from 1 April 1997 (**"the 2000 Rules"**). The 2000 Rules provided for a final salary pension at Normal Retiring Date (65, or 63 for some members) of the familiar type – the precise calculation was a matter of some complexity but the details do not matter and in essence it was a n/60 scheme with some additional tweaks.

12. Rule 1.11 of the 2000 Rules (**"Rule 1.11"**) concerned annual increases to pensions in payment. It provided, so far as relevant, as follows:

> "**1.11 INCREASE IN PENSIONS**
>
> (a) Subject to Part 5, the annual pension paid to a Member or Member's Beneficiaries will be increased on 1 April in each year commencing on the 1 April immediately following the date of payment of the first instalment of pension, at the rate detailed in section (b) below or such higher rate as the Trustees, with the agreement of the Company, shall from time to time decide …
>
> (b) The rate of increase to be applied in terms of section (a) shall be:-
>
> (i) in respect of the part of the Member's pension which relates to Qualifying Pensionable Service completed on or after 6 April 1997, **the percentage increase in the retail prices index over the year ending 30 September in the calendar year prior to that in which the increase is due to take place subject to a maximum of 5 per cent as specified by order under Section 2 of Schedule 3 of the Pension Schemes Act**, and
>
> (ii) in respect of the excess of the part of the Member's pension which relates to Qualifying Pensionable Service completed prior to 6 April 1997 (if any) over an amount of pension which when expressed as a weekly rate is equal to the guaranteed minimum pension, **the percentage increase in the retail prices index over the year ending 30 September in the calendar year prior to that in which the increase is due to take place subject to a maximum of 5 per cent as specified by order under Section 2 of Schedule 3 of the Pension Schemes Act**…"

(emphasis added). Rule 1.11(c) and (d) made similar provision for increases in pensions payable to Member's Dependants. The reference to Part 5 in Rule 1.11(a) is to provisions dealing with Inland Revenue limits.

13. The minutes of the trustees' meeting which adopted the 2000 Rules show that it was held in Glasgow and Rule 4.13 of the 2000 Rules provided that the rules should be construed by the law of Scotland. It was not suggested that this made any difference to the relevant approach – indeed I do not think it was mentioned before me – and since under English law, in the absence of evidence to the contrary, a foreign law is assumed to be the same as English law, I will proceed on the basis that there is no relevant difference for present purposes between Scottish and English law.

14. TOPS was amended by Deed of Amendment dated 21 December 2007. This introduced a new benefit structure on what is known as a "CARE" (career average revalued earnings) basis. This applied to all accrual on and after 1 January 2008, and the final salary section was closed to future accrual. Rule 1.11 continued to apply to the final salary benefits accrued up to 31 December 2007 but not to the CARE benefits accrued thereafter, which had their own increase rule.

15. The Scheme (that is the Thales UK Pension Scheme) was established by Definitive Deed and Rules dated 9 January 2008. A Second Definitive Deed and Rules dated 30 June 2008 replaced the entirety of the rules. It appears from its terms that the Scheme was designed, among other things, to be a vehicle into which benefits accrued under a number of predecessor schemes, including TOPS, could be transferred. Mr Carr was one of those who thereafter transferred his past service rights accrued under TOPS into the Scheme. This included his final salary benefits accrued up until 31 December 2007. The effect of certain provisions of the Second Definitive Deed, the detail of which it is not necessary to set out, is that his final salary benefits are, subject to some immaterial exceptions, to be governed by the same rules as applied under TOPS. That means that the 2000 Rules, and in particular Rule 1.11, apply to his final salary benefits.

16. Mr Carr, who was born in 1953, is now a pensioner member of the Scheme. I was told that he ceased pensionable service on 31 March 2012 and that his pension commenced on 1 April 2012, although he did not leave employment until 31 March 2018.

17. As already referred to, the annual Revaluation Orders made pursuant to sch 3 PSA 1993 had historically always been based on increases in RPI, but in 2010 Government announced that it planned to use CPI instead of RPI for, among other things, revaluation of deferred pensions. On 25 August 2010 the Trustee was given advice by its solicitors as to the implications for the Scheme. There were a number of provisions to consider, and in relation to many of them the advice was firm; in relation to Rule 1.11 however the advice was that it was a more complicated provision to interpret and not at all clear, but that the Trustee should take a cautious approach and adopt RPI.

18. Then in 2016, after Thales UK had received advice that Rule 1.11 in fact required the use of CPI (and had done since 2011), the Trustee took advice from leading counsel which was to the same effect. It therefore wrote on 31 January 2017 to pensioner members of the Scheme with final salary benefits earned under TOPS (such as Mr Carr) informing them that from April 2017 increases would be based on the statutory requirements (and hence CPI, and capped, in the case of increases taking effect after 6 April 2009, at 2.5% for post-6 April 2005 accruals) rather than RPI (and capped at 5%). It also said that because pensioners had received RPI increases when they should have received CPI increases, they had been overpaid but it had been agreed that they would not have to repay such amounts; nor would their pensions be reduced, but they would be frozen until the pensions they ought to have had caught them up.

19. The practical effect for someone in Mr Carr's position was that the RPI increases he had received on 1 April in each year since drawing his pension (1 April 2013 to 1 April 2016) were in each case higher than the CPI increases would have been, as follows:

| | RPI | CPI |
|---|---|---|
| 1 April 2013 | 2.6% | 2.2% |
| 1 April 2014 | 3.2% | 2.7%* |
| 1 April 2015 | 2.3% | 1.2% |
| 1 April 2016 | 0.8% | 0.0% |

(* capped at 2.5% for pension attributable to service between 6 April 2005 and 31 December 2007). That meant that he would receive no increase on 1 April 2017, as his cumulative increases based on RPI up to 1 April 2016 exceeded what the cumulative CPI increases up to and including 1 April 2017 (where the CPI figure was 1%) would have been.

20. Mr Carr promptly complained to the Trustee under its internal dispute resolution procedure, and when the Trustee rejected his complaint, to the Ombudsman. The Ombudsman, as already referred to, upheld his complaint in a Determination dated 12 December 2019. I will have to look at some of his reasoning below but in essence he decided that "retail prices index" in Limb 1 in its natural and ordinary meaning referred to RPI and that was therefore what the draftsman intended.

*Statutory provisions*

21. It is necessary to give some account of the relevant statutory provisions, found in PSA 1993 and the Pensions Act 1995 (**"PA 1995"**); further details can be found in the Appendix to Vos J's judgment in *Danks v Qinetiq Holdings Ltd* [2012] EWHC 570 (***"Qinetiq"***) at [76]-[102]. Both PSA 1993 and PA 1995 contain provisions designed to provide members of pension schemes with a measure of protection against price inflation. PSA 1993 concerns what is known as "revaluation", that is the increase of deferred pensions between the date a member leaves the scheme and the date his pension comes into payment. PA 1995 by contrast concerns what is known as "indexation", that is annual increases to pensions in payment.

*Revaluation of deferred pensions under PSA 1993*

22. First, PSA 1993. This was a consolidation Act which brought together a number of provisions applicable to occupational pension schemes. Part IV contains protection for early leavers, and Chapter II of Part IV (ss. 83-86) provides for revaluation of accrued pensions (in excess of guaranteed minimum pensions or **"GMPs"**), consolidating provisions originally introduced in 1985 for those leaving pensionable service on or after 1 January 1986. Specifically, s. 83 provides for revaluation of relevant benefits (in effect the accrued benefits in excess of GMPs of deferred pensioners leaving pensionable service at least a year before normal pension age), s. 84 specifies how they are to be revalued, the default position being by the "final salary method", and sch 3 contains among other things provisions explaining what the final salary method is.

23. In its original form (being the form in which it stood at 31 May 2000 when the 2000 Rules were adopted), para 1 of sch 3 provided that in the case of a person whose

pensionable service terminated on or after 1 January 1991 the final salary method was to add to the amount that would otherwise be payable an amount equal to "the appropriate revaluation percentage" of his accrued pension in excess of GMP.

24. Para 2 of sch 3 then provided:

> "**2. The revaluation percentage and the appropriate revaluation percentage**
>
> (1) For the purposes of paragraph 1 the Secretary of State shall in each calendar year by order specify a revaluation percentage for each period which is a revaluation period in relation to that order.
>
> (2) A period is a *"revaluation period"*, in relation to an order under this paragraph, if it is a period which—
>
> (a) begins with 1st January 1986 or with an anniversary of that date falling before the making of the order; and
>
> (b) ends with the next day after the making of the order which is 31st December.
>
> (3) The revaluation percentage which the Secretary of State is to specify in relation to each revaluation period is—
>
> (a) the percentage which appears to him to be the percentage increase in the general level of prices in Great Britain during the period which is the reference period in relation to that revaluation period; or
>
> (b) the maximum rate,
>
> whichever is the less.
>
> (4) The Secretary of State may estimate the percentage increase mentioned in subparagraph (3)(a) in such manner as he thinks fit.
>
> (5) For the purposes of that sub-paragraph, the reference period in relation to a revaluation period is—
>
> (a) in the case of the revaluation period beginning on 1st January 1986, the period which begins with 1st October 1985 and ends with the last day before the making of the order which is 30th September; and
>
> (b) in the case of the revaluation periods with later commencement dates, the period which—
>
> (i) begins with the last day before the commencement of the revaluation period which is 1st October; and
>
> (ii) ends with the last day before the making of the order which is 30th September.
>
> (6) For the purposes of sub-paragraph (3)(b) *"the maximum rate"*, in relation to a revaluation period, is—
>
> (a) in the case of a revaluation period of 12 months, 5 per cent.; and

(b) in any other case, the percentage that would be the revaluation percentage had the general level of prices increased at the rate of 5 per cent. compound per annum during the reference period in question.

(7) In paragraph 1 *"the appropriate revaluation percentage"* means the revaluation percentage specified in the last calendar year before the date on which the member attains normal pension age as the revaluation percentage for the revaluation period which is of the same length as the number of complete years in the pre-pension period."

25. Para 2(1) requires the Secretary of State to make an order in each calendar year. I was shown by Mr Stallworthy an example, namely the 2000 Revaluation Order (the Occupational Pensions (Revaluation) Order 2000 SI 2000/3085). The Order was made on 16 November 2000 and (by para 1(2)) came into force on 1 January 2001. The substantive provision is in para 2 which sets out in 2 columns a series of revaluation periods and the corresponding revaluation percentages, as follows:

| Revaluation period | Revaluation percentage |
|---|---|
| 1st January 1986 – 31st December 2000 | 80.1% |
| 1st January 1987 – 31st December 2000 | 74.7% |
| [etc down to] | |
| 1st January 2000 – 31st December 2000 | 3.3% |

It can be seen that the revaluation periods specified in column 1 are those required by para 2(2) of sch 3; and that for each period a revaluation percentage is specified in column 2 in accordance with the requirement in para 2(3) of sch 3. By para 2(3)(a) this is based on the percentage increase in the general level of prices in Great Britain (subject to a cap of 5% compound under para 2(3)(b)), not for the revaluation period itself but for the relevant reference period. By para 2(5) each reference period runs from the 1 October before the start of the relevant revaluation period and ends on the 30 September before the making of the Order, that is in this case 30 September 2000.

26. It is to be noted that by para 2(4) the Secretary of State may estimate the percentage increase in any way that he thinks fit. Up to and including the 2009 Revaluation Order (SI 2009/3267 made on 10 December 2009 and coming into force on 1 January 2010), the Secretary of State in fact always used RPI for this purpose, but in July 2010 the Government announced that it intended to use CPI instead, and the 2010 Revaluation Order (SI 2010/2861 made on 30 November 2010 and coming into force on 1 January 2011) was based on CPI. There is no formal evidence to this effect, but it is referred to in Vos J's judgment in *Qinetiq* at [86] and [100] and was not disputed before me. (It appears from *Qinetiq* at [101] that the Government did not revisit the calculation of inflation for any period prior to 2010 so the cumulative percentages thereafter consisted of hybrid percentages partly based on RPI and partly on CPI.)

27. By then the provisions of sch 3 had been amended to provide for a lower 2.5% cap for later accruals. I was not taken through this in any detail, but it is all set out in *Qinetiq*. The Pensions Act 2008 (**"PA 2008"**), by s. 101 and sch 2 paras 1 to 3, amended sch 3 PSA 1993. The amendments came into force on 6 April 2009. They are quite

extensive but it is not necessary to set them out in detail: the effect was that a deferred pensioner's accrued benefits attributable to pensionable service on or after 6 April 2009 were to be revalued subject to a 2.5% cap rather than a 5% cap, and the Secretary of State was required therefore to specify in the annual Revaluation Orders both a higher and a lower revaluation percentage for each revaluation period. Thus for example the 2010 Revaluation Order provided in para 2 for 3 columns, consisting of the revaluation period, the higher revaluation percentage and the lower revaluation percentage, the lower revaluation percentage only being shown for the last two revaluation periods (as a person attaining normal pension age in 2011 who was in pensionable service on 6 April 2009 could only have completed either 1 or 2 complete years in the pre-pension period), as follows:

| Revaluation period | Higher Rev % | Lower Rev % |
| --- | --- | --- |
| 1st January 1986 – 31st December 2010 | 132.9% | - |
| [etc down to] | | |
| 1st January 2009 – 31st December 2010 | 1.7% | 1.7% |
| 1st January 2010 – 31st December 2010 | 3.1% | 2.5% |

28. As explained by Vos J in *Qinetiq* at [102] the combined effect of the PA 2008 changes to sch 3 and the adoption of CPI for the calculation of inflation from 2010 meant that for deferred members reaching normal pension age after 1 January 2011, their benefits are revalued by reference to RPI in respect of complete years of deferment prior to 1 January 2010, and to CPI in respect of complete years of deferment since then, capped at 5% pa compound, or 2.5% pa compound for post-6 April 2009 accruals.

*Indexation under PA 1995*

29. Second, PA 1995. Before PA 1995 there was no obligation on pension schemes to increase pensions in payment (save to a limited extent for GMPs), although many schemes did so either on a discretionary basis or because their rules so provided. But s. 51 PA 1995, which came into force on 6 April 1997, imposed a general statutory obligation on schemes approved for tax purposes to provide pension increases on that part of a pensioner's benefits attributable to pensionable service on or after that date.

30. As originally enacted (and in the form in which it stood on 31 May 2000 when the 2000 Rules were adopted) s. 51 provided, so far as relevant, as follows:

> "**51 Annual increase in rate of pension**
>
> (1) Subject to subsection (6) this section applies to a pension under an occupational pension scheme if—
>
> (a) the scheme—
>
> (i) is an approved scheme, within the meaning of Chapter I of Part XIV of the Taxes Act 1988 (retirement benefit schemes approved by the Commissioners of Inland Revenue) or is a scheme for which such approval has been applied for under that Chapter and not refused, and

(ii) is not a public service pension scheme, and

(b) apart from this section, the annual rate of the pension would not be increased each year by at least the appropriate percentage of that rate.

(2) Subject to section 52, where a pension to which this section applies, or any part of it, is attributable to pensionable service on or after the appointed day or, in the case of money purchase benefits, to payments in respect of employment carried on on or after the appointed day—

(a) the annual rate of the pension, or

(b) if only part of the pension is attributable to pensionable service or, as the case may be, to payments in respect of employment carried on on or after the appointed day, so much of the annual rate as is attributable to that part,

must be increased annually by at least the appropriate percentage.

(3) Subsection (2) does not apply to a pension under an occupational pension scheme if the rules of the scheme require—

(a) the annual rate of the pension, or

(b) if only part of the pension is attributable to pensionable service or, as the case may be, to payments in respect of employment carried on on or after the appointed day, so much of the annual rate as is attributable to that part,

to be increased at intervals of not more than twelve months by at least the relevant percentage and the scheme complies with any prescribed requirements.

(4) For the purposes of subsection (3) the relevant percentage is—

(a) the percentage increase in the retail prices index for the reference period, being a period determined, in relation to each periodic increase, under the rules, or

(b) the percentage for that period which corresponds to 5 per cent per annum,

whichever is the lesser.

…"

31. A number of expressions in s. 51 were defined by s. 54(3), including "appropriate percentage", which was defined as follows:

> " *"appropriate percentage"*, in relation to an increase in the whole or part of the annual rate of a pension, means the revaluation percentage for the latest revaluation period specified in the order under paragraph 2 of Schedule 3 to the Pension Schemes Act 1993 (revaluation of accrued pension benefits) which is in force at the time of the increase (expressions used in this definition having the same meaning as in that paragraph)"

32. As can be seen, the effect of s. 51 was to require the post-6 April 1997 part of a pension to be increased annually by at least the appropriate percentage, this being the

revaluation percentage for the most recent revaluation period specified in the Revaluation Order then in force. Thus for an increase taking place in April 2000, the Revaluation Order then in force would be the 1999 Order and the most recent revaluation period would be 1 January 1999 to 31 December 1999. That would, as explained above, be based on the percentage increase in the general level of prices for a reference period of 1 October 1998 to 30 September 1999, capped at 5%, such increase to be estimated by the Secretary of State in such manner as he thought fit, but in practice until 2010 based on RPI.

33. However by s. 51(3) a scheme did not have to comply with the requirement to increase the relevant part of a pension by the "appropriate percentage" if it was increased at least annually by at least the "relevant percentage", the relevant percentage being the increase in RPI for a reference period determined under the rules, subject to a cap of 5%. In other words this permitted schemes to rely on their own increase rules so long as the increase met the requirements for qualifying as a relevant percentage. The practical difference between the statutory appropriate percentage and a relevant percentage specified by the rules was two-fold: (i) most obviously, it allowed schemes to specify a different reference period to that used in the Revaluation Orders (so for example the rise in the 12 months from 1 January to 31 December might be less than the rise in the 12 months from 1 October to 30 September, but a scheme that used the former as its reference period would not need to top the increase up to the higher rate in the latter which would form the basis for the appropriate percentage); (ii) less obviously, a relevant percentage had to be based on at least the rise in RPI whereas the appropriate percentage would be based on the Secretary of State's estimate in whatever manner he thought fit.

34. This second difference was less obvious because by the time PA 1995 came into force in April 1997, there had been over 10 years of Revaluation Orders, all based in fact on RPI, and the notion that the Secretary of State might use some other index was probably not something that would have occurred to most pensions practitioners. Again there was no formal evidence to this effect, but I am aware from other cases that RPI had by 1997 been the main measure of UK retail or consumer price inflation for many decades, widely used not only by Government but in many other contexts, whereas CPI was then relatively unknown, having been recently introduced for some specialised purposes connected with the European Community.

35. The Pensions Act 2004 (by s. 278) amended the provisions of s. 51 PA 1995 by lowering the cap from 5% to 2.5% for pensions attributable to pensionable service on or after 6 April 2005. It is not necessary to set out the amendments in detail: the substance was found in a new s. 51ZA which amended the definition of "appropriate percentage" such that for a pension (or part of pension) attributable to post-6 April 2005 service, the appropriate percentage would be the lesser of the revaluation percentage for the latest revaluation period specified in the Revaluation Order in force and 2.5%. At this date the 2.5% cap had not been introduced for the purposes of revaluation – as set out above (paragraph 27), this did not take place until four years later on 6 April 2009 – which means that the Revaluation Orders only gave a single revaluation percentage for each revaluation period capped at 5%, which is why s. 51ZA PA 1995 referred to the lesser of that figure and 2.5% for post-6 April 2005 accruals.

36. When PA 2008 amended sch 3 PSA 1993 to require the Revaluation Orders to specify

a higher and lower percentage rate, it also amended (by s. 101 and sch 3 para 8) s. 51ZA PA 1995 so that the appropriate percentage for post-6 April 2005 accruals now referred simply to the lower revaluation percentage for the latest revaluation period specified in the Revaluation Order in force. This did not change the substantive effect of the provision, and s. 51ZA remains in this form today. The current position therefore is that the annual increases required by s. 51 PA 1995 are capped at 5% for pre-6 April 2005 accruals and at 2.5% for post-6 April 2005 accruals.

37. Since the appropriate percentage cross-refers to the revaluation percentages specified in the Revaluation Orders, the effect of the switch to CPI for the purposes of revaluation in 2010 has the effect that the increases required by s. 51 PA 1995 have themselves been based on CPI rather than RPI since the 2010 Revaluation Order.

*Are any of the increases required by Rule 1.11 to be capped at 2.5%?*

38. Although it is very much a subsidiary question, and logically only arises if the main question is answered in Thales UK's favour, I propose next to consider whether there was any basis for the assertion made in the Trustee's letter of 31 January 2017 that:

> "In addition [to being based on CPI since January 2011] the maximum increase required by the statutory provisions reduced from 5% to 2.5% for pensions attributable to pensionable service on and from 6th April 2005. In the case of TOPS, this change was applicable to pension increases applied on and from 6th April 2009."

In practical terms this would affect the pension increase due on 1 April 2014 where the CPI figure for the 12 months to 30 September 2013 was 2.7% (paragraph 19 above); and also I believe the pension increase due on 1 April 2018 where the corresponding figure was 3%.

39. It is not clear if the point is persisted in: I heard no oral argument on it, and it is not raised as a distinct issue in Mr Stallworthy's written submissions. But there is a reference to it in a footnote, and it has not been expressly abandoned, and I think it would be helpful for me to consider it.

40. The way in which the point is put in Mr Stallworthy's written submissions is that any change to the indexation provisions has resulted from changes to the surrounding legislation, and there is then a footnote referring, by way of example, to the amendments to PA 1995 reducing the maximum appropriate percentage for post-6 April 2005 accruals from 5% to 2.5% pa.

41. On analysis, I do not think the Trustee can have been right on this point. Had Rule 1.11 cross-referred to the appropriate percentage as specified in s. 51 PA 1995, then one could see the force of the argument, not least because the 2000 Rules contain an express provision that reference to any part or section of an Act includes any statutory modification of it. But Rule 1.11 contains no reference to s. 51 (or indeed to PA 1995 at all). Instead Limb 2 cross-refers to Revaluation Orders made under PSA 1993 as follows:

> "as specified by order under Section 2 of Schedule 3 of the Pension Schemes Act."

42. Even if one assumes that Thales UK is right that Limb 2 has to be given primacy over Limb 1, this therefore only takes one to the relevant Revaluation Order. Until 2009, the Revaluation Orders only contained one relevant figure, namely the revaluation percentage for the latest revaluation period, which was capped at 5%. It is true that the 2009 and subsequent Revaluation Orders contain two figures, namely the higher and lower revaluation percentages. But the effect of the amendments made by PA 2008 is that the lower revaluation percentage is only applicable to accruals post-6 April 2009. I do not see how it can be treated for the purposes of Rule 1.11 as applicable to post-6 April *2005* accruals, something found only in the indexation provisions in PA 1995, and not in the revaluation provisions in PSA 1993. But of course if the effect of Limb 2 is to incorporate a 2.5% cap only for post-6 April 2009 accruals, it has no operation at all, as Rule 1.11 only applies to the final salary benefits under TOPS and not to the CARE benefits, and final salary accrual ceased in TOPS on 31 December 2007, so there are no post-6 April 2009 accruals.

43. I conclude therefore that none of the increases required by Rule 1.11 is subject to a 2.5% cap, whatever the answer to the main question.

44. Before leaving the question of the 2.5% cap, it is worth noting that it does neatly illustrate that the choice between Limb 1 and Limb 2 is not a choice between a scheme-specific provision in Limb 1 and the default statutory rules in Limb 2. The default statutory rules are those set out in s. 51 PA 1995, but as the above discussion shows, Limb 2 does not incorporate or cross-refer to those. Instead it cross-refers to the Revaluation Orders under PSA 1993. This is a point of some significance to which I return below.

*Limb 1 or Limb 2 – Analysis*

45. Having cleared out of the way that subsidiary point, I can now consider the main question. Mr Stallworthy advanced his argument under 7 Grounds of Appeal in which he criticised various aspects of the Ombudsman's reasoning. But he recognised that it is not enough for him to point to suggested flaws in the reasoning; he also needs to put forward a positive case as to why his suggested construction is to be preferred. I propose in the circumstances to give my own analysis of the question of construction before turning to the specific criticisms made by Mr Stallworthy of the Ombudsman's Determination.

46. The difficulty of construction in the present case is not caused by any ambiguity in the meaning of the words used. Each Limb of Rule 1.11 is perfectly comprehensible in itself: Limb 1 requires one to ascertain at each 1 April the increase in RPI for the 12 months to the previous 30 September, and then cap it if necessary at 5%. The directions are clear and unambiguous. Limb 2 requires one by contrast to look at the percentage specified in a Revaluation Order. It is true that there are numerous Revaluation Orders and each contains a number of revaluation percentages but neither of these points causes any difficulty as it is obvious from the context that the reference is to the latest Revaluation Order, and the percentage for the last revaluation period, so that for example for the increase due on 1 April 2011 one would look to the 2010 Revaluation Order and identify the revaluation percentage for 1 January 2010 to 31 December 2010 (itself based on the increase in prices from 1 October 2009 to 30 September 2010). So there is no difficulty in understanding the words in either Limb.

47. The sole source of difficulty is that since the April 2011 increase the two Limbs have been inconsistent. There was always, as Mr Stallworthy said, a latent inconsistency between them, as it was never necessarily going to be the case that they would produce the same answer, albeit that there was no actual inconsistency so long as the Revaluation Orders were based on RPI. The question is how this inconsistency is to be resolved.

48. The principles applicable to the construction of written instruments in general, and the rules of pension schemes in particular, have been considered in a number of well-known recent cases, including a series of cases in the Supreme Court. It is not necessary to refer to them in detail although they are very familiar. What I take from them in particular is that there are a number of interpretive tools available to the Court, and that the modern process of construction is a unitary exercise in which the extent to which each tool will assist the Court will vary according to the circumstances (*Wood v Capita Insurance Services Ltd* [2017] UKSC 24 at [12]-[13] per Lord Hodge JSC); and that the circumstances in which the rules of pension schemes operate make it appropriate for the Court to give weight to textual analysis (*Barnardo's v Buckinghamshire* [2018] UKSC 55 (***"Barnardo's"***) at [14]-[16], again per Lord Hodge JSC).

49. I will start therefore with a natural and ordinary reading of Rule 1.11. There is admittedly nothing which clearly and unambiguously signals which Limb the draftsperson regarded as taking precedence in the event of inconsistency. The inference I draw from this is that it did not occur to him or her that the two limbs might diverge in practice, because if it had, one would have expected a clear preference for one or other to have been included in the rule. Nevertheless, I consider that the natural and ordinary reading of Rule 1.11 gives primacy to Limb 1.

50. It is not always easy to articulate with precision why one reading of a disputed phrase seems more natural and ordinary than another, as the way in which language strikes a reader as having a natural and ordinary meaning is an accumulation of experience of how language is ordinarily used, but I will try and tease out why I take this view.

51. Rule 1.11(a) provides that pensions:

> "will be increased on 1 April in each year … at the rate detailed in section (b) below."

This therefore sets up an expectation that sub-paragraph (b) will detail the rate. When one comes to Rule 1.11(b) it duly provides that:

> "the rate shall be…"

Reading on, after identifying the relevant part of the pension (in Rule 1.11(b)(i) for example that relating to Qualifying Pensionable Service post-6 April 1997) one comes to Limb 1:

> "the percentage increase in the retail prices index over the year ending 30 September in the calendar year prior to that in which the increase is due to take place subject to a maximum of 5 per cent"

Pausing there, this is a detailed, clear and unambiguous statement of the rate. It is

complete by itself and does not need further exposition. In grammatical structure, the provision so far is in the form "The rate shall be X" where X identifies the rate to be used.

52. Limb 2 then follows in these terms:

> "as specified by order under Section 2 of Schedule 3 of the Pension Schemes Act"

What is the function of these words? They are not there to set up a competing rival rate; they are there to tell you something else about the rate that has already been identified, namely that you will find it specified in the appropriate Revaluation Order. In grammatical terms it seems to me that Rule 1.11(b) in effect provides "The rate shall be X, and here is some more information about X". In other words, the two Limbs are not doing the same thing: Limb 1 is identifying the rate, Limb 2 is describing an attribute of the rate that has been so identified.

53. In these circumstances if one asks what rate is "detailed in section (b)", my answer is that the rate detailed in section (b) is that set out in Limb 1, not that referred to in Limb 2. This is not because Limb 1 is in fact more detailed than Limb 2 (although this is a noticeable feature of the rule) but because Limb 1 tells you what the rate is, whereas Limb 2 tells you something about that rate (where to find it). On this basis, if, as has happened, you can no longer find that rate specified in the Revaluation Orders, it does not take away from the fact that the rate that has been detailed by sub-paragraph (b) is that identified in Limb 1.

54. This was I think in effect the view taken by the Ombudsman in his Determination. At [37] he said:

> "I consider that there is nothing modifying, altering or qualifying the words "retail prices index" or the 5% per cent cap. So I have construed the words in their ordinary and natural meaning. As a matter of common sense, since the draftsman expressly used the words "retail prices index", I consider that that is the index by reference to which he intended pensions in payment to increase."

At [50] he expressed the view that reference to the Revaluation Order was:

> "simply in order to enable the reader to ascertain the percentage increase in RPI that applied in any given year."

At [52] he said that he considered the word order to be relevant:

> "Had the intention of the draftsman been to provide increases only by reference to the Orders, I consider that the more natural way of drafting Rule 1.11(b) would have been to refer to the Order first and then to follow it with an explanation of what index currently applied concerning the Order."

He repeated this at [62]:

> "If the intention had been to apply the Order and also to explain how the figure contained in the Order had been calculated, then as I said, the natural and logical way of doing that would have been to have referred to the Order first and then to provide the explanation of the calculation behind the figure contained in the Order."

I agree. The position would have been very different if the rule had provided something along these lines:

> "The rate shall be … that specified in the latest Revaluation Order, namely the rise in RPI over the 12 months to the previous 30 September subject to a maximum of 5%"

A rule in such a form would have started by identifying the rate as that specified in the Revaluation Order, and then gone on to say something else about that rate. That on its natural and ordinary meaning would have given primacy to the cross-reference to the Revaluation Order. By contrast the actual wording of the rule in my view gives primacy to the detailed identification of the rate in Limb 1.

55. The natural and ordinary meaning of the words is only a starting point, and only one tool, in the process of construction. I will therefore go on to consider whether there are any countervailing considerations. But this is not a case such as *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 where one answer rather than another makes more commercial sense, or, to pick up the well-known expression of Millett J in *re Courage Group's Pension Schemes* [1987] 1 WLR 495 at 505, gives more reasonable and practical effect to the scheme. Whichever answer is given (RPI or CPI) the provision is workable and practical and does what it is plainly intended to do, which is to provide protection against inflation to pensioners, and (in the case of post-6 April 1997 accruals) to comply with the statutory requirements.

56. I will say straightaway that despite Mr Stallworthy's eloquent submissions, I am not persuaded that there is in the end any ground for departing from what I consider to be the natural and ordinary interpretation of Rule 1.11, and that in my view Limb 1 is to be given primacy. He argued his case under a number of heads (not entirely in the same order as the Grounds of Appeal) and I will take them in the order in which they were argued.

*Need to give weight to Limb 2 (Ground 1)*

57. Mr Stallworthy's first point was that the Ombudsman failed to give any adequate weight to the express wording of Limb 2. He said that any reader of Rule 1.11 would be bound to ask what Limb 2 was doing: if the rate was simply intended to be that in Limb 1, Limb 2 was otiose. In his submission, Limb 1 was included as a convenient summary of the statutory provisions and the reference to the statutory provision in Limb 2 was intended to be primary.

58. I do not think this argument takes matters any further. On any view one does not need both Limbs, as either is sufficient to identify the rate. So long as they both produce the same result, having both of them is duplicative and unnecessary but does not matter; but as soon as they diverge, having both limbs is not only unnecessary, but is worse because it is potentially misleading. This is true whichever Limb one gives primacy to. If one gives primacy to Limb 1, then Limb 2 is indeed otiose. But it is also misleading because from 2010 the Revaluation Orders do not in fact specify the rise in RPI over the 12 months to the previous 30 September, and anyone who took the figure from the Revaluation Order would be mistaken. But it is equally true to say that if one gives primacy to Limb 2, then Limb 1 is both otiose and misleading. It is no longer a convenient summary of what Limb 2 provides, but a deeply inconvenient one as it would be wrong. To my mind all that can be taken from this is that the

draftsperson did not appreciate, or did not think through, the potential inconsistency between the two Limbs under which as soon as they diverged one was bound to be right and the other both unnecessary and positively misleading. I do not see that it points towards one Limb rather than the other having primacy.

59. Mr Stallworthy said that where there were 2 halves to a clause, one cross-referring to legislation and the other summarising the effect of the legislation, primacy should be given to the former. I do not think there can be any general principle to that effect. I think it all depends on the wording of the clause in question. I entirely accept that if one had a clause which said:

> "The rate shall be that specified in the latest Revaluation Order (RPI subject to a maximum of 5%)"

the natural interpretation would be that the part in brackets was simply seeking to summarise the substantive effect of the cross-reference; but if one had a clause which said:

> "The rate shall be the rise in RPI over the 12 months to the previous 30 September, subject to a maximum of 5% (as specified in the latest Revaluation Order)"

the converse would to my mind be the case. Rule 1.11 is much closer to this formulation than the other.

*Construction in favour of beneficiaries – Ground 5*

60. Mr Stallworthy criticised the Ombudsman for placing reliance on the *contra proferentem* rule. At [38] of the Determination, the Ombudsman referred to the *contra proferentem* rule and said that it applied to trusts derived from a contractual and commercial context, which included pension schemes. Mr Stallworthy referred me to the treatment of the rule in *Lewison, The Interpretation of Contracts* (6th edn, 2015) at §7.08 and in particular to a number of statements to the effect that the rule is one of last resort: see eg *Macey v Qazi* (CA, Times 13 Jan 1987) and *Sinochem International Oil (London) Co Ltd v Mobil Sales & Supply Corp* [2000] 1 Ll Rep 339. He also referred me to *Barnardo's* at [28] where Lord Hodge JSC said (in the context of whether a rule of a pension scheme permitted CPI to be substituted for RPI):

> "The court must construe the scheme without any preconceptions as to whether a construction should favour the sponsoring employer or the members."

In the light of these statements, Mr Stallworthy submitted that it is wrong to reach for the *contra proferentem* rule when first considering the construction of a disputed provision, although he accepted that it could be used as a tie-break as a last resort.

61. That seems to me to be probably right. In any event it is not obvious that the *contra proferentem* rule would really assist in resolving the question in the present case, as it is a general principle that in English law a written instrument has a single meaning that is fixed when the instrument is executed. At the time the 2000 Rules were adopted, it could not be said whether giving Limb 1 or Limb 2 primacy would be likely to favour the employer or the members. The fact that as it turns out Government has chosen to reduce the protection to members (and so it is now in their interest to give Limb 1 primacy) is certainly not something that could have been

foreseen in 2000; indeed the trend of legislation and regulation had for a long time been the other way. So if looked at on the day the 2000 Rules were executed, I do not think anyone could have said that one interpretation rather than the other would be in the interests of members.

62. I am rather doubtful therefore if the Ombudsman was justified in placing any reliance on the *contra proferentem* rule. None of this however means that his actual decision was wrong.

*Need to construe against the legislative background – Ground 2*

63. Ground 2 criticises the Ombudsman for failing to give adequate weight to the legislative background. Mr Stallworthy pointed out that s. 51 PA 1995 gave the framer of a pension scheme a choice between opting for their own bespoke increase rule (by adopting a "relevant percentage") or not doing so in which case the statutory default of "appropriate percentage" applies. He said that there was no need for a scheme to "hardwire" an indexation provision into its rules unless it was seeking to adopt a relevant percentage, and the usual reason for doing that was because the scheme wished to use a different basis period for calculating the annual increases, but that was not the case here.

64. I do not think any weight can be placed on this point for two reasons. First, it was, and is, in my experience not at all uncommon for those drafting rules to incorporate the effect of statutory provisions into their rules, even if the statutory provisions are overriding and do not need to be reproduced. Whether a drafter did or not was largely a question of personal drafting style. So quite apart from the schemes which deliberately adopted a different (relevant) percentage, even those schemes which were happy to adopt the statutory appropriate percentage might or might not seek to reproduce the effect of the statutory requirements in their rules. One scheme might content itself with a rule which said that pensions accrued after 6 April 1997 should be increased as required by s. 51 PA 1995; another scheme might expressly provide that pensions accrued after 6 April 1997 should be increased by the rise in RPI over the 12 months to the previous 30 September, subject to a cap of 5%, not as the deliberate adoption of a different relevant percentage, but simply as an attempt to reproduce what was understood to be the practical effect of the statutory requirements. It was I think usually a matter of happenstance which technique was adopted, and I doubt most drafters thought it made any practical difference at all. It was only once CPI was adopted by the Government in place of RPI that it could make a difference because schemes which simply cross-referred to the statutory requirements of s. 51 PA 1995 found that their indexation provisions tracked the Government's switch to CPI, whereas those that had expressly referred to RPI in their rules did not. But that was I suspect very often just a fortuitous effect of the drafting technique adopted rather than any conscious decision.

65. None of this however helps to resolve the question in the present case: I am quite content to assume that whoever drafted the 2000 Rules was seeking to reproduce the effect of the statutory requirements, but this does not to my mind assist in determining whether the wording in fact adopted was effective to give primacy to the reference to RPI in Limb 1 or to the cross-reference to Revaluation Orders in Limb 2.

66. The second point is one that I have already referred to in the context of the 2.5% cap

(paragraph 44 above), namely that in fact the choice between Limb 1 and Limb 2 is not between a scheme-specific increase rule and a cross-reference to s. 51 PA 1995, as Rule 1.11 does not cross-refer to PA 1995. Instead it cross-refers to the Revaluation Orders. The practical effect of that is that when the indexation requirements in s. 51 PA 1995 diverged from the revaluation requirements in PSA 1993 (as they did between 6 April 2005 and 6 April 2009 when the former, but not the latter, were capped at 2.5%) Limb 2 of Rule 1.11 referred to the latter. That illustrates that neither Limb in fact incorporates the statutory requirements of s. 51 PA 1995, and undermines the argument that Limb 2 should be given primacy because the drafter did not intend to adopt a relevant percentage and intended to abide by the appropriate percentage. Whatever he or she in fact intended, the way in which Rule 1.11 is worded does not on any view precisely track s. 51 PA 1995. To my mind that shows that there is no particular reason to assume that the wording has the effect of giving primacy to the cross-reference to the Revaluation Orders in Limb 2 in preference to the specific provision in Limb 1.

*Reliance on word-order – Ground 6(b)*

67. Mr Stallworthy criticised the Ombudsman for placing inappropriate weight on the word order. The Ombudsman at [52] of his Determination referred to the fact that in *Barnardo's* Lord Hodge JSC at [21] placed some reliance on the word order of the provision there under consideration, and then continued as cited above (paragraph 54). Mr Stallworthy said that *Barnardo's* was a very different case where the word order suggested a sequence of events.

68. Rule 1.11 is obviously not on all fours with *Barnardo's*, and in particular there is no question here of the rule referring to a sequential process, but I do not think the Ombudsman made the mistake of thinking that it was. All he was saying was that word order can affect meaning, something that is self-evidently the case (as indeed Mr Stallworthy accepted), and that in this case the word order is of some assistance. For the reasons that I have already given (paragraph 54 above), I agree with the Ombudsman and do not think he fell into error in this respect.

*Echoing of statutory language – Ground 6(a)*

69. Mr Stallworthy also criticised the Ombudsman for not giving any, or adequate, weight to the fact that Rule 1.11(b) echoes the statutory language. He said that Limb 2, with its reference to:

> "specified by order under Section 2 of Schedule 3 of the Pension Schemes Act"

was reminiscent of the definition of appropriate percentage in s. 54(3) PA 1995 which referred to:

> "specified in the order under paragraph 2 of Schedule 3 to the Pension Schemes Act 1993".

And Limb 1, with its reference to:

> "the percentage increase in the retail prices index over the year **ending 30 September** in the calendar year prior to that in which the increase is due to take place subject to a **maximum of 5 per cent**"

picked up the provisions of sch 3 PSA 1993, specifically para 2(3)(b):

> "the **maximum** rate"

and para 2(5)(b)(ii):

> "**ends** with the last day before the making of the order which is **30th September**".

70. I do not think this criticism of the Ombudsman is justified. The drafter may or may not have taken the language from the statutory provisions referred to. But I do not see that this drives an interpretation of Rule 1.11 which gives primacy to Limb 2. The one thing that is clear is that the drafter has not simply provided, as he or she might have done, that pensions should be increased by the appropriate percentage as defined in s. 54(3) PA 1995. Had that been done, there would have been no difficulty. The difficulty is that instead of doing that, the drafter has drafted an increase rule with two potentially inconsistent Limbs. Even if it could be shown that one, or even both, Limbs derived to some extent from statute, it would not follow that the drafter intended Limb 2 with its cross-reference to statute to take precedence over Limb 1.

*Non-use of defined term "Index" – Ground 3*

71. Nor do I think there is anything in Mr Stallworthy's next point. This is that the 2000 Rules in fact contained a definition of the defined term Index which was as follows:

> " "Index" means the Government's Index of Retail Prices."

This definition was used in Part 5 of the 2000 Rules which set out the Inland Revenue limits on benefits. It was not however used in Rule 1.11, as it could have been.

72. I agree, but I do not see that anything flows from this. There is no suggestion that in Limb 1 "the retail prices index" means anything other than RPI. I do not see that the fact that the drafter had available, but did not in fact use, a defined expression, somehow weakens the effect of Limb 1. If instead of "the retail prices index" the drafter had used "the Index" in Rule 1.11, what difference would it have made? So far as I can see, none.

*Royal Mail v Evans – Ground 4*

73. Mr Stallworthy said that where there were two inconsistent provisions, one of them had to be "read down" to make them fit together, citing *Royal Mail Group Ltd v Evans* [2013] EWHC 1572 (Ch) (***"Royal Mail"***) as an illustrative example. He accepted that the wording in that case was plainly different, and that it could not be decisive, referring to what I had said (citing the classic statement of Sir George Jessel MR in *Apsden v Seddon* (1874-75) LR 10 Ch App 394 at 397) in *Atos* at [2] about it not being possible on questions of construction to obtain much if any assistance from referring to other authorities on other documents. Nevertheless he suggested that it was a helpful analogy showing how a Court of construction can read down a provision to make it fit with the rest of the instrument.

74. I do not think it is necessary for the purpose of this judgment to discuss *Royal Mail* in detail. The difficulty in that case arose in relation to a provision that provided that certain members of a pension scheme:

> '**who had been entitled to have their pension in payment or in deferment increase without limitation in line with the retail prices index** shall continue to be so entitled under this Scheme" (emphasis added)

(see at [4], [6] and [42]). There were strictly speaking no members who had been entitled to have their pensions increase in line with RPI, as the relevant members had been entitled to have their pensions increase in line with public sector schemes. Public sector schemes enjoyed full index-linking by reference to the general level of prices but (in much the same way as with statutory revaluation) this was a matter for the Secretary of State to estimate as he thought fit, and although RPI had been used until 2010, the Government had then started using CPI.

75. Asplin J accepted a submission on behalf of Royal Mail that the purpose of the words which I have emphasised was to identify the relevant class of members and that the substantive effect of the provision was to continue their entitlement not to give them a new one: see at [78]-[82]. That meant that although the reference to the relevant members' previous entitlement was not strictly accurate, it could be read as shorthand for their actual entitlement.

76. One can see certain similarities between *Royal Mail* and the present case. But there are also significant differences. The deciding point in *Royal Mail* was that the Court accepted that the provision was a "grandfathering" provision designed to continue an existing entitlement not create a new one. Once seen in that light, it was not difficult to conclude that the words I have emboldened were intended to identify a class of members, not confer an entitlement. It is well established that once it is concluded that an instrument is intended to refer to a particular person or thing, an inaccurate description of that person or thing will not invalidate the reference, this principle being traditionally expressed in the Latin maxim *"falsa demonstratio non nocet cum de corpore constat"*, which can be translated as "a misdescription does no harm": see generally *Lewison* at §9.05.

77. The problem in the present case is a rather different one, which is to identify which of two inconsistent provisions is to prevail. It is more reminiscent of the statement cited in *Lewison* from Lord Parker of Waddington in *Eastwood v Ashton* [1915] AC 900 at 912:

> "It is clear, however, that this maxim [ie *falsa demonstratio*] is useless unless and until the Court has made up its mind as to which of two or more conflicting descriptions ought under the circumstances to be considered the true description. When this is done the false description may, of course, be disregarded, and the maxim merely calls attention to this obvious result."

Thus once the Court has decided which of Limb 1 or Limb 2 is to be given primacy, the other Limb can be disregarded. I accept therefore that if on its true construction Limb 2 were to be given primacy, Limb 1 could be read down as an inaccurate summary of what Limb 2 provides. But equally if Limb 1 is given primacy, Limb 2 can be rejected as inaccurate (or to be more precise as no longer accurate after 2010). But this does not to my mind assist in determining which is to be given primacy.

*Dynamic interpretation – Ground 7*

78. Mr Stallworthy said that the rules should be given a dynamic or mobile interpretation

(see *Lewison* at §5.15). He relied in support of this principle on the fact that a pension scheme is:

> "designed to operate in the long term, defining people's rights long after the economic and other circumstances, which existed at the time when it was signed, may have ceased"

(*Barnardo's* at [14] per Lord Hodge JSC).

79. I have no problem with the principle, and I accept that if Limb 2 were to be given primacy, the effect would be to cross-refer to Revaluation Orders as they are from time to time. But again I do not see that it assists on the prior question of which Limb is to be given primacy. One is after all not here talking about a provision which concerns future accrual. All the benefits to which Rule 1.11 applies are past service benefits – indeed all were accrued before 2008. It is not self-evident that the principle that a pension scheme should be interpreted in such a way as to enable it to be adapted to meet new circumstances has any particular resonance when considering the rights of members who earned their benefits by providing service many years ago.

*Inconsistent provisions*

80. Finally, Mr Stallworthy, at my request, put before me statements from the textbooks as to the principles by which inconsistent provisions are to be reconciled.

81. *Chitty on Contracts* (33rd edn, suppl) at §13-070 states as follows:

> "Where the different parts of an instrument are inconsistent, effect must be given to that part which is calculated to carry into effect the purpose of the contract as gathered from the instrument as a whole and the available background, and that part which would defeat it must be rejected. The old rule was, in such a case, that the earlier clause was to be received and the later rejected; but this rule was a mere rule of thumb, totally unscientific, and out of keeping with the modern construction of documents."

82. *Lewison* at §9-08 also refers to the old rule that the earlier of two inconsistent provisions takes precedence, the later provision being rejected as repugnant, but, in contrast to *Chitty*, suggests that it is still applicable, although only as a last resort, citing *Joyce v Barker Bros (Builders) Ltd* (1980) 40 P&CR 512 (Vinelott J) and *Peabody Trust Governors v Reeve* [2008] EWHC 1432 (Ch) (Mr Gabriel Moss QC).

83. I am very grateful to Mr Stallworthy for bringing these passages to my attention. Fortunately I do not need in the present case to reconcile the divergent views they give, as for the reasons I have sought to express I consider that Limb 1 of Rule 1.11 is to be given primacy in any event. None of the arguments that Mr Stallworthy has so carefully put before me persuades me to depart from what I consider to be the natural and ordinary effect of the language of the Rule which is that the rate specified by Rule 1.11(b) is that set out in Limb 1, namely RPI capped at 5%.

*Conclusion*

84. In my judgment the Ombudsman came to the right conclusion on the question of construction and I will dismiss the appeal.