Neutral Citation Number: [2015] EWHC 3492 (Ch)

Case No: HC-2015-001163

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

IN THE MATTER OF THE BCA PENSION PLAN
AND IN THE MATTER OF SECTION 48 OF THE ADMINISTRATION OF JUSTICE ACT 1985

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

Date: 2 December 2015

Before:

MR JUSTICE SNOWDEN

- -

BCA PENSION TRUSTEES LIMITED **Claimant**

- -

Mr. Paul Newman QC (instructed by **Stevens & Bolton LLP**) for the **Claimant**

Hearing date: 16 November 2015

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Approved Judgment

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

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MR JUSTICE SNOWDEN

MR JUSTICE SNOWDEN:

1. This is a Part 8 Claim made pursuant to section 48 of the Administration of Justice Act 1985 ("section 48"). That section provides as follows:

> "(1) Where -
>
> (a) any question of construction has arisen out of the terms of a will or a trust; and
>
> (b) an opinion in writing given by a person who has a 10 year High Court qualification, within the meaning of section 71 of the Courts and Legal Services Act 1990 has been obtained on that question by the personal representatives or trustees under the will or trust,
>
> the High Court may, on the application of the personal representatives or trustees and without hearing argument, make an order authorising those persons to take such steps in reliance on the said opinion as are specified in the order.
>
> (2) The High Court shall not make an order under subsection (1) if it appears to the court that a dispute exists which would make it inappropriate for the court to make the order without hearing argument."

2. The Claimant is the sole trustee ("the Trustee") of an occupational pension scheme known as the BCA Pension Plan (the "Plan"). The application has been made because of what appears to have been a mistake in the course of the consolidation of the rules of the Plan by which some words in the Plan's pension increase rule were inadvertently omitted from the consolidated text.

3. The Trustee has obtained an opinion from leading pensions counsel, Mr. Paul Newman QC, on the correct interpretation of the pension increase rule. Rather than seek to pursue formal rectification proceedings or to use the power of amendment in the Plan's rules, the Trustee now seeks, in reliance upon Mr. Newman's opinion, an order that it be authorised to administer the Plan on the basis that the Plan's pension increase rule should be interpreted as if the words previously deleted had not been deleted but are to be read back into the Plan.

4. The Application raises questions of (i) interpretation of the relevant rules of the Plan, (ii) the scope of section 48, and (iii) the appropriate notification that should be given to persons who are or might become entitled to benefits under the Plan. Although section 48 envisages that the application will be decided on paper and without a hearing, in the instant case I asked for a short hearing to explore some of the issues raised.

Background

5. By an interim trust deed dated 5 April 1996 Integrated Transport Systems Limited established an occupational pension scheme, which was then known as the ITS Pension Plan. The interim trust deed was replaced by a final trust deed and rules dated 24 March 1998 (the "Original Rules").

6. The pension increase rule in the Original Rules was Rule 23, which read as follows:

> "(1) A pension under the Plan … increases on 1st April each year after it starts to be paid. The rate of increase is determined in accordance with sub-rules (2) and (3).
>
> Sub-rule (2) applies to a pension or part of it to which section 51 of the Pensions Act 1995 applies (pension attributable to pensionable service after 5th April, 1997) and sub-rule (3) applies to a pension or part of it attributable to earlier pensionable service to which that section does not apply.
>
> (2) The rate of increase attributable to a pension or part of it to which this sub-rule applies is the percentage increase in the Central Statistical Offices retail prices index over the Reference Period subject to a maximum of 5 per cent for any Reference Period. A Reference Period is determined by comparing the level of retail prices index for the month of February immediately preceding the 1st April on which the increase is made with its level for the month of February of the previous year.
>
> (3) The rate of increase attributable to a pension or part of it to which this sub-rule applies is 3 per cent. on the whole pension including any amount relating to the Member's guaranteed minimum pension."

7. Rule 23 of the Original Rules was drafted to comply with (the then recently introduced) section 51 of the Pensions Act 1995. Section 51 of the Pensions Act 1995 introduced a statutory regime under which occupational scheme pensions were to be increased in respect of that part of the pension attributable to pensionable service on or after 6 April 1997. The rate of the required increase was, at that time, the lesser of 5% and the increase in the retail price index over the prescribed period.

8. The name of the Plan was changed by a Deed of Alteration dated 8 February 2000 from the ITS Pension Plan to the BCA Pension Plan and the Trustee become trustee of the Plan.

9. On 30 March 2005, a Deed of Alteration (the "2005 Deed of Alteration") was entered into to reflect a statutory amendment to section 51 of the Pensions Act 1995 (s.51ZA of the Pensions Act 1995, as inserted by s. 278(7) of the Pensions Act 2004). The amendment to section 51 of the Pensions Act 1995 reduced the non-inflation related element of the statutory pension increase rate from 5 per cent to 2.5 per cent, in respect of that part of a pension attributable to pensionable service on or after 6 April

2005. The 2005 Deed of Alteration replaced Rule 23(2) of the Original Rules (wrongly identified in the Deed as Rule 26(2)) by the following clause:

> "The rate of increase attributable to a pension or part of it to which this sub-rule applies is the percentage increase in the Central Statistical Offices retail prices index over the Reference Period subject to a maximum of 2½ per cent for any Reference Period. A Reference Period is determined by comparing the level of retail prices index for the month of February immediately preceding the 1st April on which the increase is made with its level for the month of February of the previous year."

10. The recitals to the 2005 Deed of Alteration recorded that the amendment did not apply to pensions in payment as at the date of the 2005 Deed of Alteration or to pension benefits already earned prior to 6 April 2005.

11. In late 2011 the Trustee's solicitors undertook a consolidation exercise of the Plan rules which resulted in the execution of a consolidated trust deed and rules dated 2 November 2011 (the "Consolidated Rules").

12. The corresponding provision to Rule 23 of the Original Rules (as amended by the 2005 Deed of Alteration), in the Consolidated Rules was Rule 22 which reads as follows:

> "22 PENSION INCREASES
>
> 22.1 A pension under the Plan (except, unless the Principal Company decides otherwise and the Trustees agree, a pension under Clause 14.1.2 of the Trust Deed and a pension derived from a Member's voluntary contributions) increases on 1st April in each year after it starts to be paid as follows.
>
> 22.2 The rate of increase attributable to a pension or part of it to which this sub-rule 22.2 applies is the percentage increase in the Office for National Statistics retail prices index over the Reference Period subject to a maximum of 5 per cent (prior to 6 April 2005) and 2.5% (after 5 April 2005) for any Reference Period. A Reference Period is determined by comparing the level of the retail prices index for the month of February immediately preceding the 1st April on which the increase is made with its level for the month of February of the previous year.
>
> 22.3 The rate of increase attributable to a pension or part of it to which this Rule 22.3 applies is 3 per cent. on the whole pension including any amount relating to the Member's guaranteed minimum pension."

13. A comparison between Rule 23 of the Original Rules and Rule 22 of the Consolidated Rules is set out below, with the words in strikethrough showing the words deleted

from Rule 23 of the Original Rules, and the words underlined showing the words that were inserted into Rule 22 of the Consolidated Rules:

> "22 PENSION INCREASES
>
> 22.1 ~~23(1)~~ A pension under the Plan (except, unless the Principal Company decides otherwise and the Trustees agree, a pension under ~~clause 15(1)(b)~~ Clause 14.1.2 of the Trust Deed and a pension derived from a Member's voluntary contributions) increases on 1st April in each year after it starts to be paid as follows. ~~The rate of increase is determined in accordance with sub-rules (2) and (3).~~
>
> ~~Sub-rule (2) applies to a pension or part of it to which section 51 of the Pensions Act 1995 applies (pension attributable to pensionable service after 5th April, 1997) and sub-rule (3) applies to a pension or part of it attributable to earlier pensionable service to which that section does not apply~~
>
> 22.2 ~~23(2)~~ The rate of increase attributable to a pension or part of it to which this ~~sub-rule~~ Rule 22.2 applies is the percentage increase in the ~~Central Statistical Offices~~ Office for National Statistics retail prices index over the Reference Period subject to a maximum of 5 per cent (prior to 6 April 2005) and 2.5% (after 5 April 2005) for any Reference Period. A Reference Period is determined by comparing the level of the retail prices index for the month of February immediately preceding the 1st April on which the increase is made with its level for the month of February of the previous year.
>
> 22.3 ~~23(3)~~ The rate of increase attributable to a pension or part of it to which ~~this sub-rule~~ Rule 22.3 applies is 3 per cent. on the whole pension including any amount relating to the Member's guaranteed minimum pension."

14. Apart from renumbering, there are three differences between Rule 23 of the Original Rules and Rule 22 of the Consolidated Rules:

    i) the second unnumbered sub-paragraph of rule 23(1) in Rule 23 of the Original Rules, which identified the elements of pension to which the different rates of increase in Rules 23(2) and 23(3) were to apply, was omitted;

    ii) the Office of National Statistics (ONS) replaced the Central Statistics Office; and

    iii) the different pension increase rates in Rule 22.2 reflected the amendment made to Rule 23(2) of the Original Rules by the 2005 Deed of Alteration.

    Of these, the most important for present purposes is (i) - the omission of the last sentence of the first sub-paragraph of Rule 23(1) of the Original Rules and the omission of the entirety of the second unnumbered sub-paragraph of that Rule.

The Issue

15. The application has been made by the Trustee because it was noted, on a recent review of the Plan's constitutional documents, that if one reads the text of Rule 22 of the Consolidated Rules alone, it is not immediately apparent which of Rule 22.2 or Rule 22.3 is intended to apply to any particular pension or part of a pension. Accordingly, it is unclear whether, in any particular case, the annual pension increase should be,

    i) the increase in the ONS retail price index capped at 5 per cent for any Reference Period prior to 6 April 2005, and 2.5 per cent for any Reference Period after 5 April 2005 (as per Rule 22.2); or

    ii) a flat 3 per cent (as per Rule 22.3).

16. For reasons that I will explore below, the Trustee contends that Rule 22 of the Consolidated Rules should be construed as if the words which were included in the earlier Rule 23(1), but omitted on the consolidation, were reintroduced. I was told that this corresponds with the manner in which the Trustee has been administering the Plan in practice, both before and after the consolidation exercise in 2011.

17. It is evident, however, that if this were not the case, there could be a significant financial effect upon individual members of the Plan, especially given the relatively low rates of inflation in recent years. It is also apparent that if each member was to be allowed to elect for the most financially advantageous result for themselves, there could be significant consequences for the resources of the pension fund itself.

Amendment

18. It is not possible for the Trustee unilaterally to amend Rule 22 of the Consolidated Rules to make its meaning clear on the face of the document by adding the omitted words to the document. That is because section 67 of the Pensions Act 1995 (as amended by the Pensions Act 2004) provides that the exercise of a power to amend a pension scheme is voidable at the instance of the Pensions Regulator if the amendment is such that, on taking effect, it would or might adversely affect any subsisting right of any member of the scheme or any survivor of a member of the scheme. "Subsisting right" is defined in section 67A(6) of the Pensions Act 1995 in relation to a member as,

> "(i) any right which at that time has accrued to or in respect of him to future benefits under the scheme rules, or
>
> (ii) any entitlement to the present payment of a pension or other benefit which he has at that time, under the scheme rules …"

The difficulty is that if Rule 22 of the Consolidated Rules does not mean what the Trustee contends it means, then by definition the amendment might affect the entitlements of members of the Plan.

Construction of pension schemes

19. The same principles of construction apply to pension scheme documents as to any other documents: see ICM v Stribley [2013] PLR 409 (Asplin J). The question is ultimately what meaning would be conveyed to a reasonable reader of a document who has all the background knowledge which would have been reasonably available to the parties in the situation they were in at the date of execution of the document. If more than one interpretation is possible, the correct choice of meaning may depend upon the practical consequences of rival interpretations. And if one would conclude from the context that something must have gone wrong with the language of the document, the court is not required to attribute to the parties an intention they plainly did not have.

20. The courts have long been willing to correct obvious and easily-correctable mistakes made in documents as a matter of construction: see e.g. Coles v Hume (1828) 8 B&C 568. Lord Hoffmann recently explored this aspect of construction in Chartbrook Ltd v Persimmon Homes Ltd [2009] 1 A.C. 1101 at paragraphs 22-25:

> "22. In East v Pantiles (Plant Hire) Ltd (1981) 263 EG 61 Brightman LJ stated the conditions for what he called "correction of mistakes by construction":
>
> > "Two conditions must be satisfied: first, there must be a clear mistake on the face of the instrument; secondly, it must be clear what correction ought to be made in order to cure the mistake. If those conditions are satisfied, then the correction is made as a matter of construction."
>
> 23. Subject to two qualifications, both of which are explained by Carnwath LJ in his admirable judgment in KPMG LLP v Network Rail Infrastructure Ltd [2007] Bus LR 1336, I would accept this statement, which is in my opinion no more than an expression of the common sense view that we do not readily accept that people have made mistakes in formal documents. The first qualification is that "correction of mistakes by construction" is not a separate branch of the law, a summary version of an action for rectification. As Carnwath LJ said, at p 1351, para 50:
>
> > "Both in the judgment, and in the arguments before us, there was a tendency to deal separately with correction of mistakes and construing the paragraph 'as it stands', as though they were distinct exercises. In my view, they are simply aspects of the single task of interpreting the agreement in its context, in order to get as close as possible to the meaning which the parties intended."

> 24. The second qualification concerns the words "on the face of the instrument". I agree with Carnwath LJ, paras 44–50, that in deciding whether there is a clear mistake, the court is not confined to reading the document without regard to its background or context. As the exercise is part of the single task of interpretation, the background and context must always be taken into consideration.
>
> 25. What is clear from these cases is that there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant."

21. It is also clear that earlier contractual documents (but not drafts produced in negotiation) can be used as part of the background to the construction of later documents. In Cherry Tree Investments Ltd v Landmain Ltd [2013] Ch 305 at paragraphs 101-103 Lewison LJ said,

> "101. In KPMG LLP v Network Rail Infrastructure Ltd [2007] Bus LR 1336 this court was concerned with the terms of a break clause in a lease granted in 1985. It followed generally the form of a draft lease attached to a 1974 agreement for lease, pursuant to which the grant took place. However, some words contained in the agreed draft had been omitted from the final version. The form in which the clause appeared in the final version made no sense if read literally. One of the questions was whether the agreement for lease was admissible for the purpose of interpreting the final granted lease. Carnwath LJ said, at para 39:
>
> > "Applying this logic, Mr Nugee submits that a lease, unlike an ordinary commercial contract, creates an interest in land, which may last many years and be owned in different forms by many different parties. It is addressed not merely to the original landlord and tenant, but also to their successors in title, their undertenants, their chargees and so on. Accordingly, what matters is the background material reasonably available to this disparate group of people. That, it was suggested, will include such matters as the physical location and layout of the property, and perhaps common form provisions found in a typical lease; but not a prior agreement for a lease 'which is a private arrangement between the original parties and which successors have no right to know about, let alone see'."

> 102. Carnwath LJ said that he did not accept this argument and added, at para 41:
>
> > "Similarly, I see nothing in Mr Nugee's argument that the original agreement may no longer be available to successors. This is an issue of proof, not principle. In disputes about older documents of title it is a commonplace that the court may not have full information about the context in which the agreement was made. This is as true of questions about the physical state of the land, which Mr Nugee accepts as relevant, as it is about background transactions. Where relevant evidence is not available, the court has to do its best on what there is. I cannot see this as a principled reason for excluding such evidence in a case where it is available."
>
> 103. He therefore held that the agreement for lease was admissible in interpreting the final version."

22. What is equally clear, however, is that the principles outlined in Chartbrook should not be read as an broad invitation for the courts to rewrite commercial contracts. In ING Bank NV v Ros Roca SA [2011] EWCA Civ 353 at paragraph 110, Rix LJ made the point that:

> "Construction cannot be pushed beyond its proper limits in pursuit of remedying what is perceived to be a flaw in the working of a contract… Judges should not see in Chartbrook an open sesame for reconstructing the parties' contract, but an opportunity to remedy by construction a clear error of language which could not have been intended."

23. Likewise the court will not, as a matter of construction, read into a document whole clauses omitted in error, where the document makes sense without it. In Cherry Tree Investments (above) the Court of Appeal was asked to construe a legal charge to include an enlarged power of sale for the mortgagee, which had not been previously set out in the charge. The court refused to do this because it would have involved including an entire provision which had been omitted by the parties from a document which made sense without it. Lewison LJ said, at paragraphs 132-133:

> "132. Even the staunchest advocates of the court's ability to consider extrinsic evidence stop short at saying that by the process of interpretation the court can insert whole clauses that the parties have mistakenly failed to include. In his well-known article "*My Kingdom for a Horse: The Meaning of Words*" (2005) 121 LQR 577, 586 Lord Nicholls of Birkenhead wrote:
>
> > "The flexible approach, I add, would not render the remedy of rectification redundant. If by oversight parties omit an agreed clause from their contract, interpretation would not provide a remedy. The words

> included in the contract could not be interpreted to include the meaning intended to be conveyed by the clause which, accidentally, had been omitted."

133. Likewise Professor Burrows wrote in *Construction and Rectification*, p 96:

> "Say, for example, the parties orally agreed that there should be a time-bar clause in the contract but that this clause was mistakenly omitted from the written contract. The omission of that clause would not be obvious from the document itself. It is hard to see that construction, as opposed to rectification, could cure the problem.""

24. Lewison LJ went on to say (at paragraph 135) that:

> "… It is one thing to say that the reasonable reader would perceive an obvious mistake in the document (call it "A") and that recourse to the background enables mistake A to be corrected. It is quite another to say that having perceived mistake A, recourse to the background enables the reasonable reader to identify another and unconnected mistake (call it "B") and then use the background to correct both mistake A and mistake B. I do not believe that there is any case that goes that far; and in my judgment it would be an unwarranted extension of the principles approved in Chartbrook. As Lord Hope explained in Melanesian Mission Trust Board v Australian Mutual Provident Society (1996) 74 P & CR 297, 301:
>
> > "The intention of the parties is to be discovered from the words used in the document. Where ordinary words have been used they must be taken to have been used according to the ordinary meaning of these words. If their meaning is clear and unambiguous, effect must be given to them because that is what the parties are taken to have agreed to by their contract. Various rules may be invoked to assist interpretation in the event that there is an ambiguity. But it is not the function of the court, when construing a document, to search for an ambiguity. Nor should the rules which exist to resolve ambiguities be invoked in order to create an ambiguity which, according to the ordinary meaning of the words, is not there. So the starting point is to examine the words used in order to see whether they are clear and unambiguous. It is of course legitimate to look at the document as a whole and to examine the context in which these words have been used, as the context may affect the meaning of the words. But unless the context shows that the ordinary meaning cannot be given to them or that there is an

> ambiguity, the ordinary meaning of the words which have been used in the document must prevail."

Mr. Newman QC's opinion dated 9 February 2015

25. Mr. Newman's opinion is that the wording of Rule 22 of the Consolidated Rules makes no sense given that,

    i) both Rules 22.2 and 22.3 provide different rates of increase to apply to pensions under the Plan and that,

    ii) both Rules 22.2 and 22.3 refer to "the rate of increase attributable to a pension or part of it which this [sub] rule apples", without giving an appropriate indicator as to which pension or part of the pension is to be increased.

    Mr. Newman's opinion is that this lack of direction makes Rule 22 of the Consolidated Rules unworkable and that the court can accordingly conclude that something has gone wrong with the drafting of the Consolidated Rules.

26. Mr. Newman (rightly) accepts that the Trustee's subjective intention and subsequent administration of the Plan is not admissible on the question of construction, but he suggests that the terms of the Original Rules and the 2005 Deed of Alteration are admissible background, relying upon National Grid Co plc v Laws [2001] 1 WLR 864 (at 871) in which Hoffmann LJ used a superseded scheme contract to construe the successive scheme contract. Mr. Newman suggests that when these documents are considered, it is obvious that there was a mistake in omitting the words from Rule 23(1) of the Original Rules.

27. Mr. Newman also expresses his view that whilst the correction by way of construction for which the Trustee contends would involve reading a whole sub-paragraph into Rule 22.1 of the Consolidated Rules, this would not be contrary to the principle in Cherry Tree Investments. He states,

> "The inclusion of the relevant paragraph operates to make sense of what is otherwise a nonsensical provision. Its inclusion does not change the meaning of the document but gives practical effect to the existing meaning: it reflects the fact that a clear mistake has been made and that it is clear what the mistake is and how to correct it."

Analysis

28. I agree with Mr. Newman, for the reasons that he gives, and also following KPMG LLP v Network Rail Infrastructure Ltd, that the Original Rules and the 2005 Deed of Alteration are admissible evidence as part of the background to the construction of the Consolidated Rules.

29. I also agree with Mr. Newman that it is self-evident that there has been a mistake with the drafting of Rule 22 of the Consolidated Rules. Both on its face and read in light of the background and context, Rule 22 of the Consolidated Rules does not make sense, because it does not contain any indicator as to which element of the member's pension the increases contained in Rule 22.2 and Rule 22.3 are intended to apply.

30. In that respect, I consider that it is clear that the Consolidated Rules do not envisage that members should simply be able to elect for the most favourable alternative for them. Quite apart from the fact that there is no hint of a mechanism under which members could make such election, each of Rules 22.2 and 22.3 commence with the words, "The rate of increase attributable to a pension or part of it *to which this Rule applies*…" (my emphasis). The natural meaning of the emphasised words is that there will be some other provision that sets out the pension or part of it to which each of those Rules applies.

31. Giving members an option to elect for whichever alternative most suited them would also have been a radical change to the Plan. It is significant that the absence of an indicator clause was the product of a consolidation exercise. The presumption is that such a radical change would not have been intended as part of what was merely a consolidation exercise. If it had been, it would doubtless have been preceded by detailed advice, financial modelling and consultation with members. I also anticipate that administrative chaos would prevail if, each year, all members were to be required to elect for an increase calculated by reference to one or other of Rule 22.2 or 22.3.

32. I also agree with Mr. Newman that the nature of the mistake and the corrective construction necessary to cure it is obvious. Reference to Rule 23 of the Original Rules shows precisely what was omitted in error. Quite apart from that direct route, an objective observer who was versed in pensions law would also doubtless make the connection between the dates which do appear in Rule 22.2 of the Consolidated Rules and the changes made to section 51 of the Pensions Act 1995 by section 278(7) of the Pensions Act 2004 to which I have referred in paragraph 9 above. He would also appreciate that section 51 only applied to pensionable service on or after 6 April 1997.

33. In conclusion, I agree with Mr. Newman that in order to correct the mistake in Rule 22 of the Consolidated Rules, the Rule should be construed by reading the following wording into, and at the end of, Rule 22.1:

> "Rule 22.2 applies to a pension or part of it to which section 51 of the Pensions Act 1995 applies (pension attributable to pensionable service after 5th April, 1997) and Rule 22.3 applies to a pension or part of it attributable to earlier pensionable service to which that section does not apply."

34. I am satisfied that reading these words into Rule 22 of the Consolidated Rules does not infringe the principles set out in the authorities referred to above, and in particular Cherry Tree Investments. The consequence is not to create a new contractual provision in Rules that would work without it: its inclusion is necessary to make the existing Rules work.

The application and scope Section 48 of the Administration of Justice Act 1985

35. Mr. Newman QC plainly satisfies the requirement of s.48(1)(b) of the Administration of Justice Act 1985, being counsel having a ten year High Court qualification within the meaning of section 71 of the Courts and Legal Services Act 1990. Since I am entirely in agreement with his opinion, I think it appropriate to grant the Trustee's application and to authorise it to administer the Plan in accordance with the construction of Rule 22 of the Consolidated Rules which I have set out above.

36. I should, however, make it clear that in granting the Trustee's application under section 48, I am not making any declaration or granting any relief that binds any of the members or potential beneficiaries of the Plan. Such members and beneficiaries are not parties to these proceedings and no representation order has been made. My order will protect the Trustee against any complaint that it has wrongly administered the Plan if it does so in accordance with my order. But members are entirely free to contend, should the point arise, that a different construction of Rule 22 of the Consolidated Rules should apply: see *Lewin on Trusts* (19th ed., 2015), 27-066, which states as follows (footnotes omitted):

> "Section 48 is not explicit as to the precise effect of an order made under it. Although the section requires a question of construction to have arisen, the wording is merely that the order made authorises the steps specified in it, not that the question of construction is thereby decided. Coupled with the fact that those affected by the decision will not be heard, that wording suggests that the order is equivalent to a *Benjamin* order; that is, it permits the trustees to act on the construction adopted by the court and protects them against a claim for breach of trust but does not bind the beneficiaries, who will remain free to contend later for a different construction and, if necessary, follow any trust property distributed in reliance on the order."

Notice to Plan Members

37. The main reason that I was not simply prepared to deal with the Trustee's application on paper (as section 48(1) indicates may be appropriate if the court agrees with the opinion furnished to it) related to the question of the publicity that should be given to my order and the reasons for it.

38. I had originally proposed that I would make my order under section 48 conditional upon the Trustee giving notice of the order to the members of the Plan and that I should grant liberty to any member of the Plan to apply to have the order set aside or varied within two months of receipt of the notification.

39. The Trustee objected to this course on several grounds, including (i) that such an order was not consistent with the purpose and effect of an order under section 48; (ii) that it would not necessarily be possible to notify all persons interested or potentially interested under the Plan, (iii) that the notification exercise would be expensive; (iv) that members might be encouraged to challenge the order, putting the Trustee (and hence the Plan) to the costs of dealing with such challenges; and (v) that members would get access to the order if they exercised their rights to obtain information

relating to the constitution of the scheme under regulation 11 and paragraph 3 of Schedule 3 to The Occupational and Personal Pension Schemes (Disclosure of Information) Regulations 2013 (on the basis that the order would be a document that supplemented the scheme rules).

40. Mr. Newman submitted that section 48 is obviously intended to enable trustees to have questions of construction which do not involve a dispute between rival parties resolved by the court using a cost-effective and summary procedure. He submitted that the main purpose of section 48 was to provide protection for the trustee and that it was inherent that the decision of the court on the issue of construction might have an effect one way or another upon the members or beneficiaries. He said that these considerations meant that I should not do anything by way of imposing conditions upon my order that might serve to reduce the utility of the procedure under section 48.

41. I accept Mr. Newman's submission that it would be wrong in principle to make my order in this case conditional upon the giving of notice to members or to grant any liberty to apply to set it aside. That is mainly because, as I have indicated, my order under section 48 does not bind members in any event. However, I also have in mind in this case that the implementation of my order will maintain the increases in the benefits which the Trustee has in practice been paying to individual members, and hence will not increase any actuarial deficit of the Plan (which I was assured was well-funded and in surplus on all but the most extreme actuarial basis).

42. I am not, however, persuaded that any of the points made by Mr. Newman as to the utility of section 48 mean that the Trustee should not be required to provide notification to the members of the Plan of my order and the reasons for it. I accept that there should be scope for modifying or for dispensing altogether with notification to members of a pension scheme in an appropriate case, especially having regard to the existing statutory requirement to provide constitutional information relating to the scheme to members who request it. But if an order under section 48 directly relates to the level of benefits that will be payable to members of a pension scheme, I think that members should be told of the order unless there are compelling reasons to the contrary.

43. In this case, Mr. Newman has persuaded me that it would be appropriate to adopt a different method of communication with members of the Plan than I had originally envisaged. He told me that the Trustee sends communications to members of the Plan from time to time, that one is due to go out shortly, and that the Trustee would be prepared to undertake to include an appropriate notice giving details of these proceedings in that next circular. I am satisfied that this is a sensible and proportionate method of notification to members, provided (i) that an appropriate form of wording is used, (ii) that any electronic communication contains a link to this judgment and my order, and any hard copy communication offers to provide hard copies of the judgment and order; and (iii) that both types of communication offer to provide hard copies of the evidence placed before me (excluding any confidential information concerning members). An approved form of the notice will be attached to the order that I intend to make under section 48.