Neutral Citation Number:[2020] EWHC 1596 (Ch)

Case No: PE-2017-000005

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

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

Date: Friday 19 June 2020

Before:

THE HON MR JUSTICE TROWER

- -

Between :

UNIVAR UK LIMITED	**Claimant**
- and -	
(1) STEPHEN BRIAN SMITH	
(2) ~~ROBERT JOSEPH GEARY~~	
MARK MONGAN	
(3) ANTHONY EDWARD CORRIGAN	
(4) ~~BRIAN DOUGLAS MORGAN~~	
(5) DANIEL MULCHINOCK	
(6) PAUL LEIGHTON	
(7) PHIL SHIMELLS	**Defendants**

MICHAEL FURNESS QC and TIM MATTHEWSON (instructed by **Pinsent Masons LLP**) for the **Claimant**
KEITH ROWLEY QC (instructed by **DLA Piper UK LLP**) for the **First to the Sixth Defendants**
HENRY LEGGE QC and MICHAEL UBEROI (instructed by **Burges Salmon LLP)** for the **Seventh Defendant**

Hearing dates: 26-28 Feb, 2-6, 9-13 and 16 March 2020

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Approved Judgment

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

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MR JUSTICE TROWER

Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will be deemed to be 10.00 AM on 19th June 2020.

Mr Justice Trower :

Introduction

1. In these proceedings, Univar UK Limited (the "Company") seeks rectification of two rules in the definitive deed and rules dated 13 March 2008 (the "2008 DDR") which governs the terms of the Univar Company Pension Scheme (1978) (the "Scheme") of which it is the principal employer. The two rules are those which make provision for increases to pensions in payment and increases to pensions in deferment in the final salary section of the Scheme.

2. The rectification sought (the "Rectification Issue") would delete the existing reference in Schedule 3 of the 2008 DDR to an inflation-linked pension increase calculation based on the Retail Prices Index ("RPI") and replace it with:

   2.1. in the case of pensions in payment a calculation based on such increase as may be required by section 51 of the Pensions Act 1995 ("PA 1995") or any act amending or replacing the same; and

   2.2. in the case of pensions in deferment a calculation based on such increase as may be required by the revaluation provisions of the Pension Schemes Act 1993 ("PSA 1993") or any act amending or replacing the same.

3. The reference to the requirements of section 51 of the PA 1995, is to the obligation to increase a pension in payment, to the extent that it has accrued on and after 6 April 1997, annually by at least the rate for the latest revaluation period set out in the revaluation order in force at the time of the increase. Revaluation orders provide for what appears to the Secretary of State for Work and Pensions to be the percentage increase in the general level of prices in Great Britain in the last year. The rate to be applied for the purposes of increasing the pension is then subject to a cap of 5% per annum in respect of pension accrued until 5 April 2005 and a cap of 2.5% per annum in respect of pension accrued on and after 6 April 2005.

4. The reference to the revaluation provisions of the PSA 1993 is a reference to those parts of that act (sections 83 and 84 and paragraphs 1 and 2 of Schedule 3), which provide for a pension in deferment to be revalued in accordance with the rate set out in the same annual revaluation orders as are used to quantify increases to pensions in payment under the PA 1995. The rate to be applied for revaluation purposes is then subject to a cap of 5% per annum in respect of pensionable service until 5 April 2009 and a cap of 2.5% per annum in respect of pensionable service on and after 6 April 2009.

5. Orders made pursuant to the PA 1995 and the PSA 1993 currently provide for inflation-linked increases to pensions in payment and revaluations of pensions in deferment to be calculated by reference to the Consumer Prices Index ("CPI") which usually, but not invariably, produces a lower level of increase than RPI. If rectification were to be granted, linking increases to those statutory requirements would restore the position to what it was under the terms of the deed and rules which formerly governed the Scheme (the Definitive Deed and Rules relating to the Ellis & Everard Limited Company Pension Scheme dated 11 December 1996 (the "1996 DDR")). It is the Company's case that it was never intended at the time of the 2008 DDR to make any changes to

this aspect of the governing deed and rules and that the effect of this change was to increase the cost to the Company of funding the Scheme by an estimated £23.2 million.

6. The statutory requirements for revaluing pensions in deferment also provide for revaluation to be applied once at the time the pension comes into payment. The 2008 DDR changed this requirement and provides for a revaluation to take place annually on the 1 May each year. As with the CPI / RPI issue, it is the Company's case that it was never intended at the time of the 2008 DDR to make any changes to this aspect of the governing deed and rules. It was said that the effect of this change was to increase the cost to the Company of funding the Scheme by an estimated £3 million, because the annual revaluation would not take into account periods of negative inflation.

7. The proceedings also raise two other groups of issues:

   7.1. Whether former members of two pension schemes which closed in 2002 (the Berk Group Pension Scheme (the "Berk Scheme") and the Univar Limited Pension and Life Assurance Scheme (the "PLAS Scheme")), and who joined as members of the Scheme on 1 May 2002, are entitled to have their pensions in payment increased by reference to RPI subject to a cap of 5% irrespective of the position of other members of the Scheme. This issue arises as a consequence of the announcements (the "Berk / PLAS Announcements") which were made when they joined the Scheme. The Company contended that their entitlements to an increase are the same as those of the other members of the Scheme. This is a question of construction of the Berk / PLAS Announcements. There is also an issue as to whether or not the Company has exercised a power under the 1996 DDR or the 2008 DDR to determine that RPI capped at 5% should be used to determine increases. I shall call these the "Berk / PLAS Issues". The Company initially sought rectification of the Berk /PLAS Announcements in the alternative, but no longer does so.

   7.2. The effect of representations as to the rate of revaluation which were made to members of the final salary section of the Scheme in 2010, when those members (the "Opt-Out Members") opted out of the final salary section in exchange for a promise that they be admitted to the defined contribution section. I shall call the process by which this occurred the "Opt-Out Process". This gives rise to questions of whether the Company undertook additional contractual obligations to the Opt-Out Members and/or whether the Company has exercised a power under the 2008 DDR to determine that revaluations of their pensions in deferment be calculated by reference to RPI capped at 5%. It also gives rise to questions of estoppel and whether the Opt-Out Members have equitable rights to have their deferred pensions revalued on the same basis. I shall call these the "Opt-Out Issues". The estimated cost to the Company of this issue being decided against it is £5.7 million.

8. The Representative Beneficiary pleads that the Opt-Out Issues give rise to defences to the claim for rectification. He also makes a counterclaim seeking declarations in relation to the rights of the Opt-Out Members based on many of the same arguments of fact and law which are said to give rise to defences to the claim for rectification.

The Parties and their witnesses

9. The Company is part of a group (the "Univar Group") of which a US company, Univar Inc, is the indirect parent. It has been the principal employer of the Scheme since 25 July 2001. The Univar Group carries on a global business which sells, markets and distributes chemicals. The UK business was originally carried on by companies within the Ellis & Everard group which had been acquired by Royal Vopak NV in 2000 and was spun off shortly afterwards as part of the Univar Group. In 2003 the name of the Scheme was changed from the "Ellis & Everard plc Company Pension Scheme" to the "Univar Company Pension Scheme (1978)" to reflect these developments.

10. The defendants to the proceedings are the trustees of the Scheme (the "Trustees") who adopt a neutral position and a representative beneficiary, the seventh defendant, Mr Phil Shimells (the "Representative Beneficiary" or "Mr Shimells"). The active opposition to the claim has been advanced by the Representative Beneficiary.

11. Although the Trustees have taken a neutral position, their counsel, Mr Keith Rowley QC, has explained in his skeleton argument that the production of the 2008 DDR was an exercise in which they, through their professional advisors, took the lead. For that reason the Trustees have waived privilege in respect of legal advice provided to them during that process and have given what he described as the fullest possible disclosure in a case in which he said that almost all the relevant contemporaneous documentation survives. The Trustees also provided statements from nine witnesses. All of the Trustees who were in office at the time of the 2008 DDR, and signed in their capacity as such, gave evidence except for Mr Graham Jackett who has since died.

12. The Company called four witnesses in support of its claim, all of whom were cross-examined at the trial. They were:

    12.1. Mr Christopher Morley, who was the Univar Group's Vice President for Finance and Administration for the European chemical distribution business. This was a role which he described as effectively the Univar Group's European finance director. He was a director of the Company between March 2001 and April 2008 and was also a director of a number of other Univar UK operating and holding companies. He reported both to the European President of the Univar Group, Mr John Philpotts, and to its financial director based in the USA, Mr Patrick Tole. He left the Univar Group in 2009, after which time he said that he had no knowledge of what occurred. In his capacity as Vice President for Finance and Administration he had overall responsibility for the Scheme. It was his evidence that, in the exercise of that responsibility, he relied on Mr Stephen Smith, Mr Robert Geary, Mr Norman Simpson (all of whom worked in the same office as him) and Mr Craig Lawson (who was based in the US) to bring matters to his attention. He was never a trustee of the Scheme, but he was a member of its defined benefit section and took his pension in September 2019. He was a signatory to the 2008 DDR signing as a director on behalf of the Company.

    12.2. Mr Craig Lawson, who was a vice-president for administration at Univar Inc between July 2002 and March 2008. He acted as a conduit between Mr Morley and the Chief Administrative Officer at Univar Inc ("CAO") in relation to the Scheme, Mr John Sammons. Mr Lawson then had other HR roles within the Univar Group until he left in August 2018. He was based in the USA during his time with the Univar Group, but was a regular visitor to the UK during his employment. He was a company-nominated trustee of the Scheme from March

2005 to January 2011 but has never been a member of the Scheme. He signed the 2008 DDR in his capacity as one of the Trustees.

12.3. Ms Catherine McKenna, who was as she remains a partner in Hammond Suddards (now Squire Patton Boggs (UK) LLP)) ("Hammonds"). She was the principal partner advising in relation to the Scheme during the drafting of the 2008 DDR and supervised the drafting process which was carried out by her assistant, Ms Charmian Johnson.

12.4. Ms Charmian Johnson, who was an assistant solicitor at Hammonds during the drafting of the 2008 DDR. She qualified in 1998 and is now a partner in Eversheds Sutherland LLP specialising, as she did at the time, in pensions work.

13. The Trustees called the following nine witnesses, all but one of whom were cross-examined at the trial:

13.1. Mr Stephen Smith, who was HR director of the Company (having previously fulfilled the same role for Ellis & Everard Plc) until his retirement at the end of 2008. By the time of his retirement he was also fulfilling the role of HR director for Univar Europe. He worked in the same office as Mr Morley. He became chairman of the Trustees in 1994 and continues as such. He was therefore chairman at the time of the 1996 DDR, the time of the 2008 DDR and the time that the Opt-Out Issues arose. He was a signatory of the 2008 DDR and is a defendant to these proceedings in his capacity as a continuing trustee. He is a pensioner member of the senior final salary section of the Scheme.

13.2. Mr Robert Geary, who was employed by the Company as HR manager until he retired on 31 December 2008. He reported to Mr Norman Simpson who also gave evidence. He was a trustee of the Scheme between 1978 and 2019, starting as a company-nominated trustee and becoming a member-nominated trustee in 2006. He was a signatory of the 2008 DDR in his capacity as one of the Trustees. Initially he was a defendant to these proceedings in his capacity as one of the Trustees, but Mr Mark Mongan (who did not give evidence) was substituted in his place shortly before the trial. He is a member of the Scheme. He had an important role in the events with which the proceedings are concerned, and project managed the process of reviewing and replacing the 1996 DDR on behalf of the Trustees.

13.3. Mr Norman Simpson, who was employed by the Company as its Finance Director for Strategy and Development in Europe. He was also its company secretary. He was one of the Trustees between 1998 and his retirement in 2009 and was a signatory of the 2008 DDR both in his capacity as a trustee and as company secretary on behalf of the Company.

13.4. Mr Timothy Taylor, who was a Financial Controller, employed by the Company at the time of the 2008 DDR. He reported to Mr Morley. He was a member-nominated trustee of the Scheme between December 2006 and September 2009 at which stage he left the Company's employment. He was a signatory of the 2008 DDR is his capacity as one of the Trustees. He was only ever a member of the defined contribution section of the Scheme and is no longer a member.

13.5. Mr James Clarke, who has held a number of IT roles at the Company and is now employed by Univar Inc in the role of Director, IT Business Office. He was a company-nominated trustee of the Scheme between the end of 2005 and 2011 and was a signatory to the 2008 DDR in that capacity. He is a deferred member of both the defined benefit section and the defined contribution section of the Scheme.

13.6. Mr Anthony Corrigan, who is the Company's commercial director for EMEA. He was appointed as a company-nominated trustee of the Scheme in May 2006 and continues to hold office as such. He was a signatory to the 2008 DDR and is a defendant to these proceedings in his capacity as a trustee. He is a deferred member of the defined benefit section of the scheme and an active member of the defined contribution section.

13.7. Mr Michael Latham, who is an IT director for the EMEA division of the Company and was its regional finance director for the UK, Ireland and the Nordics. He was not a trustee at the time of the 2008 DDR, but was appointed at the beginning of 2011, staying in post until 2019. He fulfilled an important role on behalf of the Company in developing its proposals for closing the final salary section of the Scheme in 2010.

13.8. Ms Alison Barnes, who is a senior actuary at Willis Towers Watson ("WTW"). Mr Keith Lewis of WTW was appointed as actuary to the Scheme in about August 2006 and Ms Barnes was his deputy. WTW replaced Mercer HR Consulting ("Mercer"), although Mercer continued as Scheme administrators.

13.9. Mr Stanley Williamson, who was employed as a general manager at a number of the Company's sites in Scotland until his retirement in 2001. He was one of the Trustees between May 2003 and 2006 and is a pensioner member of the defined benefit section of the Scheme. He was not a signatory of the 2008 DDR, and was the only one of the Trustees' witnesses who was not cross-examined at the trial.

14. The Representative Beneficiary gave evidence himself and called one witness of fact (Mr Martin Pugh) and one expert (Mr Richard Gibson, a consulting actuary). All three of these witnesses were cross-examined at the trial:

14.1. Mr Shimells himself has been employed by the Company in a number of different capacities since July 1996. He is now the Regional Business Manager for the UK, Ireland and the Nordics. He has been an active member of the Scheme throughout his employment by the Company. He was a member of its senior final salary section during the period of greatest relevance to these proceedings: 2002 to 2010. In 2010, he opted out of the final salary section of the Scheme (thereby becoming a deferred member of that section) and joined the defined contribution section (thereby becoming an active member of that section). He is due to retire in 2026. He has never been one of the Trustees.

14.2. Mr Martin Pugh, who had a number of leadership roles in the Company and was its European marketing director between 2009 and 2013. He left the Company's employment in 2018. He joined the Scheme in 1987 and became a member of the senior final salary section in 1994. He then became a deferred member of

the senior final salary section in 2010 when he opted out and joined the money purchase section as an active member. He was therefore an active member throughout the period of most relevance to these proceedings (1996 to 2010).

14.3. Mr Richard Gibson who is a consultant actuary and a partner in Barnett Waddingham LLP. He was instructed by the Representative Beneficiary to consider the extent to which the Opt-Out Members have suffered a detriment as a result of the Opt-Out Process.

15. In my view all of the witnesses did their best to assist the court. The events which the witnesses of fact were asked to recall took place 10 to 15 years ago, and it is inevitable that their memories were not as sharp as they might have been had these proceedings come to trial rather sooner. However, the clarity and independence of their recollections was subjected to detailed testing in cross-examination, and without exception the witnesses were frank in their acknowledgment of those instances in which they were and those in which they were not able to add anything to the contemporaneous documentation.

Representation Order

16. The Company seeks an order under CPR 19.7(2) that the Representative Beneficiary be appointed to represent all members of the Scheme, together with those claiming under or in respect of such members, in whose interests it would be to argue against the granting of the relief sought. It also seeks the appointment of itself to represent all other members of the Scheme, together with those claiming under or in respect of such members.

17. This relief is agreed by the Trustees and the Representative Beneficiary. Evidence from Mr Smith establishes that the members of the Scheme have been kept informed of the proceedings with announcements describing the issues in dispute, explaining the court process and summarising potential outcomes. They have also been provided with details of the Representative Beneficiary's solicitors should they wish to obtain further information. Those solicitors have been contacted by two members, but nobody has appeared to advance additional arguments or to contend that the representation orders sought ought not to be made.

18. I am satisfied that this is a case to which the provisions of CPR 19.7 apply and that the two categories of member I have described comprise classes of persons who have the same interest in the claim. I also agree with the Company's submission that representation orders would further the overriding objective. Accordingly, I shall make representation orders in the terms sought and agreed.

The 1996 DDR

19. The Scheme was originally established by an interim trust deed dated 1 September 1958, but the earliest relevant version of the rules of the Scheme are incorporated in the 1996 DDR. The parties to the 1996 DDR were the then principal employer (Ellis & Everard Plc) and the seven trustees, three of whom (Mr Geary, Mr Jackett and Mr Smith) continued to be trustees at the time of the events with which these proceedings are concerned and two of whom (Mr Geary and Mr Smith) gave evidence at the trial. The 1996 DDR was what Mr Geary described as a consolidated deed, the drafting of

which was a drawn-out process, apparently because of the frequent changes to pensions law which were taking place at the time. Ms McKenna was involved in the drafting.

20. The rules themselves were contained in Schedule 2 to the 1996 DDR, which made provision for the payment of several different benefits for members. For present purposes the most important of these benefits was a Formula Pension calculated by reference to the formula: 2% x a member's final pensionable salary x their pensionable service.

21. Rule 9 of Schedule 2 made provisions for pension increases. It dealt separately with guaranteed minimum pensions ("GMPs") as defined in the PSA 1993, increases in which were governed by separate rules (the GMP Rules, set out in Schedule 4 to the 1996 DDR) and the excess over the GMP, i.e. that part of the Formula Pension which exceeded the amount of a member's GMP. Those parts of rule 9 which dealt with increases to the excess over the GMP were the predecessor provisions to those with which these proceedings are concerned. They dealt separately with increases to the excess over the GMP in payment and the revaluation of the excess over the GMP in deferment.

22. Increases to the excess over the GMP in payment were provided for by rule 9.1.2 of Schedule 2 in the following terms:

> "*The pensions in payment under the Scheme may be increased from time to time by such amount as the Principal Employer (after considering Actuarial Advice, and with the consent of the Trustees so determines, subject to Revenue Limits*".

Revenue Limits were the limitations required as a condition of approval of the Scheme by the Inland Revenue as an exempt approved scheme for the purposes of Part XIV of the Income and Corporation Taxes Act 1988. The effect of rule 9.1.2 was that, so far as the 1996 DDR itself was concerned, increases to the excess over the GMP in payment were discretionary.

23. Although increases to the excess over the GMP in payment were wholly discretionary so far as the terms of the 1996 DDR were concerned, by the time it was executed section 51 of the PA 1995 had been enacted (although it was not then in force). This required pensions in payment attributable to pensionable service on or after the appointed day (which was fixed as 6 April 1997) to be increased annually by at least the appropriate percentage. The appropriate percentage was ascertained by reference to the revaluation provisions contained in the PSA 1993. Initially it amounted to the lesser of the amount which appeared to the Secretary of State to be the percentage increase in the general level of prices in Great Britain in the last year (known as the "inflation percentage") and 5%. By an amendment introduced by the Pensions Act 2004 (the "PA 2004"), the 5% figure was replaced by 2.5% in respect of pensionable service from 5 April 2005. The inflation percentage was set by revaluation orders made under the PSA 1993 and until 2010 was based on RPI.

24. Mr Smith gave evidence that, both before and after the introduction of statutory minimum pension increases, the Company awarded increases to the excess over the GMP in payment on a discretionary basis. The Trustees made recommendations on the level of annual awards and, from shortly after the time of his appointment as chairman, the recommendations were based on increases to state pensions which Mr Smith

understood to be based on RPI. By the time that the 1996 DDR was executed the Trustees had been told about the imminent introduction of limited price indexation ("LPI"), which he understood to mean a measure of pension increases which was based on RPI subject to a cap of 5%.

25. Revaluation of the excess over the GMP in deferment was provided for by rule 9.2.2 of Schedule 2 in the following terms:

> "*Where a Deferred Pensioner leaves Pensionable Service at least one year before his/her Normal Retirement Date, any part of his/her deferred pension under the Scheme which exceeds his/her GMP shall be increased in accordance with the Revaluation Requirements.*"

26. The "Revaluation Requirements" were defined by reference to the requirements of Chapter II of Part IV of, and Schedule 3 to, the PSA 1993, and the Occupational Pension Schemes (Revaluation) Regulations 1991, both of which were already in force. These required revaluation of deferred benefits by the lesser of (a) the "inflation percentage" and (b) a prescribed percentage, which was or became 5% in respect of pensionable service to 5 April 2009 and 2.5% in respect of pensionable service thereafter. The inflation percentage was fixed by statutory instrument as the percentage which appeared to the Secretary of State to be the percentage increase in the general level of prices in Great Britain during the revaluation period. This increase is also set by revaluation orders made under the PSA 1993 and until 2010 was based on RPI. Revaluation is applied so as to require the addition of a single lump sum to a member's deferred pension when it comes into payment.

27. It follows that, from a time shortly after the execution of the 1996 DDR, increases to the excess over the GMP in payment and revaluations of the excess over the GMP in deferment were both required to be made by the applicable statutory requirements. In the case of pensions in payment, the statutory obligation to increase existed but was not referred to on the face of the 1996 DDR, while in the case of pensions in deferment the statutory requirement to revalue was expressly referred to on the face of the relevant rule.

28. In neither instance were the actual words of the applicable statutory provision written out on the face of the rule and in neither instance was there any specific reference to RPI. Although the 1996 DDR had a defined term which might have been used had the draftsmen wished to do so ("***Index*** *means the Index of Retail Prices (All Items) published by the Central Statistical Office (or any other index approved by the Inland Revenue for the relevant purpose)*"), it was not used for this purpose.

29. However, Mr Geary explained that RPI was an index which was familiar to him before the 1996 DDR was produced, because it had been used for revaluing pensions in deferment. He had been involved in using it for the purposes of giving formal notification of preserved benefits to members who left the Scheme prior to retirement. He also explained how he was pleased with the provisions for mandatory increases in the PA 1995 because, although the Company had never declined to grant an increase and he believed that they would continue to do so, it was a good thing if the Company would have to abide by overriding legislation even if it was not mentioned in the 1996 DDR.

30. Mr Geary also explained how, once the 1996 DDR came into effect, the Company's practice was to grant discretionary increases to the excess over the GMP attributable to service before the appointed day (6 April 1997) at the same rate as was required by the provisions of section 51 of the PA 1995. He said that this was mainly for administrative convenience, because it was much easier to apply a single rate of increase to the whole of the non-GMP element of the pension in payment. This meant that, in practice, LPI at a level of RPI capped at 5% was applied across the board. This was not, however, the Company's invariable practice and Mr Geary identified two occasions on which the Trustees discussed seeking a more substantial increase from the Company – one in order to match an above-inflation staff pay rise, and the other where the Scheme was in surplus.

31. There were several other terms of the 1996 DDR which featured in the evidence and which it is convenient to set out at this stage:

    31.1. By clause 2.4.1 of the 1996 DDR, the Principal Employer was empowered with the consent of the Trustees "*to alter amend extend modify or add to all or any of the trusts, powers and provisions contained in this deed and any deed executed supplemental to it*". This power of amendment was subject to certain provisos set out in clause 2.4.2, including one to the effect that no alteration amendment extension modification or addition could be made which would, in the opinion of the actuary to the Scheme, diminish the benefits already accrued to a Member (being an active member, a pensioner or a deferred member) without that member's previous written consent. This was the power used to give effect to the 2008 DDR.

    31.2. By clauses 2.4.1 and 2.4.3 of the 1996 DDR, the power to alter, amend etc under clause 2.4.1 was capable of being exercised with retrospective effect, pending which the Scheme could be administered in accordance with any notice or explanatory booklet issued to employees or members by the Trustees or the Employers, so long as it was consistent with statutory provisions, legal requirements and Revenue Limits.

    31.3. Clause 6.1.2 of the 1996 DDR provided for the quorum for meetings of the Trustees to be two, with a chairman to be appointed by agreement or lot. If the number of Trustees present and voting at the meeting exceeded two, the Trustees were permitted to act by a majority, with the chairman having a casting vote.

    31.4. One of the powers available to the Trustees was a power of augmentation under clause 10.4 of the 1996 DDR, which enabled the Trustees, with the consent of the Principal Employer, to provide increased or additional benefits in respect of any actual, contingent or prospective beneficiary under the Scheme. There was evidence that this power was used on a number of occasions to provide members with additional benefits, which were then taken into account as part of the process of producing the 2008 DDR.

The 1996 Explanatory Booklet

32. In October 1996, shortly before the 1996 DDR was executed, the Company published an explanatory booklet to the Scheme entitled "Ellis & Everard Plc Company Pension Scheme" (the "1996 Explanatory Booklet"), the terms of which are of particular

relevance to the Berk / PLAS Issue. It made clear that it was a guide to the Scheme and "*will always be overruled by the formal rules if there is any difference between the two documents*." The reference to the formal rules was to the 1996 DDR as amended or replaced from time to time.

33. Two parts of the 1996 Explanatory Booklet were directly relevant to protection against inflation, although neither made reference to the use of any specific measure or more particularly to RPI:

33.1. A section dealing with pensions in payment which explained as follows:

*"**What about inflation?***

Once in payment, the GMP part of your Scheme pension will be increased each year in line with inflation. These increases will be provided partly by the Scheme and partly by the State.

In addition, the Trustees will review your pension and may make increases from time to time to help offset the effects of inflation, provided the Company agrees and sufficient resources are available."

33.2. A section dealing with pensions in deferment which explained as follows:

*"**Inflation Protection***

To help offset the effects of inflation your preserved pension will be increased each year. The GMP part of your preserved pension will be your GMP at the date you leave the Scheme, increased at a rate set by the Government, currently 7% compound for each tax year up to State Pension Age.

In addition, the Scheme will increase the balance of your preserved pension in line with increases in prices up to a maximum of 5% a year compound between the date you leave the Scheme and the date you retire."

34. As is not uncommon in a booklet of this sort, there was a statement on page 25 that the booklet was subsidiary to the terms of the Scheme itself in the sense that the Scheme would override the terms of the booklet in the event of any difference between them. The statement took the following form: "*This booklet is a guide to the Scheme and will always be overruled by the formal rules if there is any difference between the two documents.*"

<u>The Berk / PLAS Announcements</u>

35. By 17 December 2001, the Company, which had become the Principal Employer on 25 July 2001, had decided to close two other Group pension schemes on 30 April 2002 and to invite their members to join the Scheme. At that stage, the Scheme was still called the Ellis & Everard Plc Company Pension Scheme (1978). Those two other group schemes were the Berk Scheme and the PLAS Scheme (together the "Berk / PLAS Schemes"). On 18 March 2002 another Group company, Vopak Holding Distribution UK Limited, announced details of the proposed changes to the pension arrangements being implemented as a result of the proposed closure and gave details of the invitation to members to join the Scheme.

36. The Berk / PLAS Announcements were drafted by Mercer and were signed by Mr Smith in his capacity as the Company secretary. Mr Smith made clear in his evidence that he considered that the Berk / PLAS Announcements were purely a matter for the Company, and he stressed the capacity in which he had signed and in particular that he did not sign in his capacity as chairman of the Trustees or otherwise on their behalf. Mr Geary was mentioned in the Berk / PLAS Announcements as the person to whom queries were to be directed. He explained in his evidence that he was identified as such in his capacity as HR manager, not in his capacity as one of the Trustees.

37. The arrangements announced in March 2002 were expressed as an invitation to the Berk and PLAS Members to join the Scheme and provided that for the purposes of the Berk / PLAS Schemes the members would be treated as if they had left service on 30 April 2002, that their contributions to the Berk / PLAS Schemes would cease and that they would be awarded a preserved pension under the Berk / PLAS Schemes payable from their normal retirement age and based on their final pensionable salary and their pensionable service on 30 April 2002. It was made clear that their preserved pension would remain in the Berk / PLAS Schemes and would be subject to their respective rules.

38. As to the invitation to join the Scheme, the Berk / PLAS Announcements explained that, like the Berk / PLAS Schemes, the Scheme was a final salary pension arrangement, the chief features of which were set out in the 1996 Explanatory Booklet available on the Company's intranet site. This was a reference to the explanatory booklet dated October 1996 which I have already mentioned. It also set out in clear terms (underlined and in bold) that what followed was an explanation of another document (viz. the explanatory booklet): "*Please note the following explanations of certain parts of the Explanatory Booklet which will apply in respect of your membership of the … Scheme*".

39. It follows from this that the attention of the Berk / PLAS Members was drawn to the 1996 Explanatory Booklet because they were told that the booklet would apply to their membership of the Scheme. On looking at this booklet, the Berk / PLAS Members would have been informed that, if there was any difference between it and the formal rules, the formal rules would prevail. The formal rules were contained in the 1996 DDR as amended or replaced from time to time.

40. The Berk / PLAS Announcements then went on to describe a number of features of the Scheme as they would apply to Berk / PLAS Members, including in particular that their pensionable service would begin on 1 May 2002 for the purposes of calculating their benefits under the Scheme. It also introduced a concept of Notional Pensionable Service to describe the pensionable service which those members had completed up to 30 April 2002 under the Berk / PLAS Scheme. This would be used to calculate a Notional Pension based on $1/60^{th}$ of final pensionable salary for each year of Notional Pensionable Service. If that figure exceeded the preserved pension payable under the Berk / PLAS Scheme, the member's pension payable under the Scheme would be increased by the difference. There would be no commensurate reduction in the amount payable under the Scheme if the preserved pension were to exceed the Notional Pension.

41. For present purposes the most relevant section of the Berk / PLAS Announcements related to inflation-linked increases. It appears in the section headed "*Please note the*

following explanations of certain parts of the Explanatory Booklet which will apply in respect of your membership of the ... Scheme" and is in the following form:

> "*Retirement Pension continued, What about inflation?*
>
> *Any pension payable from the ... Scheme which is attributable to Pensionable Service on or after 1st May 2002 will increase each year whilst in payment in line with increases in the Retail Prices Index, up to a maximum of 5%.*
>
> *Any pension payable from the ... Scheme which is attributable to Notional Pensionable Service will increase at the rate which would have applied under the [Berk / PLAS] Scheme*."

42. Mr Smith and Mr Geary thought that what was said in the Berk / PLAS Announcements reflected the position which then applied under the Scheme. They both also thought that Mercer included the statement about pension increases to make it clear to the former members of the Berk and PLAS Schemes that they would be entitled to statutory increases rather than purely discretionary increases. They said that this would have been particularly relevant given that the pension increase rules which would have applied from 1 May 2002 if the Berk and PLAS Schemes had not been closed, were 3% per annum for the Berk Scheme and 5% per annum compound (subject to the pension not exceeding its initial amount as increased in line with RPI from the date the pension commenced) for the PLAS Scheme. The way that Mr Geary summarised his view of the way that pension increases were described in the Berk / PLAS Announcements was as follows:

> "*... the reference to increases in line with RPI capped at 5% was not a surprise to me because I understood this was the basis for statutory minimum pension increases. I would not have queried why the announcements did not mention LPI rather than RPI, as I thought this amounted to the same thing*."

43. The issue which arises is whether the reference to an increase each year while in payment in line with increases in the RPI is a reference to the measure of inflation currently used for that purpose under the Scheme, or whether it gives rise to a freestanding independent entitlement to an inflation-linked increase based on RPI which is quite separate from the entitlements that might otherwise arise under the Scheme.

The Proposal to amend the 1996 DDR

44. The defined benefit section of the Scheme closed to new entrants on 1 July 2002, and the money purchase section of the Scheme commenced a month later on 1 August 2002, although it was not documented prior to the execution of the 2008 DDR.

45. On 28 November 2002, when considering what were described as Future Projects, the Trustees agreed that "*due to recent scheme changes and legislation ... Hammonds should review and bring up to date the [1996 DDR]"*. The way that Mr Smith described the purpose of the proposed new DDR (and he thought that the proposal was likely to have come from Mercer) was to consolidate in one document all of the changes which had been made to the Scheme since the 1996 DDR had been prepared. He gave as examples (a) the fact that in 2002 the Berk and PLAS Schemes had closed and some of

their members had joined the Scheme and (b) the introduction of a number of legislative changes. With specific reference to benefit changes, he said:

> "*The consolidated deed and rules were not intended to change the benefit structure, other than as required to implement changes which had already been made since the 1996 Deed and changes resulting from legislation. Accordingly, the consolidated deed and rules were not intended to amend the basis on which pensions in payment were increased or deferred pensions were revalued.*"

46. Hammonds had been appointed to act for the Trustees on all aspects of the Scheme by a letter countersigned by Mr Smith in April 1997, which was intended to operate as a formal appointment for the purposes of the PA 1995. In that letter, Hammonds had stated that they would also accept instructions to advise the Principal Employer unless a conflict of interest did or could arise, in which case both parties would be advised of the actual or potential conflict and given an opportunity of seeking separate advice.

47. The instructions to carry out the review were given to Hammonds by Mr Geary. The individuals at Hammonds who were involved were Ms McKenna as the partner responsible and Ms Johnson, who carried out much of the day to day work under Ms McKenna's supervision. Ms Johnson explained that, where she was responsible for any drafting Ms McKenna's supervision was usually carried out in face to face meetings. This means that the origin and development of the drafting is not always recorded in writing, although as will appear it has been possible to reconstruct how and when some of the relevant changes were made.

48. Mr Geary was said by Ms McKenna to be the trustee most involved in the project and he described himself as effectively project managing the review process. In that capacity, he was Ms McKenna's principal point of contact, and he said that he spoke to Ms Johnson on a regular basis during the drafting process. He had been one of the Trustees who had executed the 1996 DDR and remained in post throughout the events with which these proceedings are concerned. He was also the Company's HR manager with responsibility for pensions and so was well placed to carry out what was a time-consuming role. Mr Geary did not, however, have any authority to agree to any changes without the agreement of the other Trustees or the Company.

49. So far as Hammonds were concerned the other Trustees who were particularly involved in reviewing the drafts of the documentation were Mr Smith (as chairman of the Trustees) and later Mr Lawson and to a lesser extent Mr Simpson. Mr Smith confirmed that he was given regular updates on progress by Mr Geary. Ms McKenna was not aware of any separate review by individuals acting only for the Company. She understood that the Company was kept up to date through those of the Trustees who were also members of the Company's senior management, an understanding which was also shared by Ms Johnson.

50. The way in which Ms McKenna understood her instructions is important. As she described them, they were to consolidate the governing documentation of the Scheme. When explaining what she meant by that she said that there had been much change since the execution of the 1996 DDR, including the introduction of a money purchase section, and the purpose of the consolidation exercise was to reflect such changes in a new DDR.

51. Ms McKenna also said that her instructions extended beyond what she described as benefit consolidation so as "*to reflect by "signpost" the new legislation affecting the Scheme*". She said that she did not understand there to be any intention on behalf of the Company or the Trustees to make changes to the Scheme that went beyond those necessary to bring the Scheme's documentation up to date and to take into account any statutory requirements. She specifically confirmed her understanding that there was no intention to require pension increases and revaluation to be calculated by reference to RPI (as distinct from the statutory requirements) or to apply revaluation on a year-by-year basis.

52. Ms Johnson's evidence was to the same effect, and she linked that to a schedule of changes which was one of the documents for which she was responsible. It was prepared for the purpose of recording all changes to be made to the drafting of what was to become the 2008 DDR:

> "*My understanding was that, unless a specific change had been agreed and included in a schedule of changes prepared by Hammonds, there was no intention on behalf of the Trustees or the Company to make changes to the existing provisions of the Scheme in the 2008 Deed.*"

53. Ms McKenna understood that in carrying out the work Hammonds' services were to be provided to both the Trustees and the Company and gave consideration to questions of conflict. She did not consider there to be a conflict between the interests of the Trustees and the interests of the Company, and that view is at least consistent with a belief that Hammonds were not instructed to advise on, or draft the language for, new benefits to which the members were not already entitled either under the 1996 DDR or by such other changes as may already have been introduced. Ms Johnson said much the same thing, explaining also that the exercise of reviewing and updating the 1996 DDR was to be led by the Trustees but was also for the benefit of the Company.

54. Mr Morley also said that there was a common interest between the Company and Trustees in relation to the drafting process because he understood (probably from Mr Lawson or Mr Smith) that the exercise was directed at the preparation of a consolidating deed "*intended to update the Scheme's documentation by putting into a single document the existing benefit structure of the Scheme rather than making substantive changes to the benefits*". For this reason, he was content to let the Trustees take the lead on the exercise.

The Preparation of a Benefit Summary

55. The first task undertaken by Hammonds was to ascertain the existing benefit structure of the Scheme. To that end, Ms McKenna obtained a full set of documentation from Mercer which she had received and started to review by April 2003. At that stage she told Mr Geary that she may also need to see copies of minutes of meetings of the Trustees in order to gain a full understanding of the benefit structure of the Scheme. Mr Geary understood that Hammonds would be putting together a summary of the benefits contained in the 1996 DDR, including any changes in practice which needed to be treated as part of the existing benefit structure. He agreed that it was part of his responsibility to make sure that they were accurate.

56. At the next meeting of Trustees held on 29 May 2003, Mr Geary reported that the Hammonds review of the 1996 DDR was underway. This was the first meeting attended by Mr Williamson who had just been appointed as a Trustee. It was his evidence that, at the time he was appointed, he was aware that the general purpose of the proposed new DDR was to consolidate changes to the Scheme that had occurred since the 1996 DDR, but he did not remember any further discussions around the specific reasons that a new DDR was required.

57. On 22 October 2003, Ms Johnson, sent to Ms Lynn Hood of Mercer and Mr Geary a draft Benefit Summary and Comparison stating in the introductory notes that it: "*summarises the benefits available under the Scheme as set out in the draft replacement Definitive Deed and Rules [to be provided in due course], enabling a comparison to be drawn between different benefit categories*". The covering e-mail asked for Ms Hood's confirmation that the benefit summary "*is accurate and matches current practice*". It is clear from this that Ms Johnson was seeking confirmation of current practice as well as Ms Hood's views on the benefits for which the 1996 DDR made specific provision, and Mr Geary knew that was the case. Ms Hood was heavily involved in the process of preparing the benefit summary, but Mr Geary did not think that she had any further involvement in the drafting of the 2008 DDR.

58. This document, and other preparatory drafting materials, do not seem to have had a wider circulation amongst the Trustees. Mr Smith did not recall seeing it, and it seems likely that if it had been made available to anyone other than Mr Geary as the professionals' main point of contact, it would have been to Mr Smith as the chairman that it would have been sent.

59. The pension increase provisions for the staff final salary section were described as follows: "*Excess over GMP increased by such amount as Principal Employer determines (after considering Actuarial Advice and with consent of Trustees)*". Mercer was to confirm the position in relation to the senior final salary section and LPI was identified for the money purchase section. Mr Geary assumed that there was no mention of revaluation because that was a matter dealt with by the statutory requirements rather than the terms of the 1996 DDR itself. He said that, having reviewed Ms Johnson's email and the benefit summary, he asked the Company's payroll manager, Patricia Barnes, for information about how benefits were applied in practice which he then checked against the benefit summary. Mr Geary said that this was particularly important for the money purchase section of the Scheme because it was relatively new and was being introduced into the Scheme's governing documentation for the first time.

60. Mr Geary also said that he did not, as a matter of course, refer to the 1996 DDR or other deeds as part of his review. He saw that exercise as one of the tasks for the Scheme's advisors. This approach was consistent with the position which was adopted by Mr Smith. They both relied on the description of the existing position and the proposed changes in the summaries and other notes produced by Hammonds rather than their own perusal or analysis of the formal documentation governing the terms of the Scheme.

61. Ms Hood returned the draft on 26 November 2003 with a number of redline comments, including by inserting the words "*subject to regulations*" in the description of pension increases, but otherwise left the description of this aspect of the staff final salary section

benefits unchanged. It seems to me that she was thereby confirming that so far as she was concerned it was accurate and matched current practice. She confirmed that the senior final salary section pension increases were the same as those for the staff final salary section. A copy of this version of the Summary in evidence had a manuscript annotation made by Ms Johnson "*subject to PA 95 i.e. LPI*" written next to the description of the pension increase rule. This does not seem to have been sent to Mr Geary.

62. The reference to PA 95 was a reference to the Pensions Act 1995 and the reference to LPI was to limited price indexation, a term used to describe the lesser of an annual increase in the applicable inflation index (then normally RPI) and an applicable percentage. At this stage the applicable percentage cap for LPI purposes was an issue that was uppermost in the minds of pensions professionals. At their meeting on 27 November 2003, the Trustees were told by Mercer that it was anticipated that LPI requirements for pensions in payment in respect of future service were to be capped at 2.5% per annum rather than the existing 5%. This change was then introduced by the PA 2004. Mr Smith said that he was aware that this was likely to reduce costs for the Company. He said that, although he appreciated that the change would introduce a reduction in the percentage used for setting the LPI cap, it did not occur to him that the index used might change from RPI. Mr Geary made the same point in his witness statement.

63. Ms Johnson's second draft of the benefit summary was then sent to Ms Hood and Mr Geary on 26 January 2004. The pension increases part for the staff final salary section had been amended so that it read: "*Excess over GMP increased by such amount as Principal Employer determines (subject to Pensions Act 1995) after considering Actuarial Advice and with consent of Trustees)*" but was otherwise unchanged. As the Company submitted, this amounted to an accurate summary of the pension increase provisions of the 1996 DDR.

64. Shortly thereafter, the process of drafting what both Ms Johnson and Ms Hood described as a consolidation of the deed and rules was put on hold to await the implications of the PA 2004 and the Finance Act 2004 (the "FA 2004"). These included what the Government ultimately decided in respect of certain tax simplification proposals. This was reported to the Trustees by Mr Geary at a meeting held on 21 June 2004.

65. During the period in which no progress was made in the drafting, the question of pension increases arose for the Trustees from time to time. Thus, at a meeting in December 2004, the Trustees agreed to leave the change to the LPI cap introduced by the PA 2004 until 2006 when other changes were likely following tax simplification. Mr Geary understood that the effect of the legislation was that the reduced cap would apply automatically for those in active service, but that the Company had a discretion to award a higher increase if it wished. Also, during this period, Mr Lawson became a trustee of the Scheme. He said that, once he was a trustee he remembered being told that the purpose of what he described as the consolidated deed and rules was to consolidate the changes to both the structure of the Scheme and to UK pensions law over the years since the 1996 DDR.

66. In January 2005, the Company circularised to all of its employees a document entitled "*Modernising our Benefits*". This dealt with a range of employee benefits unrelated to

pensions. It also had a section dealing with pensions in which amongst other matters it described the extra contributions which were being asked from members of the defined benefit section. When summarising the Scheme as compared to other typical defined benefit schemes in the market, it described the pension increase provision as "*LPI - Pension increases*". It then went on to explain that "*LPI is Limited Price Index and Pensions Legislation dictates that all schemes must apply a proportion of this inflation factor. We apply this in full to our pensions increases*." This was not a very accurate way of describing LPI, but it drew attention to the fact that there was a statutory entitlement to an inflation-linked increase which it was the Company's practice to apply in full. The focus though was on the statutory requirement, not the specific metric (RPI) that was then used to quantify the statutory requirement. Mr Geary sent this document to Ms McKenna later in the year once the drafting process had restarted.

The Company's Corporate Governance Policies and Procedures

67. At about the same time, the Univar Group introduced a new version of its Corporate Governance Policies and Procedures (the "Governance Policies"). The copy in evidence was dated 1 July 2005 and some of it touched on the extent to which pensions issues required the involvement of senior executives based in the US. It was said by the Company that parts of the Governance Policies made clear that, if there had been any intention to make the pension increase changes in issue in these proceedings, they should and would have been referred to those senior executives in accordance with the Governance Policies.

68. The fact that this was not done, and did not occur to those familiar with the Governance Policies, is relied on as evidence that there was no intention by them to make those changes. The evidence for the Company on this point was given by Mr Lawson and Mr Morley.

69. Mr Lawson, who had contributed to the drafting of the Governance Policies in their original form, drew attention to the fact that "*Changes to benefits or pension plans, including establishing or changing pension plan funding levels*" required prior involvement by the CAO (Mr John Sammons). Mr Morley said that he was very familiar with the Governance Policies having personally written the parts which affected the European members of the Group. Not surprisingly, he said that the pension plan changes described in the Governance Policies were intended to be limited to material changes, and materiality would vary from jurisdiction to jurisdiction. He also drew attention to the requirement for the prior involvement of the Chief Financial Officer (Mr Tole) ("CFO") in relation to "*Pension and benefits costs and accounting*".

70. Mr Morley said that, when he was assessing the extent to which an issue might give rise to a material change requiring prior involvement by the CAO or the CFO, he had regard to the levels at which disposals and expenditure in excess of $250,000 or $500,000 (depending on its nature) required prior approval from the CFO. As another illustration he also said that Mr Sammons and Mr Tole were involved in the triennial actuarial valuations for the Scheme. It was apparent from his answers in cross-examination on this subject that he did not think that individuals such as Mr Geary, Mr Smith or Mr Simpson would ignore the Governance Policies with which they would all have been very familiar, and whether an escalation would be thought appropriate would depend on the perceived magnitude and significance of the change.

71. He also explained when re-examined by Mr Furness QC that:

> "*If I understood there was a change of such magnitude that the company could have significant financial penalty, if you like, going forward I would have considered raising that with John Sammons and Pat Tole, having discussed with Craig Lawson first*"

and that he would have done so even though it had no immediate cost.

72. Mr Lawson was asked whether he would have escalated any change in the pension increase rule to Mr Sammons, if he had been told that the only circumstance in which the rates might change was if the law changed and he said that he would not have done so in those circumstances because "*I would not have alerted him to the fact that the law can change. He knows the law could change. We all know the law could change*". That was one view of the nature of the change and Mr Lawson's answer was understandable in that context. He also accepted that he would not have escalated the issue to Mr Sammons for another linked reason which was that the change would have made no difference to the cost of the Scheme to the Company in 2008.

73. He also accepted that the approach he would have taken to materiality was dependent on the probability of the change having an adverse impact on the position of the Company. Thus, the possibility of negative inflation was one of the factors which would have affected the extent of the prejudice to the Company in the context of changes to the rules for revaluation of pensions in deferment, and he agreed that the unlikelihood of that occurring would be likely to have caused him to conclude that any such change was not for that reason material.

74. However, when it was put to him by Mr Furness QC that the change was in fact a one way bet for the Company, because if the statute provided for a higher rate than RPI it would have to fund the higher rate while if the statute provided for a lower rate than RPI it would still have to fund RPI based increases, his answer was rather different:

> "*I would have had trouble with that change and I would want to discuss it with the trustees, and I would want the company, the UK and if necessary Univar NV to know about it, because, like you said, at the back of 97 it was a one way ratchet. Members could gain but not lose, the company couldn't gain. It seemed to me appropriate to have it so that both the company and the members had some responsibility or risk when it came to increases, and the company shouldn't be the only one benefitting. Just a bit of background, pensions were very expensive, and they were particularly expensive between 2001 onward because primarily the discount rate. So the liabilities were very, very high, three major pension plans were in deficit and we were taking whatever steps we could to deal with those deficits and we certainly weren't looking for any way to increase that liability, just the opposite.*"

75. Mr Lawson also said that, once he had been appointed, he had some contact with Hammonds to make sure that he understood the effect of the consolidated deed and rules so that he could make sure that any changes which would or might have material costs implications were drawn to the attention of other Univar Inc executives. One example of this was the first Trustees' meeting attended by Mr Lawson on 5 May 2005 at which it was recorded that Univar Inc had requested information on the effect and

cost implications of some new tax simplification rules. These were eventually incorporated into the Scheme through a deed of amendment which I shall call the 2006 Deed. Mr Geary said that, once Mr Lawson had become a Trustee, it was made plain to Hammonds that anything new in the deed would need to be approved by Mr Lawson on behalf of the Company.

76. At that meeting, the PA 2004 changes to the LPI cap were discussed again:

> "*The new Pension Act enables pension built up after 5 April 2005 to be increased in line with the Retail Price Index (RPI) or a 2.5% maximum; previously the maximum was 5%. Any changes to the present system will be a Company decision.*"

This discussion was against the background of the discussion at the meeting of Trustees at the end of the previous year (13 December 2004) about deferring the changes for a year. This was something that both Mr Smith and Mr Geary understood could be achieved with the consent of the Company.

The drafting process restarts

77. No further progress was made in the drafting of the proposed new DDR until after a meeting that Mr Smith, Mr Simpson and Mr Geary had with Ms McKenna and Ms Johnson on 19 August 2005, the purpose of which was described by Ms McKenna as being to discuss the requirements of the 2004 legislation and the re-commencement of the drafting of the proposed new DDR. During the course of the meeting, Hammonds were instructed to resume drafting once some of the further information on the detail of the proposed benefits had been provided to them by the Company. Mr Simpson was present because he was a management accountant and was there to deal with matters relating to tax simplification. Mr Geary did not think that he made any contribution to the drafting process; primary responsibility for that continued to rest with him and (anyway at a high level) Mr Smith.

78. The notes of the meeting record that one of the issues discussed was the reduction of the LPI percentage from 5% to 2.5% which had been introduced by the new legislation and that "*the Company would need to consider further before making a decision*". None of the participants had an independent recollection about the precise nature of this discussion. However, I think that Mr Geary, Ms McKenna and Ms Johnson were all correct to assume that the issue arose because the reduction of the cap from 5% to 2.5% produced a disparity between the position of the members of the staff final salary section whose benefits would be affected by the legislative change and the position of the members of the senior final salary section who were entitled to 5% LPI under the 1996 DDR. In other words, the question of a disparity that had arisen as a result of a legislative change was something that the Company would need to consider.

79. Mr Legge QC for the Representative Beneficiary suggested to both Ms McKenna and Ms Johnson that the discussions at the August meeting included the issue of how the proposed new pension increase rule should be drafted and in particular whether it should refer only to the statutory requirements as they may be from time or whether there should be a specific reference to RPI. He suggested that they took instructions on this point from Mr Smith, Mr Simpson and Mr Geary. Neither solicitor agreed with the suggestion and Ms McKenna was clear that if that had been the case it would have been recorded in the note.

80. In further development of this line of cross-examination, there was the following exchange between Mr Legge QC and Ms Johnson:

> *"Q. You see, Ms Johnson, what I am trying to understand is why it was that four months later you drafted the initial draft of the deed in the way that you did, and what I am going to suggest to you is that you understood that that had been raised with the client and that you had instructions in relation to that matter. Do you have any recollection to the contrary?*
>
> *A. I thought when I produced that first draft I was being helpful but I think you are giving me too much credit to be honest. I think I've drafted it in error thinking I hadn't changed anything, thinking that I would be helpful including the statutory provisions, and I haven't realised what I've actually created there, and obviously there was discussion about changing the cap because it was a relevant change give the Pensions Act. So I don't think I had any instructions on changing anything other than the maximum cap and we've talked about the prorating.*"

81. In his witness statement, Mr Smith said that he had no recollection of any specific discussion concerning pension increases or revaluation taking place. Although he accepted that he was present, Mr Simpson had no recollection of what was discussed at the meeting. It was suggested to Mr Simpson by Mr Legge QC in cross-examination that there were respects in which he was giving instructions on behalf of the Company or representing the Company at the meeting. Mr Simpson explained that that was not the case.

82. The other individuals attending the meeting were also questioned about instructions being given at this meeting on drafting style. Mr Geary said that he had no recollection of any such instruction being given and his evidence was to the effect that it was not that type of meeting. In particular he disagreed with the suggestion made to him by Mr Legge QC that any of the participants would have been able to give instructions at that meeting as to what the Company broadly wanted. Neither he nor Mr Simpson had any recollection of a discussion that the proposed new deed should be user-friendly. Mr Smith said that he thought that there was "*a discussion about making it easy to read, that's for sure*" because it is quite a complicated document and "*if there is any way they can make it easier to understand the better*" although on reflection he thought that "*Discussion might be too long. There was maybe a comment*".

83. In my judgment, Mr Smith's evidence on this point is accurate and reflects what probably occurred. There was probably a comment about ease of use of the proposed new DDR, but it went no further than that. I also accept the evidence of Ms McKenna and Ms Johnson on this point. No instruction was given to Hammonds about the form that the drafting should take. Mr Legge QC's suggestion does not fit happily with the form of the note of the meeting and was not supported by anybody who was present. It is clear that the cap gave rise to a matter requiring input from the Company on which the discussion is more likely to have focussed. It is a matter to which I will return, but in my judgment, Ms Johnson's evidence that she drafted in error thinking that she had not changed anything but thinking that she would be helpful was convincing in the straightforward way in which it was given.

84. The minutes of the meeting recorded "*Hammonds to write to BG to inform him of the status of the drafting of the DB Scheme's consolidated deed and rules prior to work*

being suspended as a result of the new legislation". It was suggested by Mr Legge QC that this letter "*has been lost and has not been disclosed*", and that it might have recorded an instruction on the drafting of the pension increase rule. I am satisfied that there is no substance to this suggestion. Not only would such an instruction have been inconsistent with the intended function of such a letter (focussed as it was on where the process had got to before the suspension of drafting work), I think that the Company is right to contend that Ms Johnson's e mail of 10 November, which I shall deal with shortly, contained the information contemplated by the minute, but gave no instruction on the drafting of the pension increase rule.

85. Mr Legge QC also suggested to Mr Morley that at some stage someone on behalf of the Company was specifically told that Hammonds had decided to draft the pension increase rule in such a way that the terms of the legislation (i.e. RPI plus 5% or RPI plus 2.5%) were drafted into the 2008 DDR. He said that he had no recollection of that being the case, and I am satisfied that this did not occur.

The first draft of the proposed new DDR

86. On 8 and 9 November 2005, there was a meeting of Trustees, which was the first one attended by Mr Clarke. When Mr Clarke became a trustee, he was told by Mr Smith much the same as Mr Williamson and Mr Lawson were told when they became trustees a little earlier, namely:

> "*Mr Smith explained to me upon my appointment that the 1996 Deed was in need of updating because of significant changes in UK pensions law and also to the Scheme (amongst other changes, there had been a merger with the Royal Vopak scheme). The intention was to create one governing document for the Scheme which would incorporate all of these changes; it was a consolidating process.*"

87. During the course of the meeting there was some discussion of the tax simplification rules which had already been discussed at previous meetings of the Trustees. This issue was to lead to the execution of the 2006 Deed in April 2006. It was also one of the occasions on which it can be seen that the Trustees were making recommendations to the Company to set the appropriate rate of increase for the excess over the GMP in payment (for which they recommended an increase of 2.7% as from 1 May 2006). The minutes do not disclose that any other matters relating to the issues in these proceedings were discussed.

88. Immediately after this meeting, on 10 November 2005, Ms Johnson e-mailed Ms Hood, copied to Mr Geary, summarising how she was proposing to take matters forward in the light of the fact that most of the benefit structure had already been agreed before the process was put on hold at the beginning of 2004. In so doing she reminded the recipients of the state of play when the drafting process was suspended in early 2004, by which time most of the benefit structure had been agreed. There were no material changes to the draft benefit summary which she included with her e-mail. Ms Hood had earlier indicated that she agreed with the only change which had been made to the description of the pension increases benefit (viz. the inclusion of the phrase "*(subject to Pensions Act 1995)")* as a qualification to the Principal Employer's discretion to determine. She said:

> "*As well as the new definitive deed and rules being a consolidated deed and rules to reflect the 3 categories of membership, the new deed will also incorporate any changes agreed between the Principal Employer and the Trustees pursuant to the Finance Act and Pensions Act 2004. Therefore, I propose to draft the new definitive deed and rules in 2 stages, the first of which will be to document and consolidate the 3 member categories, i.e., the Staff Final Salary Section, Senior Final Salary Section and the Money Purchase Section. The second stage will be to incorporate the Pensions Act and Finance Act changes into the deed, once such changes have been agreed between the Principal Employer and the Trustees.*"

89. At this stage of the process the draft benefit summary included reference to particular benefits which were not expressly provided for by the terms of the 1996 DDR and the question arose as to how they should be dealt with under the proposed new DDR. One example, which was explored in the evidence, was whether a pension should be available to children and dependants of deferred members either who leave a spouse who then dies, or who never had a spouse in the first place. The benefit was then included in the first draft of the new DDR. Mr Geary said that this particular example was one in respect of which the draft either reflected what the Trustees would have done by exercising their discretion under the augmentation rule or reflected an actual practice that had developed.

90. Ms Johnson said that she used the 1996 Deed as a starting point for the drafting and then translated it into one of Hammonds' "*then precedent definitive deed and rules*". She was not able to remember which precedent she used and it was not established during the course of the trial which one it might have been.

91. The first draft of the proposed new DDR was then circulated by Ms Johnson as an attachment to an e-mail she sent to Ms Hood and Mr Geary on 21 December 2005. Mr Geary said that he would have sent this on to all of the other Trustees and they would probably have been sent the schedule of changes as well. It is also his evidence that this was his practice in relation to each of the drafts, although the evidence that any particular drafts were studied in any detail by the other Trustees was scant, and save for the occasions on which they were taken through them in detail, I think that the likelihood is that they did not do much more than read through them to see in broad terms what they contained. In any event, given the period of time which has elapsed, it is not surprising that most of the Trustees have little recollection of whether or not they did so.

92. This first draft had been reviewed by Ms McKenna before it was sent out. She had made some changes, but none of them were changes to the pension increase or revaluation provisions. The e-mail under cover of which the draft was sent to Mr Geary and Ms Hood confirmed that:

> "*As stated in my previous e-mail, this draft incorporates the current benefit structure of the Scheme, i.e., the 3 existing member categories are now reflected in the deed. The Pensions Act and Finance Act changes, however, will be incorporated in due course (during stage 2 of the drafting) once such changes have been agreed between the Principal Employer and the Trustees.*"

Ms Johnson also asked Ms Hood to let her have her comments on the most recent version of the benefit summary to ensure that the benefit structure was accurately

reflected in the draft DDR and to review the first draft of the DDR itself with that in mind "*to ensure that it is accurate and inform me of any comments that you may have*". She said that she had drafted the proposed new DDR on the basis of the benefit structure set out in the draft of the benefit summary which she had sent to Ms Hood and Mr Geary on 10 November.

93. A summary of this draft was also attached to Ms Johnson's email, in which she said that the draft DDR had been prepared "*to update the provisions of the existing documentation*" and that "*it incorporates the existing benefits of the Closed Staff Final Salary Section ...*". Paragraph 2.1 of the summary explained that the Introduction to the Deed explained its purpose "*i.e. that the parties wish to consolidate the governing documentation of the Scheme and reflect the existing benefit structure (with certain changes) ...*" Paragraph 2.5 of the summary described the rules of the final salary section in the following terms:

> "*Schedule 3 contains the Final Salary Rules of the Scheme. The Final Salary Section of the Scheme was closed to new entrants with effect from 1 July 2002. These Rules incorporate the benefit structure and membership contribution obligations which are applicable to all of the Final Salary Section Members, other than the variations applicable to the Members of the Senior Final Salary Section. Such variations are set out in a separate Appendix to Schedule 3. Again, it is intended that this document consolidates those benefits rather than makes any change to them.*"

94. It was Mr Geary's evidence that he took this to mean that the rules of the Scheme were being rewritten in a different form and what was being incorporated was the substance of the 1996 DDR together with the agreed benefit changes that had arisen out of the practice that had developed since 1996. To that extent he readily accepted in his oral evidence that when Ms Johnson's covering e-mail described the draft as reflecting the existing summary it would include recording the practice and would not be an absolute replication of the same words.

95. Ms Johnson also explained that various changes would need to be made to the new draft pursuant to the PA 2004 and the FA 2004 and that these would be incorporated into the next stage of the drafting (and an updated version of the explanatory note) once the Principal Employer and the Trustees had agreed them. This explanation drew a clear distinction between the exercise of reflecting the existing benefit structure derived from the 1996 DDR and existing practice, which she said had already been done in draft, and the exercise of incorporating the new legislative changes which were yet to be incorporated.

96. The draft itself recited in Recital D the wish of the Company as Principal Employer to replace in their entirety the provisions which governed the Scheme being contained in a large number of documents listed in a schedule, including the 1996 DDR. This wish was given effect by clause 1.1(c) which provided for the deletion of the 1996 DDR in their entirety and the substitution in their place of the proposed new DDR.

97. Recital E to the proposed new DDR included the following:

> "*It is the intention of the parties to this Deed that this Deed and Rules should consolidate the governing documentation of the Scheme so as to duplicate the*

existing benefit structure of the Scheme with certain changes. However, the parties are of the view that the amendments within this Deed and Rules will not adversely affect any entitlement or accrued rights of any Member and thus are not restricted by Section 67 of the Pensions Act 1995."

98. Schedule 3 to the proposed new DDR contained the rules applicable to members of the staff final salary section of the Scheme. For the purposes of these proceedings the most important provisions are those dealing with pension increases as set out in rule 7 of Schedule 3 as follows:

"7.1 Pensions in payment

(a) GMP …

(b) Non-GMP (as-of-right). *Subject to the provisions of the 1995 Act, any pensions (excluding any GMPs) in payment under the Scheme in relation to Pensionable Service on or after 6 April 1997 shall be increased on [1 January] [Mercer to confirm] in proportion to the increase in the Index over the preceding twelve month period subject to a maximum increase of five per cent in respect of that period.*

(c) Discretionary Increases.

Each pension in payment under the Scheme may be increased (or further increased) from time to time by such amount as the Principal Employer (after considering Actuarial Advice, and with the consent of the Trustees) so determines, subject to [Revenue Limits].

7.2 Pensions in deferment

(a) GMP *...*

(b) Non-GMP. *Where a Preserved Member leaves Pensionable Service at least one year before the Normal Retirement Date, any part of the preserved pension under the Scheme which exceeds the GMP shall (subject to Rule 7.2(c)) be increased on [1 January] [Mercer to confirm] each year as provided in Rule 7.1(b) and (c) above.*

(c) ***Revaluation Requirements.*** *Any increase referred to in Rule 7.2(b) shall be subject to the revaluation requirements of the 1993 Act.*"

99. The way in which rule 7 was drafted meant that the defined term "*Index*" was directly incorporated into the pension increase rule in the proposed new DDR. Schedule 1 (Definitions and Interpretation) contained a definition of "*Index*" which took the following form: "*Index means the Index of Retail Prices (All Items) published for the month of February by the Central Statistical Office (or any other index approved by the Inland Revenue for the relevant purpose).* As I have already mentioned, with the exception of the reference to the month of publication, the same definition had been included in the 1996 DDR, but in that instance the definition had not been used for the purposes of quantifying any increases in pensions in payment or the valuation of pensions in deferment.

100. Mr Geary remembered reading the whole of the draft DDR at the time it was sent to him by Ms Johnson. He was sure that this would have included reading the pension increase provisions which would have included looking at the definition of "*Index*". He was quite clear that he thought that it referred to the rate which was applicable from time to time under the relevant statute. In his view this also reflected the practice which was adopted. As he put it:

"*A. Presumably the wording that was in this deed reflected and the Act itself of what we were doing. I still think it reflects the Act. That's what I always thought. I'm sorry, I'm not saying that very well, am I?*

Q. It is probably my fault for not asking. Tell me what you thought.

A. I thought this reflected the 1995 Act where we had to provide increases after that particular date. Anything before that was discretionary.

Q. I understand that that was your understanding.

A. Yes.

Q. But insofar as it reflected the Act it was also the rate that applied from time to time. Sorry, it was also the rate that applied at this stage, wasn't it?

A. Yes."

101. Mr Geary said that it would not have concerned him that the definition referred to RPI, as he understood that this was the basis of LPI. He said that he had expected a provision in the form of rule 7.1(c) because he knew that the Company had a discretion to award higher increases than the law required. This rather confirms that Mr Geary thought that the focus of the drafting of rule 7.1(b) was what the law required, rather than what the draft DDR might require independently of whether or not the law might require it as well.

102. The effect of Mr Geary's evidence was that, although he could see with hindsight that a change of substance to the benefit structure of the Scheme had been made, he did not notice that at the time. He said that he was entitled to assume, and did assume, that the substance of the benefits, so far as increases for pensions in payment and the revaluation of pensions in deferment were concerned, was implemented by the wording of the proposed new rule 7. Mr Geary agreed with Mr Legge QC that the revaluation issue was what came to be called a "black box issue", by which he meant an area where he left the technical people to do the drafting both as to method and rate. In re-examination, he clarified that this did not mean that the technical people had carte blanche to do the drafting, because he read it and it made sense. There was no question therefore of this being a case in which any operative decision of substance was delegated to the professionals. The position on Mr Geary's understanding of the rules making provision for the increase to pensions in payment was different. He regarded the underlying concepts as more straightforward to grasp, but I am satisfied that he still made the assumptions that the substance of those pension increase benefits was derived from the 1996 DDR as applied in accordance with the PA 1995.

103. In fact, the overall effect of this drafting was that:

103.1. by operation of draft rule 7.1(b), pensions in payment in relation to Pensionable Service on or after 6 April 1997 must be increased on a date to be confirmed each year in proportion to the increase in RPI over the preceding twelve month period subject to a 5% cap;

103.2. by operation of draft rule 7.2(b) (applying rule 7.1(b)), pensions in deferment in relation to Pensionable Service on or after 6 April 1997 must be revalued annually on a date to be confirmed in the period beginning with the cessation of active membership and ending on the member's normal retirement date in proportion to the increase in RPI over the preceding twelve month period subject to a 5% cap.

104. These were changes from the effect of the pension increases provisions of the 1996 DDR in the following respects:

104.1. The explicit reference to RPI and a cap of 5% in the rules dealing with both pensions in payment and pensions in deferment replaced the existing reference in the 1996 DDR to the statutory requirements for the measure of inflation and the LPI cap such as they may be from time to time.

104.2. The revaluation of the excess over the GMP in deferment was to be calculated annually on a date to be confirmed whereas, under the 1996 DDR, the revaluation of pensions in deferment automatically followed the statutory requirements which involved revaluation only once at the time the pension came into payment.

105. To that extent, Ms Johnson was wrong to say that "*this document consolidates those benefits rather than makes any change to them*". It is the Company's case that the mistakes which it now seeks to have rectified were made at this early stage in the drafting process and were not identified or corrected before or for some time after the execution of the 2008 DDR. Ms Johnson accepted that this was the case. She said: "*Well with hindsight I shouldn't have done that. That's why I think I've started an error quite early on in the drafting that hasn't been picked up.*" In my view the following explanation for the reason behind the error, which she accepted she had made, rang true and is an accurate description of what occurred:

> "*I think because I was using Hammonds' precedent deed and rules at the time, rather than just updating the 1996 existing document, ie keeping with the layout and the style, I think I've been – I've tried to be helpful to write in the statutory provision but I've probably ended up being a slave to the precedent and making an inadvertent change as a result of that.*"

106. Ms McKenna said that when she reviewed the draft of the proposed new DDR, she did so together with the benefit summary. She said that she did not realise that the draft of rule 7 was different from what was said in the benefit summary. As she explained it, she was conducting an overall review of somebody else's draft and was not replicating all of the work that was done as part of putting that draft together. She thinks that she would have cross-checked some things, but not everything, and has no recollection of cross-checking the pension increase rule. She thinks that she would not have done so and one of the reasons for that (apart from the absence of any recollection on the point) is that she believes that, if she had, she would have noticed the discrepancy between the

benefit summary and the draft rule 7 in Schedule 3. She also confirmed that so far as she was concerned it was not just a drafting issue:

> *"It did make a difference to the rates and reflecting and effectively making a change which would have inked in a certain level of increase by reference to the statutory provision at the time would have been a change."*

107. The proposed new DDR also included a Schedule 4 containing rules applicable to members of the money purchase section of the Scheme which had commenced on 1 August 2002. Historically, the rights of these members were undocumented:

107.1. Rules 2.1 and 2.2 of Schedule 4 set out the eligibility of employees for membership. It permitted those who became employees before 1 July 2002 to be admitted to membership of the money purchase section at the discretion of the principal employer and the Trustees and on such special terms as they may determine. In her covering note, Ms Johnson had said that because the money purchase section had previously been undocumented, it was "*intended that this document accurately reflects the existing benefits and current practice of the Money Purchase Section (rather than makes any changes to them)*".

107.2. Rule 8.1 of Schedule 4 included provision for increases to pensions in the money purchase section. As to pensions in payment attributable to pensionable service after 5 April 1997, they were to be increased with effect from the start of each scheme year by the lesser of 5% and the percentage increase in RPI in the preceding calendar year. Pensions in deferment were simply to be varied to take into account any alteration in the value of the underlying investments between the date of cessation of active membership and the date the pension comes into payment in accordance with the revaluation requirements of the PSA 1993.

The 2006 Deed

108. Before the next draft of the proposed new DDR was produced the Trustees determined at a meeting held on 14 and 15 March 2006 that the changes introduced by the FA 2004 and the PA 2004 should be properly documented. One of these changes was made by section 278 of the PA 2004, which provided for the reduction of the LPI cap from 5% to 2.5% in respect of pensionable service from 6 April 2005. This change had already been discussed and agreed with the Company over the course of the previous year and, at their meeting held on 13 December 2004, the Trustees had agreed that it would be better to delay the reduction of the LPI cap to 6 April 2006. This was then agreed by the Company.

109. To that end, on 6 April 2006, the Company, acting with the consent of the Trustees, exercised its power under clause 2.4 of the 1996 DDR to alter and amend the 1996 DDR in order to apply certain aspects of the new tax regime being introduced by the FA 2004. It did so by execution of a deed of amendment to which the Trustees were also parties (the "2006 Deed"). Mr Geary said that he reviewed the 2006 Deed but concentrated on the tax simplification provisions rather than those relating to pension increases and did not compare any of them to the 1996 DDR.

110. The clause which is relevant to the present proceedings was clause 2.16 which was entitled "Pension Increases (Rule 9.1)" and made provision as follows:

"*A Member's pension accrued in relation to any period of Pensionable Service on and from 6 April 2006 will be increased in payment to the extent required by Section 51 of the Pensions Act 1995 save that the first four annual pension increases applicable to the pension in payment of a senior member immediately following the commencement of payment of his pension benefits shall be applied at a rate of 5% per annum.*"

111. This clause was intended to defer from 6 April 2005 to 6 April 2006, the replacement of the 5% figure with the 2.5% figure in respect of pensionable service from 5 April 2005 which I have mentioned in paragraph 23 above. It is not a point that I have to decide formally, but the clause does not seem to have had that effect. Although it specifically applied the reduction of the statutory cap from 5% to 2.5% with effect from 5 April 2006, it made no provision for the position in respect of pensionable service between the appointed day (5 April 2005) and 5 April 2006 with the apparent consequence that statutory indexation will have applied automatically in any event. It is of some note that the drafting continued to link the extent of the inflation-linked pension increase to the statutory requirements of section 51 of PA 1995. It did not seek to write in a measure based on RPI.

112. Ms Barnes made clear that the intended approach was more generous than that required by the legislation, even though the 2006 Deed does not seem to have achieved its intended purpose. Mr Morley had no recollection of whether the Company gave consideration to the cost implications of deferring the reduction in the statutory cap from 5 April 2005 to 5 April 2006. He was also cross-examined on the question of whether or not approval for its execution was sought from Mr Sammons as CAO in accordance with the provisions of the Governance Policies but was unable to say one way or the other.

113. Mr Smith explained that, at the time this amendment was introduced, he did not give specific thought as to how the reduction of the statutory cap might affect the position of the former members of the Berk and PLAS Schemes. He said that the reason for this was that he had assumed that the 2006 Deed would apply to all current members of the Scheme and that, now the former Berk / PLAS members had joined the Scheme, they would be entitled to the same benefits as the other members going forward.

The further drafts of the proposed new DDR

114. There was a brief discussion of progress on the drafting of the proposed new DDR at a meeting of Trustees on 16 May 2006 when Mr Smith also reported on the execution of the 2006 Deed and that Ms McKenna was working on the proposed new DDR. Mr Geary thought that, by this point in time, there were a variety of reasons for creating what he described as a consolidated deed. These included the need to consolidate changes to the Scheme's benefit structure, to include rules for the new money purchase section of the Scheme, to make provision for the former Berk and PLAS Members, to address changes in legislation and to deal with the issues which arose because the Scheme had not been correctly equalised by the 1996 DDR.

115. This was Mr Corrigan's first meeting as a Trustee. He said that he did not look at the 1996 DDR or the 2006 Deed at the time of his appointment because he did not consider that there was a need for him to do so. He knew that statutory rules applied to pension increases, but he did not know the technicalities and relied on the Trustees' professional

advisors to give guidance on any changes in the statutory position. He also knew that a new consolidated DDR was being prepared but did not remember any discussion about its specific purpose and said that he was not involved in the drafting process.

116. In response to a request made by Mr Geary on 16 October 2006, Ms Johnson sent him a draft schedule of changes which the proposed new DDR would make to the 1996 DDR. This seems to have been in the same form as a schedule that had originally been sent to him on 8 August. Amongst other things it included changes to a number of benefits unrelated to the pension increase rule, which reflected changes in practice that had developed since the 1996 DDR. I shall explain their significance in more detail a little later in this judgment. In relation to rule 7.1(b) of Schedule 3 (Pensions in payment), the Schedule explained that: "*This Rule has been amended to provide that pensions in payment in relation to pensionable service on or after 6 April 2006 shall be increased by LPI subject to cap of 2½%. This change was introduced by the Pensions Act 2004*." Although this reflected the fact that a change had been made to the draft of the pension increase rule to link it to the statutory changes made by the PA 2004, it did so by reference to LPI subject to the cap (i.e. the minimum statutory requirement), not by drawing attention to the fact that RPI had been drafted into the wording.

117. Mr Geary said that this was consistent with his understanding of what had occurred with the 2006 Deed. It seems likely that this change had already been included in a draft of the proposed new DDR prepared by Ms Johnson for a meeting that Mr Smith and Mr Geary may have had with Ms McKenna on 30 August 2006. A copy of that draft has not, however, been located and was not in evidence at the trial. The evidence as to what was discussed at any meeting on 30 August was very sketchy as well. Neither Mr Smith nor Mr Geary had any recollection of it and, although the minutes of a Trustees meeting held the following day (31 August) referred to the progress being made by Hammonds on the drafting, there was no reference to a meeting the previous day between Mr Geary, Mr Smith and Ms McKenna, and it is quite possible that it never happened.

118. At about this time, Mr Lawson was provided with a copy of the draft and made a number of very detailed comments which were sent to Hammonds by Mr Geary on 15 September. Mr Lawson said that this confirmed that he read the draft carefully:

> "*I see that I had no comments in relation to rule 7 of Schedule 3, relating to pension increases. I am not surprised because without receiving legal advice, I would not have realised that it would have the effect I describe below. My review would have checked for typographical mistakes and for sense.*"

119. He said that he looked at the whole of the proposed new DDR, including the pension increase rules, but said that he did not cross-refer to the 1996 DDR, and his review was limited in this sense:

> *"I relied on our attorney to tell us … if there was anything significant. The intention was not to change it significantly so I am afraid my help with this was mostly being compulsive in finding typos."*

120. It had originally been intended that an advanced draft of the proposed new DDR would be considered at a meeting of the Trustees held on 5 and 6 December 2006, but in the event, it was not ready. There was however a meeting between Mr Smith, Mr Geary,

Mr Lawson, Ms McKenna and (possibly) Ms Johnson sometime in November 2006 when the existing draft of the proposed new DDR was discussed. So far as Mr Geary and Mr Smith were concerned, the purpose of involving Mr Lawson in this part of the process was to ensure that "*the US were represented in the way in which this was structured*" and because "*we wanted to make sure that Craig was happy*". The attendees, including Mr Lawson, remembered the meeting, but nobody was able to recall the details of any discussion.

121. Mr Geary was pressed in cross-examination as to whether there was a discussion about the pension increase rule at the November meeting and said that he could not remember, but that he doubted it because there were many other issues which were likely to have had a more significant impact. He did, however, think that the drafting approach would have been discussed, but did not explain what form that discussion took or might have taken. He was sure that Ms McKenna would have gone through the amendments and highlighted what had changed, and that knowing Mr Lawson as he did, he would have made a lot of comments.

122. The Representative Beneficiary relied on the absence of a note of this meeting as illustrative of what Mr Legge QC called a notable scarcity of relevant notes and documentation. He also gave two or three other examples including the letter sent after the August 2005 meeting (as to which for the reasons I have already explained I think that he was mistaken), a September draft of the proposed new DDR and what he called a complete absence of notes of telephone conversations between Mr Geary and Hammonds, even though Mr Geary said that he spoke with Ms Johnson very frequently. He relied on the absence of these materials as justification for a submission that it is equally likely that Hammonds were given instructions on drafting style by the Company or the Trustees (i.e. so as to write RPI into the pension increase rule), which would have been reflected in such documentation had it existed or been adduced in evidence.

123. None of the witnesses to whom this contention was put by Mr Legge QC (and the cross-examination on this point concentrated on the August 2005 meeting), accepted that any such instruction was given, and I think that it is the kind of point which one of them would have remembered if the instruction had in fact been given. I also do not accept that such gaps as there are in the documentary record are significant on this issue. In my view, Mr Legge QC's submission on this point is not well-founded.

124. The December meeting of the Trustees was the first meeting attended by Mr Taylor. He had taken over from Mr Williamson when he resigned. The meeting was told that the new DDR was near completion but that there were still some final details to check and some points to discuss with the Company. Mr Taylor's understanding of the process was as follows:

> "*I understood that the 2008 Deed was intended to put the Scheme's governing provisions in one place and to reflect the changes in the law which had taken place since the [1996 DDR] and the changes brought about by new members joining from the Royal Vopak NV pension schemes in the early 2000s. The 2008 Deed was accordingly intended to be a consolidation exercise and I do not recall there being any discussion about changing the benefit structure of the Scheme.*"

125. In early February 2007, Mr Geary attended a presentation from WTW. Mr Lewis had by then taken over as the Scheme actuary. The presentation made multiple references

to pension increases in the context of their impact (amongst other factors) on the Scheme's funding requirements. In that context, WTW referred to the increases as being LPI including a 5% or a 2.5% cap, and Mr Geary understood that LPI was itself based on RPI.

The February 2007 meeting

126. The draft that had originally been intended to be discussed in December 2006 was ready for the meeting of Trustees that was held on 27 and 28 February 2007. The draft identified by underline and strikethrough the changes from the previous draft. There were a significant number of detailed changes dealing with matters both related and unrelated to the issues in these proceedings. Apart from the meetings in August 2005 and November 2006 this was the only occasion on which Mr Smith recalled being involved in the process of reviewing a draft of the proposed new DDR.

127. Ms McKenna attended part of the Trustees meeting held on 27 and 28 February 2007 and dealt with two separate matters. The first was the merger of the Berk Scheme and the PLAS Scheme with the Scheme. The Trustees decided to proceed with this proposal. The second was the progress on the drafting of the proposed new DDR. The minutes recorded that "*The new draft Definitive Trust Deed and Rules has been prepared to up date the current definitive deed and rules dated 11 December 1996.*" As to this, Ms McKenna gave an outline of the structure of the proposed new DDR and distributed a copy of the current draft to each of the Trustees. They were incorporated in a pack of documents prepared by Hammonds for the meeting which also included a note describing the structure of the proposed new DDR and a schedule of changes from the 1996 DDR. Mr Geary said that Ms McKenna's presentation lasted for several hours.

128. The note describing the structure of the proposed new DDR explained the nature of the changes in the following passages:

> "*The draft Trust Deed now incorporates the existing benefits of the closed Staff Final Salary Section, the closed Senior Final Salary Section and the open Money Purchase Section… Further changes have also been included in the draft Trust Deed pursuant to the Pensions Act and Finance Act 2004. Please see the Schedule of Changes document for further details of such changes.*" [paragraph 1]
>
> "*Schedule 3 contains the Final Salary Rules of the Scheme… Again, it is intended that this document consolidates those benefits, rather than makes any changes to them.*" [paragraph 2.5]
>
> "*As mentioned in paragraph 1 above, the Schedule of Changes details all of the changes made to the existing definitive deed and rules and the reasons for such changes. This document also sets out the outstanding information required to finalise the new deed and rules*" [paragraph 3]

129. By this stage Mr Smith had come to understand that the statement that the proposed new DDR incorporates the existing benefits of the Scheme did not mean that it replicated those benefits exactly. He agreed that his understanding was that it was intended to capture the practice of the Scheme as well and that was the sense in which Hammonds were using the concept of a benefit structure. This was a view shared by others including in particular Mr Lawson.

130. The schedule of changes, which the accompanying note said was designed to detail all of the changes to the 1996 DDR, was entitled "*Schedule of Changes in relation to Pensions Act 2004 and Finance Act 2004 made in Definitive Deed and Rules dated [ ]*" and included the following statements:

130.1. In relation to the Introduction:

> "*The recitals explain that the purpose of the new Definitive Deed and Rules is to reflect the existing benefit structure and the changes made in the Deed of Alteration dated 6 April 2006 in response to the simplification of the taxation of pension schemes and to certain provisions of the Pensions Act 2004 and other legal requirements (e.g., Civil Partnership Act 2004).*"

130.2. In relation to rule 7.1(b) of Schedule 3:

> "*This Rule has been amended to provide that pensions in payment in relation to pensionable service on or after 6 April 2006 shall be increased by LPI subject to cap of 2½%.*
>
> *This change was introduced by the Pensions Act 2004.*"

131. Mr Lawson and Mr Smith both said that they understood that this pension increase change was not a new change to the Scheme's benefit structure but was merely a consolidation of a provision contained in the 2006 Deed. More generally, Mr Smith said that he understood the Schedule of Changes was intended to give details of all of the changes made to the 1996 DDR and the reasons for such changes. This is not surprising given what Hammonds had said in their accompanying note. The changes included those that had arisen by changes in practice and also as mandated by statute. This intent was also reflected in the following exchange with Mr Furness QC:

> "*Q. But I am taking, from the basis on which this was presented to you and your fellow trustees, that you, and so far as you know your fellow trustees, were proceeding on the basis that you were taking the 1996 deed, you were making the changes on the list, but you weren't making any changes you hadn't been told about that weren't on the list .*
>
> *A. No.*"

132. Ms Johnson confirmed that this was what the wording of the schedule of changes was intended to convey. She said, in evidence with which Ms McKenna also agreed:

> "*The only change highlighted by the schedule of changes in relation to pension increases or revaluation was the change made by the Pensions Act 2004 that LPI was now subject to a cap of 2½%, rather than 5%, as had previously been the case. As explained above, this change had already been addressed in the 2006 Deed of Amendment which was then intended to be consolidated in the 2008 Deed. There was no indication in the schedule of changes that the basis of pension increases or revaluation was to be changed from the position under the 1996 Deed and the 2006 Deed of Amendment taking into account overriding statutory requirements*."

133. The schedule of changes made no other reference to increases to pensions in payment or revaluation of pensions in deferment, other than to note that it was for Mercer to confirm the date of pension increases. However, it did identify a number of benefits (lump sum on death in service, spouses', children's and dependants' pension on death of a preserved member and lump sum payable on death of pensioner under 75) which amounted to changes that were not mandated by the terms of the PA 2004 or other legal requirements. It transpired during the course of the trial that, although these were changes to entitlements under the express terms of the 1996 DDR, they reflected established practice. As Mr Geary explained in his oral evidence, it remained the case so far as he was concerned that the new DDR was going to incorporate the benefit provisions of the 1996 DDR as updated by the practices listed in the schedule of changes, and that there were no other material changes which were not on the list.

134. As to the draft of the proposed new DDR itself, a new recital D was included recording that, in response to the FA 2004, the PA 2004 and other legal requirements the then Principal Employer and the Trustees had agreed to change the benefits provided by the Scheme and enter into the 2006 Deed. Also, the old Recital E was re-lettered F and the phrase *"so as to reflect the existing benefit structure of the Scheme with certain changes and reflect the changes made by the Amending Deed"* was inserted to replace the phrase *"so as to duplicate the existing benefit structure of the Scheme"*. Both Mr Geary and Mr Lawson thought that the concept of reflecting the existing benefit structure extended to existing practice.

135. The other relevant changes were that there was a cosmetic change to the definition of "*Index*" replacing "*Inland Revenue*" with "*HM Revenue & Customs*", and there were some changes to the pension increase rule in Schedule 3, as it related to the excess over the GMP in payment (rule 7.1(b)), in order to distinguish between the entitlement to increases in respect of pensionable service between (a) the period 6 April 1997 to 6 April 2006 and (b) the period on or after 6 April 2006. There was also a minor change to rule 7.1(c) dealing with discretionary increases to pensions in payment, so that the reference to "*Revenue Limits*" in the previous draft was replaced with a reference to "*Scheme Limits*" – this was to reflect a definitional change earlier in the document, on which nobody has suggested that anything turns. No changes were made to the draft in respect of increases for the purposes of revaluing pensions in deferment.

136. The proposed amended rules 7.1 (Pensions in payment) and 7.2 (Pensions in deferment) took the following form, after taking account of redline changes illustrating the amendments from earlier drafts:

> ***"7.1 Pensions in payment***
>
> ***(a) GMP …***
>
> ***(b) Non-GMP (as-of-right).*** *Subject to the provisions of the 1995 Act, any pensions (excluding any GMPs) in payment under the Scheme in relation to Pensionable Service:*
>
> > *(i) on or after 6 April 1997 and before 6 April 2006 shall be increased on [1 January] in each year [Mercer to confirm] in proportion to the increase in the Index over the preceding twelve month period subject to a maximum increase of 5% in respect of that period;*

(ii) on or after 6 April 2006 shall be increased on [1 January] in each year in proportion to the increase in the Index over the preceding twelve month period subject to a maximum increase of 2½% in respect of that period."

(c) Discretionary Increases.

Each pension in payment under the Scheme may be increased (or further increased) from time to time by such amount as the Principal Employer (after considering Actuarial Advice, and with the consent of the Trustees) so determines, subject to Scheme Limits.

7.2 Pensions in deferment

(a) GMP …

(b) Non-GMP. *Where a Preserved Member leaves Pensionable Service at least one year before the Normal Retirement Date, any part of the preserved pension under the Scheme which exceeds the GMP shall (subject to Rule 7.2(c)) be increased on [1 January] [Mercer to confirm] each year as provided in Rule 7.1(b) and (c) above .*

(c) ***Revaluation Requirements.*** *Any increase referred to in Rule 7.2(b) shall be subject to the revaluation requirements of the 1993 Act.*"

137. The Trustees were walked through the documents which highlighted the salient changes, but Mr Smith did not recall being shown a copy of the drafting of the rule 7 itself and none of the other Trustees said that they were. He remembered that the focus of Ms McKenna's presentation was on the schedule of changes and explained that Ms McKenna used it to highlight changes that had been made and to explain their effect. He also did not think that there was any discussion at the meeting of the revaluation rule and said that "*my understanding remained that, unlike pension increases, revaluation was a one off event rather than an annual process based on RPI*". None of the other Trustees said that there was any detailed discussion around indexation in relation to pension increases or revaluation.

138. Unlike most of the other Trustees, Mr Geary was familiar with the proposed new DDR itself and he was asked about his understanding of the definition of Index as it appeared in that document. Consistently with the evidence he gave in relation to the first draft which he had been sent in December 2005, he said that he would have understood the definition of Index to include reference to RPI rather than the index which applied from time to time under the statute. However, he went on to make clear that he did not think that he would have understood at the time that, if the rate which was prescribed by the legislation at the time changed, the index referred to in this definition would remain the same.

139. Mr Lawson accepted that he would have been particularly alive to the issue of pension increases, and accepted that he would have looked at the definition of Index, although he said that the way that the pension increase rule (7.1(b)(i)) worked was a little hard to understand because of what had been taken out and what had been put in, and he said that the revaluation issues were a matter for the actuaries. He agreed that he would have concluded that the index that applied was not the statutory index, although I am

bound to say that his evidence was not very clear on this point, because he had said in his preceding answer "*Unless it is an index approved by HM Revenue and Customs, I guess that could be statutory but not in itself, no*."

140. So far as Ms McKenna was concerned the fact that the schedule of changes referred to the reduction of the LPI cap from 5% to 2.5% meant that any discussion on the pension increase rule would have been limited to that issue. She did not accept that the way that the LPI cap change was described was inaccurate nor that it reflected the fact that Hammonds had been instructed to draft the proposed new DDR in a way which sets out the terms of the PA 2004 in the terms of the DDR itself, and she went on to confirm:

> "*There was no instructions to draft out the provisions in the deed, and in fact no instructions to do anything other than to roll forward on the basis of the current provisions at the time, reflecting the overriding effect of the legislation, and if that is unclear or the drafting wasn't then achieved to achieve that, that is a mistake that was made in order to reflect a difference of what the drafting said, but it wasn't because of instructions to do so.*"

141. Later in her evidence, she went on to explain that the idea of including a minimum level of revaluation in a pension increase provision was something that is done from time to time, although she said this in the context of an underlying assumption that statutory revaluation was the basis of the benefit that had always been paid in the case of the Scheme:

> "*A ... some schemes will adopt a statutory basis, some schemes will adopt something different as long as there is a minimum level of revaluation that complies with the statutory requirement and different schemes do it in different ways.*
>
> *Q. So these provisions would have been within the range of what you might have expected to see in a pension scheme?*
>
> *A. Yes.*"

142. This draft also included changes to the pension increase rule as it affected the senior final salary section. By paragraph 4 of Appendix 1 to Schedule 3, it was provided that pensions in payment would be increased on 1 May each year at a rate of 5% simple for the first four pension increases, and only thereafter would the provisions of the proposed new rule 7.1(b) apply to senior final salary members.

143. The February 2007 meeting of Trustees was important because it was the only one at which the Trustees discussed the terms of the proposed new DDR in any detail, and it was attended by all eight of the Trustees (Mr Clarke via conference call), each of whom also executed the 2008 DDR in due course. Important though the meeting was, the Trustees' recollections of it varied, perhaps not surprisingly given the passage of time. Thus, Mr Simpson remembered the meeting but had no memory of what was discussed, while Mr Corrigan did not remember the meeting at all.

144. There was no evidence that there was any discussion of how if at all the terms of the pension increase rules in the proposed new DDR reflected or related to the inflation-linked increase provisions under the 1996 DDR. If there had been, I think that one at least of the witnesses would have remembered and I am satisfied that there was not. To

the extent that they had any independent memory, all of the Trustees confirmed that they thought that the proposed new DDR would incorporate the substance of the benefits in the 1996 DDR as updated by the practices identified in the schedule of changes, and that was what the draft of the proposed new DDR did. Thus, both Mr Corrigan and Mr Simpson, whose memories of the meeting were hazy, said that they thought that the proposed new draft DDR recorded practice.

145. Even those who had no independent recollection of this meeting (and the presentation of the schedule of changes in that context) agreed that they relied on the schedule of changes as a comprehensive list of the changes from the 1996 DDR. Mr Simpson accepted that he would have relied on Hammonds to record the practice accurately, but he said that he would have skim read the schedule of changes as well, and that is an approach which I think that several of the Trustees who were less intimately concerned with the drafting process are likely to have taken as well. Mr Simpson also agreed that there was a change in the draft DDR from the existing position in relation to pensions in payment because the schedule of changes referred to an increase in LPI subject to a cap of 2.5%, and prior to that there had been "*no indexation, there was no increase other than a discretionary increase.*"

146. Mr Taylor, Mr Corrigan and Mr Clarke were also asked about the wording of rules 7.1 and 7.2, and in particular the extent to which they assumed that these rules contained amendments to the existing wording and still remained to be completed. None of them seemed to have any independent recollection of what they actually thought at the time (not surprisingly given the passage of time), and I do not think that their evidence on this point added much to what can be discerned from a reading of the documents.

147. Mr Morley was not present at the meeting but it is apparent from the minutes that he was taking a close interest in a number of the issues that were discussed, and he said in evidence that he read the draft DDR itself. He also recognised the schedule of changes which was presented to the meeting by Hammonds but was unable to say whether this was the version that he saw at the time, although I think that the likelihood is that it was and that he read the schedule at the time. He also said that he thought that he would have been aware of the general nature of the changes flagged by the schedule but would have relied on the fact that neither Mr Lawson nor Mr Smith thought that they required escalation to Mr Sammons under the Governance Policies.

148. The Company invites me to find as a fact that Mr Morley also shared the understanding and belief of all of the Trustees that the proposed new DDR incorporated the substance of the 1996 DDR and made the changes set out in the schedule of changes but no others. There was no specific confirmation to that effect, but I am satisfied from the totality of Mr Morley's evidence that he understood that the purpose of the schedule was to identify all material changes from the 1996 DDR, and that he expected it to be a comprehensive document. In these circumstances, I am satisfied that he thought that all material changes would have been included in the schedule of changes and, by reliance on Mr Lawson and Mr Smith, he thought that he would have had his attention drawn to anything which had a material impact on member benefits.

149. Mr Morley was also taken to the changes in the death in service benefits in the context of his evidence that he thought that the 2008 DDR was only a consolidating deed. He confirmed that the question for him when deciding on whether any change could be approved without further escalation to Mr Sammons in accordance with the Governance

Policies was whether the increase in exposure was material. He was not, however, able to remember whether or not specific consideration was given at the time to the materiality of these changes but thought that it probably was.

Further drafts of the DDR

150. The next draft of the proposed new DDR was dated April 2007, and therefore followed on from the February meeting of Trustees. There is no evidence that it was anything other than an internal Hammonds document which was not distributed to the Company or any of the Trustees. It was produced at or about the same time as a drafting meeting which was held on 23 April 2007 between some of the professionals involved including Ms Johnson, Ms Barnes and Mr Kelvin Rothwell of Mercer. The purpose of the meeting was to confirm and consider the documentation relating to the benefit entitlements of some of the historic categories of member. Although it is recorded that Mr Smith and Mr Geary were to attend the meeting, Mr Smith had no recollection of doing so.

151. As with the previous draft there were a number of changes which were identified by underline and strikethrough, although they were not as numerous as the changes from the first draft. There were, however, some changes to the pension increase rule in the staff final salary section, both as it related to pensions in payment and as it related to pensions in deferment. The changes identified the date on which the increase was to take effect (a change from 1 January to 1 May) and made specific reference to variations for members of the senior final salary section (as described in Appendix 1 to Schedule 3) and the Berk and PLAS Schemes (as described in Appendix 2). There were also some clarificatory changes to the revaluation wording to identify more precisely the period in respect of which the revaluation increase was to be applied (i.e. between the date of the end of active membership and the date on which the member's pension comes into payment).

152. Taking account of these changes, this draft of rule 7 took the following form:

"7.1 Pensions in payment

(a) GMP …

(b) Non-GMP (as-of-right). *Subject to the provisions of the 1995 Act, any pensions (excluding any GMPs) in payment under the Scheme in relation to Pensionable Service:*

(i) on or after 6 April 1997 and before 6 April 2006 shall be increased on 1 May in each year in proportion to the increase in the Index over the preceding twelve month period subject to a maximum increase of 5% in respect of that period;

(ii) on or after 6 April 2006 shall be increased on 1 May in each year in proportion to the increase in the Index over the preceding twelve month period subject to a maximum increase of 2½ % in respect of that period;

> *This Rule 7.1(b) is varied for Members of the Senior Final Salary Section as set out in Appendix 1 to Schedule 3 and for former members of the Berk Scheme and PLAS Scheme as set out in Appendix 2 to Schedule 3.*
>
> ***(c) Discretionary Increases.***
>
> *Each pension in payment under the Scheme may be increased (or further increased) from time to time by such amount as the Principal Employer (after considering Actuarial Advice, and with the consent of the Trustees) so determines, subject to Scheme Limits.*
>
> ***7.2 Pensions in deferment***
>
> ***(a) GMP ...***
>
> ***(b) Non-GMP.*** *Where a Preserved Member leaves Pensionable Service at least one year before the Normal Retirement Date, any part of the preserved pension under the Scheme which exceeds the GMP shall (subject to Rule 7.2(c)) be increased as provided in Rule 7.1(b) and (c) above in the period beginning on the date of cessation of Active Membership and ending on the Member's Normal Retirement Date (or the earlier date on which the Member's pension comes into payment).*
>
> *(c)* ***Revaluation Requirements.*** *Any increase referred to in Rule 7.2(b) shall be subject to the revaluation requirements of the 1993 Act.*"

153. The variation of the pension increase rule for the members of the Berk Scheme and the PLAS Scheme was dealt with in Appendix 2 to Schedule 3 which set out variations to the rights of members of a number of former schemes which were expressed to override any conflicting provisions to be found elsewhere in the proposed new DDR. It took the following form:

> "*3 Former Members of the Berk Scheme and PLAS Scheme*
>
> *Pending the execution of a deed which sets out the detailed provisions that apply in respect of the former members of the Berk Scheme and PLAS Scheme, the Scheme shall be administered in accordance with the announcements dated 18 March 2002 attached as Appendix 3 to Schedule 3 in respect of those former members of the Berks Scheme and PLAS Scheme who joined the Scheme on 1 May 2002. In the event of any uncertainty as to the entitlement of or in respect of a former member of the Berk Scheme or PLAS Scheme, the Principal Employer and the Trustees shall determine such entitlement.*"

154. At that stage of the drafting, the Berk / PLAS Announcements were not attached. They were only attached to the executed versions of the 2008 DDR, but I have already described the form that they took. This draft of the proposed new DDR appears to have been identical to the version that was then sent in redline and clean copy as an attachment to an e-mail from Ms Johnson to Mr Geary on 6 July 2007.

155. When this draft was sent to Mr Geary it was accompanied by an explanatory note the purpose of which was "*to set out the changes made to the Trust Deed since the date of*

the last Trustee Meeting held on 28 February 2007 and to flag up the provisions where further information is required before the Trust Deed can be finalised.” The way in which Ms Johnson described the changes to the pension increase rule was as follows:

> “***Rule 7 (Pension Increases - non-GMP element):*** *In relation to pensions in payment, we have amended Rule 7.1(b) to provide that such increases are granted on 1 May every year. In relation to the revaluations for pensions in deferment, we have amended Rule 7.2(b) to provide that such increases will be made for the period beginning on the date of cessation of Active Membership to the date on which the Member’s pension comes into payment.*
>
> ***Rule 7.1 (Pension Increases):*** *The pension increases rule is now stated to be varied for members of the Senior Final Salary Section (to cover the 5% increases for the first 4 years) and the former members of the Berk and PLAS Scheme (to cover the pension increases that apply in respect of calculating the Notional Pension).*”

156. Ms Johnson did not identify any change to the basis on which pensions would be increased or revalued, nor did she explain that the effect of the drafting was or might be to provide for revaluation of pensions in deferment to be on a year- by-year basis. Mr Smith said that he did not review the draft wording of the proposed new DDR at this stage, but Mr Geary did. So far as concerned the revaluation rule, he explained his position as follows:

> “*I did not have detailed knowledge of the statutory revaluation rules (although I was aware of their existence), nor was I familiar with the detail of the Scheme rules on revaluation. I did not discuss this provision with Hammonds. I expected that it would reflect the Scheme's current practice because the Trustees had not given any instructions to change the present system and we had not received any updates regarding new legislation that would require changes to the Scheme. I relied on Hammonds and Mercer to ensure the drafting was correct.*”

157. The next Trustees’ meeting was held on 11 September 2007. There was no discussion of the proposed new DDR, although the meeting was informed that the current timetable was for the final version to be signed off at the November 2007 meeting. There was then a drafting meeting attended by Mr Geary, Ms Johnson and Ms Barnes the following day (12 September 2007) at which there was discussion of pro-rating for the purposes of rule 7 and a note that Ms Barnes would find out what was happening in practice and let Ms Johnson know. She followed up on this point in an e-mail to Ms Johnson dated 5 October 2007 telling her that Mercer had confirmed that in practice they pro-rated the first pension increase so that (e.g.) if an employee retires on 1 April, they will be entitled to $1/12^{th}$ of the annual pension increase on 1 May.

158. This is another example of an occasion on which Mr Geary had cause to look at the drafting of the pension increase rule, although he regarded the question of how to deal with pro-rating to be "black boxed” (rather like the technical questions relating to revaluation) and he left the drafting to the professionals who should have known how it worked. I am sure that Mr Legge QC is correct to say that there were a number of occasions on which Mr Geary was taken back to the rule and this was one of them. It does not, however, establish that he scrutinised the rule with a critical eye for the

question of what would happen if the statutory index were to change, and I do not think that he did.

159. This question arises again in relation to the next draft of the proposed new DDR, which was sent in redline (showing the changes from the previous draft) as an attachment to an e-mail from Ms Johnson to Mr Geary on 9 November 2007. It was accompanied by an explanatory note, which identified the points of change from the draft circulated on 6 July. There was another change to the definition of "*Index*" in Schedule 1 which changed the month of its publication to September so that it took the following form:

> "*Index means the Index of Retail Prices (All Items) published for the month of September by the Central Statistical Office (or any other index approved by the HM Revenue & Customs for the relevant purpose).*"

Mr Geary said he would have looked at this change because it was redlined. He explained that it reflected the approach which the Trustees had always taken to using the previous September's RPI when determining the pension increase to be applied from the following May - February was too close to the beginning of May when the pension increases were applied. This was therefore another change which reflected established practice. It did not, however, relate to the link between the use of RPI and any changes to the statutory index.

160. Mr Clarke was also asked about this version of the proposed new DDR and more particularly the definition of Index. He thinks that he would have read it at the time, although had no independent recollection of doing so, and accepted that there was no reference to a statute and in evidence which was I think largely reconstruction from the documents said:

> "*Q. So you would have assumed that it meant what you thought it did which was the retail prices index, correct?*
>
> *A. Yes, that seems fair.*"

161. This draft also included further changes to the pension increase provisions applicable to members of the staff final salary section set out in rule 7 of Schedule 3 to deal with the pro-rating point which had been discussed in the e- mail exchange between Ms Johnson and Ms Barnes, and was explained in the accompanying explanatory note. Rule 7.1(b) included a new sub-paragraph (iii) to deal with this point, but rule 7 was otherwise unchanged:

> *"(iii) a pension that has been in payment for less than a year shall be increased by at least one-twelfth of the full increase for each complete month for which the pension has been in payment."*

162. As I have mentioned it had been intended that the proposed new DDR would be signed off at the Trustees meeting held on 14 November 2007 and it seems as if Ms Johnson also assumed that this would happen when she attached what she thought was the final version to her e-mail to Mr Geary. This did not happen, because a last-minute problem arose in relation to the early retirement provisions, so there was no general discussion and the sign-off was carried forward to the next meeting.

The 2008 DDR

163. The final draft of the proposed new DDR was then sent as a redline attachment to an e-mail from Ms Johnson to Mr Geary on 25 February 2008 and was signed off at the meeting of Trustees held the following day. All eight Trustees were present in person, by telephone or by video link, and most of them signed the 2008 DDR at that meeting. The draft included a small number of changes, but none of them related to any of the questions which arise in these proceedings.

164. The execution of the 2008 DDR was eventually completed on 13 March 2008. It was signed by each of the eight Trustees (Mr Geary, Mr Simpson, Mr Smith, Mr Jackett, Mr Corrigan, Mr Lawson, Mr Clarke and Mr Taylor) all of whom gave evidence at the trial apart from Mr Jackett who has since died. Mr Morley (a director) and Mr Simpson (the Company Secretary) signed on behalf of the Company. I have already explained the development of the drafting, but I should summarise the relevant parts of the final form as follows, most of which I have already described when explaining what occurred as part of the drafting process.

165. It recited the wish of the Company as Principal Employer to replace in their entirety the provisions which govern the Scheme listed in a large number of documents detailed in a schedule to the 2008 DDR, including the 1996 DDR and the 2006 Deed. Specific provision for the deletion of the 1996 DDR in their entirety and the substitution in their place of the 2008 DDR was made by clause 1.1(c) of the 2008 DDR.

166. Recital F to the 2008 DDR was in the following terms:

> "*It is the intention of the parties to this Deed that this Deed and Rules should consolidate the governing documentation of the Scheme so as to reflect the existing benefit structure of the Scheme with certain changes and reflect the changes made by the [2006 Deed of Amendment]. However, the parties are of the view that the amendments within this Deed and Rules will not adversely affect any entitlement or accrued rights of any Member and thus are not restricted by Section 67 of the Pensions Act 1995.*"

167. Subject to some very minor and irrelevant changes, the power of amendment set out in the 1996 DDR was replicated by clause 2.3 of the 2008 DDR. Likewise, the substance of the provisions for meetings of Trustees which had been set out in clause 6.1.2 of the 1996 DDR was repeated in clause 6.1(a) of the 2008 Deed, although the changes in the wording were slightly more substantial. There was also a power of augmentation in broadly the same form as had been included in the 1996 DDR.

168. Schedule 3 to the 2008 DDR contained the rules applicable to members of the staff final salary section of the Scheme. For the purposes of these proceedings the most important provisions are those dealing with pension increases as set out in rule 7 as follows:

> ***"7.1 Pensions in payment***
>
> > *(a) …*

(b) ***Non-GMP (as-of-right).*** *Subject to the provisions of the 1995 Act, any pensions (excluding any GMPs) in payment under the Scheme in relation to Pensionable Service:*

(i) on or after 6 April 1997 and before 6 April 2006 shall be increased on 1 May in each year by the increase in the Index over the preceding twelve month period subject to a maximum increase of 5% in respect of that period;

(ii) on or after 6 April 2006 shall be increased on 1 May in each year by the increase in the Index over the preceding twelve month period subject to a maximum increase of 2½ % in respect of that period;

(iii) a pension that has been in payment for less than a year shall be increased by at least one-twelfth of the full increase for each complete month for which the pension has been in payment.

This Rule 7.1(b) is varied for Members of the Senior Final Salary Section as set out in Appendix 1 to Schedule 3 and for former members of the Berk Scheme and PLAS Scheme as set out in Appendix 2 to Schedule 3.

(c) Discretionary Increases.

Each pension in payment under the Scheme may be increased (or further increased) from time to time by such amount as the Principal Employer (after considering Actuarial Advice, and with the consent of the Trustees) so determines, subject to Scheme Limits.

7.2 Pensions in deferment

(a) *...*

(b) ***Non-GMP.*** *Where a Preserved Member leaves Pensionable Service at least one year before the Normal Retirement Date, any part of the preserved pension under the Scheme which exceeds the GMP shall (subject to Rule 7.2(c)) be increased as provided in Rule 7.1(b) and (c) above in the period beginning on the date of cessation of Active Membership and ending on the Member's Normal Retirement Date (or the earlier date on which the Member's pension comes into payment).*

(c) ***Revaluation Requirements.*** *Any increase referred to in Rule 7.2(b) shall be subject to the revaluation requirements of the 1993 Act.*"

169. The way in which rule 7 was drafted meant that, unlike in the 1996 DDR, the defined term "*Index*" was directly incorporated into the pension increases rule in the 2008 DDR. Schedule 1 to the 2008 DDR then contained a definition of "Index" which took the following form:

"*the Index of Retail Prices (All Items) published for the month of September by the Central Statistical Office (or any other index approved by the HM Revenue & Customs for the relevant purpose)".*

170. The overall effect of this drafting was that:

170.1. by operation of rule 7.1(b)(i), pensions in payment in relation to Pensionable Service on or after 6 April 1997 and before 6 April 2006 must be increased on 1 May each year by the increase in RPI over the preceding twelve month period subject to a 5% cap;

170.2. by operation of rule 7.1(b)(ii), pensions in payment in relation to Pensionable Service on or after 6 April 2006 must be increased on 1 May each year by the increase in RPI over the preceding twelve month period subject to a 2.5% cap; and

170.3. by operation of rule 7.2(b) applying rule 7.1(b), pensions in deferment in relation to Pensionable Service on or after 6 April 1997 and before 6 April 2006 must be revalued annually in the period beginning with the cessation of active membership and ending on the member's normal retirement date by the increase in RPI over the preceding twelve month period subject to a 5% cap; and

170.4. by operation of rule 7.2(b) applying rule 7.1(c), pensions in deferment in relation to Pensionable Service on or after 6 April 2006 must be revalued annually in the period beginning with the cessation of active membership and ending on the member's normal retirement by the increase in RPI over the preceding twelve month period subject to a 2.5% cap.

171. The other aspect of Schedule 3 to the 2008 DDR which is relevant to the issues raised in these proceedings is referred to in rule 7.1(b) and relates to the position of the former members of the Berk Scheme and the PLAS Scheme as set out in Appendix 2 to Schedule 3. This appendix deals with the position of members of a number of Former Schemes and is expressed to override any conflicting provisions elsewhere in the 2008 DDR. Paragraph 3 provides as follows:

> "*3 Former Members of the Berk Scheme and PLAS Scheme*
>
> *Pending the execution of a deed which sets out the detailed provisions that apply in respect of the former members of the Berk Scheme and PLAS Scheme, the Scheme shall be administered in accordance with the announcements dated 18 March 2002 attached at Appendix 3 to Schedule 3 in respect of those former members of the Berk Scheme and PLAS Scheme who joined the Scheme on 1 May 2002*."

172. The final aspect of the 2008 DDR which featured at the trial was the inclusion of Schedule 4. This contains rules applicable to members of the money purchase section of the Scheme which had commenced on 1 August 2002. As I have already mentioned, until the execution of the 2008 DDR, the rights of the members of the money purchase section were undocumented, a situation which I understood from all counsel to be not unusual. Rules 2.1 and 2.2 of Schedule 4 set out the eligibility of employees for membership of the money purchase section of the Scheme. For present purposes rule 2.2 is the one which is relevant. It permits those who became employees before 1 July 2002 to be admitted to membership at the discretion of the principal employer and the Trustees and on such special terms as they may determine.

The effect of the 2008 DDR on the pension increase rule

173. Rule 7 of the 2008 DDR had the effect of changing the pension increase provisions of the 1996 DDR in the following respects:

173.1. Increases to the excess over the GMP in payment must be calculated by reference to RPI subject to specified caps, whereas, under the 1996 DDR (as amended by the 2006 Deed), the rate of increases to pensions in payment automatically followed the statutory requirements. The statutory requirements currently provide for pension increases to be calculated by reference to CPI.

173.2. The revaluation of the excess over the GMP in deferment must be calculated annually on 1 May each year and by reference to RPI subject to specified caps, whereas, under the 1996 DDR (as amended by the 2006 Deed), the revaluation of pensions in deferment automatically followed the statutory requirements. The statutory requirements currently provide for revaluation to be calculated by reference to CPI and at a one-off revaluation date.

173.3. Increases to the excess over the GMP in payment and revaluation of the excess over the GMP in deferment are capped at 5% in relation to pensionable service between 6 April 1997 and 6 April 2006 and 2.5% in relation to pensionable service on and after that date, whereas under the 1996 DDR (as amended by the 2006 Deed) pension increases and revaluation would have been on the statutory basis, which reduced the cap from 5% to 2.5% from 6 April 2005 in respect of pension increases and from 6 April 2009 in respect of revaluation.

174. Mr Lawson said that he was not aware that these changes would be made, because he relied on Hammonds for legal advice as to such matters and he would not have picked up on them himself or appreciated their consequences without them being pointed out to him and explained. He then summarised his position as follows:

> "*My intention (and, as far as I understood, that of the other parties signing the 2008 Deed) was that, at the time of signing, it would reflect the benefit structure under the 1996 Deed and 2006 Deed of Amendment, and any other statutory requirements except where a change had been specifically highlighted in the schedule of changes prepared by Hammonds and agreed. As these changes to pension increases were not highlighted in the schedule of changes, I intended the 2008 Deed to reflect the existing basis for pension increases and revaluation*."

175. By way of corroboration that this was his state of mind, Mr Lawson also said that he did not think at the time that any issues that arose in relation to the drafting of the 2008 DDR were required by the Governance Policies to be referred up to the CAO:

> "*If it had been explained to me that the changes introduced a risk of additional costs (as I understand they did), I would have escalated the issue to Mr Sammons at Univar Inc. and there would have been consideration about whether to consent to the amendment. I also expect that there would have been detailed consideration by the Trustees of the issue. These things did not happen because the changes were not brought to our attention*."

> "*I confirm that I did not escalate any issues to John Sammons, the Chief Administrative Officer at Univar Inc., at any time before the execution of the 2008 Deed because as far as I was aware it was a consolidating deed that introduced no material changes.*"

176. This expression of intention is consistent with the evidence as to what was and what was not discussed at meetings which the Trustees had with the professionals who were advising them. As to this, Ms McKenna's evidence was as follows:

> "*I do not recall any discussions with the Trustees at the Trustee meeting of 27 and 28 February 2007 (or indeed at any other meeting whether with the Trustees, a sub-group of the Trustees, the Company or any other party) about changing the basis on which pensions in payment were increased or deferred pensions were revalued, other than to reflect the current Scheme provisions, as overridden by statutory requirements. I am confident that there would not have been any such discussion, given the content of the Schedule of Changes*."
>
> and
>
> "*These were not changes that were discussed with the Trustees or with the Company at any time prior to the execution of the 2008 Deed, and I therefore did not advise the Trustees or the Company about them. I understand that similarly Ms Johnson did not advise the Trustees or the Company about this effect of the 2008 Deed in relation to pensions increases and revaluation*"
>
> and
>
> *"I am very clear that actually there was a mistake made at the beginning, an unfortunate mistake and that unfortunately was compounded throughout and we didn't have instructions to make a change, and had we sought instructions I'm firmly of the view that the rule would not have said what it ultimately did say."*

177. Ms Johnson's evidence was to similar effect. She also gave firm evidence that she was not instructed to change the provisions for pension increases or revaluation in any of the ways that I have described above. She also confirmed that the changes were not matters in respect of which Hammonds had advised the Trustees or the Company at any point in time. She also confirmed that, so far as she was concerned, it would have been included in the schedule of changes for which she was "*a bit of a stickler*":

> "*The 2008 Deed was, except where a specific change was highlighted in a schedule of changes and agreed to by the Trustees and the Company, intended to be a consolidation of the existing provisions of the Scheme, whilst also reflecting statutory changes where appropriate*."

178. Mr Morley's evidence on this point was that he was confident that he was not informed by anyone that the effect of the 2008 Deed would be to introduce a change to the existing benefit structure by fixing pension increases and revaluation to RPI rather than the statutory requirements, or to introduce a provision for year-by-year revaluation of pensions in deferment. He said that, if these changes had been drawn to his attention, he would have appreciated that they introduced a risk of material cost implications, which would have required escalation to Mr Sammons, which he did not do. He said

that he had no intention that the 2008 DDR should make the changes referred to above, but that he did intend the 2008 DDR "*to reflect the existing basis for pension increases and revaluation*".

179. However, in his oral evidence, he accepted that he did not foresee that the statutory rate of increase might change and that if he had realised that there was a change to the DDR, but which kept the rates (and therefore the costs to the Company) the same, he would not have thought that that was a material change which required escalation in accordance with the Governance Policies. It is only the implications that have arisen since which would have caused the escalation to have been necessary if they had been apparent to him at the time, which they were not.

180. In his oral evidence, he said that his memory was that "*the broad thrust of the [2008 DDR] was a consolidating deed*". When he was asked about whether he really thought that the 2008 DDR was only a consolidating deed, in the light of the changes in the death in service and other benefits which were referred to in the schedule of changes provided to the Company and the Trustees at the time of the February 2007 meeting, he said:

> "*Q. … Since you have seen all of these changes I would suggest to you, Mr Morley, that in truth you can't really have thought that deed was simply a consolidating deed. You must have realised that there were some changes being made.*
>
> *A. My recollection was the main aim of the deed was a consolidating deed but there were other provisions within it, yes.*
>
> *Q. So it was the main aim?*
>
> *A. Yes*."

Later in his evidence, when being re-examined by Mr Furness QC, he expanded on what he understood the other provisions to be, describing them as "*not of a significant matter*".

181. In giving that evidence, Mr Morley relied on what would have happened if he had been aware of the changes. He explained that there were two different procedures for executing documents such as the 2008 DDR. Where the changes were material, the discussion between the Company and the Trustees would have been led on the Company side by the Regional Finance Director, or another HR function holder, and the director who executed would first have required authority to do so from Univar Inc. Where the changes were not material, he said that there was what he called a streamlined approval process by which the changes would not be discussed at Univar Inc level and he, as the relevant "regional function holder" (together with Mr Smith), would have had authority to conclude the negotiations. This would then have enabled the local Company board member (a role which he also fulfilled) to execute the document together with Mr Simpson as the Company secretary.

182. The intention of the other Trustees was expressed by them in different ways. Starting with Mr Smith, he said that he did not review the whole of the 2008 DDR before executing it. He relied on the schedule of changes and said that he understood:

> "*that the pensions increases provision had changed to implement the 2.5% LPI cap from 6 April 2006, but I believed this to be a consolidation of the position under the 1996 Deed and the 2006 Deed. As no changes were brought to my attention in the context of revaluation, I assumed that the position under the 1996 Deed had been maintained.*"

183. Mr Smith also confirmed that he did not appreciate that the 2008 DDR had written the then statutory rules relating to pension increases into the rules of the Scheme. He also said that he believed that, if the law changed, it would override the terms of the 2008 DDR. As to what Mr Smith thought that the position was under the 1996 DDR (as amended by the 2006 Deed) he explained that he thought that the position was that for pensions accrued pre-6 April 1997 increases were awarded at the Company's discretion, that for pensions accrued from 6 April 1997 increases were in line with RPI capped at 5%, and that for pensions accrued from 6 April 2006 increases were in line with RPI capped at 2.5%. He did not appreciate that it was possible for the index used for LPI to be changed. As to revaluation of pensions in deferment he said:

> "*Regarding revaluation, I believed that the 2008 Deed would reflect the position in the 1996 Deed, which I understood to provide for revaluation in accordance with statutory requirements. I was not familiar with the legislation but understood that it provided for one-off revaluation which I understood was linked to RPI.*"

184. Mr Geary confirmed that it was his intention to execute a deed which implemented the 1996 benefit structure as modified by subsequent practice and by statute, with the changes listed in the various documents, but not to make changes which went beyond that. He then summarised his position as follows:

> "*When executing the 2008 Deed, I understood that the pension increase rule for non-GMP elements of pensions accrued after 6 April 1997 was a discretionary rule subject to capped statutory increases. However, I was aware of (and comfortable with) the reference to RPI in the definition of "Index" which appears in the 2008 Deed because that is what I understood statutory increases to be based on. That understanding was based on my experience of dealing with pension increases as a Trustee and as a member of the PCC, which I have referred to in this statement. It did not occur to me that the index used to calculate LPI might change, and I do not recall ever being advised to the effect that it could do so prior to execution of the 2008 Deed; I therefore did not consider whether such a change would be possible under the 2008 Deed.*
>
> *"In relation to the frequency of revaluation, I understood revaluation to be a one-off event at the point in time when a deferred pension was put into payment and I believe that the Scheme was administered and valued on that basis. I understood the concept of revaluation but did not have a detailed knowledge of the statutory requirements and, in practice, the Scheme's actuarial advisors took responsibility for revaluation calculations. Prior to execution, I read the revaluation rule in the 2008 Deed but relied on Hammonds to provide appropriate drafting. The Trustees did not instruct Hammonds to change the basis on which pensions were revalued and I was therefore unaware that the drafting of the 2008 Deed would operate to make this an annual obligation.*"

185. Mr Williamson had retired as a trustee some time before the execution of the 2008 DDR, but in respect of the period for which he held office his evidence was consistent with that of the other Trustees:

> "*Throughout the period in which I served as a Trustee, I was not aware that there was any intention on the part of the Trustees for this deed to change the Scheme benefits in respect of pension increases and revaluation, save as was required by law.*"

186. Mr Taylor remembered reading the 2008 DDR before the meeting at which it was executed. He did not remember focusing on the pension increase or revaluation provisions and did not think that he would have looked at the definition of Index. More generally he said that he executed the 2008 DDR on the basis that the schedule of changes prepared by Hammonds was a comprehensive document and listed all of the changes as between the 1996 DDR and the 2008 DDR. He relied on Hammonds' advice that the schedule was complete. He explained his position on what he now understands to be the legal effect of the pension increases provisions in the 2008 DDR as follows:

> "*I did not appreciate that this would be the effect of the 2008 Deed because it was not pointed out to me by Hammonds at that time (or beforehand). Whilst I read the 2008 Deed before signing it, I would not have picked up on the changes to the rules concerning pension increases and revaluation, nor appreciated their consequences, without them having been specifically pointed out and explained to me by the Trustees' advisers. My intention was that the 2008 Deed would not change the Scheme's benefit structure in relation to pension increases and revaluation, save as required by the law.*"

187. Mr Simpson had only limited recollection of the events with which these proceedings are concerned, but he recalled signing the 2008 DDR, which he did both in his capacity as a trustee and on behalf of the Company as Company secretary. He did not explain whether or not he read the 2008 DDR before he signed it. He thinks that he discussed it with Mr Morley, but it is clear that when he did so, he placed heavy reliance on the fact that other Trustees and the professionals were happy with the form that it took. His position in overall terms on the benefit structure was set out in his witness statement and reiterated during his oral evidence:

> "*I did not intend the 2008 Deed to change the benefit structure under the Scheme in relation to pension increases and revaluation (save as required by law) and I do not believe the other Trustees had any such intention. I relied on Hammonds to ensure that the drafting of the 2008 Deed was correct in this regard.*"

188. It was also quite clear that Mr Simpson did not think that there was a difference in practice between the position in relation to the revaluation of deferred pensions under the 1996 DDR and the position under the 2008 DDR in the sense that he understood that in both instances they were increased in accordance with RPI. I was left with the impression from his evidence that he only ever really thought about the position at the relevant time and did not focus on the issue of whether the reason that RPI was used was because of the wording of the relevant DDR or was derived from the requirements of the statute.

189. Mr Simpson was also asked about the significance of the fact that the change to the benefit structure which was achieved by the change in wording of the pension increase rule was not foreshadowed by the schedule of changes. He said that he was unable to remember whether that meant that he would have thought that there was no change because this particular change was not listed. He did however stress that CPI was not on the cards at that stage. Like other witnesses he did not foresee the possibility of any change to CPI and said that employees who joined the Scheme had always been told that their pensions would be indexed to RPI going forward. It therefore followed that, to his mind, the mention of RPI was because that was how the Company had always done it and continued to do it after the 2008 DDR came into effect.

190. Mr Corrigan did not have a central role in the drafting process and only became a trustee part way through. It is clear, however, that like the other Trustees who could remember he understood that the Hammonds' schedule of changes was a comprehensive document and thought that the 2008 DDR was intended to be a consolidating deed. He summarised his position at the time of its execution as follows:

> "*RPI was the only measure of inflation I was aware of at the time but I do not recall any specific discussion regarding hardwiring pension increases and revaluation to RPI, nor about applying revaluation annually. I did not intend the 2008 Deed to change the Scheme benefits in respect of pension increases and revaluation, save as required to comply with the law. I relied on the Trustees' legal advisers to ensure that these provisions were drafted correctly*."

191. He later clarified his evidence to make clear that he now has no independent recollection that he did not intend the 2008 DDR to change Scheme benefits in the way that he described the position in this passage of his witness statement. What he thinks that he should have said was:

> *"... if you asked me what the intention was, I don't believe the intention was to change that part of the trust deed and rules. I don't believe that came out as an amendment that we were aware of. I recall a surprise when it came to surface in 2012 that there was an error in the drafting of the document."*
>
> and
>
> "*This is a retrospective view. If you ask me today, did I think that that change in trust deed and rules intended to change the benefits, my answer would be I don't think it was intended to change the benefits on everything that I've read and seen since then, but that's not a recollection of what I thought at the time.*"

192. Mr Clarke was confident that he would have read the 2008 DDR before he signed it, and he would have done so comparing it to the schedule of changes. He thought that there would have been no changes which were not included in the schedule of changes. On the assumption that the changes went beyond consolidation, which he said that he had no intention to be implemented, he said as follows:

> "*It has further been explained to me by the Trustees' solicitors that these changes were not a consolidation of changes to the Scheme, nor were they required by statute. In light of this, there was no intention on my part (or, as far as I was aware,*

on the part of the Trustees as a whole) when executing the 2008 Deed, to makes these changes to pensions increases and revaluation."

193. Ms Barnes features in the story from time to time, although WTW did not advise either the Trustees or the Company on the form or effect of the pension increase rules. Her role was limited to confirming that the existing practice was accurately reflected by Ms Johnson in the various drafts of the schedule of changes. It is, however, apparent that WTW did not believe that any of the changes that I have described above were made by the 2008 DDR. The reason for this relates to the approach that it took to preparing its triennial valuations.

194. The first triennial valuation for which it was responsible after Mr Lewis was appointed Scheme actuary in August 2006 was dated as at 30 June 2006. The next one was dated as at 30 June 2009. Ms Barnes explained in her evidence that one of the necessary procedures adopted by WTW for preparing its valuations is the preparation of a standardised conversion template for documenting the benefit structures for a scheme. No amendment or update was made to the relevant conversion template in respect of the pension increase or revaluation rules for the Scheme. As I understood her evidence, if WTW had appreciated the effect of the changes introduced by the 2008 DDR, this would have been done.

Rectification: the Law

195. Rectification is an equitable remedy which amends documents so that they accurately reflect the true intention of their makers. The remedy is described in Snell's Equity (34th edn) at para 16-001 in the following terms:

> "*Where the terms of a written instrument do not accord with the true agreement between the parties, equity has the power to reform, or rectify, that instrument so as to make it accord with the true agreement. What is rectified is not a mistake in the transaction itself, but a mistake in the way in which that transaction has been expressed in writing*."

196. The remedy is available not only in cases where particular words have been misused, but also in cases where those words were used intentionally, but it was mistakenly considered that the words had a different meaning to that which they in fact have as a matter of their true construction: see *Re Butlin's Settlement Trusts* [1976] Ch 251 at 260G:

> *"... rectification is available not only in a case where particular words have been added, omitted or wrongly written as the result of careless copying or the like. It is also available where the words of the document were purposely used but it was mistakenly considered that they bore a different meaning from their correct meaning as a matter of true construction. In such a case, which is the present case, the court will rectify the wording of the document so that it expresses the true intention ..."*

197. This also illustrates that rectification is available where there was a mistake as to the legal effect of the words used in the document having regard to their true construction, even if the document contains the very wording it was intended to contain. This is to be contrasted with the commercial (or more often fiscal) consequences of the mistake,

or the advantages to be gained by entering into it, where rectification is not available: see e.g. *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361 ("*FSHC*") at [48] and [181].

198. In *AMP (UK) Plc v Barker* [2001] Pens LR 77 at [70], the way that Lawrence Collins J explained the distinction in a case concerned with the rectification of a pension scheme was as follows:

> "*It is sometimes said that equitable relief against mistake is not available if the mistake relates only to the consequences of the transaction or the advantages to be gained by entering into it … This distinction seems to have been derived ... from the 1929 edition of Kerr on Fraud and Mistake. If anything, it is simply a formula designed to ensure that the policy involved in equitable relief is effectuated to keep it within reasonable bounds and to ensure that it is not used simply when parties are mistaken about the commercial effects of their transactions or have second thoughts about them. The cases certainly establish that relief may be available if there is a mistake as to law or the legal consequences of an agreement or settlement ...*"

199. *AMP* was considered by the Court of Appeal in *Allnutt v Wilding* [2007] EWCA Civ 412, a case in which a different result was reached. Mummery LJ, approving Rimer J at first instance, explained the distinction between legal effect and commercial consequences in the following passage at [19] and [20]:

> "*19 ...The position is that the settlor intended to execute the settlement which he in fact executed, conferring benefits on his three children. The settlement correctly records his intention to benefit them through the medium of a trust rather than the alternative of making direct gifts in their favour. I am unable to see any mistake by the settlor in the recording of his intentions in the settlement. The mistake of the settlor and his advisers was in believing that the nature of the trusts declared in the settlement for the three children created a situation in which the subsequent transfer of funds by him to the trustees would qualify as a PET and could, if he survived long enough, result in the saving of inheritance tax.*
>
> *"20. That sort of mistake about the potential fiscal effects of a payment following the execution of the settlement does not, in my judgment, satisfy the necessary conditions for grant of rectification. The mistake did not result in the incorrect recording of his intentions. I think that the judge put it well when he said the following in paragraph 23 of his judgment:*
>
>> *"23. The case is therefore one in which I find that [the settlor] intended to execute a settlement in exactly the form that [the solicitor] drafted. Insofar as he was labouring under any sort of mistake when he did so, his mistake was not as to the language, terms, meaning or effect of the settlement. The only mistake was that a payment of the £550,000 to it would be a potentially exempt transfer.*
>>
>> *"24. …. Since … Mr Strain must be assumed to have understood the meaning of the fact of the substantive trust the powers of the settlement he executed and to have intended to execute a settlement in that form and having the legal effect it did, there is no error in the drafting of the settlement or in his*

> *understanding of it that calls for correction. Mr Strain's only mistake was in relying in Mr Wilding's implicit advice that the payment of money to that settlement would be a potentially exempt transfer. That was wrong and apparently negligent advice, but in the circumstances of the case the remedy of rectification is not available to cure the damage it has caused."*

200. Whether the mistake is through the misuse of words, or as to their legal effect, the circumstances in which the remedy can be exercised so as to rectify a contract were summarised by Peter Gibson LJ in *Swainland Builders Ltd v Freehold Properties Ltd* [2002] EWCA Civ 560, at [33] and [34]. He explained that the party seeking rectification of a contract must show that:

> "(*1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified;*
>
> *(2) there was an outward expression of accord;*
>
> *(3) the intention continued at the time of the execution of the instrument sought to be rectified;*
>
> *(4) by mistake, the instrument did not reflect that common intention.*"

201. As I will explain, it is established that the second of these requirements is modified in the case of an amendment to the rules of a pension scheme where that can be achieved through the approval by one party (trustee or employer) of what the other has done, rather than by mutual agreement. Peter Gibson LJ then went on to add the following points derived from the authorities:

> "*(1) The standard of proof required if the court is to order rectification is the ordinary standard of the balance of probabilities. "But as the alleged common intention ex hypothesi contradicts the written instrument, convincing proof is required in order to counteract the cogent evidence of the parties' intention displayed by the instrument itself". …*
>
> *(2) Whilst it must be shown what was the common intention, the exact form of words in which the common intention is to be expressed is immaterial if in substance and in detail the common intention can be ascertained. …*
>
> *(3) The fact that a party intends a particular form of words in the mistaken belief that it is achieving his intention does not prevent the court giving effect to the true common intention*."

202. The need for a common intention and the need for convincing proof to displace the words of the document itself were reiterated by the Court of Appeal in *FSHC*. Leggatt LJ (with whom Rose LJ and Flaux LJ joined) summarised at [46] the underlying principles as follows:

> "*At a general level, the principle of rectification based on a common mistake is clear. It is necessary to show that at the time of executing the written contract the parties had a common intention (even if not amounting to a binding agreement) which, as a result of mistake on the part of both parties, the document failed*

accurately to record. This requires convincing proof to displace the natural presumption that the written contract is an accurate record of what the parties agreed."

203. In *FSHC,* the Court of Appeal examined what is meant by a continuing common intention, in the light of the *obiter* view expressed by Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38 that, where the document of which rectification is sought is a written contract, the test of intention is objective in the sense that it is what a reasonable observer with knowledge of the background facts and prior communications between the parties would have thought their common intention at the time of contracting to be. After an extensive review of the authorities, Leggatt LJ (at [176]) rejected Lord Hoffmann's view that an objective approach should be adopted. He held that there were two bases on which a written contract may be rectified for common mistake: (i) where a document fails to give effect to a prior concluded contract and (ii) the equitable doctrine that a party will not be allowed to enforce the terms of a written contract when to do so is against conscience because it is inconsistent with what both parties in fact intended (and mutually understood the other to intend):

> "*We consider that we are bound by authority, which also accords with sound legal principle and policy, to hold that, before a written contract may be rectified on the basis of a common mistake, it is necessary to show either (1) that the document fails to give effect to a prior concluded contract or (2) that, when they executed the document, the parties had a common intention in respect of a particular matter which, by mistake, the document did not accurately record."*

204. Leggatt LJ then went on to make clear that in the latter case (i.e cases other than those in which the document fails to give effect to a prior concluded contract), a common subjective or actual intention must be shown and, in the case of a claim to rectify a written contract:

> "*it is necessary to show not only that each party to the contract had the same actual intention with regard to the relevant matter, but also that there was an "outward expression of accord" – meaning that, as a result of communication between them, the parties understood each other to share that intention."*

205. However, in reaching that conclusion Leggatt LJ had also concluded (*FSHC* at [78]) that, where what is sought to be rectified is the rules of a pension scheme not a contract and the mistake arose when the trustees were exercising their power to amend the rules with the consent of the employer, an outward expression of accord is not required:

> *"In such a case it <u>is</u> sufficient to justify rectification that the intentions of the trustees and the employer coincide in that they both independently have the same intention regarding the effect of the amendment. It is not necessary to show that the trustees and the employer had a common intention as a result of communication with each other because the validity of an amendment does not depend on the parties having mutually agreed it – only on one having approved what the other has done."*

206. This difference in the requirements where it is the rules of a pension scheme not a contract that are sought to be rectified had been explained at first instance by Lawrence Collins J in *AMP (UK) Plc v Barker* [2001] Pens LR 77, a case in which it is clear that

the judge applied a subjective approach. This was followed by Etherton J in *Gallaher Ltd v Gallaher Pensions Ltd* [2005] Pens LR 103 at [117] who said that *AMP* was authority for the proposition that

> "*... provided the claimant in a case like the present can show convincingly a continuing common intention by the Principal Employer and the trustee which, by mistake, is not given effect by the deed of amendment, the discretionary remedy of rectification is in principle available and objective manifestation or outward expression of the continuing common intention is not a separate requirement.*"

207. The principle that an outward expression of the continuing common intention is not a separate requirement in a pension scheme context has been followed by Warren J in *Re IBM Pension Plan* [2012] Pens LR 469 at [19], who also applied a subjective approach and stressed the need for there to be: "*cogent evidence of the intentions of both the trustee and the employer where the power of amendment requires the consent of both*". At least two recent cases have now proceeded on the basis that *FSHC* has confirmed that it is not necessary to show an outward expression of accord in proceedings for rectification of a pension scheme: *Re Colart Pension Scheme* [2020] Pens LR 3 at [7]; *Re Chas A Blatchford & Sons Ltd Group Pension Scheme* [2019] EWHC 2743 (Ch) at [23]. In my view, although strictly *obiter*, what Leggatt LJ said in *FSHC* at [78] about the test for rectifying the rules of a pension scheme is clear approval by the Court of Appeal of a line of first instance authorities, which I should follow.

208. However, this in no way affects the need (emphasised by Warren J in *Re IBM Pension Plan* at [19]) for cogent evidence of the intentions of both the trustees and the principal employer. To demonstrate this, the claimant will invariably rely upon extrinsic evidence of the intention, rather than simply relying upon evidence from the decision maker as to what he intended in his own mind. This was a point, which was also made by Lawrence Collins J in *AMP* at [66]:

> "*The certainty of transactions would be undermined if the court could act, otherwise than in exceptional circumstances, simply on the assertion of a party to the transaction. But when one is considering the intentions of a collective body such as a group of trustees or a committee of a board it is their collective intention which is relevant, and it would be a very odd case (and certainly not this one) if that collective intention were not objectively manifested.*"

209. I agree with Mr Furness QC's submission that, when Lawrence Collins J refers in this passage to objective manifestation, he is concerned with the evidential question of how the intentions of a body such as a group of trustees or committee of a board are established and that this will normally be by (or at least with the support of) documentary means. He is not suggesting that the intention itself can be objective but, because the court is required to identify the collective intent of a body of individuals, the manifestation of that intent will most clearly be established by the documentation with which they were provided and which they discussed, together with the documentary record of those discussions.

210. However, while that may be right as a matter of evidence, it is important to stress that the exercise remains one of ascertaining the actual collective intent, which is a subjective question. Any other approach would be inconsistent with the reiteration of the need for discovery of the actual intention, which was restated by the Court of Appeal

in *FSHC*. What Lawrence Collins J said in *AMP* was that it would be a very odd case if the collective intent of trustees were not to have been objectively manifested, and I quite understand why he made that point. That is not the same, however, as an exercise in objective analysis, because the purpose of the exercise is still to ascertain what was actually intended.

211. In ascertaining the actual intent of a corporate entity such as the Company, the person or persons who were the decision-makers and who had authority to bind the company in relation to the relevant transaction, are those whose intention is to be attributed to it: *Hawksford Trustees Jersey Limited v Stella Global UK Limited* [2012] EWCA Civ 55 at [41]. This link between the decision makers and the persons whose intention is to be attributed to the company for rectification purposes is treated by Patten LJ as an answer based on sound principle. It will not always be easy to apply this test on the facts, but what matters is the intention of the person who made the actual decision in relation to the relevant mistake, having regard to whatever constituted the decision making process of the entity concerned and the extent to which individuals involved in the decision making process relied on others.

212. As to ascertaining the collective intention of a body of Trustees, I received some interesting submissions on the correct approach where the subjective intention of some of the Trustees is mistaken as to the words or legal effect of a document, but the subjective intent of others is not. In light of the conclusions I have reached on the facts, I do not think that it would be helpful for me to say any more than this. It seems to me that the correct approach is first to identify the trustees who participated in the actual decision pursuant to which they committed themselves collectively to the words in that part of the document which (objectively construed) is said not to reflect the actual subjective intent. In a case such as the present, that is all of the Trustees, because they were all parties to the relevant document. However, in carrying out that exercise, it may be the case that the actual intention of some of them was simply to be guided by others on a particular issue without having any independent intent of their own. That is only likely to arise, however, where notwithstanding their status as trustee they are not in fact a decision maker in relation to the relevant issue, for example because the words or their legal effect were of insufficient significance for them to need to form a view which was independent of the view of those who addressed and were known to have addressed the issue in question.

213. The present case is one in which the Company relied on the decision-makers' subjective intention as being to maintain the status quo, save and in so far as specific changes were necessary as a result of legislation or to reflect existing practice or were otherwise specifically agreed. In that context, it was said that the intention not to make any specific change can be inferred from the absence of any evidence that there was an intention to make it. This is an issue which arises from time to time in a pensions context, where the document sought to be rectified is an amended version of the trust deed of the relevant scheme. I agree with what Vos J said in *Industrial Acoustics Company Ltd v Crowhurst* [2012] Pens LR 371 at [45] on this issue:

> "*... it seems to me that there will be cases, particularly in a pensions context, where it will be permissible to allow rectification when one can say by implication perfectly clearly that the parties did not intend by the Deed they entered into, to effect a particular change, even though they had not stated outwardly to each other*

(or indeed at all) that they did not intend to effect that change, simply because the change was not in any form discussed."

214. I also share the view expressed by Henry Carr J at first instance in *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2018] EWHC 1588 (Ch) at [47] that:

> *"the authorities illustrate the proposition that, where an important change is made to an existing arrangement between the parties, the absence of any discussion of that change may itself be evidence that the parties did not intend it. Whether that is true in any case depends on all the circumstances."*

215. I also agree with Mr Furness QC that it is no bar to rectification that the mistake in respect of which rectification is sought occurred as a result of negligence on the part of the claimant or its legal advisors. As Lawrence Collins J said in *AMP* at [71], negligence "*not only does not prevent rectification, but is a ground for it*". In the present case, the Company's solicitors at the time have been very frank about what they accept was a mistake on their part. Mr Legge QC did not contend that negligence meant that the mistake could not be said to have given rise to a rectifiable error, but he did submit that, when assessing the weight that I should attach to the admissions of a mistake by Ms McKenna and Ms Johnson, I should bear in mind that they had an interest in admitting their mistake. Any such admission would facilitate the Company's claim to rectification, and rectification would be likely to minimise the quantum of any claim that the Company may have against them.

216. Finally on the law, because rectification is a discretionary, equitable remedy there are a number of equitable defences that may be available and it seems that rectification may also be granted on terms that the claimant grant some form of concession to the defendant: - see the discussion in *Hodge, Rectification (2nd Ed.)* at 1-58 - 1-61 and *Central & Metropolitan Estates Ltd v Compusave* [1983] 1 EGLR 60. In the present case, such defences are advanced both generally and more specifically in the context of the Opt-Out Issues and I will revert to them later in this judgment.

The Parties' Submissions on Rectification

217. The Company submitted that the requisite intentions are clearly and consistently evidenced. It said that the evolution of the draft DDR demonstrates that the changes now sought to be rectified could not have been intended, and that the recollections of the relevant decision makers agree with the documentary record. It submitted that an unintended change was made by an instrument which was intended only to effect a limited range of other changes. It said that it has established its claim, because it has identified the changes which it said were unintended and proved that they were given effect by an instrument which was intended to effect a limited range of changes which did not include those now in issue.

218. In making this submission, the Company accepted that this is not a case in which the parties to the instrument were unaware of the existence of the relevant clause which effected the relevant changes. It appeared in the various drafts of the 2008 DDR and was the subject of amendments highlighted in the various drafts of the schedule of changes. The Company's case is that, although the parties may have been aware of the existence of the rules which gave effect to the relevant changes, they were ignorant of the fact that the rules as drafted had the legal effect that they did.

219. In explaining how it has proved its case, the Company placed particular emphasis on the materials that were put before the meeting of Trustees held on 27 and 28 February 2007. It said that this documentation was the first that was seen and read by all of the relevant decision makers and was clearly designed by the legal advisors as a comprehensive explanation of the object and effect of the 2008 DDR. The Company said that the documentation both considered at and recording this meeting constitutes the obvious objective manifestation of the collective intent referred to by Lawrence Collins J in *AMP*.

220. The Company submitted that any reader of the text which was produced at the February meeting would have understood that what became the 2008 DDR was to incorporate the current benefit structure of the Scheme, save for alterations made to accommodate statutory requirements and that every change of substance (as opposed to changes to the drafting) was set out in the schedule of changes. Those changes in practice were brought about in different contexts and for different reasons, but it submitted that, to the extent that there were changes in the wording of the benefit structure from the form which the wording took in the 1996 DDR, they were established changes which reflected existing Scheme practice.

221. The Company also submitted that none of the relevant decision makers could have thought that the 2008 DDR would incorporate any aspect of the undocumented practice of the Scheme which they had not been told about by reference to the schedule of changes. It was submitted that the evidence is clear that all of the changes were listed in that schedule as at the time of the February meeting and, to the extent that any further changes were made subsequent to that meeting (such as the pro-rating point which was discussed in November 2007), the Trustees' attention was specifically drawn to it.

222. In making submissions on the drafting prior to the February 2007 meeting, the Company divided the period into two phases, the first of which was said to relate to the ascertainment of the existing benefit structure and the second of which was to identify the changes required by the new statutory provisions. The Company said that the benefit summaries accurately identified the effect of the pension increase rule and made no mention of the revaluation rule, therefore giving the correct impression that revaluation was simply subject to the statutory regime. It also said that anyone reading the materials would have been given the clear impression that the first draft of the DDR was simply an accurate translation of what was set out in the benefit summaries and nothing changed thereafter.

223. In the light of this, the Company submitted that the words used were not intended to have the effect of changing members' benefits by introducing a minimum guaranteed level of indexation and a different basis of revaluation, but this is what they did. In short, these changes were not on the list of intended changes and there was therefore no intention to make them. The effects on which it relied are (i) the writing into the rules of a minimum level of indexation and revaluation which did not exist before, and (ii) the alteration of the revaluation mechanism to one which was inconsistent with the statutory regime.

224. The Company said that there is no evidence that anybody knew about these effects, nor that they intended them and that the evidence shows conclusively that the parties did not do so. The changes resulted from writing out the then current statutory regime into the rules contained in Schedule 3 of the 2008 DDR, but the Company submitted that

the effect was just the same as if the effect of the 1996 DDR pension increase rule had been exactly replicated but had then been followed by a rule which set out a new minimum entitlement for members based on pension increases and revaluation in accordance with RPI. The further consequential change to the timing of revaluations of the excess over the GMP in deferment stemmed from a cross referral of the revaluation rule to the indexation rule.

225. The Company said that this situation is quite different from a situation in which an instrument has an unintended consequence, as opposed to a mistake about its legal effect. The mistake in the present case is one as to legal effect because it is all about the amount of pension which a member will enjoy on retirement in accordance with the terms of the Scheme. Any unintended change to the basis of that provision is a change to the effect of the instrument not a mistake as to the consequence or collateral advantage which may enure (such as minimising tax or the like).

226. In support of its case that nobody knew or intended the legal effect I have described, the Company submitted that it is not relevant that there were some changes to the text of the pension increase rules during the drafting process, such as the introduction of the 2.5% cap, pro-rating, the date on which increases were paid and the reference period to be used. The important point so it submitted is that no changes to those rules were agreed in the respects which mattered, nor was there any discussion as to whether or not any such changes should be made.

227. Likewise, the Company submitted that it does not matter that there were changes made to Scheme benefits on the basis of practice and said that this is no illustration of the fact that the pension increase changes in issue in these proceedings must also be regarded as reflecting a practice which the Trustees and the Company must have intended to record. The reason for this is that unlike the other changes of practice which came to be recorded in the 2008 DDR, the changes in issue did not appear in the schedule of changes and, in any event, a rule change which permitted the possibility of future benefit for members could not be regarded as a reflection of present practice even if it was expressed in terms of what was then happening (i.e. RPI).

228. The Company submitted that the same intention was held by the Company and the Trustees collectively. It said that its key decision maker was Mr Morley, who read the February 2007 material. He correctly understood that the proposed new DDR was intended to consolidate the Scheme's existing benefit structure, subject to changes in response to current statutory requirements. The Governance Policies focussed his mind on the importance of ensuring that there were no benefit changes which were neither part of the consolidation nor required by statute because, if there had been, he would have had to consider whether they were sufficiently material to refer them to Mr Sammons.

229. The Company also said that Mr Morley's evidence was corroborated by Mr Lawson who, although not a decision maker on behalf of the Company, was a representative on the Trustee body who was tasked with keeping an eye on the cost implications of the Scheme from the Group's perspective. Mr Lawson was more closely involved in the drafting process than Mr Morley and his evidence was that he too was unaware of the fact that the 2008 DDR was making the relevant changes. The other Company signatory was Mr Simpson, who also saw the February 2007 material, and also gave

evidence that he had no intention to make any changes to the pension increase and revaluation rules which were not on the schedule of changes.

230. As to the intention of the Trustees, the Company relied on the collective decision making, both at the time of the February 2007 meeting and thereafter. This was an occasion on which everything was apparent to them from the material with which they were supplied, and they were all told that the changes were included in a list of specified changes which made no reference to the change to the pension increase rule with which these proceedings are concerned. The Company submitted that their intent can be derived both from the documentary record and from the fact that the oral evidence of each of them was consistent with a conclusion to that effect.

231. The Representative Beneficiary relied on the fact that this is not a case in which no changes at all were intended. It is plain that some changes were intended which meant that convincing proof was required to prove that the changes challenged in these proceedings did not match the common intention of both the Company and the Trustees. He submitted that the concept of the Company's stated intention being to reflect the existing benefit structure was inherently vague, and that the changes which were drafted into the pension increase rules reflected the existing practice of the Scheme, which all witnesses accepted was intended to be one of the justifications for producing a new DDR in the first place.

232. He also maintained his case that the probabilities were that instructions were given to Hammonds to draft the 2008 DDR in a style which made it more user-friendly by spelling out on the face of the rule the wording of what was then the statutory minimum, namely RPI subject to a statutory cap. To that extent there was no mistake at all, because Hammonds did what they were instructed to do. He also said that some of the Trustees, and most particularly Mr Geary, studied drafts of the proposed new DDR on numerous occasions, and noticed that RPI as opposed to the statutory wording was used in the definition of Index. This was therefore said to be inconsistent with any mistake by him as to the drafting of the rule.

233. The Representative Beneficiary also pointed out that none of the witnesses identified that there was anything objectionable about the new rule 7 at the time the 2008 DDR was executed, and submitted that the criticisms all proceed on the basis of an *ex post facto* explanation of the effect of the new rule when the applicable statutory index changed from RPI to CPI in 2010. He said that, on the assumption that the index was going to stay the same, and nobody thought that it might change, the most that could be said was that the new draft changed the rule in a way that was unnecessary.

234. These submissions were made in relation to the changes to both the pension increase provisions for the excess over the GMP in payment and the revaluation provisions for the excess over the GMP in deferment in so far as they related to the index to be applied for the purpose of calculating the increase. The same was also said about the rare circumstances in which the other change to the revaluation rule might have made any difference. It might have done so only when there was a year of negative inflation during the period of deferment, with the consequence that affected members would have benefitted from an annual as opposed to a one-off valuation. All the witnesses who were asked about this confirmed that this was not an objection that any of them would have made at the time, and for the same reason were unable to say that these

particular changes would have given rise to any questions under the Governance Policies.

235. The Representative Beneficiary then submitted that the factor which caused the claim to be brought was the unforeseen change to CPI in 2010. It could not be said therefore that the rule as drafted did not accord with the subjective intentions of the parties at the time, either because several of the witnesses had no difficulty with the new rule as RPI had been the rate previously used for indexation or because it reflected the practice under the old rule. It was therefore said that this was a case where the mistake was equivalent to the mistake as to fiscal consequences explained in *Allnutt v Wilding* and that rectification was not therefore available.

Conclusions on Rectification

236. In my judgment, the Company has established that neither it nor the Trustees actually intended that the pension increase rules in the 2008 DDR should have the legal effect that they did. I have reached that conclusion having regard both to the contemporaneous documentation and to the oral evidence of the witnesses. As I have already said, it is not surprising that much of the oral evidence was not very clear on the question of the relevant witness' actual state of mind because memories had faded. Nonetheless, there were many respects in which the witnesses were able to elucidate the documentation in a manner which was helpful, but in the end, I think that the documents as so elucidated were a secure route to establishing the necessary subjective intent.

237. It is clear that the collective intent of the Trustees and the Company was to produce a new DDR which consolidated the governing documentation for the Scheme, having regard to changes in the law and changes in the way in which the Scheme was operated in practice. The evidence of each Trustee and the decision makers on behalf of the Company was consistent on this point as was the position of both of the solicitors (Ms McKenna and Ms Johnson) who were responsible for the drafting and I am satisfied that all of them approached the concept of consolidation as a process which meant that no change of substance would be introduced to Scheme benefits unless the change fell within one or more of the applicable categories for which change was authorised.

238. This process of consolidation is referred to on the face of Recital F to the 2008 DDR, which itself alludes to the two core documents produced by Hammonds with the assistance of Mercer and WTW as aids to the drafting process, namely the benefit summary (recording "the existing benefit structure of the Scheme") and the schedule of changes (recording the "certain changes"). The recital, recording as it does the actual intent of the parties to the 2008 DDR, uses the concept of a document which is intended to "reflect" the existing benefit structure with certain changes and is intended to "reflect" the changes made by the 2006 Deed. In that respect it repeats the concept of reflection, which Mr Legge QC described as inherently vague when applied to the subjective intent of the Trustees and the Company.

239. I do not agree with this characterisation of the concept of reflection as inherently vague. A reflection of the existing benefit structure, whether as expressed under the 1996 DDR or as manifest in practice, is an apt description of the substance of the existing benefits to which members were entitled whether spelt out on the face of the 1996 DDR or a statement of existing practice. In my judgment, the process of consolidation with

changes, which was one that was approved by all of the Trustees meant that for each of them their positive subjective intent was to make no changes to the member benefits described on the face of the 1996 DDR other than changes required by the law and changes to record the practice that had developed since the time of the 1996 DDR as reflected on the face of the schedule of changes.

240. The evidence is also compelling that all of the Trustees and the Company (through Mr Morley as the relevant decisions maker for this purpose) appreciated that the schedule of changes was the document which was used by Hammonds to draw the attention of the Trustees, including those who could not remember, and the Company to the changes proposed to be introduced to the substance of the 1996 DDR. I am satisfied that each of the Trustees proceeded on the basis that there were to be no changes of substance unless they were included in the schedule of changes (or were otherwise expressly authorised). It is also clear that Hammonds intended the schedule to fulfil that function. It is therefore a very important document for the purposes of evidencing their intent, because it was treated by the Trustees as a guide for identifying whether or not a change of substance had been made and was a mechanism by which they were able to give tacit approval to changes to the wording of the 1996 DDR having regard to the state of the law and the existing benefits whether as reflected in the 1996 DDR or the existing practice.

241. As I have already explained the schedule of changes included reference to the pension increase rule, but it did so in a manner which did not address the change which was in fact made by the wording contained in rule 7.1(b) of Schedule 3 that is the subject matter of these proceedings. The change to which the Trustees' attention was drawn was the change introduced by the PA 2004, namely the reduction in the cap from 5% to 2.5%, and it did so by referring to increases "*by LPI subject to a cap of 2.5%*". Mr Geary in particular knew that LPI was RPI plus a cap, but LPI is an acronym for the statutory concept of limited price indexation. Although the Trustees proceeded on the basis that the existing statutory requirement was a capped RPI, and do not seem to have thought that the statutory index could or might be changed, the use of LPI as a descriptive term in the schedule of changes is consistent with a subjective intention to use the statutory price indexation rather than RPI (albeit capped) in its own right.

242. In these circumstances, because the schedule did not identify the relevant change, the primary mechanism for reversing the clear subjective intent to make no change other than required by law or practice gave no hint to the Trustees or the Company that the change was being made. The schedule is therefore inconsistent with anything other than no change being made to the legal effect of using statutory minimum indexation for pension increases which had been the position under the 1996 DDR. In reaching this conclusion I attach weight to the fact that both Ms McKenna and Ms Johnson were frank in their admission that a mistake was made for which they were responsible, and that the mistake was one of substance. As I have already indicated, I accept their evidence that this was the case.

243. I also accept their evidence (which is consistent with the evidence of those who instructed them) that they were given no instructions to draft the new pension increase rules in the way that they were drafted either directly or by suggesting that a particular drafting style was used. On this issue, I have explained my views of what did (or more accurately did not) occur during the course of describing the chronology, but the closest it came to any such instruction was that Mr Smith thought that there was a discussion

about making the document easy to read. That is, however, very far from an instruction to Hammonds (whether given directly or indirectly) to draft in such a way that RPI was split from its statutory context and tied into the new DDR in its own right. I am quite satisfied that if that was what had occurred, the change in approach would have gone onto the schedule of changes, which did not happen.

244. Nor do I consider that the fact that a number of the Trustees (including in particular Mr Lawson and Mr Geary) appreciated that the wording of the rule itself cross-referred to a definition of Index (which itself made reference to RPI) and were conscious of the fact that RPI reflected the existing practice for granting pension increases makes any difference. In particular, it is not inconsistent with a subjective intent to maintain the status quo of linking pension increases to the statutory minimum rather than to give members the benefit of RPI come what may. I approach this question on the basis that all the Trustees and the Company knew that RPI was the normal starting point and that RPI was the statutory index on which LPI was based.

245. It is also the case that none of them appreciated that CPI might be introduced as an alternative statutory index, and to that extent did not foresee that there was a possibility that RPI might no longer be the minimum requirement for statutory indexation. Nonetheless there is no evidence that any of them appreciated that the legal effect of the 1996 DDR was that the pension increases were not hardwired to RPI, while the legal effect of the 2008 DDR was that they were. Making provision for such increases as the law required to be made is very different from tying an increase entitlement to such increase as the law required to be made at the time the new DDR was entered into, but they did not appreciate that there was such a distinction.

246. Even if the Trustees and the Company had not seen the possibility of an increase in the value of the members' benefits, because they did not anticipate that there might be a change in the statutory rate, the change was still one of substance which for that reason alone neither the Company nor the Trustees intended to make. As Mr Lawson said in his evidence, it was a one-way bet or ratchet, which could only ever be of benefit to the members because the floor could never drop below RPI. It is also that aspect of the change which I am satisfied would have been referred to Univar Inc under the Governance Policies if it had been appreciated by anyone with decision making responsibility for the Company (whether Mr Morley or Mr Lawson) that this was the legal effect of the new pension increase rule. The same can be said of the position of the Trustees in light of the evidence that Mr Smith, Mr Geary and Mr Simpson in particular would not have wished to participate in any change that might have breached the Governance Policies if it had not been approved in accordance with their terms.

247. I should add that I am also satisfied that the mere fact that RPI was the index that was used by the Trustees for awarding pension increases under the 1996 DDR does not mean that it is properly to be treated as "practice" in the operation of the Scheme, so as to fall within the category of changes which the Trustees did intend to make. The reason for this is that their use of RPI was driven by the statutory requirements. It was clear from the evidence of Mr Smith and Mr Geary that it was because of those requirements that the practice was to apply the statutory minimum for indexing pension increases (i.e. LPI in the form of RPI subject to a cap). There was no established practice of applying RPI in its own right in a manner that was independent from its statutory context.

248. Furthermore, the fact that the Trustees did not focus on the possibility that the statutory index might change meant that they were inherently less likely to have appreciated the significance of the change in wording unless it was drawn specifically to their attention, which it was not. I can therefore draw no inference as to their subjective intent from the fact that they looked at the reference to RPI and they noticed the use of the word Index, because I am satisfied that they did not appreciate the significance or legal effect of what those words meant in this context. In particular their legal effect as compared to the 1996 DDR was never discussed with or explained by Hammonds and in some respects it is therefore a good illustration of what Henry Carr J said at first instance in *FSHC* in the passage I have cited earlier: "*where an important change is made to an existing arrangement between the parties, the absence of any discussion of that change may itself be evidence that the parties did not intend it.*"

249. As I mentioned, the Representative Beneficiary relied on the principle explained in *Allnutt v Wilding* in support of a submission that the mistake was as to consequence not legal effect and was therefore not one which could attract the remedy of rectification. I disagree. The effect of the words used was to alter the benefit from one which made provision for pension increases by reference to the statutory provision (both as to indexation and revaluation), to one which had the legal effect of tying RPI into the entitlement to an increase, irrespective of what happened to the statutory minimum. This was a direct but unintended legal effect of the words used and was quite different to the commercial or fiscal consequences of that legal effect.

250. In these circumstances, I am satisfied that the jurisdiction to rectify is available and in the ordinary course I would see no reason why such relief should not be granted. However, the Representative Beneficiary advances defences in relation to what occurred at the time of closure of the defined benefit section of the Scheme to which I must now turn.

The Closure of the Defined Benefit Section

251. On 18 August 2009, Mr Latham wrote to Mr Smith (as chairman of the Trustees) setting out the Company's proposal that the defined benefit section of the Scheme be closed to future accrual with effect from 31 December 2009. He said that active members of the defined benefit section would be offered membership of what he called a defined contribution arrangement, details of which would be provided. He explained how the Scheme represented a serious drain on the Company's resources, which was affecting the Company's competitive position and ability to raise finance, thereby also having an impact on the Company's ability to fund the current deficit and invest in the future success of the Company. He said that the Company proposed to start a consultation period on 1 October 2009 and would like to involve the Trustees in that process. Mr Smith circulated this letter to the other Trustees.

252. On 7 September 2009, Mr Smith wrote back to Mr Latham (copying Mr Clarke, Mr Corrigan, Mr Jackett and Mr Lawson) explaining that the Trustees had met and that, although they understood the reason for the request, they were unable to give their consent to the proposal at this stage until further information on the final salary linkage had been provided. Mr Latham responded a few days later to the effect that the Company intended to end the link to final salary, so that accrued pension benefits would be based on pensionable salary at the closure date, originally intended to be 31

December 2009. He also explained that the Company intended to offer a defined contribution scheme to the members of the defined benefit scheme.

253. The consultation process started on 15 October 2009, when the companies participating as employers under the Scheme (including therefore the Company) sent out a consultation notice to all members. The consultation period was from 16 October to 16 December 2009. The notice explained that the Scheme had a funding deficit of approximately £70 million and that, having taken advice, it had decided to move away from providing final salary pensions and to offer money purchase pensions to all employees instead. In summary the proposal was that members would no longer be able to build up any more final salary pension in the Scheme from 1 January 2010, but members would instead be automatically enrolled as a member of the Scheme's money purchase section unless they were to opt out. The notice then gave a summary of how the money purchase section would operate, including the fact that the pension built up would depend on how much each employee contributed and the investment return on their retirement account. The notice made clear that the companies remained committed to providing competitive benefits to employees and expressed the view that their proposals were amongst the best in the market.

254. The consultation notice also contained a section which described how the proposed changes would affect a member's final salary pension. In summary it explained that members would cease to be active members of the final salary section of the Scheme from 1 January 2010, but that they would be entitled to a deferred pension based on their pensionable service up to 31 December 2009 and their final pensionable salary calculated on the basis that they leave pensionable service at that date. It also said:

> "*This deferred pension will be increased from [Scheme closure] until normal pension age broadly in line with inflation, up to a maximum of 5% each year for most of your pension.*"

255. Mr Smith did not recall reviewing the notice before it went out, but he thinks that he would have understood the reference broadly in line with inflation to be a reference to RPI-based increases, capped at 5%. Mr Corrigan said that he thought that the reference to inflation was a reference to RPI because he was not aware of any other inflationary measure at that time. Mr Latham's evidence was to the same effect, although he knew about the existence of CPI:

> "*Whilst it is difficult to recall my thoughts from the time, I believe that I would have understood the reference to "inflation" to be a reference to RPI and the reference to "up to a maximum of 5%" as being a reference to the statutory cap on the pension revaluation rate. I was aware of RPI as a measure of inflation, as well as the consumer prices index ("CPI").*"

256. Presentations to members were then prepared as anticipated by the consultation notice. The slides were prepared by WTW with some minor revisions by Mr Latham. They were also reviewed by the Company's solicitors who I think by that stage were Pinsent Masons LLP ("Pinsents"). These presentations explained the commercial reasons for the proposed closure of the final salary section and the nature of the future benefits under the money purchase proposals. The part of the presentation explaining how the changes would affect the final salary section included a slide which made the following point:

> "*Your deferred pension will be increased between 31 December 2009 and your retirement, broadly in line with increases in the retail prices index, subject to a maximum of 5% each year.*"

257. At the end of the presentation, there was a statement in smaller (but legible) writing at the bottom of Slide 17 which gave notice that:

> "*The benefits described in this presentation are a summary of the existing and proposed provisions of [the Scheme]. This presentation does not override the Trust deed and rules of the Scheme upon which all actual benefit entitlements will be determined.*"

258. Mr Latham explained that the presentations were made at all of the Company's sites having active members of the final salary section during the period 20 October to 3 November 2009. He recalled that in one presentation one member asked a question regarding revaluation and that there was then what he described as a high-level explanation of RPI.

259. On 3 November 2009, there was a meeting of the Trustees at which, amongst many other matters, there was discussion of funding and the relative weakness of the Group's covenant. It was also agreed that the assumptions for future funding should be amended "*To reduce the allowance for discretionary pension increases - assuming that discretionary increases will be granted in line with the annual increase in RPI subject to a maximum of 2.5%pa, rather than the initial allowance of 5% pa.*" At this stage the statutory inflation index remained RPI and the reduction related to the reduction in the cap to 2.5%. The Trustees were also informed that counsel thought that the Scheme Actuary would not be able to certify that the removal of the link to final salary could be achieved under the power of amendment in the 2008 DDR (this was a reference to the restrictions on such a power explained in *Re Courage Group's Pension Scheme* [1987] 1 WLR 495).

260. A Questions and Answers ("Q&As") document in relation to the Company's proposal was issued on the same day (3 November). The notice had said that this would be prepared during the course of the consultation process and would be based on feedback received. It was posted on the Company's intranet and displayed on all site noticeboards. It explained the nature of the proposed changes to the pension provision and why the Group considered that the changes were necessary, including a belief that the funding deficit in the Scheme had increased to over £70 million. Much of the Q&As document was concerned with the operation of the money purchase section and was drafted in a manner which emphasised the positive aspects of members' benefits, explaining that it was amongst the best in the market. It also stressed that, unlike the money purchase section, the security of the final salary section was dependent on the strength of the Group's covenant and therefore vulnerable to its insolvency and the consequential need to rely on the Pension Protection Fund.

261. In answer to a question about what would happen to the pension already built up in the final salary section, it was explained that the member would be entitled to a deferred pension quantified as if the member had left pensionable service on 31 December 2009 and that "*under the formal rules which govern the ... Scheme*" the final pensionable salary will be based on earnings as at 1 July 2009. As to inflation-linked increases, it stated:

> "*Your deferred salary pension will then be increased from 1 January 2010 until normal retirement age broadly in line with inflation, up to a maximum of 5% each year for most of your pension.*"

There was no reference to RPI in the Q&As document and it provided that in the event of inconsistency between the document and the 2008 DDR, the latter would prevail.

262. The Q&As document ended with the following statement, in italics and in the same font size as the remainder of the wording:

> "*Please note that this document is intended only to explain the proposed changes to your pension arrangements. It does not affect any pension entitlement you might have in the Univar Scheme. In the event of any inconsistency between this document and the Univar Scheme's Definitive Deed and Rules, the Definitive Deed and Rules shall prevail.*"

263. On 20 November a second draft of the Q&As document was issued to members. There was no clear evidence that it was displayed on the Company's intranet and notice boards. Mr Latham said that that would have been the normal practice for such communications, and there is no reason to doubt that it was done for this version of the Q&As document as well. It dealt with inflation linked increases differently from the first version. Q&A 11 took the following form:

> *"Q. Mention is made that the DB sections will increase in value "broadly in line with the Retail Price Index…" from Jan 2010. Are there more details on exactly how this will work?*
>
> *A. Once the final salary scheme closes to future accrual all existing active members will become 'deferred'. i.e you will not be accruing any further benefits and will not pay any more contributions to this scheme. All deferred benefits are increased each year in line with statutory increases set by the Government. Broadly, your deferred benefit will increase in line with the increase in the retail prices index between 1 January 2010 and your date of retirement, subject to a maximum increase of 5% a year over that period."*

264. The answer to Q&A 15 about why it had been decided to "wind up" the Scheme now rather than waiting to the end of the pension year stated:

> "*The decision to close the scheme was taken to reduce future exposure to risk and volatility. Waiting until the end of the pension year would just have allowed that risk to carry on for a longer period. There are no implications to closing the scheme at any other time than the end of the pension year. It is also worth noting that the scheme is not being 'Wound Up'. The scheme will continue to be run by the Trustees and will continue to pay out members' benefits earned to 31 December 2009 as they fall due in accordance with the Trust Deed and Rules."*

265. At the same time Mr Latham and Mr Smith were in correspondence during the course of which Mr Latham proposed an opt-out option which would fix members' final pensionable salaries and they would then be entitled to "*a statutory revaluation as a deferred pensioner*". Mr Latham said that, in referring to statutory revaluation, he was referring to revaluation in line with RPI subject to a cap of 5% or 2.5%. Mr Smith

thought that there was no distinction between this and the statement in the consultation notice that deferred pensions would be increased "*broadly in line with inflation, up to a maximum of 5% each yea*r".

266. At about the same time, communication started between Pinsents for the Company and DLA Piper UK LLP ("DLA") for the Trustees as to the way in which the Company's proposals could be achieved. Mr Howard Ridley of Pinsents explained that the Company's preferred route was for the active members of the final salary section to opt out of active membership so as to become an Opter-Out within the meaning of the 2008 DDR. The effect of this would be that they would then become preserved members under the Scheme and entitled to revaluation of their deferred pensions. It would also mean that the Company would avoid having to make members' future pay rises non-pensionable which was another approach that the Company had been considering.

267. During the course of this correspondence, Ms Kate Payne of DLA said that she did not think that it would be open to the Company to adopt a unilateral approach, advising members that any pay rises would be non-pensionable. She also expressed concern about an alternative which would involve the Company making any future pay rise conditional on a member's agreement that it would then be non-pensionable. This second alternative continued to be on the table so far as the Company was concerned, but the first option was not pursued further.

268. The Company's proposals were then discussed at a meeting of the Trustees on 9 December 2009. Mr Latham, who was not then a trustee, attended as a representative of the Company and he presented a paper entitled "Company proposals – 9th December" which he had prepared with the assistance of the Company's solicitors. It identified three ways forward:

268.1. The Trustees could take advice and formally agree to the Company's proposal to break the final salary link by notifying members unilaterally that future pay rises would be non-pensionable.

268.2. The Company could enter into a contractual variation with members to the effect that future pay awards would be non-pensionable.

268.3. The members could elect whether to opt-out of the final salary link or to maintain it. In relation to the description of the opt-out option, the presentation represented that it would include "*Revaluation of deferred DB pension at RPI (max 5%)*".

269. Mr Lawson was there also representing Univar Inc. He said that at this stage the Group as whole was trying to reduce pension costs, being in the process of closing both the US and the Canadian plans and was committed to breaking the final salary link. The Trustees expressed concern that the opt-out option risked triggering a section 75 debt on one or more of the participating employers. The upshot of the discussion was that the Trustees were not prepared to agree to anything until the ongoing valuation discussions were successfully concluded. The Company had wanted to be in a position to write to members on 18 December, having reached a decision on what to do in the week in which the consultation period with members ended, but the result of this meeting was that this was no longer possible. There was obvious concern amongst the Trustees as to the way that the Company had proceeded. In particular, Mr Corrigan

expressed disappointment that the Company had proceeded with its consultation before all of its legal advice was available – he was concerned that the members should receive a clear communication from the Company regarding its proposals for closure.

270. On a different subject the Trustees were also told at this meeting that the level of RPI to September 2009 (on which the pension increase as at 1 May 2010 was to be based) was negative. Mr Ballad of DLA agreed to review the 2008 DDR and confirm how the negative increase should be dealt with.

271. On 18 December 2009, the Company informed the members that, following the substantial feedback from its consultation process, it had now decided to delay any changes for the time being. The Company then started the process of designing a solution which would involve giving the members of the final salary section two options. This resulted quite quickly in the formulation of an approach which reflected a development of the third alternative outlined by Mr Latham to the Trustees on 9 December:

271.1. Option one involved the member opting out of the defined benefit section, thereby becoming a deferred member entitled to join the defined contribution section with employer contributions of between 6% and 12% of basic pay. They would then be entitled to a revaluation of the defined benefit plan benefits on the basis of a pensionable service up to, and a pensionable salary as at, a fixed date.

271.2. Option two involved the member staying in the defined benefit section, in which event the member would not be able to join the defined contribution section or receive the benefit of employer contributions to their pension. The defined benefit plan contributions would be based on pensionable service up to a fixed date to be notified. The final salary link would be maintained but there would be a distinct possibility that members would not receive further pay rises because of the Company's desire to reduce its exposure to the risk and volatility of final salary pensions. The Company also contemplated a policy of dismissing and reengaging on terms which would break the final salary link.

272. A further presentation was then prepared for the Trustees. Mr Latham was the individual at the Company responsible for giving instructions to WTW on the drafting of the presentation and for discussing the proposals with the Trustees. Mr Latham said that the Company's solicitors also had some input in the drafting process. The initial draft described the rights of a deferred member under option one as including a right to "*obtain statutory deferred increases*", a phrase which was then changed to "*obtain statutory revaluation*". More generally it was drafted to make option one seem significantly more attractive than option two.

273. The Company very much hoped that all members would choose the first option, and the final draft of the presentation made very clear that this was what the Company wished to achieve. Initially the draft presentation also said that, although the Company was very reluctant to do so, it may be prepared to take the dismiss and re-engage approach I have mentioned above "*as a last resort*". This was not included in the final draft, but the notes for the presenter made the following two points:

- *The Company has not yet formed any proposals regarding how to break the final salary link should this situation arise. However, as discussed previously, one option may be for the Company not to award any pay increases to members who remain in the DB scheme. Another option may be to force through a contractual variation to replace the DB scheme membership with DC scheme membership.*

- *[If pressed] Forcing through a contractual variation may require a termination of the existing contract with an offer to re-engage the affected individual on new terms, which will be identical save in relation to pension entitlement.*

274. It was also recognised that there was a potential problem if any member were to choose the second option, because of the possibility that a section 75 debt might then be triggered on their employer at some stage in the future. This was the issue referred to in the Trustees' meeting of 9 December and could only be solved if each of the participating employers retained at least two or three active members in the defined benefit section in circumstances in which any one of the participating employers had at least one employee who did so.

275. This presentation was made by Mr Latham to Mr Smith, Mr Clarke and Mr Corrigan at a meeting on 1 March 2010. The essence was that members would be asked to agree to an opt-out of active membership of the final salary section on the basis of a fully-informed consent. Mr Clarke recalled that a particular concern of the Company was as to what would happen if some members refused to opt out while others agreed. The presentation also stated that a member who chose to opt out of the final salary scheme would "*become a deferred member (and hence obtain statutory revaluation)*". At this stage Mr Corrigan knew that revaluation was concerned with protection against inflation and believed that the statutory position was to use RPI for revaluation purposes.

276. The Company sent a further letter to members on 9 March telling them that it was continuing discussions with the Trustees and that it would contact them as soon as they had more information to share with them. Then on 17 March there was a Trustees' meeting at which Mr Smith, Mr Clarke and Mr Corrigan reported to the Trustees on their 1 March meeting with Mr Latham. The minutes of that meeting recorded that there was a way around the point on the section 75 debt so long as three individuals could be selected as employees of each participating company to remain in the defined benefit section if any single employee of any participating employer could not be persuaded to opt out. Not surprisingly, DLA advised that there were risks that this solution might be viewed as debt avoidance or moral hazard. The Trustees were also of the view that the closure of the defined benefit section should be linked to the ongoing valuation discussions and that they should not agree to closure until those had reached a satisfactory conclusion. At this stage it seemed likely that the proposal would come into effect at the end of September.

277. After this meeting Pinsents had a detailed discussion with the Company (Mr Latham and Ms Allison Sheard) on the precise form of the presentation to members. It was presented as a proposal to close the final salary section, but with member engagement. The core proposal was to end the build-up of any more final salary pension in the Scheme from 1 November 2010, to be achieved by asking members to opt out of the final salary section and join the money purchase section. Drafts of the presentation

which were being exchanged between Pinsents and the Company in May included a slide which described a member's entitlements if they chose to opt-out of the final salary section (Option 1) and referred to a revaluation of members' deferred pensions in order to protect against inflation. The protection was to take the form of an increase between 31st October 2010 and retirement, "*broadly in line with increases in the retail prices index, subject to a maximum of 5% each year*".

278. The early draft also included a description of what the member would (and would not) receive if they chose Option 2. It explained that they would receive a pension based on final salary when the member left the Company based on pensionable service to 31 October 2010, but that the pension would not be revalued to protect it against inflation whilst still employed by the Company. They would not be able to join the "*market leading money purchase section*" and would not benefit from the "*more generous death in service benefits*". It also asserted that because the final salary link would remain "*... the Company may need to consider other ways to break this link*".

279. In later drafts of the presentation two changes were made to those parts which described Option 2. The first was that the reference to pensions not being revalued to protect them against inflation was deleted and replaced with: "*You will be entitled to a pension based on your pensionable service to 31st October 2010 and your eventual final pensionable salary when you leave Univar or, if greater, your deferred pension at 31st October 2010 revalued as already explained*". The second was that, at the request of Mr Latham, the statement about breaking the final salary link was strengthened to say "*... the Company will take such steps as are necessary to minimise risk and break this link*".

280. Drafts of a letter to members (the "Covering Letter") and an opt-out form for completion and return by members (the "Opt-Out Form") were also discussed by Mr Ridley and Ms Payne during this period. The draft of the Covering Letter included reference to the deferred pension based on pensionable service up to 31 October 2010 being increased from then until normal pension age "*broadly in line with inflation (as measured by the retail prices index), up to a maximum of 5% each year for most of your pension*". In the section dealing with what would happen if members did not accept the Company's proposed changes (Option 2), early drafts included statements to the effect that pensions would not be increased from 31 October 2010 broadly in line with inflation, but this was later changed to take the same form as I have already described in relation to the later drafts of the presentation.

281. The draft of the accompanying Opt-Out Form also described each of the two options. Option 1 was to accept the Company's proposed pensions changes, to withdraw from active membership of the final salary section of the Scheme and to join the money purchase section. Option 2 was to decline the Company's proposed pension changes and acknowledge that they would not be eligible for membership of the money purchase section or the more generous death in service benefits. The draft Opt-Out Form used language which acknowledged the differences between Option 1 and Option 2.

282. An Appendix to the Covering Letter was also drafted, summarising the benefits for members who accepted the Company's proposal and comparing them to the benefits for members who did not. The earlier drafts of this summary described the final salary pension element of the benefits depending on the option chosen as follows:

282.1. Option 1: "*Based on pensionable service and final pensionable salary at 31 October 2010. Increased between 31 October 2010 and retirement, broadly in line with inflation, up to maximum of 5% each year for most of your pension*" and

282.2. Option 2: "*Based on pensionable service to 31 October 2010 and your eventual final pensionable salary when you leave Univar. Not increased, unless you receive a pay rise, while you remain employed by Univar.*" In later drafts the last sentence was replaced with *"or if greater, your deferred pension as at 31 October 2010 revalued to retirement."*

283. There was a meeting of the Trustees on 16 June 2010 at which the Company's proposal to close the Scheme's defined benefit section to future accrual was discussed, as was the form of the Covering Letter to be sent out with the Opt-Out Form. The Trustees considered that the form of the Covering Letter was acceptable, in part because it made clear that the Trustees' consent to the proposal was contingent on a satisfactory conclusion to the valuation negotiations. Those discussions were not yet complete, and Ms Payne had made clear in her correspondence with Mr Ridley that the Trustees were not prepared to do more than agree in principle pending final agreement concerning valuation and the amount of future contributions to be made by the Company for what Mr Smith called deficit repair. The drafts which were approved by the Trustees had been finalised with the assistance of the Company's professional advisors, and the Trustees' lawyers were also given an opportunity to comment. The Trustees were told by Ms Payne that consent to the opt-out did not become effective until the Company consented and that once accrual had ceased it could not be reversed.

284. The following day (17 June) two of the employer companies, Univar Limited and Distrupol Limited, sent the Covering Letter accompanied by the Opt-Out Form to each of the Scheme's members. It was drafted as an update to the proposal which had originally been sent out to member on 15 October 2009. The Covering Letter said that there had been a deterioration in the Scheme's funding and confirmed that the funding deficit was now likely to be around £80 million. It said that the size of the deficit meant that the benefits already promised may not be met in full, and that it might restrict the Group's ability to do business.

285. The Covering Letter explained that members now had two options, either to accept or decline the Company's proposed changes. It was heavily weighted towards encouraging members to accept the Company's proposals. It included the following form of words in the section dealing with what would happen if a member accepted the Company's proposed changes and opted out of the final salary section (Option 1):

> *"From 1 November 2010 you will cease to be an active member of the final salary section of the Scheme, you will not build up any more final salary pension in the Scheme and you will pay no more contributions to fund your final salary pension.*
>
> *"You will be entitled to a deferred pension based on your pensionable service up to 31 October 2010 and your final pensionable salary calculated on the basis that you leave pensionable service on that date. This deferred pension will be increased from then until normal pension age broadly in line with inflation (as measured by the retail prices index), up to a maximum of 5% each year for most of your pension.*

> *"From 1 November 2010 you will join the money purchase section of the Scheme. Univar and you will contribute to this section on the basis summarised below, so that you can continue to build up a pension during your future employment with Univar.*"

286. In the section dealing with what would happen if members did not accept the Company's proposed changes (Option 2), the Covering Letter included the following:

> *"You will be entitled to a pension from the final salary section based only on your pensionable service up to 31 October 2010 and your eventual final pensionable salary when you leave Univar or, if greater, your deferred pension as at 31 October 2010 increased as set out above. You will pay no more contributions to fund your final salary pension.*
>
> *"You will not be able to join the money purchase section of the Scheme from 1 November 2010 or at a later date unless Univar agrees.*
>
> *"As your pension benefits from the final salary section will remain linked to future salary increases, Univar will take such steps as are necessary to minimise the risk and break this link.*"

287. As Mr Latham pointed out in his witness statement, the phrase "*as set out above*" meant that if a member did not choose to opt out then his or her pension entitlement would be increased in line with the final salary link or revaluation whichever was better, and that the basis of any revaluation would be the same as that applicable to members who chose to opt out.

288. The final form of the Appendix to the Covering Letter, summarising the benefits for members who accepted the Company's proposal and comparing them to the benefits for members who did not, focused on the minimum statutory protection (i.e. LPI) rather than RPI in its own right and described the final salary pension element of the benefits depending on the option chosen as follows:

    288.1. Option 1: "*Based on pensionable service and final pensionable salary at 31 October 2010. Increased between 31 October 2010 and retirement, broadly in line with inflation, up to maximum of 5% each year for most of your pension. These increases are protected by legislation."*

    288.2. Option 2: "*Based on pensionable service to 31 October 2010 and your eventual final pensionable salary when you leave Univar or, if greater, your deferred pension as at 31 October 2010 revalued to retirement."*

289. The accompanying Opt-Out Form also described each of the two options. It opened with a statement to be confirmed by the member that:

> "*I understand that I have two options, to accept Univar's offer to opt out of and voluntarily withdraw from the final salary section of the Scheme and join the money purchase section of the Scheme, or not. I understand the details of these two options, which are set out in the letter dated 17 June 2010 and the differences between them. I also understand that the option I have chosen (as indicated below)*

will take effect from 31 October 2010 or a later date which Univar will notify to me in writing (Closure Date)."

290. The Opt-Out Form gave each member the option to tick one of two boxes. The first was for Option 1, which was to accept the Company's proposed pensions changes, to withdraw from active membership of the final salary section of the Scheme and to join the money purchase section. The second was for Option 2 which was to decline the Company's proposed pension changes and acknowledge that they would not be eligible for membership of the money purchase section or the more generous death in service benefits. Both Options identified the nature of the inflation-linked increase proposed:

290.1. In the case of Option 1:

"*I agree that on and from the Closure Date:*

I will opt out of and voluntarily withdraw from being an active member of the final salary section of the Scheme and will pay no more contributions to the final salary section of the Scheme.

I will not accrue any further benefits under the final salary section of the Scheme.

Instead, on and from the Closure Date, I will become a deferred member of the final salary section of the Scheme, entitled to a deferred pension from the final salary section. My deferred pension will be calculated under the rules which govern the Scheme by reference to:

(i) my pensionable service as at the Closure Date; and

(ii) my final pensionable salary as at the Closure Date.

My deferred pension will be increased from the Closure Date until normal retirement date broadly in line with inflation (as measured by the retail prices index) up to a maximum of 5% each year for most of my pension."

290.2. In the case of Option 2:

"*I will be entitled to a pension from the final salary section of the Scheme based on my pensionable service up to the Closure Date and my eventual final pensionable salary when I leave Univar, or, if greater my deferred pension as at the Closure Date increased as set out above. I will not pay any more contributions to fund my final salary pension after the Closure Date*."

291. As with the wording of the Covering Letter itself, as explained by Mr Latham, it is clear that the words in Option 2 "*increased as set out above*" was a reference back to the wording in Option 1 which referred to an increase for the relevant period "*broadly in line with inflation (as measured by the retail prices index) up to a maximum of 5% each year*".

292. During the course of June and July the Company embarked on the process of presenting its proposals to members. Presentations were made at most operating sites. They were made by a number of senior managers, all of whom had a preparatory training session

from Mr Latham when they were taken through the slides; Mr Corrigan remembered attending one of these at the Pinewood Hotel. There was also a webex presentation available for members who were not able to attend a physical presentation. The evidence was that the vast majority of members would have either attended a presentation or a webex session.

293. The slides which were used at these presentations were prepared by Mr Latham, WTW and the Company's solicitors. They explained that the Company expected the funding deficit in the final salary section to have increased and was now slightly higher than the £80 million estimated the previous year. The essence of the proposal was an invitation to join what was described as a market leading money purchase section with attractive death in service benefits. The members were told that that the Scheme's rules allowed pensionable service to cease but did not allow the Trustees to agree to an amendment which would break the link between salary and final pensionable salary. The Company said that the break could however be achieved by other means, and that the Company was putting forward a revised proposal "*to do this without amending the Scheme's rules*".

294. The detail of the changes set out in the presentation tracked much of what had been said in the Covering Letter and Opt-Out Form. It explained that members would not be able to build up any more final salary pension in the Scheme from 1 November 2010 and that the Company was therefore asking members to opt out of the final salary section and join the money purchase section. When describing the detail of what members would receive if they chose to opt out, the presentation explained as follows:

> *"You will be entitled to a deferred pension based on your pensionable service to 31st October 2010 and your final pensionable salary at 31st October 2010.*
>
> *"Your deferred pension will be revalued each year in order to protect it against inflation. It will increase between 31st October 2010 and your retirement, broadly in line with increases in the retail prices index, subject to a maximum of 5% each year.*
>
> *"You will join a market leading money purchase scheme.*
>
> *"You will benefit from more generous death in service benefits."*

295. When describing the detail of what members would receive if they chose not to opt out, the presentation explained as follows:

> *"You will be entitled to a pension based on your pensionable service to 31st October 2010 and your eventual final pensionable salary when you leave Univar or, if greater, your deferred pension at 31st October 2010 revalued as already explained.*
>
> *"You will NOT be able to join the Univar market leading money purchase section and the Company will not make any contributions.*
>
> *"You will NOT benefit from more generous death in service benefits.*

> *"As the link between your salary and your final pensionable salary will remain the Company will take such steps as are necessary to minimise risk and break this link*."

296. At the bottom of the last slide of the presentation, there was the following rubric in small letters:

> "*The benefits described in this presentation are a summary of the existing and proposed provisions of the Univar Company Pension Scheme (1978). This presentation does not override the Trust deed and rules of the Scheme upon which all actual benefit entitlements will be determined.*"

297. There was evidence in the form of an email from one of the presenters (Ms Whitfield) who described the presentations she had carried out on 6 June and said that there had been "*little reaction to the news more an air or [sic] resignation*". She also set out some questions that had been raised, which required clarity, one of which was: "*Would the new Defined Contribution Scheme always be based on RPI or is there a likelihood this could change?"*

298. Mr Latham, who received Ms Whitfield's email, understood this question to relate to the defined benefit section, as RPI increases were not relevant to the defined contribution section. The Company submitted that, assuming this to be the case, the clear inference of Ms Whitfield's email is that she did not answer the question during the Presentation. It also said that the natural inference is that members were not given any assurance that revaluation (or pension increases) would always be based on RPI for two reasons:

    298.1. Mr Latham understood that revaluation would be provided in accordance with the rules of the Scheme. If he answered the question (as to which there is no evidence one way or the other) and if his response was passed on to the member in question, he would have explained that revaluation would be provided in accordance with the rules of the Scheme, and that the basis of indexation could change with the consent of the Company and the Trustees.

    298.2. The fact that there was no "Questions and Answers" document produced in relation to the Presentation suggests that it is most likely that no response was provided at all.

In my view, the probabilities are that no reassurance was provided and I certainly do not have sufficient evidence to justify a finding that it was.

299. On 8 July 2010, Mr John Dunn of WTW sent DLA and Mr Smith a copy of the announcement by the Minister of State at the Department for Work and Pensions that the Government was proposing to use CPI rather than RPI as the basis for determining pension increases in the next revaluation order to be made under the PSA 1993. He asked for a view on the interaction between that announcement and the 2008 DDR. It seems that this announcement was unexpected and came without any prior consultation.

300. Mr Ballad of DLA then looked at rule 7 to Schedule 3 of the 2008 DDR and expressed the view in his response to Mr Dunn (copied to Mr Smith) that any change from RPI to

CPI would be unlikely to affect the rate of increase for the excess over the GMP in payment which would remain RPI for so long as it was available as an index and added:

> *"I think the provisions relating to revaluation in Rule 7.2 on page 79 are unusual and seem to give more than the statutory minimum. This might not have been an issue previously if the statutory revaluation was higher than the pension increases set out in Rule 7.1, but it might make the calculation of benefits more complicated if statutory revaluation is less than RPI in future. I am not sure anything can be done about that but I would be interested in your thoughts.*"

301. This was the first time that the legal effects of the changes brought about by the drafting of the pension increase provisions of the 2008 DDR came to the attention of the Trustees and their professional advisors. Mr Ballad's comments do not seem to have caused anybody to revisit the wording of what was being said to the members in the presentations relating to the Company's proposals that members should opt out of the final salary section. Mr Latham's position in relation to this development was as follows:

> "*Whilst the Company had some initial advice in relation to the proposed change to CPI, no suggestion was made that the closure process would be affected or ought to be halted. At the time, there was a lot of uncertainty as to the possible impact of the change. ln my view, reference was made to RPI in the Opt Out Documentation because the 2008 Deed referred to RPI in the definition of "Index" in Schedule 1. We would not have used the term 'Index' as opposed to 'RPI' in presentations or the Opt Out Documentation as 'RPI' was a term which people were familiar with.*"

302. By mid-September, all but ten of the members had returned their completed Opt-Out Forms and chosen Option 1. Of those ten, three had refused to opt out and seven had simply not returned their forms. Those three then had meetings with Mr Latham or the Company's HR director (Mr Hooper) and in the end, all members were eventually persuaded to opt out, the last one returning his Opt-Out Form selecting Option 1 on 12 October 2010. Mr Latham said that the reason that those members had initially refused to opt out was that they misunderstood the requirements set out in the Opt-Out documentation. However, this was not initially apparent because Mr Latham started the process of getting the approval from Univar Inc to implementing a dismissal and re-engage policy as a potential way around the problem. On 30 November 2010, the defined benefit section of the Scheme ceased to have any active members. At this stage there was still no agreement between the Company and the Trustees regarding the strength of the Company covenant, the recovery plan or its length and the parental guarantee which was being offered.

303. In the event the recovery plan was only agreed in July 2011 and shortly afterwards (in September 2011) the valuation and guarantee were finalised. The closure of the final salary section was eventually reflected in a Deed of Amendment dated 4 October 2011, which recorded that the closure occurred as a result of all remaining active members of the final salary section becoming Opters-Out on 30 November 2010 in order to become active members of the money purchase section under rule 2.2 of Schedule 4 to the 2008 DDR with effect from 1 December 2010. It was Mr Smith's understanding that the conditions which the Trustees regarded as a necessary pre-requisite to their agreement to the cessation of pensionable service were only fulfilled when the valuation was agreed and finalised in September 2011.

304. It was Mr Lawson's evidence that:

> "*At the time of the closure of the final salary section of the Scheme to future accrual in 2010, I had no reason to believe that the position in respect of the revaluation of pensions in deferment or increases to pensions in payment was anything other than that which applied prior to the execution of the 2008 Deed and had then been consolidated in that Deed*".

305. Mr Clarke said that he believed that the Company is obligated to operate under the terms described in the Opt-Out Form, as this was the basis on which the members agreed to opt out. Mr Corrigan was slightly more specific. In his witness statement, he said:

> "*During this time, I do not recall any discussion among the Trustees as to how the benefits of those members who chose to opt out of the final salary section should be revalued. As a member, I took the opt out communications and presentation referred to above at face value and understood that revaluation would be carried out in line with RPI.*"

306. The way that Mr Latham described his understanding of the position was as follows:

> "*The Opt Out Documentation was intended to create a binding contract between the members and the Company: in exchange for giving up active membership of the FS Section, members were offered membership of the MP Section and deferred status on certain terms, which included revaluation in accordance with RPI. The basis for revaluation was simply based on what was set out in the 2008 Deed. At the time, there was no suggestion that the 2008 Deed was wrong as regards the revaluation basis, nor any discussion of that possibility. The Opt Out Documentation needed to be legally binding with fully informed consent to ensure no members could come back at a later date and seek reinstatement in the FS Section.*"

307. The Government then issued a consultation paper on its CPI proposals in December 2010, with the consultation period running until 2 March 2011. It gave its response to the consultation in June 2011.

308. The June 2011 version of the Scheme's Defined Benefit Guide, produced after the defined benefit staff section had closed to further accrual (as it did on 1 December 2010), dealt separately with increases to pensions in payment and increases to deferred pensions. Each referred to increases to compensate for the effects of inflation but neither referred specifically to RPI. As to the former it stated:

> "*Once in payment, your Scheme pension will be increased to help offset the effect of inflation. This does not apply to Pensionable Services before 6th April 1997.*"

As to the latter it stated:

> "*To help offset some of the effects of inflation between your date of leaving and Normal Retirement Date, your preserved pension will be increased each year. The GMP element of your preserved pension will be increased at a rate set by the Government. In addition, the Scheme will increase the balance of your preserved*

> *pension in line with inflation subject to various limits that result from the requirements of the Scheme's Rules and overriding legislation*."

309. On 5 March 2012, DLA, by then acting for the Trustees, wrote to Ms McKenna and said that that as a result of a review they had identified that rule 7.2 provided for pensions in deferment to be increased in the same way as pensions in payment which appeared to be an unusual provision. They asked for an explanation as to why it was drafted in this way. The issue of why RPI had been drafted into rule 7.1 was not raised at this stage, but the matter was briefly discussed at a meeting of the Trustees held on 9 May 2012. The Company asserts that it was first aware of the changes to the pension increase rule made by rule 7 of Schedule 3, when they were brought to its attention in September 2012.

The Opt-Out Issues: Contractual Effect

310. The first part of the Representative Beneficiary's case on the Opt-Out Issues is that it is clear from the circumstances in which the Opt-Out Form was executed by the Opt-Out Members that the Company must have been making a promise to provide the benefits which were the *quid pro quo* for the member opting out. It was submitted that this is reinforced by the express terms of the Covering Letter and the Opt-Out Form, both of which uses the language of contract. It was said that the statement in relation to the use of RPI for revaluation should therefore be treated as a contractual promise by the Company, which is extrinsic to the terms of the Scheme, but enforceable as such.

311. The way that the Representative Beneficiary puts his case on this point is that a contract between the Company and each Opt-Out Member was concluded when the Opt-Out Member signed Option 1 on the Opt-Out Form. It was said that, under the terms of that contract, the Company promised that the pensions of Opt-Out Members would be increased from the Closure Date until normal retirement date broadly in line with inflation (as measured by RPI) up to a maximum of 5% each year for most of the Opt-Out Member's pension. It was said that this amounted to a promise that the metric of inflation for the purposes of calculating increases to the pensions in deferment of Opt-Out Members would be RPI and that increases would continue to be capped at 5% in relation to all pensions which were already subject to that cap.

312. The Company accepted that it is possible for a member of a pension scheme to become contractually bound to accept benefits which are different from those to which he would be entitled under the rules of that scheme (*South West Trains Ltd v Wightman* [1998] Pens LR 113, *HR Trustees Ltd v German* [2010] Pens LR 23 (also known as *IMG*) and *Re Gleeds Retirement Benefits Scheme* [2015] Ch 212), but said that these are all cases in which the extrinsic contract made provision for the members to receive less than their entitlement under the relevant rules. The member then cannot seek to recover his legal entitlement under the scheme rules because he has bound himself by the extrinsic contract not to do so. However, it is submitted that there are significant theoretical difficulties with an argument that an employer has bound itself to a contract which entitles a member to deferred final salary benefits which are more than those to which they would be entitled under the rules. The reason for this is the impact which any agreement to receive more from the Scheme would have on the other members of the Scheme.

313. It is then said that, even if there is in theory no overarching objection it would make no sense for such an agreement to be reached without the trustees of the relevant scheme being a party to it. The reason for this is that it could not sensibly be said that an employer would agree to a legally binding commitment to improve final salary benefits outside the parameters of the powers to do so under the relevant scheme rules. Exposing itself to personal liability outside the parameters of the Scheme would at best be a commercially surprising thing for an employer to do, and there is no indication that the Company had any intention to do that in the present case.

314. That is one of the reasons why in *HR Trustees Ltd v German* (a case in which the employer, not the members, was the proponent of the contract), Arnold J made clear that:

> "*... in the circumstances of the present case, I consider that the Employers must establish not merely that there was an intention to create legal relations, but specifically an intention to create contractual relations. The reason why I say this is that the parties may have intended to create legal relations to be regulated by the applicable trust documents. What the Employers must establish is an intent to create contractual relations, so that the contract is binding even if its terms differ from those of the applicable trust documents.*"

315. During his oral closing argument, Mr Legge QC sought to advance a case that there was a contract to which the Trustees were a party. Mr Rowley QC objected to the way this was done and identified a number of reasons why this argument was made far too late, including the fact that it was not pleaded and that the Trustees had had no opportunity to adduce evidence to deal with it. He also complained that the way the point was put was wholly unspecific, the terms of the alleged contract were not adequately particularised, and the case was not in any event supported by any evidence that was adduced at the trial. I agree with Mr Rowley QC's submissions on this point. I think that the issue has been raised far too late, and in any event, I do not think that the Representative Beneficiary has proved any such case on the evidence. Even if I were to consider such a case, it would fail.

316. Mr Furness QC also submitted that one factor which went to the question of whether there was any intention to create contractual relations was whether the words used were sufficiently precise, because the use of vague language is inconsistent with contractual intent.

317. Against this background the Company advances four propositions as to the combined effect of the Covering Letter (together with its accompanying Appendix) and the Opt-Out Form (together the "Opt-Out Documents"):

317.1. The Covering Letter and the Opt-Out Form do not evince an intention to create contractual relations with the members who exercised Option 1.

317.2. The wording in the Covering Letter and the Opt-Out Form cannot reasonably be read as making a contractual offer as to the terms on which a member's deferred pension would be revalued if he selected Option 1.

317.3. Any contractual promise which the Covering Letter and Opt-Out Form might make is to be construed as a promise to provide benefits on the terms already provided for by the rules of the Scheme.

317.4. Any term in the Covering Letter and Opt-Out Form as to the terms on which a member's deferred pension would be revalued is too vague to have contractual force.

318. As to the first proposition, the Company accepted that it was obliged to provide the Opt-Out Members with the defined contribution benefits set out in the Opt-Out Documents, but submitted that this is not inconsistent with an analysis that there was no intention to create contractual relations. It made that submission because it said that the correct legal analysis is that each of the Opt-Out Members opted-out of active service by exercising their power under the rules of the Scheme to become an Opter-Out, but would have been entitled to set aside that election if the Company failed to provide the promised benefits from the defined contribution section.

319. The Representative Beneficiary takes a position at the opposite extreme. Not only did he say that there was contractual intent, he also submitted that the benefits to be provided to Opt-Out Members can only have been given by the terms of a fresh contract constituted by the Opt-Out Form and did not involve any intention by the Company to promise that matters would be regulated going forward by the terms of the 2008 DDR. The reason he made that submission was that he said that the effect of becoming an Opter-Out is that Active Membership ceases and there is no question of him transferring from one section to the other.

320. I do not accept the submission of the Representative Beneficiary, in any event in the way it was put. In my view the position is that, from signature of the Opt-Out Form there was a contract in place between the Company and the member which provided for two things to happen on the Closure Date. The first was that the signatory became an Opter-Out with the consequences which flowed from that in relation to their deferred pension under the terms of the 2008 DDR. The second was that the Opters-Out were entitled to immediate admission to the money purchase section of the Scheme with the consequences and benefits which flowed from that.

321. It also follows from what I have just said that I do not agree with the Company's analysis on this first point either. Although the taking effect of the option chosen by the relevant member was capable in theory of being deferred by the Company beyond the initial 31 October 2010 Closure Date, it was in the Company's obvious commercial interests for closure to occur as soon as possible so long as any problems, such as those which arose in relation to the possible triggering of a section 75 debt that I mentioned a little earlier on, had been sorted out. I consider that once the Closure Date had occurred (whenever that may be), the Company was contractually bound to provide the consideration for which the electing member agreed to become an Opter-Out. In short, the Company made a contractual promise to procure the admission of the member to the money purchase section of the Scheme as from the Closure Date. In my judgment, therefore, there was a contract between the Company and each member electing for Option 1 by which, in return for becoming an Opter-Out, each member would be entitled to join the money purchase section of the Scheme, but the terms of the contract were far more limited in their scope than the contract contended for by the Representative Beneficiary.

322. In his closing submissions on the remaining three propositions, Mr Furness QC analysed each of the statements which appeared on the face of the Covering Letter and the Opt-Out Form, both as they related to the retained benefits in respect of the final salary section and as they related to the benefits to be received on joining the money purchase section. I think that he was correct to submit that all of the statements relating to the members' benefits under the final salary section were explanatory (to a greater or lesser degree of precision) or descriptive of the legal consequences of opting out of the final salary section or joining the money purchase section of the Scheme. They did not constitute freestanding contractual offers operating independently from the legal entitlements which members had as a result of becoming Opters-Out under the terms of the 2008 DDR. There are a number of reasons for this conclusion with particular reference to the contractual term relied on by the Representative Beneficiary. Taken together, they are in my view a compelling basis for concluding that the only independent extrinsic promise made to members electing for Option 1 was a promise to enable them to join the money purchase section on the Closure Date.

323. First, the term proposed by the Representative Beneficiary reflects the effect both of the unrectified 2008 DDR and of the statutory regime at the time the Covering Letter and the Opt-Out Form were circulated to members. This was because it spelt out what the statutory requirements for minimum pension increases then were. I agree that it is inherently improbable that the Company would be making an extrinsic contractual promise for the provision of something which was already part of the Scheme benefits in any event.

324. Secondly, I agree with Mr Furness QC's submission that the relevant wording in the Covering Letter and the Opt-Out Form is too vague to have contractual effect in its own right. The statement was that deferred pensions will be increased "*broadly in line with inflation (as measured by the retail prices index) up to a maximum of 5% each year for most of my pension*". In my judgment the use of the words "*broadly*" and "*most of*" suggest that nothing in the sentence in which they appear was intended to be contractually binding. I agree with the submission that the imprecision is a strong indication that they were intended as a broad summary of the benefits provided for by the rules of the Scheme. The lack of precision in the language describing the increase is particularly apparent when a comparison is made with what was said in the Appendix to the Covering Letter, which (as I have described above) made no reference to RPI.

325. Mr Legge QC submitted that the court should construe the relevant wording as a promise that, in so far as the pension increases in line with inflation, RPI will be the measure of that inflation and that "*broadly*" is to be construed as a reference to the cap which changed between 5% and 2.5%. I do not agree. In my view, "*broadly*" would be a very unnatural adverb to use to draw attention to the two different percentage caps, particularly where the word appears in the sentence before the reference to inflation rather than the capped percentage itself, and where there is in any event only reference to one of the two caps. In my view, it is much more likely to reflect the drafter's intention to convey an inherent imprecision in the choice of increase that would be made, although it would be linked in a broad sense to inflation (which as a word was described by reference to the precise concept of RPI).

326. Put another way, the drafter defined inflation as a concept by reference to RPI and then qualified the increase which would be applied as being one which was broadly in line with that percentage. In light of the statutory obligation to revalue, the drafter may not

have contemplated much of a divergence from RPI, but the important point is that some divergence from the precision of RPI was contemplated and the use of words such as "*broadly*" and "*most of*" gives rise to obvious inherent uncertainty. Their use in this way is much more consistent with the relevant statement being intended to operate in a manner that describes some other obligation or promise rather than in a manner which conveys or gives rise to an independent promise of its own.

327. As to the words "*most of*" where they qualified "*my pension*" I think that the most natural meaning of those words is that they were intended to highlight the fact that there would be a difference in cap between pre and post-1997 service, which is what it meant to Mr Latham. However, it is difficult to use as a qualifying phrase having contractual effect because it is likely to mean something different for different members depending on the length of their service. For that reason alone, it is a form of words which is inherently imprecise, particularly when used to convey information to a wide body of different individuals all of whom will have had their own specific circumstances to consider. In my judgment it points to language intended to have descriptive or explanatory, rather than contractual effect.

328. Thirdly, both Option 1 and Option 2 made exactly the same statement about the extent of the inflation-linked increase of the member's deferred pension payable from the final salary section of the Section. This was achieved in relation to Option 2 by the phrase "*increased as set-out above*". The link in language means that both the statement in Option 1 and the statement in Option 2 should *prima facie* have the same legal effect, but it would be strange for the Company to have made any free-standing contractual promise to Option 2 members in respect of their continuing membership of the final salary section, when the whole purpose of the exercise was designed (and was known by all members to be designed) to reduce rather than expand on the Company's obligation to them.

329. Fourthly, the Presentations stated that what was said in them amounted to a summary of the existing and proposed provisions of the Scheme and that they did not override the 2008 DDR upon which all actual benefit entitlements were to be determined. The evidence was that members would all have been to a Presentation or attended a webex session and it was certainly the intention that they should. The consequence is that it is necessary for the Presentation, the Covering Letter and the Opt-Out Form to be construed together. While the statement of override was specifically concerned with the contents of the Presentation, not the contents of the Opt-Out Form, I consider that the fact that it was expressed in those terms is inconsistent with the Opt-Out Form containing promises with independent contractual effect. In other words, it represented that anything that amounted to a benefit entitlement (such as any right to an inflation linked pension increase) was to be construed and governed by, and only by, the terms of the 2008 DDR.

330. Fifthly the Opt-Out Form made specific reference to one other aspect of the members' deferred pension benefits which is inconsistent with a free-standing contractual promise. It included a statement that "*My deferred pension will be calculated under the rules which govern the Scheme by reference to (i) my pensionable service as at the Closure Date; and (ii) my final pensionable salary as at the Closure Date.*" This was a reiteration that the deferred benefits were governed by the rules of the Scheme and is inconsistent with the existence of some free-standing contractual right under an extrinsic contract constituted by the Opt-Out Form.

331. I should add that, on this particular issue, the Representative Beneficiary relies on a number of statements by Mr Latham on his views as to the proper interpretation of some of the statements made in the Covering Letter and the Opt-Out Form and whether or not they were intended to give rise to a contractual relationship between the Company and each member. I do not think that what was said is of any great assistance on the questions that I am asked to decide, and strictly speaking his evidence was inadmissible on this point. In any event, nothing that Mr Latham had to say is inconsistent with my conclusion that the Company did at least promise to procure the admission of the Opt-Out Members to the money purchase section of the Scheme on the Closure Date. To that extent the Company bound itself to some limited contractual obligations which ensured that there was what Mr Latham said was "*consideration on both sides, and so on, so once the members had agreed to this and it had been enacted, nobody could come back later and ask for reinstatement and then trigger all of the pain that would entail*."

Opt-Out Issues: Deemed Exercise of Power

332. The next argument made by the Representative Beneficiary was that the statement that deferred pensions will be increased broadly in line with inflation (as measured by RPI) up to a maximum of 5% per annum, was also a valid exercise of the power at rule 7.2(b) of the 2008 DDR to appoint the rate at which deferred pensions were to be increased for the members who signed the Opt-Out Form.

333. The power referred to was said to be spelt out in rule 7.1(c):

> "*Each pension in payment under the Scheme may be increased (or further increased) from time to time by such amount as the Principal Employer (after considering Actuarial Advice, and with the consent of the Trustees) so determines, subject to Scheme Limits.*"

This power to determine is itself applied to the revaluation of pensions in deferment by rule 7.2(b):

> *"any part of the preserved pension under the Scheme which exceeds the GMP shall (subject to Rule 7.2(c)) be increased as provided in Rule 7.1(b) and (c) above"*

334. In making this submission, the Representative Beneficiary pointed out that it is well established that the exercise of a power to dispose of property, can be effective even though the disposition makes no mention of the power and does not purport to be an exercise of it *(Davis v Richards & Wallington* [1990] 1 WLR 1511). He accepted, however, that it is necessary to establish that the requisite intention to make the disposition justifies the imputation of an intention to exercise the power. That may be more difficult to achieve where nothing is said or done which makes a specific link between the act said to be the exercise of the power and the provision from which the power is derived.

335. The Representative Beneficiary submitted that the Covering Letter and the Opt-Out Form both evidence a declaration to increase deferred pensions broadly in line with inflation (as measured by RPI), up to a maximum of 5%, for those members who signed the Opt-Out Form, that the Company had the power to make this determination pursuant to r. 7.2(b) and that it is therefore for the Company to prove that it had the positive

intention not to exercise its power which it has not done. In my judgment this argument fails for two main reasons.

336. First, I think it is clear that the Opt-Out Form and the Covering Letter do not evince an intention on the part of the Company to exercise the power to determine that RPI should be the metric of inflation. As I have already explained in my conclusions on the contractual argument, I consider that the intention of the Opt-Out Form and the Covering Letter was that the Opt-Out Members were to receive membership of the money purchase section in exchange for their election of Option 1, this not being available to them without the consent of the Company if they elected for Option 2. The intention went no further than that, because the proposal was that the rights of the Opt-Out Members would then be governed by the Rules of the Scheme as Opters-Out in so far as they related to their former active membership of the defined benefit section and as members in so far as they applied to membership of the money purchase section going forward.

337. It seems to me that it follows from my conclusion that there was no extrinsic contract under which the Company committed to a metric of inflation based on RPI, that the Company cannot have intended to exercise a power to increase the preserved pension derived from the final salary section by providing for it to increase "*broadly in line with inflation (as measured by RPI), up to a maximum of 5%*". Put another way, in the particular circumstances of this case, there is no logical basis on which the Company could have intended to exercise a power in this manner when (as I have held to be the case), it did not intend to agree an extrinsic contract to the same effect.

338. The second reason relates to Mr Legge QC's submission that, while the Trustees can insist on actuarial advice being taken, if the Company does not do so, there is simply a claim against it but the exercise is effective. He submitted that the court should strain against a conclusion that the exercise of the power is invalid if the advice is not taken and pointed out that it was for the Company's benefit that the advice was to be obtained.

339. I do not accept this submission. In my view it is clear from the wording of rule 7.1(c) that the power can only be exercised after Actuarial Advice has been taken and with the consent of the Trustees. I agree with the Company's submission that these are both preconditions to the exercise of the power and I agree that neither of them was satisfied in the present case. *Walker Morris Trustees Ltd v. Masterson* [2009] Pens LR 307 was cited to me as an example of a case in which the court determined that, although it was necessary to construe the rules of a pension scheme in a practical and purposive way, these types of precondition to the exercise of powers were there to be complied with.

340. Actuarial Advice is a defined term. It is advice given by the Scheme Actuary either in relation to his duties in accordance with the PA 1995 or advice given by any actuary in other circumstances, and which the Trustees shall consider but not be bound to follow unless required to do so by statute or court order. As to the taking of Actuarial Advice before what was said to constitute the exercise of the power occurred, I do not understand the Representative Beneficiary to contend that this was done anyway for the purposes of exercising the power. However, he submitted that:

340.1. any failure would not have had the effect of invalidating the Company's determination because the words confer on the member a right to bring a claim against the Company if the member has suffered prejudice and the Company

took no advice. He relied for that proposition on *Betafence Ltd v Veys* [2006] Pens L.R 137, at [66] – [67];

340.2. Actuarial Advice at the time of the Opt-Out documentation would have been otiose because the applicable method of statutory revaluation at the time was RPI in any event;

340.3. Recent Actuarial Advice (using RPI for revaluation of deferred pensions) had in any event been obtained in the form of the "as at 30 June 2009" Actuarial Valuation which was being finalised throughout 2010;

340.4. It was not the practice of the Company and the Trustees to take Actuarial Advice before exercising the identical power to award discretionary increases to pensions in payment at rule 7.1(c) of the 2008 DDR or rule 9.1.2 of the 1996 DDR and there was no reason why the power at rule 7.2(b) should be treated any differently from the power to award pension increases, when the power is not only in the same terms but expressly incorporates the power at 7.1(c) by reference.

341. I do not consider that *Betafence* assists the case of the Representative Beneficiary. As Mr Furness QC pointed out, that case concerned a different form of conditionality which did not operate as a precondition to the exercise of the power. In the present case, the words in parentheses in rule 7.1(c) make clear that the power to determine can only be exercised <u>after</u> Actuarial Advice has been considered and <u>with</u> the consent of the Trustees. A construction which requires the Actuarial Advice to be considered first and for the Trustees to give actual consent at the time the power is exercised makes good commercial sense. It ensures that the power is only exercised by the Company having regard to the actuarial considerations which it is appropriate for it to take into account before doing so, and it gives to the Trustees a participating function which facilitates the proper operation of the Scheme.

342. I also think that, as a matter of construction of rule 7.1(c), the Actuarial Advice must relate to the issue with which the exercise of the power is concerned. It follows from this that the mere fact that Actuarial Advice may have been being taken for other purposes, such as the 30 June 2009 Actuarial Valuation, does not avail the Representative Beneficiary. In order to constitute Actuarial Advice in the first place, it seems to me that the actuary must at least be invited to focus on the question with which his advice is concerned. There is no evidence that any such steps were taken in this case.

343. Likewise, I do not think that prior practice in relation to what occurred when setting the discretionary rates of increase under the 1996 DDR assists. The advice required in that context is likely to have been limited to advice on the rate of inflation for the relevant period together with advice on the question of whether there was anything which meant from an actuarial point of view that the Company and the Trustees should not take that rate as the correct starting point for the discretionary increase. There is no clear evidence that advice in this form was not taken. In any event, the advice required for exercise of the power in the circumstances suggested by the Representative Beneficiary would be of an altogether different order because it would have a long term impact extending beyond a single year and might affect the deferred pensions of Opters-Out in a manner which did not apply across Scheme benefits as a whole. In short, the nature

and detail of the advice required will be affected by the purpose for which the power is to be exercised. In the present case, it was to be expected that, if a power of the sort suggested by the Representative Beneficiary were to have been exercised, the advice would or should have been carefully focused on the purpose and impact of its exercise.

344. As to the requirement for the consent of the Trustees, the evidence does not establish that any such consent was given. I consider that the consent contemplated by the rule is something which must be given in an unqualified form and must be clearly evidenced. While the form of the relevant documentation was discussed with and agreed by the Trustees, the Covering Letter recorded that their agreement to the arrangements was only "in principle" and the evidence is that the documentation was very much the Company's to which the Trustees were only prepared to lend their name on the basis that their consent was contingent on the satisfactory conclusion of the valuation negotiations. As I have explained, while the Closure Date occurred on 31 October 2010, those valuation negotiations were not completed until the following year at which stage the closure was reflected in a deed of amendment.

345. In these circumstances I do not consider that it is possible to say that the Trustees consented to the exercise of the power contended for by the Representative Beneficiary. I should add that the Representative Beneficiary submitted that, even if the consent was not given by the Trustees at the time, it could still be given now and that it was no longer open to the Company to change its mind because the exercise was irrevocable. I do not think that either of those propositions is free from difficulty, but given the other conclusions I have reached on this part of the case, I do not think that it is necessary for me to express a concluded view on the points and do not propose to do so.

346. It follows for all these reasons that in my judgment the argument based on a deemed exercise of the power under rule 7.2(b) fails.

Opt-Out Issues: Estoppel

347. The next argument is based on estoppel. I think it is fair to say that both parties took the legal argument on estoppel at quite a high level of generality and addressed the point by reference to principles which they said were applicable to all forms of estoppel by representation or convention. It is said by the Representative Beneficiary that the Opt-Out Documents created an estoppel that operated to bar any claim to rectification. It is submitted that the way that the estoppel will be enforced is by the Company being ordered to give effect to its representation as to an RPI-based revaluation in the Opt-Out Form and Covering Letter. Alternatively, it is submitted that the Opt-Out Members, as third parties to the rectification claim would be able to take free of the rectification claim as if they were *bona fide* purchasers for value.

348. The Representative Beneficiary cited a passage from the judgment of Neuberger LJ in *Steria v Hutchinson* [2006] Pens LR 291 at [93] as a helpful summary of the requirements for estoppels based on representation in a pension context, at the root of which is unconscionability. In *Steria*, the issue was whether a member could rely on representations made in a booklet explaining the terms of a pension scheme:

> "*When it comes to estoppel by representation or promissory estoppel, it seems to me very unlikely that a claimant would be able to satisfy the test of unconscionability unless he could also satisfy the three classic requirements. They*

are (a) a clear representation or promise made by the defendant upon which it is reasonably foreseeable that the claimant will act, (b) an act on the part of the claimant which was reasonably taken in reliance upon the representation or promise, and (c) after the act has been taken, the claimant being able to show that he will suffer detriment if the defendant is not held to the representation or promise. Even this formulation is relatively broad brush, and it should be emphasised that there are many qualifications or refinements which can be made to it."

349. The Representative Beneficiary also relied on estoppel by convention and for the applicable principles cited the judgment of Briggs J in *HMRC v. Benchdollar Ltd* [2009] EWHC 1310 as subsequently modified by him in a minor respect in *Stena v MNRPF* [2010] Pens L.R 411 at [136] and applied in a pension scheme context by Newey J in *Prudential Staff Pensions Ltd v The Prudential Assurance Company Ltd* [2011] Pens LR 239 at [209]-[213]:

"(i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them.

(ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it.

(iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter.

(iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties.

(v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position."

350. The representation relied on by the Representative Beneficiary in the present case (which were also said to reflect the sharing of the common assumption for the purposes of the argument based on estoppel by convention) were the words in the Covering Letter "*This deferred pension will be increased from [the Closure Date] until normal pension age broadly in line with inflation (as measured by the retail prices index) up to a maximum of 5% each year for most of your pension"* and the similar words in the Opt-Out Form:

"*My deferred pension will be increased from the Closure Date until normal retirement date broadly in line with inflation (as measured by the retail prices index) up to a maximum of 5% each year for most of my pension.*"

351. The first question is whether the representation relied on is clear and unequivocal. Unless that requirement is satisfied any representation-based estoppel does not get off the ground. Likewise in the case of estoppel by convention, a lack of clarity in the

words used to evidence the common assumption will undermine any argument that there was a sufficient convention to give rise to the estoppel. The Representative Beneficiary submitted that these words were sufficiently clear and were contained in documentation that was intended to be relied on. It also submitted that the use of the words "*broadly*" and "*most of*" do not affect that conclusion.

352. The Company said that that is not the case. It submitted that any representation about revaluation is to be construed as a representation to provide benefits on the terms set out in the rules of the Scheme. For similar reasons to those which I described when expressing my conclusions on the contractual claim, the Company said that there was no clear and unequivocal representation to the effect that RPI would be the applicable metric of inflation for the purpose of calculating increases to the pensions in deferment of Opt-Out Members. It said that the only representation was that pensions in deferment would be increased in accordance with the rules of the Scheme.

353. I agree with the Company's case on this point. In my judgment the statements made were not clearly to the effect that the Opt-Out Members' pension increase entitlement would be based on RPI independently of the provision that was made under the rules of the Scheme. There were two main reasons for this. The first was the inherent imprecision of language which I have already described in my conclusion on the contract point. The second is that the words used were descriptive (rather than definitional) of what the pension increase entitlement was then thought to be under the terms of the 2008 DDR. It is not a fair reading of the Opt-Out Documents taken as a whole that those words did anything more than provide a description of the words included in the 2008 DDR and the representation was only to the effect that the nature and extent of the benefits that Opt-Out Members would receive in respect of their deferred pension would be whatever was provided by the terms of the 2008 DDR.

354. As I understand its case, the Company does not contend that the Opt-Out Documents, properly construed as a whole, were not to some extent intended to be relied on by the Opt-Out Members. It is plain that they were, in the sense that they were advanced not just as explanatory of the two options which were available to members, but also as what were intended to be persuasive parts of the process by which members made up their minds as to which option to elect. Thus, the Company accepted that the terms of the money purchase scheme and the suggestion that the security (i.e. covenant strength) of final salary benefits already earned would be improved if final salary accrual and linkage were to be terminated were both advanced as inducements to elect for Option 1. But the Company submitted that this does not mean that it had any actual or presumed intention to induce reliance on any representation made as to the applicable metric to be used for calculating inflation-linked pension increases in respect of the pensions in deferment of Opt-Out Members.

355. The relevance of this submission is that the Company said that the statements relied on by the Representative Beneficiary cannot therefore have been thought by the Opt-Out Members to have had the necessary quality of materiality. The principle, as explained in Spencer Bower on Reliance-Based Estoppel (5th edn) at [5.33] is that:

> "*A representation or belief has the quality of materiality if it is reasonably capable of inducing the alteration of position which A sets up as its actual consequence. It must have been "of a nature", and in that sense "calculated", or of which the*

> *tendency or natural and probable result is, to induce A in particular, in the circumstances of the individual case, to alter his position in the manner alleged*."

356. Another reason why the Company submitted that the particular statements relied on by the Representative Beneficiary were not ones on which the Opt-Out Members can reasonably have thought that they could rely was that the Presentation (which was one of the Opt-Out Documents) contained a clear statement that the benefits described were a summary of the existing and proposed provisions of the Scheme and that it did not override the 2008 DDR, upon which all actual benefit entitlements would be determined. It was said that this statement negatives any intention to induce reliance on the part of the Company.

357. As to reliance itself, the Representative Beneficiary cited another passage from Neuberger LJ's judgment in *Steria* at [117], which makes clear that the test is not a 'but for' test but rather is whether the representation was a significant factor taken into account by the member when (in that case) deciding whether to join the Scheme:

> "*In order to succeed in a claim based on estoppel, it is probably not necessary for a claimant to satisfy what is known in a somewhat different area of the law as the 'but for' test. In other words, in the present case, it does not appear to me that Mr Hutchison has to show that, if the representation in question had not been made, he would not have joined the Scheme. He merely has to show that the representation was a significant factor which he took into account when deciding whether to join the Scheme*."

358. Mr Furness QC was content to accept Neuberger LJ's approach, notwithstanding the mildly qualified way in which it was expressed. He submitted, however, that that does not mean that some form of counterfactual enquiry may not be appropriate. I agree with the Company's submission that the reason for this is that, if the Opt-Out Members would have selected Option 1 on the Opt-Out Form even if the alleged representation had been corrected, that would be highly material in determining whether or not the relevant statement was a significant factor in their decision.

359. The Representative Beneficiary said that there is a burden on the Company to negative reliance. He submitted that, where a representative beneficiary seeks to establish an estoppel (anyway a proprietary estoppel), he does not have to provide evidence pertaining to all members, and that in any event the evidence in the present case is good. He also said that, where a representation is made which is calculated to influence the representee, the burden shifts to the representor to show that there was no reliance and that is not an exercise which has been done in this case. In particular he relied on *Greasley v Cooke* [1980] 1 WLR 1306 and *Grant v Edwards* [1986] Ch 638, 657 for the proposition that, once it has been established that promises were made, and that there has been conduct by the plaintiff of such a nature that inducement may be inferred, then the burden of proof shifts to the defendants to establish that he did not rely on the promise.

360. I see considerable force in what is said on this subject in Spencer-Bower on Reliance-Based Estoppel (5th edn) at [5.7] and in *Steria* at [130] and I think that the principle is probably limited to the very different context of proprietary estoppel of the type considered in *Grant v Edwards*. In any event I do not think that it can be treated as a principle of law to be applied in all circumstances divorced from their factual context.

More particularly it seems to me that much will depend on the nature of the representation or statement relied on, and whether or not it would appear to be one that was expected to induce the relevant conduct. As Neuberger LJ observed in *Steria* at [130]:

> "*In many cases, and I think that the Greasley case was one of them, it can fairly be said that, once it is established that the representation was made, the representation together with all the other facts of the case enables the claimant to say that, unless the defendant can elicit some further evidence to the contrary, the claimant will have discharged the onus. I am inclined to think that the Greasley case went no further than that. If, however, it did establish a point of general principle, then, in common with Mummery LJ, I would hold that it is limited to cases of proprietary estoppel: on the basis that it seems to me to be a questionable principle, I would limit its ambit to as narrow an area as respectably possible.*"

361. In the present case, it is important that the context in which the relevant statement was made was the need for existing members to choose as between two options. It follows that the question of whether it can be said that there was any intention to induce reliance on the particular statement will be dependent on the materiality of the statement to that choice as the conduct sought to be induced. Looking at it from that perspective, it is in my view very unlikely that anyone would have thought that an inflation-linked increase based on RPI, as distinct from any other inflation-linked metric would be a significant factor in that decision. That is not of course to say that the need for some form of inflation-linked increase would not have been a significant factor. The evidence supports a conclusion that it would have been, but in the light of the fact that there was a minimum statutory increase in any event, I do not think that objectively speaking the difference between capped RPI and the statutory minimum would have been a significant factor in any member's thinking. I think that is the case, even though as Mr Legge QC pointed out there was at least a strong prospect of CPI being introduced as the statutory metric during the period in which the Opt-Out Forms were being signed.

362. This way of looking at it was, as Mr Furness QC pointed out, strengthened by the fact that exactly the same representation or statement was made about the inflation-linked metric in the description of both options. This was clear from the fact that both the Covering Letter and the Opt–Out Form used the phrase "*increased as set out above"* when referring to the deferred pension increase under Option 2 so that it was immediately obvious that the inflation-linked increase referred back to the description of Option 1 and would therefore be exactly the same whichever of the two they chose. It is only if the change from RPI to CPI (or some other metric) was capable of reversing the comparative benefits of Option 1 as against Option 2 that anybody could have thought the pension increase statement might have any inducing effect on the members when deciding on the election they wished to make. There was no suggestion that there were any circumstances in which that might be the case. The logical consequence of this is that it is most unlikely that the statement was or might be thought to have been a significant factor in any member's thinking.

363. If there had been any difference between the inflation-linked metrics applicable to each of the two options, the position might have been different, and it would then have been necessary to consider the extent to which a representation as to the precise metric either (a) could reasonably have been thought to be a significant factor or (b) was in fact treated by any of the members as a significant factor. On the second of these issues,

the Representative Beneficiary called evidence from Mr Shimells and Mr Pugh and also relied on evidence from some of the other witnesses.

364. To start with, there was no evidence that any of the members would have taken a different course and selected Option 2 if the statement relied on had articulated that the inflation-linked metric would be whatever was required by the relevant statute from time to time (whether the PA 1995, the PSA 1993 or otherwise). This is not at all surprising, because the question is entirely hypothetical, but it has some bearing on the issue of whether any of the members regarded what was said as a significant factor. The way that the witnesses expressed themselves varied.

365. Mr Corrigan said the use of CPI rather than RPI would not have changed his mind on opting out "*but I wouldn't be flippant enough to say it was irrelevant*" and he said that if CPI had been referred to it would have "*resonated*" with him. I am sure that he was correct to say that it was not an irrelevant question, but the issue for me is whether it could be said to have been a significant factor for him. I think that it went into the overall mix, but it was obvious that what mattered much more was the quality of the defined contribution scheme that was being offered going forward if he elected for Option 1, the Company's expressed intention to find a way of breaking the final salary link come what may (which made Option 2 particularly unattractive) and the fact that it was untenable for the Company to continue with future accruals and final salary in any event. The existence of some form of inflation-linked increase benefit was also material but I do not think that the use of RPI rather than any other inflation-linked metric could on any view have been characterised as a significant factor to him.

366. Much the same can be said of the evidence given by Mr Shimells. The inflation-linked metric that was chosen was something that he noticed at the time, but he accepted that it was not the biggest consideration and what he noticed about it was that the pension increase entitlement was what he described as "*pegged to something tangible*". To that extent the use of RPI was a factor in his thinking, but this was because it was an index with defined characteristics and I cannot conclude on the evidence that it was anything approaching a significant factor because it only arose in the sense that he thought that RPI produced greater definitional certainty. In my view he had no concern as to how RPI might compare to any other inflation-linked metric so long as that was what it was.

367. The evidence given by Mr Pugh was significantly the most focused on the distinction between RPI and CPI (or indeed any other method of describing an inflation-linked measure), and in my view was the only evidence which came near to establishing that the pension increase representation under Option 1 was a significant factor in the thinking of any single member. The Company pointed out that, during the course of the preparation for the trial, the solicitors for the Representative Member made considerable efforts to find a member who would give evidence on reliance and Mr Pugh was the only one (apart from Mr Shimells) whose evidence was in the end led. I think it was therefore fair for the Company to submit that there was a real sense that his evidence was likely to be as good as it was going to get.

368. Mr Pugh said that the pension increase statement in the Opt-Out Documents meant sufficient to him that, if they had said something different "*I would have at least questioned some of the trustees*". He gave this evidence against the background of an admission that he had what he himself described as a "*slightly geeky interest in economics and the recession of 2008*" and being "*aware of the difference between CPI*

and RPI, the way they were calculated and the impact." He accepted that the statement was not a part of the presentation that had a significant impact on him, although he said that may have been because, as he put it, "*nothing was changing so why would I react?*" It was clear, however, that the driver for him was that nothing should be changing. He said that he did not know the Scheme rules in detail but "*just thought that my pension and its accumulated benefits are referenced to RPI*".

369. It was also put to him that there were other more important factors including the quality of the defined contribution scheme which was being made available under Option 1 but not under Option 2 and the general tenor of his evidence was to agree. However, although he accepted that going for Option 1 was a no brainer, he also said that the whole package was what mattered. He even hypothesised towards the end of his evidence that there was a third option of just not consenting at all. Strictly speaking I think that would be no different to ticking the Option 2 box, but he made the point he did in order to emphasise that the option which the Company was encouraging the members to accept was a single package.

370. Although I have paused in relation to Mr Pugh's evidence, at the end of the day, I do not think that the reference to capped RPI was a significant factor in the choice that any of the Opt-Out Members made between Option 1 and Option 2. This is not just because the difference between the pension increase entitlement as written and the pension increase entitlement in the 2008 DDR as rectified (RPI or such other measure as the government might choose from time to time) would not have caused any of them to behave differently. It is also because there was no logical reason to cause any of them to treat it as anything other than a reflection of what was on offer whether Option 1 or Option 2 was chosen. Everybody was carrying out an exercise in comparing options. It follows that what mattered both from an objective perspective (when assessing intention to induce reliance) and from the subjective state of mind of the members (to the extent that evidence was given on actual reliance) was whether the position in relation to the pension increase rule as it applied to their deferred pension was different between the two options. It follows that I am not satisfied that there was any sufficient reliance to give rise to the estoppel claimed by the Representative Beneficiary.

371. The next element which the Representative Beneficiary must prove in order establish his case on estoppel is detriment. In the light of the findings I have already made, his claim to an estoppel fails, but I think that I should explain my views anyway. I shall do so quite shortly, because it is necessary for me to assume that there were at least some Opt-Out Members in respect of whom reliance was established and I have concluded that that is not the case. Accordingly, what I have to say about detriment is necessarily hypothetical.

372. On the assumption that there were Opt-Out Members who took into account the pension increase statement as a significant factor when electing for Option 1, the detriment to be proved by the Representative Member must flow from that act of reliance. As the issue arises in the context of making a choice between alternative options, the act of reliance is the act of making the choice. It seems to me that that must involve the Representative Beneficiary establishing that there is a category of Opt-Out Member who is now worse off having chosen Option 1 in which the pension increase benefit is that provided for by the Scheme as rectified than he would have been if he had chosen Option 2 (where the pension increase benefit would be the same).

373. Mr Furness QC said that there were a number of reasons why this part of the argument did not get off the ground. I think that he was correct on at least one of them. All the evidence pointed to the Company being able to break the final salary link in due course in any event. If that were to occur, and it is very clear that the Company was determined to achieve that result, it is very difficult to identify circumstances in which the election for Option 2 could benefit any Opt-Out Member. In my judgment, it is more likely than not that this would have been the case and all of the witnesses who were asked about it (including Mr Pugh) accepted that the Company would have done what was necessary to break the link. This goes a long way towards rebutting the Representative Beneficiary's case on detriment without having to go through the artificial exercise of examining the hypothetical position of a number of different categories of member which was examined in Mr Gibson's evidence. It is plain that the views of Mr Pugh I have just described reflected a widespread view amongst the membership and it is to be expected that this would be another reason why it is plain that none of them would have done anything other than elect for Option 1, whatever the nature of the statement that was made about inflation linked increases.

374. In any event, although the expert evidence led by the Representative Beneficiary identified the possibility that one or two individuals might have been worse off, it was not established that those who might have suffered detriment relied on the statement in the sense contended for by the Representative Beneficiary. It follows that he has not shown in relation to any single individual that those requirements for an estoppel (reliance and detriment) are established. I also do not think that it is at all likely that any Opt-Out Member would have gone through the exercise of working out how it was that they might have suffered detriment.

Opt-Out Issues: Bona Fide Purchaser

375. The Representative Beneficiary's next argument based on equitable principles is that the court should not grant rectification either generally or so as to affect adversely the interests of the Opt-Out Members, because they are *bona fide* purchasers for value or have so changed their position as to bar the claim to rectification.

376. It is common ground that the court will not grant rectification to the detriment of a *bona fide* purchaser for value but, as Mr Legge QC accepted, it is established (anyway at first instance) that members are not *bona fide* purchasers for value of any rights which may be mistakenly conferred on them under the transaction between the Trustees and the Company. He does so in light of the judgments of Lawrence Collins J in *AMP* at [79] as cited with approval by Etherton J in *Gallaher* at [47]:

> "*At the outset of the hearing, the Representative Defendants resisted the claim to rectification on the further ground that they and the persons they represent gave consideration for their benefit entitlement under the Rules of the Schemes: in effect, it was contended, they are bona fide purchasers (without notice). That defence was rejected by Lawrence Collins J in AMP. He said, at para [79]:*
>
> > *'In my judgment early leavers .... or other members of the Scheme, are not in the position of bona fide purchasers. It is true that they give consideration for their pension rights, but they gave no additional consideration for the 'rights' which the rule changes mistakenly conferred on them, and it is wholly*

> *unrealistic to treat them as purchasers of anything in the present context other than such rights as were properly granted in the rules.*'

377. However Mr Legge QC contended that the present case is to be distinguished from what was said in *AMP*, because the members acquired their rights while under a misapprehension as to the rate that would be applied so as to increase their pensions in deferment. In support of his submission that this makes all the difference he points out that Lawrence Collins J was dealing with a case in which the relevant members had no knowledge of the terms of the rule of which the company was seeking rectification. He then cited *Irish Pensions Trust Ltd v Central Remedial Clinic and others* [2005] IEHC 87 (a decision of Kelly J) for the proposition that the fact that the members were unaware of the adoption of the rule in that case was a distinguishing characteristic recognised as such by the judge.

378. Mr Legge QC also submitted that the present case is different from *AMP* because the members acquired new rights under the Scheme (deferred pensions with no final salary linkage) when they opted out of the final salary section and received in return the promise of new defined contribution benefits from the money purchase section of the Scheme in respect of their future service. The benefits which they received after their election to proceed with Option 1 were therefore new and different rights to the benefits which they had before the election and were rights for which they gave additional consideration.

379. I do not have to grapple with the question of whether or not the members gave additional consideration for any new and different rights, although I can see that there may be arguments about what it was that the members actually purchased for value when what they did was exercise their existing right to opt out. This is because a rather shorter answer to those two points is supplied by Mr Furness QC. The defence adds nothing to the arguments based on contract, the exercise of a power and estoppel, because it presupposes that the Opters-Out have acquired new legal rights which would be prejudiced by the grant of rectification in the first place. As I have already held that they have acquired no new legal (or equitable) right to have their deferred pension increased by reference to RPI, and as I consider that that is the right which if it were to have been established would have been the right affected by rectification, it is my view that the doctrine of *bona fide* purchase simply does not apply.

380. In my judgment this is also an answer to the other arguments advanced by the Representative Beneficiary in relation to the impossibility of *restitutio in integrum* and change of position. These defences presuppose that the Opt-Out Members have acquired rights which will be affected by rectification after they have dealt with them by electing to opt out. If, as I have concluded, they have acquired no such rights I do not consider that these defences can have any application.

381. In these circumstances, I am satisfied that it is appropriate to grant the rectification sought by the Company and that what occurred at the time of closure of the defined benefit section does not alter that conclusion.

The Berk / PLAS Issues

382. I explained the factual background to the Berk / PLAS Issues in its chronological place earlier in this judgment. The question which arises is a point of construction of the

Berk / PLAS Announcements, the terms of which were incorporated into the 2008 DDR by paragraph 3 of Appendix 2 to Schedule 3 and were reproduced verbatim in Appendix 3 to Schedule 3. Do they provide that the Berk Members and PLAS Members are entitled to increases to pensions in payment (but not revaluation of pensions in deferment) calculated by reference to RPI capped at 5%?

383. Initially, the Company sought rectification of the Berk / PLAS Announcements to provide that the increases to pensions in payment for former members of the Berk and PLAS Schemes are on the same basis as for other members of the Scheme, save for the pension attributable to Notional Pensionable Service in respect of which increases would be at the rate applicable under the Berk Scheme or the PLAS Scheme as the case may be. The Company no longer pursues its claim to rectification, but it relied on some of the rectification points in support of its construction argument.

384. As I have already mentioned, the incorporation of the Berk / PLAS Announcements into the 2008 DDR was also referred to in rule 7.1(b) of Schedule 3 itself which specifically provides that the rule (i.e. the pension increase rule) is varied for members of the Berk and PLAS Schemes. It seems that as part of the process of drafting it was considered that the most pragmatic approach was simply to continue to administer the Berk and PLAS Schemes in accordance with the original Berk / PLAS Announcements rather than trying to weave their terms more precisely into the wording of the 2008 DDR itself. As I will explain, the evidence is that the perceived complexity seems to have arisen out of the concept of Notional Pensionable Service.

385. The Company submitted that, on a proper construction of the Announcements, the Berk Members and PLAS Members are entitled to pension increases on the same basis as the other members of the final salary section of the Scheme under the 2008 DDR as rectified. It accepted, however, that pension attributable to "Notional Pensionable Service" i.e. pensionable service completed up to 30 April 2002 under the Berk Scheme or PLAS Scheme would be increased at the rate provided for under the Berk Scheme or PLAS Scheme. In making this submission the Company said that it is reflecting how the Trustees have administered the pensions of the Berk Members and PLAS Members in practice since they joined the Scheme on 1 May 2002.

386. The Representative Beneficiary disagreed with the Company's position. He submitted that the Berk Members and PLAS Members are entitled to increases to pensions in payment calculated by reference to RPI capped at 5%, in reliance upon the words in the Announcements: "*Any pension payable from the [Scheme] which is attributable to Pensionable Service on or after 1st May 2002 will increase each year whilst in payment in line with increases in the Retail Prices Index, up to a maximum of 5%.*"

387. It was said by the Company that the Representative Beneficiary's argument fails to give proper context to the part of the Berk / PLAS Announcements in which the statement to this effect appears. It appears in the section of the announcement which is very clearly entitled: "*Please note the following explanations of certain parts of the Explanatory Booklet which will apply in respect of your membership of the … Scheme.*" It follows that what was said in this part of the Berk / PLAS Announcements was only intended to be descriptive of what was said in the Explanatory Booklet. It cannot be read as a free-standing term on which the former Berk and PLAS Members were entitled to have that element of their pension administered without reference back to the Explanatory Booklet itself which is described as the source of the rights. Mr Legge

QC said that the mere fact that the statement appeared in that section of the Berk / PLAS Announcements is not strong enough to displace the clear meaning of the words used.

388. The Company relied on *Steria Ltd v Hutchinson* [2006] Pens LR 291 and the wording of the leaflet in *ITN v Ward* [1997] Pens LR 131, which described the amendments that it made to an explanatory booklet in the following terms:

> "*This leaflet gives a summary of improvements and amendments to the arrangements that the Company has made for providing employees with pension, sickness and life assurance benefits. It should be read in conjunction with the Pension and Salary Security Schemes Booklet dated August 1976*."

In turn, the explanatory booklet in *ITN* stated that it was a "*summary of the conditions which are set out fully in the Rules and only these can be used for legal interpretation*". Against that background, Laddie J found that the explanation of pension increases in the leaflet was expressly stated to be a summary and incomplete and that the member's reliance upon the literal terms of the leaflet failed to pay regard to the totality of the documentation.

389. In my view, the Company's construction is correct. It is very clear from the face of the Berk / PLAS Announcements that the explanation of the pension increase benefit was just that, an explanation which was not intended to be read or relied on without reference to the Explanatory Booklet which was explicitly said to apply in relationship to the Berk / PLAS Members' membership of the Scheme. To use Mr Legge QC's turn of phrase, I take the view that the context of the section of the Berk / PLAS Announcements in which the words appear is strong enough to make it impossible to read the statement without regard to the Explanatory Booklet which itself prevails. Those announcements simply explain the Explanatory Booklet, which is clearly expressed to be the document which then applies.

390. Turning to the Explanatory Booklet itself, the part which deals with pensions in payment is as follows: *"In addition, the Trustees will review your pension and may make increases from time to time to help offset the effects of inflation, provided the Company agrees and sufficient resources are available."* This reflects the discretionary provisions contained in rule 9.1.2 of Schedule 2 to the 1996 DDR. In construing that provision it is also necessary to have in mind that:

> "*This booklet is a guide to the Scheme and will always be overruled by the formal rules if there is any difference between the two documents. You may see a copy at any time – just ask the Human Resources Department.*"

391. In my view, the express reference to discretionary increases to pensions in payment, which is clearly spelt out in both the 1996 Explanatory Booklet and the 1996 DDR is both different from and inconsistent with the construction of the Berk / PLAS Announcements for which the Representative Beneficiary contended. In my judgment, the concept of a discretion, the need for the Company to agree and the need for sufficient resources to be available cannot stand with a construction that provides for a minimum increase based on a capped RPI. The consequence of this is that the cross referencing achieved by the wording of both the Berk / PLAS Announcements and the Explanatory Booklet means that the wording of both the 1996 DDR pension increase

provisions and the Explanatory Booklet (which are the same in all material respects on this point) prevails over the wording of the Berk / PLAS Announcements.

392. This construction is also consistent with the context in which the Berk / PLAS Announcements were made. They were part of the process of inviting the Berk / PLAS Members to join the Scheme, without any specific reference to the possibility that what was being described might give them different benefits to those enjoyed by the existing members in respect of their service with effect from 1 May 2002. In my view, the context of the Berk / PLAS Announcements was such that clear words were to be expected if it was being said that there were any differences between the terms on offer for the Berk / PLAS Members and the terms for the existing members.

393. The Company also submitted that the language used is understandable in light of the fact that the Announcements were a precursor to a more formal document in due course. I think that there is something in that point, but the real explanation may be that the words were intended to be descriptive of how the discretion spelt out in the 1996 Explanatory Booklet was exercised in practice, having regard to what was actually happening given the statutory minimum provided for by section 51 of the PA 1995.

394. In reaching the conclusion that I have on construction, I have considered why it was that the Berk / PLAS Members' rights in respect of their membership of the Scheme were dealt with separately by scheduling the Berk / PLAS Announcements in Appendix 3 to Schedule 3 to the 2008 DDR. Although it is not obvious that the construction of an announcement that was made in 2002 could be affected by what happened six years later, the question which arises is why this was necessary if the rights of the Berk / PLAS Members were the same as those of other members of the Scheme. The answer to this was given by Mr Geary. He thought this was because of the issues which arose in relation to Notional Pensionable Service. It seems to me that it is likely that he was correct about that, not least because that was the way in which Ms Johnson described the position in her e-mail to Mr Geary dated 6 July 2007.

395. It follows that, in my judgment, the proper construction of the Berk / PLAS Announcements is that the pension increase benefit for the Berk / PLAS Members, in respect of the pension payable from the Scheme which is attributable to pensionable service on or after 1 May 2002, is the same as the pension increase benefit that is available to other members of the Scheme.

396. The Representative Beneficiary also had an argument that, if its case on construction is rejected, the Berk / PLAS Announcements operated as an exercise by the Company of its power under rule 9.1.2 of the 1996 DDR to determine the increase of pensions in payment for the Berk / PLAS Members. To all intents and purposes this is the same power of determination as the power arising under rule 7.1(c) of the 2008 DDR that I have already considered earlier in this judgment. In this context, Mr Legge QC pointed to evidence which he extracted from Mr Geary and Mr Smith to the effect that the Trustees understood that the benefits of the Berk and PLAS Members were governed by the terms of the Berk / PLAS Announcements and that they, as Trustees, accepted the members on those terms.

397. In my view this argument fails for similar reasons to those which meant that the argument based on deemed exercise of power failed as an Opt-Out Issue. This is partly because there is no evidence that Actuarial Advice was taken before the Berk / PLAS

Announcements were made (which is when the Representative Beneficiary said that the power was exercised). I consider that the actuarial advice contemplated by rule 9.1.2 had to be given having regard to the purpose for which it was required. There is no evidence that any advice complying with that requirement was sought or obtained.

398. But the more substantive reason is that, in light of my conclusion on construction, it cannot be said that what happened at the time evinced an intention on the part of the Company to exercise the power. As the Berk / PLAS Announcements did not as a matter of construction contemplate a right to a pension increase calculated by reference to RPI capped at 5%, it logically follows that they cannot have operated either as the exercise of a power to determine an increase which was not so contemplated.