Neutral Citation Number: [2021] EWCA Civ 867

Appeal No. A3/2020/0316
Case No: PE-2019-000013

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
HH Judge Hodge QC, sitting as a judge of the High Court

Royal Courts of Justice
Strand
London WC2A 2LL

Date: 10/06/2021

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LORD JUSTICE COULSON
and
LORD JUSTICE NUGEE

BETWEEN:

BRITVIC PLC

Claimant/Appellant

– and –

(1) BRITVIC PENSIONS LIMITED
(2) SIMON RICHARD MOHUN

Defendants/Respondents

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Mr Andrew Short QC (instructed by **Addleshaw Goddard LLP**) appeared on behalf of the **Appellant** ("Britvic")
Mr Jonathan Chew (instructed by **Gowling WLG UK LLP**) appeared on behalf of the **first Respondent** Trustee (the "Trustee")
Mr Keith Bryant QC and Mr Philip Stear (instructed by **Arc Pensions Law LLP**) appeared on behalf of the **second Respondent**, a representative member of the Britvic Pension Plan (the "representative member")

Hearing dates: 12 and 13 May 2021

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JUDGMENT

"Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am, Thursday 10 June 2021."

Sir Geoffrey Vos, Master of the Rolls:

Introduction

1. The main issue in this appeal is beguilingly simple. It is whether the words "or any other rate decided by the Principal Employer" in a pension increases provision in the Rules of an occupational pension scheme mean "any higher rate" or "any other rate, whether higher or lower" decided by that employer. HH Judge Hodge QC (the "judge") decided in favour of the former interpretation. The appellant employer, Britvic, submits that he should have interpreted the rule (Rule C.10(2)) as meaning the latter. Both Britvic and the respondent representative member pray in aid the guidance as to the interpretation of pension schemes given by Lord Hodge in *Barnardo's v. Buckinghamshire and others* [2018] UKSC 55 ("*Barnardo's*").

2. Rule C.10(2) appears in both the Defined Benefit Staff Rules and the Defined Benefit Executive Rules of the Britvic Pension Plan (the "BPP"), which was established by a Trust Deed and Rules adopted on 31 January 2003. The relevant parts of Rule C.10 provide as follows:

> "(1) Each pension under the Plan increases in each year after it starts to be paid except …
>
> (2) The part of a pension which exceeds any guaranteed minimum pension in payment is increased on 1 October in each year. The rate of increase is the percentage increase in the retail prices index during the year ending the previous 31 May but subject to a maximum of 5 per cent. [in relation to Pensionable Employment up to and including 30 June 2008 and a maximum of 2.5 per cent. in relation to Pensionable Employment on and from 1 July 2008] (or any other rate decided by the Principal Employer)."[1]

3. Britvic has been the principal employer of the BPP since 2 March 2006 when it replaced Britannia Soft Drinks Limited in that role. The sole trustee of the BPP is Britvic Pensions Limited. The representative member of the BPP is Mr Simon Mohun, who was employed in the soft drinks business of Bass plc and its later iteration, Six Continents plc, which were predecessor employers to Britannia and Britvic. Mr Mohun was a member of the Bass Pension Plan (established in 1946) later called the Six Continents Pension Plan. His benefits were in due course transferred into the BPP.

4. The judge was asked to construe Rule C.10(2) in the 2003 deed and in a 2007 replacement deed, and the amended version from 2008, but the parties were agreed before the judge and before us that the meanings were the same. It is to be specifically noted, however, that members of the staff section of the BPP were subject to a pension increases clause in substantially the same form as Rule C.10(2) in their predecessor scheme, but members of the executive section of the BPP were not.

5. The context to that distinction was that the BPP was established for employees and former employees of the soft drinks business of Six Continents plc as part of a

[1] The words in square brackets were added by a Deed dated 30 June 2008.

demerger. Before the inception of the BPP on 1 April 2003, a bulk transfer of assets and liabilities was effected by transfer deeds from the existing Six Continents Pension Plan (for staff) and the Six Continents Executive Pension Plan (for executives) to the BPP. A clause in the form of Rule C.10(2) had appeared since 24 July 1996 in Rule 23 of the Six Continents Pension Plan, but such a clause had **not** appeared, as I have said, in the predecessor Six Continents Executive Pension Plan. Instead, Rule 24 of that Plan provided simply for increases at RPI subject to a 5% cap.[2] It is to be noted that Rule 23 is the subject of an interpretation and rectification claim in proceedings concerning the Six Continents Pension Plan,[3] which are coming to trial in late June 2021.

The judge's decision

6. The judge recorded at [95] that the representative member had recognised that "construed strictly literally, the phrase "any **other** rate" clearly [did] not mean "any **higher** rate"", but that the Rule had to be construed "with an eye to giving reasonable and practical effect to the scheme". In reaching his conclusions, the judge said that the words "any other rate" qualified the rate of increase, not the capped rate of RPI of 5% or 2.5%. He decided that both the drafter of Rule C.10(2) and the parties to the 2003 and later deeds "clearly had in mind only increases in the capped percentage increases in the retail prices index". That interpretation gave "better reasonable and practical effect" to Rule C.10(2), which created a two-stage mechanism, whereby (i) the trustee calculated and applied guaranteed increases based on the capped percentage increase in the RPI over the year to the end of May each year, and (ii) the employer then had a discretion to direct that a **higher**, but not a lower, rate of increase was to be applied.

7. The judge said that the power of augmentation in General Rule C.6(1) was directed to increasing benefits under the BPP generally, and not, like Rule C.10(2), to the determination of the annual increases to reflect inflation. The employer's interpretation involved an excessively literal reading of Rule C.10(2) which was at odds with its contextual purpose. Even without considering the admissible context, something had clearly gone wrong with the language of Rule C.10(2) and he was satisfied that the error was: "No doubt failing to address himself to the fact that the word "other" might permit of a **lower** rate of increase than the default rate by reference to the capped retail prices index, the draftsman has used the word "**other**" when he really meant the word "**higher**"". The legislative and documentary background made that "even more pellucidly clear".

8. In relation to that background, the judge decided that: (i) the drafter would have had the provisions of section 51(3) of the Pensions Act 1995 (the "1995 Act") in mind and would have wished to create a provision which complied with it, (ii) Rule C.10(2) was excluded from section 51(2) because it satisfied section 51(3), (iii) the outline benefit summary in the employer's letter of 17 December 2002 had said that the benefits would replicate the current terms of the Six Continents Pension Plan and the Six Continents Executive Plan, when the latter had "no power to alter the rate of inflationary increase", (iv) the outline benefit summary for both staff and executive plans said that there were to be guaranteed increases in excess of Guaranteed Minimum Pension (GMP) and

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2 Or what is called 5% Limited Price Indexation or 5% LPI.

3 Which is now known as the Mitchells &Butlers Pension Plan.

discretionary increases on top, even if the Rules were said to take precedence: that was "powerful evidence" of what the drafter of that summary and the BPP intended.

9. The judge emphasised that his decision was "highly sensitive to the facts of the present case, where the [BPP] was not addressed to future new members", but only to those who had consented to the transfer in accordance with the documents provided to them. The fourth and fifth of the specific distinctive characteristics of pension schemes identified by Lord Hodge at [14] in *Barnardo's* had no application here, because (a) there were no members who joined after the BPP started, and (b) the members did not lack easy access to expert legal advice and knowledge of the circumstances when the scheme was established. The interpretation exercise was a unitary one and it was unhelpful to consider whether the court was engaged on pure construction or corrective construction. The question was what an objective observer, with full knowledge of the admissible background, would have concluded was the true intention behind Rule C.10(2). The answer was that it was intended to provide guaranteed, but capped, increases each year, with a discretion on the employer to award a higher rate of increase. The judge concluded that "any other rate" in Rule C.10(2) meant "any higher rate". If that could not be achieved by a literal reading, an objective observer would conclude that something had gone wrong with the wording and how it should be corrected.

The parties' submissions in outline

10. Mr Andrew Short QC, counsel for the employer, submitted that, having accepted that the literal meaning of the words "any other rate" was not "any higher rate", the judge could not properly, applying the recent Supreme Court decisions in *Rainy Sky SA v. Kookmin Bank* [2011] UKSC 50 at [14]-[30] ("*Rainy Sky*"), *Arnold v. Britton* [2015] UKSC 36 at [14]-[22] ("*Arnold v. Britton*"), *Wood v. Capita Insurance Services Ltd* [2017] UKSC 24 at [8]-[15] ("*Wood v. Capita*"), and *Barnardo's* at [13]-[18], conclude that the words in Rule C.10(2) meant "any higher rate". As Lord Briggs had said in *Safeway Ltd v. Newton* [2017] EWCA Civ 1482 ("*Safeway*") at [22], the pension scheme context was "inherently antipathetic to the recognition, by way of departure from plain language, of some common understanding between the principal employer and the trustee, or common dictionary which they may have employed, or even some widespread practice within the pension industry which might illuminate, or give some strained meaning to, the words used". A corrective construction could only be applied where the mistake was clear on the face of the instrument or from some admissible context. This was not such a case like, for example, *Mannai Investments v. Eagle Star* [1997] AC 749 ("*Mannai*") (where there had been an obvious mistake in the date) or *Doe on the demise of Cox v. Roe* (1803) 4 Esp 185 ("*Doe d Cox v. Roe*") (where there had been an obvious mistake in the name of the pub) where a corrective construction was appropriate. The context relied on by the judge might be relevant to a case for rectification or estoppel, but did not support the judge's reading the words "any other rate" as meaning "any higher rate".

11. Mr Keith Bryant QC, leading counsel for the representative member, broadly supported the judge's approach and reasoning. He submitted that the natural and ordinary meaning of "any other rate" in Rule C.10(2) was not "any other rate whatsoever". Rix J had held in *Andre & Cie SA v. Orient Shipping Rotterdam BV (The Laconian Confidence)* [1997] CLC 300 at page 314 that the words "any other cause" could not mean "any other cause whatsoever", but had to be construed *eiusdem generis* as meaning any other similar cause. In *BOC Group plc v. Centeon LLC* [1999] 1 All ER (Comm) 970, Evans LJ at

pages 979-980 held that even the words "any other matter whatsoever" in a payment clause were not sufficient to exclude set-off when that could have been expressly mentioned.[4] Taking the Rules as a whole, the reasonable and practical effect of Rule C.10(2) was obviously to allow only higher rates to be applied by the employer in its discretion. The admissible contemporaneous documents made it clear that the increases were guaranteed, which was only consistent with that interpretation. Moreover, section 51 of the 1995 Act, even if construed as the judge had held, pointed in the same direction. The representative member's respondent's notice contended that the judge had been wrong to hold that Rule C.10(2) was excluded from section 51(2) because it satisfied section 51(3) unless and until the power to substitute some other lower rate was exercised. The question under section 51(3) was whether the rules of the BPP required increases of at least the relevant percentage. On the employer's interpretation the rules did not "require" such an increase, because increases might be at a lower rate if the employer so decided.

12. The submissions made by Mr Jonathan Chew, counsel for the trustee, were neutral on the main issue before the court. He made submissions as to the workability of the outcome mainly in the context of the subsidiary grounds of appeal, to which I will return in due course.

13. Against that background, I will deal first with the essential legislative background before turning to the authorities and the main issue as to the proper interpretation of Rule C.10(2), and then the subsidiary issues raised by the appeal.

Essential legislative background

14. Section 51(2) of the 1995 Act required pensions attributable to pensionable service after 6 April 1997 to be increased by the "appropriate percentage" if they were not exempt under section 51(3). The version in force between 1 December 2000 and 14 March 2005 (during which period the BPP was created) was as follows:-

> "51.— Annual increase in rate of pension.
>
> …
>
> (2) … where a pension to which this section applies, or any part of it, is attributable to pensionable service on or after the appointed day … so much of the annual rate [of the pension] 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 … if the rules of the scheme require—
>
> (a) the annual rate of the pension, or

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4 See also *Mills v. Dunham* [1891] 1 Ch 576, and *Cantor Art Services Ltd v. Kenneth Bieber Photography Ltd* [1969] 1 WLR 1226, cited by the judge at [91].

(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." [Emphasis added].

15. Until 2005, the "relevant percentage" was the increase in RPI, capped at 5%, over any 12-month period, and the "appropriate percentage" was the increase in RPI, capped at 5%, in the 12 months to 30 September in each year. The difference was that, if the scheme fell within section 51(3) by providing for the "relevant percentage", it was allowed to choose its own calculation date.

The most relevant authorities

16. The most relevant authorities are not in dispute between the parties, although there is less consensus as to their proper application. I shall set out the essential guidance from the main authorities cited, even though they are exceptionally well-known, because a proper understanding of them is central to our decision.

17. In *Investors Compensation Scheme Limited v. West Bromwich Building Society* [1998] 1 WLR 896, the fourth and fifth principles stated by Lord Hoffmann at page 913 were as follows:

> "(4) … The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see [*Mannai*].
>
> (5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera S.A. v. Salen Rederierna AB* [1985] AC 191, 201:
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> > "if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.""

18. In *Chartbrook Limited v. Persimmon Homes Limited* [2009] 1 AC 1101, Lord Hoffmann said this at [22]-[25]:

> "22. In *East v Pantiles (Plant Hire) Ltd* (1981) 263 EG 61 Brightman J stated the conditions for what he called "correction of mistakes by construction":
>
> "Two conditions must be satisfied: first, there must be a clear mistake on the face of the instrument; secondly, it must be clear what correction ought to be made in order to cure the mistake. If those conditions are satisfied, then the correction is made as a matter of construction."
>
> 23. Subject to two qualifications, both of which are explained by Carnwath LJ in his admirable judgment in *KPMG LLP v Network Rail Infrastructure Ltd* [2007] Bus LR 1336, I would accept this statement, which is in my opinion no more than an expression of the common sense view that we do not readily accept that people have made mistakes in formal documents. The first qualification is that "correction of mistakes by construction" is not a separate branch of the law, a summary version of an action for rectification. As Carnwath LJ said (at p. 1351, para 50):
>
> "Both in the judgment, and in the arguments before us, there was a tendency to deal separately with correction of mistakes and construing the paragraph 'as it stands', as though they were distinct exercises. In my view, they are simply aspects of the single task of interpreting the agreement in its context, in order to get as close as possible to the meaning which the parties intended."
>
> 24. The second qualification concerns the words "on the face of the instrument". I agree with Carnwath LJ (at pp 1350-1351) that in deciding whether there is a clear mistake, the court is not confined to reading the document without regard to its background or context. As the exercise is part of the single task of interpretation, the background and context must always be taken into consideration.
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> 25. What is clear from these cases is that there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant. In my opinion, both of these requirements are satisfied."

19. In *Rainy Sky*, Lord Clarke said this at [21]-[23]:

> "21. The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding

circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.

22. This conclusion appears to me to be supported by Lord Reid's approach in *Wickman Machine Tool Sales Ltd v L Schuler AG* [1974] AC 235 quoted by Sir Simon Tuckey and set out above. …

23. Where the parties have used unambiguous language, the court must apply it."

20. In *Arnold v. Britton*, Lord Neuberger sought to bring together the previous 45 years of jurisprudence from *Prenn v. Simmonds* [1971] 1 WLR 1381 to *Rainy Sky*. His judgment included the following:

> "15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean … And it does so by focussing on the meaning of the relevant words … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions …
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> 16. For present purposes, I think it is important to emphasise seven factors.
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> 17. First, the reliance placed in some cases on commercial common sense and surrounding circumstances … should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract …
>
> 18. Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. …
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> 19. The third point I should mention is that commercial common sense is not to be invoked retrospectively. …"

21. In *Wood v. Capita*, Lord Hodge at [8]-[15] rejected the suggestion that there had been any change in the approach to contractual interpretation. There was no need to reformulate the guidance in *Rainy Sky* and *Arnold v. Britton*, and the latter had not recalibrated the former. The recent history was one of continuity rather than change. At [13], he said that "[t]extualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation". Rather, they were "tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement", and "[t]he extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements". Lord Hodge drew a distinction between agreements that could "be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals" on the one hand and where the "correct interpretation [might] may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance". The representative member relied on Lord Hodge's statement that "[t]here may often … be provisions in a detailed professionally drawn contract which lack clarity and the … judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type".

22. Finally, in this summary, I should mention the most recent decision, and perhaps most relevant one for our purposes, in *Barnardo's*. In that case, Lord Hodge at [13] set out five "distinctive characteristics [of pension schemes] which [were] relevant to the court's selection of the court's interpretative tools" as follows:

> "First, it is a formal legal document which has been prepared by skilled and specialist legal draftsmen. Secondly, unlike many commercial contracts, it is not the product of commercial negotiation between parties who may have conflicting interests and who may conclude their agreement under considerable pressure of time, leaving loose ends to be sorted out in future. Thirdly, it is an instrument which is designed to operate in the long term, defining people's rights long after the economic and other circumstances, which existed at the time when it was signed, may have ceased to exist. Fourthly, the scheme confers important rights on parties, the members of the pension scheme, who were not parties to the instrument and who may have joined the scheme many years after it was initiated. Fifthly, members of a pension scheme may not have easy access to expert legal advice or be able readily to ascertain the circumstances which existed when the scheme was established."

23. The judge in this case, as I have said, distinguished Lord Hodge's approach in *Barnardo's* on the basis that the fourth and fifth factors did not, he thought, apply here.

24. Lord Hodge in *Barnardo's* said at [15] that "[j]udges [had] recognised that these characteristics make it appropriate for the court to give weight to textual analysis, by concentrating on the words which the draftsman has chosen to use and by attaching less weight to the background factual matrix than might be appropriate in certain commercial contracts". He approved the *dictum* of Lord Briggs in *Safeway* at [22] that is cited at [10] above. Lord Hodge then said at [16] that "[t]he emphasis on textual analysis as an interpretative tool [did] not derogate from the need both to avoid undue technicality and to have regard to the practical consequences of any construction". Such

an analysis did not involve literalism but included a purposive construction when that was appropriate (see Millett J in *Re Courage Group's Pension Schemes, Ryan v. Imperial Brewing and Leisure Ltd* [1987] 1 WLR 495 at 505).

The proper interpretation of Rule C.10(2)

25. It is worthwhile repeating the relevant words that require interpretation. They are in essence:

> "The rate of increase is the percentage increase in the retail prices index during the year ending the previous 31 May but subject to a maximum of 5 per cent. … (or any other rate decided by the Principal Employer)."

26. Plainly the judge was right to say that the words "any other rate" qualified the "rate of increase". The question, however, is whether he was right to say that the words "any other rate" meant "any higher rate". Shorn of complexity, I can completely understand why the judge thought, as Mr Bryant had submitted, that it would have been better in a number of different ways if the drafter of Rule C.10(2) had given the employer only the power to select a rate of increase higher than capped RPI. Allowing the employer a discretion limited to increasing the rate is more consistent with the admissible factual matrix and the legislative background, just as the judge said.

27. It is not necessary to summarise all the points made so compellingly by Mr Bryant to the judge and also to us. But certainly the benefit summary sent to transferring members by the employer on 17 December 2002 said that benefits would replicate the current terms of the Six Continents Plans, and the transfer invitations sent to prospective members referred to guaranteed LPI increases with discretionary increases on top. As the judge said, the drafter would have had the provisions of section 51(3) in mind and would most probably have wished to create a provision which complied with it. If Rule C.10(2) allowed the employer to reduce the rate of increase, it might not comply with section 51(3),[5] and there are undoubtedly potential complications with the application of section 51(3) that are avoided if Rule C.10(2) allowed for only higher increases at the discretion of the employer. Mr Short was unable to point to many surrounding features that made it likely that, had the drafter thought deeply about what they wanted to achieve, they would have allowed a power to apply lower as well as higher rates of increase. Whilst the general augmentation in Rule C.6(1) might suggest a wider power in Rule C.10(2), it hardly compels Britvic's interpretation.

28. The objective observer looking at the factual matrix materials that we have been shown might well conclude that the drafter did not give any thought to whether Rule C.10(2) allowed for lower rates of increase. Instead, the drafter seems to have lifted the Rule from the previous Six Continents Pension Plan. They may not even have realised that no such Rule had been in the Six Continents Executive Pension Plan.

29. As it seems to me, however, the approach indicated by, at least, *Rainy Sky*, *Arnold v Britton*, *Wood v. Capita*, and *Barnado's* is clear. In construing a pension scheme deed, one starts with the language used and identifies its possible meaning or meanings by reference to the admissible context, adopting a unitary process to ascertain what a reasonable person with all the background knowledge reasonably available to the

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[5] As to which, see [36] below.

parties at the time would have understood the parties to have meant. If, however, the parties have used unambiguous language, the court must apply it (see Lord Clarke at [19] in *Rainy Sky*), and the context of a pension scheme deed is "inherently antipathetic to … [giving] some strained meaning to … the words used" (Lord Briggs at [22] in *Safeway*, approved by *Barnardo's* at [15]).

30. Accordingly, in this case, considerable weight must be accorded to the fact that the drafter has used the unambiguous words "or any other rate", which do not naturally mean "or any higher rate". It is true that the words are not "or any other rate whatsoever", but this is not a case where an *eiusdem generis* interpretation is possible as it was, at least, in *The Laconian Confidence*. The scope for importing a limitation on the words of Rule C.10(2) in this case are, therefore, rather limited, despite the obvious advantages of doing so.

31. This is not a case where there has been sloppy or unclear drafting. The words used by the skilled professionals involved are clear. I accept that the factual matrix and the commercial consequences are not to be ignored in the necessary unitary exercise even in such a case. But even giving those factors full weight, it seems to me that the judge's interpretation can only properly be reached if it were to be concluded that there had been a clear mistake on the face of the instrument, and that it was clear, either from the instrument itself or from admissible extraneous evidence, what correction ought to be made in order to cure the mistake (see *Chartbrook* at [22]-[24]).

32. Unlike the judge, however, I cannot satisfy myself that there has in this case been a clear mistake on the face of Rule C.10(2). I can quite see that there **may** have been such a mistake. I can even see, as I have said, that it looks suspiciously likely that the draftsman simply pulled Rule C.10(2) from the Six Continents Pension Plan without considering that it had not appeared in the Six Continents Executive Pension Plan, so that continuity for all members was thereby jeopardised. I can see also that the provision as drafted is unsatisfactory in the ways eloquently expostulated by Mr Bryant, and arguably inconsistent with some of the immediately surrounding materials. What I find impossible to hold, however, is that the cure for the mistake (if mistake it was) is clear. I accept that substituting the word "higher" to make Rule C.10(2) read "or any higher rate" would be a desirable alteration, but it is very far from the only possible redrafting that would cure the mistake just as well. One might, for example, add a percentage range for the employer's discretion above LPI. There are several quite reasonable possibilities, and neither the BPP itself nor the admissible factual background tell the objective observer for sure which it should be.

33. Moreover, the process of corrective construction adopted, in the alternative, by the judge at [137] is only normally adopted where there really is an obvious mistake on the face of the document. There is no obvious mistake here as there was, for example, in *Mannai* as to the date or in *Doe d Cox v. Roe* as to the name of the pub. The objective observer might well think that the power could have been more felicitously drafted, but that is not enough to allow the court to depart from the clear language, on the unequivocal authority of *Rainy Sky* and the later Supreme Court decisions I have cited. That is particularly so when the rules of a pension scheme are being interpreted.

34. I have considered whether the judge was right to place the emphasis he did on the supposed inapplicability of the fourth and fifth special pension scheme deed factors enunciated by Lord Hodge at [14] in *Barnardo's*. In my judgment, it is far from clear

that these factors were in fact inapplicable here. First, whilst the BPP was indeed closed to new members, the rights of the members were likely to continue to be affected by it many years after it was drafted. Moreover, there was no evidence that the transferring members had had any access to expert legal advice or were, in reality, able readily to ascertain all the circumstances existing when the scheme was established. Even if these factors were less applicable here than in many pension schemes, I do not think those factors diminish the application of the principles enunciated by Lord Hodge in *Barnardo's*.

35. Our attention was drawn to a number of extra-curial articles (including one written by me).[6] It does not seem to me to be profitable to consider whether or not the applicable principles have developed over the years, or even whether a strict application of Lord Hoffmann's fourth and fifth principles in *ICS* might support the judge's reasoning (so as to ask whether the background or contextual evidence indicates that something has gone wrong with the language in the absence of any obvious ambiguity on the face of the text). I am satisfied that, on a proper application of the principles expressed in the recent Supreme Court authorities, the objective meaning of the language which the parties chose to include in Rule C.10(2) is what it actually says. The employer's discretion expressed in brackets in Rule C.10(2) allows it to decide that the rate of increase shall be at "any other rate", whether higher or lower, not just a higher rate of increase.

36. In these circumstances, the point raised by the representative member's respondent's notice may be of some significance. In my judgment, the judge was wrong to conclude that Rule C.10(2) was excluded from section 51(2) because it satisfied section 51(3) unless and until the power to substitute some other lower rate was exercised. As Mr Bryant submitted, Rule C.10(2) did not "require" increases of at least the relevant percentage, when the employer had a power that it might well exercise to apply a lower increase. The judge's construction of section 51(3) would deprive the legislation of real effect. Section 51(3) is only intended to exclude pension schemes where the rules provide for annual increases of "at least" the relevant percentage.

37. Accordingly, I would allow the appeal from the main issue decided by the judge.

The other issues

38. I can deal with the other four grounds of appeal more shortly, as did the judge.

39. The second ground of appeal argues that the judge ought to have held that the power of alteration in Rule C.10(2) allowed the employer to decide upon a different rate in relation to pension attributable to different periods of service. He, in fact, decided that the power required the same substituted figure to be applied to the whole pension, save

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6 See: Lord Sumption *A Question of Taste: The Supreme Court and the Interpretation of Contracts*, Harris Society Annual Lecture, Oxford 8 May 2017; Lord Hoffmann *Language and Lawyers* [2018] 134 LQR (Oct) 553; Vos C. *Contractual Interpretation: Do Judges sometimes say one thing and do another?* [2017] Canterbury Law Review 1; David E Grant *The rise and potential fall of corrective construction: the implication for pension trusts* (2019) 33(2) TLI 60-83.

that a different rate could be applied in relation to service before 1 July 2008 and after 30 June 2008.

40. In my judgment, the words "any other rate" can mean "any other rate or rates" because section 61(c) of the Law of Property Act 1925 allows the singular to include the plural (see also my judgment in *Danks v. QinetiQ Holdings Ltd* [2012] EWHC 570 (Ch) at [70] and [71]). I would allow the appeal on the second ground.

41. The third ground of appeal argues that the judge was wrong to hold that the employer's power in Rule C.10(2) could only be exercised annually, once the retail prices index figure for the 12 months to 31 May was known for that year. Britvic submits that the power can be used to decide a rate for more than one year or at any time before 1 October in any year. The representative member submits that the power is a limited, not a fiduciary or general one, which must be exercised in an unfettered way in advance of the 1 October increase date each year.

42. In my judgment, the words of Rule C.10(2) give the answer to this ground. The Rule provides for the rate by which pensions are to be increased on 1 October in each year. The rate of increase is explained to be a capped LPI or any other rate decided by the employer. There is no limitation in the wording as to when that decision must be made, nor is there any requirement that the discretion can only be exercised once the relevant RPI (for the year ending the previous 31 May) is known.

43. I would allow the appeal on this third ground and hold that the employer can use the power to decide a rate for more than one year or at any time before 1 October in any year.

44. The fourth ground of appeal submits that the judge was wrong to hold that the power in Rule C.10(2) could not be used to decide upon a rate of 0%. The power allows the employer to fix a rate of **increase**, which obviously cannot be negative. The representative member argues that it cannot be zero either, because a zero rate of increase would not be an increase.

45. At first blush this seems persuasive. But there is a difficulty with it. If there has to be some increase, more than zero, how much more is necessary? 1% would presumably be enough, but what about 0.1%? 0.01%? This is a point brought into focus by the submissions of Mr Chew for the Trustee, which would have to implement any purported increase, and would need to know whether such an increase was valid or not. There is no criterion in the language of the rule, or indeed in anything else, which would enable us to say whether 0.01% would be enough.

46. In those circumstances I prefer the submissions of Mr Short. He pointed out that even without the employer selecting an alternative rate, the first part of Rule C.10(2) could generate a rate of 0%. This would be the case if RPI were negative for the relevant 12 months. That may seem unlikely, but it is not impossible, and for certain periods in 2009 after the financial crash my understanding is that RPI was indeed negative. In such a case there would be no increase in the pension in excess of Guaranteed Minimum Pension despite the terms of Rule C.10(1). But if Rule C.10(2) can accommodate a 0% rate in such circumstances, it would be odd if the employer could not specify a 0% rate under the second part of the rule. I would therefore allow the appeal on the fourth ground.

47. The fifth ground of appeal suggests that the judge was wrong to hold that any figure decided upon by the employer for the purposes of Rule C.10(2) would automatically be read across into Rule C.2(2) relating to increases in deferred pensions. The employer contends that he ought to have held that the mechanism in Rule C.10(2) applies to Rule C.2(2) allowing a different rate to be applied under it.

48. Rule C.2 in the BPP was not in exactly the same form in 2003 and 2007 and in the staff and executive sections, but it is accepted that the substance was the same. Substantively, Rule C.2 provided that a member "whose Pensionable Employment ends before Normal Retirement Date is entitled to a deferred annual pension payable from Normal Retirement Date", which is "equal to the Scale Pension increased as from the date Pensionable Employment ends as referred to in DB Staff Rule C.10(2) and (4) (Pension increases) but the total increase at Normal Retirement Date shall not be less than that required by the revaluation and contracting-out requirements of the Pension Schemes Act 1993".

49. The question here is really whether the employer can apply a different rate of increase under C.2(2) from the one it applies under C.10(2). It seems to me that the power in C.10(2) must be read across to C.2(2). As Rule C.2(2) says, the deferred pensioner is entitled to a deferred annual pension "increased as from the date Pensionable Employment ends as referred to in DB … Rule C10(2) and (4) (Pension increases)". The words "as referred to" seem to me to transpose the power to the situation applying to the deferred member. I have already held that "any other rate" allows the employer to fix different rates for different periods. It follows that it also allows the employer also to fix different rates of increase for deferred members under Rule C.2(2). I would therefore allow the appeal under the fifth ground.

Conclusion

50. For the reasons I have given, I would allow the employer's appeal on each of the grounds of appeal.

51. On the main point, I would hold that the words "or any other rate decided by the Principal Employer" qualify the rate of increase to be provided under Rule C.10, and allow the employer to fix a rate of increase that is higher or lower than the capped LPI for which the rule provides.

52. I should say also that I have had the advantage of reading the helpful concurring judgments of Lord Justices Coulson and Nugee in draft, and I agree with them.

Lord Justice Coulson:

53. I agree that, for the reasons given by the Master of the Rolls, this appeal should be allowed on all grounds. I confine myself to some short observations on the first ground, in the light of the extensive guidance from the Supreme Court over the last decade.

54. Adopting a unitary interpretation exercise, and considering all the background documents as well as the deed itself, I conclude that the words "or any other rate decided by the Principal Employer" are clear and unambiguous. They mean what they say: they are referring to *any* rate, not just to one particular category or type of rate (i.e. a *higher*

rate only). I note that this also appears to have been the judge's interpretation of the words themselves: see [95] and [120] of his judgment.

55. No other part of the deed, and no other part of the background material, suggests that these words could or should mean anything other than what they say. Tellingly, we were shown no contemporaneous document of any kind which considered or discussed these words *at all*, let alone anything which suggested that the rate chosen by the Principal Employer in accordance with this power could only be higher than the capped LPI.

56. On one view, that is the end of the matter. As Lord Clarke put it in *Rainy Sky* at [23], "where the parties have used unambiguous language, the court must apply it". Lord Clarke's analysis in *Rainy Sky* has been commended in each subsequent Supreme Court decision concerned with issues of construction: see in particular *Arnold v Britton* at [76] and *Wood v Capita* at [9] and [14]. As Lord Neuberger put it in *Arnold v Britton* at [17], "the exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision." No one could suggest that the present dispute is "a very unusual case". Furthermore, the centrality of a textual analysis in the interpretation of a pension plan has been recently emphasised by Lord Hodge in *Barnardo's* at [15]. So following this guidance, the language used in the present case might be said to be the start and the end of any interpretation exercise.

57. In the absence of ambiguity, it should be unnecessary to consider those arguments which are conventionally parasitic upon ambiguity, namely commercial common sense on the one hand, and excessive literalism or undue technicality, on the other. As Lord Hodge explained in *Arnold v Britton* at [77], those issues only arise for consideration if there is "a basis in the words used and the factual matrix for identifying a rival meaning". If, as here, there is no such basis, those arguments do not arise.

58. However, to the extent that it is necessary to consider such arguments, I conclude that giving these words their natural meaning would not flout commercial common sense, nor give them an excessively literal interpretation. On the contrary, the words make complete commercial sense. They allow the Principal Employer, in the exercise of its discretion, to identify a rate of increase which may be less than the capped LPI. For obvious reasons, that may not be what the second respondent, and the other members of the pension plan, would like the Rule to say; that interpretation may even be less consistent with the admissible factual matrix and the legislative background (as the Master of the Rolls notes at [26] above). But, without more, that does not permit the court to rewrite the deed.

59. Finally, it is necessary for the court to consider the possibility that something has gone wrong with the language, and if so, whether the mistake can be put right through "corrective construction": see *Chartbrook*, and *Barnardo's* at [18].

60. In my view, the conditions for such corrective construction have not been made out. There is neither an obvious error nor an obvious solution to any error. There is nothing to suggest that the draughtsman made a mistake, either in 1996, or 2003 or 2007, by including the words in question. As I have said, there was no debate or discussion about the inclusion of those words in any of the documents, and no alternative version (or

possible deletion) was debated or discussed. The language is plain. So it is not possible to find that something went wrong with the language. Neither is there an obvious means of resolving any alleged error. Why should the word “higher” be included, either as an addition to, or a substitute for, the word “other”? What is the reasoned basis for such an approach? I can see no good reason.

61. The authorities suggest that corrective construction should be confined to those case, like *Mannai* and *Chartbrook*, where something has obviously gone wrong in a description, a date, a figure or a calculation, and the correct description, date, figure or calculation is obvious from the material before the court. That is all very far from the facts of this case.

Lord Justice Nugee:

62. I agree, but I add a short judgment of my own on the main point argued before us, namely Ground 1.

63. The BPP was established by Deed dated 31 January 2003 to commence on 1 April 2003. The Deed contained a fully drafted set of rules, with three benefit sections, the DB Staff Section, the DB Executive Section and the DC Section. Each of the first two sections contained a pensions increase rule in rule C.10 in very similar terms. Rule C.10(2) in each case was in identical terms and provided:

> “(2) The part of a pension which exceeds any guaranteed minimum pension in payment is increased on 1 October in each year. The rate of increase is the percentage increase in the retail prices index during the year ending the previous 31 May but subject to a maximum of 5 per cent. (or any other rate decided by the Principal Employer).”

64. There have been two further iterations of this rule. First, by Deed dated 12 December 2007 the rules were replaced in their entirety by an updated set of rules; Rule C.10(2) (in each of the two DB sections) was however reproduced in precisely the same form. Second, by Deed dated 30 June 2008, the rules were amended with effect from 1 July 2008. The amendments included the replacement of Rule C.10(2) (in each of the two DB sections) with the rule set out at paragraph 2 of the judgment of the Master of the Rolls, which I reproduce here:

> “(2) The part of a pension which exceeds any guaranteed minimum pension in payment is increased on 1 October in each year. The rate of increase is the percentage increase in the retail prices index during the year ending the previous 31 May but subject to a maximum of 5 per cent. in relation to Pensionable Employment up to and including 30 June 2008 and a maximum of 2.5 per cent. in relation to Pensionable Employment on and from 1 July 2008 (or any other rate decided by the Principal Employer).”

65. We are only concerned (on Ground 1) with the question of construction of this rule. Strictly speaking the question arises in relation to each of the iterations of the rule (in the 2003 Deed, the 2007 Deed, and as amended by the 2008 Deed), and in relation in each case to each of the two DB sections, but it was not suggested either before the judge or before us that the meaning differed as between the various iterations, or as

between the two sections. It is established law that where the very same provision is re-adopted in the same form, its meaning may in principle change if the context is materially different (*Stena Line Ltd v MNRPF Trustees Ltd* [2011] EWCA Civ 543 at [34] per Arden LJ), but there is nothing to suggest here that the context was materially different (save for the introduction of the 2½% cap in 2008, which does not affect the present question). I can therefore concentrate on the construction of the 2003 rule.

66. We are not concerned with any other issues that may arise. As explained by the Master of the Rolls the BPP was established in the context of a demerger of the soft drinks business from Six Continents plc, and a rule in the same form as Rule C.10(2) had been introduced into the Six Continents Pension Plan in 1996. That rule is now the subject of separate proceedings which raise a number of issues (primarily rectification, but also as to the effectiveness and effect of the amendment to introduce it), and, depending on the answers to the questions raised in those proceedings, it appears from the Trustee's evidence in the present case that there may be knock-on effects for the members of the BPP. None of that however is before us, and we are simply concerned with the meaning of Rule C.10(2) in the BPP.

67. As my Lords have referred to, the principles for ascertaining the meaning of written instruments in general, and the provisions of pension schemes in particular, have been authoritatively expounded in a series of recent decisions of the Supreme Court. It is not necessary to revisit these very familiar decisions in any detail. I would like to add one footnote however, which is that not all questions of construction raise the same problem. I can illustrate this by some of the authorities that happen to be in the bundle provided to us.

68. Sometimes the provision to be construed is unclear because a word has two different meanings. Genuine ambiguities of this sort are probably quite rare. More commonly there is no real dispute what a word means, but there is a disagreement as to how it applies in the particular context. In *Prenn v Simmonds* [1971] 1 WLR 1381 the question was what *"profits of RTT"* referred to – was it the separate profits of RTT alone, or the consolidated profits of RTT and its subsidiaries (per Lord Wilberforce at 1383E-F)? As this formulation shows, this is not really a dispute about the meaning of the word *"profits"* – it means excess of income over expenditure or similar – but about what it refers to in the particular context in which it is used. For such questions, understanding the context is therefore necessarily an important, indeed essential, element in determining how the language is to be understood. Cases such as this where what is in issue is what a word, or phrase, refers to abound in the authorities: what does *"the sum actually paid"* refer to (*Charter Reinsurance Co Ltd v Fagan* [1997] AC 313); what does *"such sums"* refer to (*Rainy Sky*); does *"any replacement adopted by the Trustees"* refer to an index that is adopted by the Trustees as a replacement for RPI, or an index that replaces RPI and is adopted by the Trustees (*Barnardo's*)?

69. In such cases the language, either by itself, or at any rate once read in context, can be seen to give rise to rival possible interpretations. To resolve which of the rival interpretations is to be preferred the Court has recourse to a number of familiar tools and techniques in accordance with the guidance from the Supreme Court cases. This guidance includes the fact that the aim is to ascertain what a reasonable person armed with all the background knowledge reasonably available to the parties would have understood them to have meant; that textualism and contextualism are both tools available for that purpose; that the exercise is a unitary and iterative one; and that the

Court is entitled to prefer the construction which is consistent with business common sense.

70. But those cases have also made entirely clear that one cannot jettison the language used by the parties. As both my Lords have referred to, the consistent teaching of the Supreme Court is that one does not get into the question of choosing which interpretation is more consistent with business common sense unless there are two rival interpretations available: see *Rainy Sky* at [21]-[30] per Lord Clarke JSC, where the entire passage is about the consequences of a term being *"open to more than one interpretation"*, especially at [23] (*"Where the parties have used unambiguous language, the court must apply it"*); *Arnold v Britton* at [17]-[18] per Lord Neuberger PSC (*"commercial common sense and surrounding circumstances ... should not be involved to undervalue the importance of the language… [the court is not justified in] ... searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning"*), and at [77] per Lord Hodge JSC (*"there must be a basis in the words used and the factual matrix for identifying a rival meaning"*). These statements were all made in the context of construction of contractual provisions, but they apply at least as strongly to the construction of pension schemes where there are various factors which make the context *"inherently antipathetic"* to departing from the plain language of a provision (*Safeway* at [22] per Lord Briggs JSC), and which justify giving weight to textual analysis (*Barnardo's* at [15]). It is true that Millett J said as long ago as 1987 in *re Courage Group's Pension Schemes* [1987] 1 WLR 495 at 505 that the provisions of a pension scheme "*should wherever possible be construed to give reasonable and practical effect to the scheme"*, but the important words for present purposes are *"wherever possible"*.

71. The meaning of Rule C.10(2) must therefore be approached by asking first if there are two possible rival interpretations. In the circumstances, this resolves itself into the question whether *"any other rate"* can reasonably be read or understood as meaning *"any higher rate."* In common with my Lords, I do not think it can. I do not think Mr Bryant gets any assistance on this from either *The Laconian Confidence* or *BOC Group v Centeon*. They show how *"other"* has been construed in other cases, but to my mind shed no light at all on whether *"any other rate"* in Rule C.10(2) can be understood as meaning *"any higher rate"*. If one simply reads the rules on their own there is no reason to give *"any other rate"* anything other than its ordinary meaning under which an *"other rate"* might be a lower rate or a higher rate.

72. I accept that language is a very flexible instrument. I also accept that language is never used acontextually, and always has to be read in context. But there is to my mind a difference between on the one hand having regard to the context or factual matrix, and to considerations of commercial common sense (or, in the case of a pension scheme, the desire to give reasonable and practical effect to the scheme), with a view to resolving which of two rival interpretations is to be preferred, and, on the other hand, having regard to such matters to create an ambiguity that is not there in the language. The former is part of the familiar task of construction which arises whenever a provision gives rise to possible rival interpretations. The latter is a much more doubtful exercise that runs the risk of impermissibly using such matters to displace the language that the parties have actually chosen.

73. In the present case, there were a number of matters relied on Mr Bryant. One was the legislative background, specifically the provisions of s. 51 Pensions Act 1995. As

explained by the Master of the Rolls, these are drafted in such a way that a scheme is obliged to increase the relevant parts of a pension (post-1 April 1997 accruals) by at least the *"appropriate percentage"*, unless the rules require them to be increased by the *"relevant percentage"*. I accept that on Mr Bryant's construction, the operation of these provisions is much more straightforward and simpler than it is on Mr Short's. On Mr Bryant's construction, Rule C.10(2) does not permit the employer to reduce the rate below 5% LPI, with the result that s. 51(3) is satisfied and one does not need to have regard to the appropriate percentage at all. On Mr Short's construction, the practical operation of the provisions depends on whether (as he submits and the judge held) s. 51(3) is satisfied in any case where the employer does not specify an alternative rate, or whether, as Mr Bryant submits, it is never satisfied, but Mr Bryant convincingly demonstrated that the rate would either be liable to oscillate between the statutory rate and the scheme rate, or that there would have to be a duplicative calculation, neither of which made much sense. I agree, and if the question is whether Mr Short's construction is liable to cause practical difficulties, I accept that it is. That is a good reason for concluding that the drafter of the rule would have been well advised to draft it differently. But that is not the question. The question is what the drafter actually did. I do not think one can legitimately extrapolate from the operation of s. 51 that what the drafter meant to do, and did, was provide that the employer should only be able to specify a higher rate.

74. The other main category of material relied on by Mr Bryant was the material available showing what active members of the Six Continents Plans were told when invited to join the BPP and transfer their past service benefits to it. This undoubtedly indicates that they were told that they would get the same benefits as under their existing schemes, and that in the case of pensions increases that included a guarantee of 5% LPI increases (based on the scheme default rate) with discretionary increases on top. That shows a mismatch between what the transferring members were told and what the BPP in fact provided. It may or may not give the transferring members grounds for complaint. But again any such matters are not before us, and I have not been persuaded that it means that Rule C.10(2) is open to different interpretations, or that *"any other rate"* can be read as *"any higher rate"*.

75. I said above that not all questions of construction are of the same type. As well as choosing between rival interpretations, the Court can correct mistakes as a matter of construction. It is clear from the Supreme Court authorities that this is a separate interpretative tool from those involved in choosing between rival interpretations: see in particular *Arnold v Britton* at [78] and *Barnardo's* at [18], both per Lord Hodge JSC.

76. These cases are cases where there has been a drafting *mistake*. Sometimes the mistake is a simple transposition obvious on the face of the document, as where John is written for Mary, or Landlord for Tenant, or a decimal point is put in the wrong place. Sometimes the language of the contract as written is obviously garbled: *KPMG LLP v Network Rail Infrastructure Ltd* [2007] EWCA Civ 363 was an example of this type of case. In such a case the mistake is plain enough, and the issue becomes whether it is also obvious what the provision was intended to be. Sometimes however the mistake does not readily appear when reading the provision, but it becomes apparent on examination that this cannot have been what the drafter meant, as it makes no rational sense. *Chartbrook* was a case of this type, where the formula on its natural reading led to a wholly irrational result that, in the judgment of the House of Lords, could not

possibly have been what was meant. Another example was my decision in *Sterling Insurance Trustees Ltd v Sterling Insurance Group Ltd* [2015] EHWC 2665 (Ch) where adding the word "due" to "accrued" led to such odd consequences that I was persuaded that it must have been included by mistake.

77. This type of case is in principle quite different from the type where there are two rival interpretations. In such a case it is not a question of choosing which interpretation is more consistent with commercial or business common sense, or gives more reasonable and practical effect to a scheme. They are unusual cases, *"fortunately rare"*, because we do not easily accept that people have made linguistic mistakes, particularly in formal documents, and it requires a *"strong case"* to persuade the Court that the interpretation is sufficiently irrational to justify the conclusion that there has been a mistake: *Chartbrook* at [14]-[15].

78. In the present case I agree with my Lords that there is no basis for concluding that the drafter made a drafting mistake. On the contrary, he or she evidently took the language directly from the predecessor provision in the (main) Six Continents Pension Plan. That seems a rational enough thing to do, certainly as regards the DB Staff Section, which was much the larger of the two DB sections. The fact that there were communications to members indicating that the 5% LPI was guaranteed and the employer had a power to give discretionary increases on top does, as I have already referred to, indicate that there was a mismatch between what the transferring members were told and what the rules provided, but this does not to my mind justify the inference that the mistake was in the drafting of the rule, which reproduced the existing rule. The mistake may equally have been in the drafting of the letters to members, and we do not even know whether the drafter knew anything about what the members had been told.

79. It is true that the Six Continents Executive Plan did not contain a similar rule but provided for straightforward 5% LPI increases. But does that make it irrational for the drafter to have used the same wording in the new DB Executive Section as in the new DB Staff Section? I do not think we have the material on which to conclude that that was the case. For all we know, the drafter may have been well aware of the difference but intended to align the two sections. I do not think that can be ruled out as irrational. It is possible, although to my mind less likely, that the drafter overlooked the difference between the two predecessor schemes. It is possible that the drafter intended to reproduce the difference but failed by mistake to do so. That was not suggested before us, but if it were the case, it might be possible, on sufficient proof of the intention, to rectify the provision in the Executive Section; that would not however have any impact on the provision in the Staff Section. What I do not think can be safely concluded is that the only explanation for the form of the provision in both DB sections is that the drafter intended that the employer should in both sections only have the ability to specify higher increases but made a mistake in writing *"any other rate"* instead of *"any higher rate"*. But unless that is plain, the provision cannot be corrected to so provide under the guise of construction.

80. For these reasons I agree that the appeal should be allowed on Ground 1. I also agree with the judgment of the Master of the Rolls in all other respects.