

APPROVED JUDGMENT

Ref. PE-2019-000013

Neutral citation number: [2020] EWHC 118 (Ch)

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

7 Rolls Building
Fetter Lane
London

Friday, 17th January 2020

**Before HIS HONOUR JUDGE HODGE QC
Sitting as a Judge of the High Court**

IN THE MATTER OF THE BRITVIC PENSION PLAN

Between:

BRITVIC PLC

Claimant

- v -

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

Defendants

MR ANDREW SHORT QC appeared on behalf of the **Claimant**
MR JONATHAN CHEW appeared on behalf of the **First Defendant**
MR KEITH BRYANT QC and **MR PHILIP STEAR** appeared on behalf of the **Second Defendant**

Hearing Dates: 15th and 17th January 2020

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JUDGE HODGE QC:

1. This is the court’s extemporary judgment on the substantive hearing of a Part 8 claim issued by Britvic Plc, as the sponsoring and principal employer of the Britvic Pension Plan, on 25 July 2019. This judgment is divided into eight sections as follows: (1) Introduction. (2) Background. (3) The relevant history. (4) The legal framework. (5) The employer’s submissions. (6) The trustees’ position. (7) The representative beneficiary’s submissions. (8) Conclusions. However, such division is for ease of understanding and exposition only, and each section of this judgment has informed the others.

1 Introduction

2. This case concerns the proper construction of certain provisions dealing with increases to defined benefit pensions in payment in excess of the guaranteed minimum pension and the revaluation of deferred benefits under the Britvic Pension Plan (as later amended). As later amended, these provisions provide as follows:

“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 five 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)”.

3. The focus of this case is upon the phrase in parenthesis at the end of that provision: “(or any other rate decided by the Principal Employer)”. The central question is whether the alteration power “(or any other rate decided by the Principal Employer)” allows the principal employer to substitute a rate that is **higher or lower** than would otherwise apply (as the employer contends) or whether it only allows the principal employer to substitute a higher rate (as the representative beneficiary contends). The claimant has referred to this power as the “Increase Alteration Power”, but this description is contentious because it rather begs the question to be determined in these proceedings. Mr Short might have said, but elected not to, that the description “Increase Alteration Power” rather gives the game away.

4. A subsidiary question is whether the principal employer may set a different rate for the purposes of the revaluation of deferred pensions under rule C2(2) than for the purposes of increasing pensions in payment under rule C10(2).

2 *The background*

5. The Britvic Pension Plan is an occupational pension scheme established by a trust deed and rules, dated 31 January 2003, with a commencement date of 1 April 2003. The Plan is currently governed by the Trust Deed and Rules dated 12 December 2007 (as amended). The Plan has a general rules section, a defined benefits staff section, a defined benefits executive section and a defined contribution section. The Britvic Pension Plan was set up as a result of a corporate demerger of Six Continents Plc (formerly Bass Plc), when the soft drinks business was split off from the hotel and retail businesses. The defined benefits sections were set up to receive active and most deferred members and pensioners from either the Six Continents Pension Plan (formerly the Bass Pension Plan and since renamed the Mitchells and Butlers Pension Plan) or the Six Continents Executive Pension Plan (formerly the Bass Executive Pension Plan and since renamed the Mitchells and Butlers Executive Pension Plan) who were or had been employed in the soft drinks businesses before the demerger. Both of the defined benefits sections were closed to new members from the start of the Britvic Pension Plan. The only members were those who elected to transfer in, or those who were automatically transferred in, to the Britvic Pension Plan. Both of the defined benefit sections closed to further defined benefit accrual on 10 April 2011.

6. The claimant, Britvic Plc, has been the principal employer of the Britvic Pension Plan since it replaced Britannia Soft Drinks Limited in that role on 2 March 2006. There are two witness statements from Mr Dominic Whyley. Mr Whyley is the company's Director of Tax and Treasury and was the Chair of its Pensions Committee. Mr Whyley's first statement, dated 25 July 2019, sets out the events leading to the creation of the Britvic Pension Plan, the adoption of the relevant rules and the reasons for this application. It also outlines other proceedings issued on 26 February 2018, under case number PE-2018-00003, in relation to the Mitchells and Butlers Pension Plan. These form part of the background to the instant proceedings and they are due for a trial extending, I am told, over some three weeks later this year. Mr Whyley's second witness statement, dated 15 August 2019, was provided for an interlocutory application, details of which will emerge shortly. The claimant is represented by Mr Andrew Short QC.

7. The first defendant, Britvic Pensions Limited, is the sole trustee of the Britvic Pension Plan. It is represented by Mr Jonathan Chew (of counsel). The trustee takes a neutral role in these proceedings, although the current chair of the trustee, Ms Alison Bostock, has provided three witness statements dated 7 August, 16 August and 24 December 2019, addressing various matters.

8. The second defendant, Mr Simon Richard Mohun, is a member of the Britvic Pension Plan. He has provided two witness statements dated 8 and 15 August 2019. He is represented by Mr

Keith Bryant QC, leading Mr Philip Stear (also of counsel). Mr Mohun was employed in the soft drinks business of Bass Plc, and then Six Continents, before the demerger and he was a member of their respective pension plans. His employment was transferred to the company's group, and he transferred his accrued benefits into the Britvic Pension Plan. He was an active member of that plan from April 2003 until it closed to future defined benefits accrual on 10 April 2011. His benefits would be more valuable if the principal employer is only able to substitute a higher rate of increases under the relevant provision. Mr Mohun is willing to be appointed, pursuant to CPR 19.7, as a representative of those in whose interests it would be to oppose the principal employer's interpretation of the relevant rules. There is also a statement, dated 3 January 2020, from Ms Kate Payne, a solicitor and partner with ARC Pensions Law LLP, who are the solicitors acting for the representative beneficiary. She exhibits, as exhibit KP1, some correspondence received from members of the Plan.

9. The claim form was issued under part 8 of the CPR on 25 July 2019. It raises a series of questions as to the proper construction of rule C10(2) of the 2007 Trust Deed and Rules as amended (in the case of the Staff Rules) by clause 1.4 and (in the case of the Executive Rules) by clause 1.11 of a Deed of Alteration dated 30 June 2008. In summary, rule C10 deals with increases to pensions in payment, or what may be termed "escalation". The claim form also raises a subsidiary question as to rule C2(2), which deals with the revaluation of deferred pensions before they are put into payment.

10. An amended claim form was issued on 9 January 2020 making two amendments to the original claim, with the agreement of the defendants. One clarifies that the questions posed in the original claim form are asked in relation to the 2007 Trust Deed and Rules as they were amended by the 2008 Deed of Alteration. The other amends the proceedings so that they expressly address the equivalent rules in the 2003 Trust Deed and Rules. As it is necessary to identify, at least to some extent, the true construction of the rules in the 2003 Trust Deed and Rules in order to construe the same rules in the later 2007 Trust Deed and Rules, as amended, it is sensible for that issue to be addressed in these proceedings. As Mr Bryant points out, any member of the Pension Plan with active service under the 2003 Rules who ceased pensionable service before 12 December 2007 is not subject to the 2007 Rules. Unless construction of the 2003 Rules is added to the current claim, such members would not be bound by any declarations or other rulings made by the court. Unless amended, the representation order proposed for the second defendant would not cover such members at all. Mr Bryant understands there to be no suggestion from any of the parties that the proper

construction of either rule C10 or rule C2 should be different as between different sections of the Pension Plan or as between different iterations of its rules.

11. The court was invited to note that other issues may arise in due course, either as a result of the extant Mitchells and Butlers proceedings referred to by Mr Whyley and Ms Bostock in their respective witness statements, or separately in relation to the far fewer members of the executive section of the Pension Plan. However, these issues are not to be addressed in these proceedings, which are confined to the questions of construction set out in the amended claim form.

12. The principal employer has already sought to exercise the alteration power in relation to the 2019 round of inflationary increases by substituting a rate of one per cent (subject to statutory minima of 2.4 per cent for service on and after 6 April 1997). The trustee has sought directions from the court as to whether, in all the circumstances, it should apply that rate before the court has determined in these proceedings the proper construction of the relevant rules. An interim agreement in that regard has been reached between the parties, and this was approved by Chief Master Marsh on 29 August 2019.

13. The hearing of this claim took place on Wednesday 15 January 2020. Detailed and helpful written skeleton arguments had been submitted by all three parties which the court had considered during the course of its allocated half-day's pre-reading. The court heard no live evidence. The oral submissions occupied a full court day, beginning at 10.30 am and concluding at about 4.20 in the afternoon. The court then adjourned to 10.30 this morning, Friday 17 January, to consider and map out this extempore judgment.

3 *The relevant history*

14. A non-contentious summary of events leading up to these proceedings is provided at paragraph 14 of Mr Short's skeleton argument. The Bass Pension Plan was established in 1946 and the Bass Executive Pension Plan in about 1960. On 29 August 1989, a trust deed and rules were executed to govern the Bass Pension Plan.

15. On 24 July 1996, a new trust deed and rules were executed to govern the Bass Pension Plan. Those rules included an escalation provision at rule 23, which is materially identical to what was to become rule C10. This provision did not apply to those who had already become pensioners or had left pensionable service.

16. On 17 March 2000, a new trust deed and rules was executed to govern the Bass Executive Pension Plan. Those rules included an escalation provision at rule 24, but that did not include any

power for the principal employer to set another rate of increase (as in the case of the Bass Pension Plan).

17. In 2001, Bass Plc was renamed Six Continents Plc. The Bass Pension Plan was renamed the Six Continents Pension Plan and the Bass Executive Pension Plan was renamed the Six Continents Executive Pension Plan.

18. On 17 December 2002, a new trust deed and rules were executed to govern the renamed Six Continents Pension Plan. The rules included the same escalation provision in the same terms at rule 23.

19. In 2003, the Six Continents Plc group was separated into a hotels and soft drinks business and a separate pubs and restaurant business, operated by Mitchells and Butlers Plc. The hotels and soft drinks businesses were each to have their own separate pension plans, and it was this that led to the creation of the Britvic Pension Plan (and the separate soft drinks employer group).

20. On 31 January 2003, the 2003 Trust Deed and Rules were executed by Britannia Soft Drinks Limited, as principal employer, and by Britvic Pensions Limited, as trustee. This established and governed the Britvic Pension Plan, with a commencement date of 1 April 2003. The escalation provisions at C10(2) were materially identical to rule 23 of the Six Continents Pension Plan, but not rule 24 of the Six Continents Executive Pension Plan (in that there had previously been no power to alter the rate of inflationary increase in the Six Continents Executive Pension Plan).

21. On 27 March 2003, in anticipation of the then imminent commencement date of 1 April 2003, transfer deeds were executed to effect a bulk transfer of the relevant assets and liabilities from the two Six Continents Pension Plans to the Britvic Pension Plan on the conditions set out therein. The transfer deeds each referred to a discretionary practice of awarding pension increases at two-thirds of the increase in the Retail Price Index over five per cent at clause 7.1. Mr Short notes that by 2003, the annual increase in the Retail Price Index had not, in fact, exceeded five per cent in any May since 1991.

22. In April 2003, the Six Continents Pension Plan was renamed the Mitchells and Butlers Pension Plan.

23. On 12 December 2007, an updated Trust Deed and Rules were executed to govern the Britvic Pension Plan. Rule C10(2) of the 2007 Trust Deed and Rules was in the same form as had appeared in the 2003 Trust Deed and Rules.

24. On 30 June 2008, a Deed of Alteration amended rule C10(2) by imposing a cap of 2.5 per cent in relation to service on or after 1 July 2008.

25. On 10 April 2011, the defined benefits sections of the Britvic Pension Plan closed to the future accrual of benefits with immediate effect.

26. So far as material, the relevant provisions of the 2007 Trust Deed and Rules, as amended in 2008, are as follows:

“C10 Pension increases

(1) [Subject to the two defined exceptions] Each pension under the Plan increases in each year after it starts to be paid ...

(2) The part of a pension which exceeds any guaranteed minimum pension in payment is increased on 1st 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)”.

27. The words “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” were inserted in the respective staff and executive sections by clauses 1.4 and 1.11 of the 2008 Deed of Amendment.

28. Clause C2 is headed “Ending Pensionable Employment”. Sub-clause C2(2) is headed “Deferred Pensions”. So far as material to the issues before the court, this provides:

“A Staff DB Member whose Pensionable Employment ends before Normal Retirement Date is entitled to a deferred annual pension payable from Normal Retirement Date. It is equal to the Scale Pension increased as from the date Pensionable Employment ends as referred to in DB Staff Rule C10(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 ...”

4 *The legal framework*

29. Mr Short addresses this at paragraphs 15 to 25 of his skeleton argument, again in terms that are largely non-controversial. He begins with the case law authorities. He points out that the proper approach to the construction of documents has been the subject of substantial analysis over recent years. The aim is to determine what the parties meant by the language they have used. Although there are no special rules applicable to the governing documents of occupational pension schemes,

the particular features of such schemes mean that particular weight is to be placed upon the language used.

30. Mr Short begins by referring to the trilogy of non-pension cases. In *Rainy Sky SA -v- Kookmin Bank* [2011] UKSC 50, reported at [2011] 1WLR 2900, Lord Clarke, speaking with the agreement of Lords Phillips, Mance, Kerr and Wilson, said (at paragraph 14) that the:

“... ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant ... [The] relevant reasonable person is one 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.”

31. *Arnold -v- Britton* [2015] UKSC 36, reported at [2015] AC 1619, concerned the construction of provisions in a lease of property. Speaking with the agreement of Lords Sumption and Hughes, Lord Neuberger PSC said (at paragraph 15) that the court identifies that meaning:

“... by focusing 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”.

Lord Neuberger proceeded, at paragraphs 17 to 23, to emphasise seven factors, including, in particular, the importance of the language of the provision to be construed.

32. In his submissions, Mr Bryant pointed out that there was nothing in either of these two authorities to suggest that previous authorities had in any way been wrongly decided.

33. The third in the trilogy of non-pension cases is *Wood -v- Capita Insurance Services Limited* [2017] UKSC 24, reported at [2017] AC 1173. There the Supreme Court rejected the suggestion that *Arnold -v- Britton* had rowed back from the earlier *Rainy Sky* case. Instead, at paragraph 13, Lord Hodge, speaking with the agreement of Lords Neuberger, Mance, Clarke and Sumption, said as follows:

“Textualism and contextualism are not conflicting paradigms in a battle for occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may 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. The correct interpretation of other contracts 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. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or 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. The iterative process, of which Lord Mance spoke in *Sigma Finance Corporation*, assists the lawyer or judge to ascertain the objective meaning of disputed provisions.”

34. In his oral submissions, Mr Bryant referred to paragraphs 14 and 15 of Lord Hodge’s judgment, emphasising the stability and continuity of the English law of contractual interpretation.

35. More recently, the Supreme Court has given guidance as to the proper approach to the construction of pension schemes in *Buckinghamshire -v- Barnardo’s* [2018] UKSC 55, reported at [2019] ICR 495. The leading judgment was delivered by Lord Hodge, with the agreement of Baroness Hale and Lords Wilson, Sumption and Briggs. At paragraph 13, Lord Hodge referred to the guidance as to the construction of legal documents to be found in the trilogy of non-pension cases I have previously cited. Lord Hodge continued as follows:

“14. A pension scheme ... has several distinctive characteristics which are relevant to the court’s selection of the appropriate interpretative tools. 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.”

36. In his oral submissions, Mr Bryant pointed out that neither the fourth nor the fifth of the characteristics identified by Lord Hodge are features of the present case. As to the fourth

characteristic, Mr Bryant pointed out that the defined benefit provisions of the Britvic Pension Plan had been closed to new members from its inception. The only members were those who had been transferred into the Britvic Pension Plan; and, so far as material to these proceedings, those transferring members had expressly consented to such transfers. As to the fifth of the characteristics, Mr Bryant points out that potential transferring-in members of the Britvic Pension Plan had been sent letters and other documents inviting them to transfer in, and they had elected to do so.

37. Returning to paragraph 15 of his judgment, Lord Hodge said this:

“Judges have 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.”

Lord Hodge cited from the judgment of Lord Briggs, giving the judgment of the Court of Appeal, in *Safeway Limited -v- Newton*, [2018] Pensions Law Reports 2, at paragraph 22, and he stated that he agreed with that approach. What Lord Briggs there stated was this:

“... the Deed exists primarily for the benefit of non-parties, that is the employees upon whom pension rights are conferred whether as members or potential members of the Scheme, and upon members of their families (for example in the event of their death). It is therefore a context which is 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.”

38. At paragraph 16 of his judgment, Lord Hodge said this:

“The emphasis on textual analysis as an interpretative tool does not derogate from the need both to avoid undue technicality and to have regard to the practical consequences of any construction. Such an analysis does not involve literalism but includes a purposive construction when that is appropriate. As Millett J stated in *In re Courage Group’s Pension Schemes*, [1987] 1 WLR 495, at 505 there are no special rules of construction applicable to a pension scheme but ‘its provisions should wherever possible be construed to give reasonable and practical effect to the scheme’. Instead, the focus on textual analysis operates as a constraint on the contribution which background factual circumstances, which existed at the time when the scheme was entered into but which would not readily be accessible to its members as time passed, can make to the construction of the scheme.”

39. When he came to present his oral submissions, Mr Bryant also cited from paragraphs 17 and 18 of Lord Hodge’s speech:

“17. It is nevertheless relevant to the construction of pension schemes that they are drafted to comply with tax rules so as to preserve the considerable benefits which the United Kingdom’s tax regime confers on such schemes. They must be construed ‘against their fiscal backgrounds’ ...

18. Finally, a focus on textual analysis in the context of the deed containing the scheme must not prevent the court from being alive to the possibility that the draftsman has made a mistake in the use of language or grammar which can be corrected by construction, as occurred in *Chartbrook Limited -v- Persimmon Homes Limited*, [2009] AC 1101, where the court can clearly identify both the mistake and the nature of the correction.”

40. In addition, at paragraph 28 Lord Hodge reiterated the well-known principle that the court must construe a pension scheme:

“... without any preconceptions as to whether a construction should favour the sponsoring employer or the members”.

41. In *Stena Line Limited -v- MNRPF Trustees Limited* [2011] EWCA Civ 543, reported at [2011] Pensions Law Reports 223, Arden LJ considered the approach where a clause in the original trust deed is adopted again when the deed is revised and replaced by a new trust deed, albeit one containing, to all intents and purposes, the same clause. At paragraphs 34 to 35, Arden LJ said that:

“... even though the very same clause is effectively re-adopted in the same form, its meaning may change on each re-introduction if the context in which it is re-adopted is materially different ... Thus the meaning of a clause which is re-adopted from time to time has additionally to be considered in the context of circumstances subsequent to the date of its original adoption. It follows that regard should be had both to relevant circumstances at the date of its original adoption and to relevant circumstances at each subsequent re-adoption ...”

Neither party suggested that there was any practical difference between the various articulations of the rules, although at one point, Mr Short did suggest that if a decrease in the rate of increase had not previously been permitted, then this was allowed for after the 2008 amendment.

42. Mr Short pointed out that it was well established that a document could not be construed by reference to events taking place, or documents coming into being, after the date of the document to be construed. He cited the well-known observation of Lord Reid in the case of *James Miller and Partners Limited -v- Whitworth Street Estates (Manchester) Limited* [1970] AC 583, at page 603E:

“I must say that I had thought that it is now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later”.

As a general proposition, that is, of course, clearly correct; but it must be read subject to the qualification identified by Mr Bryant that where a later document or event forms part and parcel of an earlier transaction effected by an earlier document, so as to form part of the objective substratum of the earlier document, then such later document or event may be used as an aid in the construction of the earlier document.

43. Mr Short also took me to the decision of Vos J in the case of *Danks -v- QinetiQ Holdings Limited* [2012] EWHC 570 (Ch), reported at [2012] Pensions Law Reports 131. There the court was dealing with a rule which gave members the right to an increase calculated in accordance with “the Index”. That was a defined term which meant:

“The Index of Retail Prices published by the Office of National Statistics or any other suitable cost-of-living index selected by the Trustees”.

At paragraph 55, Vos J held that this meant that:

“... the member has only a right to future increases at RPI ‘or any other suitable cost of living index selected by the Trustees’”.

As a result, there was said to be no accrued right to increases at RPI, and the trustees could select a different (and less favourable) index for future increases without adversely affecting any of the members’ accrued rights. That approach was followed by Newey J in *Arcadia Group Limited -v- Arcadia Group Pension Trust Limited*, [2014] EWHC 2683 (Ch), at paragraphs 56 to 58. The same approach was also adopted by the Court of Appeal in the *Barnardo’s -v- Buckinghamshire* case [2016] EWCA Civ 1064. At paragraph 56, Lewison LJ said this:

“It seems to me that if a person has a right to ‘A or B’ one cannot say that he has an accrued right to A. He has a right to one or other of them. As Newey J put it, a member has the right to an increase consistent with the definition; or as Vos J put it, the member has a right to a future increase at RPI or any other suitable cost of living index selected by the Trustees. I agree with both of them. I do not consider that there is a default rule in the way that Mr Simmonds suggested. On the basis of Mr Rowley’s construction of the definition, the trustees have a choice; and until that choice has been exercised, it is not possible to say that the member has a right to an increase measured in any particular way.”

McFarlane LJ (at paragraph 65) and Sir Geoffrey Vos, Chancellor (at paragraph 92) both agreed with Lewison LJ. The matter was not dealt with in the Supreme Court because this issue (which arose on a cross-appeal to the Court of Appeal) did not arise on the view taken by the Supreme Court.

44. Mr Short submitted that pensioners will get a capped increase in accordance with the Retail Price Index unless a different rate of increase is selected by the principal employer. To that extent,

but to that extent only, a rate of increase by reference to the (capped) Retail Price Index could be said to be the default position.

45. In the course of his oral submissions, Mr Bryant said that a clear distinction should be drawn between cases such as *QinetiQ* and *Barnardo's*, where there is an open-ended defined term (such as an alternative inflationary index) and the present case. Here the relevant power is an increase provision itself, and that is said by the principal employer to enable it to substitute an alternative rate for that specifically identified in the particular rule.

46. Mr Short dealt with the statutory context at paragraphs 24 and 25 of his skeleton argument. Section 51 of the Pensions Act 1995 requires pensions (in excess of the guaranteed minimum pension) attributable to pensionable service on or after 6 April 1997 to be increased by the “appropriate percentage” if, under the rules of the scheme, it is not being increased annually by either the “relevant percentage” or by the Retail Price Index (capped at 5 per cent or 2.5 per cent, depending upon the period of service for which pension is attributable). Mr Bryant referred to section 51 as the “Limited Price Indexation” (or LPI) Legislation. Mr Short points out that in practice, both the “appropriate” and the “relevant” percentages are based upon the Consumer Prices Index (or CPI) capped at either 5 per cent or 2.5 per cent, dependent upon the period of service. The “appropriate” percentage (but not the “relevant” percentage) is based upon the Index measured in the October of each year. Before 1 January 2011, the statutory regime had relied upon RPI rather than CPI. Mr Short points out that a fuller history of the development of the statutory regime can be found at paragraphs 77 to 90 of *QinetiQ*. He also points out that a detailed comparison between the two indices is provided in the judgment of Elias J at paragraphs 7 to 15 of *R (Staff Side of the Police Negotiating Board) -v- The Secretary of State for Work and Pensions* [2012] Pensions Law Reports 31. Mr Short points out that the shortcomings of RPI as a measure of inflation, and an explanation as to why it is “likely to overstate inflation”, are set out in articles by the Office for National Statistics, originally dated 8 March 2018 and updated on 14 May 2019.

47. The statutory scheme for revaluing accrued benefits in excess of guaranteed minimum pension is set out in Chapter II of Part IV of the Pension Schemes Act 1993. For current purposes, it requires the benefits of a deferred member to be increased by a percentage specified each year by order of the Secretary of State. The percentage covers the number of complete years between the date the member left pensionable service and the date on which he reaches normal pension age. Since 1 January 2011, the specified percentage in relation to complete years of deferment from the previous 1 January 2010 has been fixed by reference to CPI. Again, a fuller history of the development of this regime is said to be set out at paragraphs 91 to 102 of *QinetiQ*.

5 *The employer's submissions*

48. These are set out at paragraphs 26 and following of Mr Short's written skeleton argument. The first, and principal, question falling to be determined according to paragraph 5.1 of the amended claim form is whether (subject to the statutory minima) the employer is entitled to reduce the rate of future increases to below either 5 per cent (for service up to 30 June 2008) or 2.5 per cent (for service thereafter). As Mr Bryant notes in his skeleton argument (at paragraph 27), no one has ever suggested that, irrespective of the rate of RPI, increases under rule C10 should be at 5 per cent or 2.5 per cent (depending on the relevant period of service). That is not the default rate. What the employer presumably wants is confirmation that it may decide, and instruct the trustee, that pensions should increase by a rate lower than the default rate, as well as by a rate above it. Mr Bryant notes that any objective observer in possession of the background information would readily understand that. Accordingly, he says that the claimant must be understood to be asking the court (at paragraph 5.1) whether it may reduce the rate of future increases below the percentage increase in RPI (measured at the previous May) capped at 5 per cent (for service up to 30 June 2008) or the percentage increase in RPI (measured at the previous May) capped at 2.5 per cent (for service thereafter). That, Mr Bryant submits, is clearly how the court should construe paragraph 5.1 of the claim form.

49. Mr Short begins by pointing out that rule C10(1) has to be read in conjunction with rule C10(2). Any increase in (1) is only the increase provided for in (2). If there is to be no increase under C10(2), for example because there was no increase in the Retail Price Index during the relevant period, then there will be no increase under C10(1). Mr Short also points out that the phrase "any other rate" clearly applies to the rate of increase, and not to the 5 per cent or 2.5 per cent cap. In my judgment, that is clearly correct. Having made those introductory observations, Mr Short submits that the starting point in resolving this question is the wording of the parenthesis at the end of C10(2). He submits that the natural reading of the words "any other rate" encompasses any other rate, whether higher or lower. He submits that it would change the meaning of those words to restrict them to any other **higher** rate.

50. Mr Short emphasises that the admissible background must always take second place to the text of the provision being construed. This natural reading is said also to provide a practical and purposive role for the alteration power within the context of the rules as a whole. The various sets of rules have always included a power of augmentation, now to be found in general rule C6(1) of the 2007 Trust Deed and Rules. This allows the principal employer, subject to payment of any

additional contributions required by the trustee, to increase any benefits. Mr Short points out that although it is expressed in terms whereby the trustee may improve benefits, where requested to do so by the principal employer, the trustee is very unlikely to refuse to provide any properly funded improvement. Although some overlap is inevitable in the governing provisions of an occupational pension scheme, the alteration power would, Mr Short submits, be rendered largely nugatory if its only additional role was to allow unfunded enhancements to pension increases to be imposed against the wishes of the trustee. He submits that if rule C10(2) only permits **increases** in the relevant rate of increase, then there would be no real scope for rule C6(1). He also submits that rule C10(4) sheds no light on the question of the power to substitute a different rate.

51. Mr Short accepts that the rates could not effectively be reduced below the statutory rates in relation to pension attributable to pensionable service on or after 6 April 1997, as the requirements of section 51 of the Pensions Act 1995 would override any such reduction. Nevertheless, he submits that this still gives the alteration power ample room for operation.

52. Mr Short also addresses Mr Bryant’s reliance on the background documentation, originating with the 1996 Bass Trust Deed and Rules. At paragraphs 31 to 36 of his skeleton argument, he points out that the documentation relied upon by Mr Bryant all post-dates the earliest 1996 iteration of the rules, and much of it is said to post-date the 2003 Trust Deed and Rules. He submits that even insofar as the documents are admissible, they do not provide any real assistance, doing no more than show what the authors of those documents thought the alteration power did. For the most part, it is said that they do so accurately, insofar as the alteration power had not been exercised. Mr Short submits that they do not directly address the question of whether the power allows for the substitution of a **lower** rate than RPI. The employer relies upon the approach set out in the *Barnardo’s* and *Safeway* cases. Mr Short addresses the various documents concerning the negotiations between Six Continents and Britannia Soft Drinks Limited at paragraphs 34 to 36 of his skeleton. These are said to be of no assistance in construing rule 23 of the 1996 Bass Trust Deed and Rules, and also of no assistance in relation to the later Trust Deeds and Rules.

53. Mr Short refers to a letter that was sent out, in similar terms, to the existing members of both the staff and executive sections of the Britvic Pension Plan on 17 December 2002 and to the outline benefit summary referred to in that letter. Mr Short emphasises the prefatory statement at the beginning of that outline benefit summary, which states in terms:

“As a summary, it cannot include every detail. The Trust Deed and Rules of the Britvic Plan will set out full particulars of the benefits and conditions on which they are payable and will take precedence in the event of any discrepancy between this or any document and the Trust Deed and Rules.”

The prefatory statement concludes:

“This document has been approved by Six Continents Plc and the Trustee of the Six Continents Executive Pension Plan.”

54. Mr Short acknowledges that there are various references in the contemporaneous documentation to the Britvic Pension Plan “replicating” or “providing the same benefits as currently provided in” the relevant preceding Bass or Six Continents Pension Plan. This is said to be entirely straightforward, and of little consequence, in relation to the staff section as rule C10(2) of the 2003 Trust Deed and Rules materially reproduced rule 23 of the earlier Bass Pension Plan and Six Continents Pension Plan. Mr Short acknowledges that the position is admittedly different in relation to the executive pension plan because there was no similar alteration power in that plan. He submits, however, that references to “replicating” or “providing the same benefits as currently provided” should be given little weight when construing rule C10(2). He emphasises that these proceedings are concerned purely with issues of construction, and do not extend to the possibility of any estoppel or claim for rectification.

55. On the second question, whether the employer is entitled to set different rates of future increases for different tranches of service, Mr Short submits that although the power is expressed in the singular, referring to “any other rate” rather than “any other rates”, this should not be construed as precluding the setting of different rates. He points out that the singular includes the plural pursuant to section 61(c) of the Law of Property Act 1925; and he refers to the fact that that was applied by Vos J in a similar context in the *QinetiQ* case (at paragraphs 70 and 71). Moreover, Mr Short submits that the current iteration of the rule expressly anticipates different rates being applied to different periods of service given the different caps for service before and after 1 July 2008.

56. On the third question, whether the employer may set the rate of future increases by reference to CPI, or another alternative index to RPI, Mr Short submits that unless a qualification can be read into the power, limiting it to substituting any other **higher** rate, there can be no objection to the rate being set by reference to CPI (whether directly to CPI or to CPI plus or minus some other percentage). Mr Short submits that it would be impractical, and unduly technical, for the principal employer to be required to identify a particular figure every year, rather than simply to identify the rate by reference to CPI, thereby making valuations and funding decisions more straightforward. Mr Short submitted that there did not appear to be much dispute as to this third question.

57. The fourth question is whether the principal employer may set the rate of future increases at or near to zero per cent. He acknowledges that, on its face, rule C10(1) appears to require there to be

an increase each year. But properly construed, he submits that rule C10(1) only requires the pension to be increased annually by the rate required by rule C10(2) **if any**. He says that it does not require an increase where the rate under rule C10(2) is 0 per cent, as would have been the case where there was no increase, or even a decrease, in RPI, as was the case in 2009. If the rate identified by rule C10(2) can be 0 per cent, there can be no proper basis for precluding the principal employer selecting that rate when exercising the alteration power. In other words, Mr Short emphasises that rule C10(1) is subject to rule C10(2) and does not override it.

58. Mr Short addresses the fifth question, which is whether the employer may set a different rate for the purposes of rule C2(2) than for the purposes of C10(2). He submits that this question really raises the issue whether rule C2(2) incorporates the mechanism to be found in rule C10(2) or merely the figure produced by that mechanism. He submits that it should be the former. The rule uses the phrase, “as referred to in DB Staff Rules C10(2) and (4)”. It is said that that does not connote that it is limited to the rate identified and applied under the relevant rule C10(2). He submits that his conclusion would provide a more practical and purposive outcome, given that the statutory underpin is calculated in a different manner (and on different benefits) than that applicable to increases to pensions in payment under rule C10(2). He does not suggest that the employer could retrospectively alter the rates applicable in relation to years before the current year. Insofar as a rate has already been fixed under rule C10(2) for a past year without the alteration power having been exercised in relation to either rule C10(2) or rule C2(2), deferred members will continue to benefit from that rate when their pension is revalued. Furthermore, there is an overriding entitlement to the statutory minimum increase pursuant to rule C2(2) and the Pension Schemes Act 1993.

59. Mr Short submits that the same answers should be given in relation to the 2003 Trust Deed and Rules. There is said to be no good reason to find that the parties intended the adoption of identical wording in 2007 to signify any difference in meaning from the 2003 Trust Deed and Rules.

60. For all of those reasons, Mr Short submits that, in each case, the question posed in the amended claim form should be answered in the affirmative, with the questions receiving the same answers in relation to both the 2003 and 2007 Trust Deed and Rules.

6 *The trustee’s position*

61. The trustee supports the appointment of Mr Mohun under CPR 19.7 to represent, on an issues-based basis, adversely affected members. Mr Chew points out that this is a standard feature of most pension cases and is appropriate in this case. It is proposed that Mr Mohun should represent all members, and those claiming through them, of the Britvic Pension Plan in whose interests it would

be to argue that the questions raised in the claim form be answered in the negative. In other words, Mr Mohun will argue against the employer's position. Mr Bryant, for Mr Mohun, is also content that such an order should be made.

62. Mr Bryant notes that although Mr Mohun is a member of the staff section of the Britvic Pension Plan, the issues raised in these proceedings also affect members of the executive section, of which Mr Mohun is not, and never has been, a member. However, the relevant rules are materially identical in the two sections; and, even if any issue specific to the executive section were to arise, it is difficult to see how Mr Mohun's interests would be in conflict with the affected members of the executive section. Similarly, the provisions of the 2003 rules are materially identical to those of the 2007 rules, as they stood before the 2008 Deed of Alteration and so it is difficult to see how Mr Mohun's interests could be in conflict with those of pre-2007 leavers. Mr Bryant therefore considers it to be appropriate that his client should be appointed to act as representative for affected members of both sections of the Britvic Pension Plan, including pre-2007 leavers. On that point, all three counsel are, for once, *ad idem*.

63. In those circumstances, Mr Chew makes it clear that the trustee is neutral on the construction issues and limits its role to ensuring that relevant matters are put properly before the court and that any decision is administratively workable.

64. The trustee is concerned that the greater source of uncertainty and member concern in respect of pension increases in the Plan, is **not** the construction issues raised by this litigation, which are relatively limited in scope, but the wider issues arising from the Plan's history that have led to the pension increase rules being in their current form. In short, the current pension increase rules appear to give the employer a unilateral power to set the rate of pension increases. Mr Chew notes that the Plan's history is relatively complex; the current Plan is a successor to the historic Bass Pension Plan, dating from the 1940s, and various corporate restructurings and dealings, which have led to the creation of this Plan in 2003. Mr Chew notes that the alteration power is inconsistent with certain historic rules in the predecessor plans, with what members were told at the time of the creation of the Plan and thereafter; and it may also be inconsistent with what was intended at the time of the creation of the Plan. Mr Chew points to the extant litigation in the Mitchells and Butlers proceedings, challenging the introduction of the alteration power into the predecessor Bass Pension Plan (later known as the Six Continents Pension Plan). As a result, Mr Chew notes, first, that there may be various claims as a matter of law: rectification (whether of the pension increase rules or the transfer deed transferring members into the Plan); estoppel arguments by members; and claims based on the invalidity of the relevant pension increase rule for some or all members or periods of

service. He also notes, secondly, that as a matter of plan administration, the trustee (and the representative beneficiary) have both been receiving complaints and queries from members that a proposed exercise of the alteration power would deprive members of guaranteed RPI pension increases.

65. Mr Chew addresses the broader issues in relation to pension increases in more detail at paragraphs 37 to 40 of his written skeleton, and the member communications and the responses to them at paragraphs 41 through to 43. He emphasises that the trustee is neither advancing these potential claims nor suggesting that they detract from the utility of resolving the construction issues. He simply makes the point that the issues surrounding the alteration power are wider than those currently in issue before this court. He also points to the fact that the concerns amongst the membership have added to the trustee’s burdens in administering the Plan.

66. Nevertheless, the trustee supports the making of declarations clarifying the scope and meaning of the pension increase rules, provided that any such declarations are sufficiently caveated to ensure that they do not, or could not be misunderstood to, affect any other claims in respect of the pension increase rules. Given the understandable concerns expressed by certain affected members to date, Mr Chew notes that perception and clarity of communication of the scope of this claim are perhaps more important than they would be ordinarily.

67. As to the administrative workability of the declaration sought, Mr Chew makes two points. First, the trustee seeks a caveat preserving any other claims relating to the alteration power. The claim form is drafted in terms of the employer being “entitled” to exercise the alteration power in certain ways. The trustee considers that these declarations alone will not “entitle” the company to exercise the alteration power. The word “entitled” should not be used (as it is said to be both inaccurate and risks misunderstanding amongst the membership). An appropriate caveat along the following lines should, Mr Chew suggests, be used:

“Without prejudice to any other claims or arguments (whether for rectification, estoppel, challenging the validity of the current or past Plan rules, or any other claim or any future claim challenging the exercise of any power or purported power in the plan rules) **It is declared** that on the proper construction of rules C10(2) and/or C2(2) of the 2003 and the 2007 Trust Deed and Rules (as amended) those rules as currently formulated confer a power on the company (subject to statutory minima) ...”

68. The second issue of administrative workability raised by Mr Chew relates to the fourth issue, by which the claim form seeks a declaration as to the employer’s entitlement “to set the rate of

future increase at **or near to 0 per cent**". The use of the phrase at "or near to" 0 per cent is said to risk uncertainty as to whether any proposed future exercise is sufficiently near to 0 per cent to be permitted. Does that mean 1 per cent, 0.1 per cent, 0.01 per cent, or some other figure? Mr Chew submits that any such declaration should be sufficiently precisely formulated to avoid, so far as practicable, any future dispute.

69. Subject to those matters of administrative workability, the trustee supports the court making declarations as to the meaning of the pension increase rules as currently drafted. I accept that those issues of administrative workability will need to be factored into any resulting court declaration.

7 The representative beneficiary's submissions

70. Mr Bryant began by noting that whilst the employer believes that it has a wide power to direct a variation from the default rate, the trustee very properly does not wish to depart from that default rate without confirmation of the employer's powers. The trustee is neutral as to the outcome of these proceedings and it is Mr Mohun who should be appointed as representative beneficiary to argue against the employer's case.

71. I have already mentioned that Mr Bryant recognises that there is no suggestion that the proper construction of either rule C10 or C2 should be different as between different sections of the Britvic Pension Plan, or as between different iterations of the Trust Deed and Rules. I have already recorded that Mr Bryant is in agreement that it is appropriate for his client to be appointed the representative beneficiary on an issues-based basis. At paragraph 41 of his skeleton argument, Mr Bryant identifies certain principles relating to the construction of pension scheme provisions which he submits will be of key importance to the proper resolution of these proceedings.

72. There are nine such principles, as follows (omitting references to supporting authorities):

- (1) A pension scheme trust deed and rules is an instrument which is designed to provide benefits to which former employees will have rights over the long-term.
- (2) Pension scheme members are not volunteers and their benefits have been earned by service in employment.
- (3) Because the former employees for whom a pension scheme exists to provide benefits will not have been party to the deeds creating their rights, it is not appropriate to allow construction to be heavily influenced by background material which would not have been readily accessible by them.

(4) A pension scheme's provisions should be construed "to give reasonable and practical effect to the scheme" and this involves preferring a purposive construction, where appropriate, to a literalistic one.

(5) A pension scheme must be construed against the background of applicable pensions legislation, whether relating to taxation of pension schemes or other factors.

In his oral submissions, Mr Bryant made it clear that it was not only the relevant taxation regime that was relevant; a pension scheme must be construed not only against the background of applicable fiscal legislation, but also other regulatory and legislative matters, including contracting-out and equality legislation.

(6) A pension scheme must be construed as a whole.

(7) Each provision of a pension scheme must be construed in the light of the circumstances at the time that it was first introduced, as well as on each occasion it is re-adopted; and while the court should be astute to the possibility that provisions in two schemes which exhibit "family resemblances" might nonetheless fall to be considered differently, the terms of predecessor schemes are admissible as an aid to construction.

(8) Pension schemes are not generally the product of commercial negotiation.

(9) The court must be alive to the possibility that the draftsman has made a mistake in the use of language or grammar which can be corrected by construction.

73. I would accept, in broad terms, the validity of all of those general principles. However, it should be borne in mind that there are certain features peculiar to the present case. In particular, this is a case where no new members have been able to join the Britvic Pension Plan since its inception, and members who did transfer in at its inception had the benefit of explanatory documents. In certain other cases, Mr Bryant's fourth principle would be subject to the constraint identified by Lord Hodge in the *Barnardo's* case at the end of paragraph 16 of his judgment. In the present case however, that constraint is of limited application. Therefore, it seems to me that in the present case, the need to construe the provisions of a pension scheme so as to give a reasonable and practical effect to the scheme, and the preference for a purposive construction, where appropriate, as opposed to a literalistic one has rather more force than in the general run of pensions cases where the third,

fourth and fifth characteristics identified in Lord Hodge’s speech in the *Barnardo’s* case will have rather more relevance and application.

74. Mr Bryant addresses the question of admissibility of background evidence and documents at paragraphs 42 and 43 of his skeleton. He relies on the materials identified at paragraph 43 of his skeleton: First, evidence as to the commercial objectives with which the Britvic Pension Plan was established by Britannia Soft Drinks Ltd by way of the 2003 Rules. He contends that these are admissible under the principles formulated in *Prenn v Simmonds* [1971] 1WLR 1381 at page 1385H, and which are unaltered by *Chartbrook*. He makes it clear that he does not rely upon these as evidence of what the principal employer or the trustee meant by the text of any provision included in the 2003 Rules, but rather as forming part of the evidence that is admissible to show the context in which the further evidence which he identifies goes to the correct construction of the 2003 Rules.

75. Secondly, he relies on the terms of the existing Six Continents Pension Plans as being the schemes from which transfers were to be taken at the inception of the Britvic Pension Plan, and specifically the transfer-out powers of those schemes and rules. Thirdly, he relies upon the transfer arrangements for active members of the Six Continents Plans as at 31 March 2003, who then became subject to the rules of the staff and executive sections of the Britvic Pension Plan. He invites the court to note that deferred and pensioner members, as at 31 March 2003, became subject to general rule A4 of the 2003 Rules, and so are outside the scope of these proceedings. That is relevant because although their consent was not sought to the transfer-in, that can be disregarded for present purposes. Transfers for the active scheme members took place with their consent. They were solicited by packs of material sent to members on 17 December 2002. Those are said to form part of the “objective substratum” upon which the Britvic Pension Plan was created, which is part of the admissible background. Moreover, they were, by definition, readily accessible to members. Indeed, no one became subject to rule C10(2) who did not physically receive a transfer invitation.

76. Fourthly, reliance is placed on the transfer deeds under which the asset transfers from the two Six Continents Plans to the Britvic Pension Plan took place. Although these were both dated 27 March 2003, and thus post-dated the execution (but not the effective date) of the 2003 Rules, Mr Bryant submits that they are admissible in their construction, as if they were comprised in one document, on the grounds that they are all part and parcel of the same transaction. They are also said to form part of the “objective substratum” upon which the Britvic Pension Plan was created. Moreover, they pre-date, and are therefore clearly admissible, in relation to the construction of the 2007 Rules. Mr Bryant cites the case of *Thompson v Bee* [2009] EWCA Civ 1212, reported at [2010] Ch 412. Mr Bryant submits that all of these documents are part of the demerger and

establishment of the Britvic Pension Plan; without the transfer deeds, the scheme would have had no assets and no members. Mr Bryant submits that the transfer deeds are a minor part of his argument, but they are said to bolster the other material.

77. Mr Short points out that the *Thompson v Bee* case is dealing with the converse situation to that in the present case. There, the issue was whether an earlier will was admissible as an aid to the construction of a later assent. The will necessarily preceded the assent, and the assent was intended to give effect to the provisions of the will. Mr Short is strictly correct in that; but, in my judgment, the converse holds good if a later document is all part and parcel of the same transaction. In my judgment, the underlying principle holds good, and supports the proposition that a later document may be admissible to construe an earlier document if they are all part and parcel of the same transaction and formed part of the same objective substratum.

78. Fifthly, and finally, Mr Bryant relies upon the terms of the Limited Price Indexation Legislation at the relevant dates.

79. In my judgment, for the reasons that Mr Bryant gives, all of the classes of material upon which he seeks to rely as part of the admissible background are properly admissible. I accept Mr Bryant's submission that nothing in the *Barnardo's* case suggests that background material is inadmissible. It does all go to its weight. Mr Bryant submits that, construed in accordance with his nine principles, and, if necessary, in the light of the admissible background material, the correct interpretation of rule C10(2) is that it creates a two-stage mechanism, to be used in any year, under which the trustee must apply the RPI-based default rate unless the employer exercises its discretion to substitute another, and a **higher**, rate.

80. Mr Bryant's reasons are summarised at paragraph 45 of his skeleton. They are five in number. First, even without regard to admissible background material, this would be the purposive interpretation, and that which would give reasonable and practical effect to the scheme within the fourth of his principles. Specifically, the division of labour between the trustee's role (in applying the default rate in the absence of a direction by the employer) and that of the employer makes sense only if the default rate is also a guaranteed rate, so that the purpose of any direction by the employer is limited to supplementing the default rate, rather than undoing it. If the aim were to design a mechanism giving fundamental control over pension increases to the principal employer, the means of achieving that aim would not involve the creation of a binary mechanism, such as that established by rule C10(2). Mr Bryant develops this argument at paragraphs 46 to 55 of his written skeleton.

81. Secondly, Mr Bryant submits that the construction for which he contends would respect the need to interpret the Britvic Pension Plan's provisions as a whole (within the sixth principle)

whereas the alternative positions that might be contended for by the employer strain credulity when the sixth principle is taken into account and, indeed, depend upon an excessively literalistic approach, which is said to be entirely at odds with the fourth principle. That argument is developed at paragraphs 56 to 59 of Mr Bryant’s skeleton.

82. Thirdly, even without considering the admissible background, therefore, there are said to be reasons for preferring the construction contended for by Mr Bryant. Moreover, if it is necessary to justify recourse to the admissible background, the considerations identified at the first and second stages of the argument are said to be sufficient to justify the court in holding that, on the face of the 2003 Rules, something has gone wrong with the language, so as to engage the ninth principle. Mr Bryant expands upon that at paragraph 60 of his skeleton.

83. Fourthly, taking into account the Limited Price Indexation Legislation at all material times, in accordance with the fifth principle, the reasons for construing rule C10(2), as contended for by Mr Bryant, are said to become even more powerful. He developed that argument at paragraphs 61 to 76 of his skeleton.

84. Fifthly, taking into account the terms of the transfer-out powers of the two Six Continents Pension Plans (in accordance with the fifth and seventh principles), the transfer invitations and the preservation legislation, these reasons are said to become yet more convincing. That argument is developed at paragraphs 77 through to 89 of Mr Bryant’s skeleton.

85. I turn to consider each of those submissions as developed by Mr Bryant. First, construing rule C10(2) to give reasonable and practical effect to the Britvic Pension Plan. Rule C10(2) provides for annual counter-inflationary pension increases to be applied to pensions in payment. On its true construction, this is said to create a two-stage mechanism, both conceptually and procedurally. First, the trustee is required to calculate, and apply, **guaranteed** increases based on the capped percentage increase in RPI over a one-year period, up to the end of May in each year. Secondly, the principal employer has a discretion to direct that a higher rate of increase is applied. It is only at this second stage that any discretion emerges.

86. It is clear from the language of rule C10(2) that this mechanism has to be operated on an annual basis; the rate of increase to be applied each year can only be determined on an annual basis since the default rate is pegged to RPI up to the end of May in that year. The discretionary power is said to be limited to **increasing** the default rate, and not to reducing or extinguishing it. That mechanism is said to be very different to the type of rule that was considered in the *QinetiQ* case.

87. The purpose of this two-stage mechanism is said to be to limit the extent to which the value of a pension in payment may be eroded by inflation. The first stage gives assurance to members that

anti-inflationary protection will be applied to the guaranteed extent. At the same time, it limits the exposure of the pension plan, and its sponsoring employer, to inflationary risk. The second stage allows for additional protection to be provided where the principal employer considers that this would be appropriate.

88. The purpose of the second stage remains anti-inflationary even though increases at that stage are not tied to RPI or any other index. Increases might be made at the second stage, either (a) because RPI inflation is running at above the cap on the guaranteed increase rate, and the circumstances allow for an increase that will wholly or partially offset the erosion of value that would otherwise occur as a result of the difference; or (b) because whilst RPI inflation is running at below the cap, there have been periods in the past where it has exceeded the cap and a catch-up increase is deemed affordable and appropriate.

89. Mr Bryant points out that the general rule C6 confers a general power to increase benefits. The two rules are aimed at different ends, and neither can be construed as limiting or assisting in the construction or delimitation of the other. Mr Bryant makes it clear that he does not contend that at the second stage the power is a fiduciary one. The employer is entitled to exercise the power taking into account its own interests, and that is said to be why the second stage takes the form that it does.

90. The mechanism that Mr Bryant contends is created by rule C10(2) depends upon a purposive construction of the language in that rule, according to which the phrase “(or any other rate decided by the principal employer)” is understood to mean that the type of rate that may be decided upon by the principal employer is one that is **higher** than the rate generated at stage 1 of the process. That is said to mean that the construction for which Mr Bryant contends may be expressed by substituting the words, “higher” for “other” in the text of the rule.

91. Mr Bryant submits that this does not need to be approached on the basis of “corrective construction” as such. It was a commonplace of construction even before the *Investors Compensation Scheme* case for the scope of apparently sweeping provisions to be narrowed on construction following an investigation of the purpose of the mechanism of which they formed part. The construction contended for is said to have much in common, for example, with decisions such as *Mills v Dunham* [1891] 1 Ch 576, in which the Court of Appeal construed the phrase “transact business” (in a restrictive covenant) to mean “transact **similar** business”; or the case of *Cantor Art Services Ltd v Kenneth Bieber Photography Ltd* [1969] 1WLR 1226, in which the Court of Appeal construed the phrase “allowed into possession” (in an agreement to assign a lease) as meaning “allowed **lawfully** into possession”; or even the decision of the House of Lords in *Bank of Credit and Commerce International SA v Ali* [2001] UKHL 8, [2002] 1 AC 251 that (in a general release in

a compromise agreement) the phrase “all or any claims...of whatsoever nature that exist or may exist” only embraced claims of a type that the parties could then have had in contemplation.

92. Mr Bryant relies specifically on the division of labour between the trustee and the principal employer. It is said to make no sense to construe rule C10(2) as an entirely discretionary mechanism. The Britvic Pension Plan would lack practical coherence if rule C10(2) were construed so as to allow the principal employer at stage 2 to substitute a rate **lower** than the RPI-based default rate produced by stage 1. If the intention had been to allow the principal employer to exert fundamental discretionary control over pension increases (subject to statutory minima), it is said to be distracting and unnecessary to go to such detailed lengths in setting out an RPI-based default increase, which might apply but equally might not. If the intention had been to give the employer control over pension increases, subject only to statutory minima, why specify a default rate and then give the employer a power to veto that rate. Why not simply set up a system according to which, subject to those minima, the principal employer just determines pension increases by an exercise of discretion, as one unitary process?

93. On the contrary, it is said that establishing a mechanism involving a division of labour between the trustee and the employer (but without requiring them to concur on any matter) strongly suggests that what is being created is a mechanism with cumulative components; allowing the employer, at the second stage, to undo the trustee’s work at the first stage, rather than simply to supplement and augment it, would make no sense.

94. Mr Bryant elaborates upon his second submission (that the 2003 Rules must be construed as a whole) at paragraphs 56 through to 59. I do not find it necessary to reproduce those paragraphs in this judgment. I have simply borne them in mind.

95. On his third argument, Mr Bryant recognises that, construed strictly literally, the phrase “any **other** rate” clearly does not mean “any **higher** rate”; but one must construe the provisions with an eye to giving reasonable and practical effect to the scheme. That is said to militate in favour of the construction for which Mr Bryant contends. If necessary, he would argue that something has gone wrong with the language. He referred in the course of argument, to Nugee J’s decision in the case of *Sterling Insurance Trustees Ltd v Sterling Investment Group Ltd* [2015] EWHC 2664 (Ch). There, Nugee J concluded that the inclusion of the word “due” in the phrase “accrued due” could only be attributed to a mistake.

96. In his submissions, Mr Short rejected the suggestion that something had gone wrong with the language of clause C10(2). He submitted that that could not be right. That was because the draftsman of the 2003 Trust Deed and Rules had carefully followed through from the language of

the 1996 Bass Pension Deed. There could be no error in the language used; there had simply been a deliberate selection of particular language. As a matter of history, it is perfectly true that the language of clause C10(2) mirrored the language of the earlier clause 23 in the staff scheme (although not the language of the corresponding rule 24 in the executive scheme). But in my judgment, that does not necessarily mean that something has not gone wrong with the language of both instruments.

97. Mr Bryant developed his fourth argument (that C10(2) must be construed in the light of the Limited Price Indexation Legislation) at paragraphs 61 through to 76 of his written skeleton. He submits that a consideration of that legislation as it stood in January 2003 (the date of the 2003 Rules) shows that if the Britvic Pension Plan is to be given reasonable and practical effect, then rule C10(2) must be construed as creating the two-stage mechanism for which he contends.

98. He submits that there is always the potential for legislation to influence the correct construction of private instruments because the legal obligations to which parties are subject are necessarily part of the admissible background. It is said to be an example of the presumption of legality, whereby parties are unlikely to have intended to agree to do something either unlawful or legally ineffective. It is said to be unlikely that that was the parties' intention.

99. On a proper understanding of the overriding Limited Price Indexation Legislation, talk of statutory minimum pension increases (as used in the claim form) does not accurately reflect the true position. There was no statutory minimum pension increase as such. Instead, there was a binary regime, according to which, an overriding requirement applied **unless** the pension scheme in question contained a particular type of increase rule.

100. As at 31 January 2003, a scheme would be opted into the regime set out in subsections 51(3) and (4) if (and only if) it contained a rule requiring annual increases to pension accrued on and from 6 April 1997 of at least RPI capped at 5 per cent. If, on the other hand, a scheme did not contain a rule qualifying under section 51(3), then it would be required as a matter of overriding law to apply increases to post-April 1997 pension at the "appropriate percentage".

101. As at 31 January 2003, the Secretary of State had always assessed the percentage increase in the general level of prices in Great Britain by reference to RPI. Therefore, at that time, anyone creating a new pension scheme was faced with a choice. They could design a pension increase mechanism which was to be scripted into the rules. If they did so, they needed to specify guaranteed annual increases by reference to RPI (capped at no less than 5 per cent) in order to comply with the requirements of subsections 51(3) and (4). If they did so, they could choose the reference period by which increases in RPI were measured. Alternatively, they could do nothing. If they did that, they

would be required to ensure that the increase each year was at least equal to the capped annual increase in the Secretary of State's revaluation order, which they could reasonably have assumed would be RPI measured on the 1 October to 30 September reference period.

102. Mr Bryant recognises that the draftsman might have followed a hybrid course, including a rule which did not conform with the stipulations in sections 51(3) and (4); but the Limited Price Indexation Legislation would be blind to the merits of any such rule. Section 51(2) would then be triggered as if the scheme contained no pension increase provision at all. The trustees would then be bound each year to calculate which of the increases scripted under the rule and that demanded by section 51(2) would be the higher, and then to apply that increase. Mr Bryant submits that it is unclear why anyone would want to put trustees to the administrative burden of making that comparison unless they were forced by some external circumstance to do so.

103. When first established, the Britvic Pension Plan clearly included a pension increase rule in rule C10(2). The question then is whether rule C10(2) in the 2003 Rules was designed with a view to conforming with the stipulations in subsections 51(3) and (4). Mr Bryant submits that: (1) if the words "or any other rate" are to be given a literal meaning (as the employer contends) rule C10(2) would not have complied with subsection 51(3); (2) if, however, rule C10(2) is construed as contended for by Mr Bryant, it would have so qualified because increases could be relied upon always to be equal to the "relevant percentage", or higher if the principal employer exercised its discretion to give an additional increase.

104. That is said to be, in itself, a powerful reason for construing rule C10(2) in the way contended for by Mr Bryant. In particular, it is said that anyone with knowledge of the Limited Price Indexation Legislation, together with the rest of the admissible background, would, if they had wished to create a scheme with reasonable and practical effect, surely have avoided creating a scheme under which, if the principal employer did not exercise its veto in relation to a particular October increase date, the default increase that the trustee would be obliged to apply would have to be the greater of either (i) the percentage increase in RPI to the previous May, capped at 5 per cent, or (ii) the percentage increase in RPI to the end of the September before that, again, capped at 5 per cent. Mr Bryant submits that such a regime would not have "reasonable and practical effect". In short, he submits that the intention behind rule C10(2) must have been to create a rule providing "relevant percentage increases" within subsections 51(3) and (4).

105. Mr Short accepts that it is unlikely that the parties would have intended to act inconsistently with applicable legislation; but he submits that that has no present application here. Here, it is said that one is concerned with a power. An unexercised right cannot take the scheme outside the

exclusionary scope of section 51(3). The provisions of section 51 are not engaged unless and until the power is exercised. Section 51 does not render the setting of a rate inconsistent with capped RPI unlawful; it merely engages the rest of section 51. Mr Short further submits that Mr Bryant's argument is a technical and flawed argument which ignores the statutory scheme. He also makes the point that in fact the equivalent legislation was not actively in force at the time of the creation of the 1996 Bass Trust Deed and Rules.

106. Mr Bryant's fifth argument is that when one construes rule C10(2) in the light of the other admissible background which forms part of the "objective substratum" against which the transfer arrangements were effected, and the Britvic Pension Scheme was created, it becomes clear that the purpose of rule C10(2) must have been to confer only a power in the employer to **increase** the rate of increase above the default rate set by reference to capped increases in RPI.

107. The transfer invitations included summaries of the benefits to be provided under the Britvic Pension Plan. These included statements as to guaranteed and discretionary increases (under the heading "Pension increases") as follows:

"Pension increases

Guaranteed Increases:- Pensions in excess of any Guaranteed Minimum Pension (GMP) are guaranteed to be increased on 1 October in line with the rise in the Retail Prices Index (RPI) for the year ending 31 May preceding the review date, up to a maximum of 5%

Discretionary Increases:- The Trustee and the Company intend to pay additional increases on the pension in excess of the GMP of two-thirds of the increase in RPI over 5%. These increases are not guaranteed."

That statement is said to be part of the admissible background and it shows clearly to what the members were consenting. This documentation is said to show both that something has gone wrong with the language of rule C10(2) and to supply the information needed to confirm what the mistake was. It is said to be analogous to an antecedent agreement about what the specification of the 2003 Rules would be. Mr Bryant also relies upon the other matters which he identifies at paragraphs 82 to 89 of his written skeleton.

108. Mr Short points to the prefatory statement at the beginning of the outline benefits summary which, he says, makes it clear that the description of pension increases cannot trump the express terms and provisions of the Trust Deed and Rules. He also points to the fact that the outline benefits statement does not expressly address the words in parenthesis in C10(2). Mr Short also emphasises that the accompanying letter included a statement that the Britvic Pension Plan was being set up to

provide the same benefits as currently provided by the Six Continents Pension Plans. In relation to the staff scheme, that is said to be helpful to the employer because the earlier staff scheme had included an alteration power in precisely the same terms as that conferred by the parenthesis at the end of rule C10(2). Mr Short accepts that the statement is unhelpful to him in relation to the executive scheme; but his submission was that it would be an example of the tail wagging the dog if the executive scheme were to drag the much larger staff scheme in a different direction to that already applying under the pre-2003 scheme rules.

109. Moving on to the construction of rule C2(2) of the 2003 Rules, Mr Bryant submits that the construction of rule C2(2) is straightforward. It provides for the increase of deferred pensions on 1 October each year by the same percentage, and subject to the same cap, as applied to pensions in payment liable to increase on the same date as a result of rule C10(2) on the construction for which he contends. Had the intention been to provide a discretionary regime (as contended for by the employer) a statement to that effect would have been in rule C2(2) rather than merely a cross-reference to rule C10(2).

110. Mr Bryant submits, for the reasons given at paragraphs 92 through to 95, that there is no reason to attach any different meaning to rules C10(2) and C2(2) under the 2007 Rules (apart from the substitution, in relation to service on and from 1 July 2008, of the lower 2.5 per cent cap for increases). Mr Bryant reminds the court that the 2007 Rules fall to be construed at the time of their adoption, and again at the time of the 2008 Deed of Alteration, even though the provisions were materially identical to those included in the earlier 2003 Rules. Those rules, however, plainly form part of the admissible background to the later rules and, he submits, the paramount part of that background. Although the relevant Limited Price Indexation Legislation had changed, it had not done so in any way so as to disrupt his analysis in relation to the 2003 Rules.

111. In summary, Mr Bryant submits that the answers to the questions raised on the claim form concerning the proper construction of rules C10(2) and rule C2(2) should be the same for both the 2003 and the 2007 Rules (both pre and post the 2008 amendment). The questions should be answered as follows:

112. One, on any 1 October (“increase date”), the trustee must increase pensions to which rules C10(2) and C2(2) apply by the default rate in the absence of any direction by the employer to increase at a higher rate.

113. Two, if on any increase date the employer directs the trustee to increase pensions at a rate exceeding the default rate, that rate must apply across the board in substitution for the default rate. The employer may not direct different rates in relation to parts of pension which are attributable to

different tranches of pensionable service, save for possible differential increases for pre- and post-2008 accrual.

114. Three, if on any increase date, the employer directs the trustee to increase pensions at a rate exceeding the default rate, it may set that rate as it likes, including by reference to CPI or any other index.

115. Four, the employer's ability to direct the trustee to increase pensions at a rate above the default rate only arises at (or a reasonable time before) an increase date. It can make no advance direction in relation to future increase dates. It can direct the trustee to increase pensions by a rate at or near to 0 per cent only if that would exceed the default rate.

116. Five, if on any increase date the employer directs the trustee to increase pensions at a rate exceeding the default rate, that rate applies to the increase of pensions under rule C10(2) and consequently also applies to the revaluation of deferred pensions under rule C2(2). Accordingly, the employer may not specify a rate for revaluation increases under rule C2(2) that is different from the rate specified in relation to pension increases under rule C10(2), upon which it is entirely parasitic.

8 *Conclusions*

117. I begin by identifying the limitations of my decision. I accept that the predecessor rules and the documents surrounding and effecting the transfer arrangements which led to the creation of the 2003 Britvic Pension Plan, Trust Deed and Rules are all clearly admissible as an aid to the construction of the later 2007 Trust Deed and Rules (as amended) and also, so far as material, the true construction of the 2003 Trust Deed and Rules.

118. However, I have heard no evidence as to the factual background at the time of the adoption of the new rules which governed the Bass Staff Pension Plan from 1996 or the Executive Pension Plan in 2000 or as to the omission from the latter Executive Pension Plan of any power, as in the Staff Pension Plan, for the principal employer to alter the rate of increase.

119. In those circumstances, and particularly since the true meaning and effect of any pre-2003 Trust Deed and Rules is likely to be an issue in the existing Mitchells & Butlers proceedings, and also because any decision might potentially affect, although it could not bind, persons who are not presently before the court, I agree with Mr Bryant, whose concerns are shared by Mr Chew for the trustee, that I should make no findings of fact about the true construction of any Trust Deed or Rules earlier than the 2003 iteration.

120. At bottom, this case raises a very short point of construction. Does the power, at the end of clause C10(2), enabling the principal employer to alter the rate of increase bear its literal meaning,

which would entitle the principal employer to decide upon any other rate, or is that power limited to deciding upon a higher rate? Initially, I confess to having been attracted by the literal meaning of the phrase “any other rate”, and thus to the employer’s contention. But having considered the matter more fully in the light of all the arguments so skilfully deployed before me by Mr Bryant, and notwithstanding the skilful counter-submissions of Mr Short, I have been persuaded by Mr Bryant’s arguments that when the draftsman used the phrase, both he, and also the parties to the 2003 (and later) Trust Deed and Rules, clearly had in mind only increases in the capped percentage increases in the retail prices index.

121. I accept Mr Short’s submission that the words “any other rate” clearly apply to the rate of increase and not to the five per cent, and later the two and a half per cent, caps on the increase in the retail prices index.

122. I accept Mr Bryant’s first submission that his suggested construction gives better reasonable and practical effect to rule C10(2). I accept Mr Bryant’s submission that the provision creates a two-stage mechanism, both conceptually and procedurally, whereby, first, the trustee is required to calculate, and then to apply, guaranteed increases based on the capped percentage increase in the retail prices index over a one-year period up to the end of May each year; and then, secondly, the employer then has a discretion to direct that a **higher**, but not a lower, rate of increase is to be applied.

123. Construed in accordance with the nine principles identified by Mr Bryant, and supported by the admissible statutory and documentary background, in my judgment the better interpretation of rule C10(2) is that it creates that two-stage mechanism, which is to be used in any year, and which has the effect that the trustee must apply the retail prices index-based default rate unless the employer exercises its discretion, at the second stage, to substitute another rate, which must be a **higher**, but not a lower, rate.

124. I attach rather less weight to Mr Bryant’s second submission that his construction is better aligned to the provisions of the Trust Deed and Rules as a whole. I also reject Mr Short’s submission that his construction fits in with, and only with, the Trust Deed and Rules as a whole and, in particular, to general rule C6. In my judgment, rule C6 is directed to an entirely separate matter. It is directed to increasing benefits under the Plan generally, and not to the determination of the annual increases to pensions in payment to reflect changes in the value of money which is what rule C10 in both the staff and executive scheme sections in the Trust Deed and Rules is directed to. Those two rules are addressing different matters. However, I do accept Mr Short’s submission that neither rule C6(4) nor rule C10(4) shed any real light on the disputed issues of construction.

125. I accept Mr Bryant’s submission that Mr Short’s construction involves an excessively literal reading of the phrase in parenthesis at the end of rule C10(2) “any other rate” and that this is at odds with the contextual purpose of that provision. Even without considering the admissible background, including the legislative context, I am satisfied, for the reasons that Mr Bryant developed under the first of his submissions, that something has clearly gone wrong with the language of the phrase in parenthesis; and I am also satisfied as to precisely what the error is. 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**”. I am satisfied that that conclusion becomes even more pellucidly clear when one has regard to the legislative and the documentary background.

126. As regards the legislative background, I fully accept Mr Short’s submission that any right of a pensioner in payment of his pension to any increase in that pension is to an increase to be determined in accordance with rule C10(2) as a whole. That right accrues on 1 October in each year, and is a right to a capped increase, determined by the percentage increase in the retail prices index during the year ending the previous 31 May **unless** the principal employer decides upon some other rate. Unless and until some other rate is decided upon, I am satisfied that the requirements of section 51(3) of the Pensions Act 1995 are satisfied, and that rule C10 is excluded from the other provisions of section 51.

127. Where I part company with Mr Short on this aspect of the case is that, in my judgment, the draftsman would have had the provisions of section 51(3) (or its predecessor statutory provision in the form in which it was drafted at the time of the drafting of the rules) and whether or not that provision was yet in force, firmly in mind; and the draftsman would have wished to create a provision which complied with the applicable excluding provisions of section 51(3). In that regard, I accept the submissions of Mr Bryant, which I have already summarised in section 7 of this judgment. I also accept that the other admissible background evidence provides further support for that conclusion.

128. The letter of 17 December states that the Britvic Pension Plan is being set up to provide the same benefits as currently provided by the Six Continents Pension Plans. In the case of the Executive Scheme, there was in that existing Plan no power to alter the rate of inflationary increase. I acknowledge Mr Short’s point that one should not allow the tail of the Executive Scheme to wag the dog of the Staff Scheme; but in relation to both schemes, the outline benefit summary referenced in that letter is quite clear and explicit as to what the draftsman of that summary understood to be the position with regard to pension increases.

129. First, there were to be guaranteed increases. Pensions in excess of any Guaranteed Minimum Pension (or GMP) were guaranteed to be increased on each 1 October in line with the rise in the Retail Prices Index (RPI) for the year ending 31 May preceding the review date, up to a maximum of 5%. GMPs earned after 5 April 1988 were guaranteed to be increased each year in line with the rise in the RPI up to a maximum of 3%. There was then provision for discretionary increases. The trustee and the employer were said currently to intend to pay additional increases on the pension in excess of the GMP of two-thirds of the increase in RPI over 5%, but those increases were not guaranteed.

130. I acknowledge, of course, that it was made clear in the prefatory statement to the outline benefit summary that it could not include every detail. The Trust Deed and the Rules of the Britvic Pension Plan were to set out full particulars of the benefits and conditions on which they were payable and were to take precedence in the event of any discrepancy between the outline benefit summary (or any other document) and the Trust Deed and Rules. But the document was said to have been approved by Six Continents PLC and the trustees of the Six Continents Pension Plans. It was intended to give a fair summary of the benefits and conditions applicable to pensions under the proposed Britvic Pension Plan. I do not consider that the draftsman intended it to be in any way tricky or misleading. In my judgment, it is powerful evidence of what the draftsman of the outline benefit summary, and of the proposed Britvic Pension Plan, intended that that plan should provide. It is, in my judgment, evidence that the draftsman understood that the power of alteration in the existing 1996 Staff Plan (but not, of course, the 2000 Executive Plan, which contained no such alteration provision) provided for upwards-only increases above capped RPI.

131. In my judgment, that supplies the answer to Mr Short's point that there could not be an error in the language of rule C10(2) because it deliberately reproduced the language of the existing Staff Pension Scheme, albeit not the Executive Pension Scheme. That documentation provides further support for the conclusion at which I would have arrived, accepting Mr Bryant's first submission, even without the benefit of this additional evidence.

132. In the case of the Executive Scheme, that construction accords precisely with what is said in the letter of 17 December about the new Britvic Pension Plan being set up to provide the same benefits as currently provided by the Six Continents Executive Pension Plan.

133. I should stress that my decision is highly sensitive to the facts of the present case, where the Britvic Pension Plan was not addressed to future new members. It was being directed to those who had consented to the transfer of their existing pensions into the new Britvic Pension Plan in accordance with the documentation that had been provided to them.

134. I have already indicated that I accept Mr Bryant’s submission that the fourth and fifth of the specific distinctive characteristics relevant to the court’s interpretation of pension schemes identified by Lord Hodge in the *Barnardo’s* case had no application to the instant case. This is not a case where the scheme confers important rights on members of a pension scheme who were not parties to the original instrument and who may have joined the scheme many years after it was initiated. It is not a case where members of a pension scheme lacked easy access to expert legal advice or were unable readily to ascertain the circumstances which existed when the scheme was established. Potential members of the new Britvic Pension Plan were already in existence, and readily identifiable, and were sent letters and other documents explaining the features of the new pension scheme and invitations to transfer into it, in reliance upon which they elected to effect such transfers.

135. For all of these reasons, I am satisfied that Mr Bryant’s construction is the correct construction. The exercise of interpreting a document is a unitary one. I do not find it helpful to consider whether the court is engaged in a pure exercise in construction, or in one of “corrective construction”. There is a single unified, and unitary, process of construction. The question is: what would the objective observer, with full knowledge of the admissible background, including the underlying legislative provisions and the documents produced as part and parcel of the creation of, and the transfer into, the Britvic Pension Plan, have concluded was the true intention behind the concluding, parenthetical power conferred on the principal employer by clause C10(2)?

136. I have no doubt that he would have concluded that he was to receive guaranteed, but capped, increases each year, calculated by reference to the increase in the retail prices index (so capped) but with a discretion on the part of the principal employer (rather than the trustee) to award a higher rate of increase if the principal employer thought fit. If he had thought about the use of the word “other” in the phrase “any other rate”, he would have concluded that it meant only some other **higher** rate.

137. To the extent that that conclusion cannot be achieved by a literal reading of the phrase “any other rate” in the parenthesis, then I have no doubt that any objective observer would have concluded that something had clearly gone wrong with the wording of the parenthesis and that reader would have been equally clear in their own mind as to what the nature of that error was and how it should be corrected.

138. So, for those reasons, I would accept Mr Bryant’s submission that the first of the questions is to be answered in the sense that on any 1 October, the trustee must increase pensions to which rules C10(2) and C2(2) apply by the default rate in the absence of any direction by the employer to increase them at a **higher** rate.

139. Having reached that conclusion, I have no doubt that the other submissions advanced by Mr Bryant in relation to questions 2, 3 and 4 follow on in the way Mr Bryant has suggested at paragraph 96 of his skeleton argument. I would also accept, for the reasons that he gives, Mr Bryant's submissions in relation to the true construction of rule C2(2) of the rules. I prefer Mr Bryant's suggested construction to that of Mr Short. I am satisfied that rule C2(2) provides for the increase of deferred pensions on 1 October in each year by the same percentage, and subject to the same cap, as is applied to pensions in payment liable to increase on the same date as a result of rule C10(2) on the construction which I have adopted for that rule.

140. I accept Mr Bryant's submission that had the intention been to provide a discretionary regime, then a statement to that effect would have been included within rule C2(2) rather than merely cross-referring over to rule C10(2). I also make it clear that my construction applies to both the 2003 and also the 2007 Trust Deed and Rules, subject to the amendment effected in 2008.

141. If my construction differs from that that would have been applied to the earlier 1996 Rules, as to which I express no opinion, then I am satisfied that this would simply be an example of the situation contemplated by Arden LJ in the *Stena Line Ltd v MNRPF Trustees Ltd* case, where, if necessary, the meaning changed in the light of the context in which the 2003 Trust Deed and Rules came into existence. However, for the reasons I indicated at the beginning of this section of the judgment, it is inappropriate that I should express any concluded opinion on the true meaning and effect of the earlier 1996 Rules.

142. So that concludes this extempore judgment.

We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.