EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 31
P290/23

Lord Malcolm
Lord Doherty
Lord Tyre

OPINION OF THE COURT

delivered by LORD TYRE

in the Petition of

abrdn (SLSPS) PENSION TRUSTEE COMPANY LIMITED

Petitioner

for

Directions

Petitioner: Mure KC, D. Welsh; Shepherd and Wedderburn LLP
Respondents: Roxburgh; Pinsent Masons LLP

1 August 2023

[1] The petitioner is the trustee of a trust-based occupational pension scheme established in 1937 for the purpose of paying pensions to retired employees of the Standard Life Assurance Company. The scheme, previously called the Standard Life Staff Pension Scheme, was re-named abrdn (SLSPS) Pension Scheme in 2023. The original declaration of trust establishing the scheme has been amended from time to time, most recently when the current rules were adopted on 28 and 29 March 2023. Since the demutualisation of Standard Life in 2006, the "principal employer", responsible for adoption and amendment of the scheme rules, appointment of the trustee, and making payment of contributions to the

scheme fund, has been Aberdeen Corporate Services Limited, formerly known as Standard Life Employee Services Limited.

[2] The scheme, which has been closed to new members since 2004, is a hybrid occupational pension scheme providing both defined benefits and defined contribution benefits. The present application is concerned only with the defined benefit part of the scheme, in terms of which a member is entitled to a set level of benefit on retirement linked to salary and length of service, with the benefit accruing over the course of the member's employment. Throughout the lifetime of the scheme, defined benefits have been almost exclusively funded by the participating employers, although for a limited period some members made contributions to the scheme for the purposes of retaining or obtaining particular defined benefits. There are currently three participating employers, including the principal employer, who are responsible for funding the defined benefits in the scheme and for paying employer contributions to the defined contribution "pots" of the active members. The participating employers are the respondents to the petition.

[3] In 2016 the scheme was amended to cease to offer further accrual of defined benefits. The principal employer and the petitioner negotiated and agreed to amend the scheme rules to provide the petitioner with a power (the "discretionary increase policy") to grant certain additional increases to defined benefit pensions without the agreement of the principal employer. This policy allows the petitioner to apply annual increases to defined benefit pensions in payment in addition to the annual increases guaranteed elsewhere in the rules, up to the level of Consumer Prices Index inflation each year.

[4] The defined benefits part of the scheme is currently in surplus, in that the value of the available assets exceeds the actuarial estimate of the assets that would be required to secure with an insurance company the benefits that have accrued to members. The

petitioner and the participating employers view this favourable situation as an opportunity to "de-risk" the defined benefit scheme benefits: in other words to maximise the likelihood of members' defined benefits being paid on time and in full. Two of the principal risks to the members' benefits are that the value of the scheme's assets will fluctuate from time to time, and that it is impossible to know for how long each member's pension will require to be paid. There is no guarantee that the defined benefits part of the scheme would remain in actuarial surplus if the scheme continued to operate under current arrangements for an unknown period of time to come.

[5] The intention of the petitioner and the participating employers is to secure all accrued defined benefits with an insurance company in two stages: initially a "buy-in" contract and in due course a "buy-out" contract. This is a commonly-used method to de-risk defined benefit pension schemes. Under the buy-in contract, the investment and longevity risks within the defined benefit part of the scheme are transferred to an insurance company which agrees to pay regular amounts to the scheme trustee designed to mirror the trustee's regular payment obligations to members. The trustee remains responsible for the payment of benefits, and the participating employers remain liable for ensuring that the benefits are fully funded. The buy-out transaction, however, results in the insurance company assuming liability to individual members to pay directly to them all of the benefits previously insured under the buy-in contract. In the context of the present scheme, after the petitioner has entered into the buy-in contract, the employers would terminate their participation in the scheme, triggering its winding up. On completion of the buy-out, the petitioner would have no continuing responsibility to members because their benefits would have been secured by insurance and the responsibility for making those payments would rest directly with the insurer. The defined contribution pots would also be secured outside the scheme in advance

of or during its winding up. The petitioner considers that once all of the benefits have been secured and sufficient provision has been made for any residual liabilities and the expenses of winding up, the trust purposes of the scheme will have been fulfilled.

[6] A question then arises as to what is to be done with any remaining surplus assets. The scheme rules make no provision for this, and prohibit any amendment to the rules which would permit payment to be made to the participating employers of any monies contributed by them except in the event of the scheme's "principal employer" being wound up, which is not what is intended. In these circumstances, the petitioner's view is that the remaining assets would be subject to a resulting trust in favour of the participating employers, on the basis that the funding and other risks in relation to the defined benefits, including the obligation to fund those benefits, sit and have always sat with the employers. Given, however, that it will be divested of the remaining assets and its role as trustee will be ended when the buy-out transaction has been completed, the petitioner is unwilling to proceed with the proposed de-risking transactions without the matter of the proper receipt of any remaining assets being definitively determined.

[7] Having regard to the fact that it does not have power to secure members' benefits under a buy-out transaction without the participating employers' co-operation, the petitioner is minded to enter into an arrangement with the employers that the parties will co-operate to complete the buy-in and buy-out transactions, and to return any remaining assets to the employers. The petitioner is however mindful of its duty to the scheme members, and considers that any such arrangement should include the application of a part of the anticipated remaining assets to provide additional benefit for the defined benefits members. Following negotiations between the petitioner and the participating employers, the proposed arrangement will effect an augmentation for defined benefit members,

financed by part of the remaining assets, and will also transform the discretionary increase policy mentioned above into a guaranteed CPI-linked increase.

Questions for the court

[8] The petitioner seeks directions in terms of section 6(vi) of the Court of Session Act 1988 and part II of chapter 63 of the Rules of Court. The questions upon which the petitioner seeks directions are as follows:

1. Is the decision of the petitioner to enter into the arrangement, including the transformation of the discretionary increases into a guaranteed increase which can be secured as part of the de-risking transaction and the agreement to augment benefits for members in the context of a de-risking of the scheme by way of a full buy-out of member benefits, a decision that the petitioner is entitled to make in accordance with the current scheme rules and with its fiduciary duties?

2. Are the remaining assets the subject of a resulting trust arising as a matter of law?

3. In the event that the answer to question two is in the affirmative:

   (a) Does such a resulting trust operate in favour of such company or companies as are participating employers immediately before the date when no members remain in pensionable service under the scheme?

   (b) Does such a resulting trust operate as a matter of law only when (i) the buy-out transactions have been completed, (ii) sufficient provision has been made for any remaining liabilities, and (iii) sufficient provision has been made for the expenses of completing the winding up of the scheme?

[9] The petition was served on the participating employers, who lodged answers supportive of the petitioner's analysis of the answers to the questions.

[10] By interlocutor dated 16 May 2023 the court remitted the petition to Mr Robert Howie KC to consider and report upon the facts and circumstances of the petition and upon the questions posed therein and also whether what was proposed represented a reasonable exercise by the petitioner of its discretion. We are grateful to the reporter for his careful investigation of the factual circumstances and his clear and comprehensive report to the court.

The reporter's findings and recommendations

[11] The reporter observed that, in view of the position taken by the participating employers' in their answers, the petition was in effect undefended. He therefore considered it necessary to make enquiries to ensure that the primary facts averred were correct and to exclude the possibility that the proceedings were collusive. He was satisfied that the recital of the facts in the petition was accurate and that the proceedings were not collusive. The degree of agreement seen in the pleadings was the result of lengthy discussion and negotiation between the petitioner and the respondents in which each side had "fought its corner". Such discussion and negotiation was a common feature of the advancement of schemes to de-risk pension scheme trusts by the kind of mechanism proposed here.

[12] As regards question 1, the reporter noted that the petitioner sought directions regarding its *entitlement* to enter into the arrangement, as opposed to guidance as to how to exercise a discretion which, historically, the Scottish courts have declined to give. The reporter recommended that the question be answered in the affirmative. Under clause 1 of the 1937 trust deed, the trustee was to hold and administer the fund. Whether to enter the

arrangement, and in particular, whether to conduct the buy-in, was a matter for the administration of the fund, and thus fell within the power in clause 1 and the discretion of the petitioner as to how the scheme would be administered. As regards the buy-out, the trustee had power under the scheme rules to wind up the scheme and to secure benefits by, *inter alia*, the purchase of individual policies or annuity bonds, which is what the buy-out would do.

[13] In relation to fiduciary duty, entry into the arrangement was an action permitted by the trust deed and rules and could not therefore be a breach of trust. The trustee had negotiated in the members' interest and had secured some advantages for them. The members would obtain the benefit of a higher pension, and future increases in pension would be guaranteed CPI-linked increases rather than discretionary increases. Certainty for the members would be increased because risks for the future value of their pensions would be reduced or eliminated. There was no conflict of interest between the trustee and the members, and the reporter identified no disadvantage to the members which would outweigh the benefits. It could not therefore reasonably be concluded that a decision by the trustee to enter the arrangement would be a breach of fiduciary duty.

[14] The reporter recommended that question 2 also be answered in the affirmative. The prohibition on alteration of the rules so as to permit the payment to the company of contributions paid by it into the fund did not apply to distribution of a surplus of assets over scheme liabilities. Where the investment policy of the trustee had been successful in producing such a surplus, there was no provision in the rules which dictated what was to happen to it or in whom it vested. Scots law recognised the concept of a resulting trust arising by operation of law. In the circumstances, the surplus remaining in the hands of the

trustees without direction in the trust deed and rules as to how it was to be disposed of was subject to a resulting trust arising through the action of the common law.

[15] Turning to question 3(a), the reporter interpreted the question as asking whether the resulting trust of the surplus in the scheme operated *only* in favour of companies which were participating employers immediately before the date when no members remained in pensionable service under the scheme. He noted, under reference to *In re British Red Cross Balkan Fund* [1914] 2 Ch 419, that at common law all participant employers, current and past, would have been entitled to that share of the surplus bearing the proportion to the total of employer contributions which their own contribution bore, and that funds directed to a dissolved company would in turn fall to the Crown as *bona vacantia*. Under the scheme rules, however, where another employer employs members who remain in pensionable service, any employer whose participation in the scheme terminates loses its rights to a share of any surplus in the fund. The reporter accordingly proposed that question 3(a) be answered in the affirmative.

[16] As regards question 3(b), the reporter observed that a resulting trust could not arise until a surplus emerged upon which it might act. A surplus was by definition an amount in excess of that needed to allow the payment of sums for which the scheme trust might be liable or which it was its main purpose to make. Such excess could not be said to have emerged until all the benefits had been secured by the issue of the individual contracts to members as part of the buy-out and the costs of the winding up had been met. The reporter therefore suggested that this question be answered in the affirmative.

[17] Finally, the reporter considered whether what was proposed represented a reasonable exercise by the trustee of its discretion. He noted the limited extent to which the exercise of an absolute discretion could be reviewed by the court. In *Board of Management for*

Dundee General Hospitals v *Bell's Trustees* 1952 SC (HL) 78, Lord Reid gave examples of grounds for interference by the court where there had been no true exercise of the discretion: answering the wrong question; the trustee's failure to address his mind to the right question; perversity shown by ignoring the right question; dishonesty or bad faith; and doubted whether even *Wednesbury* unreasonableness was available as a ground for review. The reporter saw no evidence that the trustee's decision to enter the arrangement could be attacked on any of those grounds. It conferred benefits on the pensioners and had no evident disadvantages for them. It was the product of lengthy debate and negotiation with the respondents, and inevitably involved some element of compromise. The trustee kept the members of the scheme informed about matters; there was no attempt to disguise what was happening. Throughout the negotiation process, the trustee took advice from expert professional advisers including advice on the strength of the covenant of the insurer assuming the liabilities. Whether the reasonableness of the exercise of the trustee's discretion was viewed by reference to the results of the transaction for the members in whose interests the trustee was working, or on a judicial review basis concentrating attention on the decision-making process, the trustee's decisions and actions fell within the band of reasonable decisions or modes of arriving at such a decision, and were not open to challenge on the grounds set out in *Dundee General Hospitals* or those more recently canvassed in *Braganza* v *BP Shipping Ltd* [2015] 2 Lloyd's Rep 240.

Argument for the petitioner

[18] On behalf of the petitioner it was submitted that the reporter's recommendations should be adopted and that each of the questions posed in the petition should be answered in the affirmative.

[19] The petition was competent. Although section 6(vi) of the Court of Session Act had been repealed, the relevant rule of court had been expressly saved. It raised questions relating to the administration of the trust-estate and the exercise of powers vested in the trustees which required an immediate decision by the trustees. It had been brought to the attention of members of the scheme by various means and no member had lodged answers. The Crown had no interest. All parties with an interest had therefore had an opportunity to participate in this process, and it satisfied the competency requirements set out by Lord President Normand in *Peel's Trustees* v *Drummond* 1936 SC 786.

[20] The petitioner was not seeking directions as to how a discretionary power ought to be exercised - that being a matter for the trustee and not capable of delegation to the court - but rather sought confirmation from the court that, as a matter of law, it might enter into the arrangement. The approach to be taken by the court was to determine not whether it would reach the same view as the petitioner but, rather, whether the decision was one that the petitioner was entitled to reach in the circumstances (*Dundee General Hospitals*, above). The petitioner considered that in all the circumstances the proposed transaction was in the interests of the members and represented a proper exercise of its fiduciary powers. It would promote the scheme's purpose by enhancing defined benefits. The petitioner had taken legal, actuarial, and risk transfer advice on the proposed transaction, along with covenant and investment advice. It had taken into consideration the purpose of the scheme, the size and origins of the present actuarial surplus within the fund; the respective duties of the petitioner and the participating employers, the terms of the current rules and their predecessors, the history of contributions from participating employers and members, the terms of the discretionary increase policy, the petitioner's investment powers and the investment and commercial risks of running a scheme having regard (among other things)

to the age profile of the scheme's defined benefit members, the needs and expectations of defined benefit members, the financial position of the present participating employers and what course they might take were the proposed transaction not to proceed. In these circumstances it was submitted that the petitioner had taken into account (only) relevant factors, that entering into the proposed transaction was a decision that a reasonable pension trustee could consider entering into if acting reasonably, and therefore that the petitioner was entitled to enter into it.

[21] As a matter of generality, Scots law recognised the arising of a resulting trust in favour of the original contributor of funds to a trust where there had been a failure or completion of the trust purposes. The resulting trust stood separate from the scheme rules: *Haig* v *Lord Advocate* 1976 SLT (Notes) 16, Lord Kincraig at 17-18. The main purpose of the present scheme, as set out in rule 16A(4), was "the provision of pensions for Members … on their retirement". That purpose would be completed when the petitioner had performed its obligations in full, having secured all of the scheme's benefits for its members. At that point the value of any "surplus" assets would become clear and those assets would thereafter no longer be held for any scheme purpose. They would then, by operation of law, be held by the petitioner on a resulting trust. Although there was no direct Scottish authority for those propositions, they were consistent with the approach taken in *Davis* v *Richards & Wallington Ltd* [1990] 1 WLR 1511 and in the Privy Council case of *Air Jamaica Ltd* v *Charlton* [1999] 1 WLR 1399.

[22] In whose favour, then, did the resulting trust arise? The actuarial report produced by the petitioner demonstrated that the scheme had been very largely non-contributory for its members and that, subject to the following exceptions, all contributions had been paid by participating employers. There were some minor contributions from members for a period

between 2004 and 2007 representing approximately 5.5% of the contributions to the scheme for that period. There were some indirect member contributions to the scheme by way of salary sacrifice in return for additional scheme benefits, and there was evidence of some transfers into the scheme with a total value of approximately £90,000, but that ought to be seen in the context of a total value of the scheme assets of between £588.5m and £818.9m at the relevant dates. In these circumstances, the resulting trust arose in favour of such participating employers as remained at the date when there came to be no members remaining in pensionable service under the scheme.

[23] There were a number of reasons why the petitioner was entitled to decide not to hold a part of the scheme funds for those members who had made contributions. The actuary had been satisfied that those members had received value for their contributions. The surplus had emerged after all of the members' contributions had been made, so all benefits including enhanced benefits were secured. The participating employers' obligation had been to fund a deficit; they had not abandoned their right to any excess. The character of the members' contributions was different: the purpose was to enhance their own rights. That purpose had been achieved and indeed enhanced. The exercise of calculating which individual members would be entitled to how much would cost a disproportionate amount of the surplus. In all of these circumstances it was within the petitioner's discretion to agree to the proposed enhancement of the rights of all members rather than attempting to identify the contributors with a view to benefiting only them: cf *Edge* v *Pensions Ombudsman* [1998] Ch 512, Scott V-C at 535, applied in *Trustees of the Joy Manufacturing Holdings Ltd Pension and Life Assurance Scheme*, 29 January 1999 at p 21.

[24] The resulting trust arose only when the proposed transaction had completed to the point where the benefits of the members were secured, all remaining liabilities had been

paid or provided for, and sufficient provision had been made for the winding up of the scheme.

Argument for the respondents (the participating employers)

[25] The respondents' submissions did not differ in any material regard from those of the petitioner. They too submitted that each of the questions should be answered in the affirmative.

Decision

Competency

[26] We are satisfied that no issue of competency arises. As was noted in *Grosvenor's Trustee and Gillespie Macandrew (Trustees) Ltd* 2022 SLT 785 at paragraph 15, section 6 of the 1988 Act was repealed by the Courts Reform (Scotland) Act 2014. However, by article 7(1) and (2)(e)(iii) of the Courts Reform (Scotland) Act 2014 (Commencement No. 2, Transitional and Saving Provisions) Order 2015, any subordinate legislation made under section 6, including Rules of Court 63.4 - 63.6A, remained in force. We suggest, however, that it would be desirable for this anomaly to be rectified by the restoration of a statutory power. This could be achieved by enactment of clause 64 of the draft bill annexed to the Scottish Law Commission's Report on Trust Law (SCOT LAW COM No 239; August 2014), but no provision to this effect is contained in the Trusts and Succession (Scotland) Bill currently under consideration by the Scottish Parliament.

[27] The reporter also raised a question as to the scope, following the repeal of section 6(vi), of petitions for directions not involving Lloyd's of London, and in particular whether the restrictions laid down in cases such as *Henderson's Trustees* v *Henderson* 1938

SC 461 still applied. In that case the court criticised the use of a petition for directions for questions which ought to be dealt with formally by special case or which could be settled without recourse to the court. In our view these criticisms cannot be levelled at the present application. The petitioner seeks answers to questions relating to the administration of the trust estate and the exercise of powers vested in it, requiring an immediate decision, and upon which it is entitled to seek the guidance of the court. The conditions stated by Lord President Normand in *Peel's Trustees* v *Drummond* (above) at page 794 are met. The questions are neither premature nor hypothetical, and we see no reason why, in modern practice, the petitioner should be required to resort to the more formal procedure of a special case.

[28] There is however an issue in relation to the presence of a contradictor. As already noted, the participating employers presented an argument which was wholly supportive of the petitioner. If there is a real contradictor, it is the Crown which might seek to argue that all or some of the assets in the fund ought to be treated as *bona vacantia* rather than being held on a resulting trust in favour of the employers. The petition was not served on the Crown and so no opportunity was afforded for such an argument to be presented. It is regrettable that service was not effected on the Crown, but in the circumstances of this case we are satisfied that it was unnecessary as none of the assets will become *bona vacantia*. As we explain below in our answers to questions 1 and 2, we accept that when the trust purpose is fulfilled the assets will be held on a resulting trust in favour of the participating employers. The reporter has thoroughly investigated whether any entitlement to share in the surplus remained vested in former participating employers which have been dissolved. He noted that the factual background had been investigated in a note by the Rt Hon JE Drummond Young identifying a number of companies which had been participating

employers at some point during the life of the scheme, but confirming that all of the companies so identified had ceased to be participating employers some time ago and had lost any right that they might otherwise have had to a share in the surplus. None of the assets would have fallen to be held on a resulting trust for them had the companies still existed, and so the fact they have been dissolved does not result in any assets becoming *bona vacantia*.

Question 1

[29] We answer this question in the affirmative. As the reporter has observed, the court is not asked to express an opinion on whether the petitioner's discretion should be exercised in the manner proposed. As the court made clear in *Trustees of the Joy Manufacturing Holdings Ltd Pension and Life Assurance Scheme* (above) at page 17, under reference to the authorities cited there, it is not open to trustees to surrender to the court a discretion that has been vested in them by the trust deed. That is not however what the petitioner seeks to do: it asks rather whether it is entitled to enter into the proposed arrangement. We agree with the reporter's reasons for concluding that it is so entitled. Entry into the buy-in stage of the arrangement, in terms of which an annual payment will be made to the petitioner by an insurer of a sum which matches the liability of the trustees to members of the scheme, falls within the scope of the petitioner's duty under clause 1 of the trust deed to hold and administer the fund. Entry into the buy-out stage is permitted by rules of the scheme which when read together allow, on a winding up of the scheme, the securing of benefits by the purchase of individual policies or annuity bonds.

[30] In relation to the limited grounds for interference by the court with the exercise of a trustee's discretion (see paragraph [17] above), we see no basis for such interference. The

petitioner has sought and obtained appropriate professional advice and has taken into account all material considerations. The arrangement as a whole benefits the members by removing the risk that at some future date the fund might come to be insufficient to meet the full cost of their pensions. The enhanced benefits secured for members have been the subject of lengthy negotiation in which the trustee has acted in the members' interests. In all the circumstances we are satisfied that entering into the proposed transaction is a decision that a pension trustee acting reasonably could make.

[31] A particular point arises in relation to those members who have made contributions in one way or another to the fund, as described in paragraph [22] above. For the reasons set out there, including the disproportionate cost of calculating the value of those individual members' contributions, the arrangement includes no provision for those members to receive any special treatment. In our view that decision too is one that the petitioner was entitled to take in the reasonable exercise of its discretion. A similar, though somewhat more extreme, situation arose in *Edge* v *Pensions Ombudsman* [2000] Ch 602 where, in order to reduce a surplus in the fund, the trustees reduced the contributions made by employers and employee members in service and increased pension benefits to members in service but did not confer any benefits on pensioners. The Pensions Ombudsman determined that the trustees had failed to act impartially as between members in service and pensioners, and directed that the amendments be set aside. The Court of Appeal, affirming the judgment of Scott V-C (at [1998] Ch 512), held that the trustees' duty was no more than the ordinary duty to exercise their discretion for its proper purpose giving due consideration to relevant matters and excluding the irrelevant, and that provided they did so, they could not be criticised if they appeared to prefer the claims of one interest over others. In a passage approved by the Court of Appeal and also applied by this court in *Trustees of the Joy*

Manufacturing Holdings Ltd Pension and Life Assurance Scheme (above) at pages 24-25,

Scott V-C observed (at 537):

> "In my judgment the trustees, in deciding how to reduce the surplus, had no duty to be impartial as between members in service and member pensioners. They were entitled to prefer the former. They were entitled to recommend a package which included reductions in the future contributions that the employers would have to pay…. The Pensions Ombudsman's conclusion is, in my judgment, a consequence of his attempt to put himself in the position of the trustees and himself to decide what was fair."

It is likewise not for this court to disturb the petitioner's decision not to attempt to calculate and confer benefits on those few members who made contributions of one kind or another to the fund, but rather to enter into an arrangement under which those members would benefit along with all the others from the proposed enhancements.

Question 2

[32] We answer this question in the affirmative. The concept of a resulting trust is explained in Menzies on Trustees (2nd ed, 1913) at paragraph 1044 as follows:

> "The truster has a radical beneficial interest in the trust estate. When the execution of all the practicable purposes of the trust fails to exhaust the estate, this radical beneficial interest comes into play, and a resulting trust in favour of the truster emerges."

In *Haig* v *Lord Advocate* (above), a case concerning the proper interpretation of a pension scheme trust deed, the Lord Ordinary (Kincraig) observed, *obiter*, at page 18:

> "If circumstances arise in which the trustees are holding funds without there being any provision in the trust deeds and rules directing them as to the disposal of the funds, the disposal must be regulated by the application of the law. If the law provides that, in the circumstances, the funds must be returned to the company, it is the law which so provides and not the deeds."

[33] The essence of the emergence of a resulting trust is that the purpose of the trust has been fulfilled, leaving a surplus of funds in the hands of the trustee which is not required for

the trust purposes. In those circumstances the truster becomes entitled to have the unused funds returned to him. On the basis of the facts set out in the petition and confirmed by the reporter, that is the position in relation to any surplus remaining in the hands of the petitioner after provision has been made for all of its liabilities to members and others, and for the expenses of completing the winding up of the fund.

Question 3

[34] We answer both parts of this question in the affirmative. Like the reporter, we interpret question 3 as asking whether resulting trust operates *only* in favour of such companies as are participating employers immediately before the date when no members remain in pensionable service under the scheme. In principle, any surplus is held on a resulting trust for those who provided it: *Air Jamaica Ltd* v *Charlton* (above) at page 1411. For the reasons already discussed, however, we are satisfied that no formerly participating employer whose participation has terminated retains any entitlement to share in the surplus.

[35] We are also satisfied that no resulting trust operates in favour of those members who made contributions to the fund. As senior counsel for the petitioner submitted, the character of those contributions was different from the character of the participating employers' contributions. The members' purpose was to obtain augmented pension entitlements, and that purpose has been achieved (with, indeed, further enhancement as a result of the arrangement). That is to be contrasted with the purpose of the participating employers' contributions, which was to fund the scheme and, in particular, to meet any deficit that might arise from time to time. The distinction was recognised in a slightly different context by Millett J in *In re Courage Pension Schemes* [1987] 1 WLR 495 at 514-5:

> "…[S]urpluses arise from what, with hindsight, can be recognised as past overfunding. Prima facie, if returnable and not used to increase benefits, they ought to be returned to those who contributed to them. In a contributory scheme, this might be thought to mean the employer and the employees in proportion to their respective contributions. That, however, is not necessarily, or even usually, the case. In the case of most pension schemes, and certainly in the case of these schemes, the position is different. Employees are obliged to contribute a fixed proportion of their salaries or such lesser sum as the employer may from time to time determine. They cannot be required to pay more, even if the fund is in deficit; and they cannot demand a reduction or suspension of their own contributions if it is in surplus. The employer, by way of contrast, is obliged only to make such contributions if any as may be required to meet the liabilities of the scheme."

In the present case, it was not the purpose of the employers' contributions to produce the surplus that has now arisen as a consequence of the investment policies adopted by the petitioner. The employers have not abandoned their entitlement as a matter of law to any such surplus. It is therefore the employers alone in whose favour the resulting trust operates.

[36] Finally, we agree with the reporter that a surplus cannot be said to have emerged until all of the scheme benefits have been secured by the issue of the individual contracts to members as part of the buy-out, and any other liabilities and the costs of the winding up have been met or provided for.

Disposal

[37] For these reasons we answer all of the questions in the affirmative. We find the petitioner entitled to the expenses of the petition out of the trust estate.