Neutral citation number [2025] EWHC 11 (Ch)

IN THE HIGH COURT OF JUSTICE **CLAIM NO. PE-2024-000032**

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

BUSINESS LIST (ChD)

PENSIONS

In the matter of the Arcadia Group Pension Scheme and the Arcadia Group Senior Executives Pension Scheme

MASTER MARSH (sitting in retirement)

Rolls Building

Fetter Lane

London EC4A 1NL

BETWEEN:

ARCADIA GROUP PENSION TRUST LIMITED

Claimant

and

JOANNE TERESA SMITH

Defendant

JUDGMENT

Hearing 26 November 2024

Judgment delivered remotely on 3 February 2025

1. The claimant is the trustee of the Arcadia Group Pension Scheme (“the Staff Scheme”). The principal employer, Arcadia Group Limited (“Arcadia”), now AGL Realisations Limited, went into administration on 30 November 2020. On 9 April 2022 it went into liquidation.

2. Arcadia is also the principal employer of what has been described as a ‘sister scheme’, the Arcadia Group Senior Executives Pension Scheme ("the Executive Scheme") of which AG Senior Executives Pension Trustee Limited is the trustee.

3. Both the Staff Scheme and the Executive Scheme are in the course of being wound up.

4. At the disposal hearing of this Part 8 claim on 26 November 2024 I made declarations that:

(i) The claimant would be acting within the scope and purpose of the amendment power of the Staff Scheme in amending its rules so as to permit a merger of the Executive Scheme into the Staff Scheme.

(ii) The Claimant's proposed exercise of the amendment power, and thereafter the exercise of the amended power to effect a merger of the Executive Scheme into the Staff Scheme, is approved.

5. This judgment provides my reasons for granting this relief.

6. Nicolas Stallworthy KC and Charlotte Elves appeared for the claimant and Richard Hitchcock KC appeared for the defendant. I am grateful to counsel for their careful and measured submissions, both written and oral.

7. The Staff Scheme was established in 1991 to simplify and amalgamate the various pension schemes within the group which then existed. Its first Definitive Deed and Rules was executed in 1994. The Staff Scheme was closed to new members with effect from 31 July 2005. This was reflected in a Deed of Variation with a new Deed and Rules dated 26 March 2009. A further Deed of Variation dated 29 December 2010 adopted a new Trust Deed and Rules (“the 2010 Trust Deed and Rules”) to replace the 2009 Trust Deed and Rules which ended the accrual of benefits for members with effect from 1 January 2011. Amendments to the Executive Scheme to close it to new members and to end accrual mirrored the changes to the Staff Scheme.

8. The proceedings come about because the claimant wishes to amend the 2010 Trust Deed and Rules so as to be able to accept a bulk transfer-in to the Staff Scheme of the beneficiaries, assets and liabilities of the Executive Scheme on an unsegregated basis. But for the fact that the claimant intends to use the power to amend the Staff Scheme at a time when both it and the Executive Scheme are in the course of being wound up and Arcadia is in liquidation, the proposal would be uncontroversial. However, in light of the late stage at which the power is to be exercised, the claimant considered it was appropriate to seek confirmation that there was no fetter on the power to amend and its use was for a proper purpose; and given that the decision can be characterised as a momentous one, the court's approval was also sought.

9. The defendant was appointed by an order of Master Bowles (sitting in retirement) made pursuant to CPR rule 19.9(2) to represent all beneficiaries of the Staff Scheme in whose interests it might be to oppose the relief sought. She has had the benefit of independent specialist legal advice from Sacker & Partners and Mr Hitchcock. She concluded with the benefit of their advice that there are no realistic grounds upon which to oppose the claim. In accordance with the practice referred to in the Chancery Guide at 26.28 the defendant has been permitted to file a confidential opinion produced by Mr Hitchcock explaining why the claim is not opposed. The opinion has not been seen by the claimant. In addition, the court had the benefit, after hearing Mr Stallworthy's submissions, of a hearing in private to consider Mr Hitchcock's advice.

10. In *Re Egerton Trust Retirement Benefit Scheme*, which is quoted by Hart J in *Public Trustee v Cooper* [2001] WLTR 901, Robert Walker J (as he then was) categorised the different types of application trustees may wish to make seeking the assistance of the court. This claim concerns categories (1) and (2) which were explained by Robert Walker J in the following way:

> "(1) The first category is where the issue is whether some proposed action is within the trustees' powers. That is ultimately a question of construction of the trust instrument or a statute or both. The practice of the Chancery Division is that a question of that sort must be decided in open court and only after hearing argument from both sides. It is not always easy to distinguish that situation from the second situation that I am coming to …

> (2) The second category is where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers … In such circumstances … they think it prudent and the court will give them their costs of doing so to obtain the court's blessing on a momentous decision. In a case like that, there is no question of surrender of discretion and indeed it is most unlikely that the court will be persuaded in the absence of special circumstances to accept the surrender of discretion on a question of that sort, where the trustees are prima facie in a much better position than the court to know what is in the best interests of the beneficiaries."

11. Although Robert Walker J indicated that *Public Trustee v Cooper* categories (1) and (2) are not always easy to distinguish, there is a clear difference in the role of the court in this case. The first declaration made by the court determines a binary issue, namely whether the proposed exercise of powers by the claimant to amend the Staff Scheme is within the scope and purpose of the claimant's powers under the scheme. The exercise of that power to amend to enable a merger to take place at a time when the schemes are in the course of being wound up is unusual. The second declaration provides approval to the exercise of the power on the basis that the decision is a 'momentous' one.

12. If the court is asked only to consider a category (2) application, it is inevitable that the court will wish to be satisfied that as a preliminary point the proposed exercise of power is within the scope of the trustee's powers and for a proper purpose. However, category (2) is more concerned with the process of exercising the powers. The court is not concerned with whether the decision is objectively 'correct' (in the sense that it is a decision the court would have made if asked) but rather whether the decision can be objectively justified and whether a proper process of decision making has been followed. Richard Smith J recently summarised the role of the court in a category (2) application in *Brass Trustees Limited v Goldstone* (Re Biwater Retirement and Security Scheme) [2023] EWHC 1978 (Ch) at [50]:

> "The role of the court in a 'blessing' application such as this is limited, namely to see that the proposed exercise of the trustees' powers is lawful and within the power, and that it does not infringe the trustees' duty to act as ordinary, reasonable and prudent

trustees might act, ignoring irrelevant, improper or irrational factors. In doing this, it requires to be satisfied only that:

(a) The trustees have in fact formed the opinion that they should act in the way for which they seek approval;

(b) The opinion of the trustees was one which a reasonable body of trustees, correctly instructed as to the meaning of the relevant clause, could properly have arrived at – including taking into account relevant considerations and ignoring irrelevant considerations; and

(c) The opinion was not vitiated by any conflict of interest under which any of the trustees was labouring."

Background

13. The court was provided with a substantial body of evidence from Alda Andreotti who is chair of the claimant and Fiona Wenlock who is a director of the claimant. In addition to providing evidence of the background and the process by which the claimant made a decision in principle to amend the rules of the Staff Scheme to permit a merger with the Executive Scheme, they explain how the two schemes have been operated in tandem with each other.

14. The two schemes have been described in the evidence and in submissions as 'sister' schemes. That is not a term of art but is a useful way to see them. The two schemes have a common principal employer. Other indicators of their close relationship are:

(i) There is a material overlap in the composition of their respective boards of directors. The decision in principle taken by the claimant's board of directors was the decision of Fiona Wenlock, who had been re-appointed to the board for this purpose, because all the other directors are also directors of the corporate trustee of the Executive Scheme.
(ii) They share the same administrators and professional advisors.
(iii) The trustees have adopted a common approach to the management of the schemes and meetings of their boards were usually joint meetings unless a particular decision required a scheme specific meeting to be organised.

(iv) They have had a joint investment and funding committee and a joint approach to funding. One aggregate pension contribution was negotiated from Arcadia and then apportioned between the schemes by the Trustees who sought, based upon actuarial advice, to achieve parity between the schemes.

(v) On promotion within the Arcadia Group employees have transferred from the Staff Scheme to the Executive Scheme. Approximately 50% of members of the Executive Scheme were transferred from the Staff Scheme.

(vi) Both schemes were closed to new membership in 2005 and to future accrual in 2010.

15. The attitude of the boards of directors is helpfully illustration by Fiona Wenlock in her witness statement where she says:

> "21. Throughout my time as a Trustee director, there has always been a sense of 'togetherness' and a shared goal of the directors of both Trustees of wishing to optimise the position of both Schemes. As such, while I have been a director of the [claimant], in my experience the way in which the Schemes are run, the governance that was put in place, the behaviours of the directors of the Trustees and how the Schemes were run side-by-side as 'sister schemes' meant there was never a sense that we needed to merge them, which would have cost money to do."

16. There were funding concerns about both schemes but historically there was greater concern about underfunding in the Staff Scheme. Although as Fiona Wenlock indicates there was thought to be no need for the schemes to be merged, events have, wholly unexpectedly, led to the Staff Scheme being in surplus and the Executive Scheme being in deficit. This is despite over recent years both schemes having been managed in a way which was designed to achieve parity between them based upon actuarial advice.

17. The joint approach of the both trustees to funding can be further illustrated by the events subsequent to 2019. In June 2019 a Creditors Voluntary Arrangement was proposed to restructure the Arcadia Group. This caused the Staff Scheme and the Executive Scheme to enter a Pension Protection Fund ("PPF") assessment period and followed prior regulatory action by the PPF against Sir Philip Green and others in connection with the BHS schemes. Three structures were put in place with the PPF's agreement to achieve scheme rescues

involving their exit from PPF assessment periods consequent on the restructuring of the Arcadia Group under the CVA.

(i) By a deed dated 11 June 2019 ("the LCG Deed") Lady Cristina Green committed to pay £100 million to the schemes without a split between the schemes being determined.

Clause 3.6 of the LCG Deed provided that:

"The Trustees will procure that each of the Subsequent Payments are split between the Arcadia Schemes in such fixed proportions as are decided by the Arcadia Schemes' Actuary … such that the Funding Levels of the Arcadia Schemes are projected to become equivalent to each other on the date the final Subsequent Payment is due to be paid. The Actuary will project from 31 March 2019 using the 2019 Funding Basis together with the assumptions to be used in the Recovery Plans for the 31 March 2019 valuations and taking account of the deficit repair contributions payable pursuant to the relevant Recovery Plan before the final Subsequent Payment is due to be paid."

The first £25 million received from Lady Green was paid to the Staff Scheme because at the time of the CVA it was understood to be much less well funded than the Executive Scheme. In the event, the entirety of the £100 million from Lady Green was paid to the Staff Scheme because of the understanding at the time about the relative disparity of funding between the two schemes.

(ii)A deed dated 4 June 2019 ("the Pensions Deed") was entered between the trustees of the schemes and Arcadia Group companies setting out aggregate deficit repair contributions for the schemes. Clause 6.17(b) of the Pensions Deed provided that, pursuant to the 2019 actuarial valuation:

"… the split of those aggregate contributions between the Schemes shall be determined so that the recovery periods under each Scheme's Recovery Plan shall be the same".

The Pensions Deed also sought to give the schemes an equal funding level. Pursuant to the Pensions Deed, the Staff Scheme received a greater 'split' of the aggregate contributions than the Executive Scheme.

(iii) A security package was put in place for the schemes to secure their respective contingent statutory debts under section 75 of the Pensions Act 1995 which would fall due in the event of a subsequent insolvency ("the Security Arrangements"). A deed dated 4 June 2019 between the claimant and the trustee of the Executive Scheme ("the Security Trustee Deed") appointed the claimant as the Security Trustee in connection with the Security Arrangements. Clause 3.1.3 of the Security Trust Deed provided that sums recovered by the Security Trustee from time to time should be distributed to the schemes' trustees "in the proportions that the Schemes' respective Section 75 deficits at the relevant time bear to the aggregate of the section 75 deficits for the Schemes at that time)." This again sought to ensure an equal funding level between the schemes. By June 2022, pursuant to this provision, the Staff Scheme had received 85% of the sums recovered under the Security Arrangements.

18. Arcadia Group companies went into administration in November 2020. This caused both the Staff Scheme and the Executive Scheme to enter a PPF assessment period for a second time. The administrations also triggered a separate statutory debt under section 75 in respect of each scheme. As required by legislation, those debts were certified on 1 April 2022 by reference to each scheme's buy-out deficit at the date of administration. Recoveries in respect of those section 75 debts were made initially under the Security Arrangements and later as pari passu distributions from the liquidators in respect of the unsecured balances.

19. On 3 February 2023 the claimant was able to purchase a 'buy-in' policy with Aviva, securing all of the accrued liabilities to all beneficiaries of the Staff Scheme in full. The trustee of the Executive Scheme completed a buy-in on the same date but was only able to secure 87% of the value of its accrued liabilities. Both buy-ins were provisional, to the extent that they permitted the benefits secured to be increased on receipt of further distributions from the liquidators in respect of the unsecured balance of each scheme's respective section 75 debt.

20. Thereafter, because each scheme had been able to secure benefits above the level of PPF compensation, they exited their respective PPF assessment periods.

21. From well before the CVA until June 2022, actuarial predictions had been that the Staff Scheme was less well funded than the Executive Scheme. As a consequence, the great majority of contributions and recoveries were apportioned in favour of the Staff Scheme.

22. The reversal in the schemes' respective funding levels is due to a combination of variables, including market volatility occasioned by the 2022 mini-budget, improvements in insurer pricing for pension schemes seeking to secure their liabilities, scheme 'experience' (e.g. mortality of beneficiaries) and the 'shape' of Staff Scheme benefits being priced more favourably than the 'shape' of Executive Scheme benefits. The insurance market and economic conditions, amongst other matters, have led to an unexpected outcome.

23. The Security Arrangements have been fully performed. Each scheme retains only its unsecured claim in the Arcadia's liquidation in respect of the remaining balance of that scheme's respective section 75 debts. Future recoveries in respect of those unsecured claims will only increase the disparity in funding between the two schemes, not least because the debt due to the Staff Scheme is so much greater than the debt due to the Executive Scheme: £431 million compared with £76 million.

24. The latest update from Barnett Waddingham, the actuaries appointed by both schemes, based upon figures as at 30 September 2024, indicates that if dividends in respect of the section 75 claims are paid at 28.8p in the £, the Staff Scheme will have a surplus of £35 million and the Executive Scheme a deficit of £11 million. Even if the dividend is 35p in the £ the Executive Scheme will still have a deficit. There is a possibility, albeit an unlikely one, that section 75 recoveries could reach a level at which the Executive Scheme has a surplus, but there would in that scenario be a significant mismatch of funding between the two schemes. If the schemes merge, there will be a surplus to be shared amongst all beneficiaries.

2010 Trust Deed and Rules

25. The Staff Scheme is currently governed by the 2010 Trust Deed and Rules.

26. The claimant intends to exercise the power to amend the Staff Scheme so as to permit merger with the Executive Scheme. The amendment power is found in clause 9 which provides:

"The Company may from time to time with the consent of the Trustees by deed or written instrument alter or add to any of the trusts and provisions of this Deed or the Rules. Any alteration or addition may have retrospective effect."

27. However, Clause 12.9 makes it clear that the power continues until the Staff Scheme is wound up and where the principal employer is in liquidation, the power is "… in the Trustees who may exercise it without the need for the Company's consent."

28. Clause 1.2 of the Trust Deed provides:

"Object

The main object of the Scheme is to provide Scale Benefits for, and in respect of, those persons who are at any time Members.

For the purposes of this Clause, "Scale Benefits" means benefits to which Members and other persons are entitled on retirement or death calculated on the scale set out in the Rules. It does not include any additional benefits which might be provided by means of augmentation of benefits or amendment, or on termination (whether total or partial) of the Scheme, except where such benefits have already been granted."

29. It is of key importance that the object of the Staff Scheme, namely the provision of Scale Benefits, does not give members a right to receive additional benefits by way of augmentation.

30. The winding up provisions in clause 12.2 require that the Fund must be used to provide for the "Basic Entitlements" (as they are defined in that clause) of "Identified Beneficiaries" who are defined in clause 11.4 as "all Members living on the Termination Date and ... all persons entitled to receive benefits as a result of the membership of Members who died on or before the Termination Date".

31. Under clause 12.3 the trustee has a discretion to make additional payments. It provides that:

"If the Fund is more than sufficient to provide the Basic Entitlements, the Trustees may, with the consent of the Company (except as provided below) and after

consulting the Actuary, use the balance of the Fund to augment the Basic Entitlements and/or to provide other benefits for or in respect of Members who are Identified Beneficiaries (or who would be Identified Beneficiaries if still living). The consent of the Company is not required if it is in liquidation, administrative receivership, administration or is dissolved."

32. Under clause 12.4, any balance of the Fund that is left over after payment of Basic Entitlements and Augmentation (if any) "will be paid to the Employers in such shares as the Trustees, after consulting the Actuary, think appropriate ...".

33. There is therefore a clear distinction in the 2010 Trust Deed and Rules between Basic Entitlements and Augmentation. The trustee is required to pay the former whereas there is a discretionary power to pay the latter. A dilution of the surplus in the Staff Scheme will not deprive any scheme member of a benefit to which there is an entitlement. It would, however, result in the surplus that is available for distribution by way of augmentation being reduced.

34. One of the key changes to the Staff Scheme was made in 2010 was to introduce Rule 1.3 which provides that:

> "No transfer of assets may be accepted into the Fund from any other pension scheme."

35. This contrasts with Rule 1.4 of the 2009 Deed and Rules which, like the 1994 Rules, made express provision for bulk transfers into the Staff Scheme. The earlier provisions also contained provisions enabling former members to re-join the Staff Scheme and the 2009 Rules introduced provisions for the re-instatement of former members who had transferred out.

36. However, the 2010 Trust Deed and Rules still contains power by clause 4.2 to create separate classes of members and separate funds:

> "The Trustees shall have power with the consent of the Company by deed to make or adopt additional Rules or sets of Rules to apply to particular classes or categories of employees or Members (or other persons entitled to benefit) and also to set aside within the Fund a separate fund or funds of such amounts as they shall determine after taking the advice of the Actuary to hold for such particular classes or categories of

employees or Members or other persons to the intent that such employees or Members or other persons shall be entitled to benefit only from such separate fund or funds."

Scope of the power to amend

37. The principal proposed amendment is to Rule 12.3 by adding sub-rule (A) providing that the claimant may (after consulting the Actuary) use the balance of the Fund:

> "(A) in conjunction with a block transfer to the [Staff Scheme] of all of the assets of the [Executive Scheme] to accept a merger of the Executive Scheme and its beneficiaries into the [Staff Scheme] and thereupon provide the benefits for such beneficiaries previously prescribed by the Executive Scheme as their basic entitlements thereunder, provided that accepting such a transfer does not prevent Identified Beneficiaries being provided with their Basic Entitlements: and/or
>
> (B) …"

38. The express terms of the power to amend the Staff Scheme are broad and it is expressly provided that (a) the power continues until the Staff Scheme has been wound up and (b) if the principal employer is in liquidation the power vests solely in the trustee. Both provisions are entirely understandable given the possible need to amend in the course of winding up and the fact that if the principal employer is in liquidation the insolvency regime might well lead to a mis-alignment of the interests of the Staff Scheme and the company. The initial issue for the court as to the scope of the power to amend is whether the power is subject to an implied fetter when it is in the course of being wound up and/or the company is in liquidation.

39. Mr Stallworthy's starting point concerning powers to amend is the observations made by Millett J (as he then was) in *Re Courage Group's Pension Schemes* [1987] 1 All ER 528, at 537f to j:

> "… I should make some general observations on the approach which I conceive ought to be adopted by the court to the construction of the trust deed and rules of a pension scheme. First, there are no special rules of construction applicable to a pension scheme; nevertheless, its provisions should wherever possible be construed to give reasonable and practical effect to the scheme, bearing in mind that it has to be operated against a constantly changing commercial background. It is important to

avoid unduly fettering the power to amend the provisions of the scheme, thereby preventing the parties from making those changes which may be required by the exigencies of commercial life. This is particularly the case where the scheme is intended to be for the benefit not of the employees of a single company, but of a group of companies. The companies of the group may constantly change as companies are disposed of and new companies are acquired; and such changes may need to be reflected by modifications to the scheme.

Second, in the case of an institution of long duration and gradually changing membership like a club or pension scheme, each alteration in the rules must be tested by reference to the situation at the time of the proposed alteration, and not by reference to the original rules at its inception. By changes made gradually over a long period, alterations may be made which would not be acceptable if introduced all at once. Even the main purpose may be changed by degrees …".

40. Lord Walker in giving the decision of the Privy Council in *Bank of New Zealand v Board of Management of the Bank of New Zealand Officers' Provident Association* [2003] UKPC 58 at [19] cited this passage with approval.

41. It is also helpful to have in mind the observations made by Neuberger J (as he then was) in *Capital Cranfield Trust Corporation Ltd v Sagar and others* [2002] OPLR 151 in the context of a trustee having express power to alter or modify any of the scheme's provisions when the company had gone into liquidation. Neuberger J could see no basis for construing the rules so as to imply a fetter on the powers of the trustees.

"... the fact that the proposed amendment or amendments would be with a view to altering matters in connection with winding up would not be a good view to altering matters in connection with winding up would not be a good reason. The contrary view would involve implying fetters on the power to vary reason. The contrary view would involve implying fetters on the power to vary which are not to be found in clause 4 or clause 19(b)(iii).

In my judgment, particularly given that there are express fetters, it would be wrong to imply any further fetters unless it was plainly necessary and obvious that they should

be implied. On the contrary, in the present case I think that it is by no means plain that such fetters should be implied. ...".

42. There are no express fetters on the power in the case of the Staff Scheme 2010 Trust Deed and Rules. In answer to the question 'is there a principled basis upon which a fetter should be implied' the clear answer is 'no'. It may be unusual for an amendment to be made in the course of winding up a scheme with the company in liquidation so as to permit a merger but that is not to the point. The power to amend was used in 2010 to introduce clause 1.3 which prevents a merger. The power to amend was expressly preserved for use by the trustee in the course of winding up the scheme and no express fetter was imposed. The power was intended to be both wide and flexible. There is no reason to consider that it was intended to have a more limited scope when exercised solely by the trustee.

Proper Exercise of Powers

43. I turn to consider whether the proposed amendment is a proper exercise of the claimant's powers. The court has to consider whether adding beneficiaries to the Staff Scheme would be outside the proper exercise of the power of amendment because it affects the existing interests of beneficiaries who have a contingent interest in discretionary augmentation from a surplus. The merger would reduce the surplus and their interest would be diluted.

44. The Privy Council has recently provided guidance on the proper exercise of powers in the context of private trusts in *Grand View Private Trust Co Ltd v Wong*. The appeal concerns the laws of Bermuda but there is no reason to suppose that there is any difference with the laws of England and Wales.

45. The following principles can be summarised from the judgment of the Privy Council given by Lord Richards:

(i) The proper purpose, or purposes, of a fiduciary power is to be determined as at the date of the instrument conferring the power and is to be objectively determined. [61]
(ii) Where the instrument is silent about the purpose of the power, "… ascertaining its purpose depends on an inference from the mischief of the provision conferring it, which is itself deduced from its express terms, from an analysis of their effect, and

from the court's understanding of the business context." Lord Sumption in *Eclairs Group Ltd v JKX Oil & Gas plc* [2015] UKSC 71 [30].

(iii) The identification of the purpose of a power will also be informed by the rest of the instrument containing the power. [62]

(iv) "It is generally the case that fiduciary powers conferred on a trustee of a trust with identified beneficiaries must be exercised to further the interests of the beneficiaries." [120]

(v) The power to add or exclude beneficiaries is a power of a potentially different character. "… the question of the purpose of such a power is not to be answered by applying, as an overriding principle, a rule that all powers must be exercised in the interests of some or all or the beneficiaries, unless express provision to the contrary is made. The task is to discern the intended purpose of the particular power of addition and exclusion in the context of the particular trust. This requires the approach of considering the power in the context of the trust instrument, and the circumstances surrounding it …". [121]

46. The instrument conferring the power to amend is the 2010 Trust Deed and Rules. A power to amend in substantially the same form has been part of the scheme since it was set up by an Interim Trust Deed. Whether the proposed exercise of the power to amend is outside its proper purpose falls to be determined by considering the 2010 Trust Deed and Rules looking at the instrument as a whole in its context.

47. Mr Stallworthy and Mr Hitchcock both submitted that the court is entitled to have regard to the fact that from inception in 1991 and up to 2005 new members were admitted, that under Rule 1.4 of the 1994 and 2009 Deed and Rules bulk transfer of assets into the Fund from another pension scheme was permitted and that former members could re-join or be re-instated. There is, however, an issue about whether the relevant context in which the 2010 Trust Deed and Rules are considered includes not just the Staff Scheme in the form in which it is found in 2010 (being the instrument conferring the power to amend) but also earlier versions of the scheme and the manner in which the power has been exercised up to that date. If the context in which the 2010 Trust Deed and Rules does not include the scheme's history of changes it is more likely that a narrow view would be taken of the power to amend because it is closed to new members and prohibits merger.

48. I am persuaded, however, that relevant context does include the history of the scheme because a review of the exercise of a power to amend should involve not just looking at the scheme in its last iteration but also how the power to amend has been used to create the scheme in its current form. This is illustrated by the fact that it was only in 2009 that the Staff Scheme was closed to merger. If the power was used in that way in 2009, and that was then an exercise for proper purposes, why might it not be a proper purpose to reverse that change the following year?

49. Although it is not a necessary part of the reasoning in this decision, I also do not find it easy to square Robert Walker J's observation in *Re Courage* that "each alteration in the rules must be tested by reference to the situation at the time of the proposed alteration, and not by reference to the original rules at its inception" with a requirement to assess the proper purpose of a power at the date of the instrument giving the power to amend. Pension schemes may evolve by serial use of the power to amend. When considering proper purposes, it is obviously right for the context in which the decision is being made to be considered and for the court to have regard to the manner in which both schemes have been managed since 2010, the insolvency events and how the additional funding from Lady Green has been applied. It may be a gloss to the principle summarised at paragraph 45(i) above is needed to reconcile the tension between the date of determination of proper purposes and the circumstances that may be taken into account.

50. The Privy Council makes it clear in *Grand View v Wong* that the purpose of the trust is of central importance. Clause 1 of the 2010 Trust Deed and Rules provides for one objective namely the provision of Scale Benefits for persons "who are at any time Members" and Scale Benefits do not include benefits by way of augmentation. The objective contemplates a changing group of members with new members being admitted. Notwithstanding the changes to the scheme in 2010 the objective is one that has the potential to apply to a changing class of persons. There is therefore no reason to treat the 2010 changes to the scheme as being immutable. The circumstances that pertain in 2024 are quite different to those of 2010.

51. The key changes that will be implemented using the power to amend will be to undo the change to clause 1.1 (no employee is eligible to join the scheme) and clause 1.3 (no transfer of assets may be accepted into the scheme). Such a change does not undermine the principal purpose of the Staff Scheme. Critically, as the Privy Council pointed out in *Grand View v Wong* at [121] there is no overriding principle that all powers must be exercised in the

interests of some or all of the beneficiaries (unless express provision to the contrary is made). The interests of the current members of the Staff Scheme do not have to be considered exclusively.

52. To my mind the key elements for the court to have in mind in this case are:

(i) The unrestricted nature of the power to amend. Having amended the scheme to exclude new members and mergers there is no fetter on the power being exercised to reverse that amendment if circumstances warrant it.

(ii) The manner in which the main object of the scheme is defined and the fact that the main object of funding Basic Entitlements (ie full scale benefits) can be achieved notwithstanding the merger. A merger of the two schemes does not deprive members of the Staff Scheme of an entitlement in accordance with its Main Objects. It merely dilutes their contingent interest in augmentation.

(iii)The close relationship between the Staff and Executive Schemes. In using the surplus in the Staff Scheme to benefit members of the Executive Scheme the claimant would be providing pension benefits the principal employer intended those members to receive, albeit the intention was that they receive those benefits through the Executive Scheme.

(iv)The shared objective of trustees to achieve a surplus in both schemes. That objective was pursued with the benefit of advice from shared professional advisers.

(v) The fact that there is a surplus in the Staff Scheme and a deficit in the Executive Scheme was an unintended consequence of forces outside of the control of the trustees.

53. Some support can be found in *Bank of New Zealand v Board of Management of the bank of New Zealand Officers' Provident Association* [2003] UKPC 58 where the Privy Council held that it was within the power of amendment to make amendments providing new or increased benefits for former employees who were not current beneficiaries provided it did not disturb the accrued rights of present beneficiaries.

54. I am satisfied that the claimant is intending to use the power to amend so as to permit a merger of the two schemes for a proper purpose.

The claimant's 'In Principle' Decision

55. The second limb of *Public Trustee v Cooper* focuses on the process of decision making. The court, before giving approval, and having been satisfied that the proposed decision is within the scope and proper purpose of the trustee's powers, will be concerned about the factors that have been taken into account in reaching the decision and ensuring that any conflicts of interest have been resolved or at least managed in a satisfactory way.

56. Helpful guidance about decision making by trustees is set out by Richard Smith J in *Brass Trustees Ltd v Goldstone*:

> "46. When exercising a fiduciary power, trustees are required to inform themselves of the relevant facts and take into account relevant factors and ignore irrelevant ones (Harris v Shuttleworth [1994] ICR 991 at 999G-H; Pitt v Holt [2013] 2 AC 108; Lewin on Trusts (20th ed.) at [29-023]-[29-025] and [29-041]-[29-044]). As Lewin points out, although a number of authorities talk of taking into account 'all relevant matters', the range of circumstances required to be taken into account will depend on context. For example, time, urgency, quantum and cost may play a part. Lewin considers that the duty to take into consideration relevant matters is best regarded as an element of the duty to act responsibly. Trustees must have a rational basis for a decision but will be in breach only if a given matter is so significant that a failure to take it into account would be irrational. As to what is a relevant matter to take into account, the authorities, such as they are, indicate that this too depends on context, including the nature of the trust and power under consideration (Pitt v Holt [2011] EWCA Civ 197, [2012] Ch. 132 at [114]).
>
> 47. Trustees should also act rationally (sometimes expressed as not acting capriciously) and reasonably. The distinction between rationality and reasonableness was explained (in a different context) in Hayes v Willoughby [2013] 1 WLR 935 at [14] in the following terms:- 'Rationality is not the same as reasonableness. Reasonableness is an external, objective standard applied to the outcome of a person's thoughts or intentions. … A test of rationality, by comparison, applies a minimum

objective standard to the relevant person's mental processes. It imports a requirement of good faith, a requirement that there should be some logical connection between the evidence and the ostensible reasons for the decision, and (which will usually amount to the same thing) an absence of arbitrariness, of capriciousness or of reasoning so outrageous in its defiance of logic as to be perverse.'

48. The test of reasonableness is often described as Wednesbury reasonableness …. This requires the trustee not to act as no reasonable trustee would. In Edge v Pensions Ombudsman [1998] Ch 512, this was put in terms of not taking a decision that 'that no reasonable body of trustees properly directing themselves could have reached' (Edge at 534, affirmed by the Court of Appeal in [2000] Ch. 602)."

57. The decision of the Court of Appeal in *Edge v Pensions Ombudsman* has particular relevance here. Chadwick LJ in giving the judgment of the court reviewed the considerations to which a pension trustee might have regard in determining what to do with a scheme's surplus. Three points in particular emerge from the judgment:

(i) The court should usually have regard to the circumstances in which the surplus has arisen and give weight to those who are the effective source of the surplus. (626D)

(ii) The essential requirement is for the trustee to address the question of what is fair and reasonable in all the circumstances. (627D)

(iii)Exercising fiduciary powers often requires a trustee to weigh the interests of one cohort of beneficiaries against the interests of another cohort of beneficiaries or even non-beneficiaries:

> "Properly understood, the so-called duty to act impartially - on which the ombudsman placed such reliance - is no more than the ordinary duty which the law imposes on a person who is entrusted with the exercise of a discretionary power: that he exercises the power for the purpose for which it is given, giving proper consideration to the matters which are relevant and excluding from consideration matters which are irrelevant. If pension fund trustees do that, they cannot be criticised if they reach a decision which appears to prefer the claims of one interest - whether that of employers, current employees or

pensioners - over others. The preference will be the result of a proper exercise of the discretionary power." (627D)

58. The decision of the board of the claimant was made by Fiona Wenlock on her own on 5 June 2024 because she is the only director of the claimant who does not have a conflict of interest by virtue of being a member of the Executive Scheme or a director of the Executive Scheme's trustee. She had the benefit of a written opinion produced by Mr Stallworthy. Minutes of the board meeting held on 5 June 2024 record the purpose of the meeting in the following way:

> "2.1 The purpose of the meeting was to discuss, and, if considered appropriate, approve the merger (the "Merger") of the Scheme with the Arcadia Group Senior Executives Pension Scheme ("AGSEPS"), to be achieved by a bulk transfer of all assets and assumption of all liabilities from the AGSEPS on an unsegregated basis, or by any other measures having similar economic effect.
>
> 2.2 It was NOTED that the rationale for the Merger, in broad terms, would be to ensure fair and equal treatment of the Scheme and the AGSEPS, by enabling future recoveries from the shared sponsor of the Scheme and the AGSEPS to be applied in a way which would enable all members of both pension schemes to receive the full value of their accrued pension entitlements.
>
> 2.3 It was further NOTED that this would give effect to the longstanding joint objective of the Trustee and the trustee of the AGSEPS, which was that the trustees of the two pension schemes should work in collaboration to achieve the full funding of both pension schemes."

59. The minute goes some way to show that relevant considerations were taken into account in making the decision. The evidence goes further and shows that Fiona Wenlock took into account:

> (i) That the main object of the Staff Scheme was to provide for Basic Entitlements for Members.

(ii) That the trustee has a discretion to provide augmentation for members from any surplus remaining after the provision of Basic Entitlements as well as a discretion to return that surplus to the Company.

(iii) Merger of the two schemes would dilute the Staff Scheme's funding level but would not affect the trustee's ability to pay Basic Entitlements to Members.

(iv) The circumstances in which the surplus has arisen.

(v)What is fair and equitable in all the circumstances.

60. This last consideration is clearly one of the major drivers for the merger. There is no obligation on the part of the claimant to amend the scheme to enable a merger to take place but there is a strong moral obligation. This is an entirely proper matter for the claimant to have taken into account. The funding arrangements for the two schemes have been managed with a view to achieving equality between them and it is only as a consequence of unforeseen circumstances that it has not been achieved. Favouring the Staff Scheme over the Executive Scheme in the distribution of receipts, such as payments made by Lady Green, has meant that the Executive Scheme is the effective source of the surplus.

61. The minute of the board meeting held on 5 June 2024 goes on to note the conflicts of interest that were declared and concludes with a record of the decision made by Fiona Wenlock alone to a merger of the two schemes being approved in principle.

62. The claimant has had regard to a broad range of factors and has reached a balanced decision that is objectively justifiable. There is no indication that irrelevant factors have been taken into account. I am satisfied that the approach adopted by the claimant's board and Ms Wenlock manages the conflict of interest in a way that prevents the decision being tainted and that the decision made in principle is one that should be approved.

Representative beneficiary

63. The defendant has played an important role in considering the proposed amendment to the scheme rules and testing whether it could properly be opposed. The view has been reached with the benefit of specialist advice that the claim cannot be defended.

Announcements

64. The claimant's proposals have been announced to members of both schemes in communications dated 6 June, 6 August and 8 November 2024. No member has articulated any objection to the merger proposal.

65. In addition, the claimant informed the PPF and the Pension Regulator of the proposed merger proposal. The PPF replied saying:

> "… the PPF have no objection, regarding the merits of the proposed merger as described in the Trustee's Briefing Note. I am aware that the Trustee has worked tirelessly to ensure the best member outcomes throughout PPF assessment, and that continues in respect of the work it is now undertaking."

66. The Pension Regulator replied saying:

> "In relation to the proposed merger of the two schemes, we understand the trustees rationale for proceeding with this step, which includes giving consideration to the efforts made historically to bring up the levels of funding in the main staff scheme relative to the exec scheme. Accordingly we have no further questions or observations at this time"

67. Finally, the claimant has also notified the liquidator of the Arcadia Group (Teneo) who stated that Teneo was neutral and had no interest in the merger.