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Case No: PE-2018-000003

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

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

Date: 12 November 2021

Before:

THE HONOURABLE MR JUSTICE TROWER

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In the matter of the Mitchells & Butlers Pension Plan

Between:

Mitchells & Butlers Pensions Limited	**Claimant**
- and -	
Mitchells & Butlers Plc	**Defendant**

- -
- -

Michael Tennet QC, Edward Sawyer and Jonathan Chew (instructed by **Gowling WLG (UK) LLP**) for the **Claimant**
Keith Rowley QC and Oliver Hilton (instructed by **Clifford Chance LLP**) for the **Defendant**

Hearing dates: 30 June 2021 and 1, 2, 5, 6, 7, 8, 12, 19, 20 and 21 July 2021

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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.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the representatives of the parties by email. The date and time for hand-down is deemed to be 12th November 2021 at 10.30

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THE HONOURABLE MR JUSTICE TROWER

Mr Justice Trower:

Introduction

1. These proceedings are brought to rectify the pension increase provisions contained in the rules of the Mitchells & Butlers Pension Plan (the "Plan"), an occupational pension scheme which was originally established in 1946 for employees of companies in the Bass group. The Plan was originally known as the Bass Employees' Security Plan and was also known as the Bass Pension Plan and the Six Continents Pension Plan before it adopted its present name on 15 April 2003.

2. The claimant, Mitchells & Butlers Pensions Limited ("the Trustee"), is the sole corporate trustee of the Plan. It sues in its capacity as such and on behalf of the present and former Plan members (and those claiming through them) in whose interests it is that the claim should succeed. It has been trustee of the Plan at all times material to the matters with which these proceedings are concerned. It was known as Bass Pensions Limited until 2001 and Six Continents Pensions Limited between 2001 and 2003.

3. The defendant, Mitchells & Butlers plc ("M&B"), is the principal employer under the Plan. It defends the proceedings in that capacity and also as representative of those present and former Plan members (and those claiming through them) in whose interests it is that the claim should not succeed. It only became principal employer under the Plan in November 2003, succeeding to Mitchells & Butlers Retail Limited formerly called Six Continents Retail Ltd ("Retail") on 6 November 2003, which had itself succeeded Six Continents Plc formerly Bass Plc ("Bass" or "6C Plc" as the context requires) on 28 March 2003. I shall use the capitalised phrase "Principal Employer" to describe the principal employer under the Plan from time to time.

4. Bass, and subsequently M&B, were also each the principal employer in relation to an occupational pension scheme which more senior members of Bass management were entitled to join (the "Executive Plan"). Many of its benefits were equivalent to, or at least perceived to be equivalent to, the benefits provided under the Plan. From time to time, the Executive Plan featured in the evidence in that context.

5. The current governing document of the Plan is a deed (the "2006 deed") dated 6 April 2006, which was A-day for the purposes of the changes introduced by the Finance Act 2004 ("FA 2004"). The rules (the "2006 rules") for the defined benefit and defined contribution sections of the Plan are annexed to the 2006 deed. They have been amended from time to time since then but not in a manner which affects the issues in these proceedings.

6. There are two earlier versions of the Plan deed and rules in respect of which rectification is sought. The first is a definitive trust deed dated 24 July 1996 (the "1996 deed") with rules annexed (the "1996 rules"). The second is a deed described as a deed adopting alterations to the Plan dated 17 December 2002 (the "2002 deed") with rules annexed (the "2002 rules"). I shall also have to refer to a deed in force immediately before the 1996 deed came into effect: a supplemental consolidating deed dated 29 August 1989 but effective from 1 April 1988 (the "1988 deed") which annexed the rules then applicable to the Plan (the "1988 rules").

7. The Principal Employer under the 1988 deed, the 1996 deed and the 2002 deed was Bass / 6C Plc. By the time of the 2006 deed the Principal Employer had become M&B. The circumstances in which (and method by which) the Principal Employer was changed has given rise to one of the more significant issues in the proceedings. This will require me to reach conclusions on the meaning and legal effect of two deeds, each entitled 'Deed Changing Principal Employer', dated 28 March 2003 (the "March PE deed") and 6 November 2003 (the "November PE deed") (together the "PE Deeds").

8. There are two basic aspects of the pension increase provisions contained in the Plan rules which are in issue:

   i) Whether the Trustee's entitlement under the 1988 deed and rules to select an index for determining the annual percentage increase to be applied to pensions in payment (both parties have called this the index selection power or "ISP"), which was not included in the 1996, 2002 or 2006 deeds and rules, should have been continued, and if so whether that right is enforceable against M&B.

   ii) Whether M&B has and is entitled to exercise the right to decide the rate by which pensions in payment should be increased on 1 October in each year. Both parties have called this the increase alteration power (or "IAP"). This right was introduced into the governing documentation of the Plan by rule 23(2) of the 1996 deed and rules and has continued as one of the 2002 rules and one of the 2006 rules.

9. The Trustee contends that the rules annexed to the 1996 deed, the 2002 deed and the 2006 deed should be rectified so as to delete the IAP and reinsert the ISP. M&B now accepts that mistakes were made in the drafting of the rules annexed to the 1996 deed and the 2002 deed which mean that they would be rectifiable as against Bass / 6C Plc. However, it contends that the 1996 deed and rules and the 2002 deed and rules should not be rectified as against it. It also continues to dispute that any rectifiable mistake was made in the drafting of the 2006 deed and rules.

10. In support of its case that, notwithstanding its concession that rectifiable mistakes were made in the drafting of the 1996 rules and the 2002 rules, they should not be rectified as against it, M&B submitted that, when it became Principal Employer in 2003, it did so as a *bona fide* purchaser for value without notice. Its case is that it therefore takes free from the Trustee's equitable claim for rectification. The Trustee denies that this defence is available, because the doctrine of *bona fide* purchase is simply inapplicable to a transaction such as the one by which M&B assumed the position of Principal Employer in respect of the Plan.

11. In circumstances in which it is now accepted that mistakes were made in the drafting of the 1996 deed and rules and the 2002 deed and rules, the argument as to why there was no mistake in the drafting of the 2006 deed and rules revolved around the precise nature of the parties' subjective intent. Was it intended that the 2006 rules would replicate the pension increase provisions in the form contained in the 1996 rules and the 2002 rules (for which M&B contends) or was it intended that there would only be the limited changes to the documents governing the Plan referred to in the surrounding documentation, and that otherwise the existing substantive rights or liabilities, including any equity to rectify, would continue to subsist (for which the Trustee contends)?

12. The Trustee also contends that the removal of the ISP and the inclusion of the IAP infringed the terms of the power of amendment contained in the Plan and were invalid. It seeks declaratory relief to that effect. The terms said to have been infringed were that the power of amendment required the Trustee to consult with the Plan actuary before it was able to alter or modify all or any of the trusts powers or provisions contained in the rules of the Plan from time to time. The power was also subject to a proviso that no alteration or modification could be made which in the opinion of the Plan actuary operates substantially to prejudice the rights or interests of Plan members in respect of prior service. The Trustee said that this consultation did not take place in an effective manner. The relevant circumstances also gave rise to a point on section 67 of the Pensions Act 1995.

13. There is also a construction point on the application of rule 1(6) of each of the 1996, 2002 and 2006 rules. The question is whether the rights of all members, early leavers and pensioners pre-July 1996 are preserved in respect of benefits earned before that date or whether those rights only apply to pensioners or early leavers who left pensionable service before that date.

Rectification: the law

14. There was no material disagreement between the parties as to the principles applicable to the determination of a claim for rectification of the rules of an occupational pension scheme. I reviewed those principles in *Univar UK Limited v Smith* [2020] Pens LR 23 ("*Univar*") at paras 195 - 216, which the parties were content to accept as an accurate description of the law. I can therefore summarise the position quite shortly.

15. The starting point is that rectification is an equitable remedy which amends documents so that they accurately reflect the true intention of their makers. The standard of proof is the balance of probabilities, but "convincing proof" is required to counteract the cogent evidence of the parties' intention displayed in the instrument itself (*Re IBM Pension Plan*, *IBM UK Pensions Trust v IBM UK Holdings* [2012] Pens LR 469 ("*IBM*") at para 19).

16. The essential conditions to be satisfied for a rectification claim were set out in *Swainland Builders v Freehold Properties* [2002] 2 EGLR 71 at paras 33 and 34, *FSHC Group Holdings v GLAS Trust* [2020] Ch 365 ("*FSHC*") at para 78, *AMP (UK) v Barker* [2001] Pens LR 77 ("*AMP*") at paras 65-66 and *Gallaher Ltd v Gallaher Pensions* [2005] Pens LR 103 ("*Gallaher*") at para 117. They are as follows:

    i) The claimant must establish a continuing common intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified.

    ii) The continuing common intention must be an actual, subjective intention, which is rightly a demanding test to satisfy and as a matter of policy should be difficult to prove: *FSHC* at paras 174 and 176.

    iii) While an outward expression of accord must normally be proved, it is not required where the claim is for rectification of the rules of a pension scheme

made pursuant to a power of amendment exercisable by the trustees with the employer's consent. In that context it is sufficient if the (subjective) intentions of the trustees and the employer coincide, so that they both independently have the same intention: *FSHC* at para 78; *AMP* at paras 65-66 and *Gallaher* at para 117.

iv) The common intention must have continued to subsist at the time of execution of the instrument.

v) It must be shown that, by mistake, the instrument did not reflect that continuing, common intention.

17. The remedy of rectification is available, not only in cases where particular words have been misused, but also in cases where particular words were used intentionally, but it was mistakenly considered that the words had a different meaning from that which they in fact have as a matter of their true construction: *Re Butlin's Settlement Trusts* [1976] Ch 251, Ch D, at 260G, *AMP* at paras 69-71 and *Univar* at para 197. This principle applies where the words said to have been misused by the parties to the instrument were actually read and seen by them but misunderstood as to their effect. In other words, it applies where there was a failure (amounting to a mistake) to appreciate the effect of what had been seen.

18. There will be cases in a pensions context where it is clear that the parties did not intend to effect a particular change even though they did not state to each other that they did not intend to effect that change, simply because the change was not in any form discussed: *Industrial Acoustics v Crowhurst* [2012] Pens LR 371 at para 45 and *Univar* at para 213. As Henry Carr J explained in *FSHC* at first instance ([2018] EWHC 1588 (Ch) at para 47), there will also be cases where an important change is made to an existing arrangement between the parties and the absence of any discussion of that change may itself be evidence that the parties did not intend it: see also *Univar* at para 214.

19. Where there is a consolidating pension trust deed which repeats a rectifiable error made in an earlier deed or deeds, rectification may be available for the later deed or deeds if the evidence of intention at the time of its execution was that the consolidating deed should reflect the members' substantive legal entitlements under the earlier deed including the right to rectify. If, however, the only intention at the time of the consolidating deed was to replicate the language of the earlier deed as it then stood, a claim to rectify may not be established: *IBM* at paras 448-451. Ultimately, however, this is a question of interpreting the evidence and is thus a question of fact (*IBM* at para 449).

20. Where the relevant intention is that of a corporate entity, the person or persons who were the decision-makers and who had authority to bind the entity in relation to the relevant transaction, are the individuals whose intention is to be attributed to it: *Hawksford Trustees Jersey v Stella Global UK* [2012] 2 All ER (Comm) 748 at para 41. As I explained in *Univar* at para 211, it will not always be easy to apply this test on the facts, but what matters is the intention of the person or persons who made the actual decision in relation to the relevant mistake, having regard to whatever constituted the decision-making process of the entity concerned and the extent to which individuals involved in the decision- making process relied on others.

21. It is permissible in a rectification claim to have regard to events after the transaction is entered into as evidence of the parties' intention at the time of the transaction. This well-established principle was reiterated by Etherton J in *Gallaher* at para 141, a case in which subsequent events were relied on both to evidence the subjective intent and to demonstrate the outward manifestation of an accord.

22. Although M&B now accepts that mistakes were made in the drafting of the 1996 and 2002 deeds and rules such that they would be rectifiable as against Bass / 6C Plc, the relief sought affects the interests of represented parties and I must explain why I am satisfied that this concession was rightly made. It is also important background to a number of other issues that arise in these proceedings including in particular the argument about *bona fide* purchase and to the argument about rectification of the 2006 deed. This last point means that it is necessary to make quite detailed findings notwithstanding the concession. It is the Trustee's case that the parties' continuing understanding of the meaning and effect of the pension increase provisions in the 1996 and 2002 deeds is an essential building block for ascertaining their subjective intention as to the equivalent provisions in the 2006 deed and rules. This means that the basis of that understanding, and the extent to which it was ingrained in the minds of those involved by the time they came to consider the 2006 deed and rules, is an important part of the case.

The witnesses

23. I heard oral evidence from 16 of the 19 witnesses for whom statements were served, all of them by the Trustee. M&B called no witnesses of fact to support its own case.

24. The Bass / M&B group directors, officers and employees who gave oral evidence were:

    i) Sir Ian Prosser who was chairman and CEO of Bass / 6C Plc between 1987 and 2003. He then became chairman of Intercontinental Hotels Group plc ("IHG") for a short period after its demerger from the Bass group in 2003. He was not a director of the Trustee.

    ii) Mr Timothy Clarke who was a member of the Bass executive board from 1995 and joined the main board in December 1996. He was CEO of Retail between May 1995 and 2002 when he became CEO of Bass / 6C Plc, a position which he continued to hold until the demerger of the Bass group in 2003 when he became CEO of M&B. He remained CEO of M&B until his resignation in 2009. He was also a director of Retail throughout the relevant period. He was not a director of the Trustee.

    iii) Mr Richard North who was the group finance director of Bass / 6C Plc between 1994 and 2003 and a member of its executive committee. He took over responsibility for the pensions department when Mr Wigley retired in 2000. In 2003 he became CEO of IHG on its demerger from the Bass group. He was not a director of the Trustee.

    iv) Mr Spencer Wigley who is a solicitor. He started as company secretary and general counsel to Bass in 1992 and became a member of the Bass executive

board in 1995. He became personnel director of Bass in 1997 with responsibility, amongst other matters, for the pensions department. He retired in November 2000. He became a director of the Trustee in 1995 and was chairman of the Trustee between January 2001 and the end of 2003.

v) Mr Iain Napier who was the Bass HR director (or director of group personnel) from the early 1990s, in which capacity he was ultimately responsible for the pensions department, the director of which reported to him. He was a member of the executive committee of the Bass board from 1994 and became a main board director in 1996 (but after the 1996 deed was executed). In 1996 he also took over as CEO of Bass Brewers. He was a director of the Trustee between April 1993 and March 1997. He left the Bass group in 2001 when its brewing division was sold to Interbrew UK Ltd ("Interbrew"), at which time the group changed its name to Six Continents.

vi) Mr Trevor Jones who was the Bass / 6C Plc director of pensions between 1997 and 2003. He became an employer-nominated director of the Trustee in September 1995 at a time at which he was the financial director of the group's Britvic soft drinks division. He was chairman of the Trustee between 2004 and 2009. He was also a director of the trustee of the Executive Plan between 1995 and 2009.

vii) Mr Richard Collin who was a director of the Trustee between 1990 and 1998. He was also a director of the trustee of the Executive Plan.

viii) Mr Michael Bramley who was a director of Retail between 1995 and 2009 and a director of M&B between its formation in 2003 and 2009. He was chairman of the Trustee at the time these proceedings were commenced and was an employer-nominated director of the Trustee between 1998 and 2007. He was also a director of the trustee of the Executive Plan between 2003 and 2007.

ix) Ms Bronagh Kennedy who was HR director of 6C Plc and then M&B between 2003 and 2008. She was also M&B's general counsel and company secretary between 2003 and 2010 and a director of Retail between 2000 and 2010. She was a director of the Trustee between 2000 and 2007.

x) Mr Karim Naffah who was a director of Strategic Planning and then Strategy director at Bass / 6C Plc from 1992 to 2003 and then became finance director of M&B in April 2003, a post which he filled until he left the group in 2008. He was a member of the executive committee of Bass and then M&B from 2000. He was also a director of Retail between 2000 and 2008. He was not a director of the Trustee.

xi) Mr David Coles who was an actuary and was the Bass group pensions manger between 1990 and 2004, having worked for the group since 1983. He was the most senior pensions specialist within the pensions department during that period and reported to the Bass director of pensions (initially Mr Peter Scurlock and subsequently Mr Trevor Jones).

xii) Ms Judith Deeley who was a long-standing employee of Bass and 6C Plc who became the Bass pensions manager in 2003. Between 2006 and 2012 she was the Trustee's pensions manager and company secretary.

xiii) Mr Colin Hammond who was Bass' financial controller of pensions from April 2003. He was a director of the trustee of the Executive Plan but was not director of the Trustee. He was also secretary to the Trustee for a short period in 2006 before Ms Deeley took office.

25. Statements were also admitted from two former officers of the Bass / M&B group who did not give oral evidence and were not cross examined:

i) Mr Kenneth Richards was a longstanding member of the Bass group's senior management but had retired from his executive role in 1989. He was chairman of the Trustee and chairman of the trustee of the Executive Plan between 1989 and 1998.

ii) Mr Richard Winter is a solicitor who joined Bass as head of group legal in January 1994, a position which he held until 2000, when he took over from Mr Wigley as Bass' company secretary. He remained company secretary until April 2003 when he became company secretary and general counsel of IHG following its demerger from the Bass group.

26. Statements were also served from two solicitors at the firm then called Wragge & Co LLP ("Wragges") who acted for the Trustee from 2005 and whose evidence related only to the drafting and preparation of the 2006 deed: Ms Vivien Cockerill, a partner, who was cross examined and Ms Suzannah White, an associate, who was not.

27. Finally, the two Plan actuaries for the duration of the relevant period gave evidence on which they were cross-examined. They were Mr Roy Carr (who was in office between 1991 and 2005) and Mr Gareth Edwards (who became Plan actuary in December 2005). They were both partners at W M Mercer Fraser Limited ("Mercer").

28. Not surprisingly, many of the witnesses had several different roles in the Bass / 6C / M&B group during the period with which these proceedings are concerned. There will be occasions in which it will be necessary to focus on the precise decision-making function which they each fulfilled from time to time. Thus, a number of them were directors or officers of both Bass / M&B and the Trustee at the same time (Mr Napier, Mr Wigley, Mr Richards, Mr Bramley, Ms Kennedy) while others were only directors or officers of Bass and/or M&B (Sir Ian Prosser, Mr North, Mr Winter, Mr Clarke and Mr Naffah) or were only directors or officers of the Trustee but had other jobs elsewhere in the Bass group (Mr Jones, Mr Collin, Mr Hammond and Ms Deeley).

29. The inevitable closeness of these connections extended to employees who were not directors or officers of either the Trustee or whichever entity was the Principal Employer at the time (Bass / 6C Plc, Retail or M&B). As Mr Jones and Mr Bramley explained in their evidence, the individuals who worked for the Bass group pensions department were also expected to give assistance, support and advice to the Trustee, which doubtless explains why Mr Wigley said that he and the other Trustee directors placed a great deal of reliance on their work. The way that Mr Coles put a similar point

from the employees' perspective was that when he attended board meetings of the Trustee, he would be looking at issues from both the Bass and the Trustee perspective.

30. The relevant events happened a long time ago and it is inevitable that the witnesses' memories were not always reliable. I am satisfied, however, that without exception they did their best to assist the court, and it is not said by either party that this was not the case. On many occasions it was obvious that a witness had their memory refreshed by documents to which they had been taken either in the course of the preparation of their witness statements or during their cross-examination. There were also some occasions in which the witnesses were simply reconstructing what they thought was manifest from the documents without having any independent memory of what in fact occurred. As Mr Keith Rowley QC, who appeared for M&B, submitted, that type of evidence is of limited assistance.

31. However, although memories were often imprecise as to the detail, the same could not be said about some of the more general themes which ran through the evidence. In particular, I found to be compelling the many different ways in which the witnesses all expressed what I accept was a universal belief at the time the 1996, 2002 and 2006 deeds were executed that the existing Plan documentation contained a guaranteed pension increase entitlement. I also found compelling the belief they all had that they would have become aware of any proposal to make a substantive change to those provisions, and that without exception they all would have regarded the removal of the Plan's pension increase guarantee (by the grant to Bass or to M&B of any discretion to set the rate of increase) as a substantive change and that they would have known about such a proposal if it had ever been on the table, which in their evidence it was not.

The Plan's pension increase provisions: pre-1996 provisions

32. Until 1987, the documentation governing the Plan contained no provision for guaranteed pension increases, although there was a rule (contained in rule 3(F) of the rules annexed by way of Appendix to the supplemental deed dated 9 August 1982) providing for discretionary increases in pension. From time to time, this was exercised with a view to providing protection against inflation.

33. On 20 October 1987, a supplemental deed was executed which introduced a replacement rule 4(A) providing for an annual pension increase on that part of a member's pension that exceeded the guaranteed minimum pension ("GMP") at a rate equivalent to the Official Index of Retail Prices in the 12-month period ending on the 31 May immediately before the date of the increase, or if less 4%. This form of pension increase entitlement is generally known as limited price indexation ("LPI") and, in the present case, amounted to a cap of 4% LPI.

34. The Official Index of Retail Prices was defined to mean "*the index of retail prices published by the Department of Employment or any other index selected by the Trustees and approved for the purposes of the Main Scheme by the Commissioners of Inland Revenue*". This therefore specified RPI, but also introduced the ISP for pension increase purposes, because the effect of the definition of Official Index of Retail Prices was to give the Trustee the power to select the index, so long as it was approved for the purposes of the Plan by the Inland Revenue. A provision to this effect did not just apply

to pensions in payment. There was similar provision for the purposes of revaluing deferred pensions.

35. The members' entitlement to inflation-linked pension increases on that part of their pension that exceeded the GMP was repeated in the 1988 deed and rules, as was the ISP. The rules were annexed to the deed and for present purposes the most important ones were in the following form:

> "*2 Definitions*
>
> ...
>
> *"Official Index of Retail Prices" means "the index of retail prices published by the Department of Employment or any other index selected by the Trustees and approved for the purposes of the Plan by the Board of Inland Revenue.*
>
> ...
>
> *20 PENSION INCREASES*
>
> *Any yearly pension ... in payment under the Plan ... shall be increased on each 1st October which is after the later of the 30th September 1987 and the date the pension became payable. Subject to Rule 36(A) – (Inland Revenue limitations), each increase shall be a percentage of the yearly pension in payment immediately before the increase.*
>
> *The percentage shall be either the percentage increase, if any, in the Official Index of Retail Prices in the twelve month period ending on the 31st May immediately before the date of the increase or, if less, 4 per cent., ...*
>
> *This Rule shall not apply to:-*
>
> *Any part of a pension payable to a Member from and after State Pension Age or to his spouse on the Member's death which comprises a Guaranteed Minimum Pension. ...*"

Rule 8(A)(4) of the 1988 deed and rules made specific provision for guaranteed increases in the valuation of deferred pensions in the same form.

36. The 1988 deed and rules also contained (in the form of rule 18(A)) an augmentation provision for discretionary pension increases to be awarded at the request of Bass as the Principal Employer subject to the payment of any required additional contributions by each relevant participating employer. This rule was used to satisfy an aspiration that was described as the "Aim", which became relevant in circumstances in which, for any relevant period, RPI exceeded 4%. The Aim was referred to in the evidence of several witnesses and much of the contemporary documentation dealing with the members' pension increase entitlements. It was a non-binding expression of intent agreed between Bass and the Trustee that members would be awarded further pension increases on the excess of any GMP amounting to 2/3rds of the increase in RPI above the cap of 4% LPI.

37. Both the entitlement to a pension increase of 4% LPI and the Aim were regarded by Bass and the Trustee as sufficiently important to warrant specific mention in much of the documentation explaining the structure and terms of the Plan to members and other interested parties. Thus, they were both referred to in the Plan's Report and Accounts for the years ended 31 March 1988, 31 March 1990 and 31 March 1991. In each case the wording distinguished between the entitlement to an increase at 4% LPI, which was described as a guarantee, and the Aim, which, while falling short of a promise, was expressed as a present aspiration.

38. The distinction between the guaranteed entitlement to an increase and the Aim were also both referred to in the 1989 edition of the Plan booklet and the 1990 edition of the Plan handbook in the following terms:

> "*Pensions in excess of any GMP are guaranteed to be increased in line with the rise in the RPI for the year ending 31st May preceding the increase, up to a maximum of 4%. Also, while not a promise, it is the Company's present aim to pay additional increases on pension in excess of any GMP, based on two-thirds of that part of any rise in the RPI which is above 4%.*"

The power of augmentation was used to achieve the Aim between 1988 and 1991 when inflation exceeded 4% LPI.

39. The Plan handbooks were issued by Bass and were regarded by Mr Coles and others in the pension department as Bass documents. Mr Napier said much the same and added that they were drafted under the supervision of Mr Scurlock and Mr Coles. He also said that, although he did not think that they would have been referred to the Bass executive committee for approval, he (as the group HR director from the early 1990s with ultimate responsibility for the pensions department) would have seen and approved the proofs and the executive committee would have seen them on a 'for information' basis at the time of issue. Mr Richards said that the board of the Trustee did approve the handbooks and the witnesses were consistent in their evidence that, in a number of different contexts, the practice was to refer to them as the source of any information relating to members' current benefits and entitlements under the Plan. As will appear, this was also the position when decision-makers came to consider drafts of the proposed new Plan deeds.

40. By the beginning of 1991, the Plan had developed a surplus. The initial results of the actuarial valuation as at 31 March 1991 indicated that it was about £285 million. The issue of how to split it as between Bass and the Plan members was raised at a Pensions Delegates Conference ("PDC") held on 19 March 1991. PDCs were a feature of the Bass group's policy of consultation, communication and involvement which reflected what a number of witnesses described as its paternalistic attitude towards its employees. Mr Coles explained that the PDCs were the means by which pensions matters were communicated by Bass to its workforce, and each business division was required to nominate a delegate. They were well attended not just by members and their delegates, but also by several employees from the Bass group's pensions department, including the group's director of pensions, the Plan actuary and directors of the Trustee. The evidence was that delegates took their role seriously and any proposed changes were both discussed and recorded at length. At the March 1991 PDC, one of the options discussed was to increase the 4% LPI to 5% LPI for all pensionable service.

41. In the event, this is what was agreed by Bass and the Trustee towards the end of 1991, having been approved at a board meeting of the Trustee held on 5 December 1991, while at the same time it was agreed that the employers' contributions would reduce to 4% of pensionable emoluments for what was projected to be 11 years. The effect of this agreement was that the surplus would be apportioned as to 22% towards enhanced benefits for members and as to 78% by way of reduction to future contributions by Bass. The Aim was to continue to apply as well but, in light of the LPI percentage increase, would only then cut in at 5% LPI rather than 4% LPI. As both Mr Coles and Mr Collin pointed out in their evidence, this agreement was significant in the sense that the increase in the guaranteed amount was a quid pro quo for the benefit which Bass received by a reduction in its contribution rate.

42. The agreement as it related to the increase in LPI was explained by Bass' director of pensions, Mr Scurlock, and the Plan actuary, Mr Carr, at another PDC held on 10 December 1991, when it was described as a "*Pension Increase Guarantee*". Mr Collin said that this was given a lot of scrutiny by pension delegates, and member-nominated directors of the Trustee, who represented the workforce at large. The Trustee submitted (and I accept) that this demonstrated a high level of awareness and involvement amongst the workforce when it came to pension matters.

43. The agreement was not recorded in a formal amendment to rule 20 of the 1988 rules at that stage but was announced to members more generally in a leaflet issued in December 1991. This leaflet, which members were asked to keep in the back of their Plan handbook, announced a number of benefit improvements, the relevant one of which was entitled "*Pension Increase Guarantee - Up from 4% to 5%*" and said:

> "*Pensions in payment and deferred pensions in excess of the Guaranteed Minimum Pension (GMP) are currently guaranteed to be increased each year on 1st October by the rise in the Retail Price Index (RPI) up to 4%. In addition, there is an aim to grant a further increase of two-thirds the excess of the RPI over 4%.*
>
> *From 1 October 1992, when the next increase is due, the maximum increase under the guaranteed formula will be 5%. The additional aim will be two-thirds the excess of inflation above 5%.*"

44. The Quick Guide summary in the 1992 edition of the Plan handbook issued the following year continued to refer to the award of 'guaranteed increases' each year, and the slightly more detailed description of the pension increase provisions (given on p.12 of the Plan handbook) used very similar wording to that which had been used before the percentage increase was agreed, again stressing the guaranteed nature of the increase entitlement as against the discretionary operation of the Aim:

> "*Pensions in excess of any GMP are guaranteed to be increased in line with the rise in the Retail Price Index (RPI) for the year ending 31st May preceding the increase, up to a maximum of 5%. Also, whilst not a promise, it is the Company's and the Trustees' present aim to pay additional increases on pension in excess of any GMP, of two-thirds of the amount that the rise in the RPI is above 5%. In practice, the aim has been achieved in the past.*"

45. At this stage it is convenient to note that, in general terms, M&B urged me to be cautious about attributing too much significance to the language that was used in the

Plan handbooks. Mr Rowley submitted that they could not be taken by a reasonable reader to be a technical or exhaustive definition of the Plan's pension increase provisions. The copies in evidence give support to this submission, clearly stating that the handbooks only contained a summary, and the relevant deed and rules would override in the case of any inconsistency. Thus the 1992 handbook contained the following prominent statement (similar warnings were included in the 1997 and 1999 versions):

> "*This Handbook is a guide to the Plan and, although every effort has been made to ensure that the contents are accurate, it cannot include every detail. It will, therefore, be overridden by the legal documents, the Trust Deed and Rules, governing the Plan should there be any discrepancy between the two*."

46. On one level, I agree with Mr Rowley's submission. Most of the witnesses who addressed the point appreciated that the Plan handbook was what Mr Clarke called a good accurate business summary of the governing documentation and that to understand the detail it would be necessary for a reader to refer to the terms of the rules themselves. One of the witnesses (Mr Bramley) said that he thought that everybody used the handbook as the definitive document, but he also went on to say that he knew that this was not strictly accurate; the point he was seeking to convey was that the corporate culture of Bass was such that it would not have stated anything in the handbook that it did not believe was correct at the time.

47. However, the general recognition that the Plan handbook was no more than a summary capable of being overridden by the applicable deed and rules so far as strict legal entitlements were concerned, does not really engage with the core point. In my view what matters is the extent to which the Plan handbook reflected a common understanding of what the rules themselves provided and identified the benefits which were of sufficient significance to merit specific mention. The way that this was explained by Mr Clarke in his evidence reflected the views of all of the witnesses who were asked about the point. What he said was:

> "*The Plan's member handbooks were important documents and, I think it is accurate to say, reflected my understanding, and I would say the understanding of the senior management of the Company generally, of the main benefits under the Plan ... By "main benefits", I mean that not every detail of members' benefits was set out in the member handbooks, as those benefits were more comprehensively detailed in the Plan's legal documentation such as the Rules; the handbooks summarised the position*."

48. The importance of the Plan handbooks was described in different ways by different witnesses, but Mr Wigley's evidence was representative. He described the 1992 version's summary of the pension increase provisions as broadly according with his understanding of the pre-1996 members' entitlements and said that he regarded those responsible for its preparation as part of a highly competent department. The view within Bass itself was shared by Mr Carr. He explained in his (not very surprising) evidence how Bass employees like many other employees tended to refer to the relevant pension plan's handbooks rather than the rules for a description of their benefits.

49. The witnesses' views on the significance of the Plan handbook also provides important background to the specific subjective intent with which the relevant decision-makers

approached their agreement to adopt the new versions of the deed and rules. This was particularly the case in relation to the 1996 deed because the Plan handbook was used by the drafters during the course of the drafting process as the source for their understanding of the members' benefits to be included, but it also featured as a significant consideration in the witnesses' evidence as to their subjective intent at the time at which the 2002 deed and the 2006 deed were entered into.

50. The ISP was not referred to in the Plan handbook, but I agree with the Trustee's submission that this is not surprising and does not affect the fact that the handbooks were a fair reflection of what was generally thought by the members, Bass and the Trustee to be the extent of members' rights to pension increases. Although the ISP meant that the Trustee had the ability to alter the index, as Mr Coles amongst others explained, RPI was used as shorthand for inflation-proofing generally (subject to the cap) and the circumstances in which it was able to do so were circumscribed by the absence of any other revenue approved index. More importantly, the Trustee's position as a fiduciary with duties to the members meant that the prospect of the ISP being used in a manner that undermined the value of the guarantee was vanishingly small. To that extent it was a provision that had nothing like the same significance for members as the guaranteed entitlement to inflation linked pension increases and the Aim, both of which were referred to in the Plan handbook.

51. Also in 1992, Bass and the Trustee agreed to a number of detailed amendments to the 1988 deed and rules. The deed of amendment which recorded this agreement was dated 23 July 1992 and does not contain any provision for changes to the pension increase power (so the opportunity was not taken to change the percentage figure in rule 20 of the 1988 rules from 4% to 5%). However, the Trustee relied on it as an example of how at that stage both Bass and the Trustee wished to keep the balance of power between members and company under review and ensure that it remained appropriate.

52. The evidence was that these amendments were introduced (anyway in part) in response to concerns about the 1991 Maxwell pension scandal expressed by members at recent PDCs. Mr Napier said that his recollection was that the change came about due to a concern that the group might be using the Plan to meet the cost of redundancies. Whatever the true position it reflected a recognition by both Bass and the Trustee that the width of the existing employer discretions in the Plan documentation was capable of being exploited by what were referred to in the evidence as predatory employers to the detriment of Plan members generally. This focus on issues relating to the balance of power continued to raise its head from time to time in the run up to execution of the 1996 deed and rules, by which stage the possibility of hostile takeover activity had started to become of concern to some pension delegates and others.

53. The evidence also included a number of examples of other documents in which the terminology of 'guarantee' was used to describe members' entitlements to pension increases at 5% LPI, both in conjunction with and separately from the description of the Aim which was not of course guaranteed. Thus, in a booklet dealing with additional voluntary contributions issued in 1993 it was represented to members that:

> "*Pensions arising from AVCs, like pensions from the Plan, are guaranteed to be increased in line with the rise in the Retail Price Index (RPI) for the year ending 31st May preceding the increase, up to a maximum of 5%. Also, whilst not a promise, it is the Company's and the Trustees' present aim to pay additional*

increases of two-thirds of the amount that the rise in the RPI is above 5%. The aim has, in practice, been achieved in the past. The increases take place as from 1st October each year."

54. This language of guarantee was also striking in the case of papers emanating from Mr Coles (one of the people who was seen by Mr Bramley as working for both Bass and the Trustee). He was not a decision-maker in relation to the deeds of which rectification is sought but his role as group pensions manager meant that he prepared many of the papers that were considered by those who were. His understanding of the nature of the Plan's pension increase provisions went some way towards informing the understanding of those individuals who were.

55. Thus, in the papers he produced for meetings of the board of the Trustee, Mr Coles was accustomed to refer to the 5% LPI as a guarantee. There are several examples of this in the evidence, and at least one of the papers (prepared in June 1994) was sent to Mr Napier, who was then a director of the Trustee, and the Bass human resources director with overall responsibility for pensions on its behalf. He also used the same terminology when addressing PDCs (as recorded for example in the minutes of the PDC held on 19 October 1994) and particularly when describing how the 5% LPI worked in conjunction with the Aim.

56. There were also other contexts in which the guaranteed nature of the pension increase provisions at 5% LPI were part of the basis on which the Plan was administered. One example was the assumptions used by Mr Carr, who had been the Plan actuary since January 1991, in his 1994 actuarial valuation for the Plan. He distinguished the Aim (which was said not to be a promise) from the 5% LPI which was treated as if it was. This was also the basis on which members of the Reckitt & Colman pension fund were bulk transferred into the Plan in 1995, when Mr Carr's assistant, Mr David Coleman, made clear in his discussions with Watson Wyatt (advising Reckitt & Colman) that pensions in excess of any GMP were guaranteed to increase in line with RPI up to a maximum of 5%.

57. It also continued to be the case during the period prior to the execution of the 1996 deed that the delegates attending the PDCs (and the evidence is that they were well attended) continued to raise the pension increase provisions as an issue for further discussion. In particular, there continued to be questions as to whether the Aim could be converted from an aspiration into a guarantee, thereby giving members an enhanced prospect of greater protection against the effect of inflation at a rate in excess of 5%. This was first raised at the March 1994 PDC. Mr Napier explained that this was a matter that he discussed with Sir Ian Prosser around that time, and their joint view was that it was desirable for Bass to retain the flexibility of this particular discretionary element, although he was clear that there was no discussion between them that the pension increase provision for 5% LPI should cease to be a guarantee.

58. The decision not to convert the Aim into a guarantee was reported back to the PDC held in October 1994 when Mr Coles explained that the introduction of a guarantee above 5% LPI was inappropriate because it would reduce the risk profile of the Plan's investment strategy. The reason for this was that Mr Carr had advised that any such extension of the guarantee would cost the Plan an extra £8.5 million per year. Mr Napier agreed with this explanation and said that he did not remember it as being particularly contentious, but he made the compelling point in his evidence that he would

have regarded it as duplicitous and contrary to the nature and mindset of Bass senior management to have tried to go in the opposite direction (i.e., to remove the guarantee) without informing the delegates. Furthermore, the discussion of the issue reflected a concern by some members (known to both Bass and the Trustee through the several directors and pensions department employees who attended the PDCs) that it was important for inflation-linked pension increases to be as secure as possible. It also indicated the extent to which they were a sensitive issue, any interference with which would have been highly contentious.

59. The minutes of the last PDC before the process of drafting the 1996 deed commenced continued to use the language of guarantee when describing the pension increase provisions. This was significant given the inter-relationship between the views and influence of the pension delegates and the Bass group's general corporate culture as explained by Mr Bramley, who had not yet become a director of the Trustee, in the following terms:

> "*If there had been a suggestion in or around 1996 of allowing the Company to determine unilaterally the rate of pension increases, there would have been uproar amongst the Pension Delegates and trade unions and it would have been strongly opposed. I would have expected to know about it. Also, if it had been proposed, I feel sure that the Company would have raised it with the Pension Delegates at the time given the constructive relationship between the Company and the Pension Delegates.*"

60. Against this background it is not surprising that much of the evidence as to the witnesses' recollection of the guaranteed nature of the pre-1996 entitlement to a pension increase entitlement at 5% LPI was as categoric as it was. This continued to be the theme of the evidence during the period in which the question of preparing what came to be the 1996 deed was first being considered by witnesses from all parts of the Bass group and is important background to their subjective intentions when approving or participating in the approval of the wording of the 1996 deed.

61. Thus, in his evidence at the trial Mr Coles confirmed that this was his understanding of the position, as did Mr Jones, a director of the Trustee by the time that the 1996 deed came to be executed. Other witnesses holding office with the Trustee were equally categoric. Mr Richards, the chairman of the Trustee, made clear that the 5% LPI increase was guaranteed, that this was an important benefit and that there was never any suggestion that Bass would have or might be given a discretion to alter it. Evidence to the same effect was given by Mr Collin, the human resources director for Bass Leisure and a director of the Trustee, who also said that the pension provision, including the guarantee was an important feature of employees' pay to which Bass was committed. Like Mr Bramley he also said that he would have expected that any suggestion prior to 1996 about giving Bass the power unilaterally to determine the rate of pension increases would have been discussed at the next PDC and recorded. It was not. He also said that any such proposal would have been discussed amongst other divisional HR directors (of which he was one). I accept his evidence that he would have remembered it if it had happened and that as he did not remember it, the strong probability is that it did not happen.

62. On the Principal Employer side, there were two members of the Bass board who gave clear evidence about their understanding of the position immediately prior to the

commencement of the drafting process in relation to the 1996 deed: the chairman, Sir Ian Prosser and Mr Clarke (at that stage a member of the Bass executive committee). They both used the language of guarantee when describing their understanding of the nature of the pension increase provisions of the Plan, and there was no evidence from any other members of the board to the contrary. Sir Ian remembered that increases to pensions in line with RPI up to a cap were guaranteed but had no independent recollection of the precise nature of the provisions. I think that both Sir Ian and Mr Clarke had their recollections assisted by consideration of the Plan handbooks, but Mr Clarke also explained that the rate of pension increases was important to him because of his memory of how inflation had eroded pensioners' incomes during the 1970s and 1980s, which meant that he thinks he would have remembered any discussion about changing increase guarantees, which he did not. Sir Ian simply said that what was said in the handbooks was consistent with his understanding and recollection of the basis on which increases were awarded.

63. I was satisfied that Sir Ian Prosser and Mr Clarke were being entirely straightforward in their evidence when explaining that the legal and commercial effect of what they considered to be the 5% LPI guarantee was in their minds in 1995. I also think that the form in which their evidence was given is consistent with the evidence of many other witnesses to the effect that the guaranteed nature of this particular Plan benefit was deeply ingrained in the understanding of everybody involved in the administration and decision making relating to the Plan.

64. The same can be said about Mr Richard Winter, a solicitor who was head of group legal at Bass at the time. His recollection of the guaranteed aspect of the pension increase provisions was also aided by consideration of the Plan handbooks. He was not cross examined, but there is no reason to believe that he was only reconstructing what occurred by reference to the documents or that his recollection was not genuine as to what was in his mind at the time. He said that he was never aware of any change to this being agreed or even discussed either as to the introduction of the IAP or the removal of the ISP.

65. Likewise, Mr Wigley, who was general counsel of Bass and became a member of its executive board shortly before the 1996 deed drafting process began, also gave evidence as to the significance of the guaranteed nature of the pension increase provisions. He explained the position as follows:

> "*Any proposal to make the basis by which pension increases were made less favourable to members or to give the Company the unilateral ability to choose to adopt a less generous rate of increase than the guarantee would have been met with great resistance by the Trustee and by the unions. Given my role both within the Company and as a Trustee director, it would have been impossible for any such proposal to have been advanced without my knowing about it.*"

66. I shall deal with this in more detail a little later, but Mr Wigley's statement was a clear statement of the position reflected in the evidence given by all of these individuals that any change to the guaranteed nature of the pension increase provisions would have been what Mr Coles described as an extraordinary event which would have been discussed at length. He said, and I accept, that it would have been a very big deal that he would have remembered. There is no evidence that, at any stage prior to the commencement of the drafting of the 1996 deed, there was any proposal to modify the pension increase

provisions so as to remove the Trustee's control over the selection of the applicable inflation-linked index or to give Bass a discretion to disapply what had been the 5% LPI guarantee.

67. Some of the strongest evidence on this point came from Mr Napier, who was ultimately responsible for the Bass group pension department and, by the time the drafting process for the 1996 deed commenced, was a member of the Bass executive committee. He summarised the position as being clear in the sense that the annual pension increase combined an element that was guaranteed and a discretionary element in years when the RPI exceeded 5%. He also explained the way in which the question of whether or not to award a discretionary increase was determined. Each year Mr Coles prepared a paper setting out the increases to be applied and Mr Napier was responsible for seeking the Bass board's approval for any discretionary increase over and above its legal obligation. In that context there were two other discretionary elements, apart from the Aim: an annual Christmas gift and a funeral benefit. Once Mr Napier had confirmed the proposed pension increase including those discretionary elements, Mr Coles prepared a paper for the board of the Trustee.

68. Importantly, for present purposes, Mr Napier said that the process by which increases were determined was uncontentious and reflected a common understanding amongst the Bass management, the Bass pensions department and the directors of the Trustee as to how pension increases worked. Mr Napier was clear that if any change which might lead to lower increases being payable had been proposed, there would have been a very strong reaction from the Trustee. He said that, if what occurred in 1996 could be read in hindsight as having made that change, that was emphatically not what he intended to happen.

<u>Drafting of the 1996 Deed</u>

69. At the beginning of 1995, Allen & Overy ("A&O") wrote to Mr Andrew Jolly, the Trustee's company secretary, with a quote for a proposed redraft of the Plan's governing deed and rules. Mr Jolly did not give evidence but was described by Mr Coles as A&O's principal contact within the Trustee's board. Any redraft would take effect by the Trustee exercising its power under clause 6 of the 1988 deed, acting with the consent of Bass and after consultation with the Plan actuary, to alter or modify all or any of the trusts powers or provisions of the deed or rules.

70. Clause 6 of the 1988 deed was in the following terms:

> "*After consulting the Actuary the Trustees may at any time and from time to time with the consent of the Principal Employer alter or modify all or any of the trusts powers or provisions of this Deed or of the Rules and any such alteration or modification may have retrospective effect. Any alteration or modification shall be made by deed executed by the Trustees and by the Principal Employer*."

71. By provisos (iii) and (iv) to clause 6 it was provided that:

> "*(iii) no alteration or modification shall be made which in the opinion of the Actuary shall operate substantially to prejudice the rights or interests in respect of*

service prior to the effective date of the alteration or modification of any person already a Member at such date;

(iv) no alteration or modification shall be made which in the opinion of the Actuary shall operate substantially to prejudice any of the benefits under the Plan in respect of a Transferred Member as are determinable by reference to his Former Scheme Pension except with the consent of the Transferred Member, …"

72. A&O suggested two alternative approaches for both of which the £13,500 charge would be the same. The first was to make the required changes to the existing trust deed and rules. The second was to take A&O's standard format as a starting point, the objective being "*to write the deed and rules in clear, modern English so that they will be easier to read, understand and to advise on*". A&O were instructed to take the second route using their standard form as the starting point but adopting what were described as "*the announcements or other material*" as the basis for specific alterations from the existing form. I accept that the Trustee's intention was that the drafting should be a consolidating exercise, and that any changes were to be based on announcements to members or other material. These concepts were articulated in at least one board meeting held during the course of the drafting process and were referred to in the evidence of a number of the witnesses.

73. Mr Napier did not instigate the project but supported it to ensure that the rules of the Plan were what he called tight, clear and in good order in the context of a disposal of the Bass distribution business, which he did not want to get bogged down in pension matters. The way that Mr Napier explained it was to say that he viewed the 1996 consolidation as a simple updating exercise which included nothing substantive. It was, he said, a tidying up exercise. Mr Coles also referred to what he called the 1996 Consolidation as a non-event, which was not intended to make any substantive changes.

74. The approach described by Mr Napier and Mr Coles was then confirmed at a meeting of the board of the Trustee held on 2 March 1995 at which it was agreed that A&O should be employed to produce an updated trust deed and rules using their standard wording, in line with the schedule of amendments attached to the secretary's report dated 21 February 1995. This report was not in evidence, but it is not suggested that the proposed amendments included any reference to the introduction of an IAP or anything like it and I am satisfied from the contemporaneous documentation that has survived that it is most improbable that it did. A&O's letter of appointment as what the minutes called Plan solicitors was then formally agreed at the next meeting of the board of the Trustee held in May. Although the bulk of the work was done by A&O, Bass as Principal Employer instructed its own solicitors, Linklaters & Paines ("L&P"), to act for it in the Plan redrafting exercise.

75. Although some of the contemporaneous documentation relating to the redrafting of the Plan deed and rules has survived, much has not. I was told that many of A&O's archived documents were lost in an Iron Mountain storage facility fire in July 2006. It is thought likely that much of the documentation relating to the drafting and adoption of the 1996 deed and rules (and indeed the later redrafting exercise in 2002) was included in the archived material that was lost. This means that the court has an incomplete documentary record of what occurred.

76. This might be thought to have an impact on the cogency of the evidence which the Trustee is able to advance in support of its case. However, in light of the consistent manner in which the witnesses gave their evidence (both in their statements and orally) and the fact that the documents which have survived are strongly supportive of that evidence on the central issues that matter, I do not consider it at all likely that any of the relevant documents will have contained evidence capable of undermining the strength of the evidence that is otherwise available. In particular, there was clear evidence that any positive decision to change the existing benefit structure or the powers available to Bass or the Trustee under the Plan would have required board approval on both sides and would have been recorded as a material matter in the minutes. There is no evidence that this type of documentation has been lost. It follows that the absence of any reference to proposed or agreed changes in the minutes is good evidence that, if any change was made in the formal documentation (into which category I include the introduction of the IAP and the removal of the ISP), it was not intended.

77. The relevant part of the A&O standard form which dealt with inflation-linked pension increases was contained in a draft rule 23(2) in the following terms:

> "*[(2) That part of a pension which exceeds any guaranteed minimum pension in payment is increased on [ ] in each year. The rate of increase is [per cent. per year compound] [the percentage increase in the Central Statistical Office's retail price index during the year ending on [each] [the previous] [but subject to a [maximum] [minimum] increase of [ ] per cent. per year compound (or any other rate decided by the Principal Employer [and notified to] [with the agreement of] the Trustees)].]*"

The way in which the A&O standard form in its raw state was written and presented therefore contemplated the possibility that there would be cases in which the Principal Employer's discretion to alter the rate of interest might be appropriate and cases in which it would not. It also contemplated that, even if the discretion was included, it might be appropriate to qualify it by requiring notification to, or agreement by, the trustees. Mr Coles, who was closer to the drafting process than most other witnesses, said that he had no recollection of seeing that standard form.

78. A draft of a new deed and rules for the Plan prepared in accordance with the A&O standard form had been prepared by 5 July 1995, although it was not in evidence. However, a note produced by A&O for a meeting of the Trustee's board held the following day has survived and refers to the draft deed being based on the 1988 deed and rules as amended in July 1992 and the draft rules being based on the 1992 edition of the Plan handbook together with amendments announced subsequently "*as specified in the list attached to Andrew Jolly's letter of 17 February 1995*". This letter was not in evidence either, but as with Mr Jolly's report dated 21 February 1995, there is no evidence that any amendments referring to an IAP had been announced and I am satisfied that they had not. It follows that, so far as the pension increase provisions were concerned, A&O were asserting that the draft rules were based on the 1992 edition of the Plan handbook. As I have already explained, the 1992 edition of the Plan handbook made clear reference to a guaranteed annual pension increase at 5% LPI, which is irreconcilable with a discretion being given to the Principal Employer by the terms of the IAP or provision to similar effect.

79. The A&O note also commented on a significant number of the clauses in the draft deed and explained or sought further information in relation to the drafting of many of the rules. The note made no reference to the pension increase provisions nor was any explanation given on the form of a draft rule 23, which might have been expected to be the case if any change of substance was proposed or under consideration.

80. Reference to a guaranteed increase at 5% LPI and to the Aim continued to be made in other materials put before the board of the Trustee during the period in which the 1996 deed was being drafted. Thus, Mr Coles' note to the chairman and directors of the Trustee prepared for and presented to the board meeting of 6 July 1995 reiterated that both the entitlement to 5% LPI and the aspiration of the Aim needed to be taken into account when setting the increase to take effect on 1 October 1995. He explained that, as RPI had risen by 3.4% in the year to 31 May 1995, 3.4% was the increase to which members were entitled under the Plan. He also explained that Bass did not propose any additional increase, on the basis that the aspiration reflected in the Aim did not require it. In my judgment, it is very likely that, if either the introduction of the IAP or the removal of the ISP was under consideration at this stage (and I am satisfied that neither of them were), it would have been drawn to the attention of the Trustee's board at this meeting.

81. The existence of a draft at this stage is also referred to in another letter from A&O to Mr Jolly dated 14 August 1995, which annexed a derivation table explaining the source of each of the clauses in the new draft deed (but not the rules). This was prepared by reference to the 1988 deed and rules as amended by the July 1992 deed of amendment and made no reference to the pension increase provisions in either rule 20 of the 1988 rules or the definition of Official Index of Retail Prices. Because the pension increase provisions were to be included by A&O in the new rules to which this derivation table made no reference, it casts no light on when it was that the terms in which A&O suggested that their standard form rule 23(2) should be included was first proposed.

82. The board of the Trustee was updated at a meeting held in November 1995 when the directors were informed that what was described as the new consolidation was expected to be finalised early in 1996 for review and approval by both Bass and the Trustee. Mr Collin did not remember much time being taken up with any discussion about this, but he understood that the board would have to make a decision in due course. He said that what he described as a tidying up exercise without making any fundamental changes was being supervised by the pensions department.

83. The earliest available marked up copy of the proposed new deed and rules dates from December 1995 and included changes from the previous draft in blue. This draft incorporated a pension increase provision based on A&O's standard form rule 23(2) in the following terms:

> "*That part of a pension which exceeds any guaranteed minimum pension in payment is increased on 1st October in each year. The rate of increase is the percentage increase in the Retail Price Index during the year ending the previous 31st May but subject to a maximum increase of five per cent. per year compound (or any other rate decided by the Principal Employer).*"

84. The phrase Retail Price Index was given no defined meaning. This draft of rule 23(2) is therefore the first surviving draft in which the mistake sought to be rectified by the

Trustee appears. It incorporated the IAP by the words in parentheses and excluded the ISP by replacing the defined term "*Official Index of Retail Prices*" (which had given the Trustee the power to select another approved index) with the phrase "*Retail Price Index*". It contained no annotations in blue, which indicates that this form of words had first been included in a draft earlier in point of time than the version in evidence which has now been lost. What is clear is that somebody must have decided not to incorporate any part of the phrase "*[and notified to] [with the agreement of] the Trustees*" which appeared as an option in the A&O standard form, but there was no evidence as to who made that decision.

85. How the draft came to be prepared in this form is unclear. I think the strong likelihood is that somebody made a mistake, but who that was and how it came to be made is impossible to discern with any certainty. There is no contemporaneous documentation which explains the circumstances, a reflection of the fact that the documentary material which supports the form of the original instructions given by the Trustee to A&O is incomplete and some of the versions of the proposed new deed and rules prepared during the course of the drafting process are missing. It is possible that the drafters thought (wrongly) that the words in parentheses were appropriate so as to permit the Principal Employer to exercise the power of augmentation to achieve the Aim, in which eventuality the increase would be more than a maximum of 5%. But this is speculation and I make no finding to that effect, although there are hints in the later evidence that some of the witnesses might have thought that this was the true effect of the wording when summarised in other documents.

86. M&B pointed to the fact that the Trustee did not call any evidence from any of the individuals at A&O who were involved in the drafting process as relevant to the court's evaluation of the evidence. I bear this in mind but regard it as of limited significance in circumstances in which the drafters (A&O) were not the decision-makers and there is no suggestion that the changes removing the ISP and incorporating the IAP were drawn to the attention of Bass or the Trustee, whether by way of mark-up on an earlier draft, by inclusion in a list of changes or otherwise. More importantly, the evidence as to the sources of the information relied on by A&O when preparing the final versions of the documentation for submission to the boards of both Bass and the Trustee are wholly inconsistent with any instructions having been given for the draft to include changes which either incorporated the IAP or removed the ISP. There is no extraneous evidence to support a conclusion that they were.

87. I have already mentioned the note prepared by A&O in July 1995, but there is other significant material. In particular, by a letter to Mr Jolly (copied to Mr Scurlock) dated 5 February 1996, A&O explained that they had based their drafting on the current Plan explanatory booklet (i.e. the 1992 version) together with later announcements, the most recent form of the trust deed and rules (i.e. the 1988 deed together with the supplemental deed dated 23 July 1992) and the Trustee's current practice in situations where those documents did not give a complete picture.

88. So that there could be no doubt as to the form of any announcements, those subsequent to the 1988 deed relied on by A&O were listed in an appendix to the 5 February letter, by reference if appropriate to where they had been included in the current Plan explanatory booklet. This appendix included a reference to the proposed new rule 23 as reflecting the announced change to the pension increase provision that was amended with effect from October 1992 as described on page 12 of that explanatory booklet.

This was a reference to the passage from the 1992 handbook I have cited earlier in this judgment. It used the language of a guaranteed entitlement to an increase in pensions in excess of GMP at 5% LPI, a form of words that was flatly inconsistent with the introduction of the IAP and did not support any change that removed the ISP. The letter was sent on by Mr Scurlock to Mr Wigley, Bass' company secretary, on 7 February under a cover of a memorandum which, like a number of other contemporaneous documents, referred to the exercise as one of consolidation in one document of everything that had been referred to in the appendix to the A&O letter.

89. The A&O letter also drew attention to the fact that two additional changes had been made relating to the circumstances in which a winding up of the Plan could be triggered and what A&O called a minor rule change (not previously agreed by Bass but requested by the Trustee) concerning the payment of pensions to children. These changes had nothing to do with the pension increase provisions, but the evidence makes clear that the introduction of the IAP combined with the removal of the ISP is likely to have been regarded by both the Trustee and Bass as materially more significant. The Trustee submitted that, if any change such as the introduction of the IAP or the removal of the ISP had been intended, the decision-makers on behalf of Bass and the Trustee could reasonably have expected that those changes as well would have been highlighted in the letter. This submission was supported by the evidence of the chairman of the Trustee (Mr Richards) who explained that this is what he would have expected to happen, and in my view is well-founded.

90. A&O also confirmed in this letter that in preparing the drafts no attempt had been made to alter what they described as the "*balance of power*" as between Bass and the Trustee. They advised in terms that, except as specifically mentioned, all the powers and discretions expressed in the 1988 deed to be exercised by Bass or the Trustee as appropriate "*are similarly expressed in the drafts*". There was no specific mention of the introduction of the IAP or the removal of the ISP, even though amendments to that effect would not just have removed the guaranteed entitlement to an LPI pension increase linked to RPI but would also have removed the Trustee's limited ability to stipulate an index other than RPI and granted to Bass the much wider power to grant increases at "*any other rate*" – an apparently unqualified discretion.

91. The letter and its appendix were both included in the documentation put before the Trustee's board at its meeting held on 29 February 1996 at which the proposed drafts were approved in principle for forwarding to both Bass and the Plan actuary for their approval. The short memo from Mr Jolly, under cover of which the drafts and the A&O letter explaining what had been done were provided to the directors, made clear that the re-draft was intended to be a consolidation exercise in light of new legislation and announcements that had been made since the introduction of the 1988 deed and rules. Mr Jones and other witnesses including Mr Napier confirmed that this was their understanding of the exercise that had been carried out. They had their recollections refreshed by the contemporaneous documentation, but there is no reason to think that they were reconstructing without any actual memory of it.

92. The minutes of that meeting also make clear that the board of the Trustee was told that the drafting was based on the 1992 Plan handbook, together with any subsequent documentation, and that the balance of power that existed as between the Trustee and the Principal Employer remained unchanged. The structure was explained by Mr Martin of A&O. It was recorded in terms that the only differences between the existing

situation and the draft documentation related to dependent child allowances and winding up, matters that were unconnected with the pension increase provisions. There was no reference to any change in the pension increase provisions.

93. In my judgment there could be no reasonable basis for anybody who understood and appreciated the effect of the wording in the draft to think that the introduction of the IAP and the removal of the ISP could be anything other than a significant and material shift in the balance of power. This was a factor of real significance to many of the witnesses (such as Mr Jones who when shown it remembered the letter and its emphasis on no change in the balance of power). In my judgment it is a powerful pointer towards a conclusion that the recipients of the letter did not have drawn to their attention, and did not appreciate, that the A&O draft had or might have had the effect of removing the pension increase guarantee or the ability of the Trustee to set an authorised inflation-linked index other than RPI.

94. Mr Napier could not remember the phrase "*balance of power*" per se but having refreshed his memory by reading the A&O letter he said that it was consistent with his understanding of what the 1996 consolidation was intended to do, and more importantly what it was not to do. As he also said, the 1996 consolidation was not supposed to make changes to the existing arrangements and practice in 1996 except for the specific changes pointed out by A&O. There was no intention to give Bass new powers over pension increases. Evidence to the same effect was given by Mr Richards. He confirmed that the intention was not to change the existing provisions of the Plan except for the changes pointed out by A&O in their 5 February 1996 letter, but instead to continue with the substance of the existing provisions subject to the announcements that had been referred to in the annex to that letter.

95. The Trustee submitted that the A&O letter is a crucial document because it is the basis on which the Trustee itself considered and approved the changes made to the documentation governing the Plan by the 1996 deed. I agree with this characterisation.

96. Perhaps not surprisingly, the evidence from all the witnesses was that they relied heavily on what they were told by A&O and did not carry out their own analysis of the words used. Mr Coles, who was closer to the detail of the proposed changes than most of the members of the Trustee's board, said that he had no recollection of reviewing the wording of the new rule 23 at the time the drafts were put before the board, but he was sure that, if he had, he would not have picked up on the significance of the change. Indeed, the way in which he expressed himself in this part of his evidence indicates that he had to have it pointed out to him that the draft gave Bass a unilateral right to change the level of increase to below the guaranteed amount. That appears to have come to him as a surprise, which either indicates that he did not read it at the time, or he did so with a mindset that it was to be read in a manner that was consistent with the Plan handbook.

97. So far as the Trustee directors were concerned, Mr Collin, who was a director of the Trustee and the HR director for Bass leisure but not a pensions expert, said that he did not expect to have to scrutinise the draft rules line by line and did not do so. I think it is most improbable that he read the new rule 23 and that, if he did so, he appreciated its effect. The evidence from Mr Jones as to what he looked at was similar. He thinks that the members of the board were taken through the draft either by A&O or by Mr Scurlock or Mr Coles and had their attention drawn to particular changes. He was sure

that his attention was not drawn to the pension increase provisions apart from the increase of the cap from 4% to 5% LPI which was not yet reflected in any of the formal Plan documentation although it was one of the categories of change for which an announcement had been made.

98. The reference to there being no changes apart from a consolidation of those listed in the A&O appendix and the two about dependent child allowances and winding up was confirmed when the A&O letter was sent together with drafts of the proposed new trust deed and rules to Mr Wigley in early February. It was also consistent with correspondence between A&O and L&P in March 1996 when the solicitors for Bass and the Trustee were corresponding on a number of very detailed points on the drafting of the rules. It is clear from the correspondence that they were concerned with clarification of the drafting, not alterations in substantive rights.

99. The fact that there was no intention to make any alteration to substantive benefits in the 1996 consolidation is also apparent from a PDC which was held on 13 March 1996. Mr Scurlock gave an update of benefit alterations which had occurred over the previous year. He explained that, on 1 October 1995, pensions in payment in excess of the guaranteed minimum pension element were increased by 3.5% which was equal to the rise in RPI for the 12 months to 31 May 1995 the period used for determining such increases. In light of the way in which Mr Scurlock appears to have expressed himself, it would have been far from straightforward not to mention that Bass was considering changing the terms of the existing pension increase benefit if he knew or expected that that had or would be done. I am satisfied that he did not do so because no such change was under consideration.

100. Likewise when the next draft was presented to the executive committee of the Bass board on 16 April 1996, it was represented in a note prepared for that purpose by Mr Napier (both a director of the Trustee and the Bass group's HR director), that the aim was to bring the formal documents up to date and no attempt had been made to alter the balance of power as between Bass and the Trustee. His note identified the two minor rule changes in relation to dependent child allowances and winding up and recorded that L&P were satisfied that the revised trust deed and rules should be adopted by Bass as the new definitive documentation for the Plan. In his evidence he described the exercise as a consolidation of the Plan's deeds and rules. This concept of consolidation was a phrase that was used by other witnesses such as Mr Richards and Mr Clarke and is a description which I am satisfied is consistent with the intention of both Bass and the Trustee at the time.

101. In the light of Mr Napier's paper, the Bass executive committee, chaired by Sir Ian Prosser, agreed to recommend the revised trust deed and rules for approval, subject to written confirmation from L&P that the new documents did not change the relative positions of the Trustee and Bass. This reflected the evidence that those involved in the decision-making process specifically intended that the balance of power (i.e., the relative positions of Bass and the Trustee under the Plan) was not to be changed. As Mr Clarke put it, the record of the decision included in the minutes was consistent with his recollection that the production and execution of the 1996 deed and rules was merely a matter of process and was not something that would make any difference to the benefits under the Plan or the powers of Bass relative to the Trustee.

102. The executive committee was made up of senior members of the Bass group's management, a majority of whom were also on the main board. It included the chairman and CEO, the finance director and the HR director (whose responsibilities included pensions). There was evidence from a number of witnesses, including Mr Richards, Mr Wigley, Mr Napier and Mr Clarke, that on matters of this sort the executive committee would consider the matter in detail and that the main board would normally accept executive committee decisions without reconsidering them in detail. It was Mr Clarke's unchallenged evidence that any change to the pension increase provisions which had what he called economic substance would have had to be both considered and approved by the executive committee and the main board.

103. The recommendation by the executive committee was accepted by the board of Bass at its meeting held on 17 April 1996. I am satisfied that it did so in light of Mr Napier's paper and the advice given by L&P that the proposed new trust deed and rules would not change the balance of power.

104. While the process of obtaining Trustee and Bass board approval was going on, the pension department was also consulting the Plan actuary. What happened in this regard is of central relevance not just to the rectification claim, but also to an alternative way in which the Trustee puts its case, viz. its argument that the alterations to include the IAP and exclude the ISP were in any event ineffective for want of sufficient consultation as required by clause 6 of the 1988 deed. This is a point to which I shall return later in this judgment. It is convenient to explain the evidence as to the Plan actuary's role and my factual findings at this stage.

105. On 11 April 1996, shortly before the meeting at which the board of Bass accepted the executive committee's recommendation to approve the revised trust deed and rules, Mr Carr was sent a draft of what became the 1996 deed. I am satisfied that this draft contained the wording (contained in the new rule 23(2)) which incorporated the IAP, and I agree that it is likely to have been a draft which did not include any marking-up to highlight the IAP as a change. In the covering letter, Mr Jolly asked Mr Carr to consider a copy of the draft deed and rules, together with a copy of the paper which had been prepared by Mr Napier explaining the rationale to the Bass board. This was the paper in which Mr Napier emphasised that no attempt had been made to alter the balance of power between Bass and the Trustee and that A&O had considered and were satisfied with the draft. He was asked to consider the material and confirm that it was in order for the directors of the Trustee to give the deed and rules their final approval at their May meeting.

106. The Napier paper referred to only two changes of substance neither of which related to the pension increase provisions. It is clear that Mr Carr's attention was not specifically drawn to rule 23, nor was it said to him that the effect of rule 23(2) was to include the IAP and exclude the ISP. A little later, on 2 May 1996, Mr Coles faxed Mr Carr a copy of the letter from A&O to Mr Jolly dated 14 August 1995 and its table of derivations, a copy of the 5 February 1996 letter from A&O and its accompanying appendix together with a later letter from A&O dated 18 March 1996 which indicated some further changes, none of which related to the pension increase provisions. As with the documentation he was sent in April, none of this material made any reference to the deletion of the ISP or the inclusion of the IAP.

107. The only reference to rule 23 was in the appendix to the February 1996 letter. However, this reference was to the October 1992 increase from 4% to 5% as described on page 12 of the current Plan explanatory booklet and did not relate to the change with which these proceedings are concerned. I agree with the Trustee's submission that, to the extent that rule 23 deleted the ISP and included the IAP, this appendix was misleading. Not only does it support a conclusion that there was a drafting mistake, but it also supports a conclusion that the true legal effect of rule 23 was not fully explained to the Plan actuary, which is consistent with the existence of the mistake. Furthermore, it did not on any view identify the deletion of the ISP or the introduction of the IAP as alterations or modifications on which consultation with the Plan actuary was required.

108. On 7 May 1996, having raised some issues unrelated to the pension increase provisions in a letter written the same day that he received Mr Coles' fax, Mr Carr wrote to Mr Jolly, the company secretary of the Trustee, confirming that in his opinion the proposed new deed did not contravene any of the provisos to clause 6 of the 1988 deed. He said in terms, and by reference to proviso (iii), that he confirmed that "*none of the alterations or modifications operates substantially to prejudice the rights or interests of any member in respect of his/her service prior to the date of execution of the Deed.*"

109. Mr Carr also summarised in his 7 May letter the correspondence on which he relied "*to identify the changes which have been made from the provisions as contained in the existing documentation of the Plan as they affect members currently in service*". He described this as being correspondence which showed "*the sources of input to the Trust Deed and detail the input into the Rules*". It included the February A&O letter and accompanying appendix.

110. It was Mr Carr's evidence that he understood the 1996 redrafting process to be a consolidation. He said that, in giving the confirmation that he gave, he was not aware of the introduction of the IAP or the deletion of the ISP. This evidence was consistent with his understanding that the A&O advice on 'balance of power' meant that the ability of each of Bass and the Trustee to control the benefit structure was not affected by the changes. He said that he could not recall reading rule 23 before giving his opinion, although he thought it was quite likely that he did. He thought that when he did so he would have been focusing on what he described as the mathematical components of the rule and did not appreciate what is now accepted to be its true legal effect. He could not remember whether he also looked at the 1988 deed and rules as part of this exercise but thought that he would have regarded a look at the Plan handbook as sufficient.

111. Mr Carr also agreed with the suggestion put to him in cross-examination that because of the differences in drafting style between the 1988 deed and rules (which had been drafted by Mercer) and the A&O draft, a comparison of each separate provision would have been a time-consuming task. He accepted that, as he would have looked at rule 23(2), he would also have seen the words "*or any other rate decided by the principal employer*" in the new draft rule 23(2). He was clear that he did not identify that it had the meaning that it is now accepted to have and surmised that he must have thought that he read it as meaning "*any higher rate decided by the principal employer*". He could not say, however, whether or not that was part of his thinking process at the time.

112. Mr Carr also said that if he had appreciated the meaning and effect of rule 23(2) to be that the ISP was removed and the IAP was introduced, he would have concluded that they substantially prejudiced individual members' rights and interests and he would not

have approved the change. He was pressed on this point in cross-examination but was clear that he would have seen the IAP as a reduction in accrued rights even though it required the Principal Employer to make a specific decision to set a lower rate. I did not understand him to disagree with the suggestion that he would have had to make a judgment as to the prospect of this decision being made, but he was quite firm that he would have regarded the existence of the discretion that was available to the Principal Employer in light of the introduction of the IAP as a substantial prejudice to accrued rights, not least because of the material possibility of a takeover by the type of entity that he called a "*predatory outfit*". He said that, unless he had received a legally binding commitment from Bass not to use the IAP in such a way as to bind future employers of the Plan, he would not have gained any comfort in taking that approach from the fact that Bass had not then announced that it intended to exercise the IAP.

113. I accept this evidence. Although Mr Carr's independent recollection of what occurred was far from complete, his evidence was consistent with the surrounding material and confirmatory of the oral evidence of other witnesses. It is also consistent with the way in which Mr Carr continued to fulfil his functions after the 1996 deed was executed, when he continued to refer to members' guaranteed entitlements to an increase on pensions in both payment and deferment at RPI subject to a maximum of 5% both in his actuarial valuations and in other material, such as his February 1997 note on transfer values. Whether or not Mr Carr should have identified the effect of rule 23(2), it is clear to me that he did not do so.

114. Shortly after Mr Carr's 7 May letter, the proposed new trust deed and rules were then given further consideration at board meetings of the Trustee held on 23 May 1996 and 4 July 1996 when further changes were noted or discussed, although Mr Richards said that to his mind the substantive decision to approve the 1996 deed and rules had been made at the February meeting. It is striking that, although the draft included the IAP and removed the ISP, it was formally approved by the board of the Trustee at the same meeting held on 4 July 1996 at which Mr Coles' paper for the October pension increase stated that "*The Plan guarantees annual increases in pensions in excess of any Guaranteed Minimum Pension in line with the rise in the Retail Price Index (RPI) up to 5%, and there is an aim to give additional increases based on two-thirds of that part of any rise in the RPI which is above 5%*".

115. The minutes of the same meeting also recorded that the board approved what was described as members' "*entitlement*" under the Plan to their 1996 pensions increase at an RPI of 2.2%. There is nothing to indicate that any member of the board appreciated that the approved draft included pension increase provisions containing a substantive change from the provisions included in the 1988 deed and rules, nor more specifically that this change was inconsistent with the description in those same minutes of the members' 1996 pension increase as an "*entitlement*" and in Mr Coles' paper as a "*guarantee*".

116. The 1996 deed was then executed on 24 July 1996. The signatories on behalf of the Trustee were Mr Scurlock and Mr Jolly, neither of whom gave evidence. The signatories for Bass were Mr North and Mr Wigley, both of whom did. The rules included rule 23(2) in exactly the same form as the draft dated December 1995 and therefore incorporated the IAP but excluded the ISP. The 1996 deed itself continued to include (by clause 16) a provision under which the Trustee was empowered to increase

any of the benefits under the Plan at the request of the Principal Employer. This was the power under which the Aim could have been achieved.

Conclusions on Subjective Intent: 1996 deed and rules

117. The Trustee described the weight of the witness evidence in support of its case that the introduction of the IAP and deletion of the ISP were a mistake as overwhelming. In light of M&B's concession that there was indeed a mistake in the drafting, I can summarise my conclusion quite shortly, but I agree with the Trustee's description. In my view it is quite clear that the decision-makers for both the Trustee and M&B did not intend to change the existing pension increase provisions either by introducing the IAP or by deleting the ISP. Or as Mr Coles put it in cross-examination "*There was no intention to change anything one way or the other*".

118. I am satisfied that this was the actual subjective intention of all of the decision-makers acting as such for both the Trustee and Bass. To the extent that any of them actually read the words of rule 23 (and there is no clear evidence that any of them actually did so) I do not think that they appreciated the effect of the words that had been used. In short, this is one of those cases in which the importance of any change was such that, because it was neither identified to nor discussed with the decision-makers, there is a very strong inference to be drawn that there was no subjective intent to make it. I am satisfied that those decision-makers all assumed that the substance of the pension increase provisions remained unchanged.

119. Before summarising that specific intent so far as the material witnesses were concerned, I should deal with an aspect of the Bass corporate culture about which there was a fair bit of evidence and on which the Trustee placed some reliance in support of its case. I have already referred to what a number of witnesses (Mr Carr, Mr Collin and Mr Wigley) called the paternalistic attitude that Bass had in relation to its employees and those of other members of the group. This was said to be inconsistent with a subjective intention by anyone involved to introduce the IAP or remove the ISP.

120. It is clear that, in using this phrase, the witnesses did not mean that Bass was not robust in defending its own commercial interests. What they meant was that Bass had a culture of being open and fair with its employees, or as Mr North put it in his evidence that it respected its employees and took care of them, a sentiment that was also adopted by Mr Clarke in his oral evidence. The witnesses also stressed that, although the relationship between Bass and the Trustee was warm (as Mr Napier put it) or genial and collaborative (the phrase used by Mr Jones), it could not be said that they were always of one mind. As Mr Napier said in his evidence, both the Trustee and Bass were well aware of the separate roles which they had in relation to the operation of the Plan, a sentiment reiterated by Mr Jones and Ms Kennedy both of whom were in position during the period after Bass had been replaced as Principal Employer by Retail and then M&B. Mr Napier also explained that Bass always regarded pension provision as a key part of its employees' total remuneration package and, in that context, that it was proud of the benefits that were provided. Sir Ian Prosser gave evidence with different emphasis but to the same general effect – as he put it, the Plan was an important part of the reward given to Bass employees.

121. The evidence which supports the existence of a corporate culture that valued these qualities is clear and I accept well-founded. The Trustee submitted that this corporate culture was relevant corroboration of the unlikelihood that either Bass or the Trustee would intend to take steps to remove or permit the removal of an important established benefit from members, without full and proper consultation before doing so.

122. I accept the broad thrust of the submission, more particularly in circumstances in which the evidence pointed to significant takeover and merger activity in the industry and the possibility that the Bass group would be subject to takeover by or merger with controlling entities having a less paternalistic or respectful corporate culture (using paternalism in the sense explained by the witnesses). This was a consideration which dated back to at least the time of the 1992 deed of amendment and seems to have influenced the conduct of the Trustee although it became particularly significant as a consideration during the period between the 1996 deed and rules and the 2006 deed and rules when the structure of the industry was changing significantly. As Mr Coles explained, he perceived that the Trustee's directors saw their principal role as safeguarding members' benefits, a function of particular importance in the context of any takeover when the attitude of an incoming entity to the Plan would be uncertain.

123. This concern was one not just held by the Trustee, with its fiduciary duties to the members, but also by Bass / 6C Plc itself as illustrated by at least one of the instructions given by its director of pensions, Mr Scurlock, to L&P which resulted in the 1996 deed. Dealing with a possible redraft of the provisions for individual transfers and buy out, Mr Scurlock said:

> "*The concern was to protect the members' interest against the possibility of unreasonable action by a predatorial Employer. For instance, such an employer might engineer the transfer out of thousands of members to individual personal pensions on a cash equivalent basis - an action which would be very much against members' interests, leaving behind a huge surplus which the employer might then use to his own advantage. We believe therefore that new Rules 13 and l4 should stay as they are.*"

124. In my view this was a contemporaneous manifestation of evidence that was given by a number of witnesses about the way in which the Trustee functioned in cooperation with and what Mr Coles described as a partnership with Bass, as Principal Employer. Mr Coles made the point that the directors of the Trustee saw their principal role as protecting and safeguarding member benefits, particularly in circumstances in which there was the possibility of hostile takeover activity.

125. Turning to the specific intent of individual decision-makers, given the consistency of their approach throughout the process, it does not matter very much precisely when it was that the operative decision to enter into the 1996 deed was made by the Trustee, but formal approval was given at the board meeting held on 4 July 1996, which was attended by Mr Richards, Mr Jones, Mr Napier and Mr Wigley. Mr Collin, the only other director who gave evidence, was not present. The only other Trustee director who featured to any material extent in the story of how the 1996 deed came to be executed was Mr Scurlock. He was at the meeting but did not give evidence. I think that his role in the process was such that it is most unlikely that he will have had a different subjective intent to those who did.

126. I am also satisfied that the subjective intent of these individuals as decision- makers is sufficient to reflect the true intent of the Trustee as a corporate body. They were the individuals who had the most influence on the approach that the board as a whole took. That is not say that the other members of the board abrogated their responsibility in the decision to which they were party. It is just that they took their lead from those who did give evidence and Mr Scurlock, and there is every reason to believe that their intent on the pension increase provisions was, like them, one of no change. In reaching that conclusion I bear in mind the fact that a number of the witnesses were both directors of the Trustee and held decision-making roles on behalf of Bass.

127. As to the five individual Trustee directors who gave evidence, I have already referred anyway in general terms to much of what they had to say. It is therefore sufficient to recite what seems to me to be a clear summary of what they actually intended when approving the execution of the 1996 deed and rules in passages from their evidence that I accept:

i) Mr Richards, as chairman of the Trustee at the time:

> "*... it was certainly not my intention in approving the 1996 Consolidation to confer a unilateral power upon the Company to decide (including to reduce) the rate of increases payable under the rules. I also recall no such discussions between the Trustee and the Company about that being intended. Such a change would have been discussed and examined very closely by the Trustee as it would have represented a significant change to the balance of power. I cannot imagine that such a change would have been approved by the Trustee board.*"
>
> and
>
> "*I do not recall reviewing Rule 23 of the 1996 Consolidation at the time. I have been told that it could be interpreted as giving the Company the power to reduce the rate of increase payable under the Plan. If that is the effect of Rule 23, I do not believe that was ever the intention of the Company or the Trustee. Giving the Company that power would have involved a fundamental shift in the balance of power between the Company and the Trustee which was, as far as I was aware, never contemplated and which I would have considered to have been contrary to the advice Allen & Overy had given …*"

ii) Mr Jones, who had just become a director of the Trustee and was shortly to become Bass' director of pensions, said that if there had been intended to be any departure from the existing benefit structure, it would have been discussed (both amongst the Trustee directors and at the PDCs where it would have been opposed) and he recalled no such discussion. In his cross-examination he said that this intention not to change the Plan's benefit structure was in his view shared by all the directors of the Trustee and extended to changes which might benefit both the members and Bass. He described the idea that Bass should be given more powers in that regard as a "*non-starter*". He summarised his actual intention in the following evidence, which he said related to both the introduction of the IAP and the removal of the ISP:

"*My intention in agreeing to enter into the new deed and rules was not to change the existing provisions of the rules, except for the changes that Allen & Overy pointed out in the 5 February 1996 letter, but to carry forward the existing provisions, subject to the agreed and announced changes that had been referred to in the appendix to that letter*."

iii) Mr Napier's intention was clearly one of no change to the pension increase provisions, because they were not amongst the provisions described in the 16 April 1996 paper that he himself prepared for the board of Bass in his capacity as the Bass group HR director. He summarised his position as follows:

"*As far as I was concerned, the Company and the Trustee had the same understanding of what the 1996 Consolidation was doing. The Company and the Trustee had a very trusting and open relationship and, if there had been an intention to alter their powers in respect of the Plan by the 1996 Consolidation, that would have been a significant issue for the Trustee and would therefore have been subject of open and frank discussions. It was not, and so I can confidently conclude that there was no such intention*."

iv) Mr Wigley, who was also a member of the Bass executive committee, summarised his position as follows:

"*Certainly, I did not intend - in either my Trustee or Company role - the 1996 Consolidation to increase the powers of the Company or to reduce, or facilitate the reduction of, member benefits. If there had been a move to introduce any changes of this nature, the other Trustee directors and I would have been told about it (by, for example, the Trustee's legal advisors Allen & Overy or the Pensions Department). I would also have expected it to be raised on the Company side to Executive Committee and Company board level. There was no such communication and I do not believe that any such changes were made intentionally. I would not have agreed to such a change if it had been presented to me*."

v) Mr Collin, then a director of the Trustee and the human resources director of Bass Leisure, said that he did not intend any change in the balance of power whether in favour of the members or in favour of Bass. He said that if there had been an intention to make changes that potentially reduced member benefits "*I would have experienced that as a proverbial earthquake*", a colourful phrase which emphasised, in my judgment quite accurately, that the introduction of the IAP and the removal of the ISP would have been very significant developments that were not intended. He said that Mr Napier would have been "*hung out to dry*" if he had suggested it. In his view Mr Napier would never have made such a suggestion without first ensuring that it was discussed at a PDC or a meeting of the Trustee's board, neither of which happened. It was in his view inconceivable that the rule 23 change was intended.

128. As to the Bass director witnesses, the individuals whose involvement featured in the evidence, and led the decision-making for Bass, were Sir Ian Prosser, Mr North, Mr Napier and Mr Clarke. I have already summarised Mr Napier's evidence in the context of his role as a director of the Trustee. They all were clear that they had no intention to

change the established pension increase provisions and that if there had been any suggestion that it should happen it would have been a very significant change.

129. Speaking of the wording of rule 23, Sir Ian Prosser said the following:

> "*... if it is interpreted to permit the principal employer alone to make a change to the entire basis on which pension increases were to be awarded, it constitutes a fundamental change in the way in which Bass and the Trustee had been approaching the issue of increases. Such a power would be contrary, I believe, to the way in which those parties conducted themselves, and my recollection of their respective intentions as to how pension increases were to be determined and applied (which was instead reflected by the member handbooks ... i.e. that pension increases were guaranteed at the rate of RPI up to 5% with a non-binding aspiration to pay more if RPI exceeded 5%).*"

130. Sir Ian Prosser also confirmed, as did Mr North, Mr Napier and Mr Clarke, that the board proceeded on the basis that there was no change to the balance of power as between Bass and the Trustee that was not brought to their attention. Sir Ian said that if there had been anything mentioned to that effect, he would have remembered it and he did not do so.

131. Mr North had very little recollection of what occurred and said with disarming frankness that because he had no funding concerns as the Plan was in surplus, he took little interest in the Plan or its rules. He was however clear that he never heard of any proposal to give Bass a power to reduce the rate at which earned or promised pensions would be increased. He also said that because the Plan was in surplus there was no commercial imperative to give Bass that power and said that there would have been huge discussion about it if it had been proposed which he would have remembered.

132. Mr Clarke's position, which he said applied both to the introduction of the IAP and the removal of the ISP reflects his own position and can also stand as a fair summary of the evidence they all gave:

> "*My attention was never drawn to any proposal to give the Company a new unilateral power to determine pension increases. Had such a proposal been made or communicated to me, I would have considered it to be at odds with the confirmation we had received that there would be no change planned to the balance of powers under the Plan. I do not recall any changes being proposed to the powers relating to pension increases during any time from my appointment as Chief Executive of Bass Taverns in 1995 onwards (or indeed at any earlier time). Had any such changes been proposed, they would have been documented in advanced of a Bass Executive Committee meeting and the subject of intense discussions during any such meeting. Had such a change been agreed, l would have expected details of it to be communicated to the members, and clearly noted in the minutes prepared after the relevant meeting of the Executive Committee.*"

133. In light of this evidence, I am satisfied that all of the members of the Bass board intended to make the changes identified in Mr Napier's paper, but otherwise intended to carry forward the existing benefit structure. As to the other witnesses who gave evidence on this point, Mr Wigley had a role from both Bass and Trustee perspectives,

and I have explained his evidence above. Mr Coles, whose role I have already described was clear that there was no intention to change anything one way or the other. As I have already said he explained that it would have been a very big deal to remove a Trustee power and grant a new power to Bass which would have been documented. He also used the phrase a "*jarring development*" and said that he would have remembered any such proposal (which he did not). I am satisfied that his evidence on this point was accurate.

134. In summary, I am satisfied from the evidence adduced by the Trustee that both it and Bass had a continuing common intention at the time of execution of the 1996 deed to continue to include within the governing documentation of the Plan a pension increase provision which was substantially the same as rule 20 of the 1988 rules, as subsequently amended to increase 4% to 5%. I take the view that the evidence which supports this conclusion is cogent. In particular I am satisfied that the decision-making members of the board of both Bass and the Trustee only had the subjective intent to change member benefits to the extent that the changes were drawn to their attention by A&O and that neither the introduction of the IAP nor the removal of the ISP fell into that category.

135. In my judgment, the evidence is only consistent with a conclusion that there was no intention by any individual acting on behalf of either Bass or the Trustee to change the pension increase provisions so as to introduce the IAP or remove the ISP. It is therefore only consistent with a subjective belief by the members of the board of Bass that the original pension increase provisions remained unaltered as a matter of substance and is incompatible with a subjective understanding or appreciation by them that the form of deed which they were approving qualified the existing guarantee whether by introduction of the IAP, removal of the ISP or otherwise.

136. It follows that, subject to the *bona fide* purchaser defence to which I shall turn in due course, I consider that the Trustee is entitled to the relief that it seeks for rectification of the 1996 deed and rules.

From the 1996 deed to 2002

137. During the period after the execution of the 1996 deed, there were many different contexts in which the only explanation for the way in which documentation was prepared and expressed is that the relevant author, whether acting on behalf of Bass, the Trustee or their respective advisers, believed that the terms of the Plan's pension increase provisions remained unchanged as a matter of substance from the position under the 1988 deed and rules. In other words, this material is only consistent with their understanding that the terms of the 1996 deed continued to make provision for a guaranteed pension increase at 5% LPI, which was incompatible with an understanding that this had been replaced by the IAP.

138. This material both corroborates the evidence as to the subjective intent of the decision-makers for Bass and the Trustee at the time of execution of the 1996 deed (admissible as such in accordance with the principle confirmed in *Gallaher*) and sets the scene for their state of mind at the time they approved the execution of the 2002 deed and the 2006 deed. It shows the extent to which the understanding of the guaranteed pension

increase provisions was ingrained in the minds of those in the Bass group concerned with pension matters.

139. Thus, Mr Coles continued to use the language of guarantee that he had used when describing the pensions increase entitlements. The evidence included examples of this in the board papers he wrote in July 1997 (the year after the execution of the 1996 deed), July 2001 and July 2002 (the two years immediately before the entering into of the 2002 deed and rules). The July 2001 paper was reviewed before the meeting by Mr North, in his capacity as group financial director of Bass, who noted his agreement to Mr Jones' recommendation that, with inflation at less than 5%, the guaranteed level under the 1996 rules was 2.1% and that he assumed that Bass would not therefore be wanting to give an additional discretionary increase. In his evidence about this note, Mr North confirmed that he never heard any proposal to give Bass the power to reduce the rate at which pensions would be increased.

140. Mr Coles also confirmed in his oral evidence (which I accept) that, if he had been aware of any change to these provisions effected by the 1996 deed, he would have explained those changes so that the Trustee's board could have regard to them when it was considering the pension increases to take effect in the following October. He did not do so.

141. Likewise, the minutes of the meeting of the Trustee's board held in July 1997 at which Mr Coles' paper was considered referred to the decision to increase pensions in excess of GMP in line with RPI, which was said to be "*in accordance with the Rules*". Similarly, the increases approved at the July 2001 and July 2002 board meetings of the Trustee used forms of words which reflected the board's understanding that this continued to be an entitlement. This reflected how the benefits were treated generally during the period up to the preparation of the 2002 deed, with Mr Coles continuing to refer to the guarantee of 5% LPI and the Aim in the papers that he presented to the meetings of the board of the Trustee at which decisions were made on the appropriate rate for pensions increases in 2000, 2001 and 2002. In every instance, it was not just said that the pension increase provisions gave a guaranteed entitlement, the tone of what was said reflected a presumption that the increase at 5% LPI was in effect automatic with no decision to be made where inflation was less than 5%.

142. The same language of guarantee continued to be used in the papers put before the executive committee of the board of Bass. Thus, there are examples from Mr Wigley in July 1997 and July 1998 concerned with what he called the normal pension increase to take effect from 1 October in the relevant year, both of which referred to "*the guaranteed level under the Rules*" i.e., what were by then the 1996 rules and there was no decision required to be made because inflation was running at less than 5%. The only discretion which was referred to was the decision on whether or not to give an additional discretionary increase under the power of augmentation. In neither instance was a discretionary increase recommended, because the aspiration reflected in the Aim was not engaged, as inflation had been less than 5%. However, there was never any reference to the question of whether Bass should exercise the quite different discretion reflected by the IAP contained in the wording of rule 23(2). If anyone had appreciated that this was a discretion which Bass was entitled to exercise, it is to be expected that this would have been a matter that was recorded as having been considered by decision-makers on its behalf. There is no evidence that any such consideration was given.

143. The continuation of the existing pension increase entitlement and the aspiration reflected in the Aim were also both reiterated in the editions of the Plan handbooks issued to members subsequent to the 1996 deed. Thus, the 1997 and 1999 editions of the Plan handbooks (the latter of which was reissued when Bass changed its name to Six Continents Plc in July 2001) both included the following statement, making precisely the same representations to members that had been included in the 1992 handbook used for the purposes of drafting the 1996 deed:

> "*Bass Plan pensions and allowances in payment, in excess of any GMP, are guaranteed to be increased on each 1st October in line with the rise in the Retail Price Index (RPI) for the year ending 31st May preceding the review date, up to a maximum of 5%. Where the rise in the RPI exceeds 5%, it is the Company's and the Trustees' present aim to pay an additional discretionary increase of 2/3rds of any rise in the RPI which is above the 5% guarantee. Whilst not a promise, in practice, this additional increase has been achieved in the past.*"

The same representation was made in relation to the revaluation of deferred pensions: "*The guaranteed deferred pension will increase at the rate of the increase in the Retail Price Index, limited to 5% in any year*."

144. The 1997 edition of the handbook was the one that Mr Bramley thinks that he was given to read when he became a director of the Trustee in 1998. He said that it contained an accurate reflection of what he had understood to be the members' entitlement under the Rules since 1989 when his role in the Bass group first required him to take on a significant element of responsibility for employee relations and remuneration policy and practice. This continued to represent his understanding of the Plan's pension increase provisions up until after the 2006 deed was entered into. Evidence to the same effect was given by Mr Collin who described the Plan handbook as the bible of the way that the Plan was administered, and its description of the pensions increase provisions as being an accurate description of the true position.

145. I also think that corporate culture of the type I have already referred to is relevant to the question of whether either Bass or subsequently M&B is likely to have made the types of representation as to the guaranteed nature of the pension increase provisions that it made in its Plan handbooks, if anybody had thought that they were not accurate and complete. As Mr Bramley said in cross-examination:

> "*I think the culture of the company at that time was that it was a very almost paternalistic but very open and honest culture and it would not have stated anything in the handbook that it didn't believe was correct at the time*."

146. The Trustee submitted that these matters pointed against the possibility that the Trustee would have willingly entrusted any Principal Employer of the Plan with a wide-ranging unilateral power which allowed it to cut the rate of pension increases under the Plan. However secure the Trustee may have felt about the attitude of Bass under the control of its existing management, the inclusion of any such power would have permitted a new and different Principal Employer or controlling management (in place in consequence of a successful takeover) to reduce the rate of pension increases to which members had previously been entitled. I accept this submission.

147. In that regard it is striking that the pension increase provisions in the Plan and the Executive Plan were described in their respective handbooks in very similar terms even though the Executive Plan never incorporated an IAP. Thus, the 1997 edition of the Bass plc Executive Plan handbook included the following representation:

> "*Bass Plan pensions and allowances in payment, in excess of any GMP, are guaranteed to be increased on each 1st October in line with the rise in the Retail Price Index (RPI) for the year ending 31st May preceding the review date, up to a maximum of 5%. Where the rise in the RPI exceeds 5%, it is the Company's and the Trustees' present aim to pay an additional discretionary increase of 2/3rds of any rise in the RPI which is above the 5% guarantee. Whilst not a promise, in practice, this additional increase has been achieved in the past*."

148. There was unchallenged evidence from a number of witnesses (Mr Jones, Mr Bramley, Mr Coles, Mr Collin, Mr Hammond and Mr Richards) that they always understood that the pension increase provisions for the Executive Plan were the same as those for the Plan. I am satisfied that this was a widely held assumption in the Bass group and was reflected in the way that the two plans were administered. In my view this supports a continuing belief that the 5% LPI guarantee continued to apply to both the Plan and the Executive Plan notwithstanding the introduction of the IAP into the wording of Plan documentation with the execution of the 1996 deed.

149. Mr Carr also continued to use the description of the pension increase provisions in the form they had taken prior to the 1996 deed when preparing his actuarial valuations. There are examples from September 1997 and December 1999 in which he described his understanding of the position in the following terms:

> "*Members and widow(er)s' pensions are increased annually on first October each year as follows:*
>
> > *(i) The part in excess of the GMP by 5% or, if less, the annual rise in the RPI for the year ending 31st May preceding the increase. In addition, while not a promise, it is the Company's present aim to pay additional increases on pension in excess of any GMP, based on two-thirds of that part of any rise in the RPI above 5%.*"

Read in context, it seems to me that Mr Carr was proceeding on the basis that pension increases at the lesser of RPI and 5% was a promise to which members were entitled. He had also made clear that this was his understanding of the pension increase provisions under the documentation governing the Plan as at 19 February 1997 when he prepared a paper setting out the issues surrounding the calculation of transfer values applying from 6 April 1997.

150. During this period, there continued to be bulk transfers into the Plan when Bass proposed the merger of other associated pension schemes with the Plan. One example of this occurred in relation to proposals for the merger of the Intercontinental scheme with the Plan in May 1999, which required the trustees of that scheme to consider the nature of the benefits which their members would receive on completion of the merger. In that context, Mr Coles confirmed that the Plan provided for guaranteed increases in line with the increase in the RPI, subject to a maximum of 5% per year but with no minimum.

151. There was also an occasion in September 2000 in which preparations were being made to give members of the Plan employed by Bass Brewers the option to transfer into a new scheme on the sale of the Bass brewing business to Interbrew. This was an important transaction in the development of the Bass group's business and left three separate divisions: the retail business comprising pubs and restaurants, hotels and soft drinks. It also led, during the course of 2001, to Bass changing its name to Six Continents Plc, and indeed to other group companies replacing the Bass name with that of Six Continents.

152. In this context a template was produced in which Bass' director of pensions, by then Mr Jones, was to tell those members that the new scheme would give them the same level of benefits as the Plan, including "*the requirement to guarantee increases on the excess of the pension over the Guaranteed Minimum Pension (GMP) in line with inflation up to 5% per year*", together with the Aim which could not be guaranteed. The guarantee was repeated in the Q&A document expressly approved by Bass, which was sent out to those existing members in order to assist them in deciding whether or not to join the new scheme. The board of the Trustee was given the same information by Mr Jones in December 2000 and subsequently approved the transfer to the new Bass Brewers scheme in July 2001 on the basis that the discretionary and guaranteed benefits were the same, including therefore both the 5% LPI guarantee and the Aim.

153. There was no clear evidence that anyone received a letter in the form of the template, but the probabilities are that they did. In any event, its existence supports the continuing widespread belief within the Bass group that the Plan's pension increase provisions took the form described in the Plan handbook. This was bolstered by Mr Napier's evidence that, as he was engaged in the sale of the Brewers division to Interbrew, it would have come to his attention if anyone had appreciated that there were any differences between the two. He said that he believes he would have recalled if it had been raised, which he did not.

154. The evidence is not all one way, however. It includes a document which dates from the time of the Interbrew demerger project which indicates that Mr Coles had the IAP provisions of rule 23 in the 1996 rules drawn to his attention. This was a working document, which Mr Coles thought had probably been prepared by someone in the Bass Brewers pensions section, but which he thought would have been 'localised' to those working in the department. He did not think it would have been seen by anyone else in the Trustee or Bass. It summarised in tabular form differences between the Plan and the proposed Bass Brewers scheme. It included an entry by the reference to rule 23 to the effect that the words "*or any other rate decided by the PE*" were not included in the Bass Brewers scheme and a tick marked '*Ok*' beside the entry in Mr Coles' handwriting. Mr Coles' evidence about this was not very clear-cut, but he thinks that he would have been looking at this entry from the perspective of what was to be included in the wording of the new demerged Bass Brewers scheme, not that of the Plan. He was clear that the words did not cause him to think that the Plan was subject to a unilateral power for Bass to change the rate of pension increases.

155. This part of Mr Coles' evidence was not challenged in cross-examination, but the same document was also referred to by Mr Jones in his witness statement and Mr Rowley asked him about it. In his witness statement, Mr Jones speculated that it might have been prepared for the purposes of enabling him to confirm to the board of the Trustee that the pensions department had read the trust deed and rules of the Bass Brewers

scheme and that they appeared to replicate the benefits of the Plan. Like Mr Coles he also confirmed that the table would not have been shown to anyone outside the department, which seems likely as it has the appearance of a work sheet not a paper for wider dissemination. Mr Bramley was also asked about it but had no useful evidence to give.

156. I think that Mr Jones' speculation on this point was correct, and I think it is probable that he read the document at the time. There was some uncertainty in his evidence as to whose handwriting was on it (either the then Trustee secretary, Mark Bellm or Mr Coles), but I think that the evidence points to the document being prepared by Mr Bellm and then being commented on in manuscript by Mr Coles. More importantly, however, it was Mr Jones' further evidence that the overall effect of this document was that he, on the basis of the work done by Mr Bellm, was able to confirm the absence of any material differences between the Bass Brewers scheme and the Plan. It follows that Mr Jones' evidence taken as a whole is consistent with his simple failure to appreciate that the words had the material effect they are now known to have. If that were not the case, he would not have been able to conclude (as I am satisfied he did) that on this issue there was no material difference between the Plan and the Bass Brewers scheme. In short, to the extent that he gave much thought to the words at the time, and I think he gave some, he was mistaken as to their true meaning and effect.

The 2002 deed

157. The run-up to what a number of witnesses called the 2002 consolidation seems to have started with a paper presented by Ms Anna Smith (then secretary to the Trustee) to the December 2000 meeting of the board of the Trustee. In this paper she explained what are described in the minutes of the meeting as "*various legislative and benefit changes*" which required amendment to the Plan deed and rules. There is no indication that any of these proposed changes had anything to do with the pension increase provisions.

158. There is no evidence that anything very much happened for a while thereafter, but at the July 2001 meeting of the board of the Trustee, Mr Jones presented a paper on proposed new pension arrangements, which explained that Bass had decided to close the defined benefit arrangements to non-members of the Plan and set up a new defined contribution arrangement for new employees and non-members. There were a number of detailed changes discussed at the meeting. It was the same meeting at which the directors also considered the 2001 pension increase described by Mr Jones as guaranteed, but there was no suggestion that the pension increase guarantee had been or was proposed to be changed.

159. It seems that the proposed changes were then considered again by the board of the Trustee at its March 2002 meeting when Ms Smith presented a paper proposing that they be introduced by an amending deed. This amending deed was then entered into on 28 March 2002, following which members of the plan were provided with an update announcement in the form of a leaflet issued in April 2002 reflecting the changes. There was no suggestion in this leaflet that there had been or was to be any change in the pension increase guarantee at 5% LPI, which was still reflected in the current version of the Plan handbook.

160. The next thing that happened was that, in September 2002, Ms Smith presented another paper to the board of the Trustee seeking its agreement to certain further amendments to the 1996 deed and rules in order to reflect legislative changes affecting the position of fixed term employees. A number of other minor amendments were also proposed, none of which related to the Plan's pension increase provisions. Mr Bramley confirmed that what a number of witnesses called the 2002 consolidation was intended to deal with these issues and nothing else.

161. The relative insignificance of the 2002 redrafting exercise was reflected by Mr Bramley's description of it as what he and other directors of the Trustee called a non-event, and the proposed changes were thought to be non-controversial. Mr Clarke said that his memory was that there was no intention to make any changes of substance to members and Ms Kennedy used the phrase a tidying-up exercise ahead of the demerger (which I deal with in more detail below). At its meeting held on 25 September 2002, the board of the Trustee agreed that a sub-committee should review the wording of the revisions, following which they would be adopted after consultation with the Plan actuary and the Principal Employer, by then renamed 6C Plc. The revisions that were approved were those referred to in Ms Smith's paper.

162. The evidence was that at no stage during the relatively short process of drafting and agreeing these amendments was there any mention of the pension increase provisions, or of any proposal that they be changed. I accept that evidence, which was not in any event challenged by M&B.

163. The Trustee board meeting at which Ms Smith's paper was considered also approved the minutes of its July 2002 meeting at which it had considered Mr Coles' paper on pension increases dated 3 July 2002 that used the language of a 5% LPI guarantee. On the day of that meeting Mr Wigley had signed the Plan's 2002 annual report as chairman of the Trustee. The report included the following reference to the binding commitment of a guaranteed increase at 5% LPI under the heading Pension Increases in the section headed Compliance Report:

> "*It is the current policy of the Trustee and Six Continents PLC that the normal increase for all pensions takes place on 1st October each year. Pensions in excess of any Guaranteed Minimum Pension (GMP) will be increased by an amount equal to the rise in the Retail Prices Index (RPI) for the year to the preceding 31st May, up to a maximum guaranteed increase of 5%. Furthermore, while not a binding commitment, it is the aim to pay additional increases equivalent to two-thirds of amount by which the RPI movement exceeds 5%. Increases in deferred pension payments are dealt with on precisely the same basis.*"

164. In light of this very recent reconsideration of the nature of members' pension increase entitlements, there is every reason to believe that the Trustee's directors authorised the re-drafting process on the basis that it would not affect their understanding of the pension increase members' benefits in the form of the entitlement described by Mr Coles in July and the Plan's 2002 annual report.

165. In the event, the final draft deed produced for submission to the Trustee's 16 October 2002 board meeting was presented on the basis that the draft wording had been reviewed by the documentation sub-committee and made changes to the existing governing documents as outlined in a memorandum from Ms Smith of the same date.

There were a number of detailed changes, but the memorandum contained no amendments to the pension increase provisions. This sub-committee was an ad-hoc committee of the board of the Trustee, the role of which had developed from the mid-1990s, when it was what Mr Jones described as a group of Trustee directors who worked with the pension department on occasional updates to the rules. Even at this stage, Mr Bramley explained that it had no authority to do more than advance the drafting of any changes to the Plan documentation. Formal approval was required to be given by the board itself.

166. In my judgment, it is clear that the board's approval of the final draft was given on the basis that it contained no amendment to the pension increase provisions, in the sense that the board was informed that it had been told about the key changes, and it was not told they included any change to those provisions. It might be thought that this was therefore a reconfirmation of the terms of rule 23(2) of the 1996 deed which contained the IAP. But in my view that is not in fact the effect of the presumption of no change, because there was no hint in any of the documentation that the meaning or effect of this rule was different in any way from the explanation of the members' entitlements that had been given by Mr Coles in his board paper a few months earlier and was still reflected in the Plan handbook. The decision was also inconsistent with any belief by the directors of the Trustee that the benefits they understood to subsist might be being changed in any manner that was not reflected by Ms Smith's original September paper.

167. To the same effect, the oral evidence of the members of the board of the Trustee was that they approved what Mr Wigley called a technical updating of the Plan documentation on the basis that there were no changes to what was then summarised in the Plan handbook. As I have already explained, this summary continued to refer to the pension increase provisions being in the form of a guaranteed increase at 5% LPI. Evidence to this effect was given not just by Mr Wigley who was chairman of the board at this stage, but also by the other directors of the Trustee who gave evidence: Mr Jones, Mr Bramley and Ms Kennedy. There is no reason to believe that any other members of the board of the Trustee took a different view and I am satisfied that they did not do so.

168. I am also satisfied that, as a matter of substance, the actual subjective intent of the members of the board of the Trustee was accurately summarised by Mr Wigley, with particular focus on the importance of the benefit summary given in the Plan handbook, as follows:

> "*The 2002 Consolidation was, to the best of my recollection, a technical updating of the Plan documents in the same way that the 1996 Consolidation had been ... I do not believe that the 2002 Consolidation was intended to achieve anything more than to tidy up the existing provisions and otherwise maintain members' rights under the Plan. As such, except for any changes necessary to achieve the aims I have described, which would have been specifically highlighted by those doing the drafting, my recollection is that the 2002 Consolidation was intended to repeat what was already set out in the Plan's existing rules which we considered was accurately summarised in the handbooks.*"

169. So far as Mr Bramley was concerned, he said that, if there had been any change from what he continued to believe was a 5% LPI guarantee together with the Aim, this would have been a major issue for the Trustee, and he would have known about it:

> "*I understood, and believe that other Trustee directors at the time also understood, that pension increases were made by reference to the increase in the RPI up to 5% with the aim to pay two-thirds of any increase in the RPI above 5% and that RPI 5% was guaranteed under the Rules so could not be changed unilaterally by the Company. Any change from this position would have been a major issue for the Trustee board warranting detailed investigation and discussion, and I would have expected to have known about it. If it was discussed at a Trustee board meeting that I was unable to attend or discussed between senior individuals on the Trustee board outside of board meetings, I am confident that I would have been informed and involved given the importance of the issue. I am confident that there was no such investigation or discussion.*"

170. To the same effect, Ms Kennedy, who had only become directly involved as a director of the Trustee since the execution of the 1996 deed and rules, gave evidence that she understood for the whole period she was involved that increases were granted in line with inflation up to 5% with a discretion thereafter, but that it was never suggested to her that Bass had the ability to change the commitment of increases at RPI up to 5%. She also said that to the extent that rule 23 permitted Bass to reduce the rate of increase, that was not what the parties had in mind when entering into the 2002 consolidation:

> "*I do not recall any intention to alter the powers that the Trustee had relative to the powers of the Company as part of the consolidation exercise. Nor was there any intention to change members' entitlements to benefits in 2002 other than very minor changes explained in the leaflet to the Members board dated April 2002 and the memos from Anna Smith …*"

171. On the same day, the board of 6C Plc also approved the proposals contained in the draft which became the 2002 deed. It did so on the basis that, because the amendments from the existing plan documentation would not involve any material changes in the established principles, authority to approve the details of such amendments could be delegated to the General Purposes Committee. At the same meeting the board considered a paper prepared by the group finance director, Mr North, which set the proposed changes in the context of the more significant proposals that were then under consideration for the establishment of two new schemes for the employees of the hotels and soft drinks divisions of the group's business. These further proposals also involved the insertion of Retail as a new Principal Employer for all of what had then come to be called the Six Continents Pension Plans. These further proposals are of particular significance to the *bona fide* purchaser defence advanced by M&B which I will consider a little later in this judgment.

172. The decision-makers who approved the substance of the 2002 deed on behalf of 6C Plc were the members of its board. Sir Ian Prosser's evidence was that he had no recollection of any change in approach to pension increases being discussed in 2002. His evidence and that of Mr Clarke and Mr North is only consistent with a conclusion that they all believed that "*the amendments would not involve any material changes in the established principles or increased costs*" (as it was put in the minutes of the meeting). It is quite clear that those established principles were thought by them to be as summarised in the Plan handbook. So far as the pension increase provisions were concerned, they were believed to be consistent with the descriptions given in the Plan handbook, i.e., including the 5% LPI increase guarantee and the Aim.

173. Mr Clarke fortified what was apparent from the minutes by stating in his evidence that he did not recall any suggestion that there should be changes to the way pension increases were applied from the existing practice summarised in the member booklets and that he did not believe that anyone else on the board thought so either. He said that if there had been such a suggestion, he would have regarded it as something that 6C Plc would not wish to do because of "*the significant implications of threatening the morale and motivation of the 45,000 employees*". His intention, which he believed was shared by the members of the Bass board and executive committee, was to carry forward the same underlying benefits, rights and liabilities of the Plan into what he described as the M&B era, the prospects of which were dealt with in Mr North's paper. It is clear that this included the pension increase provisions described in the member booklets.

174. On 25 October 2002, during the period between the formal approval of the draft deed by the boards of the Trustee and Bass and the time of its execution, L&P wrote to Mr Jones (who was by then 6C Plc's director of pensions) with a table that compared how the balance of discretionary powers lay as between 6C Plc and the Trustee in relation to both the Plan and the Executive Plan. L&P made some suggestions as to rebalancing the discretions in the rules relating to contributions and the distribution of a surplus on a winding up, the latter of which provided that all of the surplus must be used to increase benefits rather than giving any discretion for a return to the employers. L&P did not make any suggestions for changes relating to pension increases, although the table did describe rule 23, comparing it to the equivalent rule 24 in the Executive Plan. This table spelt out the words "*(or any other rate decided by the Principal Employer)*" thereby referring to the IAP when describing the Plan's pension increase provisions in contradistinction to the description of the pension increase provision in the Executive Plan (rule 24) which did not.

175. Mr Jones was pressed in cross-examination as to whether he would have noticed the distinction between the table's description of the Plan's rule 23 and the Executive Plan's rule 24, and if not why not. He said that he did not think that he would have done, because the focus of the letter was on the discretions which L&P were suggesting might be changed not on the remainder of the 15 or so other discretions which were described in the table. As he put it, they were not what the letter was really about. He also said that this was a very busy time because of the demerger proposals.

176. I accept Mr Jones' evidence on this point. Mr Winter did not recall seeing the letter or the accompanying table and there is no reason to think that he did. It seems likely that if Mr Jones had appreciated that the reference to rule 23 had any significance, he would have raised it with either Mr Winter or Mr North and he does not seem to have done so. I am satisfied that, whether rightly or wrongly, he did not focus on this part of the table and did not appreciate that it appeared to indicate that the Plan contained the IAP as part of its pension increase provisions while the Executive Plan did not. I was left with the impression that he can now see with the benefit of hindsight that this was a point he might have picked up, but I do not think that he did so at the time.

177. The 1996 deed contained (in clause 27) a power to alter or modify which was only exercisable after consulting the Plan actuary. It was in substantially the same form as clause 6 of the 1988 deed. Clause 27 also included a proviso (equivalent to proviso (iii) to clause 6 of the 1988 deed) to the effect that no such alteration or modification could be made which in his opinion operated substantially to prejudice the rights or interests of any person already then a member. With that in mind, at some stage prior to 15

November 2002, Ms Smith forwarded a final draft of the revised rules to Mr Carr, which I am satisfied did not have any changes to rule 23 marked up on it.

178. On 15 November 2002, Mr Carr then gave certificates under section 67 of the Pensions Act 1995 and regulation 42 of the Occupational Pension Schemes (Contracting-out) Regulations 1996. The former of these certificates confirmed that in his opinion "*the modifications would not adversely affect any member (without his consent) in respect of his entitlement, or accrued rights or pension credit rights, acquired before the amendments are made*".

179. It is clear that Mr Carr was unaware that any issue arose in relation the pension increase provision when he was sent a draft of the proposed new 2002 deed, and he confirmed in his oral evidence that he had been assured at the time that there were no significant changes from the 1996 deed. The source of this assurance was not identified with any precision, but I am satisfied that no attempt was made to draw his attention to the pension increase provisions. This is not surprising in light of the fact that nobody instructing Mr Carr on behalf of the Trustee intended to make any changes to the 2002 deed as it related to the pension increase provisions and therefore it follows that nobody understood that they were consulting the Plan actuary on any such change.

180. As with what occurred in 1996, I will revert to this issue in relation to the separate question of consultation a little later in this judgment, but for present purposes it is my view that Mr Carr's evidence supports the Trustee's case that a rectifiable mistake occurred when the 2002 deed was executed, thereby reconfirming the existing draft of rule 23(2) in the form it was included in the 1996 deed. It is plain that he did not appreciate that rule 23(2) incorporated the IAP. The reason this is quite clear is that, on 12 December 2002, which was shortly after he had given that certificate, he signed an actuarial valuation report as at 31 March 2002, which referred to the guarantee as one of the Valuation Assumptions:

> "*The Plan guarantees to increase the part of each member's pension in payment in line with inflation, subject to a maximum yearly increase of 5.0%. Statutory increases are also provided on the (1988-1997) Guaranteed Minimum Pension (GMP). For the purpose of this valuation, I have assumed that pension increases would be granted in line with price inflation. Current price inflation has been assumed to be 2.5% per annum.*"

It also contained an almost identical statement in relation to pension increases as the one I have already referred to in relation to prior years:

> "*Members and widow(er)s' pensions are increased annually on 1st October each year as follows:*
>
> > *(i) The pension (excluding any GMP for service before 6 April 1997) increases by the annual rise in the RPI for the year ending 31st May preceding the increase, subject to a maximum of 5%. In addition, while not a promise, it is the Company's present aim to pay additional increases on pension in excess of any GMP, based on two-thirds of that part of any rise in the RPI above 5%.*"

181. In the event, the 2002 deed was executed and dated 17 December 2002 with Mr North and Mr Winter signing for 6C Plc and Mr Jones and Ms Smith signing for the Trustee. The form of rule 23(2) containing the IAP was unchanged from the form it took in the 1996 deed. As to the signatories Mr North has limited independent recollection of what occurred at the time, but he did think that if there was any suggestion that there should be a change in the pension increase provisions, he (and other members of the 6C Plc board) would have been told. Mr Winter only signed as secretary and did not regard himself as a decision-maker on behalf of 6C Plc. Indeed, what he called the 2002 consolidation only came to his attention once the drafting was finished and the need for board approval arose. He pointed out that there was a great deal going on at the time with the work required on the demerger. His evidence was, however, consistent with the conclusion that no substantive change was intended.

182. Ms Smith signed as secretary of the Trustee and was not one of the decision-makers. Mr Jones, the other signatory, was a director of the Trustee and was one of the decision-makers. His evidence was as follows and is only really consistent with there being no change from the existing position as he perceived it to be:

> "*The nature of the discussions in 2002 about the new Trust Deed and Rules was about bringing the Plan's deeds up-to-date with legislation and good employment practices, and to ensure that the Plan was in a good shape for the group's reorganisation and demergers. I remember the topics outlined in Anna Smith's memo of 25 September 2002 (and similar memo of 16 October 2002). These were not important changes. I did not, and cannot recall anyone else, turning their mind to pension increase rules in relation to the 2002 Consolidation.*
>
> …
>
> *I believe that the Company and the Trustee were of the same mind-set as me. At this time I was the Company's Director of Pensions as well as a Trustee director and I would have been aware of any significant discussion or review over the pension increase provisions of the Rules in 2002 The existing practice as regards pension increases was simply being maintained whilst the corporate restructuring and demergers were going on, as reflected in David Coles's memos the Trustee board noting the increases to be applied.*"

183. In these circumstances, the evidence that the subjective intention of the decision-makers in relation to the 2002 deed was for no change to be made to what they then considered to be the pension increase provisions in the form of a guaranteed 5% LPI per annum with the Aim continuing as a discretionary aspiration is compelling. I am also satisfied that everyone involved in the decisions assumed that the Plan handbooks produced for the members were accurate in their summary of the benefits then available under the Plan. There is a wealth of evidence that this is the case, and no material to support a conclusion that anyone appreciated that the effect of the wording in rule 23(2) of the 1996 deed was to introduce the IAP and remove the ISP. In my judgment the concession made by M&B in relation to the existence of the mistake in the pension increase provisions in the 2002 deed relied on by the Trustee was rightly made. Subject to the *bona fide* purchaser defence to which I shall now turn, an order for rectification ought to be made.

Context of the *Bona Fide* Purchaser Defence

184. M&B became the Principal Employer in respect of the Plan in November 2003. It did so pursuant to the November PE deed to which it was a party together with the Trustee and Retail, which had itself become Principal Employer by the March PE deed. It is M&B's case that, when it became Principal Employer, it did so as a *bona fide* purchaser for value without notice of the equity to rectify claimed in these proceedings.

185. The way that M&B pleaded this part of its case was as follows:

> "*when it (the Defendant) became Principal Employer of the Plan in November 2003 it did so as a bona fide purchaser for value without notice of and thus free from any equitable claim for rectification in respect of the 1996 and 2002 Deeds, such that there was thereafter no actionable mistake as regards the Defendant (in relation to the [IAP] or the [ISP]) or other equity which affected the 2006 Deed or which was capable of being reversed by the 2006 Deed*"

186. In his oral closing submissions, Mr Rowley accepted that this argument is not one that has previously been presented to a court, nor is it one that has been considered by commentators. But he said that this is not of any particular significance because applications for rectification of a pension scheme are normally brought by employers, rather than against them, and pointed out that novelty is not of itself a reason for rejecting an argument. This submission is undoubtedly correct so far as it goes, but it does mean that I have to consider the requirements and elements of the defence without the assistance of any prior judicial analysis as to how it might be applied in the circumstances with which the court is now concerned.

187. The circumstances in which M&B became Principal Employer of the Plan require further explanation. By September 2002, at about the time that Ms Smith submitted her paper to the board of the Trustee on the proposals for the amendments that culminated in the 2002 deed and rules, 6C Plc had already started the process of planning for a corporate reorganisation. Sir Ian Prosser traced the reasons for this back to Bass' decision to sell the brewing business in 2000, but the ultimate cause does not matter for present purposes. The plan was to separate the Six Continents group into two separate listed companies, each carrying on separate parts of the existing business, the two main divisions of which were hotels and pubs with a much smaller soft drinks (Britvic) business. The plan that was formulated, known as project Shakespeare and which I have already alluded to as the demerger, was for two new companies to be incorporated. IHG was to become the holding company of the hotels business and was to hold a controlling interest in the Britvic soft drinks business, while M&B was to become the holding company of the retail (UK pubs) business.

188. Mr Clarke said that the individuals who were most involved as the driving force behind the demerger were himself and Mr North in discussion with Sir Ian Prosser. Mr North's focus was on the commercial substance of the demerger, and he was the Bass board member for that aspect. The mechanics of the demerger were dealt with by Mr Naffah, who said that he was heavily involved in the process that helped the board to decide to pursue the demerger, and Mr Winter who was, by then, the company secretary. Mr Winter was in charge of the legal side, with advice from L&P. All of these individuals gave evidence.

189. The detail by which this reorganisation was to be effected does not now matter because, in its opening skeleton argument for the trial, M&B abandoned its original case that the consideration which it provided as part of the demerger amounted to value or consideration for the purposes of the *bona fide* purchaser defence. I can therefore take this part of the history very shortly. In summary, M&B was inserted as a new holding company for 6C Plc. This was achieved through a scheme of arrangement under Part XIII of the Companies Act 1985 (the precursor to Part 26 of the Companies Act 2006), as a result of which all of its existing shareholders ended up holding an interest in shares in both IHG and M&B. There was also a return to shareholders funded by bank borrowings.

190. As to the pensions aspect of the reorganisation, on 29 September 2002, Mr North sent a memo to the members of the board of 6C Plc dealing with the group's UK Pension scheme structure. He introduced the paper by expressing his understanding that 6C Plc "*wishes to provide for a continuation of the defined benefit arrangements to those employees who currently benefit from them*". He explained that the proposal was that there should be three separate pension plans each of which would replicate the current pension arrangements. The retail business, as the largest of the three businesses, would retain the Plan (and the pensions department) and new plans would be established for the hotels and soft drinks businesses to be owned and managed by IHG and Britvic. The minutes of the board meeting which approved the proposal described in Mr North's memo stated in terms that the new plans for the hotels and soft drinks businesses would replicate the benefit structures of the Plan and the Executive Plan.

191. The basic principle of replication was reiterated in advice given to the Trustee by both Mercer and A&O during early October and in two further papers dated 16 October 2002, one prepared for the board of 6C Plc by Mr North entitled 'Pensions - Implementation Plan' and one prepared for the board of the Trustee and the Executive Plan trustee by Mr Jones entitled 'Six Continents Plc – Demerger Announcement'. These papers were considered by the respective boards the same day in meetings the minutes of which again recorded that the benefits under the new schemes would replicate those under the Plan. This was consistent with Sir Ian Prosser's evidence that it was generally understood that the pension arrangements were just to roll on unchanged and, as he put it "*nobody's rights to substantive benefits were supposed to have changed*". They were the same meetings as those at which the boards of 6C Plc and the Trustee approved the final drafts that became the 2002 deed and rules.

192. The minutes of the 6C Plc board meeting also recorded the proposal that Retail would be used as the new Principal Employer for the Plan in place of 6C Plc, a proposal that was also mentioned in Mr Jones paper to the board of the Trustee. Retail was no stranger to the Plan; it had adhered to the Plan as a participating employer in 1979 (under its former name of Bass Alton Limited) and was an active employer in the Bass group's retail business making annual contributions of approximately £1 million in the period immediately before it became Principal Employer.

193. It seems from another note Mr Jones prepared for the members of Retail's executive committee on 18 October that, although the Plan and the Executive Plan would continue as the pension schemes for the retail business, no decision had yet been made by Retail itself that it would take on the role of the new Principal Employer. Mr Jones pointed out that the usual structure involved either the holding company or the main employing company being the principal employer for the purposes of a scheme such as the Plan.

His paper explained why it was that Retail was best placed to fulfil this function and there was a need for the new arrangements to be in place by 1 April 2003. As with the papers presented to the boards of 6C Plc and the Trustee, the proposal presented to this committee was one of no change to member benefits by the reorganisation.

194. The principles of replication and no change in benefits was then reflected in a demerger pension briefing pack prepared in November 2002 for distribution to a wide range of people including Trustee directors and pension delegates. Documents within the pack, including a letter to be signed by Mr Jones as 6C Plc's director of pensions, stressed that benefits would be unaffected in any way by the pension demerger and confirmed the continuation of the 5% LPI guarantee and the continuing aspiration of the Aim as one of those benefits.

195. The principle of no change in benefits continued to be at the heart of communications with members throughout the demerger process. One example is the Spring 2003 edition of the 6C Plc pension plan magazine issued to members about the time of the demerger, and shortly before the substitution. It made a clear representation in more than one place that the calculation of pension benefits would not be changed by the demerger and that the principles of no change and replication would apply. It is clear to me that 'no change' so far as the pension increase provisions and other benefits were concerned meant, where relevant, no change from what had been the case pre-1996 and continued to be set out in the Plan handbook.

196. At a meeting of the board of the Trustee held on 19 December 2002, it was agreed in the light of papers produced by Mr Carr and Mr Jones that the basis on which the Plan's fund was to be split between the three schemes was to be calculated using the assumptions for the actuarial valuation as at 31 March 2002. As I have already explained, these assumptions included specific reference to the pension increase guarantee at 5% LPI. Ms Kennedy, who was a director of the Trustee at that stage but not directly involved in the demerger, gave evidence that this was generally understood within Bass to be the case.

197. On 10 February 2003, a meeting of the board of the newly incorporated M&B was held at which a number of existing members of the board of 6C Plc (Sir Ian Prosser, Mr Clarke and Mr North) were appointed additional directors. At the same meeting, Mr Winter, who was 6C Plc's company secretary, was appointed secretary of M&B. By the time that the demerger was complete, the roles carried out by the senior management had changed. Thus, Sir Ian Prosser became chairman of IHG, Mr North became its CEO and Mr Winter became its company secretary. Mr Clarke became CEO of M&B and a member of its board. The other 6C Plc directors who became directors of M&B were Mr Roger Carr (who took over as M&B's non-executive chairman) and Mr Naffah. Mr Bramley who had worked in the Bass group since 1980 also joined the M&B board and Ms Kennedy who had worked in the Bass group since 1996 became its HR director and company secretary. This all reflected what Mr North called a "*noticeable continuity of management*" by which most of the senior executives went to one or other of the demerged businesses and "*the commercial reality that all we were doing was separating two existing businesses*".

198. The way in which the Plan and the Executive Plan were to be dealt with post-demerger do not seem to have been issues as such in the reorganisation, but as was to be expected,

both pension schemes were referred to in the explanatory statement sent out to shareholders on 17 February 2003 for the purposes of the scheme of arrangement:

> "*Six Continents Group presently has two exempt approved retirement benefits schemes, namely the Six Continents Pension Plan (''SCPP'') and the Six Continents Executive Pension Plan (''SCEPP''). It is intended that a subsidiary of M and B will be substituted for Six Continents as the principal employer of both these schemes and that, as a result of the Proposals, certain members will transfer their past service benefits to new schemes to be established as exempt approved retirement benefits schemes within the InterContinental Group, one of which will relate to the Hotels Business and the other to the Britvic Business. It is anticipated that the sums transferred to those schemes will be calculated in a manner intended broadly to leave each of SCPP and SCEPP with a similar funding position to that which applied before the transfers*."

In the listing particulars sent out at the same time, more detail was given of the impact of the reorganisation on the Plan and the Executive Plan. The intention was said to be that "*a company in the M and B Group will succeed before Separation as principal employer*" of the Plan and the Executive Plan.

199. Mr Naffah said that, as finance director designate of M&B, he took a close interest in the proposed funding and allocation of pension liabilities to M&B on demerger, but he did not recall being involved in any discussion prior to or at the time about making any changes to the plans' benefit structure or rules or to member rights. This is consistent with the fact that throughout the process of planning, it continued to be recorded from time to time that there would be no change in the benefits available under the Plan as a result of the corporate restructuring. This was a consistent theme of the documentation placed before the boards of both the Trustee and 6C Plc, where the language used was that the benefits would be replicated within each of the schemes and that existing benefits to members would not be changed and would be continued.

200. The Trustee submitted that the separation of the group pension arrangements was a separate process from the corporate reorganisation and that it would have been undertaken even if the reorganisation had not proceeded. There are a number of references in the contemporaneous documentation to that effect, which was clear as early as November 2002. Nevertheless, it is also the case that the proposal to set up separate pensions plans for the hotels and soft drinks parts of the business (including therefore a demerging of the pensions arrangements relating to those businesses), while the Plan was to remain in place for the retail side of the business, was put forward and considered in the context of and in conjunction with the corporate reorganisation. However, it is now clear that, despite what M&B had argued up until the commencement of the trial, there was no direct relationship of dependency between the two transactions. In particular, it is no longer said by M&B that it undertook any obligations pursuant to the corporate reorganisation itself which may amount to value for the purposes of the *bona fide* purchaser defence.

201. The fact that no change in benefits was a basic principle on which the boards of the Trustee and 6C Plc proceeded was not challenged by M&B. That is not irreconcilable with its argument that, when it became Principal Employer, it took free of the equity of rectification if the defence were to be otherwise available, not least because it says that at the time it was no more than an inactive SPV. But in my view, for reasons that I will

come to, the evidence of what was intended by way of preserving member benefits sits unhappily with its case that the Trustee's inchoate right to rectify a provision of the 1996 and 2002 deeds concerned with members' benefits under the Plan was extinguished when it became Principal Employer.

202. The drafts of the new hotels and soft drinks division pensions plans included an IAP in both the staff and executive sections. The Trustee submitted that this illustrated that nobody appreciated the significance of its wording because, although there was an IAP in the existing Plan, there was no IAP in the existing Executive Plan. Any differences in the form of benefits given to members of the executive sections of the three separate plans would have been inconsistent with the basic no change principle. I agree with this submission.

203. In the event, and as foreshadowed by the October 2002 board papers I have referred to above, the process by which M&B became Principal Employer did not occur by its immediate substitution or succession as such. As contemplated by the explanatory statement and the listing particulars, it was agreed by the boards of M&B, 6C Plc and the Trustee at meetings held in February 2003 that Retail would be substituted as Principal Employer in relation to the Plan and the Executive Plan with effect from 1 April 2003. The terminology used in the minutes of the meetings of the boards of M&B and 6C Plc was the language of substitution. The effective date of the substitution was shortly before the formal consummation of the demerger with the separation of the Six Continents group into IHT and M&B.

204. It was necessary for 6C Plc, the Trustee and Retail all to be party to the deed of change. This was because the power to substitute the Principal Employer was set out in clause 3 of the 2002 deed in the following terms:

> "*(1) A corporation or firm which succeeds to the business, or a substantial part of the business, of the Principal Employer in any way (including, without limitation, reconstruction, amalgamation or purchase), or is or becomes the holding company of the Principal Employer, may agree with the Principal Employer to assume its position as Principal Employer under this deed and the Rules in succession to it, if Approval would not be affected.*
>
> *(2) A change of Principal Employer: (a) must be effected by a deed by which the new Principal Employer agrees with the Trustees and the former Principal Employer (with the consent of each of them) to undertake and assume the duties, powers and position of the Principal Employer under this deed and the Rules in succession to the former Principal Employer; (b) may take effect from the date of that deed or from an earlier or later date*."

205. The Principal Employer was defined by the 2002 deed to be 6C Plc. It follows that a corporation or firm succeeding to the business or a substantial part of the business of 6C Plc or becoming its holding company was able to agree with 6C Plc to assume its position under the 2002 deed and rules in succession to it. The form of the succession was required to be by way of a deed to which each of the original Principal Employer, the new Principal Employer and the Trustee was a party, and by which the new Principal Employer undertook the duties, powers and position of the original Principal Employer under the 2002 deed and rules.

206. The concepts of assuming the position of and succeeding to the Principal Employer were recorded in the recitals to the March PE deed by which Retail replaced 6C Plc under the 2002 deed. The operative parts of the March PE deed were as follows:

> "*1. Pursuant to clause 3 of the Deed [Retail] agrees with the Trustee and [6C Plc] (with each of their consent) to become, on and from 1st April, 2003, the Principal Employer for all the purposes of the Plan in place of [6C Plc] with all the rights (express and implied) and (except as mentioned in clause 3 below) obligations of the Principal Employer under the Plan.*
>
> *2. [Retail] agrees with the Trustee and [6C Plc], as required under clause 3 of the Deed, to undertake and assume the duties, powers and position of the Principal Employer under the Deed and Rules in succession to [6C Plc] on and from 1st April, 2003.*
>
> *3. [6C Plc] is, on and from 1st April, 2003 released from any further obligations as the Principal Employer for the purposes of the Plan except in respect of the period prior to the execution of this deed*."

207. In the event, Retail was not Principal Employer under the 2002 deed for very long. It was succeeded by M&B with effect from 3 November 2003. Almost exactly the same form of words was used in the November PE deed as had been used in the March PE deed by which Retail replaced 6C Plc. The recitals referred to clause 3 of the 2002 deed and to the parties' intention that M&B will succeed Retail as the Principal Employer for the purposes of the Plan. The operative parts were as follows:

> "*1. Pursuant to clause 3 of the Deed and Rules [M&B] agrees with the Trustee and [Retail] (with each of their consent) to become, on and from 3rd November 2003, the Principal Employer for all the purposes of the Plan in place of [Retail] with all the rights (express and implied) and (except as mentioned in clause 3 below) obligations of the Principal Employer under the Plan.*
>
> *2. M&B agrees with the Trustee and [Retail], as required under clause 3 of the Deed and Rules, to undertake and assume the duties, powers and position of the Principal Employer under the Deed and Rules in succession to [Retail] on and from 3rd November, 2003.*
>
> *3. [Retail] is, on and from 3rd November, 2003 released from any further obligations as the Principal Employer for the purposes of the Plan except in respect of the period prior to the execution of this deed*."

208. Mr Naffah explained that the reason Retail was replaced as Principal Employer was that it was the preferred entity for use in a group business securitisation structure that raised £1.9 billion of debt through a bond issue. Mr Bramley said that the securitisation structure required Retail's assets to be ring fenced for that reason. Mr Michael Tennet QC, who appeared for the Trustee, expressed a concern in his written closing that some of Mr Rowley's cross-examination appeared to foreshadow an unpleaded argument designed to bolster M&B's *bona fide* purchaser defence. In the event, Mr Rowley made clear in his oral closing submissions that he made no such argument, and nobody suggested that the securitisation was relevant to anything I have to decide, apart from

the fact that it provided the commercial justification for changing the role of Principal Employer from Retail to M&B.

209. It was submitted by M&B in the skeleton it served at the outset of the trial that Retail was a *bona fide* purchaser when it became the Principal Employer pursuant to the 28 March 2003 deed "*by virtue of the liabilities under the Plan's governing documentation to which it became subject*" (viz. the 2002 deed and rules) and from which 6C Plc was thereupon released. It was said that the same then applied to M&B when it became Principal Employer in succession to Retail. Before explaining my conclusions as to how these agreements fit with M&B's *bona fide* purchaser defence, it is convenient to set out the applicable principles of law.

Bona Fide Purchase: the law

210. There was no dispute between the parties that the equitable remedy of rectification will not be granted to the prejudice of a *bona fide* purchaser for value without notice who takes an interest conferred by the instrument sought to be rectified (Snell's Equity 34th edn at para 16-025). The question which was hotly contested was whether the doctrine of *bona fide* purchaser for value without notice applies at all in relation to a transaction of the type in issue in these proceedings and if so whether the necessary elements of the defence have been made out by M&B. In particular, the Trustee submitted that the doctrine has no application at all because there was no acquisition of property by Retail and then M&B. What occurred was quite different: Retail and then M&B both succeeded to a position as Principal Employer taking everything that came with that position and in particular subject to all of the equities affecting the documentation governing the Plan as at the time of their succession, including the Trustee's equity to rectify the 1996 and the 2002 deeds and rules.

211. The doctrine of *bona fide* purchase operates as a qualification to the basic rule that estates and interests primarily rank in the order in which they are created. In *Macmillan Inc v Bishopsgate Investment Trust Plc (No 3)* [1995] 1 WLR 978 ("*Macmillan*"), 999-1000, Millett J explained the position as follows:

> "*In English law the order of priority between two competing interests in the same property depends primarily on whether they are legal or merely equitable interests. Where both interests are equitable — or both legal, for that matter — the basic rule is that the two interests rank in the order of their creation. In the case of equitable interests the order of priority may be reversed in special circumstances, but "where the equities are equal, the first in time prevails." The absence of notice of the earlier interest by the party who acquired the later interest is irrelevant, even if he gave value. He cannot gain priority as a bona fide purchaser of the legal estate without notice if he has not acquired the legal estate.*
>
> *Where, however, the first is equitable and the second is legal the position is different. A bona fide purchaser for value who obtains the legal estate at the time of his purchase without notice actual or constructive of a prior equitable right is entitled to priority in equity as well as at law: see Pilcher v. Rawlins (1872) L.R. 7 Ch. App. 259. But he must have obtained the legal estate, and the question of notice is normally tested at the time when he obtained it.*"

212. It is not in issue that M&B bears the burden to prove the defence, and each element of it, including absence of notice of the prior equitable right or interest. As Mummery LJ said in *Barclays Bank v Boulter* [1998] 1 WLR 1, CA, at 8F-G:

> "*It is well established at this level of decision that the doctrine of bona fide purchaser for value without actual or constructive notice is a defence which can be raised to defeat a claim of an equitable right or interest and that the burden is on the person raising that defence to plead and prove all its elements: it is a "single defence"*."

213. If the elements of the defence are satisfied, it means that a transaction in favour of the *bona fide* purchaser is as effective as it would be if the beneficial title were to have been vested in him: *Akers v Samba Financial Group* [2017] AC 424 at para 52, per Lord Mance approving *Independent Trustee Services Ltd v GP Noble Trustees Ltd (Morris intervening)* [2013] Ch 91 at para 106. To that extent it can properly be said that beneficial title "*is overridden, or to put it more colloquially, it is lost or disappears*" per Lord Neuberger of Abbotsbury in *Akers v Samba* at para 62. One of consequences of this is that where a *bona fide* purchaser transfers his title to a third party, who has notice of the prior equitable interest, that third party will take free of it, unless he was the original trustee who sold to the *bona fide* purchaser in the first place. In that instance the trust that has been overridden or is lost (per Lord Neuberger) will revive: see e.g., the explanation in Lewin on Trusts (20th edn at para 44-143).

214. Millett J's explanation of the rule in *Macmillan* was concerned with competition between a prior equitable interest and the later purchaser of a legal estate. The rule does not apply as against a prior equitable interest where the interest that the purchaser acquires is a later equitable interest. In that situation the basic rule of first in time priority continues to apply. However, there is what is sometimes described as an exception to the rule that the doctrine does not apply to the later purchase of an equitable interest for value where the prior right is a mere equity. In that situation, the later purchaser of an equitable interest for value will prevail: *The Serious Fraud Office v. Litigation Capital Ltd.* [2021] EWHC 1272 (Comm) ("*SFO*") at para 139, Lewin on Trusts (20th edn at paras 26-020, 26-021 and 44-121), Snell's Equity (34th edn at paras 2-008 and 4-023).

215. For these purposes, a right to rectify is properly to be characterised as a mere equity (Snell's Equity 34th edn at para 2-006). In *Holaw (470) Ltd. v. Stockton Estates Ltd.* (2001) 81 P & CR 29 at para 65, Neuberger J. described the position as it related to interests in unregistered land as follows:

> "*Mr Fancourt argues that, as a claim to rectify unregistered land is "a mere equity" it would not bind successors in title. However, as I see it, that would not have assisted the defendant in the present case: the only difference between mere equities and equitable interests so far as a third party purchaser is concerned is that he must acquire a legal estate in order to overreach a prior equitable interest, but, in order to overreach a prior mere equity, it may be sufficient if he acquires an equitable estate (see Megarry & Wade, op. cit., paragraph 5–012). However, in each case, subject to any question of registration, in order to overreach, he must be a purchaser without notice, and the problem in the present case for the defendant would have been that, at any rate on the claimant's analysis, it had prior notice.*"

216. Turning to the elements of the defence, the first is the requirement for the defendant to be a purchaser. As Neuberger J said in *Nurdin & Peacock v D B Ramsden* [1999] 1 EGLR 119 ("*Nurdin & Peacock*") at 122, approving a passage in Megarry & Wade on the Law of Real Property (5th edn at p.50), the word "purchaser" has the technical meaning of a person who takes property by grant (such as gift or sale), rather than by mere operation of law, such as on intestacy. In *Nurdin & Peacock*, the fact that the relevant property (a lease) had been acquired as part of a corporate reorganisation did not of itself mean that the acquiring entity was not a purchaser.

217. The second element is that the purchase must be for value. This means that the purchase must be for a consideration in money or money's worth that is more than merely nominal. It may take the form of an assumption of liabilities, which in the case of *Nurdin & Peacock* arose under an assignment of a lease and an indemnity given to the assignor.

218. The third element is that the subject matter of the purchase must be a legal or equitable interest in property. The defence is invoked where a purchaser of an interest in property seeks priority over a prior competing interest in that property: see the way in which the defence is described by Millett J in the passage from *Macmillan* cited above and all of the leading texts.

219. Most of the cases in which the doctrine has been discussed and considered are concerned with property in the form of interests in land. However, as *Macmillan* itself illustrated, the doctrine of *bona fide* purchase is not only applicable to the transfer of interests in land. It is also capable of affecting the priority of interests in other forms of personal property. This includes shares, where legal title is acquired on registration (or at the earliest when the share transfer forms have been lodged with the company) and it would appear in some respects other choses in action where the legal interest passes on the acquisition by the purchaser of the right to sue at law: *SFO* at para 138.

220. I was not shown any authority on the application of the *bona fide* purchase doctrine to choses in action other than shares in a company, which as Millett J explained in *Macmillan* at 992G-H are a special sub species of chose in action with their own priority rules, but in that category of case the well-established rule that an assignee of a chose in action can only acquire the chose subject to all of the equities affecting it in the hands of the assignor may apply: per Romilly MR in *Graham v Johnson* (1869) LR 8 Eq 36, 43; see also Snell's Equity (34th edn at para 3-024). As Lord Millett explained in *Mulkerrins v Price Waterhouse* [2003] 1 WLR 1937 ("*Mulkerrins*") at para 15, when discussing the slightly different context of the assignment of a debt subject to a right of set-off, this well-established rule is designed to protect the debtor.

221. The fourth element is that the purchaser must not be on actual or constructive notice of the prior equitable right or interest. The burden remains on the purchaser to prove a negative. As Lord Sumption explained in *Papadimitriou v Credit Agricole Corpn and Investment Bank* [2015] 1 WLR 4265 at para 33, constructive notice means that the purchaser must prove that he has such absence of notice as entitles him to assume that there are no adverse interests:

> "*The mere possibility that such interests exist cannot be enough to warrant inquiries. There must be something which the defendant actually knows (or would actually know if he had a reasonable appreciation of the meaning of the*

> *information in his hands) which calls for inquiry … If even without inquiry or explanation the transaction appears to be a proper one, then there is no justification for requiring the defendant to make inquiries. He is without notice. But if there are features of the transaction such that if left unexplained they are indicative of wrongdoing, then an explanation must be sought before it can be assumed that there is none*."

M&B's case for being a *bona fide* purchaser

222. M&B submitted that it became a *bona fide* purchaser for value when it became the Principal Employer under the November PE deed. The way in which M&B pleaded its case avoided identifying the property in respect of which it claimed to be a purchaser, and in its skeleton argument for the trial it did not grapple with the point. It simply said that because it had not been in issue in *AMP* or *Univar* that, as a matter of principle, a *bona fide* purchaser defence was available to the members of pension scheme where the principal employer sought rectification, as a matter of principle the same defence must also be available to the Principal Employer in the present case when rectification is sought by the Trustee.

223. M&B accepted that it acquired no entitlement to receive any surplus out of the assets on a winding up of the Plan but pointed out that there are circumstances in which it is entitled to receive Plan assets, with a consequential reduction in the value of any benefit for or in respect of the member concerned, where there is a monetary obligation owed to an employer in respect of that member's misconduct. This is a right which is expressly authorised by section 93 of the Pensions Act 1995 as an exception to the general prohibition on forfeiting members' pension entitlements. I did not understand that there was any other context in which the assets of the Plan might find their way into the hands of the Principal Employer.

224. M&B then suggested in its oral opening that, if the acquisition of some form of proprietary interest is required, which Mr Rowley said was not necessarily the case, the rights of the Principal Employer under the 2002 deed are intangible property for that purpose. The subject matter of the purchase was therefore those rights. It was said that M&B gave value by becoming subject to the liabilities under the Plan, with which it had no prior legal relationship. The right of direct relevance to the rectification claim is the IAP, but Mr Rowley submitted that it was necessary to consider the full bundle of rights that were acquired under the November PE deed. In his oral closing, Mr Rowley developed this submission by making clear that, having reflected further, he did not contend that M&B acquired those rights by reason of any form of assignment taking effect pursuant to the terms of the November PE deed. He said that the mere acquisition under that deed was sufficient to render M&B a purchaser.

225. In any event, Mr Rowley submitted that it did not matter whether the rights which M&B had under the 2002 deed were properly to be characterised as property, whether in the form of a chose in action or in some other form, because he said that the doctrine of *bona fide* purchase for value as a defence to a rectification claim was sufficient to extend to the sort of rights that have been acquired by M&B in the present case, including the power to exercise the IAP. He submitted that this category of right was amongst those that entitled M&B as Principal Employer to enforce the Trustee's

obligations to hold the assets and to administer and manage the Plan. They also included a number of other rights and powers, such as those to give and withhold consent to the payment of remuneration to the Trustee, to appoint and remove the Trustee, to require the augmentation of benefits, to consent to any alteration or modification to the trusts power or provisions of the Plan deed and rules, to put the Plan into winding up thereby terminating its liability to contribute and to give binding certificates as to the amount of members' pensionable earnings. Mr Rowley submitted that, while these are rights and powers to participate in the administration of a trust, their exercise has financial consequences for M&B, because any shortfall or surplus in the assets of the Plan may lead to M&B making further contributions or reducing its contributions as the case may be.

226. Mr Rowley was unable to identify any authority which supported with any clarity a submission that there was no need for the rights or powers M&B acquired when it became Principal Employer to be property. But he relied on *Milton Keynes BC v Viridor (Community Recycling MK) Ltd* [2016] EWHC 2764 (TC) in which he said that Coulson J proceeded on the basis that there was no principled reason why the defence should not be available as an answer to a claim by the Council to rectify a contract for the provision of waste disposal and recycling services. I can say straight away that I do not accept that *Milton Keynes* is of any assistance on this point. Coulson J decided that the defence of *bona fide* purchase was not arguable for a number of reasons. The fact that he did not also conclude that it was not arguable because of the nature of the acquired rights to which it was said to relate does not in my view assist M&B's argument.

227. More generally, however, Mr Rowley pointed to the fact that in *AMP*, which was concerned with *bona fide* purchase as a members' defence to a rectification claim by a principal employer, Lawrence Collins J expressed the position in wide terms, saying at para 72 "*It is clear that a bona fide purchaser may resist rectification of an instrument under which he has acquired rights*". It is not immediately clear that Lawrence Collins J was addressing the question of whether the defence is available where a person has acquired a right not amounting to an interest in property. I am doubtful that he was, not least because, in support of what he said, he cited from an earlier edition of Snell's Equity, a text which makes clear when dealing with the *bona fide* purchaser principle as a defence to a rectification claim (see para 16-025) that the protected purchaser is one who takes an interest conferred by the relevant instrument.

228. As to the question of value, M&B submitted, in reliance on the principle illustrated by *Nurdin & Peacock,* that it gave consideration for what it called its purchase. It abandoned its original case that there were aspects of the demerger which amounted to the giving of value. Instead, it relied on four categories of specific obligation and duty arising under the 2002 deed which it said constituted value for the purposes of the defence. They were the obligation to pay contributions under clause 5, the obligation to pay administration and management expenses under clause 6, the obligation of all employers to indemnify the trustee under clause 11(3) and a specific indemnity given by it in its capacity as Principal Employer under clause 11(4). Mr Rowley submitted that Retail and then M&B accepted these liabilities as a *quid pro quo* for the acquisition of the rights which I have described. He said that it therefore followed that M&B was a purchaser of those rights for value given in the form of the undertaking of these liabilities.

229. M&B did not dispute that the burden was on it to show that it was not on notice of the Trustee's equity to rectify. It said however that it was a key plank of the Trustee's case that it had been advised by A&O that adoption of the 1996 and 2002 deeds would not change the balance of power under the Plan. This meant that it could not credibly be argued that the Trustee directors could not reasonably have relied on that advice.

230. The consequence of being a *bona fide* purchaser was said to be that M&B would take as Principal Employer free of the equity to rectify the 1996 and the 2002 deeds. It was submitted that the Trustee's equity of rectification would be extinguished and M&B's interest as Principal Employer would no longer be burdened by it. The consequence was said to be that, as at 2003, the terms of the 2002 deed and rules as they then stood (i.e., in their unrectified form including rule 23(2) which contained the IAP) must continue to stand, because the Trustee cannot revive its equity of rectification by reference to mistakes in relation to those deeds. The legal effect of everything which happened thereafter was said to flow from that consequence.

Conclusions on the *bona fide* purchaser defence

231. In my view the right starting point is the nature of the power pursuant to which Retail and then M&B became the Principal Employer under the Plan. The power contained in clause 3 of the 2002 deed (set out above) is one which can be exercised in certain circumstances with the consent of the new Principal Employer, the former Principal Employer and the Trustee pursuant to a deed to which each of them must be party. The language of clause 3(1) makes clear that the primary purpose of the power is for the new Principal Employer to agree with the old Principal Employer (with the consent of the Trustee) to "*assume its position*". In my view this language makes clear that the power is concerned with substitution and succession to a position. It is not a power which is concerned with the sale of property or the transfer of rights, save and in so far as that property or those rights attach to the position, i.e., that of Principal Employer under the 2002 deed and the rights or property transferred to it by reason and only by reason of the holding of that position.

232. Clause 3(2) of the 2002 deed then goes on to provide that the new Principal Employer must agree by deed to undertake and assume the duties, powers and position of the Principal Employer under the 2002 deed. Again, this is not the language of a transfer of property. It is the language of succession or substitution of a person to stand in the shoes of another as the holder of a position, which may carry with it the ability to exercise powers, or even to acquire property, but only in the context of having become the holder of that position. I agree with the Trustee's submission that the obvious purpose of this power of substitution is to assure a seamless transition from one entity holding the position of Principal Employer to another. There is no objective reason for thinking that the impact of the substitution should do anything more than change the identity of the legal person holding that position, leaving him with all the incidents of it.

233. I also agree with the Trustee's submission that the power under clause 3 of the 2002 deed is not a power to sell property for consideration, anyway independently of such transfer as is required to ensure that the new Principal Employer steps into the shoes of the old Principal Employer. As Mr Tennet submitted any other conclusion would make

no real commercial sense, because it would mean that, by agreeing to a substitution, the Trustee would be potentially releasing rights enjoyed by the members and detrimentally affecting their benefits, when all that was intended was to change the identity of the Principal Employer. That is not the purpose for which the power of substitution was given.

234. This can be seen from the fact that the substitution of a new Principal Employer which has the effect of jeopardising the Trustee's right to pursue enforcement of the equity of rectification for the benefit of members would cut across the principled basis on which the power to substitute was included in the first place. I see no reason why the principle explained by Millett J in *In re Courage Group's Pension Schemes* [1987] 1 WLR 495 at 511E-G is not equally applicable to the present case:

> "*In my judgment, the validity of a power of substitution depends on the circumstances in which it is capable of being exercised and the characteristics which must be possessed by the company capable of being substituted; while the validity of any purported exercise of such a power depends on the purpose for which the substitution is made. The circumstances must be such that substitution is necessary or at least expedient in order to preserve the scheme for those for whose benefit it was established; and the substituted company must be recognisably the successor to the business and workforce of the company for which it is to be substituted.*"

235. Mr Rowley submitted that the Trustee was in effect submitting that the doctrine of *bona fide* purchase could never apply to the substitution of an incoming principal employer to an occupational pension scheme. I am not sure that it went that far, but even if it did, it seems to me that the purpose for which the power of substitution is given is an important guide to the proper construction of the deed by which the power is given. If the effect of one construction is that the substitution does more than is required or expedient to preserve the scheme for those whose benefit it was established, that will count against (and strongly so) a construction which has that effect.

236. In the present case, the exercise of the power resulted in the PE deeds pursuant to which Retail and then M&B became the Principal Employer. As contemplated by the 2002 deed, these were agreements to which the original Principal Employer, the new Principal Employer and the Trustee were all party. They provided by clause 1 for Retail and then M&B to "*become*" the Principal Employer "*for all the purposes of the Plan*", terminology which in my view is only consistent with the new Principal Employer stepping into the shoes of 6C Plc or Retail (as the case may be) in their capacity as Principal Employer under the 2002 deed. They also provided by clause 1 for the taking-on of the status of Principal Employer in place of the old Principal Employer to carry with it the rights and obligations of Principal Employer under the Plan. Those therefore are the rights and obligations which attach to the position of Principal Employer – they do not amount to any form of sale or transfer in any other context or sense. In short, the concept of succession encapsulates all aspects of the old Principal Employer's status as such, including the benefits and burdens of the position that it holds.

237. Clause 2 of each of the PE deeds is then confirmatory of what clause 3 of the 2002 deed required, namely an agreement by deed by the new Principal Employer to undertake and assume the duties, powers and position of the Principal Employer in succession to the old Principal Employer. In my view the effect of this language is that Retail and

then M&B simply succeeded in all respects so far as their duties and powers under the Plan were concerned to the position of Principal Employer held by their predecessor. They were successors to that position in all respects, not merely successors in title to property. Put another way, the PE deeds provided for a succession to the old Principal Employer's status as such. It is not concerned with a right which the new Principal Employer acquired by mere assumption or assignment from an earlier holder or beneficiary of that right.

238. This focus on position is reinforced by the fact that the PE deeds also provide that, when the status of Principal Employer is assumed by the new Principal Employer in place of the old Principal Employer, the assumption of that status carries with it all of the obligations of the Principal Employer under the Plan (subject to a single exception to which I shall revert). This emphasises that it is a genuine assumption of position because the new Principal Employer is explicitly accepting with effect from the operative date of the deed the obligations of the Principal Employer under the Plan, including most obviously obligations that can be enforced by the Trustee against it. In my view the objective intent is to give by a contract to which the Trustee is party a protection to the Trustee and its member beneficiaries that is equivalent to that which Lord Millett had in mind when explaining in *Mulkerrins* that debtor protection is why an assignment of a chose in action such as a bundle of contractual rights will be subject to all of the equities affecting it in the hands of the assignor.

239. Mr Rowley submitted that the language was not sufficiently wide to make explicit that the succession of Retail and then M&B to the position of Principal Employer with its obligations as such covered the survival of an equity to rectify the documentation governing the Plan. I do not agree. The concept of succession under the PE deeds is in my view intended to put the new Principal Employer into the position of Principal Employer together with all of the benefits and burdens that are attributable to that position. The word "*obligations*" has to be construed in that context and I agree with Mr Tennet is a concept of deliberately wide import which is quite capable of extending (as it does in the present context) to an obligation to give effect to a claim to vindicate any equity to rectify the deed which provides for and governs the Principal Employer's rights, duties, powers and obligations in the first place.

240. In my judgment, the concept of having all the obligations of the Principal Employer under the Plan is designed to give the counterparty to the 2002 deed (i.e., the Trustee) the ability to enforce its rights against the new Principal Employer to the same extent as it would have been able to enforce those rights against the old Principal Employer prior to the coming into effect of the March PE deed or the November PE deed as the case may be. If there is good and cogent evidence, as there is in the present case, to establish that the person holding the position of Principal Employer at the relevant time (Bass / 6C Plc) had sufficient subjective intent to justify rectification, enforcement of that equity was an obligation or burden to which it was subject at the time of substitution. In my view, that is sufficient for it be captured as a Principal Employer obligation under the Plan within the contemplation of clause 1 of the March and November PE deeds.

241. The single exception to which I referred above flows from the language of clause 3 of the PE deeds to the effect that the current Principal Employer is on and from the relevant effective date "*released from any further obligations as the Principal Employer for the purposes of the Plan except in respect of the period prior to*" the relevant effective date.

I agree with Mr Tennet's submission that this clause is designed to preserve the obligations of the old Principal Employer in respect of the period prior to the substitution and release it in respect of the future. It does not prevent the incoming Principal Employer from becoming subject to existing obligations which continue to affect the 2002 deed and rules, and which may fall to be enforced at any time after the date of substitution. On the view I take of the extent of the obligations to which the PE deeds refer, obligations falling to be enforced at any time after the date of substitution will include the subsisting equity of rectification.

242. This approach to the language and objective purpose of the PE deeds is, in my view, consistent with the circumstances surrounding the change of Principal Employer as part of the corporate reorganisation leading to the demerger. In many different contexts, it was represented that there would be no change to member benefits and that was one of the bases on which the Trustee was a party and gave its consent. For present purposes it suffices to refer back to the papers presented to the board of the Trustee by Mr Jones and to the board of 6C Plc by Mr North at the end of 2002, the demerger pension briefing pack from the same period, the advice received from both A&O and Mercer and Mr Naffah's evidence. The concept of replication and no change was a concept that was repeated by many of the witnesses. The extinction of an equity of rectification that was required to be exercised in order to reflect the true nature of the benefits to which members were entitled under the Plan would in my view be inconsistent with the principle of no substantive change which underpinned the substitution of a new Principal Employer.

243. There was some debate as to the extent to which this material was admissible on questions relating to the true construction of the PE deeds. In my view the circumstances and purpose of the demerger and the context of the substitution are part of the factual context in which the PE deeds were entered into. This, together with the commercial consequences of one construction or another cannot be ignored in the exercise of unitary construction the court is required to carry out (e.g., per Sir Geoffrey Vos C in *Britvic Plc v Britvic Pensions Limited* [2021] EWCA Civ 867 ("*Britvic*") at para 31).

244. I also think that there is some force in Mr Tennet's submission that an application of the doctrine of *bona fide* purchase to a deed of substitution such as the November PE deed may mean that rectification of the 2002 deed might succeed against some employers but not others. This he said would be a very surprising result and would tend to have the undesirable consequence of what he called fragmenting the trust. I can see the potential for problems of this type, but the point was not explored in any detail in the argument, and in light of the other conclusions I have reached I propose to say no more about it.

245. The Trustee then submitted that, if the nature of the transaction into which a person enters involves an acceptance by him that he will be subject to the interest said to take priority, the *bona fide* purchaser defence will not be available. In support of this submission Mr Tennet relied on Snell's Equity (34th edn at para 4-051). He then submitted that this is the effect of the PE deeds.

246. M&B contended that this reliance is misplaced, because the passage is concerned with a different question: is the priority otherwise enjoyed by a prior equitable interest lost where, by reason of conduct, it would be inequitable to assert it? This is a point to

which I will return, but I do not agree with M&B's submission. The principle described in Snell is expressed as follows and I agree with it:

> "*Where the person who prima facie has a claim to priority consents to another interest having priority to it, the other interest will gain priority.*"

The illustrations then given are concerned with situations in which the beneficiary of a prior equitable interest is held to have consented to the creation of a subsequent legal right, and the legal right prevails notwithstanding notice. But the point is one of more general application where questions of priority between competing interests arise. If the purchaser has so conducted himself that he is to be treated as having consented to any prior equitable interest retaining its priority (or in the case of the equity of rectification continuing to subsist) I can see no reason why the principle should not continue to apply.

247. Accordingly, and largely for the reasons advanced by Mr Tennet in his submissions, I do not consider that M&B is able to rely on the doctrine of *bona fide* purchase. It is not applicable to the circumstances in which either Retail or M&B became Principal Employer under the PE deeds.

248. I have reached that conclusion having regard to the terms of those deeds and the purpose for which they were entered into, without working through all of the constituent elements of the defence of *bona fide* purchase one by one. Looked at from one perspective, this is a simple reflection of the nature of the transactions by which Retail and M&B became Principal Employer under the Plan, but an analysis of one or two of those elements helps to explain why.

249. The first is the nature of the property interest said by M&B to have been acquired when it became the Principal Employer under the 2002 deed. The Trustee made clear from the outset that it contended that one of the reasons why the doctrine did not apply in the present case was that, unlike the members of a pension scheme who have a right to the benefits for which the scheme makes provision, M&B has no right to receive anything from the Plan. As I have explained, M&B did not contend that it did, but what it did say, anyway by the end of the trial, is that the terms of the 2002 deed, which governed the Plan at the time it became Principal Employer, included the powers and entitlements that I have already referred to as being relied on by Mr Rowley (including the IAP), the exercise of which was capable of affecting the extent to which its liability to contribute to the Plan might have been increased or reduced.

250. Mr Tennet submitted that it was not correct to classify any of the rights or powers assumed by M&B on its succession as Principal Employer as interests in property, nor was it correct to classify M&B as a purchaser of an interest in property, both of which are essential requirements for the purposes of a *bona fide* purchase defence. In support of this submission the Trustee cited *Investors Compensation Scheme Ltd v West Bromwich BS* [1998] 1 WLR 896, 915C, in which Lord Hoffmann said that a chose in action is "*property, something capable of being turned into money*". He also said that a chose in action is a personal right of property which can only be claimed or enforced by action not by taking possession and is the debt or damages to which (in the context of an assignment) the assignor is entitled.

251. He then submitted that a chose in action that amounts to property is to be distinguished from a right in the form of a power, which is not. As Fry LJ explained in *Ex Parte Gilchrist; In re Armstrong* (1886) 17 QBD 521, 531 in a passage cited in Thomas on Powers (2nd edn at para 1.04):

> "*No two ideas can well be more distinct the one from the other than those of 'property' and 'power'. A 'power' is an individual personal capacity of the donee of the power to do something. That it may result in property becoming vested in him is immaterial; the general nature of the power does not make it property. The power of a person to appoint an estate to himself is, in my judgment, no more his 'property' than the power to write a book or to sing a song. The exercise of any one of those three powers may result in property, but in no sense which the law recognises are they 'property'. In one sense no doubt they may be called the 'property' of the person in whom they are vested, because every special capacity of a person may be said to be his property; but they are not 'property' within the meaning of that word as used in law.*"

252. Mr Rowley pointed out that there are exceptions to the general principle when for example the law will treat the donee of an absolute disposing power as the effective owner of property for some purposes (see Thomas on Powers 2nd edn at para 1.06). He also submitted in his oral closing that there was no reason why (e.g.,) a personal licence to occupy land which gives no proprietary rights should not be treated in the same way as a lease which is an interest in property for the purposes of the *bona fide* purchase defence. As I understood it, the thrust of his submission was that there was no reason not to treat the powers in the present case in the same way as property, anyway for the purposes of the *bona fide* purchase defence. The powers to which he referred relate to the administration of a trust and the management of a Plan and he said that their exercise may lead to financial consequences which enure either to the benefit or detriment of M&B as the Principal Employer.

253. Mr Rowley frankly accepted that he was unable to cite any authority in support of this submission and I do not think it is correct. Every formulation of the *bona fide* purchaser defence to which I was taken during the course of the argument treated the acquisition by the purchaser of some form of interest in property as an essential element of the defence. This is unsurprising as the principle is concerned with competing interests in the same property and, to the extent that it applies at all, applies in the same way in the context of a claim for rectification. As I have already said, the way it is formulated in that context by the editors of Snell's Equity (34th edn at para 16-025) makes clear that it applies to protect a purchaser "*who takes an interest conferred by the instrument*". This is no different to the conventional application of the defence and is in my view as much an essential element of its application to the position of the principal employer under a pension scheme as it is in other contexts.

254. The powers in the present proceedings are not capable of being turned into money, nor are they anything other than a power the exercise of which may or may not result in financial consequences for M&B as the holder of the power. As Mr Tennet submitted, they are if anything powers to deal with the property of others, not powers to deal with its own. There was no authority to which Mr Rowley was able to take me in which it has been held that such powers have been treated as property. Nor, more particularly, was I taken to any authority in which rights or powers of the quality relied on were held to be acquired free of any prior interest by operation of a *bona fide* purchaser defence.

In my judgment, for this reason as well, the assumption by M&B of the rights and powers under the 2002 deed do not amount to a purchase of an interest in property for the purposes of a *bona fide* purchase defence.

255. There is in any event a more complex question which arises. Even if M&B did acquire an interest in property, it can only have been an interest in an intangible chose in action. This opens up the application of the rule that an assignee of a chose in action takes subject to the equities. Because of the conclusions I have already explained, and the way that this point developed, it is not necessary for me to reach a concluded view on it. However, I should say something about it so as to record the way in which the argument went during the course of the trial. The difficulty has been caused in part by the fact that, while it certainly appeared at the outset that M&B contended that it acquired whatever it received when it became Principal Employer by assignment, that was no longer its position by the end of the trial.

256. The rule that an assignee of a chose in action takes subject to the equities includes in particular those categories of equity which vitiate the assignee's claim against the debtor and relate directly to the chose. At first blush, and given the fact that a claim to rectification is an equity to which the principle applies (Smith on the Law of Assignment (3rd edn at para 26.30)), this gives rise to some difficulty for M&B. The equity to rectify was plainly in existence at the time that M&B became Principal Employer because it arose from the moments that the 1996 deed and the 2002 deed respectively were executed.

257. The circumstances in which the rule that an assignee of a chose in action takes subject to the equities applies even against a *bona fide* purchaser for value is considered in a number of authorities and discussed in several textbooks (see for example Smith on the Law of Assignment (3rd edn at para 26.46ff), Lewin on Trusts (20th edn at para 26-020 and 26-021) and Snell's Equity (34th edn at paras 3-024 and 3-028)). But for present purposes it seems to me that it is sufficient to say that, where a claim to rectify an instrument could be set up against an assignor, the explanation given by Guest on the Law of Assignment (4th edn at paras 7-01 and 7-06) identifies the issues:

> "***7-01*** *An assignee takes his assignment "subject to equities". This means (inter alia) that he will in principle be exposed to any defence, right of set-off or right of retainer which would have been available to the debtor or obligor against the assignor. In Mangles v Dixon Lord Cottenham LC said: "If there is one rule more perfectly established in a court of equity than another, it is, that whoever takes an assignment of a chose in action … takes it subject to all the equities of the person who made the assignment". It is immaterial that the assignee takes the assignment for value and without notice of the equities existing between the obligor and the assignor. As Sir John Romilly MR explained in Cockell v Taylor:*
>
> > *"The rule relative to the equities which attach on a chose in action has been discussed and established in many cases. It has not been disputed, nor can it be doubted, that the purchaser of a chose in action does not stand in the situation of a purchaser of real estate for valuable consideration without notice of any prior title but that the purchaser of a chose in action takes the thing bought subject to all the prior claims upon it.*"

> "***7-06*** *The assignee is also vulnerable to defences of the obligor that impeach the existence or enforceability of the chose in action assigned even though he purchased the chose for value and had no knowledge of the circumstances constituting the defence at the time he took his assignment.*"

258. After this point had arisen, Mr Rowley sought to meet it in his oral closing submissions by submitting that on reflection it was not part of M&B's case that the November PE deed took effect as an assignment of Retail's rights and powers as Principal Employer. This was not very satisfactory because it was clear from M&B's written closing that its case was and always had been that it had taken an assignment of the rights and powers of the Principal Employer under the terms of the 2002 deed and rules.

259. Mr Rowley submitted that the November PE deed (and the March PE deed before it) operated as an assumption and discharge of the rights and obligations of the Trustee and the Principal Employer under the 2002 deed and rules. He submitted that, even though there was no assignment or transfer, the fact that M&B became the Principal Employer and gave value was sufficient to bring the relationship within the doctrine of *bona fide* purchaser for value. It was enough on his submission that value has been given and rights have been acquired. He said, in effect, that it was possible to be a purchaser for these purposes through the assumption of an office, in this case that of Principal Employer under the 2002 deed.

260. Mr Tennet complained that abandoning this way of approaching the case at such a late stage in support of an unheralded new argument (albeit based on a pure point of law) put him in some difficulties. But he said that it was clear that what M&B received under the November PE deed can only have been that which the previous Principal Employer (i.e., Retail and before it Bass / 6C Plc) had under the 2002 deed and rules. This, therefore, can only have been an assignment of the rights and powers which the previous Principal Employer had been entitled to exercise, made with the consent of the Trustee, being the only other party to the deed under which those powers arose.

261. He submitted that there were only really two alternatives. The November PE deed either gave effect to a transfer by way of assignment of what the previous Principal Employer already had, or it was the creation of new rights and powers. If it was the latter, which he said it was not, this was a wholly unheralded new way of putting the case, and it was far too late for that to be done. But he also pointed out, in my view quite correctly, that if it was the latter, it is very difficult to see how the *bona fide* purchaser defence could run at all because the assumption by M&B of these new rights and powers could not on any view constitute M&B as a purchaser of anything, let alone an interest in property. In short, they were in law new rights not purchased rights.

262. I agree with this submission. Reverting therefore to the rule that an assignee of a chose in action takes subject to the equities, because of the way that Mr Rowley now makes his case, it is not necessary for me to decide the point. In my view, the way he now argues M&B's case means that the *bona fide* purchaser principle does not apply at all. Even if that were not to be the case, I think that the same result would have been achieved by application of the rule, although I should stress that my preferred conclusion is that the question is more satisfactorily resolved by the true construction of the PE deeds.

263. Finally on this aspect of the case I should say something about *bona fides* and notice. So far as *bona fides* is concerned, the position was not much explored in argument, but nobody submitted that it was not a separate requirement to notice, although the answer will normally be the same. Mr Tennet submitted that the basis on which substitution was agreed was that it would not affect the rights and liabilities of the members, a submission which I accept. What I have more difficulty with is his submission that the court should assess *bona fides* not at the time of the relevant transaction, i.e., the entering into of the November PE deed when there is no suggestion that M&B was acting other than in good faith, but when the purchaser comes to equity for relief by asserting the defence despite the basis on which the substitution was agreed.

264. Nothing turns on the point in light of my other conclusions, but I am not sure that Mr Tennet's submission is correct. All other things being equal the question is whether M&B as a purchaser for value acted *bona fide*. In my view, this requires an enquiry as to its good faith at the time of the purchase and more particularly when it gave value, which on M&B's case is when it undertook the liabilities of Principal Employer. At that stage it knew nothing about the mistake or the Trustee's ability to claim rectification. If all the other elements of the defence had been satisfied, I do not think that M&B lacked *bona fides*, merely because it acted in an inconsistent manner at some later date.

265. As to notice, the position is slightly more complicated. At the heart of the debate was what M&B referred to as an irreconcilable tension between the Trustee's case that there was a common failure to appreciate a mistake in the drafting and its assertion on this part of the case that M&B was on notice of an equity to rectify and therefore not a *bona fide* purchaser for that reason. The Trustee's answer to that submission was that actual notice of an equity to rectify does not require the purchaser to know that the wording of the instrument contained a mistake and Mr Tennet illustrated this submission by citing *Blacklocks v JB Developments (Godalming)* [1982] Ch 183, a decision that was discussed and approved by Neuberger J in *Nurdin & Peacock*.

266. In *Blacklocks* it was held that where the vendor and purchaser of registered land were both mistaken as to the precise extent of the land conveyed, and a subsequent purchaser laboured under the same mistake, the vendor's equity to rectify was enforceable against the subsequent purchaser as much as it was against the purchaser with whom the vendor originally transacted. Mr Tennet submitted that the reason for this was that the conscience of the second purchaser was as affected by the common intention at the time of the original mistake as were the parties to the original transaction. Mr Rowley said that this was not the right analysis. The case was simply one about reasonable enquiry on the facts because he said that the judge would have taken the view that if the second purchaser had asked the vendor (who was in occupation of the disputed land) whether he claimed any rights in respect of it, he would have been told by the vendor that he claimed to own it. I do not think, however, that this was the basis on which it was decided.

267. I think that the Trustee's approach is the correct one. If the decision-makers at Retail or M&B did not think that the pension increase provisions included the IAP and, at the time they became Principal Employer, had the same subjective intent as to the nature of the pension increase provisions as the decision-makers at 6C Plc and the Trustee, it seems to me that that is sufficient to burden Retail or M&B with the equity to rectify. If that is established the entity concerned will be on notice of the equity at the time it

acquires the interest it does. It was stepping into the shoes of the Principal Employer with the same erroneous belief as its predecessor in office had as to the form, nature and meaning of the Plan's pension increase provisions. It is not therefore necessary to go on and ask the question, which Mr Rowley suggested was the question that would have been asked in *Blacklocks*: was there any good reason (such as occupation of the land in that case) why they should have enquired into the question of whether or not the unrectified deed disclosed the mistake?

268. There are two stages to answering the first question that does need answering on the facts. The first is to identify the relevant individuals and the second is to determine whether their state of mind is attributable to Retail and M&B as the case may be. On the first of these questions, there was of course a considerable overlap of directors between 6C Plc, the Trustee, Retail and M&B from which it was possible to demonstrate that directors and decision-makers at the Retail and M&B level were as mistaken as to the true nature of the pension increase provisions as were the directors and decision-makers acting for the Trustee and 6C Plc. Those individuals so it was submitted were fully aware that 6C Plc and the Trustee did not intend the pension increase provisions and the governing documentation of the Plan to include the IAP or indeed to have been materially changed since before 1996. They therefore shared the same mistaken belief in their capacity as directors of Retail and M&B as they did in their capacity as directors of 6C Plc and the Trustee.

269. Having analysed the evidence given by the individual members of M&B's board, I think that the Trustee has established this part of its case. I have explained my conclusions on their evidence earlier in this judgment in the context of their intention as to the 2002 deed and the structure of the demerger, but I think that the most important witnesses were Mr Clarke, Ms Kennedy and Mr Bramley each of whom was a director or officer of both Retail and M&B throughout the relevant period. I am satisfied that each of them had an actual, but erroneous understanding throughout 2003 (i.e., the period in which Retail and then M&B became Principal Employer) that the Plan's pension increase provisions were in the form explained in the Plan handbook and that they had not changed since before the execution of the 1996 deed. The evidence of the state of mind of Mr Naffah at this stage is less clear-cut, but that is of no real relevance because three directors or officers of Retail and M&B, each of whom had a direct involvement in the affairs of the Plan and two of whom were directors of the Trustee had an actual understanding as to the pension increase provisions which was mistaken.

270. This leaves only the question of whether their state of mind in relation to the pension increase provisions is attributable to M&B and Retail as the case may be. There was no dispute between the parties that the question for this purpose is whether they were under duties to give information they received qua directors of one company and receive it in their capacity as a director of the other. I have no doubt that this aspect of the test is satisfied. The assumption by Retail and then M&B of the position of Principal Employer was all in the context of the demerger and corporate reorganisation where there was what the witnesses described as essential continuity of management before and after its completion. In my view it is unrealistic to think that, so far as dissemination of this information was concerned, there was any reason for one company in the group to keep any of the relevant information confidential from another, and it was all of a character which in my view was in the best interests of each entity to know.

271. Mr Tennet also submitted that Retail and M&B could only take free of the equity to rectify (if otherwise a purchaser for value) if, given the universal belief that the pension increase provisions continued in their pre-1996 form as reflected in the Plan handbook, they carried out a proper investigation which they did not do. Had they done so with that question in mind, he submitted that they would have discovered the error in rule 23, because that would have been the focus of the enquiry.

272. This point goes to constructive notice and in this context requires M&B to prove a negative. I do not think that Mr Rowley is correct to point to a tension between on the one hand the Trustee's case that nobody was aware of the mistake at the time of execution of the 1996, 2002 and 2006 deeds and on the other the obligation on Retail and M&B to make enquiry. The reason there is no tension is that the two exercises were very different. Each of the redrafting processes was concerned with a consolidation exercise as to the existing deeds and rules. None of them was intended to amount to a substantive re-write. However, on M&B's case, when it became Principal Employer it was purchasing an interest, thereby acquiring what for it were new rights. If that is the right way of analysing it (which I do not think it is for other reasons, but it is the only basis on which the *bona fide* purchaser defence could work in the first place), the duty of Retail and then M&B to enquire would be very different. They knew that they were taking on obligations and duties under the PE deeds, and due diligence points to them making at least some enquiry as to what they were.

273. There is no evidence that any steps to that effect were taken, and it seems improbable that they were. The reality is that Retail and M&B did not do so because neither of them considered that it was acting as a purchaser when it assumed the position of Principal Employer under the March PE deed or the November PE deed as the case may be. But in any event M&B has not shown that, if a proper comparison exercise of the 2002 deed and rules and the 2003 handbook had been carried out, this point would not have been picked up. I think that if that had been the focus of the enquiry, which is an exercise that any prudent purchaser regarding itself as such would have carried out, there is every chance that it would. In my judgment, for that reason as well, M&B has not shown that either Retail or it was not on notice of the equity to rectify at the time they (respectively) assumed their positions as Principal Employer.

<u>Rectification of the 2006 deed</u>

274. The next issue is whether the 2006 deed should be rectified so as to remove the IAP and restore the ISP. Unlike M&B's position on the 1996 and the 2002 deeds it does not submit that it was a *bona fide* purchaser, but it opposes this application on the grounds that there was no rectifiable mistake. As it had become the Principal Employer by the time the 2006 deed was executed, there could be no question of a *bona fide* purchaser defence to a claim to rectify this instrument, although M&B submitted that the question of whether or not rectification should be granted and the correct approach to doing so would be affected by the conclusion the court reached on the *bona fide* purchaser defence to the claim to rectify the 1996 and 2002 deeds.

275. The Trustee's case was that the principal purpose of the 2006 deed was to make the alterations that were needed to give effect to the pensions tax regime introduced by the FA 2004, the Pensions Act 2004 ("PA 2004") and the Civil Partnerships Act 2004. Mr

Bramley said that, like the 2002 drafting exercise, what he called the 2006 consolidation was seen by the directors of the Trustee as a non-event. He recalled no discussion of the pension increase provisions.

276. The alterations needed to give effect to the new legislative regime were specifically identified in the papers that were submitted to the decision-makers for both M&B and the Trustee and made no reference to any change to the pension increase provisions. It was said that, in approving the form of the 2006 deed, the individuals continued to have an ingrained understanding that those pension increase provisions contained the 5% LPI guarantee and the Aim. For that reason, their actual subjective understanding of those provisions was inconsistent and incompatible with the existence of the IAP.

277. I shall come onto the evidence which relates to that question shortly, but it is necessary first to explain how M&B's positive case in response to the Trustee's claim to rectify the 2006 deed developed, bearing in mind its concession that the terms of the pension increase provisions in the 1996 deed and the 2002 deed did not reflect the parties' subjective intention. As the Trustee submitted, any positive case that M&B chose to advance required it to explain how and why it was that, having made a mistake in 2002, the relevant decision-makers decided to leave that mistake in place, thereby accepting a change which they had previously regarded as a non-starter.

278. The way in which M&B approached this issue in its pleadings was that there was a common intention not to alter but rather to retain the pension increase provisions as then drafted. It specifically denied that there had been no substantive change to the pension increase provisions affected by the 1996 deed. It made a number of allegations by way of positive case to the effect that it was known and understood that the effect of the 2006 deed was that the pension increase power was vested not in the Trustee but in the Principal Employer (by then M&B).

279. In its written closing submissions, the Trustee submitted that this way of putting M&B's case was no longer sustainable in light of the evidence. As will appear that is plainly right and in its closing submissions M&B accepted this was the case and changed tack. It expressly abandoned what it called its case that the parties positively intended to include the IAP in the 2006 deed and rules.

280. M&B submitted, however, that the nature of what the Trustee had to prove in order to justify rectification of the 2006 deed depended on whether M&B succeeded in its *bona fide* purchaser defence. The reason for this is said to be that the loss of the equity to rectify the 1996 deed and the 2002 deed cannot revive as against M&B unless it could be shown by the Trustee that there was an actual common intention by the relevant decision-makers to change the wording of the 2002 deed so as to remove the IAP and insert the ISP. It was submitted that this was no part of the Trustee's case because it had pleaded in para 109 of its Re-Amended Particulars of Claim that:

> "*the Trustee and [M&B] had a common intention that the 2006 Deed would, when executed, make the amendments referred to in Ms Deeley's paper of 22 March 2006 and Appendix 1 to that paper (being the solicitors' note of 14 March 2006) and not otherwise alter or remove existing substantive rights or liabilities under the Plan (including any equity to rectify any provisions of the plan)*."

281. In effect Mr Rowley submitted that, if the equity to rectify the 1996 deed and the 2002 deed had not survived as against M&B because of the operation of the *bona fide* purchaser defence the substantive rights or liabilities under the Plan were those expressed on the face of the 2002 deed in its unrectified form (i.e., including the IAP and excluding the ISP) unless referred to in the Deeley paper dated 22 March 2006 and its appendix. It therefore followed that, because the Deeley paper made no reference to an amendment to remove the IAP or reinsert the ISP, it was said by M&B that it was the Trustee's case that this was not intended.

282. To be fair, Mr Rowley said that he was not taking a pleading point and given the way his own client's case developed and changed during the course of the hearing that was a sensible line to take. But in any event, I do not think that this is a fair way of reading the Trustee's case because the reference to the equity to rectify (particularly when read with para 111 of its Re-Amended Particulars of Claim) must have been on the basis that the equity was established (i.e., without regard to the *bona fide* purchaser defence). Para 111 makes this clear by pleading that the common intention was to include the pension increase provisions in the form of the 1996 and 2002 deeds as rectified, i.e., without the IAP but with the ISP. In any event, because of the conclusion I have reached on the application of the *bona fide* purchaser defence, this point falls away. I should stress, however, that I do not think that Mr Rowley's submission was correct, even if M&B's *bona fide* purchaser defence had succeeded. The question for the court is the form of the common subjective intent. The mere fact that the Trustee was unable to obtain rectification of the 1996 and the 2002 deeds because of the application of the defence is most unlikely of itself to affect that question.

283. However, while M&B conceded in closing that the evidence did not justify a case that the parties positively intended to include the IAP in the 2006 deed, it submitted that the evidence was consistent with what it called Intention Category (2) to the effect that the decision-makers intended that the 2006 deed should do no more than reflect the *unrectified* provisions of the 2002 deed, continuing the substance of those provisions as they stood at the time of the 2006 deed. The Trustee's submission was that, when the decision-makers for the Trustee and M&B were considering the 2006 deed and intending there to be no change to the pension increase provisions, their state of mind was as to the pensions increase provisions as they understood them to be (i.e. in the form for which rectification is sought), not in the form they took in the unrectified version of the 1996 and 2002 deeds and rules.

284. It is immediately obvious that this dispute requires a careful analysis of exactly how the witnesses expressed themselves in the evidence they gave, but it also requires a proper appreciation of the right starting point. In particular it is relevant to an assessment of the intention of the decision-makers to have regard to what they then understood the pension increase provisions to be. This seems to me to be the critical issue.

285. In considering this question, the approach of Warren J in *IBM* was relied on by M&B. *IBM* was a case in which there was what was called a serial error in successive pension trust deeds and serial rectification was sought. The issue was whether the plan's inclusion of a consent requirement for the payment of pensions between the ages of 60 and 63 was a rectifiable error when the trustee could not show that there was any subjective intent at the time of the relevant later deed that there should be a right to early retirement without consent. Warren J said (at para 448) as follows:

> "*How, then, can it be said that the 1990 Trust Deed and Rules should be rectified when the Trust Company cannot demonstrate that the relevant individuals had a positive intention that there should be a right to early retirement without consent between ages 60 and 63, the onus being on it to establish the intention necessary for rectification? The answer to that is that a different intention may be sufficient. Thus, if it were clear that the intention was that the 1990 Trust Deed and Rules should reflect the entitlement which members of the C Plan had as a matter of law, it would follow that the 1990 Trust Deed and Rules ought also to reflect those rights; if the 1983 Trust Deed and Rules were subject to a valid claim for rectification, then the 1990 Trust Deed and Rules ought to reflect that claim and themselves be rectified to give effect to the intention. In contrast, if it were clear that the intention was that the 1990 Trust Deed and Rules should do no more than reflect, in new language, the provisions of the 1983 Trust Deed and Rules continuing the substance of those provisions as they stood at the time of the 1990 Trust Deed and Rules, a claim to rectify the 1990 Trust Deed and Rules would fail. Remedies may be available to ameliorate the effect of the mistake in the 1983 Trust Deed and Rules, but rectification would not be one of them.*"

286. Mr Rowley said that the present case fell into Warren J's second category, because any intent was only to reflect in new language in the 2006 deed and rules the provisions of the 1996 and 2002 deed and rules continuing the substance of those provisions as they stood at the time. But it is important to appreciate that Warren J was approaching serial rectification on the basis of the facts of his case in which importantly he had previously held that (*IBM* at para 445), "*there is no evidence of the subjective understanding of any of those attending the board meeting about the contents of the 1983 Trust Deed and Rules in relation to early retirement*." It seems to me that, if those whose subjective intention is in issue did have an understanding about the contents of the earlier deed, albeit one that was incorrect, a different intention again will be sufficient, namely an intention to reflect in new language the provisions of the 1996 deed and the 2002 deed continuing the substance of those provisions as their meaning was understood to be at the time of the 2006 deed and rules. Doubtless there would have been no specific understanding one way or the other in relation to many of the provisions, but if there were to be a specific understanding in relation to any particular provision (such as the pension increase provisions) that was not reflected in the language of the 2002 deed, that is likely to be an important consideration in assessing the relevant subjective intent.

287. It follows that the important question is whether, when they gave their evidence that they intended no change, the decision-makers had what they believed to be an actual understanding of the meaning of the relevant parts of the 2002 deed. On the assumption that they did have such an understanding, did they intend no change from the way they understood this benefit as described in the Plan handbook or did they have in mind no change from the way it was in fact described in the 2002 rules? This is why, in order to answer that question, it will be necessary to look at the extent of their ingrained understanding as to how the pension increase provisions worked. That is illuminated in part by the evidence as to what occurred up to the time of the demerger, on which I have already expressed my conclusions. It is also affected by the evidence of what occurred between the demerger and the execution of the 2006 deed and rules (and indeed thereafter) which is the part of the story to which I now turn.

288. The prevailing view relating to pension increase entitlements continued to be that members of the Plan were entitled to an annual pension increase at 5% LPI. This was certainly the understanding of those working in the pension department such as Mr Hammond, who gave clear evidence to that effect. It was also reflected in Ms Deeley's evidence. She became the M&B pensions manager in 2003 and said that the way in which the Plan was administered reflected her clear and long held understanding that pensions were guaranteed at RPI up to 5%. Although she had to check the Plan's deed and rules for some benefits, she never felt the need to do so when applying the annual pension increase, because she knew that that was how the Plan had long been administered.

289. This prevailing view reflected the fact that, once the demerger was complete M&B continued to represent to Plan members that the pension increase provisions were guaranteed at 5% LPI. The form of words in the September 2003 edition of the Plan handbook was almost identical to the form of words used in handbooks and booklets issued before the demerger:

> "*Pensions in excess of any GMP (see page 4) are guaranteed to be increased on each 1 October in line with the rise in the Retail Prices Index (RPI) for the year ending 31 May preceding the review date, up to a maximum of 5%. Where the rise in the RPI exceeds 5%, it is the present aim of the Company and the Trustees to pay an additional discretionary increase of 2/3 of any rise in the RPI which is above the 5% guarantee. Although not a promise, in practice, this additional increase has been achieved in the past.*"

290. It was also at least consistent with the regular newsletters sent out by the M&B pension department the summer 2003 edition of which confirmed that:

> "*Pensions in excess of the Guaranteed Minimum Pensions (GMP) for pensions in payment and deferred pensions (those of former employees who have not yet retired) will be increased by 3% with effect from 1 October 2003. This figure is the increase in the Retail Prices Index (RPI) over the year up to May, as specified in the Plan Rules*."

291. It also seems to have been the position of Ms Smith who wrote a memo to the directors of the Trustee and the trustee of the Executive Plan on 23 March 2005, with a recommendation that an entitlement to an increase at RPI up to 5% be removed from the defined contribution section of the respective plans but recognising that RPI up to 5% would continue to be the position in relation to the defined benefit section. She said that M&B was making no proposal that this level of increase be changed, which was something that Ms Kennedy thought would have had to be agreed with the Trustee in any event, in light of her belief at the time that M&B had no unilateral power to alter the rate. At the same time, Ms Smith confirmed to Mr Carr's assistant, Mr David Coleman, that M&B had no proposals to reduce contractual pension increases from 5% LPI to 2.5% LPI for future service.

292. The issue raised in the correspondence between Ms Smith and Mr Coleman had first arisen in July 2003, when Mr Jones wrote a memo for the directors of the Trustee which summarised a government announcement that the statutory LPI would be capped at 2.5%. Mr Bramley had no recollection that there was any further discussion by the

board of the Trustee on the impact this might have on what he understood to be the continuing pension increase provisions of 5% LPI for the amount in excess of GMP.

293. According to Ms Kennedy, the genesis of the proposal to introduce the rule changes which ended up as the 2006 deed and rules was a memorandum dated 11 July 2005 from Ms Smith to the directors of the Trustee and the trustee of the Executive Plan (for their meetings held on the same day) in which she outlined the consequences of the changes introduced by the FA 2004. The memo suggested that the focus should be on adjusting current provisions and practice without making any substantial revisions. She suggested that the detail be considered by the documentation sub-committee which would recommend the final amending documents to the board.

294. At the same meeting at which the board considered Ms Smith's memorandum, the Trustee board was also presented with an example of one of the pieces of documentary evidence on which M&B placed particular reliance and on which a number of the Trustee's witnesses were cross-examined. This was the first of a number of administration reports in the evidence, four more of which were prepared for meetings held after the execution of the 2006 deed (on 21 June 2006, 18 June 2007, 24 September 2008 and 8 July 2009). Ms Deeley who was responsible for their preparation explained that their purpose was to update the Trustee on what was going on in the Plan's administration, providing relevant statistics, including the number of leavers, how things were progressing and whether there were any administration issues.

295. Their significance is that, although their executive summaries either did not refer to the Plan's pension increase provisions at all or did so in a way which indicated that they were to be applied in a manner which was consistent with the existence of a guaranteed 5% LPI, the description of the Plan rules which was included within the body of the report, described at para 5.1.1 the pensions increase provisions in the following terms:

> "*The Plan rules provide for annual increases to pensions in excess of any Guaranteed Minimum Pension in line with the rise in the Retail Price Index (RPI) up to 5% (or any other rate decided by the Company). It is the present aim of the Company and the Trustees to pay an additional discretionary increase of two-thirds of any rise in the RPI which is above the 5% guarantee*."

296. The report then went on to describe the pension increase proposal for the next year in a manner which was both consistent with the guaranteed 5% LPI, and not inconsistent with the possibility that M&B retained an unexercised discretion to set a rate other than RPI up to 5%:

> "*The RPI rose by 2.9% in the year to 31st May 2005, which is the base period for determining the 1st October 2005 increase. Therefore, the increase to be applied at 1 October will be 2.9%. As inflation is less than 5%, no additional increase is required*."

297. It is tolerably clear that the words in parentheses in the first passage cited above amounted to a reference to the IAP, although I think that the waters are muddied somewhat by the reference to the Aim, because the way that the paragraph is drafted, with the reference to the 5% guarantee at the end, reads as a description of M&B's discretion relating only to the additional increase above 5% while the increase up to that amount is described as a guarantee. It also seems to me that the second passage is

more consistent with a guarantee than the existence of any general discretion in the hands of M&B, because what reads as a right to 2.9% is drafted in imperative terms which does not reflect any belief by the writer of the report that M&B may have had a discretion to apply another rate.

298. As I shall explain, the unanimous evidence of the witnesses was that for a number of reasons they did not focus on this form of words and certainly did not appreciate that it appeared to introduce the IAP. This evidence is consistent with the fact that, at the same meeting as the administration report was presented, the directors considered and amended a draft of the 2005 annual report for the Plan which referred to the pension increase provisions contrasting the Aim which was not a "*binding commitment*" with the increase of up to 5% LPI as something that "*will*" be made.

299. Indeed Ms Deeley, who drafted or supervised the drafting of the administration reports said that the Trustee never consulted or discussed with M&B on any increases up to 5%. If RPI was less than 5%, that was she said done and dusted. She confirmed that the wording of this increase rule was never discussed at any of the board meetings that she attended and maintained her evidence that her understanding had always been that the 5% LPI increase was a guarantee. However clear it may seem to the reader (looking at those words in the light of this dispute) that the rule appeared to give M&B a general discretion to set the rate, I do not think that Ms Deeley appreciated at the time the legal effect of the words used.

300. It was the practice for administration reports to be prepared for all Trustee board meetings and Mr Bramley said that it was his practice to focus on the executive summary at the beginning of each report and only skim read the body of the report. This was consistent with Ms Deeley's evidence. She said that, at the meeting she would go through anything on which the board needed to make a decision but otherwise would simply respond to questions. Any issue of significance would be pulled out of the report and dealt with as a separate agenda item. This is consistent with the way in which they were treated by those members of the board of the Trustee who read them. Thus, Ms Kennedy said that she would only have scanned most of the report and would not have read it for the purposes of determining the interpretation of the Plan rules.

301. Mr Bramley also explained how the administration reports were not normally a major part of the business of board meetings. The usual practice was for meetings of the boards of the Trustee and the trustee of the Executive Plan to be scheduled for successive times on the same day, after which a joint meeting was held at which the bulk of the business was discussed. The administration report was discussed at the separate Trustee board meeting, the totality of which would not normally take more than 30 minutes. At the 11 July 2005 board meeting, Mr Bramley said that all that was required was board confirmation for the October 2005 increase. His understanding was that with inflation below 5% and provided that the correct time period for measuring RPI had been taken "*the pension increase was a given and there was no need for further debate*". He said that it simply would not have occurred to him that a power to increase lower than RPI could be implied or construed.

302. Having made clear in his oral evidence that the guarantee of 5% LPI referred to in the Plan handbook was longstanding, Mr Jones said that if he had focused on para 5.1.1. in the administration report "*it would just have been the presumption that the company*

could increase it beyond 5% if it wished to as long as it provided the funding to the trustee to do that". His evidence then continued:

> "*Q. And the fact that none of the trustee directors raised a point on paragraph 5.1.1, and that the minutes record the administration report had been noted means doesn't it that at a trustee meeting, trustee directors all accepted the administration report as being correct?*
>
> *A. No, and I think the administration report was noted, as you said, but I think all trustees would know very well about the company's guarantee. I mean it was something they would know as a trustee, as a company officer and as an employee.*"

303. Mr Hammond, who also attended the 11 July 2005 board meeting in his capacity as financial controller of pensions, could not remember what occurred. He did not think that there would have much discussion about the pension increase, as the RPI was less than 5%, so (as he put it) the point would have been moot, because he remembered that increases based on RPI up to 5% were a guarantee. He was categoric in his evidence that nobody commented at the meeting on what the pension increase rules of the Plan actually said.

304. None of that evidence indicates that the members of the board of the Trustee may not have read the description of the pension increase provisions. However, it is consistent with the evidence of all of them to the effect that they did not identify the words in parentheses as recording the existence of the IAP with the possibility that M&B may have had the power to set a lower increase than 5% LPI. As Mr Bramley explained in evidence which I accept:

> "*There had just never been in the corporate memory any suggestion that this was possible. The directors of the Trustee at the time were all long serving, either retirees or employees of the Company, who had the same corporate memory. I do not think it would have been on either Trustee's "radar" that the Company could claim such a power*."

305. At the same meeting of the board (11 July 2005), the Trustee resolved to instruct Wragges to act for it in place of A&O. Ms Smith, who was at that stage the M&B director of pensions and company secretary to the Trustee, was initially the immediate contact for Wragges in day-to-day handling of the drafting process. Later it was Ms Deeley, when Ms Smith left the M&B group in January 2006. Mr Hammond was also involved in his capacity as the M&B group finance controller for pensions. The two members of M&B's senior management who were most closely involved were Ms Kennedy and Mr Naffah. Ms Kennedy was also a director of the Trustee. Mr Jones, who by then was chairman of the Trustee, also gave instructions to Wragges from time to time.

306. The solicitor responsible for the day to day drafting at Wragges was Ms White who confirmed that the instruction was to review and update the Plan rules, driven by the FA 2004 and PA 2004 changes. She said that Wragges were not instructed to review or overhaul the Plan's benefit structure or balance of powers unless they were impacted by the legislation. The supervising partner was Ms Cockerill. She said that, in light of those instructions, the proposed new deed did not need to amend or reconsider the Plan's pension increase provisions.

307. At the outset Ms Cockerill and Ms White discussed the scope of their review. As a result of this discussion, Ms White wrote to Ms Smith to confirm that Wragges envisaged that they would cover a number of areas, including what needed to be amended to comply with the FA 2004, a general update to address issues such as directors' fees and disability and amendments recommended in light of the PA 2004 "*such as allowing for transfer values after 3 months service or altering the provisions in relation to LPI*". This reference to a possible alteration of the provisions in relation to LPI was of some importance in light of this dispute, but Ms Smith responded in a way which caused Ms White to think that no change was required to the pension increase provisions. She said in her email:

> "*LPI has been changed for DC (where 5% was imbedded) but the PP rules refer to the legislation and require the the (sic) Company to make any change - and they decided no, so no change is expected for EPP where 5% is embedded.*"

308. Ms Cockerill stressed that the exercise they were asked to carry out was much more limited than consideration of every provision in the 2002 deed and rules. She saw this exchange between Ms Smith and Ms White at the time but did not read it as any indication that Ms Smith thought that M&B had the power to set the rate of pension increases. Even though Ms Smith's response was not very clearly expressed, I can see why it was that Ms Cockerill and Ms White treated this particular aspect of the instruction in the way they did. Furthermore, I do not think that it displays any indication that Ms Smith had focused on rule 23 as being a rule which gave M&B the unilateral right to alter the rate of inflation-linked pension increases.

309. This then led to Ms White sending a detailed scoping document to Ms Smith (copied to Ms Cockerill), which referred to a large number of clauses and rules in the 2002 deed and rules that might require amendment in light of the instructions she understood she had been given. These included rule 23 in respect of which Ms White made the following entry, which she said was intended to obtain Ms White's confirmation that the change from 5% LPI to 2.5% LPI was not one which M&B wished to make:

> "*For a pension which exceeds GMP, the rate of increase is RPI subject to a maximum increase of 5% per year (or any other rates decided by the Principal Employer).*
>
> *The Pensions Act 2004 allows pension increases to be reduced to RPI with a maximum of 2.5% but the company has decided not to change the level of increase?*"

310. Ms Smith had ticked this entry when she returned her annotated copy of the table to Ms White from which Ms White concluded that no change to rule 23 in relation to LPI was intended. What she meant by that was that she understood that the Trustee did not want to make any changes to the maximum by which pensions would be increased from 5% to 2.5%. Ms Cockerill agreed. So far as Ms White concerned, that was the end of her consideration of rule 23 and she never looked at it in its wider context of who held the power in relation to pension increases. She said that once the confirmation had been given there was nothing in the process of preparing the 2006 deed and rules which caused her to consider the LPI provisions of the Plan. Ms Cockerill's evidence was to the same effect. She said that, as she understood that Bass had made its decision as to how pensions were to be increased, and there were no further comments on this rule

she would not have considered this aspect of the scoping document in any detail if at all.

311. It is certainly possible that this exchange might have raised questions in the minds of any decision-maker in the group with an ingrained (albeit mistaken) understanding of how the pension increase provisions worked if they had concentrated on what it appeared to say. But there is no evidence that any of them did. Ms Smith did not give evidence and was not a decision-maker and it may not have come as such a surprise to either Ms Cockerill or Ms White if they had focussed on its effect, which they do not appear to have done.

312. The drafting approach which was then taken was to put the A&O drafted 2002 deed and rules onto the Wragges' system and work from there. As Ms White said the Trustee did not want the format originally derived from the A&O standard form to be changed.

313. There was then a meeting between Ms Smith, Ms Cockerill and Ms White on 14 September at which the scoping document was considered. Ms White had no recollection of any discussion of rule 23 and there is no indication from the notes of the meeting made by Ms Cockerill that there was. Ms Cockerill said that if the rule had been discussed she would have made a note. There was also another meeting on 20 September attended by Ms Cockerill but not Ms White. There is no evidence that the pension increase provisions were discussed at this meeting either.

314. The first full draft of the proposed new deed and rules was sent by Ms White to Ms Smith on 23 September showing the changes as a mark-up. There was a minor change to rule 23 to replace the word "*approval*" with the word "*registration*" in rule 23(5), but it was otherwise unchanged. In the light of the scoping instructions that Ms White had been given, she did not focus on any of the other parts of rule 23. On her first run through of the drafts, Ms Smith produced a comments schedule. She made no comment relating to rule 23 or the pension increase provisions. Neither Ms Cockerill nor Ms White thought that there was any further discussion of rule 23 at this stage. There were then some further drafts sent between Ms White and Ms Smith over the course of the next month, one of which led to the inclusion of a reference to a civil partner in addition to the reference to a spouse in rule 23(3), but rule 23 was otherwise untouched.

315. Once the process for the drafting of the 2006 deed had commenced a documentation sub-committee oversaw the drafting process, which Mr Bramley said would have been the same process as applied to the 2002 redrafting exercise. He does not seem to have had any independent recollection of what occurred, either in his capacity as a director of the Trustee or as a director of M&B although he explained what would have happened and said that he does not believe that the board of the Trustee or M&B would have regarded them as controversial in any way and would not have considered the changes at length. His evidence was that he thinks that the only parts he would have looked at were those which were highlighted in some way as being changes from the 2002 deed. He has no recollection of any suggestion that the guaranteed pension increases could be changed from the guaranteed 5% LPI at the sole discretion of M&B and says that he would have remembered it if there had been because it would have been regarded as a material development.

316. This evidence is consistent with Ms Smith's summary of the action points arising from the documentation sub-committee's December meeting. It lists the clauses in the draft

deed and the draft rules in the DB and DC sections which required consideration. There was no reference in the summary to any questions about changes to rule 23 in the DB section.

317. At about the same time, Mr Andrew Vaughan, M&B's group treasurer, was doing some work on alternative pension design solutions to save costs. On 13 September 2005 he wrote a paper for Mr Naffah, copied to Ms Kennedy, which addressed amongst other things the issue of discretionary benefits. He made the point that the Plan would need to be reviewed to identify benefits not fully guaranteed under the rules, the most significant areas of which he said were typically pension increases and early retirement. He added "*In our case pension increases are at the higher of RPI or 5% (with additional company discretion to offer two thirds of any increase above 5%)*". The word "higher" should obviously read "lower" but the sense is clear enough. Although Mr Naffah clarified his evidence to confirm that he would not necessarily have expected Mr Vaughan to make an explicit reference to any unilateral right that M&B may have had to change the rate of increase, the natural reading of the way in which Mr Vaughan expressed himself was that he understood that M&B's discretion only cut in above 5%.

318. More generally, this and a later paper dated 3 January 2006 looked at the economics of how the group might make savings on its annual contributions to its pension plans. Mr Naffah said that these papers, which Ms Kennedy called discussion documents presented for a possible negotiation between M&B and the Trustee, were no indication that anybody within the M&B management considered that a reduction in the rate of pension increases was something that M&B was entitled to impose unilaterally. I accept that evidence, not just because that is how Mr Naffah and Ms Kennedy described it, but also because in my view the relevant papers do not read as if the author thought that M&B had a right to do so.

319. Another piece of relevant work that was going on at the same time was a review by Wragges of the defined benefit section of the Plan handbook, the latest version of which was still the 2003 edition to which I have already referred. An update was prepared to be issued for A-day (i.e., 6 April 2006), which makes explicit in its benefits section that "*There is no change to how your pension is calculated or paid*". This amounted to a clear statement that there was to be no change from what had been said about pension increases in the 2003 Plan handbook (i.e., the guarantee of 5% LPI plus the Aim).

320. Ms Smith left in January 2006 before the drafting process was complete. Her role, anyway in relation to the work being done on the updating of the Plan deed and rules, was filled by Ms Deeley. Her recollection of what she was told about the purpose of the update was simply to take into account the provisions of the FA 2004 (i.e., the imminent coming of A-day) and the incorporation of changes made by deeds of amendment since the last consolidation. She was sent marked up copies of the existing forms of the 2002 deed and rules by Wragges on 31 January and 1 February and then attended a meeting with Ms White, which was also attended by Mr Vaughan, at which they went through the draft documents for the Plan and the Executive Plan. The note of the meeting prepared by Ms White makes no mention of the pension increase provisions in what was still rule 23 of the new draft and Ms Deeley does not think that she would have looked at it because it was not marked up. I am satisfied that she was right about that.

321. It seems that it was only late on in the preparation of the draft which became the 2006 deed and rules that Mr Edwards, as Plan actuary, was asked for his input on the document. Like the 1988 deed and the 1996 deed, the 2002 deed contained (also in clause 27) a power to alter or modify which was only exercisable after consulting the Plan actuary. It was in the same form as clause 27 of the 1996 deed and also included a proviso to the effect that no such alteration or modification could be made which in his opinion operated substantially to prejudice the rights or interests of any person already then a member.

322. Mr Edwards had only been appointed at the end of 2005 although much earlier (pre-the mid-1990s) he had worked on the affairs of the Plan in a support role to Mr Carr. He said that, even during the period in which he was not working on the Plan, he would discuss it with Mr Carr from time to time in a peer-reviewed context. He said it had always been his understanding that the rate of indexation for pension increases under the Plan was RPI up to a cap of 5%. He also said that he was aware of the Aim. He said that his understanding at the outset of his time as Plan actuary was that Bass did not have any power unilaterally to change these provisions.

323. Mr Edwards' recollection was that the 2006 consolidation was what he called an A-Day deed, i.e., one principally intended to take account of the changes introduced by FA 2004 and otherwise to tidy up the rules. The Trustee's initial contact with Mr Edwards was a request on 15 March 2006 for him to review the draft consolidation, which then took the form of a 240-page document. The only marked up changes to rule 23 were the "*civil partner*" and "*approval*" changes to rules 23(3) and 23(5). They did not include any change to rule 23(2). Mr Edwards took the view that it was impracticable to review the draft in detail within the timeframe that had been requested.

324. There does not seem to have been any focus on clause 27 per se, but on 20 March 2006, Ms Cockerill sent an email to Mr Edwards confirming that no section 67 certificate was needed because the power under section 68 was being used. However, she said that she thought that the directors of the Trustee would find it helpful if he could confirm that he could give such a certificate if needed. Ms Cockerill pointed to Ms White's schedules of changes as being a means by which Mr Edwards could save time.

325. The reference to Ms White's schedule of changes was a reference to a document dated 14 March 2006 which had listed everything described as one of the main changes for the new consolidated trust deed and rules. Two days later, on 22 March 2006, Mr Edwards confirmed in an email to Ms Cockerill and Ms Deeley that Ms Cockerill had confirmed that a section 67 certificate was not required and that so far as the rules were concerned "*subject to Vivien's concurrence, none of the changes adversely affect members' accrued benefits*". He stressed in his email that his opinion was only from an actuarial perspective and that his review had not involved a crosscheck of the draft documentation against the communications to members and instructions provided to the Mercer team for day-to-day benefits calculations and administration purposes. What was quite clear from the following passage taken from his oral evidence was that he simply did not have time to look at anything that was not specifically identified for his consideration:

> "*Q. Would you not have looked at the entirety of rule 23 in order to understand how the proposed amendments fitted into the rule as a whole?*
> *A. I don't believe so. There wasn't time available to do it.*

Q. Well it wouldn't take very long would it to read subrules (1), (2) and (4)?
A. Well it would have taken a long time to read all of the provisions that may or may not have been changed so we were focused on the area where you could see the tracked changes.
Q. Wouldn't the natural thing to do would be to read the whole of rule 23 as part of your discharging your functions as plan actuary under the terms of the power of amendment?
A. Well we had been guided by the lawyers to focus on the areas where the track changes had been added.
Q. I mean you had in your possession didn't you everything you needed in order to enable you to undertake the task of --
A. We didn't have the time in our possession to do the task.
Q. You have had the documents available to you, didn't you?
A. Yes.
Q. To enable you to do the task?
A. Yes, but not the time."

326. Mr Edwards also gave evidence that if he had been asked in 2006 to consider whether the removal of the ISP or the introduction of the IAP had been alterations that were first included at the time of execution of the 2006 deed and rules, he would have reached the opinion that such changes would operate substantially to prejudice accrued rights and interests in relation to pensionable service predating the 2006 consolidation.

327. The meeting at which the form of the 2006 deed was approved by the board of the Trustee was held on 22 March 2006. It did so by approving them in principle for finalisation by the documentation sub-committee. A memorandum had been prepared by Ms Deeley for consideration by the board. This was the paper referred to in the Re-Amended Particulars of Claim that I have already mentioned. It recorded that the proposed new deed and rules drafted by Wragges had been reviewed by the documentation sub-committee and attached by way of appendix the schedule prepared by Ms White describing the main changes. Those were described as being to incorporate amendments made since December 2002, to reflect some of the flexibility allowed by the FA 2004, to update some of the provisions in light of the PA 2004 and the Civil Partnerships Act 2004 and to incorporate M&B's decisions on future benefit provision for retail staff and life benefit cover only members. These were changes that Ms Kennedy described as administrative. None of the changes referred to in the Wragges' schedule related to the pension increase provisions or to rule 23. All of the witnesses including Mr Hammond and Ms Cockerill said that they had no recollection that they were raised at the meeting and would have been amazed if they had because of the impact that would have had.

328. Shortly before the 2006 deed was formally entered into there were discussions between Adam Batty, legal counsel in the M&B in-house legal department, Ms Kennedy (M&B's general counsel and HR director) and Mr Naffah (M&B's finance director) about the need for M&B itself to seek external advice on any of the changes introduced into the deed by the Wragges drafting. This was not considered necessary, an illustration in my view of the limited nature of the changes that were thought to be being introduced. As Mr Naffah explained, this was largely because the Trustee (through Ms Deeley) believed that there were no changes of substance to the Plan deeds and all that was required was a tidying up exercise.

329. The final form of the 2006 deed and rules was not in the event put before the board of M&B for its formal approval. The 2006 deed was executed and dated 6 April 2006 by Mr Naffah, a member of the executive committee and Ms Kennedy (M&B's company secretary). As a member of the M&B executive committee Mr Naffah had sufficient authority to make the decision on matters within his specific area of responsibility, which this was, without formal board approval. By that stage it was only significant matters relating to the Plan which needed the approval of the board. Ms Kennedy explained that, although she had no specific recollection of what she thought at the time, it would not have been referred to the board if she and Mr Naffah together considered that the changes were not significant, although it would have been if there was any intention to change the basis on which pensions increases were set, not least because it would have required actuarial input and a detailed communication plan to affected employees.

330. Mr Jones and Mr Hammond signed for the Trustee. The form of rule 23(2) containing the IAP was unchanged from the form it took in the 1996 and 2002 deeds and rules.

331. M&B's case was that, in these circumstances the evidence was overwhelming that no one considered that there had been an error in the 1996 and the 2002 deeds and rules, which were assumed to be correct. It also submitted that both the directors of the Trustee and M&B (through Ms Kennedy) intended to adopt the terms of the draft as laid before them, incorporating the changes highlighted by the markup to the draft together with the accompanying paper. The Trustee submitted that this was to take the evidence wholly out of context because it failed to give weight to the critical fact that, although the deeds were assumed to be correct, the witnesses all had an ingrained understanding of the meaning and effect of the pensions increase provisions that was inconsistent with those assumptions.

332. Ms Kennedy said that to the extent that rule 23 permitted Bass to reduce the rate of increase, that was not what the parties had in mind when entering into the 2006 consolidation. Her understanding, throughout the time of her involvement with the Plan, was that increases were granted at a guaranteed rate of 5% LPI and she never heard it suggested that M&B had the power to change the commitment. She went on to summarise her position, which is only consistent with her understanding in 2006 that the guarantee at 5% LPI still applied, as follows:

> "*If someone had said during the process of preparing the 2006 Consolidation that the effect of the 2002 Consolidation would be that the Company had the power unilaterally over pension increases, I would have said that this was something that would need to have been negotiated with the Trustee as we jointly agreed things. My understanding was that increases were paid at the lower of RPI and 5%.*"

333. Her intention in light of this understanding was then explored in the following cross-examination that was relied on by M&B:

> "*Q. And your intention was to adopt in 2006 the deed and rules in the form of the 2002 deed and rules, subject only to certain specified changes which have been identified to you, wasn't it?*
> *A. That is correct, but not with the intention that any errors should be repeated.*
> *Q. Well, you intended to adopt the terms of this document subject only to the changes, didn't you?*

> *A. We intended to change the rules as was required.*
> *Q. You didn't intend to adopt that instrument in any other form from as shown marked up by Wragges did you?*
> *A. Sorry, I don't -- I'm not sure I understand the question.*
> *Q. You didn't intend to adopt an instrument in any other form than as you read it marked up by Wragges?*
> *A. I read it to make sure that the changes we were told were required had been included in the document*."

334. I do not think that this evidence supports M&B's submission that Ms Kennedy's intention was to adopt in the form of the 2006 deed and rules the form of the 2002 deed and rules, subject only to certain specific changes which have been identified. The reason for this is that she made quite clear at the beginning of this line of questioning that she had no intention that any errors should be repeated. This was consistent with her ingrained understanding that the pension increase provisions were in the form described in the Plan handbooks:

> "*Q. ... Could I ask you first, this is the increase rule for pensions in payment under the scheme, could I ask you what you understood the 2006 deed to provide for as regards increases to pensions and payment under the scheme?*
> *A. My understanding was that above the guaranteed minimum pension, the rate of increase would be RPI up to 5% and then there would be a discretion on top to pay an additional amount.*
> *Q. And was that your understanding as to what subrule (2) provided?*
> *A. That is correct.*"

335. In my judgment, a fair reading of Ms Kennedy's evidence was that her intention was to adopt in the form of the 2006 deed and rules the form of the 2002 deed and rules, subject to certain specific changes that had been identified, and on the basis that she actually assumed that the pension increase rule above the guaranteed minimum took the form of RPI up to 5% and then there would be a discretion on top to pay an additional amount. I am satisfied that it follows from this evidence taken as a whole that her subjective intent was based on her ingrained but mistaken understanding that the 2002 deed and therefore the 2006 deed continued to contain the pension increase provisions in the form provided for by the Plan handbook.

336. The other decision-makers' evidence was also consistent with an ingrained understanding that at the time that the 2006 deed was entered into, the true nature of the pension increase provisions was as reflected in the Plan handbooks, i.e., the guaranteed 5% LPI, together with the Aim and it was on this basis that the intent was no change. The way that Mr Jones explained it in his evidence can be summarised in this passage from his re-examination:

> "*Q ... When you spoke there of the 2002 – of your intentions regarding the 2002 deed and rules in 2006, what at that time did you understand the 2002 deed and rules provided for in terms of increases to pensions and payment?*
> *A. Well, that pension increases were guaranteed by the company and the trustee up to 5%.*
> *Q. And that was -- when you refer to your intention to adopt the 2002 rules, you mean in the sense of providing for pension increases?*
> *A. Yes, pension increases guaranteed by the company and the trustee up to 5%.*"

337. Mr Bramley was of a similar view. He made clear both in his witness statement and in his re-examination that at the time he was shown the Wragges schedule which was put before the meeting of the directors of the Trustee on 22 March 2006, his understanding of the effect of the pension increase provisions "*would have been as it always was that the pension increases would be RPI up to 5% with discretion beyond that*". He said that if he had appreciated that that was not the effect of rule 23, he is sure that it would have been raised as an issue and sought to correct the wording. Like Ms Kennedy he accepted in cross examination that he intended to adopt the draft 2006 deed in the form in which it was shown marked up by Wragges but, as Mr Tennet submitted in closing, this in a sense provided very little support to M&B's case. An intention to execute the document placed in front of the decision-maker will always be the intention. What matters is what they think that the document means, being a document which in the present case takes the form of a draft that showed no change from the form of the 2002 deed.

338. In my view this evidence proved that Mr Bramley's subjective intention was that the pension increase provisions of rule 23 were to be included in the 2006 deed and rules in the same form as they had been included in the 2002 deed and rules. This was not just because it was not included on the Wragges' schedule of changes, but also, and critically, because his actual understanding was that the provisions of the 2002 rules, and before them the 1996 rules, had always provided for a guaranteed annual increase at 5% LPI. His intention was therefore mistaken, derived as it was from an ingrained misunderstanding of the meaning and effect of the pension increase provisions.

339. The decision-makers for M&B were not the full board because the 2006 deed was executed by Mr Naffah and Ms Kennedy in accordance with the delegated authority and decision-making power. However, it is of some relevance that Mr Clarke, who was then CEO of M&B, had an actual understanding of the position at the time which supports the Trustee's case. As he explained in his evidence, it remained the case that there was a commonly understood notion within the M&B group that the pension increase was a guaranteed entitlement. He also said in terms that he was clear that M&B remained committed to awarding increases under the Plan of up to 5% LPI and did not seek to have the power to change this unilaterally. This was not something which Mr Clarke believed was discussed, but I accept his evidence that it was in his mind at the time.

340. It is also clear from Mr Naffah's evidence that he thought that pension increases at 5% LPI were an existing entitlement. He did not understand at any stage prior to the execution of the 2006 deed and rules that M&B had any power over pension increases apart from the additional discretion to satisfy the Aim where inflation was in excess of 5%. It was Mr Naffah's evidence that if what he called the 2006 consolidation had been intended to bring out any changes that were strategically or financially significant, he would have expected these to have been drawn to his attention. Otherwise, he would have assumed that no such changes were being made.

341. It is apparent that Mr Naffah was advised by Ms Kennedy that it was proper to execute the 2006 deed, but in my judgment this evidence supports a conclusion that Mr Naffah as well cannot have intended a continuation of the pensions increase provisions of the 2002 deed having the legal effect which they are now known to have. His evidence is that he thought (wrongly) that those provisions gave M&B no discretion up to 5% and that he thought that the 2006 deed made no changes that were strategically or financially

significant, which would have been the case if there had been any change in what he understood to be the guaranteed increase at 5% LPI. I am therefore satisfied that he was mistaken in his subjective intent that the 2006 deed continued to do what he had always assumed to be the position in relation to pension increases.

342. Subsequent treatment of the pension increase provisions continued for some time in accordance with the general assumption that M&B had no unilateral right to alter the rate of increase. This continued to be the case to at least July 2010, when the board of the Trustee was concerned with the question of whether or not it should seek M&B's consent to a discretionary increase of more than 5% in accordance with the Aim in light of the fact that RPI was 5.1%. The board decided not to do so on a number of bases including the fact that the additional amount over 5% was very small, the nature of the current economic climate and the rate of salary increase that were being granted to employees. It was notable that in that context there was a general assumption that the discretion still only cut in at and above 5%. It had no application below that figure.

343. One of the more striking examples of the general assumption that there had been no change in the pension increase provisions was the issue of a DB section handbook update dated April 2006, which was written to be read together with the latest version of the full Plan handbook produced in 2003. This was the document which I have mentioned as being reviewed by Wragges. Read together, these documents made clear that the 5% guarantee continued to exist. In my view the drafting of this material, reissued as it was at the same time as the 2006 deed was entered into, is flatly inconsistent with any intention to enter into a deed including the IAP, but is wholly consistent with an intention that there should be no change based on an assumption or understanding that the meaning of the pensions increase provisions was accurately described in the Plan handbook. They also reflected the contemporaneous generally understood nature of the pension increase provisions.

344. The guarantee continued to be reflected in the 2009 edition of the Plan handbook which was the first new version since the one issued in 2003. It included the same reference as had been in the handbook in 2003, and indeed for many years before that. Similar treatment of the mandatory nature of the increase provisions was described in the annual reports of the Plan for the years subsequent to the 2006 deed which referred to the 5% LPI increase as being something that "*will be*" paid in the same manner as had been described in the 2005 annual report. Their guaranteed nature was expressed even more emphatically in the 2008 and 2009 annual reports where it was spelt out that these increases were not discretionary.

345. The same approach continued to be taken by the Plan actuary after the 2006 deed was entered into. Thus, in an Actuarial Valuations document dated 22 January 2007 which was probably prepared by Mr Edwards for the purposes of discussing funding objectives and assumptions, the following clear statement was made under the heading Pensions Increases:

> "*The Plans guarantee to increase pensions in payment (other than in relation to members' Guaranteed Minimum Pensions) in line with price inflation, subject to a maximum of 5% p.a.. In addition, although not applied for a number of years given the low inflationary environment, there is a stated aim of granting increases of two-thirds of price inflation in excess of 5% on a discretionary basis. Accordingly, we propose to assume pension increases in line with the assumed price inflation*."

346. In my judgment, this material is entirely consistent with what I am satisfied was the generally held understanding that the Plan's pension increase provisions continued to provide for an annual increase at a guaranteed rate of 5% LPI and that M&B and the Trustee continued to have the aspiration of achieving the Aim. This had been the situation since before the 1996 deed and rules had been entered into and continued to be the situation after the 2006 deed and rules were entered into. In my judgment, it supports the existence of a continuing common intention by the decision-makers in 2006 that, although the 2006 deed and rules had not been intended to make substantive changes to the form of the 2002 deed and rules, this was because the decision-makers all had an actual, albeit erroneous, belief that the pension increase provisions had a meaning that was different from the true legal meaning and effect which they are now known to have. In these circumstances, I consider that the rectification sought by the Trustee should be granted.

Consultation with the Plan actuary

347. The agreed list of issues contained a number of questions relating to the validity of the pension increase alterations to the 1988 deed and rules, the 1996 deed and rules and the 2002 deed and rules, based on the true construction and effect of their respective powers of amendment. Several of those questions are no longer live. The issues which remain to be determined relate to the meaning of consultation in clause 6 of the 1988 deed and clause 27 of both the 1996 deed and the 2002 deed and whether, on the facts, there was sufficient consultation with the Plan actuary.

348. In light of the conclusions I have reached on rectification and the *bona fide* purchaser defence, I can express my conclusions on the questions of validity more shortly. In doing so I will not repeat the factual findings as to what occurred which I set out earlier in this judgment. The wording of clause 6 of the 1988 deed, which governed the obligation to consult the Plan actuary as a condition to the effectiveness of any alteration or modification of the trusts, powers or provisions of that deed, is set out at the beginning of the section of this judgment dealing with the drafting of the 1996 deed. The equivalent provisions in the 1996 and 2002 deeds (clause 27 in both) were in substantially the same form.

349. During the course of the trial, M&B conceded that consultation with the Plan actuary in accordance with clause 6 was a condition precedent to the effective exercise of the power of amendment, the relevant aspect of which for present purposes was the introduction of the IAP and the deletion of the ISP pursuant to the new rule 23(2). I think that this concession was rightly made, not just because the language of clause 6 opens with the phrase "***After*** *consulting the Actuary*" (emphasis added). It also ensures that full effect is given to proviso (iii) in a manner that satisfies its evident purpose: to protect members against the consequences of an amendment that might otherwise prejudice their accrued rights. The same can be said about clause 27 in each of the 1996 and 2002 deeds.

350. It follows that, if the steps taken did not amount to 'consultation', the relevant amendment will not have been effective: *Pitmans Trustees Ltd v Telecommunications Group Plc* [2004] EWHC 181 (Ch) at para 61 (per Sir Andrew Morritt V-C). This part

of the case is therefore concerned with the question of whether the Plan actuary was in fact consulted.

351. In light of the evidence that I have already described earlier in this judgment, Mr Tennet submitted that there was no effective consultation with the Plan actuary for the purposes of either clause 6 or the two versions of clause 27. He said that consultation in this context means "*the communication of a genuine invitation to give advice and a genuine consideration of that advice*" and that "*sufficient information must be supplied by the consulting to the consulted party to enable it to tender helpful advice*" per Sir Andrew Morritt V-C *in Pitmans* at para 56. I agree with that submission. I also think that it is self-evident that, if the person consulted was given misleading information, consultation on the relevant issue (in the present case, the amendment) will not have taken place (*IBM United Kingdom Holdings Ltd v Dalgleish* [2014] Pens LR 334 at para 1544).

352. There is also some analogy to be drawn with the situation in which a person is required to consider advice, such as was discussed in *Univar* at para 342. In that situation it is necessary for the advisor to have been invited to focus on the question with which his advice is concerned. So, it seems to me that a consultation with the Plan actuary will not satisfy the requirement to consult if there was no sufficient identification of the subject matter of the consultation. What is sufficient will vary from case to case, but appropriate steps must be taken to ensure that the consultee is made aware of the proposed alterations or modifications on which he is being consulted.

353. In a simple case, consultation within the meaning of clause 6 may be achievable by identifying the modification issue on which consultation is to take place through nothing more than submitting to the Plan actuary copies of the existing and proposed forms of words with a request that he give his opinion that neither proviso (iii) nor proviso (iv) to clause 6 is engaged. However, where there has been a wholesale change in the drafting of a lengthy document, it may well be necessary for the nature of the alteration or modification to be identified and explained in more specific terms; otherwise, there cannot be said to have been a proper consultation.

354. In the present case, the only manner in which Mr Carr was made aware of the relevant issue in 1996 was by sending him the draft of the proposed new deed and rules under cover of a letter which asked him to consider the material and confirm to the Trustee that it was in order for it to give its approval to the proposed changes. The draft itself included the change, but the proposed alteration was not itself specifically identified either by reference within the draft itself or from the accompanying materials. He was then sent some further explanatory materials, none of which referred to or identified the introduction of the IAP or the removal of the ISP as being alterations or modifications on which consultation was required to take place.

355. This was said by M&B to be sufficient, because consultation is said to be achieved by the simple provision to the Plan actuary of the relevant materials. I do not agree. It is true that Mr Carr received materials that clearly identified certain other alterations and modifications that had been made, and on those matters, there can be said to have been a clause 6 consultation with the Plan actuary. However, the fact that some changes of substance were specifically mentioned means that, to the extent that there were any which were not (e.g., the introduction of the IAP or the removal of the ISP), there is even less room for an argument that consultation on those other matters took place.

356. The only way in which the changes which were not specifically identified might be said to have been at least identifiable, was by discerning the change through an unaided comparison of the original form of words with the new draft. I accept Mr Carr's evidence that this is not what happened. I accept that he did not in fact appreciate that he was being asked to express an opinion on an alteration or modification to introduce the IAP or remove the ISP. In my judgment, while there may be some minor alterations not capable of engaging any of the provisos to clause 6 to which it would not be necessary to draw the attention of the Plan actuary, the same cannot be said about an alteration or modification which had the effect of the new rule 23. It is plain that, on what is now known to be its true construction, rule 23 was capable of operating "*substantially to prejudice the rights or interests in respect of service prior to the effective date of the alteration or modification of any person already a member at such date*". As such it was incumbent on the Trustee to draw the attention of the Plan actuary to what it meant so that he could express a view from an actuarial perspective as to whether prejudice of that quality would in fact be caused if the alteration were to be made.

357. The absence of a sufficient consultation is further apparent from the fact that in giving the confirmation he did, Mr Carr emphasised that he was not qualified to give a view on the legal interpretation of the wording of the proposed new deed and rules, or the extent to which that wording corresponded fully to the wording of the existing documentation of the Plan. He said that he was therefore relying to that extent on the correspondence from A&O. This was an understandable position for him to adopt and one that was consistent with the underlying purpose of the consultation requirement. He said in his oral evidence that "*Bass were not in the business of paying an actuarial adviser to effectively do a full legal review of the trust deeds*". This simply reflected the fact that the evident purpose of the consultation with him as Plan actuary was to enhance members' protection from an actuarial, not a legal perspective, a point that he made clear in the way in which he expressed himself in his 7 May letter.

358. I should add that I am doubtful that it would have been sufficient for M&B's case to show that Mr Carr should have identified the matter on which he was being consulted, even if he did not do so. Mr Tennet submitted that the commercial purpose underpinning clause 6 means that it is incumbent on the Trustee as consulting party to ensure that the consultee appreciates the legal effect of the modified or altered provision. I think there is force in this submission, although it may be sufficient for the Trustee, acting reasonably, to be satisfied that the consultee appeared to have understood the true nature of the matter on which he was being consulted. Whether that qualification is correct was not explored at trial and I say no more about it, as it does not arise on the facts of this case.

359. In my view, the steps that were taken by the Trustee to draw Mr Carr's attention to the changes could not reasonably have alerted him to the fact that rule 23(2) had the legal meaning and effect that it does in fact have. They were in fact misleading even though not deliberately so. He made clear that he was not advising on the legal effect of the new drafts, which meant that to the extent that the relevant parts had a meaning which was different from that which they were assumed to have, he was being consulted on a false premise. In my view, the way in which the accompanying materials described the nature of the substantive changes meant that he was entitled to assume, as he did, that

the legal meaning and effect of the pension increase provisions was unchanged from what he and everyone connected with the Plan at the Trustee assumed they were.

360. Furthermore, I do not consider that the nature of the task that Mr Carr was asked to undertake could reasonably have been thought to require him to carry out what Mr Tennet called a "*side by side comparison of provisions that would have enabled him to spot the changes for himself*" and that is certainly not what he expected to do or did. I agree that this was not express or implicit in the function he was required to carry out under clause 6 as consultee, nor was it anticipated by the letter of instruction from the Trustee. Indeed, as Mr Tennet submitted, there are inherent difficulties in leaving the Plan actuary to his own devices when carrying out a task of comparison of that sort, well-illustrated by the assumption that he surmises he may have made as to the true meaning of rule 23(2) that I have described above.

361. In my view the obligation to identify the matters on which consultation was required was an obligation that fell on the consulting party (i.e., the Trustee) either on its own account or more likely through its lawyers, A&O, who were responsible for drafting the alterations and modifications on which consultation was sought. Not only was this what clause 6 required, it was also (as I have explained) what Mr Carr understood he was to do – he made this clear when he confirmed in his 7 May letter that his view was based on actuarial considerations and that he was not qualified to give a view on the legal interpretation of the new wording or its correspondence to the existing Plan documentation.

362. None of this is very surprising in light of the fact that I have concluded that the Trustee did not intend to make this particular change, but in my view a process of consultation requires both consulter and consultee to appreciate the essential nature of the alteration or modification (in this case to introduce the IAP and remove the ISP) on which consultation is required to be carried out. In some cases, there may be room for an effective consultation to take place even though the consultee does not in fact appreciate all of the ramifications of the alteration, but it is difficult to see how that can be the case where neither consulter nor consultee appreciate that there has been a change at all. If that were not to be the case, the commercial purpose behind the obligation on the Trustee to consult – a further layer of protection for the interests of Plan members - would not be achieved.

363. For all these reasons, I have concluded that there was no valid consultation with the Plan actuary on the inclusion of the IAP and the removal of the ISP at the time of execution of the 1996 deed. As valid consultation was a condition precedent to the effectiveness of that aspect of the alteration to the Plan's deed and rules, I am satisfied that the modification of the pension increase provisions by the 1996 deed was invalid and of no effect. It is worth noting that it is common ground that, in these circumstances, the *bone fide* purchaser defence would not have availed M&B in any event. In other words, even if it had been an answer to the rectification claim, it is no answer to a claim that the relevant amendment was invalid for a failure to consult.

364. The consultation issue as it relates to the 2002 deed and the 2006 deed can be dealt with more shortly. It follows from my conclusion that the relevant changes to the 1996 deed were invalid for want of consultation that they were not effective in the form in which they appeared in the 1996 deed. The consequence is that their inclusion in the 2002 deed would amount to an alteration of the provisions of the 1996 deed so as to engage

the need to consider the extent of the power to alter in that deed. As I have already mentioned the relevant power to alter was to be found in clause 27 of the 1996 deed which was in substantially the same form as clause 6 of the 1988 deed.

365. As to the 2002 deed, I am satisfied that Mr Carr was sent a final copy of the 2002 deed by Ms Smith at some stage prior to 15 November 2002 and to that extent he was made aware of the process of alteration and modification given effect by the 2002 deed. The evidence, however, was clear that no changes to the pension increase provisions were identified and he did not appreciate that they were a matter on which his views were being sought. For the reasons I have already given in relation to the 1996 deed, I do not consider that any sufficient consultation in accordance with clause 27 of the 1996 deed occurred in relation to the introduction of the IAP and the removal of the ISP in the 2002 rules which (on the hypothesis that the introduction in 1996 was invalid) took place for the first time in 2002.

366. A very similar situation applies in relation to the 2006 deed. The evidence which is set out in slightly more detail earlier in this judgment confirmed that Mr Edwards, by then the Plan actuary, was faced with a time pressured exercise in which he relied on a schedule of changes produced by Ms White which listed everything described as one of the main changes for the new consolidated trust deed and rules. Nothing with which he was presented by or on behalf of the Trustee drew his attention to any change to the pension increase provisions, apart from two minor changes in relation to "*civil partners*" and "*approval*".

367. It follows that, as with the work done by Mr Carr in 2002, the review request to Mr Edwards in 2006 did not identify the introduction of the IAP (or the removal of the ISP) as an alteration or modification on which his view was being sought. That is not surprising in light of the fact that none of the individuals involved understood that the drafting of rule 23 was being changed, saving the two minor respects which I have been identified. It is clear from Mr Edwards' own evidence that he did not identify the rule or its legal effect as being a matter for his review, nor was it drawn to his attention, despite the fact that it was a provision the terms of which were capable of engaging the proviso to clause 27.

368. In these circumstances, I am satisfied that the limited review carried out by Mr Edwards in 2006 did not amount, so far as any alteration to introduce the IAP or remove the ISP were concerned, to a consultation with him by the Trustee within the meaning of clause 27 of the 2002 deed. It follows that, on the hypothesis that the alterations to the pension increase provisions made in the 1996 deed and the 2002 deed were invalid, the introduction of the IAP and the removal of the ISP as reflected in the 2006 deed were invalid as well.

Section 67

369. There is a yet further question which arises in relation to the validity of the pension increase power as included in the 2002 and 2006 deeds which relates to section 67 of the Pensions Act 1995. It is identified in issues 16, 20 and 21(b) of the agreed list of issues. On reflection, I am hesitant about embarking on a determination of this issue in light of my conclusions on rectification, *bona fide* purchaser and consultation. I do

however think that it is appropriate for me to explain my conclusions albeit briefly, even though I remain to be persuaded that I should grant the declaratory relief sought, given the determinations I have made on the other issues.

370. The question that arose assumes that the introduction of the IAP and the deletion of the ISP take effect for the first time in the 2002 deed. It only arises, therefore, in circumstances in which my conclusion on the invalidity of rule 23 for a failure to consult is correct such that the 1996 deed does not include the IAP or exclude the ISP. On that hypothesis, section 67 is potentially engaged, because the new pension increase provisions were only being introduced into the Plan documentation for the first time with the execution of the 2002 deed and rules.

371. At the time of the 2002 deed, section 67 provided that:

> "*(2) The power [to modify] cannot be exercised on any occasion in a manner which would or might affect any entitlement, accrued right or pension credit right of any member of the scheme acquired before the power is exercised unless the requirements under subsection (3) are satisfied.*
>
> *(3) Those requirements are that, in respect of the exercise of the power in that manner on that occasion —*
>
> *(a) the trustees have satisfied themselves that —*
>
> *(i) the certification requirements, …*
>
> *are met in respect of that member, …*
>
> *(4) In subsection (3) —*
>
> *(a) "the certification requirements" means prescribed requirements for the purpose of securing that no power to which this section applies is exercised in any manner which, in the opinion of an actuary, would adversely affect any member of the scheme (without his consent) in respect of his entitlement, accrued rights or pension credit rights acquired before the power is exercised, … .*"

372. The "*certification requirements*" referred to in s.67 were set out in reg 3(1) the Occupational Pension Schemes (Modification of Schemes) Regulations 1996, SI 1996/2517:

> "*For the purposes of section 67(4)(a) of the 1995 Act (certification requirements in respect of any power conferred on any person by an occupational pension scheme to modify that scheme) the prescribed requirement is that an actuary shall certify to the trustees of the scheme that, in his opinion, the exercise of the power in the proposed manner to modify the scheme would not adversely affect any member of the scheme (without his consent) in respect of his entitlement, or accrued rights, acquired before that power is exercised.*"

373. The Trustee submitted that there was no compliance with the requirements of section 67(3)(a) because the certificate given by the Plan actuary was not directed at the relevant modification. The Plan actuary was not informed of the proposed manner of

exercising the power of amendment, nor could the modifications be properly certified when they were not proposed by the Trustee, as was the situation in the present case (because it is clear that the Trustee did not know that it was proposing to make them).

374. I think that an actuary's certificate will normally be valid and binding on the parties (in this case the Trustee and the Principal Employer) unless vitiated by one of the established exceptions to the conclusive nature of a contractual certificate. In *Cornwell v Newhaven Ports & Properties* [2005] Pens LR 329 at para 17, Lewison J described the relevant exception as follows:

> *"The essential difference, as it seems to me, is the difference between asking the right question and coming to the wrong answer, and asking the wrong question in the first place. Only in the latter event can a contractual certificate be successfully challenged absent fraud or collusion.*"

375. Mr Rowley took a different line. He submitted that the important question was whether the expert determination went outside the expert's remit by answering a different question from that remitted to him. He said that this was not the position in the present case because the certificate and Mr Carr's evidence made clear that he had been required to produce a section 67 certificate having regard to the relevant statutory criteria and that is what he did. He went on to say that the true issue was to identify the question that Mr Carr was asked to address, and that was apparent from the certificate, where he identified that the question he was addressing was whether the modifications would adversely affect any member without his consent in respect of his entitlement, or accrued rights or pension credit rights acquired before the amendments were made.

376. In my judgment, the Trustee is correct on this point. It is plain from the evidence that I have already set out in the context of both the rectification claim and the consultation issue that Mr Carr never actually addressed or answered the question of whether the pension increase changes affected accrued rights, because he was never asked that question and was unaware of the changes. That is not surprising because those who asked him to provide the certificate did not appreciate that there was any change from what they understood to be the established form of the pension increase provisions (i.e., a guarantee of 5% LPI) either. In my view that meant that he must have asked himself the wrong question and his certificate is therefore not binding. The evidence also justifies a conclusion that if he had asked himself the right question, he would not have given the certificate.

377. I agree with the Trustee's submission that the consequence of this conclusion is that, on the hypothesis I mentioned at the beginning of this part of my judgment, the introduction of the IAP and the exclusion of the ISP as reflected in the 2002 deed were both invalid and of no effect.

378. However, the position is different in 2006. Even on an equivalent hypothesis, namely that the introduction of the IAP and the deletion of the ISP take effect for the first time in the 2006 deed, the same analysis does not apply in the same way because by then the law had changed. Section 67(2) had been amended to provide that any exercise of a power to modify an occupational pension scheme "*to make a regulated modification"* is voidable (but not of itself void) unless specified requirements were satisfied. A "*regulated modification*" included a modification that would or might adversely affect "*Subsisting Rights*", defined as "*(i) any right which at that time has accrued to or in*

respect of [a member] 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."

379. The focus on modifications that would or might affect accrued rights is the same as under the earlier version of section 67, but there were two significant relevant differences in the structure of the legislation. The first is that non-compliance with section 67(2) means that the regulated modification is voidable in accordance with section 67G(2), which then gives the Pensions Regulator ("tPR") jurisdiction under section 67G(2) and (6) to make an order declaring it to be void. The second is that a range of additional requirements must be satisfied if the modification is not to be vulnerable to any such order. They are called the consent requirements, the actuarial equivalence requirements, the trustee approval requirement and the reporting requirement and they are listed in sections 67B-67F.

380. The Trustee submitted that the position was relatively straightforward. The amendments made by the 2006 deed did not purport to comply, and did not comply, with the requirements for a detrimental modification, because it was understood at the time that no detrimental modification was being made. It follows, so it was said, that the modifications introducing the IAP and deleting the ISP were voidable in accordance with section 67G, and the court should so declare, even though the decision as to whether to avoid was reserved to tPR.

381. In these circumstances the question is whether a declaration ought to be made. The Trustee submitted that it should, but M&B said that it should not. On this point I was treated to much law on when it is that the court should be prepared to grant a declaration as Vos J did in *Danks v QinetiQ Holdings* [2012] Pens LR 131 ("*Danks*") (who granted a declaration as to the potential voidability of a modification), and whether or not the principles discussed in *Barraclough v Brown* [1897] AC 615, 622 as explained in *Pyx Granite v Ministry of Housing and Local Government* [1960] AC 260, 302 should be applied. The rationale of that line of authority is that, if a statute creates a new right and prescribes a particular method of enforcing it, in this case by direction of tPR, that method must be used and cannot be evaded by bringing anticipatory court proceedings before the statutory right has arisen.

382. The *Barraclough* and *Pyx* line of authorities do not seem to have been cited to Vos J in *Danks*, but in any event I do not doubt that there will be occasions on which the grant of declaratory relief notwithstanding the terms of section 67G may be found to be appropriate, more particularly where, as in *Danks* and as Mr Rowley pointed out in his closing submissions, the relief was sought in relation to a potential amendment which had not yet been made.

383. However, after some hesitation I have reached a firm view that this is not such a case. The argument I have had to consider is based on a number of hypotheticals and the need for tPR to exercise its power to avoid the 2006 deed modification is unclear to me in light of the conclusions I have reached on rectification and consultation. Even if it were to become relevant, the Trustee would be able to rely on the findings made in this judgment (or indeed on any appeal). I am not persuaded that there is any useful purpose in a declaration being made, or anyway any reason that is sufficiently compelling for the court to undertake any part of the process by which tPR is entrusted by the

legislature with the ultimate duty to determine whether or not avoidance should be ordered.

Construction of rule 1(6)

384. Issue 6 in the List of issues is as follows:

> "*6. On the true construction of Rule 1(6) of the rules attached to the 1996, 2002 and 2006 Deeds:*
>
> *6.1 On the Trustee's case, do the provisions of those Deeds governing benefits (including the Pension Increase Provisions) apply to or govern the benefits of Members, Early Leavers and Pensioners earned by pensionable service only after 24 July 1996, alternatively does Rule 1(6) act as an underpin to such benefits earned before that date?*
>
> *6.2 Or on M&B's case does Rule 1(6) in each of its iterations apply only to Pensioners and Early Leavers who left pensionable service before 24 July 1996?*"

385. For the purposes of rule 1(6) and therefore this issue:

i) a Member is a person who is in pensionable employment, but excludes an Early Leaver and a Pensioner;

ii) an Early Leaver is a person whose pensionable employment has ended early, who is entitled to a pension from the Plan, but excludes a Member and a Pensioner; and

iii) a Pensioner is a person who has been a Member and is immediately entitled to a pension from the Plan, together with certain others.

386. Rule 1(6) of the 1996 deed takes the following form, the last sentence of which is central to resolution of this issue (there is a nearly identical provision in rule 1(6) of both the 2002 deed and the 2006 deed, also referring to 24 July 1996):

> "*The Schedules form part of the Rules. Schedule I sets out minimum benefits payable to and in respect of a person who is or has been in Contracted-out Employment. Schedule II sets out maximum contributions and benefits for the purposes of Approval. Any provision relating to the level of benefit payable to or in respect of a Member, Early Leaver or Pensioner and which was specified in the rules of the Plan in force immediately before 24th July, 1996 or which was notified in writing to the Member, Early Leaver or Pensioner before that date, continues to apply in the same manner, and subject to the same terms and conditions, under the Rules which are to be read and interpreted accordingly.*"

387. The Trustee submitted that the effect of rule 1(6) is to protect and preserve the benefits accruing before 24 July 1996 of those who were active members as at 24 July 1996, such that the IAP cannot be used to reduce the rate of pension increases in relation to those benefits to below 5% LPI. As I have concluded that each of the 1996 deed, the 2002 deed and the 2006 deed should be rectified as against M&B so as to exclude the

IAP, it is not strictly necessary for this question to be answered (anyway for the purposes for which it was asked). Nonetheless, the point was fully argued and, in case the matter goes further, it seems to me that it is appropriate for me to explain my conclusion.

388. To put a little more flesh on the Trustee's arguments, its primary case is that the effect of rule 1(6) is that the level of benefit specified in the 1988 deed and rules (being the rules in force immediately before 24 July 1996) forms an underpin to the benefits conferred on an active member by the 1996 deed in respect of pre-24 July 1996 pensionable service. It also makes a very similar but alternative argument that the effect of rule 1(6) is that the provisions of the 1996 deed (and subsequently the 2002 deed and the 2006 as well) governing benefits, including the pension increase provisions, do not apply in respect of the pre-24 July 1996 pensionable service of active members. In other words, the rate of pension increase under those deeds does apply but shorn of the IAP.

389. M&B's pleaded case is that rule 1(6) is irrelevant to the construction and effect of the pension increase provisions, because it only applies to the schedules to the rules and not the rules themselves. It also relied on clause 2(2) of the 1996 deed which is part of a clause entitled "*Application of Deed and Rules; Trusts of Plan*", with which it submitted that rule 1(6) was inconsistent and indeed to which it was repugnant. Clause 2(2) is in the following terms:

> *"Each person who under the 1988 definitive deed and the 1988 rules is on 23 July, 1996:*
>
> (a) *in receipt of a pension, or*
>
> (b) *entitled to a pension payment of which has not started, or*
>
> (c) *contingently entitled to a pension or other benefit on the death of a person to whom the provisions of (a) or (b) above apply,*
>
> *is entitled under this deed and the Rules to a pension of the same amount, payable at the same time for the same period and subject to the same options and guarantees as the pension to which he is entitled under the 1988 rules. Each of those persons is a Beneficiary for the purposes of this deed and the Rules. He is not a Member, Early Leaver or Pensioner (except for the purposes of clauses 28 and 31) unless he is re-admitted to membership of the Plan; in that event Rule 2(3) will apply to him."*

390. Members, Early Leavers and Pensioners have the same meaning for the purposes of clause 2(2) as they have for the purposes of rule 1(6). A Beneficiary is defined to be "*any person absolutely or contingently entitled to a benefit from the Plan*".

391. There was no dispute that the effect of clause 2(2) is to preserve the benefit structure under the 1988 deed and rules for those categories of persons who are referred to in clauses 2(2)(a)-(c) and that they are all persons who are no longer in pensionable service prior to 24 July 1996 or contingently entitled through such a person. In other words, the effect of clause 2(2) is that pre-24 July 1996 leavers continue to be entitled to benefits on the same terms as the 1988 deed and rules. The argument revolved around the extent to which rule 1(6) extended the application of the existing 1988 benefit

structure to active members in respect of their pre-24 July 1996 pensionable service as well.

392. The essence of M&B's case was that, as with clause 2(2), rule 1(6) had no application to active members. If it had been intended to preserve any part of the pre-1996 benefit structure to those who were in pensionable service or were active members as at the time of the 1996 deed, clause 2(2) is the place that it would have been done, and it is clear that it was not. Quite apart from other considerations, M&B submitted that the drafter would not have put a provision with the effect contended for by the Trustee in the rules as opposed to the main trust deed. It submitted that rule 1(6) should therefore be construed in a way that is consistent with clause 2(2) or rejected altogether as being repugnant to it.

393. The Trustee submitted that M&B was wrong and that the rules rather than the 1996 deed itself was the natural place to find a provision of this sort, qualifying the level of benefits otherwise payable under the rules. In short this was because it is in the rules not the deed that the extent of the benefits payable under the Plan is described.

394. Secondly, the Trustee submitted that, as a matter of language, rule 1(6) and clause 2(2) are concerned with two quite different categories of person. Rule 1(6) is dealing only with those who are at the time of the 1996 deed were Members, and who may become Early Leavers or Pensioners during its effectiveness. Any person who has already left as at 24 July 1996 is excluded altogether from the benefits for which the 1996 deed provides and is covered only by the benefit regime of the 1988 deed and rules. That is why clause 2(2) applies to them and provides that they are only a Beneficiary, but not a Member, Early Leaver or Pensioner for the purposes of the 1996 deed.

395. The Trustee's third argument was that rule 1(6) was concerned with the level of benefit for pre-24 July 1996 service and was focused on the protection of that level of benefits, including in particular the applicable form of pension increase provision with the ISP but excluding the IAP. This was a different focus to clause 2(2), which was concerned with retaining for those who had already left their full package of rights under the 1988 rules.

396. Fourthly, the Trustee submitted that there was commercial sense in the inclusion of a provision which protected pre-24 July 1996 accrued rights. It facilitated the ability of the Plan actuary to give his approval under proviso (iii) to clause 6 of the 1988 deed which I considered earlier in this judgment ("*no alteration or modification shall be made which in the opinion of the Actuary shall operate substantially to prejudice the rights or interests in respect of service prior to the effective date of the alteration or modification of any person already a member at such date*"). It would also guard against any possible issue with the recently enacted section 67 of the Pensions Act 1995, which regulated and restricted the exercise of any power to modify an occupational pension scheme which would or might affect members' entitlements or accrued rights acquired before the power was exercised.

397. Finally, the Trustee submitted that M&B's argument that the last sentence of rule 1(6) only referred to the schedules, and not to the deed and rules more generally, made no sense because the schedules were only concerned with statutory rights in respect of GMPs and statutory requirements in respect of Inland Revenue limits. A level of benefit provision of the type set out in rule 1(6) could have no relevant application to

matters dealt with in such schedules, and there was in any event no rational reason for treating the pre- and post-24 July 1996 leavers differently on this issue.

398. By way of amplification of its case, M&B submitted that, because rule 1(6) is in the interpretation and definitions part of the 1996 rules, it did not extend to the application of the benefit structure itself. It said that this is confirmed by the first three sentences of rule 1(6) which are descriptive of the content of the schedules and are not concerned with provisions found in the body of the rules, let alone with pre-1996 rights which are dealt with in clause 2(2). Indeed, it submitted that the deed itself rather than the rules is the place in which the application of the 1996 deed as whole is most likely to be found.

399. M&B also submitted that, as a matter of language, it was not possible to read the operative part of rule 1(6) in a way that applied it only to a particular period of pensionable service. It said that this would have the effect by a side wind of rendering redundant the benefit structure otherwise adopted in the 1996 rules. It was also submitted that the application of 1(6) not just to Members, but also to Early Leavers and Pensioners made no sense on the Trustee's construction. The reason for this is that any person who becomes an Early Leaver or a Pensioner after 24 July 1996 must necessarily have been a Member before they acquired that status, which means that the drafter must have been referring to those who had already reached that status before 24 July 1996. If that is the case, their position is already governed by clause 2(2) and they are explicitly said by that clause not to be Members, Early Leavers or Pensioners.

400. Thirdly M&B pointed out that rule 1(6) is silent as to those contingently entitled and reminded me that the Trustee had not sought rectification of rule 1(6). It said that I am not therefore presented with an argument that the meaning for which the Trustee contended was positively intended by the parties. It said that the short point is that rule 1(6) is a case of sloppy and unclear drafting (a phrase used by Sir Geoffrey Vos MR in *Britvic* at para 31). Clause 2(2) and rule 1(6) are internally inconsistent, cannot be read sensibly together and the latter provision (rule 1(6)) should therefore be rejected as repugnant to the former (clause 2(2)).

401. On this last submission my attention was drawn to Lewison on the Interpretation of Contracts (7th edn at paras 9.73 and 9.74) which explores the authorities on this canon of construction, although I note that Sir Kim Lewison went on to explain that attributing significance to the order in which provisions appear is very much a solution of last resort (Lewison at para 9.77 and per Vinelott J in *Joyce v Barker Bros Builders Ltd* (1980) 40 P&CR 512, 514), and a point of "*minor potential relevance*" (per Lord Neuberger MR in *RSPCA v Sharp* [2011] 1 WLR 980 at para 38). As he went on to say, and I agree: "*the application of a mechanistic principle seems inimical to the modern approach to the interpretation of a contract*".

402. Finally, M&B submitted that there were practical difficulties with the underpin argument because this would lead to the continuing subsistence of two competing discretionary powers in respect of the same period of pensionable service, one (the IAP) in the hands of the Principal Employer and the other (the ISP) in the hands of the Trustee. It is said that this would lead to difficulties, but I can say straight away that I do not see why that is the case. All that would happen is that the Principal Employer is not permitted to exercise the IAP in respect of pre-24 July 1996 pensionable service so as to produce a rate which is less than 5% LPI.

403. Both parties made submissions on the extent to which it was appropriate or necessary to look at the drafting history for the purpose reaching a conclusion on the correct construction of rule 1(6), although it was not entirely clear to me that either party invited me to do so. In so far as they did, I decline the invitation. Applying established principles, evidence as to the drafting process is almost always inadmissible (see e.g., the recent decision of the Court of Appeal in *Monsolar IQ Ltd v Woden Park Ltd* [2021] EWCA Civ 961 at para 40 per Nugee LJ) and I see no basis for making an exception in the present case. In any event, I am satisfied that it is perfectly possible to reach a clear conclusion on the true construction of the rule without regard to it.

404. In my view, the Trustee's approach is to be preferred. I have reached that view not just without regard to its drafting history, but also without applying what has been called a corrective approach to construction on the basis that there is an obvious error for which there is an obvious solution: *Britvic* at paras 31 and 33 (per Sir Geoffrey Vos MR) and para 60 (per Coulson LJ). As will appear it is my view that the requirements for such an approach are simply not met. While I accept that the rule could have been more felicitously drafted, I do not think that there is an obvious mistake on the face of the document (see also per Nugee LJ in *Britvic* at para 78). I am also satisfied that there is a perfectly rational and sensible explanation for giving it the meaning that it appears to have.

405. While I agree that rule 1(6) is not the most obvious place to find a provision which has the effect for which the Trustee contends, that does not seem to me to point of itself to a basis for rejecting it for repugnancy with rule 2(2) of for any other reason. In particular, I do not accept Mr Rowley's submission in closing that, having regard to the obvious intention of rule 1 as a whole and the subject matter of the first three sentences of rule 1(6), the subject matter of the last sentence is so obviously unrelated that it is something that simply should not be there. The last sentence of rule 1(6) is contained in a part of the rules which also contains a collection of miscellaneous provisions of general application, operating in a manner that is introductory to a detailed description amongst other matters of the benefits to which existing and former members are entitled under the Plan. On any view, those benefits are affected by the provisions of Appendices 1 to 5 which are incorporated by rule 1(5) while the same can be said about the Schedules referred to in the earlier parts of rule 1(6) itself.

406. In these circumstances, there is nothing particularly surprising about rule 1(6) containing provision of the type for which the Trustee contends. Contrary to M&B's submission, I do not think that its placement is any pointer to the possibility that the drafting of the rule was a mistake or that it should be rejected for repugnancy or indeed that I should take any other approach to its construction which might support M&B's case.

407. In my view the core point as a matter of language is that rule 1(6) is dealing with a different category of person from the category dealt with by clause 2(2). Those with whom clause 2(2) is concerned are pre-24 July 1996 leavers who, while Beneficiaries because they are entitled to benefits from the Plan, are not Members, Early Leavers or Pensioners. By contrast rule 1(6) is concerned with those who are active members as at 24 July 1996 (the date of the 1996 deed) to whom the rule will also apply not just when they are Members, but as and when they may become Early Leavers or Pensioners in due course. The drafting technique that was used focusses on covering that category of person in respect of the level of their benefits to which they were entitled as at 24

July 1996 (i.e., in respect of their pre-1996 deed pensionable service). It does so whether, at the time any question as to their entitlement to a particular level of benefit may arise, they are a Member, Early Leaver or Pensioner. There is no inconsistency with clause 2(2) because that clause is only concerned with pre-24 July 1996 leavers, who are only Beneficiaries for the purposes of the 1996 deed, not Members, Early Leavers or Pensioners at all.

408. In my view, it therefore follows that M&B's submission that rule 1(6) is not expressed to apply to a particular period of pensionable service is also wrong. Any provision relating to the levels of benefit specified in the rules of the Plan in force immediately before 24 July 1996 can only have related to benefits earned by pensionable service up until 24 July 1996. It must therefore follow that the words cover pre-24 July 1996 pensionable service, limited to active members as at that date, such that it operates in a manner which is consistent with clause 2(2).

409. I also consider that the commercial purpose of such a provision is rational. It ensures that the accrued rights of active members as at the time of execution of the 1996 deed are protected and preserved. As the Trustee submitted, this was important for the proper application of the power of amendment. As with clause 6 of the 1988 deed, the equivalent provision in the 1996 deed (clause 27) contained a proviso that no alteration or modification may be made which in the opinion of the Plan actuary shall operate substantially to prejudice the rights in respect of service prior to the date of such alteration of any person already a Member at that date. It was also a sensible approach in light of the recently enacted terms of section 67 of the Pensions Act 1995.

410. Finally, I should say that I prefer the Trustee's underpin argument to the one which was originally advanced, although the effect of both of them is the same. It seems to me that the wording of 1(6) applies the existing provisions relating to the level of benefit in respect of active members as of 24 July 1996 as if they were included in the 1996 deed but does not of itself exclude the benefits of Members earned by pre-24 July 1996 pensionable service.