Neutral Citation Number: [2022] EWHC 2130 (Ch)

Case No: PE-2021-000010

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

IN THE MATTER OF THE CMG UK PENSION SCHEME

7 Rolls Buildings
Fetter Lane, London
EC4A 1NL

11 August 2022

Before:

MR JUSTICE LEECH

- -

Between:

CMG PENSION TRUSTEES LIMITED **Claimant**

- and –

CGI IT UK LIMITED **Defendant**

- -

MR ANDREW SHORT QC and **MS ELIZABETH GRACE** (instructed by **Addleshaw Goddard LLP**) appeared on behalf of the Claimant.

MR KEITH ROWLEY QC and **MR HENRY DAY** (instructed by **Gowling WLG (UK) LLP**) appeared on behalf of the Defendant.

Hearing dates: 28 and 29 April and 3 May 2022

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APPROVED JUDGMENT

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

I. Preliminary Matters

1. By Amended Claim Form dated 1 April 2022 the Claimant, CMG Pension Trustees Ltd (the "**Trustee**" or the "**Trustees**"), seeks the determination of certain issues relating to the construction and effect of Rule 5.11 ("**Rule 5.11**") of the current rules of the CMG UK Pension Scheme (the "**Scheme**") under CPR Part 8. On 28 September 1973 the Scheme was established and since that date the Trustee, which is a company limited by guarantee and was formerly known as CMG Computer Management Group (Pension Trustees) Ltd, has been the corporate and sole trustee of the Scheme.

2. The Defendant, CGI IT UK Ltd (the "**Employer**"), is the Scheme's Principal Employer and has been since 30 April 2010. The Claim Form was originally issued on 20 May 2021 and also named CMG Ltd ("**CMG**"), which was the Scheme's Principal Employer from 1 October 1973 until 29 April 2010, as the Second Defendant. CMG is no longer a party to the action (although nothing turns on this).

3. The Scheme is both a defined benefit pension scheme and a defined contribution pension scheme. This claim is concerned only with the defined benefit scheme which closed to future accrual on 30 April 2010 (when the change of Principal Employer took place). From 2009 onwards the Trustee and its advisers had begun to identify issues relating to the way in which benefit changes had been implemented and the Scheme had then been administered and which resulted in benefits being underpaid to members. The Trustee took steps to address these issues and then to pay off the arrears to members.

4. In September 2019 the question arose whether the Trustee should pay arrears to members which fell due for payment more than six years earlier. This issue turns on the construction and effect of Rule 5.11 and provoked a difference of view. The Employer contended that Rule 5.11 is a forfeiture provision and that its effect is (and was) to forfeit all sums which fell due for payment more than six years before. The Trustee argued that Rule 5.11 is not a forfeiture provision and did not have that effect in the present case.

5. I am now asked to determine nine issues which have arisen or may arise out of the construction and effect of Rule 5.11. The effect of Rule 5.11 turns (at least in part) on whether members entitled to benefits under the Scheme have made "claims" for those benefits within the six year period prescribed by the rule. For the purpose of deciding those nine issues I am asked to assume that claims were made on 1 October 2019 and

that no further claims were needed after that date (however I interpret the rule and determine the issues). It follows, therefore, that the six year claims "period" with which I am concerned runs from 1 October 2013 to 30 September 2019. It is common ground between the parties that arrears accruing on or after 1 October 2013 are not forfeit.

6. In section II (below), I set out the statutory history of forfeiture clauses in pension schemes which informs the provisions of the Scheme. In section III, I set out the development of the Scheme itself. In section IV, I deal with the administration of the Scheme and how the issues which I have to determine have arisen. In section V, I set out the legal principles applicable to the construction of pension schemes and in section VI, I set out the issues which I have been asked to determine. In section VII, I deal with the construction of Rule 5.11 and whether it is a forfeiture provision and in section VIII, I set out my decision and reasons in relation to each of the nine issues. Finally in section IX, I summarise my conclusions and the way in which I dispose of the claim.

7. Mr Andrew Short QC and Ms Elizabeth Grace appeared for the Trustee and Mr Keith Rowley QC and Mr Henry Day appeared for the Employer. Mr Short invited me to make representation orders in the form set out in paragraphs 2 and 3 of the Amended Claim Form which provides as follows:

> "2. An order pursuant to CPR 19, r 7 appointing the Claimant to represent all those persons actually or potentially entitled under the Scheme interested to argue that questions 26 to 32 above are to be answered in the manner that results in larger payments being made to members; that question 33.1 and 33.2.1 are to be answered in the affirmative and question 33.2.2 and 33.3 are to be answered in the negative;
>
> 3. An order pursuant to CPR 19, r 7 appointing the First Defendant to represent all current and former employers of the Scheme and all those persons actually or potentially entitled under the Scheme interested to argue that questions 26 to 32 above are to be answered in the manner that results in smaller or no payments being made to members; that question 33.1 and 33.2.1 are to be answered in the negative and questions 33.2.2 and 33.3 are to be answered in the affirmative."

8. Mr Rowley supported Mr Short's application and I will make the requested representation orders. I add that paragraphs 26 to 33 of the Amended Claim Form reflect the nine individual issues which I have been asked to determine and which I so determine in section VIII (below).

II. Statutory Background

9. Rule 5.11 (and the Scheme rules more generally) cannot be properly construed and understood without an awareness of the statutory background which goes back as far as 1973 (when the Scheme was itself established). For much of what follows I express my gratitude to Mr Rowley and Mr Day for their thorough and clear explanation of the statutory history.

(1) The Social Security Act 1973

10. In the Social Security Act 1973 Parliament first legislated to control forfeiture clauses in pension schemes. The purpose of the relevant statutory provisions was to protect against forfeiture the rights of members who left pensionable service before the "normal pension age" but remained entitled to "short service benefit" (both terms of art under the Act). Schedule 16, paragraph 17 provided as follows:

> "(1) No rule must operate so as to deprive a person of short service benefit (whether a member himself, or a member's widow or widower or dependant) by reference to— (a) failure by him or any other person to make a claim for the benefit or for any payment due as benefit; or (b) failure by him or any other person, at any time after termination of pensionable service, to give any notice, or comply with any formality, required by the scheme as a condition of entitlement.
>
> (2) Sub-paragraph (1)(a) above is not to prevent reliance on any enactment relating to the limitation of actions; and in cases of failure to claim, the scheme may provide for the right to receive any payment to be forfeited in the event of its not being claimed within 6 years of the date on which it became due."

11. Paragraph 17(2) permitted the trustees of a pension scheme, therefore, to rely on a defence of limitation. It also permitted (but did not require) a scheme to include a provision for forfeiture where no claim had been made for six years. Paragraph 18(1) also provided that a scheme could in certain limited circumstances contain a rule enabling the trustee to exercise a charge or lien over a member's short service benefit:

> "(1) A scheme must contain no rule enabling a member's employer to exercise any description of charge or lien on, or set-off against, short service benefit, to the extent that it includes transfer credits; but a charge or lien on, or set-off against, a member's short service benefit is permissible (insofar as it does not include transfer credits) for the purpose of enabling the employer to obtain the discharge by the member of some

> monetary obligation due to the employer and arising out of a criminal, negligent or fraudulent act or commission by the member."

(2) The Social Security Pensions Act 1975

12. Parliament took a similar approach in relation to "contracted out" benefits in the Social Security Pensions Act 1975. It introduced the state earnings related pension scheme (generally known as "**SERPS**") with effect from 6 April 1978, which provided an additional state pension (above the basic state pension). SERPS was replaced by the state second pension ("**S2P**") with effect from 6 April 1997.

13. Employers and employees could contract out of SERPS with reductions in the amount of national insurance contributions which both had to pay. But the employee had to be entitled to a minimum level of pension under the employer's occupational pension scheme known as a "**Guaranteed Minimum Pension**" or "**GMP**". More usually, however, the employee's benefits under the scheme would be significantly greater than their GMP.

14. Section 39 permitted the GMP of a member or widow to be suspended or forfeited in circumstances to be prescribed and Regulation 9(2) of the Occupational Pension Schemes (Contracting-out) Regulations 1975 (SI 1975/2101) contained the prescribed provisions. In particular, it provided as follows:

> "(2) For the purposes of the said section 39(4)(b) the circumstances in which schemes may provide for an earner's or widow's guaranteed minimum pension (whether current or prospective) to be forfeited are—
>
> (a) where the person entitled to that benefit has been convicted of— (i) an offence of treason, or (ii) one or more offences under the Official Secrets Acts 1911-1939 for which he has been sentenced on the same occasion to a term of imprisonment of, or to 2 or more consecutive terms amounting in the aggregate to, at least 10 years;
>
> (b) in the case of a widow's guaranteed minimum pension, where the earner by reference to whose contracted-out employment that pension is payable had been convicted of an offence of treason, or had been convicted of offences and had been sentenced to terms of imprisonment as set out in sub-paragraph (a)(ii) above;
>
> (c) in the case of any payment of guaranteed minimum pension for which a claim has not been made, where a period of at least 6 years has elapsed from the date on which that payment became due; or
>
> (d) in the case of any guaranteed minimum pension payable under a scheme for members of Her Majesty's forces, being a scheme for which

> the Secretary of State is responsible, where the person entitled to that benefit or, as the case may be, the member of such forces has in the opinion of the Secretary of State committed an act which is gravely prejudicial to the defence, security or other interests of the state; and where forfeiture of an earner's guaranteed minimum pension is permitted by this sub-paragraph, the prospective widow's guaranteed minimum pension may also be forfeited."

(3) The Pension Schemes Act 1993

15. Section 78 of the Pension Schemes Act 1993 replaced paragraph 17 of Schedule 16 to the Social Security Act 1973 (above). Section 21 of the Pension Schemes Act 1993 also replaced section 39 of the Social Security Pensions Act 1975. It was headed "Commutation, surrender and forfeiture" and because both the 2000 Rules and the 2004 Rules (as defined below) refer to it specifically, I set it out in full:

> "(1) Where the annual rate of a pension required to be provided by a scheme in accordance with section 13 or 17 would not exceed the prescribed amount and the circumstances are such as may be prescribed, the scheme may provide for the payment of a lump sum instead of that pension.
>
> (2) Neither section 13 nor section 17 shall preclude a scheme from providing for the earner's or the earner's widow's or widower's guaranteed minimum pension to be suspended or forfeited in such circumstances as may be prescribed."

16. By this time Regulation 35(2) of the Occupational Pension Schemes (Contracting-out) Regulations 1984 (SI 1984/380) had already replaced Regulation 9(2) of the 1975 Regulations (above). However, Regulation 35(2) was itself replaced by Regulation 61 of the Occupational Pension Schemes (Contracting-out) Regulations 1996 (SI 1996/1172) which provided as follows:

> "(1) For the purposes of section 21(2) of the 1993 Act (suspension and forfeiture of guaranteed minimum pension) the circumstances in which a scheme may provide for an earner's or an earner's widow's or widower's guaranteed minimum pension to be suspended are—
>
> (a) that the pensioner is, in the opinion of the trustees of the scheme, unable to act by reason of mental disorder or otherwise and there is provision in the scheme for sums equivalent to the guaranteed minimum pension to be paid or applied, while the pensioner is so unable, for the maintenance of the pensioner or, at the discretion of the trustees, of the pensioner together with his dependants or of his dependants only, and to the extent that they

> are not so applied, to be held for the pensioner until he is again able to act or, as the case may be, for his estate;
>
> (b) that the pensioner is in prison or detained in legal custody, and there is provision in the scheme for sums equivalent to the guaranteed minimum pension to be paid or applied during such circumstances for the maintenance of such one or more of the pensioner's dependants as the trustees of the scheme may in their discretion determine; and
>
> (c) that the earner is re-employed by the employer who had previously employed him in contracted-out employment in respect of which the guaranteed minimum pension became payable or in any other employment to which the scheme paying the guaranteed minimum pension applies and there is provision in the scheme for the guaranteed minimum pension which becomes payable when the suspension is lifted to be increased in accordance with section 15(1) of the 1993 Act.
>
> (2) For the purposes of section 21(2) of the 1993 Act the circumstances in which a scheme may provide for an earner's or an earner's widow's or widower's guaranteed minimum pension (whether current or prospective) to be forfeited are—
>
> (a) that the person entitled to that pension has been convicted of— (i) an offence of treason, or (ii) one or more offences under the Official Secrets Acts 1911 to 1989 for which he has been sentenced on the same occasion to a term of imprisonment of, or to two or more consecutive terms amounting in the aggregate to, at least 10 years;
>
> (b) in the case of a widow's or widower's guaranteed minimum pension, that the earner by reference to whose contracted-out employment that pension is payable has been convicted of an offence of treason, or has been convicted of offences and has been sentenced to terms of imprisonment as set out in sub-paragraph (a)(ii);
>
> (c) in the case of a guaranteed minimum pension payable under a scheme for members of Her Majesty's forces, being a scheme for which the Secretary of State is responsible, that the person entitled to that pension or, as the case may be, the member of the forces whose widow or widower is currently or prospectively entitled to that pension, has in the opinion of the Secretary of State committed an act which is gravely prejudicial to the defence, security or other interests of the State; and
>
> (d) in the case of any payment of guaranteed minimum pension for which a claim has not been made, that a period of at least 6 years has elapsed from the date on which that payment became due."[1]

(4) The Pensions Act 1995

17. In September 1993 the Pension Law Review Committee published its report on Pension

[1] The period of 6 years was extended to 8 years by the Occupational Pension Schemes (Schemes that were Contracted-out) (No 2) Regulations 2015 (SI 2015/1677). Contracting out was abolished altogether with effect from 6 April 2016.

Law Reform (known as the "**Goode Report**"), advocating the prohibition of forfeiture provisions. The committee considered that the rules relating to charge, lien and set off were broadly satisfactory: see §4.14.30. But they made the following recommendation at §4.14.29 in relation to forfeiture provisions:

> "Except in relation to GMPs and short service benefits, scheme documents are free to provide any other grounds of forfeiture which is not inconsistent with legislation (such as discrimination), even if not involving misconduct. We consider that *a fortiori* such provisions should be made void."

18. Parliament did not accept that recommendation or implement it in full. In sections 91 and 92 of the Pensions Act 1995, however, it introduced general statutory controls which reflected the existing controls over short service benefits and GMPs. Section 91 was headed "Inalienability of occupational pension" and sub-sections (1) and (2) continue to provide as follows:

> "(1) Subject to subsection (5), where a person is entitled to a pension under an occupational pension scheme or has a right to a future pension under such a scheme — (a) the entitlement or right cannot be assigned, commuted or surrendered, (b) the entitlement or right cannot be charged or a lien exercised in respect of it, and (c) no set-off can be exercised in respect of it, and an agreement to effect any of those things is unenforceable.
>
> (2) Where by virtue of this section a person's entitlement to a pension under an occupational pension scheme, or right to a future pension under such a scheme, cannot, apart from subsection (5), be assigned, no order can be made by any court the effect of which would be that he would be restrained from receiving that pension."

19. Sub-section (5) contained a number of limited exceptions enabling an assignment in favour of the member's widow, widower, civil partner or dependant or a surrender for the purpose of providing benefits to the same class or a commutation for ill-health. Sub-section (6) also limited the power to charge or to exercise a lien or right of set off over or against a member's interests and I set it out in full (below) when I consider it in greater detail. Section 92 was headed "Forfeiture etc" and it also remains in force. It provides as follows:

> "(1) Subject to the provisions of this section and section 93, an entitlement to a pension under an occupational pension scheme or a right to a future pension under such a scheme cannot be forfeited.

> (2) Subsection (1) does not prevent forfeiture by reference to— (a) a transaction or purported transaction which under section 91 is of no effect, whether or not that event occurred before or after the pension became payable.
>
> (3) Where such forfeiture as is mentioned in subsection (2) occurs, any pension which was, or would but for the forfeiture have become, payable may, if the trustees or managers of the scheme so determine, be paid to all or any of the following— (a) the member of the scheme to or in respect of whom the pension was, or would have become, payable, (b) the spouse, civil partner, widow, widower or surviving civil partner of the member, (c) any dependant of the member, and (d) any other person falling within a prescribed class.
>
> (4) Subsection (1) does not prevent forfeiture by reference to the pensioner, or prospective pensioner, having been convicted of one or more offences— (a) which are committed before the pension becomes payable, and (b) which are— (i) offences of treason, (ii) offences under the Official Secrets Acts 1911 to 1989 for which the person has been sentenced on the same occasion to a term of imprisonment of, or to two or more consecutive terms amounting in the aggregate to, at least 10 years, or (iii) prescribed offences.
>
> (5) Subsection (1) does not prevent forfeiture by reference to a failure by any person to make a claim for pension— (a) where the forfeiture is in reliance on any enactment relating to the limitation of actions, or (b) where the claim is not made within six years of the date on which the pension becomes due.
>
> (6) Subsection (1) does not prevent forfeiture in prescribed circumstances.
>
> (7) In this section and section 93, references to forfeiture include any manner of deprivation or suspension."

20. Section 92 is permissive in the same way as its more limited statutory predecessors under the 1973 and 1975 Acts. As Mr Rowley submitted, it was (and remains) a matter of scheme design whether or not to include a forfeiture provision. Further, if the scheme designer did (and does) include such a provision, it only took (and takes) effect to the extent that it complies with the statutory criteria.

21. Section 93 also provided (and continues to provide) that section 92(1) (above) does not prevent forfeiture of a member's pension entitlement where that person has incurred liability to the employer arising out of a criminal, negligent or fraudulent act or omission (provided that the member's entitlement is not forfeited by a greater amount):

> "(1) Subject to subsection (2), section 92(1) does not prevent forfeiture of a person's entitlement to a pension under an occupational pension scheme or right to a future pension under such a scheme by reference to the person

> having incurred some monetary obligation due to the employer and arising out of a criminal, negligent or fraudulent act or omission by the person.
>
> (2) A person's entitlement or right may be forfeited by reason of subsection (1) to the extent only that it does not exceed the amount of the monetary obligation in question, or (if less) the value (determined in the prescribed manner) of the person's entitlement or right.
>
> (3) Such forfeiture as is mentioned in subsection (1) must not take effect where there is a dispute as to the amount of the monetary obligation in question, unless the obligation has become enforceable under an order of a competent court or in consequence of an award of an arbitrator or, in Scotland, an arbiter to be appointed (failing agreement between the parties) by the sheriff.
>
> (4) Where a person's entitlement or right is forfeited by reason of subsection (1), the person must be given a certificate showing the amount forfeited and the effect of the forfeiture on his benefits under the scheme.
>
> (5) Where such forfeiture as is mentioned in subsection (1) occurs, an amount not exceeding the amount forfeited may, if the trustees or managers of the scheme so determine, be paid to the employer."

III. The Scheme

22. By interim deed dated 28 September 1973 the Scheme was established and the Trustee was appointed as the sole trustee. It provided that the "**Commencing Date**" of the Scheme was to be 1 October 1973. Neither party relied on the terms of the interim deed and I do not consider it further.

(1) The 1981 Deed and Rules

23. By a definitive deed dated 11 March 1981 and made between CMG (1) and the Trustee (2) (the "**1981 Deed**") the parties agreed that with effect from 1 June 1977 the Scheme was to be administered in accordance with the provisions of the 1981 Deed and the attached rules (the "**1981 Rules**"). The copy before me was date stamped 19 March 1981 but the parties agreed that the true date of execution was 11 March 1981. Clause 3 of the 1981 Deed set out the objects of the Scheme:

> "(A) The Principal Company hereby confirms the establishment of the Scheme as provided by the Interim Trust Deed aforesaid the objects whereof are to provide Relevant Benefits for the Members of the Scheme from time to time in accordance with these presents and the Rules as from time to time amended.
>
> (B) The Principal Company covenants with the Trustees to pay or cause to be paid to the Trustees all contributions to be contributed to the Fund in accordance

> with the Rules together with any expenses of administration which the Trustees cannot meet out of the assets held by them without prejudicing the benefits to be provided under the Scheme.
>
> (C) All contributions under the Rules and other assets of the Scheme and any other moneys or assets received or to be received in respect of or for the purposes of the Scheme shall be vested in the Trustees who shall stand possessed thereof upon irrevocable trust to hold apply and dispose of the same as provided by the Trust Deed and the Rules."

24. Clause 7 of the 1981 Deed was headed "Power of Alteration" and it then provided as follows:

> "The Trustees may at any time with the consent of the Principal Company and without the concurrence of the Members by deed alter or repeal all or any of the provisions of this Deed or of the Rules for the time being in force and may make any new provisions to the exclusion of or in addition to all or any of the existing provisions and any provisions so made shall be subject in like manner to be altered or modified. Any alteration, repeal or addition which may be effected in the exercise of the power herein contained shall be notified to the Members by posting the same in some conspicuous place in the works and offices of the Employers provided always that:
>
> (i) no alteration, repeal or addition shall without the written consent of the Member operate so as to affect or prejudice the rights or interests of any person already a Member or any person receiving benefit by virtue of the Membership of any deceased Member insofar as they concern benefits secured in respect of Service prior to the date of such alteration, modification or addition except insofar as any such operation (whether retrospective or otherwise) may be necessary in order to secure approval or continued approval of the scheme under the Finance Act 1970 or other relevant legislation under which the approval of the Inland Revenue Authorities to the Scheme has been received or is sought.
>
> (ii) no alteration, repeal or addition shall operate so as to adversely affect or prejudice any pension in course of payment at the date of such alteration, modification or addition or to adversely affect or prejudice the rights or interests of any Member whose Participating Membership had ceased at or prior to the date of such alteration, modification or addition.
>
> (iii) there shall be no alteration which shall result in the return to any of the Employers of any part of the Fund except for a fortuitous surplus upon the winding-up of the Scheme."

25. Clause 11 was headed "Trustees' power to augment Benefits" and it also provided as follows:

> "The Trustees with the consent of the Principal Company may (i) increase the pension or other benefits payable under the Rules to or on the death of

> any Member (ii) provide pension for the surviving spouse or any other Dependant of any Member and increase the same (iii) provide pension and other benefits to or on the death of any former employee of any of the Employers and increase such pension
>
> Provided that (a) the total pension or other benefits payable to or on the death of any Member or to any surviving spouse or other Dependant of any Member shall not exceed any maximum specified in the Rule headed Limitation of Benefits, and (b) any lump sum payable under the provisions of Rule 9 (c) and (d) shall not be increased (other than as a consequence of an earlier increase in the Member's pension to which any lump sum is related) and no further lump sum shall be payable to the Member after the commencement of pension payments to him, and (c) before granting any pension or other benefit under (iii) above the Trustees shall obtain confirmation from the Commissioners of Inland Revenue that the approval of the Scheme under Chapter II of Part II of the Finance Act 1970 shall not be prejudiced, and (d) the Employer shall if required by the Trustees pay such additional contributions as may be necessary to provide such additional benefits under (i) (ii) or (iii) above."

26. Clause 16 provided that payment of benefit was conditional upon production of evidence or information which the Trustees might reasonably require (a provision which is not found in the subsequent deed or deeds). The Second Schedule contained the Rules and section 1 contained the definitions used in them. It did not contain a rule or clause dealing with the interpretation to be placed on headings used in the Rules.

27. Rule 14 was headed "Limitation of Benefits". The provision was very detailed and it is enough for present purposes to record that Rule 14(a)(1) provided for the payment of a pension of 1/60th of final remuneration for each year of service subject to a maximum of 40 years. Rule 15 which is directly relevant to the issues which I have to determine was headed "Deductions from Benefits" and Rule 15(b) contained the following provisions which gave the Scheme's employers a right to set off against a member's pension entitlements or to exercise a lien over them in certain circumstances:

> "(b) Notwithstanding anything contained in these Rules a Member's Employer shall be entitled to a charge or lien on or set off against (as may be appropriate) any benefit or prospective benefit to which the Member may become entitled under the provisions of these Rules for the purpose of enabling the Employer to obtain the discharge by the Member of some monetary obligation due to the Employer and arising out of a criminal, negligent or fraudulent act or omission by the Member. Provided that:
>
> (i) in respect of any such obligation, the amount recovered by the Employer out of the Fund shall be limited to the actuarial value of the Member's accrued benefits (whether actual or prospective) at the time of such

> recovery or the amount of the obligation whichever shall be the less (subject to any different agreement in writing between the Employer and the Member), and
>
> (ii) the Member shall be entitled to a certificate showing the amount recovered and its effect on his benefits or prospective benefits, and
>
> (iii) in the event of any dispute as to the amount to be recovered the Employer shall not be entitled to enforce such charge lien or set off except after the obligation has become enforceable under an order of a competent court or the award of an arbitrator or in Scotland an arbiter to be appointed (failing agreement between the parties) by the Sheriff
>
> (iv) notwithstanding (i) above the Employer shall have no entitlement to recovery out of the Fund in respect of any benefits or prospective benefits granted in relation to a transfer payment to the Fund in accordance with the provisions of Clause 15 of the Trust Deed."

28. Rule 16 was headed "Bankruptcy or attempted anticipation of benefits" and it provided for the vesting of a member's interests in the Trustees in a number of specified circumstances:

> "If a Member becomes bankrupt or attempts to assign charge or in any way to anticipate other than as provided by these Rules the benefits to which during his lifetime he may be entit1ed under the Scheme then all rights and benefits defined by the Rules in respect of such Member shall vest in the Trustees who in cases of hardship may at their discretion apply such amounts as would otherwise be due to the Member in such manner and in such proportions as they may decide for the benefit of the Member or his Dependants provided that no such payment shall be made directly or indirectly to or for the benefit of any purported assignee."

29. Both the Social Security Act 1973 and the Social Security Pensions Act 1975 were in force when the Scheme was established. The Scheme designer chose to include a forfeiture provision and Rule 18 (which was headed "Forfeiture of unclaimed benefits") provided as follows:

> "(a) Any benefit or instalment thereof payable under the Scheme which is not claimed within six years of the event giving rise to the due date of payment of such benefit or instalment thereof as the case may be shall, unless the Trustees otherwise determine, be forfeited and the proceeds shall revert to the Fund.
>
> (b) In the event that the Crown or the Duchy of Lancaster or the Duchy of Cornwall or any foreign country or state or agency or other authority thereof would become entitled directly or indirectly to a deceased's estate to which, apart from the provisions of this paragraph (b), there would be any benefit payable under the Scheme, such benefit shall revert to the Fund."

(2) The 1988 Deed and Rules

30. By a deed of variation dated 6 December 1988 (the "**1988 Deed**") the 1981 Rules were revoked and, although the 1981 Deed remained the Definitive Deed for the purposes of the Scheme, new Rules (the "**1988 Rules**") were adopted for the Scheme in their entirety. Section 1 contained the definitions section but still contained no provision dealing with the interpretation of headings. Rule 18 was headed "Benefits Non-assignable". Rule 18.1 was entirely new but Rule 18.2 replaced Rule 16 of the 1981 Rules (above) as follows:

> "18.1 Non-Assignability
>
> The benefits under the Scheme are strictly personal and may not be assigned, whether in security or otherwise mortgaged. or otherwise disposed of except as provided in the Rules.
>
> 18.2 Bankruptcy Or Attempted Anticipation Of Benefits
>
> If a Member becomes bankrupt or attempts to assign charge or in any way to anticipate other than as provided by these Rules the benefits to which during his lifetime he may be entitled under the Scheme then all rights and benefits defined by the Rules in respect of such Member shall vest in the Trustees who in cases of hardship may at their discretion apply such amounts as would otherwise be due to the Member in such manner and in such proportions as they may decide for the benefit of the Member or his Dependants provided that no such payment shall be made directly or indirectly to or for the benefit of any purported assignee."

31. The 1973 Act and the 1975 Act still remained in force when the 1988 Deed and Rules were brought into force.[2] Rule 20 was headed "Lien and Forfeiture" and replaced both Rule 15 and Rule 18 of the 1981 Rules. Rule 20.2 replaced Rule 16(a) and introduced what is now Rule 5.11 in the following form:

> "20.1 Benefit Lien
>
> 20.1.1 Subject to Rules 23 and 24 the Trustees at the request of the Principal Employer may reduce the benefit entitlement in respect of a Member under the Scheme by an amount equivalent to any debt or liability due to an Employer arising out of the Member's criminal, negligent or fraudulent act or omission provided that
>
> (i) the amount recovered shall not exceed the lesser of (a) the amount of the debt or liability, and (b) the actuarial value calculated by the Trustees on a basis certified as reasonable by an Actuary of the actual or prospective benefits in respect of the Member under the Rules on the date on which the debt or sum is established,

[2] By this time the 1984 regulations had replaced the 1975 regulations.

> (ii) any benefit derived from a transfer value received under Rule 13.1 shall be exempted from the provisions of this Rule unless the Occupational Pension Board specifically consent otherwise,
>
> (iii) the Member shall be given a certificate by the Trustees showing the amount recovered and the effect on his benefit entitlement, and
>
> (iv) in the event that the Member and the Employer are in dispute as to the amount due to be recovered the Trustees shall only be enabled to act in the foregoing terms after receiving satisfactory evidence of either the Member's acceptance in writing or an order enforceable in a court of law or the award of an arbitrator or arbiter, of the amount to be recovered.
>
> 20.2 Benefit Forfeiture
>
> Notwithstanding Rule 24 if a benefit or instalment of benefit is not claimed by or on behalf of the person entitled to the benefit or instalment in accordance with these Rules within 6 years of its date of payment it shall be retained by the Trustees for the purposes of the Fund."

32. Rule 21 provided that the Trustees could amend the Rules with the consent of the Principal Employer. Section VII was headed "Contracting Out" and Rule 24 was headed "Contracting-Out under the 1975 Act". It provided a detailed machinery for giving effect to a member's GMP. It is unnecessary to set out the detail beyond observing that the designer of the 1988 Rules chose not to include a provision for the forfeiture of a member's GMP and that Rule 24.1 (which was headed "General") provided as follows:

> "24.1.1 The provisions of this Rule shall apply to any employment which becomes a contracted-out employment by reference to the Scheme from the date that such employment is contracted-out and the provisions of Rule 24 shall override any other provisions of the Scheme which are inconsistent therewith in relation to such contracted-out employment except the provisions of Rule 21.
>
> 24.1.2 The provisions of this Rule take the place of and cancel the provisions of any previous rule or provision adopted under interim documentation to satisfy the requirements of the 1975 Act."

(3) The 1991 Deed

33. The Scheme originally provided for a "**Normal Retirement Date**" or "**NRD**" of 65 years old for men and 60 years old for women. In *Barber v Guardian Royal Exchange Assurance Group* [1991] QB 344 the European Court of Justice held that benefits under an occupational retirement scheme had to be equal for both men and women and by a deed of rectification and variation dated 15 April 1991 (the "**1991 Deed**") the Trustees and CMG agreed to amend the 1988 Deed and Rules to give effect to the *Barber* decision

and to equalise the NRD for both male and female members at the age of 65 for all members whose employment commenced after 1 January 1991. I return to the effect of the *Barber* decision (below).

(4) The 1992 Deed

34. By a deed of variation dated 30 June 1992 (the "**1992 Deed**") the Trustees and CMG also agreed to amend the Scheme with effect from 1 July 1992 to restrict the definition of pensionable salary to basic salary and to modify the booklet accompanying the Scheme and called "Guide to the CMG (Computer Management Group) Limited UK Pension Scheme" (which was introduced in May 1993).

(5) The 1995 Deed and Rules

35. By a deed of variation dated 6 April 1995 (the "**1995 Deed**") the 1988 Rules were revoked and new Rules (the "**1995 Rules**") were adopted for the Scheme in their entirety. The 1995 Rules purported to take effect from 14 March 1989 and to introduce new salary definitions. In particular, they introduced a new definition of "total earnings" which had not appeared in the 1992 Deed.

36. Section 1 continued to list the definitions used in the Rules but again contained no provision dealing with the interpretation of headings. Section 9 dealt with the pensions of the widows and widowers of members of the Scheme. Because of the tax regime it was also essential that the benefits of members or their surviving spouses did not exceed the prescribed tax limits or the Scheme was at risk of losing its status as an approved scheme. For this reason section 9.2 contained a series of "Pension Conditions" designed to achieve this:

> "(a) The amount of pension payable to the widow shall not exceed the Maximum Widow's, Widower's or Dependant's Pension nor shall the provision of any pension payable to any other person under Rule 9.0 cause this limit to be exceeded.
>
> (b) No pension shall be payable if the whole of the pension in respect of the Member has been commuted for a cash sum in accordance with the provisions of Rule 7.2.
>
> (c) In cases where at the time of the Member's death he was not living with his lawful spouse (and whether or not such spouse was dependent upon the Member for the provision of all or any of the ordinary necessaries of life) the Trustees shall have a discretion to pay a pension not exceeding the

> difference between the amount of pension payable under Rule 9.1 above and the amount of GMP (if any) payable to his lawful spouse in accordance with the provision of the paragraph below to any other Dependant of the Member selected by them and to the extent that they exercise the discretion hereby conferred the rights of the lawful spouse of the Member shall be abrogated in whole or in part, as the case may be.
>
> The Widow's GMP or Widower's GMP, as appropriate, in respect of a Contracted-out Member shall be payable to the spouse and only the value of the pension in excess of the Widow's GMP or Widower's GMP shall be applied to provide pension of the amount calculated by the Administrator on the life of any one or more of the Member's Dependants which the Trustees in their absolute discretion shall decide.
>
> (d) If a Member marries after termination of his Pensionable Service and dies within six months of such marriage, the pension payable to a spouse under Rule 9.1 shall not exceed the Widow's GMP or Widower's GMP.
>
> (e) Where a surplus arises under this Rule on account of the operation of conditions (a) or (c) above, it shall be retained by the Trustees for the purposes of the Fund.
>
> (f) If at the date of payment of the widow's pension the aggregate amount of pension payable to the widow under the Scheme and all other retirement benefit schemes {as defined in Section 611(1) of the Taxes Act) relating to the Employer does not exceed £104 per annum (or any other amount prescribed by regulations made under Section 77(5)(6) of the 1993 Act and consistent with Revenue Approval), an equivalent cash sum calculated by the Trustees on a basis certified as reasonable by an Actuary may be paid to the widow in lieu of such widow's pension under the Scheme."

37. Rule 18 of the 1988 Rules (Benefits Non-Assignable) was repeated in the 1995 Rules but this time renumbered as Rule 17. Rule 20 of the 1988 Rules (Benefit Lien) was also repeated in the 1995 Rules but renumbered this time as Rule 19. Rule 19.2 (Benefit Forfeiture) was expressed to take effect "notwithstanding Rule 23". Rule 23 replaced Rule 24 of the 1988 Rules. The principal differences between the former and the latter reflected the fact that the Pension Schemes Act 1993 had now replaced the 1975 Act.

(6) The 1995 Announcement

38. On 10 October 1995 the Trustee made an announcement to members extending the equalisation of the NRD. It announced that there would be equalisation of the NRD for those members who had joined the Scheme before 1 January 1991 and that the equalisation was intended to take effect on 1 January 1996.

(7) The 1997 Announcement

39. On 17 January 1997 the Trustee also announced to members that the accrual rate of 1/60th of final remuneration for each year of service (subject to a maximum of 40 years) which had been introduced by the 1981 Deed and Rules was to be changed to 1/80th of final remuneration with effect from 1 April 1997.

(8) The 1998 Deed

40. By a supplemental deed of trust dated 10 November 1998 (the "**1998 Deed**") the Trustee made a number of changes to both the 1981 Deed (which remained the definitive deed of the Scheme for the time being) and the 1995 Rules. It provided for the implementation of new terms "**Scheme Salary**" and "**Basic Salary**" with effect from 1 January 1995 and also for an NRD of 65 years old for any employee whose employment commenced before 1 January 1991 and who reached that age after 1 January 1996. The 1998 Deed did not, however, make any change to the accrual rate to reflect the earlier announcement.

(9) The 2000 Deed and Rules

41. By a new definitive deed dated 29 November 2000 and made between CMG (1) and the Trustee (2) (the "**2000 Deed**") the Trustee (with the consent of CMG as the Principal Employer) declared that the 2000 Deed together with the rules annexed to it (the "**2000 Rules**") was to replace the 1981 Deed with effect from 1 April 2007. The 2000 Deed and the 2000 Rules were defined together as the "**Principal Deed**". This declaration of trust was, however, expressly made subject to a proviso that the rights of those members who were in receipt of (or entitled to) a pension before 1 April 2000 remained unaffected. The proviso was in the following form:

> "(i) the relevant provisions of the Former Definitive Deed shall apply in respect of the payment of any benefit or instalment thereof which was due to be made prior to the Revision Date
>
> (ii) each person who on the Revision Date is under the Former Definitive Deed – (a) in receipt of a Pension or (b) entitled to payment of a deferred Pension which has not commenced to be paid or (c) contingently entitled to payment of a Pension or other benefit on the death of a person to whom (a) or (b) above applies
>
> is entitled under the Principal Deed to a Pension or other benefit of the same amount payable at the same time for the same period and subject to the same guarantee as the Pension or other benefit to which that person is entitled under the Former Definitive Deed and in its application to such

> person any reference in the Principal Deed to a Member or other beneficiary shall be construed accordingly"

42. Rule 1.4 of the 2000 Deed ("**Rule 1.4**") now provided that "the heading to any particular clause or rule is included for convenience and does not affect the meaning of that clause or rule". This marked a change from the 1981 Deed and Rules and also the 1988 and 1995 Rules none of which contained such a provision. The 2000 Rules did not define the term "benefit" but the word was used throughout. The term "Pension" was, however, defined as an "annual pension" and the term "Periodic Instalment" as "a quarterly (or such other frequency as the Trustees from time to time decide) instalment thereof". Rule 3 was headed "Benefits payable under the Scheme" and Rules 3.1 and 3.2 (which began a section headed "Retirement Pensions") provided as follows:

> "3.1 *General restrictions*
>
> The benefits payable under or by reference to rule 3 shall be subject to any other provision in the Principal Deed affecting the amount or payment thereof and to the provisions of any order made by a United Kingdom court in consequence of the Member's divorce
>
> 3.2 *Pension on Retirement at Normal Retirement Date*
>
> On the Normal Retirement Date an Active Member shall be entitled to a Pension equal in amount to the Retirement Pension and payable for life from the Normal Retirement Date in accordance with and subject to rules 3.4 and 3.6 and such Pension shall if necessary be increased to an amount which satisfies the requirements of section 87(3) of the Pension Schemes Act"

43. Clause 3.3 provided a detailed regime for the calculation of pension where the member chose to retire before their NRD. Clause 3.4 provided a corresponding regime for the calculation of pension where the member chose to retire after their NRD and clause 3.5 gave an option to the member to convert their pension for the benefit of a spouse or other dependant. Clause 3.6 dealt with the mechanics of payment and clause 3.7 which was headed "Commutation of Pensions" provided as follows:

> "3.7 *Commutation Option*
>
> A Member who on his Retirement Date is entitled to a Pension under rule 3 may by written request to the Trustees on or before his Retirement Date and subject to rule 2.4 elect to commute such Pension or part thereof for a lump sum not greater in amount than the Retirement Lump Sum and thereupon such Pension shall be reduced by the pension equivalent

> (calculated in accordance with rule 3.8) of the lump sum payable or cancelled as appropriate PROVIDED THAT -
>
> (i) the Trustees shall subject to rule 5.1 commute any Pension which when aggregated with any Pensions payable to that Member from all Associated Schemes (as defined in Schedule I) is not more than the Trivial Amount whether the Member so requests or not
>
> (ii) the Trustees may at the Member's written request and with the agreement of the Board of Inland Revenue (where required) commute his Pension or any part thereof if he is in exceptionally serious ill health (that is to say Incapacity which in the opinion of the Trustees acting on the advice of a registered medical practitioner reduces the Member's expectation of life to less than one year)
>
> (iii) any lump sum payable hereunder shall not be paid before the Retirement Date EXCEPT THAT - (a) in respect of a Member other than a Class A Member (as defined in Schedule I) who is entitled to a Pension under rule 3.4 such lump sum may with his Employer's consent be paid at any time on or after the Normal Retirement Date but if a lump sum is paid under the Scheme before a Member's Retirement Date no further lump sum shall be payable to the Member hereunder and (b) in respect of a Member who is entitled to Preserved Pension whereof payment is to commence before Normal Retirement Date in accordance with rule 3.21 such lump sum may be paid on the date whereon payment of the Preserved Pension is to commence
>
> (iv) the Trustees shall commute any Pension or part of such Pension which is required to be commuted under the provisions of an order made by a United Kingdom court in consequence of the Member's divorce"

44. Clauses 3.9 to 3.12 formed a section of the Rules headed "Benefits payable in the event of death". They were also followed by a separate proviso. For present purposes it is enough to set out Rules 3.9 and 3.12 together with clause (ii) of the proviso:

> "3.9 *Death in Service lump sum benefits*
>
> In the event of the death of a Member in Service (other than a Member who has ceased to be an Active Member in accordance with rule 1.5 or 1.6) there shall be payable in accordance with and subject to rule 3.12 the Lump Sum Death Benefit and if such death occurs before Normal Retirement Date a refund of contributions equal to the Member's Fund
>
> …….
>
> 3.12 *Payment of Lump Sum Death Benefits*
>
> The Trustees shall have power to pay or apply any lump sum which may be payable on the death of a Member to or for the benefit of all or any one or more to the exclusion of the other or others and in such proportions as the Trustees decide of -
>
> (a) the Member's spouse or

> (b) the parents or grandparents (whether by blood or adopted) of the Member
>
> (c) any person (except the Member) who is the child or remoter issue (whether by blood or adopted) of such grandparents and the spouse of any such person
>
> (d) any other person or persons (including for this purpose any charity society club or other similar organisation) whom the Member has in a written notice to the Trustees nominated as a beneficiary of such lump sum or part thereof or
>
> (e) the personal representatives of the Member
>
> PROVIDED THAT –
>
> …….
>
> (ii) if the Crown the Duchy of Cornwall or the Duchy of Lancaster shall become entitled directly or indirectly to the Member's estate to which apart from this proviso such lump sum or any remaining part thereof would be payable the same shall forthwith be forfeited and shall be applied by the Trustees to any other object of the Scheme"

45. Rule 3.27 was headed "Augmentation and discretionary benefits" and it conferred a number of powers on the Trustees. The exercise of those powers was also made subject to a separate proviso. Again, it is sufficient for present purposes to set out the principal rule together with clause (iii) of the proviso:

> "3.27 The Trustees shall have power with the written consent of the Principal Employer -
>
> (a) to increase the amount of any benefit which is payable to or in respect of a Member and which is less than the maximum amount permitted by Schedule I in respect of such benefit to an amount not exceeding the said maximum amount and
>
> (b) to provide for Dependants of a deceased Member a benefit or benefits (being relevant benefits as defined in section 612(1) of the Taxes Act) for which provision is not otherwise made hereunder and increase the same
>
> (c) to provide Pension and other benefits (being relevant benefits as aforesaid) to or on the death of any fonner Employee of any of the Employers and increase the same
>
> PROVIDED THAT –
>
> ……
>
> (iii) the Employer or the Member in respect of whom benefits are being augmented shall if required by the Trustees pay such additional contributions (if any) as are determined by the Trustees acting on the advice of the Scheme Actuary to be necessary for the provision of such increase or benefit"

46. Section 5 was headed "General Provisions". Rules 5.1 to 5.5 dealt with a number of discrete points and neither the Trustee nor the Employer placed any great reliance upon them and it is unnecessary for me to set them out. Rules 5.6, 5.7, 5.8 and 5.11 were, however, the subject matter of detailed argument and I therefore set them out in full together with their headings:

> "5.6 *Forfeiture or suspension of benefits*
>
> Subject to Schedule II the Trustees shall have power to forfeit or suspend the payment of any Pension payable hereunder in the event of the beneficiary thereof charging or attempting to assign the same or such beneficiary's bankruptcy and in the event of such forfeiture or suspension the Trustees may in their absolute discretion pay or continue the payment of the benefit so forfeited or suspended or any part thereof to or for the benefit of any one or more to the exclusion of the others of (a) the beneficiary or (b) the beneficiary's spouse or (c) any Dependent Child of the beneficiary who has not attained age 18 or (d) any other individual who in the opinion of the Trustees is dependent on the beneficiary for maintenance and support at the date of such forfeiture or suspension
>
> PROVIDED THAT no payment of the benefit shall be made to or for the benefit of any individual to whom the benefit was charged or to whom it was attempted to assign the benefit
>
> 5.7 *Charge on benefits*
>
> The Trustees shall have power subject to rule 5.8 at the request of an Employer to exercise a charge lien or set off against any benefit to which a Member employed by such Employer is entitled PROVIDED THAT-
>
> (i) the debt recovered from the Member in consequence of the exercise of such power shall not exceed the lesser of the amount which the Trustees acting on the advice of the Scheme Actuary determine as the cash value of the charged benefit on the date whereon such debt was incurred or the amount of the debt owed to the Employer by the Member
>
> (ii) if the said debt is disputed such power shall not be exercised until the debt becomes enforceable by order of a person or court of competent jurisdiction or the award of an arbitrator or arbiter in Scotland
>
> (iii) the Trustees shall give the Member a certificate showing the debt recovered by the Employer and the reduction (if any) in the said benefit
>
> 5.8 No charge lien or set off shall be exercised under rule 5.7 against -
>
> (a) Guaranteed Minimum Pension
>
> (b) the benefit attributable to a Transfer Value
>
> (c) any other benefit unless the debt due to the Employer is the result of a criminal fraudulent or negligent act or omission by the Member
>
> ……..
>
> 5.11 *Benefit forfeiture*

> Notwithstanding Schedule II if a benefit or instalment of benefits is not claimed by or on behalf of the person entitled to the benefit or instalment in accordance with these Rules within 6 years of its date of payment it shall be retained by the Trustees for the purposes of the Scheme"

47. Rule 6 contained the definitions applicable to the 2000 Rules. Rule 6 made the accrual rate change which had been announced on 17 January 1997 by introducing the following definition of "Retirement Pension" in respect of an active member:

> "(a) the amount calculated as 1/720 of Pensionable Salary for each complete month of the aggregate of the Member's Pensionable Service completed prior to 1 April 1997 Past Pensionable Service (if any) and Transferred Pensionable Service (if any) received and accepted under the Scheme prior to 1 April 1997
>
> (b) the amount calculated as 1/960 of Pensionable Salary for each complete month of the aggregate of the Member's Pensionable Service completed after 31 March 1997 and Transferred Pensionable Service (if any) received and accepted under the Scheme after 31 March 1997
>
> (c) the Pension purchased by the Voluntary Contributions (if any) paid by the Member and
>
> (d) in respect of an Active Member for whom a Transfer Value has been received and accepted under the Scheme the Pension which in the opinion of the Trustees acting on the advice of the Scheme Actuary is purchased by such Transfer Value"

48. The definition also included a proviso introducing a particular formula for Transfer Values. Rule 6 also included definitions of "Lump Sum Death Benefit" and "Retirement Lump Sum" which supplied the mathematical calculations to support the Commutation Option and the Death in Service lump sum benefits set out in Rules 3.7 and 3.9 (above).

49. Schedule II replaced Rule 23 of the 1995 Rules and Rule 24 of the 1988 Rules. It was headed "Overriding Provisions relating to contracting out" and this is sufficient to explain its effect. However, Schedule II differed from the earlier rules in that it now contained a qualified forfeiture provision. Paragraph 6 provided as follows:

> "6. If in relation to any Pension payable under the Scheme a Member or his spouse has a Guaranteed Minimum and such Pension is to be forfeited or payment thereof suspended in accordance with the Rules the Guaranteed Minimum Pension in respect of the Member or his spouse shall be forfeited or payment thereof suspended in such circumstances as may be prescribed in regulations made from time to time under section 21(2) of the Pension Schemes Act."

(10) The 2004 Deed and Rules

50. By a deed of amendment dated 30 April 2004 (the "**2004 Deed**") and made between CMG (1), CMG UK Ltd (another group company) (2) and the Trustee (3), the 2000 Rules were amended with effect from 1 July 2002. The 2004 Deed annexed a complete copy of the 2000 Rules (as amended) (the "**2004 Rules**"). But it was common ground that the 2004 Deed did not take effect by substituting the 2004 Rules for the 2000 Rules but only made amendments to them. In the event, the 2004 Rules did not involve any material amendments to any of the 2000 Rules which I have set out (above).

(11) The 2010 Deed

51. By a deed of amendment dated 30 April 2010 and made between CMG (1), the Employer (2) and the Trustee (3), the Employer became the new Principal Employer of the Scheme and the Scheme was closed to further accrual for the payment of defined benefits under the 2004 Rules.

IV. The Administration of the Scheme

52. In a witness statement dated 1 April 2021 Mr Mark Waight, who is a director of the Trustee, gave evidence about the administration of the Scheme. I also had the benefit of witness statements dated 15 October 2021 and 1 February 2022 made by Mr Ian Gordon (who is the solicitor and partner at Gowling WLG (UK) LLP with the conduct of the action on behalf of the Employer) and a witness statement dated 3 December 2021 made by Ms Catherine McAllister (the solicitor and partner at Addleshaw Goddard LLP with the conduct of the action on behalf of the Trustee). None of this evidence was challenged and my summary of the way in which the relevant issues arose and how the parties chose to deal with them is taken principally from the evidence of Mr Waight (as supplemented by the evidence of Mr Gordon and Ms McAllister).

53. By email dated 25 September 2019 Mr Gordon first suggested to the directors of the Trustee in writing that it was entitled to retain all arrears which had not been paid to members more than six years after the date on which they fell due for payment. The Trustee did not agree but the parties agreed that 1 October 2019 should be treated as the latest date on which a claim should have been made for the purposes of this action on the basis that the parties had become alive to the issue by that date. If Mr Gordon is correct,

therefore, then the Trustee is entitled to retain any arrears which fell due for payment before 1 October 2013.

(1) The Equalisation Issue

54. In *Barber* the European Court of Justice held that for a pension scheme to have unequal retirement ages amounted to unlawful discrimination and as a result all members of the Scheme became entitled to claim an NRD of 60 years of age from 17 May 1990 unless the Scheme changed the NRD to a different age. The Scheme was intended to "equalise" the NRD for both men and women members at 65 years of age with effect from 1 January 1991. The 1991 Deed was intended to bring that change into effect and it was the Trustee's evidence that the Scheme was administered on this basis. In 1995 both the Employer and the Trustee announced that the NRD of members who joined the Scheme before 1 January 1991 would change to 65 years of age from 1 January 1996. However, no amendment was made to the 1995 Rules until the 1998 Deed was executed.

55. On 15 March 2012 and 3 September 2014 the Trustee informed the Employer that there was a problem about the equalisation of the NRD of members because the Scheme had been administered on the basis that the equalisation of the NRD had taken effect on announcement and that the 1988 Rules and the 1995 Rules been changed retrospectively by the 1991 Deed and 1998 Deed.

56. On 21 September 2016 the Trustee resolved to correct members' benefits. The Trustee has now corrected members' future benefits and also paid off the arrears subsisting as at 31 December 2017 without interest. The Equalisation Issue had (and has) an effect on 116 pensioner members and the total underpayment (taking underpaid pension and additional lump sums together) was about £1,183,800. The largest total underpayment for an individual was £54,567.29 and the average underpayment across the 116 pensioner members was £10,204.91 (and 35 members had opted to take a lump sum). Finally, it was Mr Waight's evidence that the quantum for the part of the arrears payments relating to a period more than 6 years before the arrears were paid in April 2018 was about £23,600.

(2) The Accrual Rate Issue

57. On 17 January 1997 the change to the accrual rate (above) was announced and the

Scheme was administered on the basis that the change had taken effect on 1 April 1997. The 1998 Deed did not include the necessary amendment and the change to the accrual rate only took effect when the definition of Retirement Pension was introduced in the 2000 Rules. As a consequence, members were entitled to payment at an accrual rate of 1/60th until the change in the 2000 Rules took effect.

58. In the course of investigating the Equalisation Issue (above) the Accrual Rate Issue came to light. In June 2019 the Trustee advised all affected members and in July 2019 50 members had their pensions in payment corrected. The average arrears were £16,336.12 and the total arrears due up until 1 July 2019 were £818,306.06. However, it is Mr Waight's evidence that this figure would have been reduced to £378,509.31 if the arrears had been restricted to the 6 year period from 1 October 2013 to 1 October 2019.

59. 21 members chose a lump sum when their benefits became payable and therefore received an additional lump sum in July 2019. The largest additional lump sum was £109,391.86 and the average was £23,266.21. The total value of the lump sums paid in July 2019 was £488,590.36. But again it is Mr Waight's evidence that this figure would have been reduced to £48,793.02 if the additional lump sums had been restricted to those which fell due during the 6 year period from 1 October 2013 to 1 October 2019.

60. In October 2019 a further 89 members had their pensions in payment corrected. The highest total arrears were £108,144.26 and the average was £20,955.76. The total of the arrears due up to 1 October 2019 was £1,865,062.94. But again it was Mr Waight's evidence that this figure would have been reduced to £1,020,090.91 if payment had been restricted to sums which fell due in the 6 year period from 1 October 2013 to 1 October 2019.

61. 24 members had chosen a lump sum when their benefits became payable and therefore received an additional lump sum in October 2019. The largest additional lump sum was £42,973.02 and the average was £13,522.48. The total value of lump sums paid in October 2019 was £324,539.53. But according to Mr Waight's evidence this figure would have been reduced to £171,915.92 if payment had been restricted to sums which fell due in the 6 year period from 1 October 2013 to 1 October 2019.

(3) The Pensionable Salary Issue

62. For the sake of completeness, I add that the parties had originally identified a third issue arising out of the variation to the definition of Scheme Salary (and the incorporation of Basic Salary) introduced by the 1992 Deed. When the 1995 Rules subsequently replaced the 1988 Rules, they did not reflect the variation which the 1992 Deed was intended to bring into effect. However, by the hearing of the claim, CMG and the Employer had successfully brought a claim for rectification and Chief Master Marsh had made an order for rectification dated 26 April 2021. It is unnecessary, therefore, for me to consider this issue further.

V. Pension Schemes: Construction

(1) Construction

63. I turn next to the law on construction. In *De La Rue PLC v De La Rue Pension Trustee Ltd* [2022] EWHC 48 (Ch) (in which Mr Rowley also appeared for the employers) Trower J identified the relevant authorities at [46] to [48] and I gratefully adopt that analysis. He set out in full the guidance of Lord Hodge in *Barnardo's v Buckinghamshire* [2019] Pens LR 4 at [13] to [18] (and in the present case the parties agreed that all of the authorities on the construction of pension schemes had to be read in the light of this guidance):

> "13 In the trilogy of cases, *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900, *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173, this court has given guidance on the general approach to the construction of contracts and other instruments, drawing on modern case law of the House of Lords since *Prenn v Simmonds* [1971] 1 WLR 1381. That guidance, which the parties did not contest in this appeal, does not need to be repeated. In deciding which interpretative tools will best assist in ascertaining the meaning of an instrument, and the weight to be given to each of the relevant interpretative tools, the court must have regard to the nature and circumstances of the particular instrument.
>
> 14 A pension scheme, such as the one in issue on this appeal, has several distinctive characteristics which are relevant to the court's selection of the appropriate interpretative tools. First, it is a formal legal document which has been prepared by skilled and specialist legal draftsmen. Secondly, unlike many commercial contracts, it is not the product of commercial negotiation between parties who may have conflicting interests and who may conclude their agreement under considerable pressure of time, leaving loose ends to be sorted out in future. Thirdly, it is an instrument which is designed to operate in the long term, defining people's rights long after the economic and other circumstances, which existed at the time when it was

signed, may have ceased to exist. Fourthly, the scheme confers important rights on parties, the members of the pension scheme, who were not parties to the instrument and who may have joined the scheme many years after it was initiated. Fifthly, members of a pension scheme may not have easy access to expert legal advice or be able readily to ascertain the circumstances which existed when the scheme was established.

15 Judges have recognised that these characteristics make it appropriate for the court to give weight to textual analysis, by concentrating on the words which the draftsman has chosen to use and by attaching less weight to the background factual matrix than might be appropriate in certain commercial contracts: *Spooner v British Telecommunications Plc* [2000] Pens LR 65, Jonathan Parker J at [75]–[76]; *BESTrustees v Stuart* [2001] Pens LR 283, Neuberger J at [33]; *Safeway Ltd v Newton* [2017] EWCA Civ 1482; [2018] Pens LR 2, Lord Briggs, giving the judgment of the Court of Appeal, at [21]–[23]. In *Safeway*, Lord Briggs stated ([22]):

> "the Deed exists primarily for the benefit of non-parties, that is the employees upon whom pension rights are conferred whether as members or potential members of the Scheme, and upon members of their families (for example in the event of their death). It is therefore a context which is inherently antipathetic to the recognition, by way of departure from plain language, of some common understanding between the principal employer and the trustee, or common dictionary which they may have employed, or even some widespread practice within the pension industry which might illuminate, or give some strained meaning to, the words used."

I agree with that approach. In this context I do not think that the court is assisted by assertions as to whether or not the pensions industry in 1991 could have foreseen or did foresee the criticisms of the suitability of the RPI, which later emerged in the public domain, or then thought that it was or was not likely that the RPI would be superseded.

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

17 It is nevertheless relevant to the construction of pension schemes that they are drafted to comply with tax rules so as to preserve the considerable benefits which the United Kingdom's tax regime confers on such schemes. They must be construed "against their fiscal backgrounds": *National Grid Co Plc v Mayes* [2001] UKHL 20; [2001] Pens LR 121 at [18] per Lord

> Hoffmann; *Stevens v Bell* [2002] EWCA Civ 672; [2002] Pens LR 247, Arden LJ at [30]. In this case, the CIR guidance on approval of schemes, which is contained in the practice note on occupational pension schemes (IR 12 (1979)), forms part of the relevant background. In the footnote to para.6.14 of that guidance, the CIR stated:
>
> > "Increases in the cost of living may be measured by the index of retail prices published by the Department of Employment or by any other suitable index agreed for the particular scheme by the Superannuation Funds Office."
>
> It appears therefore that the CIR, in giving discretionary approval to a scheme, would not have objected to a scheme which empowered its trustees to substitute an appropriate index for the RPI. This is relevant background as it means that there was no CIR constraint which might influence the construction of the words in dispute. This contrasts with the *National Grid* case in which the fiscal background was directly relevant to the interpretation of a phrase in the scheme. The tax regime did not allow an employer to be paid part of a surplus of scheme funds, which had already received tax exemptions when payments were made into the scheme. But the tax regime did not prohibit the release of a debt due by the employer to the scheme which had not had those tax advantages. This assisted the House of Lords to construe narrowly a provision in the scheme which prohibited the making of scheme moneys payable to the employers. In the present case, as Lewison LJ stated at [32] of his judgment, the draftsman of the scheme did not track the wording of the Revenue guidance in the Definition but chose different language. The scheme could have empowered the trustees to select an index as an alternative to the RPI. The question is whether it did so.
>
> 18 Finally, a focus on textual analysis in the context of the deed containing the scheme must not prevent the court from being alive to the possibility that the draftsman has made a mistake in the use of language or grammar which can be corrected by construction, as occurred in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 AC 1101, where the court can clearly identify both the mistake and the nature of the correction."

64. In *De La Rue* Trower J also cited from the judgment of Sir Geoffrey Vos MR in *Britvic plc v Britvic Pensions Ltd* [2021] Pens LR 16 at [29] and [33] (which Mr Short also cited):

> "29. As it seems to me, however, the approach indicated by, at least, *Rainy Sky*, *Arnold v Britton*, *Wood v Capita*, and *Barnardo's* is clear. In construing a pension scheme deed, one starts with the language used and identifies its possible meaning or meanings by reference to the admissible context, adopting a unitary process to ascertain what a reasonable person with all the background knowledge reasonably available to the parties at the time would have understood the parties to have meant. If, however, the parties have used unambiguous language, the court must apply it (see Lord

> Clarke at [19] in *Rainy Sky*), and the context of a pension scheme deed is "inherently antipathetic to … [giving] some strained meaning to … the words used" (Lord Briggs at [22] in *Safeway*, approved by Barnardo's at [15]).
> ……
> 33. Moreover, the process of corrective construction adopted, in the alternative, by the judge at [137] is only normally adopted where there really is an obvious mistake on the face of the document. There is no obvious mistake here as there was, for example, in *Mannai* as to the date or in *Doe d Cox v Roe* as to the name of the pub. The objective observer might well think that the power could have been more felicitously drafted, but that is not enough to allow the court to depart from the clear language, on the unequivocal authority of *Rainy Sky* and the later Supreme Court decisions I have cited. That is particularly so when the rules of a pension scheme are being interpreted."

65. Mr Short also relied on the judgment of Nugee LJ, who expressed similar views to Sir Geoffrey Vos MR and gave the following guidance at [70]:

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

66. Finally, in *De La Rue* Trower J added his own gloss to the relevant authorities at [48] which summarises the position particularly well and which I adopt as the general

approach to the construction of the Scheme:

> "The conclusions I draw from these authorities are that the rules of a pension scheme are a form of instrument in respect of which significant weight is to be given to textual analysis concentrating on the language that the drafter has chosen to use. As Lord Briggs stated in *Safeway*, the context is inherently antipathetic to giving a strained meaning to those words. That does not mean to say that literalism rules the day. A purposive construction may well be appropriate, particularly where it is required to give reasonable and practical effect to the scheme."

(2) Archaeology

67. In some cases the Court has derived assistance from earlier provisions of a pension scheme in construing the current terms: see, in particular, *National Grid Co PLC v Laws* [1997] Pens LR 157 at [70] to [73] (Robert Walker J) and *Law Debenture Trust Co Ltd v Lonrho Africa Trade & Finance Ltd* [2003] Pens LR 13 at [12] (Patten J). In *National Grid* Robert Walker J (as he then was) accepted that provisions of a pension scheme which have been superseded are admissible as an aid to construction and are not excluded in the same way as drafts or the negotiations of the parties. However, he expressed some caution about the value of this "archaeology" at [70]:

> "In a case where the scope of a power of amendment and the validity of a particular amendment are in issue, examination of the history of the matter is plainly permissible and indeed indispensable. In other cases my instinct would be, like Rimer J, to stick to the current text as a general rule, while bearing in mind that the text of any long-established pension scheme is likely to be a patchwork. There is a serious policy issue here: it is often hard enough for trustees and their advisers (and even harder for members or pensioners who may not have easy access to advice) to interpret a pension scheme as it stands, without also having to delve into the archaeology of the scheme."

68. In *Barnardo's* Lord Hodge also expressed the view that the nature of a pension scheme (which may have members who have no knowledge of the earlier rules) "makes it unprofitable to delve into the archaeology of the rules in this case": see [26]. *National Grid* and *Law Debenture Trust* must now been read in the light of *Barnardo's* but I did not understand Lord Hodge to be laying down a hard and fast rule that the provisions of earlier deeds are no longer admissible in construing the current rules of a pension scheme but that the Court should be cautious before undertaking such an exercise.

69. Archaeology may remain relevant where the Court has to decide whether a clause or rule retains the same meaning when it is adopted in a new set of rules. Mr Short submitted that because a pension scheme should be interpreted as a whole, a clause which may have one meaning when it is adopted in one deed may have a different meaning when it is subsequently adopted in another deed (with other terms). He placed particular reliance upon the judgment of Arden LJ (as she then was) in *Stena Line Ltd v MNRPF Trustees Ltd* [2011] Pens LR 223. After stating the general principle which she took from *National Grid* in the Court of Appeal ([2000] ICR 174) she stated as follows at [33] to [35]:

> "33. That passage was not directed to the situation which arises in the present appeal, where a clause in the original trust deed is adopted again when the deed is revised and replaced by a new trust deed, albeit one containing, to all and intents and purposes, the same clause and the question as to the meaning of the clause is one to be asked at the present time. Here clause 30 formed part of trust deed at all material times, but new trust deeds were adopted in substitution for the previous trust deed in 1985, 1994, 2001 and 2007. If an amendment is now proposed to deal with the current deficit, the question will be whether that amendment can now be carried out under that clause as it stands today.
>
> 34. I accept Mr Spink's submission that, even though the very same clause is effectively re-adopted in the same form, its meaning may change on each re-introduction if the context in which it is re-adopted is materially different. Its meaning may be narrowed, or it may equally well have been widened, because of changes in the relevant background circumstances which fall to be taken into account in interpretation. Likewise I would also accept, as did the judge in paragraph 97 of his judgment, that it is possible that the meaning of a clause changes on re-adoption because there has been some material change in the scope or effect of some other clause in the period between its introduction and its re-introduction that has an impact on it. The case of *Thellusson v Viscount Valentia* [1907] 2 Ch 1, cited by the judge at paragraph 93 of his judgment, is an example of the narrowing of the meaning of a phrase as a result of a subsequent change in other wording of a document. The question for this court in that case was whether the rules of the Hurlingham Club could be altered so as to remove pigeon-shooting as one of its main objects. When the Club was set up, its sole purpose was 'providing a ground for pigeon-shooting' but subsequently words were added to extend the purpose of the Club to other sports, such as polo. Although the power of amendment could not be used to change the purposes of the Club fundamentally, the provision of a ground for pigeon-shooting was no longer the sole purpose of the Club. The report is a very short one and there is no explanation as to what changes had taken place in the Club's activities. If there had been evidence that they had changed before the amendment to the purpose of the Club, that evidence would have been admissible on the interpretation of the words 'providing a ground for pigeon-shooting' because that phrase, following the amendment to include sports such as polo, fell to be

> interpreted in a new context. The more likely inference, however, from the re-adoption of a clause without any material change is that the clause retained its meaning without any material change.
>
> 35. Thus the meaning of a clause which is re-adopted from time to time has additionally to be considered in the context of circumstances subsequent to the date of its original adoption. It follows that regard should be had both to relevant circumstances at the date of its original adoption and to relevant circumstances at each subsequent re-adoption. Those circumstances can then be weighed in the balance to assess the impact of all the relevant circumstances on the interpretation exercise in hand. In this case, the most recent re-introduction of clause 30 was in 2007. However, where, as here, it is said that the meaning has changed as a result of some event occurring prior to its introduction or re-introduction, and it is common ground that nothing material had happened since, it may be convenient to take the circumstances at the time of the execution of that deed. So, in this case, the parties have taken the date of the adoption of the changes to the trust deed and rules in 2001 as the date at which the meaning of clause 30 should be ascertained, even though any further amendment would have to be within the scope of clause 30 at the time that it is sought to effect an amendment in reliance on this clause."

70. In general terms I accept Mr Short's submission. However, in many cases, it will be equally likely that the designer of the scheme chose to adopt a number of existing rules without making any changes to them because he or she was perfectly happy with them and intended that that they should continue to operate unchanged. In support of this proposition, Mr Rowley relied on the last two sentences of [34] (above). I start, therefore, from the neutral standpoint that the drafter of the new rules may have intended to change the meaning of a rule without changing the language. But it will depend on the context and the extent to which other changes have had a direct effect on the application of the rule itself (even if its language remains the same).

(3) Headings

71. I also have to consider what weight to attach to Rule 1.4 and the heading to Rule 5.11. Mr Short submitted that although the authorities are divided, the better view is that the heading cannot be allowed to alter what would otherwise have been the interpretation of the clause. He relied upon the decision of Lewison J (as he then was) in *Gregory Projects (Halifax) Ltd v Tenpin (Halifax) Ltd* [2009] EWHC 2639 (Ch) at [28]:

> "I should add that Mr De Garr Robinson sought comfort from the heading to clause 2 ("Conditionality"). I do not consider that it helps. First, in very general terms that clause is about conditionality, but that general

> proposition does not help to decide the importance that the parties placed on any particular part of clause 2. For example, clause 2.2 required Gregory to insure the development once the Acquisition Condition had been satisfied. But it was not (and in my judgment could not have been) suggested that a failure to insure would have meant that the remainder of the agreement for lease was incapable of coming into effect. Second, despite the heading, all the provisions of clause 2 are immediately binding. Third, clause 1.1.8 says in terms that the headings are not to affect the interpretation of the agreement. The cases are divided on the question whether in these circumstances a heading should be taken into account (*SBJ Stephenson Ltd v Mandy* [2000] FSR 286, 297 and *Doughty Hanson & Co Ltd v Roe* [2009] BCC 126 § 71 say "Yes", while *Orleans Investments Pty Ltd v MindShare Communications Ltd* [2009] NSWCA 40 § 68 says "No"). Where, as here, the contract says in terms that headings "shall not affect the interpretation" it seems to me that respect for party autonomy means that the headings cannot be allowed to alter what would otherwise have been the interpretation of the clause in question."

72. Mr Rowley submitted that the Court could have regard to the heading as giving an indication of what the rule was generally about. He relied upon *Universities Superannuation Scheme Ltd v Scragg* [2019] ICR 738 in which Rose J (as she then was) made this point at [26]:

> "Mr Grant appearing for Mr Scragg referred me to an extract from *Lewison, The Interpretation of Contracts* 6th ed & supp (2017), para 5.13 which states that where the contract states expressly that the headings are not to affect its interpretation the cases are divided as to whether they can be used as an aid by the court. The two cases cited there where the court did take account of headings despite a contractual provision stating that they were for convenience only, *SBJ Stephenson Ltd v Mandy* [2000] FSR 286 and *Doughty Hanson & Co Ltd v Roe* [2009] BCC 126, do not, in my view, assist Mr Scragg. In the former case, the heading of a post-termination non-disclosure clause in an employment contract referred to "Confidential information" but the wording of the clause imposed a prohibition on disclosure simply of information, without the qualifying adjective that it protected only confidential information. A challenge to the width of the clause on the grounds that it purported to restrict disclosure of all information was rejected on the grounds that convenience included telling the reader at a glance what the clause is all about. Mann J in the latter case referred to the heading being convenient because it is descriptive of what the clause is about. In the present case Mr Scragg is trying to rely on the sub-heading for much more than an indication of what rule 15.1.3 is generally about, namely the trustee company's stage of the application."

73. I am not sure that there is any real difference between these two passages and it is clear from both that the Court may not rely on a heading to contradict the plain meaning of the

relevant clause where it is expressed to be for convenience only. But in any event, it is unnecessary to resolve the difference between the parties for the reasons which I set out (below).

(4) Other Authorities

74. It is trite law that the Court's construction of one document is not binding authority in relation to the construction of another. But the way in which one judge has construed a provision (or, indeed, the general approach which he or she has adopted to construction) may provide real assistance to Courts faced with a very similar exercise. In particular, Morgan J has handed down three judgments which are of particular importance in the present case:

(1) *Lloyds Banking Group Pensions Trustees Ltd v Lloyds Bank PLC* [2019] Pens LR 5 ("***Lloyds 1***") (in which Mr Rowley appeared for the Employers and Mr Short appeared for the Representative Beneficiaries);

(2) *Lloyds Banking Group Pensions Trustees Ltd v Lloyds Bank PLC* [2021] Pens LR 10 ("***Lloyds 3***") (in which Mr Rowley again appeared for the Employers and Mr Short again appeared for the Representative Beneficiaries); and

(3) *Punter Southall Governance Services Ltd v Hazlett* [2022] Pens LR 1 ("***Axminster***") (in which Mr Short appeared for the representative Defendant).

75. Both parties relied on these decisions to a greater or lesser extent. But Mr Short reminded me (and I accept) that other cases dealing with unclaimed benefits should be treated with caution and he cited *Hoover v Hetherington* [2002] EWHC 1052 (Ch) and *Atos IT Services UK Ltd v Atos Pension Schemes Ltd* [2020] EWHC 145 (Ch) in support of that proposition. In *Atos* Nugee J (as he then was) stated this at [2]:

> "As Mr Spink said, all these cases turn on the construction of the particular terms used in the scheme in question and, save insofar as they lay down general principles, no direct assistance can be obtained from them. Indeed, there is very longstanding authority that on questions of construction reference to other decisions on different words in other instruments is a practice to be deplored: see the classic statement of Sir George Jessel MR in *Apsden v Seddon* (1874-75) LR 10 Ch. App. 394 at 397:
>
> > "No Judge objects more than I do to referring to authorities merely for the purpose of ascertaining the construction of a document. That is to

> say, I think it is the duty of a Judge to ascertain the construction of the instrument before him and not to refer to the construction put by another Judge upon an instrument perhaps similar but not the same."

> Mr Spink's written submissions included a selection of indexation provisions found in the reported cases and in other Atos schemes. Such provisions often have a family resemblance consisting of a reference to the index to be used followed by circumstances in which some other index can be substituted (what can be called a trigger provision), but the detailed drafting shows a wide variety, and I entirely accept that this case has to be determined on the wording of the provision in question and not by comparing other cases in which other words have been construed. I was therefore, quite rightly, not taken to those other cases, although some of them are very familiar."

76. I approach the construction and effect of Rule 5.11 in the same way and although I derive valuable assistance from *Lloyds 1*, *Lloyds 3* and *Axminster*, I bear in mind that the context and wording of the relevant clauses was different. The primary duty for this Court is to construe the rule against the admissible background and decide the issues which have been agreed between the parties. This is sufficient to explain the approach which I have adopted to the construction of Rule 5.11. I deal with a number of other legal issues arising out of the specific issues which I have been asked to decide. But I address them in section VII (below).

VI. Rule 5.11

(1) General Approach

77. Both counsel approached their task by making general submissions about the construction and effect of Rule 5.11 before addressing the individual issues and I adopt the same approach. The issue between them was whether Rule 5.11 was intended to be a forfeiture clause at all or whether it was intended to have a more limited or targeted effect. For ease of reference I set out Rule 5.11 again (which remained the same in both the 2000 Rules and the 2004 Rules) but without the heading:

> "Notwithstanding Schedule II if a benefit or instalment of benefits is not claimed by or on behalf of the person entitled to the benefit or instalment in accordance with these Rules within 6 years of its date of payment it shall be retained by the Trustees for the purposes of the Scheme"

(2) The Trustee's Submissions

78. Mr Short submitted that the purpose of Rule 5.11 was to deal with missing beneficiaries and to prevent funds from being "orphaned or trapped within the Scheme", that it was not intended to extinguish the benefits of members where they could be identified and paid or to extinguish benefits where they had been unrecognised (e.g. as a result of a mistake by the Trustee). Finally, he submitted that it was not intended to extinguish shortfalls (e.g. where a lump sum or instalments had been regularly underpaid).

79. Mr Short also submitted that where the designer of the Scheme intended rights to be forfeited (or otherwise extinguished), he or she used that word or equivalent language and that the Court should be slow to deprive members of benefits which they had earned and which formed part of their remuneration. He contrasted Rule 5.11 with the following provisions for the following reasons:

    (1) *Clause 3.12(e)(ii)*: Where the benefits of a member are vested on death either in the Crown or the Duchy of Cornwall or the Duchy of Lancaster as bona vacantia, clause 3.12(e)(ii) provides that they shall "forthwith be forfeited and applied by the Trustees to any other object of the Scheme". If Rule 5.11 had been intended to have the same effect, the drafter could have been expected to use the same language.

    (2) *Clause 5.6:* confers a power on the Trustee "to forfeit or suspend the payment of any Pension" where the member attempts to alienate it on bankruptcy. Again, the drafter could have used the same language in Rule 5.11. Moreover, the clause expressly confers an absolute discretion on the Trustee to pay it to the beneficiary, a spouse or dependant child. Finally, the drafter used the phrase "the benefit so forfeited or suspended or any part thereof" which tends to show that he or she did not have in mind shortfalls (i.e. parts of a lump sum or instalment).

    (3) *Clause 5.7:* is not a forfeiture clause but confers a closely related power on the Trustee to exercise a charge, lien or right of set off over a member's benefits. The drafter spelt out clearly in this clause and clause 5.8 what the consequences of such an exercise would be. If Rule 5.11 had been intended to extinguish benefits once and for all, it would have been made clear what the consequences would be.

    (4) *Clause 5.9:* confers power upon the Trustee to pay any pension or entitlement to a member's representative on incapacity. It provides that "the receipt of such payee shall be a complete discharge and the Trustees shall be under no liability to see the

application of the monies so paid". Again, if Rule 5.11 had been intended to extinguish benefits once and for all, it would have contained similar language releasing the Trustee from any potential liability.

(5) *Schedule II, paragraph 6*: deals with circumstances in which a member's GMP may be forfeited. It also uses the language of forfeiture: "such Payment is to be forfeited or payment thereof suspended" and "shall be forfeited or payment thereof suspended". Again, if Rule 5.11 had had been intended to have the same effect, the drafter could have been expected to use the same language.

80. Mr Short submitted that the words "Notwithstanding Schedule II" were intended to contrast the forfeiture rule in paragraph 6 with Rule 5.11, which was not about forfeiture at all. He submitted that the drafter was in effect stating that "Rule 5.11 is not about forfeiture and forfeiture is dealt with in paragraph 6".

81. Finally, Mr Short submitted that *Axminster* provided the closest analogy. In that case clause 25 of the relevant scheme conferred a discretion on the trustees to apply any monies which had not been claimed within six years from the date of payment either in augmenting the benefits of members still in service, or reducing the employer's contributions or in paying the expenses of management and administration: see [168]. Morgan J construed this provision at [175] to [177]:

> "175. I do not accept Mr Legge's submission that clause 25 operates as a forfeiture clause or a time-bar clause. The clause does not contain any wording which directly deals with the forfeiture of an entitlement to be paid arrears of benefits. Similarly, the clause does not contain any wording which operates as a time-bar on claims for payment of arrears of benefit. It is likely that the clause was intended to deal with orphaned money which ought to have been paid, but which could not be paid, to a missing beneficiary. In such a case, the Trustee would have surplus funds which it might wish to apply for a useful purpose rather than simply retain them indefinitely. It may be that the draftsman of the clause assumed, rightly or wrongly, that after six years from a payment accruing due, a claim to arrears would be statute barred and the clause was drafted on that basis. In any event, clause 25 does not in terms provide for a forfeiture or a time-bar. The absence of wording providing for forfeiture is particularly striking in view of the references to forfeiture in clause 23. It is difficult to think that the draftsman of clause 25 thought that he was providing for forfeiture of unclaimed payments but did not need to say expressly that was what he wanted to achieve.

> 176. If clause 25 were to be construed so that it dealt only with sums due to missing beneficiaries, then the case for reading in words of forfeiture or a time-bar would be stronger. However, Mr Legge submits that clause 25 also deals with cases where the Plan has been administered on the wrong basis and members have been underpaid for a considerable period of time. Mr Legge makes that submission because he wishes to rely on clause 25 in this case which is not a case of missing beneficiaries. In a case where the Plan has been administered on the wrong basis and arrears have built up, I am certainly not persuaded that words should be read into clause 25 to give the Trustee a power to forfeit the arrears of pension due more than six years earlier or to allow the Trustee to rely on a time-bar to claims for such arrears. There is considerable force in Mr Short's submissions that where the Plan has been administered on the wrong basis for a considerable period of time, the Plan will not have been funded on a different basis which has generated a fund to be applied pursuant to clause 25. The likelihood will be that there will be no such fund. The construction contended for by Mr Legge would involve changing a clause dealing with the application of a fund to a clause which does not deal with the application of a fund but which instead provides for forfeiture of, or a time-bar in relation to, the rights of the beneficiaries.
>
> 177. I conclude that clause 25 does not permit the Trustee to take steps to apply monies to one of the purposes specified in the clause and then to say that beneficiaries have thereby lost their rights to be paid arrears of payment which accrued due more than six years earlier."

82. Mr Short submitted that the Employer was attempting to read words of forfeiture into Rule 5.11 in the same way as the employer in *Axminster*. He submitted that if the Employer is correct and Rule 5.11 is a forfeiture clause, then it is necessary to supply words to the phrase "shall be retained by the Trustee for the purposes of the Scheme" (at the end of the clause) so as to exclude the payment of that benefit or instalment which has been forfeited by the words (at the beginning of the clause).

(3) The Employer's Submissions

83. Mr Rowley began by submitting that the high point of Mr Short's argument was the absence of the word "forfeiture". He also submitted that Mr Short's submissions begged the following questions: how does Rule 5.11 apply to missing beneficiaries? Does it apply to forfeit their benefits? Or does it leave those benefits untouched." I set out the relevant passage from the transcript:

> "But I should say at this stage, it may be the fault is entirely ours: we remain in a state of genuine uncertainty as to the precise nature of my learned friend's submission in relation to rule 5.11 of the amended 2000 rules, and all of its predecessors. He says that it applies to missing

> beneficiaries. You can see that from paragraph 44 of his skeleton. But, my Lord, in my respectful submission, that statement begs the question. It begs the question: how does rule 5.11 apply to missing beneficiaries? Does it apply to forfeit their benefits? Or does it leave those benefits untouched? And if it does, then what does -- what function does rule 5.11 serve? Because what my learned friend has been doing is to search for an analysis which gives rule 5.11 content, but not the content for which we contend, which, we submit, is borne out by the natural reading of the language used. But the question is what exactly happens to the benefits of this missing beneficiary? I have said, are they forfeited? Or do they remain an obligation of the scheme? And our understanding, or our analysis, is the inexorable logic of the arguments that have been presented on behalf of the trustee is that the missing beneficiaries' benefits are not forfeited, because otherwise there would have been no point in my learned friend going painstakingly through the scheme documentation to show your Lordship: well, forfeit appears in this rule, but not in rule 5.11."

84. Mr Rowley reminded me that the Scheme was a defined benefit scheme and that it was intrinsic in such a scheme that the Trustee held a pool of assets on trust on which to draw to pay members' benefits in accordance with the rules. He pointed out that individual members did not have a beneficial interest in any particular assets and that a forfeiture rule did not have the effect of depriving a member of a beneficial interest in the same way that a forfeiture provision might take effect in a private trust.

85. He also relied on the statutory history (above). He pointed out that section 92 of the Pensions Act 1995 (and its predecessors) all permitted the forfeiture of benefits where they had been unclaimed for six years after falling due for payment. He also pointed out that there was no suggestion in section 92(5)(b) that a right of forfeiture was limited to missing members or only permitted where members (or other persons entitled) were aware of their rights. He also drew my attention to the standard precedent in the Encyclopaedia of Forms and Precedents 5th ed (1999) Vol 31 edited by Sir Peter Millett (as he then was), which was introduced after the Pensions Act 1995 and confirmed this to be correct.

86. The Scheme has contained a forfeiture clause since the 1981 Rules. In each case, however, the word "forfeiture" has been used in the heading but not in the body of the rule. Mr Rowley submitted, however, that there was no magic in the use of the word "forfeiture" in the heading. He pointed out that Rule 16 of the 1981 Rules and Rule 18.2 of the 1988 Rules which permitted forfeiture for attempted alienation on bankruptcy did not use that word at all. Again, he drew my attention to the standard precedent in the

Encyclopaedia of Forms and Precedents 5th ed (1991) Vol 31 (also edited by Sir Peter Millett) for an example of a clause headed "Unclaimed Money" and which provided as follows:

> "Any money not claimed under the provisions of the Plan within six years of it becoming payable shall then cease to be claimable and shall revert to the fund."

87. Mr Rowley submitted that Rule 20.2 of the 1988 Rules introduced what is now Rule 5.11 and whilst there can be no real doubt about its meaning, there was no provision in either the 1988 Rules or 1995 Rules which purported to exclude consideration of the heading which has always included the noun "forfeiture". He also submitted that applying the *Stena* principle, all later iterations of the rule (including Rule 5.11 of both the 2000 and the 2004 Rules) should be construed in the same manner. Finally, he submitted that the Court was entitled to have regard to the heading to explain what the clause was "generally about" but that Rule 1.4 should be seen for what it is, which is "no more than a common or garden boilerplate provision".

88. Mr Rowley relied upon *Lloyds 1* as providing the closest analogy. He relied upon the construction which Morgan J placed on two particular rules under the various schemes which were the subject matter of that decision. The judge set out the text of Rule 1, Rule 2 and Rule 3 at [402] to [404]:

> "**62.9 Failure to claim benefit**
>
> No beneficiary shall be entitled to claim any instalment of pension or other benefit to which he is entitled under the Scheme more than 6 years after that instalment has fallen due for payment."
>
> "**9.5 Forfeiture of unclaimed benefits**
>
> Any sum which may have become due to a Member or other person entitled to benefit under the Rules shall be forfeited if it has not been claimed during a period of at least six years from the date upon which that sum became due, but, if the sum formed one payment of a pension or annuity the right to such pension or annuity shall not thereby be extinguished."
>
> "**24 Unclaimed benefits**
>
> 24.1 If any pension or benefit or any instalment remains unpaid to and unclaimed by the person to whom it is payable for a period of six years from the date it became payable, then the entitlement to it shall be extinguished and it shall be retained by the Trustees in the Fund.

> 24.2 Any unclaimed AVC Interest shall be held by the Trustees on trust for the AVC Member or his estate as the case may be."[3]

89. Neither Rule 1 nor Rule 3 was headed "forfeiture" or used the language of forfeiture. Rule 2, however, was headed "Forfeiture of unclaimed benefits" and also used the word "forfeited" in the body of the rule. However, Morgan J construed all three rules in the same way at [407] to [410]:

> "Before dealing with these rules individually, I will refer to the submissions made by the RBs as to the operation of these rules. The RBs submitted that the various rules all dealt with circumstances where no pension had been claimed and the rules did not apply to a case where a pension had been claimed and paid but the full amount of the pensioner's entitlement was not paid to him. The RBs also submitted that the rules provided for the trustees to have a discretion as to what to do in a case which came within the relevant rule.
>
> 408. I will now consider the correct construction of these five rules. Rule 1 is not confined to a case where the pension has not been claimed and nothing has been paid. Rule 1 specifically refers to any instalment of pension. Accordingly, Rule 1 applies in a case like the present where the trustees have made payments in relation to pension entitlement but have underpaid the beneficiary. In such a case, Rule 1 provides that the beneficiary is not entitled to claim the amount of the arrears more than six years after those arrears accrued and ought to have been paid. As the beneficiary is not entitled to claim those arrears, the trustees are not bound to pay the beneficiary those arrears and any payment of those arrears would be a voluntary payment by the trustees. I was not specifically addressed on whether other rules of this Scheme allow the trustees to make ex gratia payments but Rule 1 does not allow an ex gratia payment in a case which comes within Rule 1.
>
> 409. Rule 2 is not confined to a case where the pension has not been claimed and nothing has been paid. Rule 2 refers to "any sum which may have become due" and also refers to a case where the sum formed "one payment of a pension or annuity". Accordingly, Rule 2 applies in a case like the present where the trustees have made payments in relation to pension entitlement but have underpaid the beneficiary. In such a case, Rule 2 provides that the unpaid sum shall be forfeited if it is not claimed within six years after it accrued and ought to have been paid. As the unpaid sum is forfeited in such a case, the beneficiary is not entitled to claim that sum, the trustees are not bound to pay the beneficiary that sum and any payment of that sum would be a voluntary payment by the trustees. I was not specifically addressed on whether other rules of this Scheme allow the

[3] He also explained that: "An AVC was an Additional Voluntary Contribution paid by a Member under Rules 19 or 20 of these Rules. An AVC Interest was the interest in the Fund which a Member had in respect of his AVCs".

> trustees to make ex gratia payments but Rule 2 does not allow an ex gratia payment in a case which comes within Rule 2.
>
> 410. Although the language of Rule 3 is different from that of Rules 1 and 2, it operates in the same way as those rules."

90. Mr Rowley submitted that Rule 5.11 operated in the same way as Rules 1, 2 and 3 in *Lloyds 1*. He also submitted that if the questions which he posed in opening his oral submissions were answered in the way which Mr Short submitted on behalf of the Trustee, then Rule 5.11 was otiose and deprived of meaning.

(4) Determination

A. The Rule

91. In my judgment, Rule 5.11 is a forfeiture clause and should be construed on the basis that any benefit or instalment of a benefit which has not been claimed within six years of the date on which it fell due for payment is forfeited and the entitlement to that benefit or instalment is extinguished. It is also my judgment that Rule 5.11 is not limited to missing beneficiaries but applies to all unclaimed benefits once the six year period has expired. I have reached these conclusions for the following reasons.

92. I begin with the admissible background to the rule before considering the text of the rule itself in greater detail. Initially, I was strongly attracted to Mr Short's argument and was inclined to the view that the Court should be slow to permit the forfeiture of a beneficiary's entitlement under a trust (in any context). However, I am satisfied that there is (and was) no real stigma attached to a forfeiture clause in an occupational pension scheme. Despite the Goode Report, Parliament has never legislated to prohibit such clauses and since 1973 and 1975 respectively it has been permissible for an employer to forfeit unclaimed short service benefits and GMPs if they are unclaimed more than six years after they fall due for payment.

93. Moreover, in the context of an occupational pension scheme, a forfeiture clause serves the same function as a contractual limitation clause in, say, an insurance policy or share purchase agreement. By contrast with a purely contractual relationship, it would be impossible for trustees to exercise a contractual right to bar a claim to a particular benefit or instalment of benefit unless they are also able to forfeit or extinguish the member's entitlement to share in the assets of the fund or scheme. If the member still retains a

beneficial entitlement under the terms of the trust, then the trustees must give effect to it. It follows that to bar a claim they must also extinguish the right.

94. I turn next to the language of the rule. I approach it on a neutral basis and without leaning either in favour of or against forfeiture. I also ignore both the heading to the current version of the rule and any previous versions. I accept that the clause does not use the word "forfeit" or "forfeiture" in relation to any benefit or instalment of benefit. But in my judgment the words "shall be retained by the Trustee for the purposes of the Scheme" have the same effect. I have reached this conclusion for the following reasons:

(1) Rule 5.11 makes no distinction between benefits unclaimed for six years because the beneficiary is missing and benefits which are unclaimed because the beneficiary is unaware of the entitlement (whether as a result of a mistake by the Trustee or otherwise). If the purpose of the rule was to draw such a distinction, one would have expected the drafter to use clear language to that effect. As Mr Rowley pointed out, there are limitation rules which depend expressly on the knowledge of the claimant: see, for example, section 14A of the Limitation Act 1980.

(2) By contrast, I am not satisfied that the Employer's construction makes it necessary to supply any additional words at the end of the clause. If the effect of the clause is to extinguish a benefit or instalment after six years, then the "purposes of the Scheme" cannot as a matter of logic include the payment of that benefit or instalment (which has ex hypothesi been extinguished). In my judgment, this is the natural and ordinary meaning of the words.

(3) Moreover, Schedule II paragraph 6 provides clear support for this construction. As Mr Rowley pointed out, section 21(2) of the Pension Schemes Act 1993 and Regulation 61 of the Occupational Pension Schemes (Contracting-out) Regulations 1996 were permissive. Although they limited the circumstances in which an employer could forfeit a member's GMP, they did not require an employer to include such a provision. The drafter of the 2000 Rules and the 2004 Rules chose to include such a provision but that provision was not paragraph 6. It was Rule 5.11.

(4) Paragraph 6 did not provide for forfeiture itself. Its purpose was to limit the circumstances in which forfeiture or suspension of a GMP was permissible. In

particular, it provided that if a member had a GMP and it "is to be forfeited or payment thereof suspended in accordance with the rules" it should be forfeited or suspended in accordance with Regulation 61. In this context, the words "Notwithstanding Schedule II" at the beginning of the Rule 5.11 make perfect sense. The drafter made it clear that despite the limitation in paragraph 6, Rule 5.11 was intended to have general effect in relation to other benefits and instalments.

(5) If the Trustee's argument is correct, then the drafter should have used the words "Subject to Schedule II" at the beginning of Rule 5.11 and not the words which he or she did use. But in my judgment, the drafter was careful to use the right language. But more to the point, it is difficult to see why it would have been necessary to include paragraph 6 in Schedule II at all if Rule 5.11 was not intended to be a forfeiture clause.

95. Finally, having considered the questions posed by Mr Rowley in argument about the effect of Rule 5.11, I have reached the conclusion that the Trustee's construction of Rule 5.11 is impractical and deprives the rule of any real effect for the following reasons:

(1) If the Trustee's argument is correct, then the words "for the purposes of the Scheme" must include not only the general purposes of the Scheme (such as augmenting benefits or paying administration costs) but also the specific purpose of paying benefits or instalments which have been unclaimed for more than six years since the date of payment. The rule must, therefore, confer a discretion on the Trustee to pay that benefit or instalment.

(2) I accept that it is possible for the rule to have this effect and Morgan J construed clause 25 in *Axminster* in a similar way. Moreover, this would provide a partial answer to the question posed by Mr Rowley (above). The effect of the rule would be to give the Trustee a discretion to pay the benefit or instalment more than six years after it fell due where there had been an absolute entitlement before.

(3) However, I am not satisfied that this is a satisfactory answer to those questions or that the rule was intended to operate in this way. If the clause confers a discretion upon the Trustee to pay unclaimed benefits where it has made a mistake and the beneficiary is unaware of the entitlement, the Trustee must be entitled to exercise that discretion in all deserving cases. As Mr Rowley pointed out, there are many

other reasons why a benefit may not be claimed apart from the beneficiary going missing.

(4) Moreover, if the Trustee's construction is correct, it is difficult to see what protection Rule 5.11 was intended to provide for the Trustee or what practical benefit it was intended to serve. The effect of the rule would not be to free up "orphaned" benefits because the Trustee would never know whether the beneficiary was missing or aware of the entitlement. In my judgment, it is far more likely that Rule 5.11 was intended to bar stale claims by extinguishing the beneficiary's entitlement to the benefit or instalment if it had not been claimed more than six years after it fell due.

B. Archaeology

96. If I had been in any doubt about the construction of Rule 5.11, I am satisfied that this is a case where it is appropriate to look at previous versions of the rule. In the present case, this is not a complex exercise which involves an examination of very different versions of the rule which evolved over time. The previous versions of the Rules all support the conclusion that Rule 5.11 was intended to be a forfeiture rule. In particular:

(1) The 1981 Rules contained a forfeiture rule which was headed "Forfeiture of unclaimed benefits" and used the word "forfeiture" in the body of the clause: see Rule 18(a). I accept that this is of limited value because the wording changed. But it demonstrates continuity. Every set of rules has included a forfeiture clause.

(2) However, the 1988 Rules introduced a rule in exactly the same form as Rule 5.11 (subject to the qualification at the beginning of the rule and the use of the word "Fund" instead of "Scheme"): see Rule 20.2. It was headed "Benefit Forfeiture" and it replaced rule 18(a). It is legitimate to have regard to the heading because the 1988 Rules did not contain Rule 1.4 of the 2000 Rules and the 2004 Rules (or an equivalent provision).

(3) The 1995 Rules contained the same rule with the same heading as the 1988 Rules (subject only to renumbering): see Rule 19.2 of the 1995 Rules. Again, it is legitimate to have regard to the heading for the same reason. It is obvious from the heading, therefore, that both Rule 20.2 of the 1988 Rules and Rule 19.2 of the 1995

Rules were intended to be forfeiture clauses.

(4) Rule 9.2(e) of the 1995 Rules also provided that where a surplus arose under conditions (a) or (c) of that rule, it was to be "retained by the Trustees for the purposes of the Fund". This shows that the drafter intended to adopt the same form of words to achieve the same outcome in a different context.

(5) I accept that the heading to Rule 5.11 is for convenience only and does not affect its meaning: see Rule 1.4. However, given that there was no substantive change to the wording of the rule itself, the obvious inference to draw (and the inference which I draw) is that Rule 5.11 was intended to retain its meaning: see *Stena Line* (above) at [34]. Indeed, I agree with Mr Rowley that it is highly unlikely that the drafter would have intended to implement a material change to its meaning by introducing a general clause such as Rule 1.4 or, to use his expression, a boilerplate provision.

C. Heading

97. In reaching my conclusion on the construction of Rule 5.11 in (a) (above) I have not relied upon the heading of the rule even as a general indication of what the rule is about. In relying on the earlier versions of the rule in (b) (above), however, I have relied upon the headings in the 1988 and 1995 Rules as an aid to their construction. Rule 1.4 makes no reference to earlier versions of the rules and I am satisfied that the approach in *Gregory Projects (Halifax) Ltd v Tenpin (Halifax) Ltd* has no application to that exercise. I am also satisfied that the correct approach to adopt is that set out in *Stena Line* and to consider whether the introduction of Rule 1.4 involved a material change to the earlier meaning of Rule 5.11 (as I have done).

D. Other Authorities

98. In *Lloyds 1* (above) Morgan J construed Rules 1 and 3 as extinguishing the beneficiary's entitlement even though the words "forfeit" and "forfeiture" were not used in either rule. Moreover, Rule 3 in *Lloyds 1* was similar to Rule 5.11 in the present case and provided that the entitlement to any pension or benefit "shall be extinguished and it shall be retained by the Trustees in the Fund" which is closely analogous to the present case. Finally, the Judge rejected Mr Short's argument on behalf of the Representative

Beneficiaries that the Trustees had a discretion to decide what to do with benefits which fell within those rules: see [407] (above). Although it is not binding authority, I take considerable comfort from the decision of Morgan J in *Lloyds 1* (above). It is a useful cross-check that the construction of Rule 5.11 which I have adopted is the correct one.

VII. The Specific Issues

99. The parties agreed nine specific issues which the Court was required to resolve (which I will call "**Issue 1**" to "**Issue 9**"). I set out each one in bold type and italics (below) immediately above my decision and reasons on each issue. I also take the heading for each section from the Agreed List of Issues. Issue 9 consists of three separate questions and Issue 9.2 has three separate parts. In each case, I set out the question (or part) in italics and bold type immediately above my decision and reasons.

(1) Rule 5.11

1. In the absence of a valid claim for the purposes of Rule 5.11, does that Rule extinguish the entitlement of any member to be paid any shortfall in the lump sum paid resulting from the Equalisation Issue once six years has passed from the date on which the lump sum was paid?

E. Background

100. Issue 1 addresses "shortfalls" in the payment of lump sums to members who elected to take advantage of the commutation option in Rule 3.7 of the 2000 Rules and the 2004 Rules (above). There was a statutory limit on the amount which a member of the Scheme could take tax free and Mr Rowley took me to the Finance Act 2004 which permitted members to take 25% of the value of their crystallised benefits (i.e. the pension which was brought into payment) tax free. The term which Schedule 29, paragraph 1 of the Act used to describe this sum was a "pension commencement lump sum". The limitations imposed by the tax legislation were reflected in the definitions used in both the 2000 Rules and the 2004 Rules: see, e.g., the terms "Retirement Lump Sum" and "Lump Sum Retirement Benefit".

101. It is not necessary for me consider precisely how the pension commencement lump sum was calculated or what effect the Finance Act 2004 had on those calculations. For present purposes, it is enough to note that members were entitled to commute their pension up to a maximum tax-free amount. Mr Short also took me to the "Guaranteed Minimum

Pension (GMP) equalisation newsletter" dated 16 July 2020 which stated that although a pension commencement lump sum could be paid in stages, it had to be taken within the period beginning six months before and ending one year after the member became entitled to it. This demonstrates that, in practice, members who elected to take a pension commencement lump sum usually intended to take the full amount available to them tax free and to take it immediately.

102. Nevertheless, the decision to take a pension commencement lump sum was a matter of choice for individual members. Those who wished to commute part of their pension into a pension commencement lump sum had to make an election under Rule 3.7 and they made this election by completing a form sent to them by the Scheme's administrator. There were a number of forms in evidence. But Mr Short took me to three specific (but anonymised) forms which were representative of the forms in use.

103. *Form 1:* The first form identified the member's retirement date as 7 September 2005 ("**Form 1**") and gave the member three options: "Full Pension", "Maximum tax free cash and reduced pension" and "Cash of £…(specify) and reduced pension". The member had ticked the second option and elected to receive the maximum tax free cash and reduced pension. Form 1 does not state the date on which the member completed it but in the light of Forms 2 and 3 I draw the inference that it must have been after the date of retirement.

104. *Form 2:* The second form identified the member's retirement date as 31 October 2005 ("**Form 2**"). It also gave as Option 1 "An annual pension of £7,640.62" and as Option 2 "A tax free lump sum of £11,364.55 plus a reduced annual pension of £6,760.40." There was no third option to take a specific lump sum chosen by the member (as in Form 1). Under cover of a letter dated 24 January 2006 Jardine Lloyd Thompson, the administrators, sent Form 2 to the member to complete. It follows that the member must have completed and returned it after the retirement date.

105. Form 2 must be read and interpreted by reference to the covering letter, which also contained a statement of both Options subject to the qualification: "This statement needs to be read in conjunction with the Retirement Option Statement Notes". Those notes included the following statements (the third of which was repeated in Form 2 itself):

> "**Payment of Your Pension**

> Your pension is payable for life by quarterly instalments in advance direct to your bank or building society account. It will be paid on or around the first of each January, April, July and October and will be taxed as earned income under the PAYE system.
>
> **Tax Free Lump Sum**
>
> The tax free lump sum quoted under Option 2 is the amount that you may take in accordance with the scheme governing documents. You may, however, if you wish, choose to receive any amount of tax free cash up to this figure.
>
> …….
>
> In preparing this statement, care has been taken to reflect the most accurate and up to date information available at the time of preparation. The final benefits payable will always be subject to the Trust Deed and Rules of the pension arrangement, any discretion exercisable by the Trustees, all prevailing legislation, up to date earnings information and, where relevant, any restrictions necessary to comply with the State pension requirements (such as the amount of tax free cash sum)."

106. *Form 3:* The third form identified the member's retirement date as 26 August 2006 ("**Form 3**"). It is clear that the member was retiring early because it identified his or her NRD as 26 August 2010. Form 3 also gave as Option 1 "An annual pension of £8,474.52" and as Option 2 "A tax free lump sum of £33,843.59 plus a reduced annual pension of £5,076.60." Again, there was no third option to take a specific lump sum chosen by the member (as in Form 1).

107. Under cover of a letter dated 23 October 2006 Jardine Lloyd Thompson sent Form 3 to the member to complete and it follows again that the member must have completed and returned it after the retirement date. The covering letter also included the same Retirement Option Statement Notes as the covering letter enclosing Form 2. Again, Form 3 must be read and interpreted by reference to the covering letter and those notes.

F. The Issue

108. Issue 1 arises in the following way. The Trustee and CMG intended to equalise the NRD of both male and female members with effect from 1 January 1996 and the administrator calculated members' benefits and, in particular, their maximum tax free lump sums on that basis. However, the change in the rules did not take effect until the 1998 Deed and, as a consequence, there was a shortfall in the tax free lump sums paid to members who elected to commute their pension under Rule 3.7 during that period. When the

Equalisation Issue (as it was called) came to light, the Trustee resolved to compensate those members by paying off the shortfall. But in doing so, they did not take account of Rule 5.11.

109. I must, therefore, decide whether a shortfall in the payment of a lump sum to a member who elected to commute his or her pension under Rule 3.7 falls within Rule 5.11. The issue may be illustrated by a simple example (which is also relevant to Issue 2):

(1) Member X retires after 1 January 1996. The administrator offers Member X £10,000 with a reduced period pension of £500 per month and Member X accepts that offer by completing either Form 1, Form 2 or Form 3.

(2) Between 2012 and 2014 the Trustee discovers that Member X was underpaid and that she should have been offered a lump sum of £11,000 with a reduced pension of £600 per month. Member X would have accepted that offer.

(3) The difference between the amount which Member X received as a lump sum and the amount which she should have been offered (and would have accepted) is £1,000. I will refer to this sum as the "**Lump Sum Shortfall**".

(4) Finally, the difference between the amount which Member X received each month and the amount which she should have been offered (and would have accepted) is £100. I will refer to this as the "**Instalment Shortfall**".

110. Issue 1 assumes that Member X has not made a valid claim to recover the Lump Sum Shortfall within six years of the date on which it fell due for payment. I will have to consider when a claim is made and whether a member made a valid claim for the purposes of Rule 5.11 in answering Issues 5 and 6. But Issue 1 requires me to consider whether as a matter of principle the Lump Sum Shortfall falls within Rule 5.11 at all.

G. Benefit

111. Mr Short's primary submission was that the Lump Sum Shortfall is not a "benefit" within the meaning of Rule 5.11 because the words "or any part thereof" were not included in the rule. He contrasted Rule 5.11 with section 92(4) of the Pensions Act 1995 which defines "pension" as "any benefit under the scheme and any part of a pension and any payment by way of pension". He submitted that if Rule 5.11 had been intended to apply

to a shortfall or under-payment, it would have included words to that effect.

112. I reject that submission and for the reason given by Morgan J in *Axminster*. The reference to "benefit" in Rule 5.11 is not a reference to the full entitlement or right of the member but to that part of the right or entitlement which was not paid on the due date and remains unclaimed after 6 years. This is clear from the final words of the Rule which require the Trustees to retain the benefit for the purposes of the Scheme. The Trustees can only retain and apply a benefit which remains unpaid (and not a benefit which they have already paid).

113. In *Axminster* Morgan J was considering a rule which was, for present purposes, in almost exactly the same form.[4] He reached the same conclusion for the following reasons at [187]:

> "Rule 36 refers to a failure to claim a benefit within six years of its becoming due. The period of time which is relevant for r.36 begins with the date on which a benefit becomes due. The reference to "a benefit" is to the sum which is payable on a certain date, whether it is a lump sum or more usually an instalment of pension. The reference to "a benefit" is not to the right to a pension from retirement (or some other date) during the lifetime of the pensioner. If an instalment was due on a certain date and part of the instalment was paid but part was not, the benefit which is relevant for r.36 is the part that was not paid. Rule 36 refers to the Trustee applying "all or any part of such benefit". "Such benefit" must be the part that it is not paid as it cannot include the part of the instalment which is paid."

H. Implied Term

114. Mr Short also submitted that a term was to be implied into Rule 5.11 that it had no application where the Trustee did not inform the member of the existence of the entitlement to a higher payment or the shortfall and the person entitled had no reasonable means of knowing that there had been a shortfall and that he or she needed to make a further claim in that respect.

[4] It was headed "Unclaimed Money" and provided as follows: "36.1 If a Beneficiary fails to claim a benefit within six years of its becoming due, it shall be forfeited but the Trustees may at their discretion subsequently apply all or any part of such benefit: (a) to the Beneficiary notwithstanding the forfeiture; (b) in augmenting the benefits of Members still in Service; (c) in reducing the Employer's contributions to the Scheme under Rule 10; or (d) in payment of the expenses of the management and administration of the Scheme under Rule 41."

115. Mr Short submitted that such a term satisfied both the business efficacy test and the officious bystander test and in support of this proposition he cited the well-known decision in *Marks & Spencer v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742. He also cited *Ali v Petroleum Co of Trinidad and Tobago* [2017] ICR 531 where Lord Hughes stated at [7]:

> "It is enough to reiterate that the process of implying a term into the contract must not become the re-writing of the contract in a way which the court believes to be reasonable, or which the court prefers to the agreement which the parties have negotiated. A term is to be implied only if it is necessary to make the contract work, and this it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, ex hypothesi, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice, 'Oh, of course') and/or (ii) it is necessary to give the contract business efficacy. Usually the outcome of either approach will be the same. The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient pre-condition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement."

116. In the pension scheme context, Mr Short also relied upon the decision of the House of Lords in *Scally v Southern Health Board* [1992] 1 AC 294 where employees who were members of the NHS superannuation scheme had the right to buy additional years of pension entitlement on favourable terms if they exercised the right within a given time period. The issue for the House of Lords was whether a term could be implied into the contract of employment that the employer had a duty to inform employees of these rights. Lord Bridge (with whom the other members of the Judicial Committee agreed), held that it did. He stated this at [7]:

> "Here the express terms of the contract of employment confer a valuable right on the employee which is, however, contingent upon his taking certain action. Where that situation is known to the employer but not to the employee, will the law imply a contractual obligation on the employer to take reasonable steps to bring the existence of the contingent right to the notice of the employee? It is true that such an implication may have the consequence of sustaining a claim for purely economic loss. But this consideration would not furnish the essential reason for making the implication. If there is a basis for making the implication, it must lie rather in the consideration that the availability of the contingent right was intended by those who drew up the terms of

> the contract for the benefit of the employee; but if the existence of the contingent right never comes to his attention, he cannot profit by it and it might, so far as he is concerned, just as well not exist."

117. Mr Rowley submitted that *Scally* was distinguishable because Lord Bridge accepted that the same reasoning might not apply to a pension scheme and that it would have been stretching the doctrine of implication of terms beyond its proper limits had the term not arisen out of the relationship between employer and employee. I must, therefore, set out the entire passage from Lord Bridge's speech at [11] and [12] where he explained the basis of implication:

> "11. I recognise that a quite different situation might arise where the pension rights available to an employee in connection with his employment were not part of the terms of his contract of employment but arose out of a separate contract between the employee and an insurance company or the trustees of a pension fund. But that is not this case. Here there is no doubt whatever that the terms of the superannuation scheme as laid down in the regulations in force from time to time were embodied in the terms of the contract of employment of each plaintiff. Since the relevant Board was in each case the employer upon whom, although acting as agent for the Department, all liabilities were imposed by paragraph 2 of Schedule 1 to the Order of 1972, it seems to me beyond question that the legal obligation, if there was one, to notify the plaintiffs of their rights in relation to the purchase of added years rested in each case on the Board, not on the Department.
>
> 12. Will the law then imply a term in the contract of employment imposing such an obligation on the employer? The implication cannot, of course, be justified as necessary to give business efficacy to the contract of employment as a whole. I think there is force in the submission that, since the employee's entitlement to enhance his pension rights by the purchase of added years is of no effect unless he is aware of it and since he cannot be expected to become aware of it unless it is drawn to his attention, it is necessary to imply an obligation on the employer to bring it to his attention to render efficacious the very benefit which the contractual right to purchase added years was intended to confer. But this may be stretching the doctrine of implication for the sake of business efficacy beyond its proper reach. A clear distinction is drawn in the speeches of Viscount Simonds in *Lister v Romford Ice and Cold Storage Co Ltd* and Lord Wilberforce in *Liverpool City Council v Irwin* [1977] AC 239 between the search for an implied term necessary to give business efficacy to a particular contract and the search, based on wider considerations, for a term which the law will imply as a necessary incident of a definable category of contractual relationship. If any implication is appropriate here, it is, I think, of this latter type. Carswell J accepted the submission that any formulation of an implied term of this kind which would be effective to

> sustain the plaintiffs' claims in this case must necessarily be too wide in its ambit to be acceptable as of general application. I believe however that this difficulty is surmounted if the category of contractual relationship in which the implication will arise is defined with sufficient precision. I would define it as the relationship of employer and employee where the following circumstances obtain: (1) the terms of the contract of employment have not been negotiated with the individual employee but result from negotiation with a representative body or are otherwise incorporated by reference; (2) a particular term of the contract makes available to the employee a valuable right contingent upon action being taken by him to avail himself of its benefit; (3) the employee cannot, in all the circumstances, reasonably be expected to be aware of the term unless it is drawn to his attention. I fully appreciate that the criterion to justify an implication of this kind is necessity, not reasonableness. But I take the view that it is not merely reasonable, but necessary, in the circumstances postulated, to imply an obligation on the employer to take reasonable steps to bring the term of the contract in question to the employee's attention, so that he may be in a position to enjoy its benefit. Accordingly, I would hold that there was an implied term in each of the plaintiffs' contracts of employment of which the Boards were in each case in breach."

118. Finally, Mr Short relied upon the general principle articulated by Cockburn CJ in *Churchward v R* (1865) LR 1 QB 173 at 195 (in which, it should be noted, the Court was not prepared to imply a term into the relevant contract):

> "In considering this subject, I must begin by saying that I entirely concur with the position taken by the learned counsel for the suppliant, that although a contract may appear on the face of it to bind and be obligatory only upon one party, yet there are occasions on which you must imply—although the contract may be silent—corresponding and correlative obligations on the part of the other party in whose favour alone the contract may appear to be drawn up. Where the act to be done by the party binding himself can only be done upon something of a corresponding character being done by the opposite party, you would there imply a corresponding obligation to do the things necessary for the completion of the contract."

119. In my judgment, it is not necessary to imply a term into Rule 5.11 either to give it business efficacy or to satisfy the officious bystander test. I have reached this conclusion for the following reasons:

(1) I have found that Rule 5.11 is not limited to missing beneficiaries and "orphaned funds" but is a forfeiture clause of general application. Its purpose is, therefore, to bar or extinguish stale claims by forfeiting benefits unclaimed for six years.

Although this construction would not prevent the implication of a term, it makes it unlikely. In *Fraser Turner Ltd v Pricewaterhousecoopers LLP* [2019] EWCA Civ 1290 Sir Geoffrey Vos C approved the following statement by the trial judge at [33] that there was:

> "[N]o absolute rule that, if there is an express term covering a particular subject, that necessarily excludes the possibility of any implied term where there is no linguistic inconsistency. Rather, the correct approach, reflecting common sense, is that the existence of such an express term makes the co-existence of a further implied term on the same subject unlikely and especially so in a lengthy and carefully drafted document on which legal professionals have been advising."

(2) Put another way, if the drafter had intended the forfeiture of an unclaimed benefit to depend on notice by the Trustee and knowledge of the Claimant, it would have been easy to formulate a rule which operated that way. However, he or she chose not to do so.

(3) Although it may be reasonable to imply such a term (and I express no view on this question), such a term is not necessary to make the clause work either in semantic or commercial terms. There are no words missing or difficulties of syntax and the rule is fully intelligible. Further, many time bar or limitation provisions operate to bar a claim whether or not the claimant has knowledge of it or sufficient knowledge to make it. Sections 2 and 5 of the Limitation Act 1980 provide obvious statutory examples. Claims for breach of warranty often have a short and strict contractual limitation period which do not depend on the knowledge of the claimants.

(4) There is no reason why a forfeiture clause in a pension scheme cannot operate in the same way (if the scheme designer so intends). As Mr Rowley pointed out, section 92(5) of the Pensions Act 1995 permits forfeiture "by reference to a failure by any person to make a claim for pension…where the claim is not made within six years of the date on which the pension becomes due". There is no suggestion that forfeiture clauses are only permissible where the claimant has actual knowledge of the claim.

(5) I accept Mr Rowley's submission that *Scally* (above) is distinguishable from the present case. Lord Bridge did not decide whether such a term was capable of being implied into the rules of a pension scheme and he was careful to say that the

implication of the term arose out of the employer and employee relationship. But in any event, the House of Lords was not considering a limitation clause or forfeiture provision but the substantive right to make additional contributions to their pensions which the employees could not exercise unless they knew about it. It is very doubtful indeed that the House of Lords in *Scally* would have applied the same reasoning to Rule 5.11.

(6) Finally, the scope of the implied term is too wide to be able to say with certainty that a bystander would have been satisfied that the Trustee, the Employer and individual members would have agreed to it. It would apply not only to shortfalls payable as a result of the Equalisation Issue or the Accrual Rate Issue but to any claim to recover an under-payment or shortfall as a result of administrative error or a failure to apply the Scheme correctly. Indeed, the Employer (if not the Trustee) would have been concerned that such a term would deprive Rule 5.11 of most of its force.

120. I have found that Rule 5.11 applies to a Lump Sum Shortfall. I have also rejected the implication of a term into Rule 5.11 limiting its effect. For these reasons, therefore, I am satisfied that Rule 5.11 extinguishes the entitlement of a member to be paid a Lump Sum Shortfall once six years has passed from the date on which it was due to be paid and no claim to recover it has been made.

2. Where any shortfall in the lump sum was, alternatively would be, liable to be extinguished, is the member to be treated as having elected to commute the corresponding part of his or her periodic pension, or should the member's periodic pension be increased to reflect the non-payment of the shortfall in the lump sum, or should some other approach be taken?

121. It is not clear to me that the parties adopted a different stance in relation to this issue. It was the Trustee's case that a periodic pension should not be reduced by reference to a Lump Sum Shortfall which was never paid and it was the Employer's case that there was no question of a member's pension being reduced. Issue 2 also contemplated that the Trustee might argue that future instalments should be increased to compensate members for the failure to pay the Lump Sum Shortfall. But in the event Mr Short did not press me with that argument.

122. In my judgment, the forfeiture of a Lump Sum Shortfall under Rule 5.11 has no effect on future instalments of a member's pension in payment and does not either increase or

reduce them. Rule 5.11 applies on the basis that Member X had a right to the Lump Sum Shortfall, that if she had made a claim for it within six years the Trustees would have paid the relevant amount but that because she has not made a claim within time, that right is now extinguished. Rule 5.11 does not require a recalculation of either her pension commencement lump sum or her reduced pension (subject to Issue 3). The forfeited benefit never formed part of Member X's periodic pension (so as to increase it) and never formed part of the lump sum which she actually received (so as to reduce her periodic pension further).

3. In the absence of a valid claim as aforesaid, does Rule 5.11 extinguish the entitlement of any member to be paid any shortfall in any periodic payment of pension resulting from the Equalisation issue once six years had passed from the date of each periodic payment of pension?

123. Issue 3 requires me to consider whether Rule 5.11 has the effect of extinguishing the Instalment Shortfall which Member X suffered each month until the Trustee corrected the amounts which she was paid (and every other member who was affected by the Equalisation Issue). For the purpose of answering Issue 3, I am also required to assume that Member X (and the other members affected by the Equalisation Issue) has not made a valid claim to recover the relevant Instalment Shortfall.

124. Mr Short submitted that an Instalment Shortfall did not fall within Rule 5.11 because an "instalment of benefits" referred to the full amount of the instalment to which each member was entitled each month and not a part of that instalment. I reject that argument for the same reasons which I have given in relation to Issue 1. I have also rejected the implication of a term into Rule 5.11. For these reasons, therefore, I am satisfied that Rule 5.11 extinguishes the entitlement of a member to be paid an Instalment Shortfall once six years has passed from the date on which it was due to be paid and no claim to recover it has been made.

4. Do the answers to paragraphs 1-3 above apply equally to shortfalls arising from the Accrual Rate issues or do different (and if so, what) answers apply?

125. Neither party suggested that the Court should adopt a different approach to the application of Rule 5.11 to a Lump Sum Shortfall or an Instalment Shortfall arising as a result of the Accrual Rate Issue. I can see no reason why Rule 5.11 should apply differently to those members affected by that issue and I am satisfied that the answers

which I have given to Issues 1 to 3 (above) apply equally to members affected by the Accrual Rate Issue.

5. When has a benefit or instalment been "claimed" for the purposes of Rule 5.11?

126. The word "claimed" is used in Rule 5.11. It is not a defined term in the 2004 Rules and it must, therefore, be given its ordinary meaning. In *Lloyds 1* Mr Rowley conceded that the term "claim" used both in the subject rules and in section 92 of the Pensions Act 1995 were not restricted to the issue of legal proceedings: see [419]. Moreover, in *Lloyds 2* Morgan J considered that this was plainly right: see [360]. I accept, therefore, that it was possible for a member to make a claim or to claim a benefit without issuing legal proceedings. Beyond that, however, neither party put forward a definition of "claim" or "claimed" or argued for a particular meaning.

I. The Trustee's Submissions

127. Mr Short argued that Issue 5 could be broken down into two elements: (i) How is a claim made? (ii) What is claimed? He pointed out that the obligation to pay benefits arose when the conditions for payment were satisfied and that the 2004 Rules do not make the entitlement to benefits conditional upon a formal claim. He also pointed out that the Trustee and administrator did not require any further information to enable payment of benefit to be made.

(i) How is a claim made?

128. Mr Short submitted that the word "claimed" should be construed in the context of the governing provisions of the Scheme as a whole and should not be construed as imposing an obligation upon members to take steps other than those expected of them in the ordinary course. A member was not expected to make a claim for a particular sum or to make repeated claims for payment of the same benefits. He, therefore, submitted that the word "claimed" should be construed on the basis that the ordinary exchange before the pension going into payment was a sufficient "claim" for the purposes of Rule 5.11.

(ii) What is claimed?

129. Mr Short submitted that the subject matter of the relevant claim is a question of fact to be answered by reference to the communications between the member and the Trustee

(or administrator) and that in most cases it will be implicit that the member has made a claim for the benefit to which he or she is entitled properly calculated by the Trustee (or administrator). Finally, he submitted that this was a practical and reasonable outcome consistent with the nature of a pension scheme where responsibility for preparing detailed calculations rests with the Trustee.

J. The Employer's Submissions

130. Mr Rowley submitted that the answer to Issue 5 was provided by Morgan J in *Lloyds 1*, *Lloyds 3* and *Axminster*, where he was careful to distinguish between the necessary administrative arrangements that must be dealt with when a pension falls into payment at the point of a member's retirement (which does not give rise to a claim) and a "claim" properly so called for the purposes of Rule 5.11 or section 92.

131. In *Lloyds 1* Morgan J held that both the forfeiture clause and section 92 were engaged where a beneficiary failed to make a claim for the underpaid amount: see [417]. In *Lloyds 2* it was not necessary for him to decide what "claim" meant but he expressed the view that the formalities in relation to the transfer from one scheme to another would not amount to a claim: see [363](ii). In *Axminster*, however, he had to decide whether the exchanges between the Trustee and a beneficiary on retirement amounted to a "claim" for the purposes of the relevant rule. He said this at [188] and [190]:[5]

> "188. To be a "claim" for the purpose of r.36, the claim must be within the period of six years from the due date of payment. A claim which is before the due date will not suffice unless it could be treated as a continuing claim which, because it continues into the six-year period, is treated as having been made within the six-year period. The choice which the member makes on retirement between an annual pension with no lump sum and a reduced annual pension with a lump sum is not a claim to a benefit for the purposes of r.36. Similarly, a discussion between the Trustee and the beneficiary at the time when the pension comes into payment as to the practical arrangements for transferring payments to the beneficiary is not a claim to a benefit for the purposes of r.36. Further, such a claim would be before the due date for payment of the benefit that went unpaid and would not qualify as a claim for r.36, unless the claim could be considered to be a continuing claim."
>
> "190. Accordingly, I interpret "a benefit" for the purposes of r.36 as being the sum which is unpaid on the date on which it fell due. A

[5] Mr Short also advanced an argument about the use of the word "fail" which he did not pursue before me. Morgan J dealt with this point at [189] and it is unnecessary for me to cite that paragraph.

> "claim" must be a claim by the beneficiary to be paid the sum which has not been paid. The claim must come after the time when the sum was due and was not paid unless it was made earlier and is a continuing claim. The word "fails" means simply that a claim was not made and does not require the Trustee to show that the beneficiary was at fault in some way, or that the Trustee was free from fault in all ways. Mr Short's submissions on the specific circumstances of this case where the Trustee did not administer the Plan correctly and the beneficiaries could not be expected to be aware that they were underpaid does not cause me to change my view as to the meaning of r.36 or as to the meaning of "fails" but those circumstances will be a relevant consideration when the Trustee comes to exercise its discretion as to how to apply the sums in question and, in particular, whether all or any part of such sums should be paid to the beneficiaries notwithstanding the forfeiture."

132. Mr Rowley submitted that I should follow *Axminster*. He also submitted that if the Trustee's construction of Rule 5.11 was correct, it would render Rule 5.11 "a dead letter" and that if a request to put a pension into payment was a "claim" for the purposes of the rule, in practice the scope of section 92 would be limited to those cases in which a member "does not complete the necessary paperwork". He also submitted that such a construction would be wholly inconsistent with section 92.

L. Determination

(i) How is the claim made?

133. I accept Mr Short's submission that because the words "claim" and "claimed" are not defined terms it is unnecessary for a claim to be made in any particular form or that any particular verbal formula is required. However, I also accept Mr Rowley's submission that the word "claim" must mean something more than a request to put a pension into payment. However, I find it impossible to go very much further than this without making some attempt to describe (if not to define) what is meant by a claim.

134. In my judgment, the word "claim" involves the assertion of a right or entitlement. It is an ordinary English word and perhaps the most familiar description of a "claim" (albeit in a very different context) is the one given by Devlin J (as he then was) in *West Wake Price & Co. v Ching* [1957] 1 WLR 45 at 55:

> "I think that the primary meaning of the word "claim" — whether used in a popular sense or in a strict legal sense — is such as to attach it to the object that is claimed; and is not the same thing as the cause of

> action by which the claim may be supported or as the grounds on which it may be based. In the Oxford Dictionary "claim" is defined as: first, "A demand for something as due; an assertion of a right to something"; secondly, "Right of claiming; right or title (to something or to have, be, or do something; also on, upon the person, etc., that the thing is claimed from)." All the examples given under these two heads are examples of claims made to an object or upon a person. Under the verb "to claim" it is observed that it is "often loosely used, especially in the United States for: contend, maintain, assert." I do not doubt that the word is frequently used in this looser meaning of "contention" or that it is often used by lawyers as if it meant the same thing as a cause of action. It is quite natural to speak of a claim in fraud or a claim in negligence, and Mr. Paull has advanced many powerful arguments to show that it is as "cause of action" that the word is used in this policy."

135. I begin with the content of the claim. In my judgment, it is possible for the assertion of the relevant right or entitlement to be either express or implied. Lawyers often talk of a claim being "intimated" and it is enough, in my judgment, if the Trustee can spell out of the communication from the member an intention to assert the right or entitlement. However, it is not necessary for the person making the claim to be aware of the right or entitlement. For instance, Member X (in the above example) may have concerns that the administrator has consistently calculated her benefits incorrectly and writes a letter stating that she asserts that she is entitled to payment of "all those benefits which you have failed to pay me". That said, it will be much easier to interpret a communication as making a claim if the member is aware that the benefit or entitlement is unpaid (and the Trustee is also aware of this fact).

136. I turn next to timing. I agree with Morgan J in *Axminster* that the claim must be made after the benefit has fallen due and within six years (unless the claim can be treated as a continuing claim to the unpaid element of the benefit). This is not so much because any earlier communication cannot be a "claim" but because a claim made before the payment fell due is irrelevant for the purposes of Rule 5.11. The member or beneficiary can only escape the effect of Rule 5.11 if the benefit is claimed within six years of its date of payment.

(ii) What is claimed?

137. Finally, I turn to the subject matter of the claim. In my judgment, it is necessary for the member or beneficiary to claim the benefit or instalment which remains unpaid. I agree, therefore, with Morgan J in *Axminster* (above) on this point too. This is consistent with

the reasons which I gave in answer to Issues 1 and 2. But it does not follow from my acceptance of that proposition that it is necessary for a member or beneficiary to make a separate or individual claim to the unpaid benefit or instalment, if it is sufficiently clear from the language used by the member or beneficiary that he or she intends to assert a continuing right or entitlement to the unclaimed element. Morgan J contemplated that it would be possible for members to make claims of this nature in *Axminster* and I agree.

6. For these purposes, does a member make a claim by completing and returning a "Retirement Option Form"?

138. In Form 1 the member expressly requested the maximum tax free cash sum. In Forms 2 and 3 the members did not expressly request the maximum available to them but it was implicit in the Investment Option Statement Notes that this was understood by the administrators to be the maximum available. Under the heading "Tax Free Cash Sum" the note stated that the member could choose to receive any amount of tax free cash "up to this figure". I am prepared to accept, therefore, that each Form contained a request to be paid the maximum pension commencement lump sum available.

139. In none of the three sample forms did the member expressly assert a right or entitlement to receive a Lump Sum Shortfall and although I agree with Mr Short that each Form should be treated as a request for the maximum amount available and each form was sent during the six years after the date on which the benefit fell due, I am unable to imply such an assertion into either Form 1, Form 2 or Form 3. I say this for the following reasons:

    (1) Each member completed the form at the request of the administrator to make a choice between options being offered to them. In my judgment, this did not amount to the assertion of a right or entitlement. None of the three members was asserting or demanding payment and the Trustee or administrator had not refused to pay them.

    (2) Even if a request for payment can amount to the assertion of a right or entitlement, all three forms were submitted before the member had been paid and the pension was in payment. It is highly artificial to treat the form as a request for payment of a shortfall when the member had no idea that he or she would be underpaid.

    (3) None of the three members was aware that he or she had been quoted the wrong

figures or that they were about to be underpaid. Indeed, it is unclear whether the member who signed Form 1 had been given a figure at all at that stage. Again, it is artificial to treat each form as a request for payment of a shortfall which the member did not know existed.

(4) Whilst knowledge is not determinative, I find it impossible to spell out of the language of the three forms the assertion of a general right or entitlement to be paid everything to which the member was entitled and whether or not the figures which the Trustee had given were correct.

(5) Finally, the members who completed Forms 2 and 3 were presented with a figure on the basis that it was the maximum to which they were entitled tax-free. They were not aware that the figure had been wrongly calculated or calculated on a mistaken basis. In my judgment, it is impossible to imply into Form 2 and Form 3 a request for payment of more than the specific sum set out in each form.

140. Accordingly, I find that on the basis of the examples shown to me, a member who completed and returned a Retirement Option Form did not make a claim for the relevant benefit or instalment for the purposes of Rule 5.11. The member did not make such a claim because the Retirement Option Form did not contain an express or implied assertion of a right or entitlement to any shortfall in his or her pension commencement lump sum or any shortfall in his or her instalments of pension.

(2) Interest

7. Should the claimant apply interest and, if so, for what period and at what rate in relation to adjustments made (or to be made in the light of the answers to the above)?

141. It is common ground that interest should be paid on any shortfall and the only issue between the parties was the rate. In both *Lloyds 1* and *Lloyds 2* and in *Axminster* Morgan J adopted a rate of 1% above base rate: see *Axminster* at [340] to [343]. In that case 166 beneficiaries (who amounted to 76% by number) were owed less than £10,000 and 126 beneficiaries (who amounted to 57.5% by number) were owed less than £5,000. Morgan J considered that the approach which he had adopted in *Lloyds 1* and *Lloyds 2* remained valid for most beneficiaries to whom arrears were payable. He also concluded that it was not appropriate to order a higher rate for those beneficiaries to whom larger sums were

due.

142. Mr Short submitted that I should adopt the rate of 2% above base rate because the amount owed to each beneficiary was likely to be significantly higher than in *Axminster*. Mr Rowley submitted that I should apply section 151A of the Pension Schemes Act 1993 and Regulation 6 of the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations1996 (SI 1996/2475) and apply base rates. He also submitted that this was appropriate because the arrears due to beneficiaries both as a result of the Equalisation Issue and the Accrual Rate Issue were windfall benefits (which they would not have received if the Scheme rules had been validly amended when they should have been).

143. In my judgment, it is appropriate to follow *Lloyds 1*, *Lloyds 2* and *Axminster* and apply 1% above base. I have set out the relevant figures above and I am not satisfied that the arrears payable (or paid) by the Trustee to each individual beneficiary are significantly higher or, if they are, that such a difference justifies a different rate. Moreover, as Mr Rowley conceded, Morgan J declined to apply section 151A and Regulation 6 in *Lloyds 1*. I have considered whether the recent increase in the inflation rate would justify adopting a higher rate of interest. But given the periods for which interest is payable, I have considered that it is not appropriate to do so in the present case.

8. On the proper construction and application of Rule 5.11 (which, for the avoidance of doubt, includes taking into account any implied limitation upon the application of that rule) is the answer to any of the questions raised above different if time elapsed between the claimant knowing that there was or may have been an underpayment and either (i) notifying the members; or (ii) arranging for the underpayment to be made good?

144. I have found that Rule 5.11 is a forfeiture clause in section VI (above). In answering Issue 1 (above), I have also addressed the question whether a term should be implied into the 2004 Rules that Rule 5.11 should not apply where the Trustee did not inform the member of the existence of the entitlement to a higher payment or the shortfall and the person entitled had no reasonable means of knowing that there had been a shortfall and that he or she needed to make a further claim in that respect. Accordingly, the answer to both Issue 8(i) and 8(ii) is negative.

(3) Recoupment

9. If any person had been incorrectly paid sums after their entitlement to those sums had been extinguished by Rule 5.11 and the claimant seeks to recoup those sums from future payments of pension:

9.1 Does section 91(6) of the Pensions Act 1995 mean that the claimant must obtain an order from a competent court before effecting such recoupment in the event that there is a dispute as to the amount to be recouped in total or from each periodic payment?

145. It is common ground that section 91(5)(f) of the Pensions Act 1995 permits the Trustee to recoup sums overpaid to a member or beneficiary by mistake provided that the Trustee complies with section 91(6), which provides as follows:

> "(6) Where a charge, lien or set-off is exercisable by virtue of subsection (5)(d) (e) or (f) —
>
> (a) its amount must not exceed the amount of the monetary obligation in question, or (if less) the value (determined in the prescribed manner) of the person in question's entitlement or accrued right, and
>
> (b) the person in question must be given a certificate showing the amount of the charge, lien or set-off and its effect on his benefits under the scheme,
>
> and where there is a dispute as to its amount, the charge, lien or set-off must not be exercised unless the obligation in question has become enforceable under an order of a competent court or in consequence of an award of an arbitrator or, in Scotland, an arbiter to be appointed (failing agreement between the parties) by the sheriff."

146. In *Burgess v BIC UK Ltd* [2018] Pens LR 13 Arnold J (as he then was) accepted Mr Rowley's argument that equitable recoupment was not a restitutionary remedy for unjust enrichment but a self-help remedy to which the Limitation Act 1980 did not apply (because it did not involve any claim for repayment but an adjustment of future accounts): see [171] and [172]. However, it was also common ground that the requirements of section 91(6) limit the ability of the Trustee to exercise that self-help remedy. Issues 9.1, 9.2 and 9.3 all raise questions about the scope of those limitations.

147. Section 91(6) operates in the following way. Where the Trustee has made an overpayment to a member or beneficiary and elects to exercise its right of equitable recoupment, it must give the member a certificate showing the amount which it proposes to recoup and if the member or beneficiary disputes the Trustee's entitlement, the Trustee may not exercise the right of recoupment unless the obligation to repay it has become enforceable under an order of a competent court. The first issue between the parties was whether the words "there is a dispute as to its amount" extend not only to a dispute about

the amount of the overpayment itself but also as to the amount which the Trustee is entitled to recoup out of each instalment of pension.

148. This issue can also be illustrated by reference to an example (which Mr Rowley gave). The Trustee overpays Member Y by £1,000 and elects to recoup it over 10 years which would require a deduction of £8.33 per month. Mr Short submitted that a dispute not only about the total amount of £1,000 but also about the amount or rate of the deduction would fall within section 91(6). Mr Rowley submitted that Parliament could not have intended that the Trustee would have to serve an individual certificate each month for £8.33 or to give the member or beneficiary the right to resist the exercise of the right of set off unless or until the Trustee obtained a court order.

149. On Issue 9.1 I prefer Mr Short's submissions. The words "its amount" in the phrase "dispute as to its amount" refer back to the words "the amount of the charge, lien or set off" in paragraph (b) which immediately precedes those words. A dispute as to the amount of the set off must extend not only to the total amount claimed but the amount of each deduction. Moreover, I am not satisfied that this produces an impractical result. I accept Mr Short's submission that it would only be necessary for the Trustee to give one certificate to Member Y setting out the total amount of the set off and the rate at which the Trustee proposed to recoup it out of each instalment of pension. It was common ground that if Member Y disputed the total amount, the Trustee would have to obtain an order of a competent court. It would be highly artificial if Member Y was unable to challenge the rate of payment at the same time.

9.2. Where section 91(6) requires the claimant to obtain such an order: (a) Is it necessary to obtain an order requiring the person to repay the overpayment in question? Or (b) Is it sufficient to obtain a declaration that there has been an overpayment to a particular extent; or (c) Is some other, and if so what, order required?

150. Mr Short also submitted that the Trustee could not recoup the overpayment until or unless it obtained an order requiring Member Y to repay the amount in question. Mr Rowley submitted that it was sufficient for a court of competent jurisdiction to make a declaration because the right of recoupment did not, as a matter of law, require Member Y to repay anything. Instead, the Trustee was able to exercise its self-help remedy and retain the money from future instalments.

151. On Issue 9.2 I prefer Mr Rowley's submissions. It is not easy to apply section 91(6) to

the equitable right of recoupment because it assumes that any right of set off must arise out of "a monetary obligation" on the part of the member or beneficiary: see paragraph (a). But, as Arnold J accepted in *Burgess v BIC UK Ltd*, the right of equitable recoupment does not depend on any correlative obligation on the part of the member or beneficiary. In my judgment, therefore, the words "the obligation in question" must be interpreted in the very broad sense of an obligation to give effect to the charge, lien or set off.

152. It follows, therefore, that it is unnecessary for the Trustee to obtain a money judgment or an order for payment and enough for it to satisfy a court of competent jurisdiction that it is entitled to exercise the right. I am satisfied that the requirements of section 91(6) would be met if the Trustee obtained a declaration against Member Y that it was entitled to exercise its right to recoup £1,000 by deducting the sum of £8.33 per month from future instalments of pension beginning immediately. Moreover, it is clear from *Burgess v BIC UK Ltd* that Arnold J thought the same and I refer to the last sentence of [166] (below).

9.3 For these purposes is the Office of the Pensions Ombudsman a competent court?

153. I therefore turn to the principal issue between the parties which was whether a court of competent jurisdiction includes the Pensions Ombudsman. Mr Short submitted it formed part of the ratio of Arnold J's decision in *Burgess v BIC UK Ltd* that the Pensions Ombudsman was not a "competent court" within the meaning of section 91(6). The full passage in the judgment upon which he relied appears at [166] to [168]:

> "166. It is also common ground that, if trustees identify an overpayment and notify it to the member with proposals for the exercise of the right of recoupment out of future payments of pension, the member can refer to the Ombudsman a dispute about either the amount or the terms on which the trustees propose to exercise their right of recoupment. The outcome of such a referral could be a decision by the Ombudsman that the trustees are entitled to exercise their right of recoupment in the way they have proposed up to an amount which the Ombudsman is satisfied has been overpaid. If the Ombudsman made such a determination and the member was unwilling to accept the consequent exercise of the right of recoupment, the trustees could apply to the County Court to enforce the determination "as if it were a judgment or order of that court": see the Pensions Schemes Act 1993, s.151(5)(a). This could be done by the County Court making an order declaring the trustees' entitlement to recoup the overpayment in accordance with the determination.
>
> 167. BIC UK contends that the Pensions Ombudsman's determination would amount to an order of a competent court, whereas the claimants dispute this.

> 168. In my judgment, a determination by the Pensions Ombudsman would not itself constitute "an order of a competent court", because the Ombudsman is not a court. An order by the County Court pursuant to s.150(5)(a) of the Pensions Schemes Act 1993 would constitute an order of a competent court, however."

154. In *Burgess v BIC UK Ltd* the primary issue which the Court had to decide was whether the scheme rules had been validly amended to permit certain increases in benefit. In the event Arnold J held that the amendment to the scheme rules was valid: see [132]. It was unnecessary, therefore, for him to go on and decide whether the Pensions Ombudsman was a competent court for the purposes of section 91(2). Nevertheless, he went on to consider this issue "in case I am wrong": see [149]. In the event, the Court of Appeal found his decision on the amendment point to be wrong: see [2019] EWCA Civ 806. But there was no challenge to his decision on the competent court point and that part of his decision took effect and bound the parties.

155. Mr Rowley submitted that Arnold J's decision on the competent court point was an *obiter dictum* (notwithstanding that there was a successful appeal against his decision on the amendment point). But he also submitted that it was wrong. He relied upon *Peach Grey & Co v Sommers* [1995] ICR 549 in which the Divisional Court held that the industrial tribunal (as it was then called) was an "inferior court" for the purposes of RSC Order 52 and that the Divisional Court itself had power to punish a contempt committed in the course of proceedings before it.

156. In *Watson v Hemingway Design Ltd* [2021] ICR 1034 the Court of Appeal also held that the employment tribunal (the successor to the industrial tribunal) was a "court" for the purposes of section 2(6) of the Third Party (Rights against Insurers) Act 2010. Bean LJ cited *Peach Grey & Co v Sommers* (above) with apparent approval: see [26]. He had no doubt that the employment tribunal was a "court" for the purposes of the Act despite the differences in procedure, its lack of enforcement powers and the kind of legal questions which it might be required to decide under the 2010 Act: see [35] to [42].

157. I am not satisfied that I should treat the passage from *Burgess v BIC UK Ltd* at [166] to [168] (above) as no more than an *obiter dictum* and I accept Mr Short's submission that it formed part of the *ratio decidendi* of the decision. In *R (Youngsam) v Parole Board* [2020] QB 387 Leggatt LJ (as he then was) gave the following guidance at [58] and [59]:

> "58. In looking for the ratio decidendi of a case, the starting point is always the rulings and reasons given in the judgment(s) to justify the court's decision, read in the light of the facts of the case and the issues that arose. Generally, this is also where the inquiry ends. But where there is scope for argument that a rule or ruling stated in the precedent case was framed too broadly, or that the decision is for some other reason better explained on a different basis which would enable it to be distinguished, the search for the ratio will also involve an evaluation of the strength and persuasiveness of the reasons expressed in the judgment(s) or otherwise advanced or available for the ruling. Such an evaluation will require consideration of a wider legal context in order to assess whether and to what extent the reasoning and the result reached in the precedent case are consistent with other authorities and legal principles (including subsequent authorities and developments in the law).
>
> 59. Whether it is permissible for a later court to engage in such an assessment depends on a variety of factors. Without seeking to be exhaustive, relevant considerations include: (1) the degree of unanimity or consensus among the judges (assuming there was more than one) who decided the precedent case; (2) the clarity or otherwise of the ruling and of the supporting reasoning; (3) whether or to what extent the point on which the court ruled was in dispute and/or the subject of argument; (4) whether or how clearly the court evinced an intention to establish a binding rule; (5) whether and to what extent prior relevant authorities were considered by the court; (6) whether the court would, or sensibly could, have reached the same result if it had not ruled as it did; (7) whether the court's ruling has been applied or approved in later cases; (8) whether the ruling or its underlying reasoning has been criticised by commentators or by judges in later cases; (9) whether the court considered or contemplated the factual situation that has arisen in the current case; and (10) the level in the court hierarchy of the court which decided the precedent case in comparison with the level of the court deciding the current case."

158. It is clear from these observations that the question whether a decision on a point of law forms part of the *ratio decidendi* of a decision depends on a number of factors. In *Burgess v BIC UK Ltd* Arnold J recognised that it was necessary for him to decide the question of law whether the Pensions Ombudsman was a "competent court" for the purposes of section 91(6) because it was possible that his decision on the amendment point might be reversed. He went on to decide that point and did so in unqualified language which shows that he intended to establish a binding rule. In the event, the outcome would have been different if he had not ruled as he did (because of the successful appeal against the amendment point).

159. The decision has been the subject of divided academic commentary. Mr Rowley relied

upon a factsheet published by the Pensions Ombudsman in April 2019 in which the incumbent criticised the decision. Mr Short relied upon an article dated 1 March 2022 "*Ombudsmen as Courts*" (2022) 42 OJLS 76 in which Dr Stephen Thomson argued that the conclusion was correct. He also drew attention to an article dated 27 May 2000 in which a previous Pensions Ombudsman, the late Julian Farrand QC, emphasised the differences between the Pensions Ombudsman and the Courts: see "*Courts, tribunals and ombudsmen – II*" (2000) 27 Amicus Curiae 1346.

160. This academic debate does not affect my conclusion that Arnold J's decision on this point formed part of the *ratio* of his decision. If anything, it reinforces my view that this was an important point of some significance (and that the judge himself would have appreciated this fact in deciding it). But in any event, I am not satisfied that the decision was wrong or that I should refuse to follow it for the following reasons:

(1) In *Watson v Hemingway Design Ltd* (above) Bean LJ stated that the question whether a tribunal is to be treated as a "court" for the purposes of a statute or rule depends on context: see [23]. The fact that the Divisional Court and the Court of Appeal may have found that an industrial tribunal or an employment tribunal should be treated as a court in other contexts, does not demonstrate that the decision in *Burgess* was wrong.

(2) The present context is the enforcement of a trustee's rights which have been limited or circumscribed by statute. A trustee may not now enforce those rights where there is a dispute without "an order of a competent court". I have held that in the case of the equitable right of recoupment section 91(6) extends to a declaration that the Trustee is entitled to exercise a self-help remedy. But the sub-section also extends to the enforcement of a charge or lien or other rights of set off. Moreover, the dispute may relate to the question whether the person entitled has been guilty of criminal, negligent or fraudulent conduct or a breach of trust (in the capacity of a trustee).

(3) The Pensions Ombudsman does have jurisdiction to decide any dispute of fact or law between the Trustee and an actual or potential beneficiary of the Scheme: see section 146(1)(c) of the Pension Schemes Act 1993. But as Mr Short pointed out, section 146(1A) expressly provides that the Ombudsman shall not investigate such

a dispute unless it is referred by or on behalf of the actual or potential beneficiary. It has no power to investigate such a dispute at the request of the Trustee. It seems unlikely that Parliament would have extended the power of enforcement in section 91(6) to the Pensions Ombudsman if the Trustee itself had no right to apply for enforcement.

(4) As Arnold J pointed out in [168] the Pensions Schemes Act 1993 does not treat the Pensions Ombudsman as a court. Section 150(8) defines "the court" as the county court in England and Wales. Section 150 confers a number of analogous powers but it does not describe the Ombudsman as a court as such:

> "(2) For the purposes of any such investigation the Pensions Ombudsman shall have the same powers as the court in respect of the attendance and examination of witnesses (including the administration of oaths and affirmations and the examination of witnesses abroad) and in respect of the production of documents.
>
> (3) No person shall be compelled for the purposes of any such investigation to give any evidence or produce any document which he could not be compelled to give or produce in civil proceedings before the court.
>
> (4) If any person without lawful excuse obstructs the Pensions Ombudsman in the performance of his functions or is guilty of any act or omission in relation to an investigation under this Part which, if that investigation were a proceeding in the court, would constitute contempt of court, the Pensions Ombudsman may certify the offence to the court.
>
> (5) Where an offence is certified under subsection (4) the court may inquire into the matter and, after hearing any witnesses who may be produced against or on behalf of the person charged with the offence and hearing any statement that may be offered in defence, deal with him in any manner in which the court could deal with him if he had committed the like offence in relation to the court."

(5) Section 151(5) also provides that any determination or direction of the Pensions Ombudsman shall be enforceable in England and Wales "in the county court as if it were a judgment or order of that court". It follows, therefore, that the Pensions Ombudsman has no direct powers of enforcement and any application for committal for breach of a determination or direction or for other enforcement remedies or, indeed, under section 150(4) (above) must be brought in the County Court.

(6) Finally, Mr Short drew my attention to a number of authorities in which the Court

has distinguished between the judicial functions of the Court and the wider powers of the investigation of the Pensions Ombudsman: see *Miller v Stapleton* [1996] Pens LR 67 (Carnwath J) and [1996] OPLR 281 (CA) and *Westminster City Council v Haywood (No 2)* [2000] Pens LR 235 (Lightman J). The drafter of section 91(6) would have had both these differences and the different enforcement regimes in mind and if Parliament had intended to extend section 91(6) to a determination by the Pensions Ombudsman, then the sub-section might have been expected to make express provision to that effect.

VIII. Disposal

161. In my judgment, Rule 5.11 of the 2004 Rules is a forfeiture rule and takes effect whenever a benefit or instalment has not been claimed for more than six years after it fell due and, in particular, whether or not the beneficiary is missing or is aware that the benefit or instalment remains unpaid. I also answer the specific issues which I have been asked to determine as follows:

1. In the absence of a valid claim for the purposes of Rule 5.11, does that Rule extinguish the entitlement of any member to be paid any shortfall in the lump sum paid resulting from the Equalisation Issue once six years has passed from the date on which the lump sum was paid?

162. Yes. I have found that Rule 5.11 applies to such a shortfall and I have also rejected the implication of a term into the 2004 Rules that Rule 5.11 had (or has) no application where the Trustee did not inform the member of the existence of the entitlement to a higher payment or the shortfall and the person entitled had no reasonable means of knowing that there had been a shortfall and that he or she needed to make a further claim in that respect.

2. Where any shortfall in the lump sum was, alternatively would be, liable to be extinguished, is the member to be treated as having elected to commute the corresponding part of his or her periodic pension, or should the member's periodic pension be increased to reflect the non-payment of the shortfall in the lump sum, or should some other approach be taken?

163. The forfeiture of a shortfall in a lump sum has no effect on future instalments of a member's pension and does not either increase or decrease them.

3. In the absence of a valid claim as aforesaid, does Rule 5.11 extinguish the entitlement of any member to be paid any shortfall in any periodic payment of pension resulting from the Equalisation issue once six years had passed from the date of each periodic payment of pension?

164. Yes. Rule 5.11 extinguishes the entitlement of any member to be paid any shortfall in a periodic payment of pension once six years has passed from the date of payment and no claim to recover it has been made.

4. Do the answers to paragraphs 1-3 above apply equally to shortfalls arising from the Accrual Rate issues or do different (and if so, what) answers apply?

165. Yes. The answers to Issues 1 to 3 apply equally to members affected by the Accrual Rate Issue.

5. When has a benefit or instalment been "claimed" for the purposes of Rule 5.11?

166. A benefit or instalment has been claimed for the purposes of Rule 5.11 when the member has expressly or impliedly asserted a right or entitlement to the specific benefit or instalment or has asserted a general right or entitlement to receive all unpaid benefits or instalments. The benefit or instalment in Rule 5.11 is a reference to the unpaid element or shortfall and not the entire lump sum or periodic payment and it must be claimed after it has fallen due.

6. For these purposes, does a member make a claim by completing and returning a "Retirement Option Form"?

167. On the basis of the examples shown to me, a member who completed and returned a Retirement Option Form did not make a claim for the relevant benefit or instalment for the purposes of Rule 5.11. The member did not make such a claim because the Retirement Option Form did not contain an express or implied assertion of a right or entitlement to any shortfall in his or her pension commencement lump sum or any shortfall in his or her instalments of pension.

7. Should the claimant apply interest and, if so, for what period and at what rate in relation to adjustments made (or to be made in the light of the answers to the above)?

168. Yes. The appropriate rate is 1% above base rate.

8. On the proper construction and application of Rule 5.11 (which, for the avoidance of doubt, includes taking into account any implied limitation upon the application of that rule) is the answer to any of the questions raised above different if time elapsed between the claimant knowing that there was or may have been an underpayment and either (i) notifying the members; or (ii) arranging for the underpayment to be made good?

169. The answer to both Issue 8(i) and 8(ii) is negative.

9. If any person had been incorrectly paid sums after their entitlement to those sums had been extinguished by Rule 5.11 and the claimant seeks to recoup those sums from future payments of pension:

9.1 Does section 91(6) of the Pensions Act 1995 mean that the claimant must obtain an order from a competent court before effecting such recoupment in the event that there is a dispute as to the amount to be recouped in total or from each periodic payment?

170. A dispute not only as to the total amount to be recouped but also about the rate of the deduction would fall within section 91(6) and where there is such a dispute the Claimant must obtain an order from a competent court before it can recoup the overpayment.

9.2. Where section 91(6) requires the claimant to obtain such an order: (a) Is it necessary to obtain an order requiring the person to repay the overpayment in question? Or (b) Is it sufficient to obtain a declaration that there has been an overpayment to a particular extent; or (c) Is some other, and if so what, order required?

171. It is sufficient to obtain a declaration that there has been an overpayment and that the Claimant is entitled to recoup the relevant sum out of future payments.

9.3 For these purposes is the Office of the Pensions Ombudsman a competent court?

172. No. The Office of the Pensions Ombudsman is not a competent court for the purposes of section 91(6).