CAS-29191-V6G7

# Ombudsman's Determination

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| Applicant | Mrs S |
| Scheme | Spirit (Legacy) Pension Scheme (**the Scheme**) |
| Respondent | Spirit (Legacy) Pension Trustee Limited (**the Trustee**) |

## Outcome

1. Mrs S' complaint is upheld and, to put matters right, the Trustee shall carry out the instructions detailed in the section "Directions".

## Complaint summary

2. Mrs S complained that she is entitled to receive a "State Scheme Supplement" (**SSS**) from the Scheme until she becomes eligible to receive her State Pension.

3. In contrast, the Scheme's administrator (**Aon**) has informed Mrs S that she will only be paid the SSS up to the age of 65, which is before her State Pension becomes payable.

## Background information, including submissions from the parties

4. The sequence of events is not in dispute, so I have only set out the main points. I acknowledge there were other exchanges of information between all the parties.

5. Mrs S joined the Scheme in May 1982 and became a deferred member in October 2006. The Trustee has confirmed that the rules which apply in Mrs S' case are within the Special Edition of the Rules of the Scottish & Newcastle Unit Retail Managers Pension Scheme relating to Former Members of the Scottish & Newcastle Staff Pension Scheme (**the Rules**). The Rules are dated 15 February 2001 and relevant extracts are shown in Appendix 1.

6. The Trustee has also provided a copy of the current governing rules for the Scheme, dated 6 June 2015. It said that they include certain general administrative provisions which apply to Mrs S.

7. In some circumstances, where a member of the Scheme left employment before 'State pension age', the final salary calculation used to determine the member's

pension would not be subject to a 'pensionable deduction' – and so the overall pension would be higher than it otherwise would have been. This benefit was known as the State Scheme Supplement (i.e. the SSS) and was set out in Rule 5.5. Key extracts from the Rules are set out in Appendix 1.

8. Importantly, Rule 5.5 also provided that the SSS would only apply "until State pension age", and that any "increases made to the Member's pension during that time which are referable to the supplement will not continue to be paid after State pension age".

9. The definition of "State pension age" contained in the Rules is therefore of importance and at the centre of this complaint. For the purposes of this Determination, I shall refer to the definition of State pension age found in the Rules as **'State pension age'.** In contrast, I shall refer to the actual state pension age, when state pension benefits come into payment, as an individual's **SPA.**

10. The Rules set out that "… State pension age has the meaning given by the rules in paragraph 1 of Part 1 of Schedule 4 to the Pensions Act 1995" (**the 1995 Schedule**).

11. At the date the Rules were executed (15 February 2001), the rules in paragraph 1 of Part 1 of Schedule 4 to the Pensions Act 1995 (**the 1995 Act**) set out that "a woman born after 5 April 1955 attains [state] pensionable age when she attains the age of 65".

12. However, further and later changes were made to the SPA. The Pensions Act 2007 increased SPA for both men and women, to 66. This was due to be introduced on a staggered timetable between 2024 and 2026. The Pensions Act 2007 also scheduled further increases to the SPA from 2036 and 2046, with the qualifying age rising to 67 and 68 respectively.

13. The Pensions Act 2011 accelerated the scheduled SPA increases that were introduced by the Pensions Act 2007. It meant that the increase in the SPA to 66 was brought forward to October 2020.

14. These decisions to make changes to the SPA were reflected in the 1995 Schedule.

15. On 13 July 2018, Aon wrote to Mrs S about her retirement. Aon set out the options for Mrs S to receive her benefits from the Scheme. One option was to take an annual pension of £15,786.42 and a tax-free lump sum payment of £75,121.49. This did not include Mrs S' additional voluntary contribution benefits in the Scheme. Aon said that a bridging pension, meaning the SSS, of £2,654.08 per year, would also be payable to Mrs S and this would "cease at State Pension Age". No further detail was provided by Aon as to meaning of this definition.

16. In October 2018, Mrs S retired from the Scheme. At that point[1], the 1995 Schedule set out that "A person born after 5th October 1954 but before 6th April 1960 attains pensionable age when the person attains the age of 66."

17. On 14 April 2019, Mrs S emailed Aon to register her concern that she was only going to be paid the SSS up to the age of 65. She said that her State Pension "does not start till 18 months after my 65 birthday [Sic]", i.e. she was not due to reach her SPA until the age of 66 years and 6 months. Mrs S said that she had not been informed of this until she received correspondence in relation to her retirement. She considered that she had previously been provided with misleading information about the age to which she would be paid the SSS.

18. On 19 February 2020, Mrs S registered a complaint under the Scheme's two-stage Internal Dispute Resolution Procedure (**IDRP**).

19. On 5 May 2020, the Trustee issued its stage one complaint response to Mrs S. It explained that a SSS applied to Mrs S' pension from the Scheme. This broadly meant that a more generous final salary could be used to calculate Mrs S' pension up to the point she reached 'State pension age'.

20. The Trustee highlighted the definition of 'State pension age' in the Rules, specifically Rule 5.5 (shown in Appendix 1). It asserted that the Rules define 'State pension age' as having the meaning given by paragraph 1 of Part 1 of Schedule 4 to the 1995 Act. The Trustee noted that the 1995 Act had been amended since the Rules were signed in 2001 and, for those born after a certain date, the age at which they will receive the State Pension had increased.

21. The Trustee said it had to consider whether the definition of 'State pension age', as given in the Rules, was fixed, or could vary as new legislation was introduced. It explained that it had taken legal advice on this matter and the conclusion was that, for Rule 5.5, 'State pension age' should be treated as a fixed age. The Trustee's position was that the Rules could not be interpreted as allowing for new legislation to amend the provision, otherwise such a change could automatically alter benefits in the Scheme in a way that was beyond its control.

22. The Trustee added that there were two possibilities for the interpretation of the point at which the definition of 'State pension age' should apply. The first was the legislation in place at the date the Rules were signed. The second was the legislation in place when the member ceased to accrue benefits in the Scheme. It said that the Scheme had historically been administered based on the latter interpretation, which was more generous to members. In Mrs S' case, the outcome would be the same under either interpretation.

[1] The legislation as it stood on 1 October 2018 – specifically rule 6 of paragraph 1 of Part 1 of Schedule 4 to the 1995 Act.

23. The Trustee concluded by setting out that it did not uphold Mrs S' complaint, but accepted that the information provided to Mrs S, around the time of her retirement, was insufficiently clear. The Trustee offered Mrs S £500 in recognition of this issue.

24. On 23 June 2020, Mrs S confirmed that she wished for the complaint to be moved to stage two of the IDRP.

25. On 4 February 2021, the Trustee issued its stage two response to the complaint. It said it affirmed the decision set out in the stage one response. It had taken further legal advice and said it understood that unless the Rules contained "express provision providing for statutory references to be interpreted as including subsequent amendments, they should be treated as fixed at the date the rules themselves were signed". This was the Trustee's position for Mrs S' case. However, its administrative approach was to treat the reference to 'State pension age' as being that applicable at the date the member ceased to accrue benefits in the Scheme, rather than the date the Rules were signed. Nonetheless, it was the Trustee's view that "the Rules should be interpreted on the basis of a fixed interpretation which does not change where the underlying legislation changes over time". The Trustee increased the offer of £500 to £1,000, in recognition of the delay in providing its response to Mrs S.

26. Following the referral of the complaint to The Pensions Ombudsman, the Trustee increased its offer to Mrs S to £1,500.

## Adjudicator's Opinion

27. Mrs S' complaint was considered by one of our Adjudicators, who concluded that further action was required by the Trustee. The Adjudicator's findings are summarised below:-

- The Rules set out that a SSS is payable to a member retiring from the Scheme, until they reach 'State pension age'[2].
- Since the Rules were drafted, in 2001, the 1995 Act has been amended by further legislation and the SPA increased. However, the Trustee's position is that the 'State pension age' under the Rules applicable to Mrs S is 65. It asserted that the definition of 'State pension age' in the Rules is not dynamic, so it would not change in accordance with amendments to the 1995 Act. It has also asserted that it was not the intention, when the Rules were drafted, to leave open the possibility that changes in legislation would alter the age at which a Scheme member is deemed to have reached 'State pension age'.

[2] The Adjudicator used references to 'SPA', but for continuity I refer to 'State pension age' where it refers to the defined term in the Rules.

- The Adjudicator's view was that the Rules do not define 'State pension age' either by reference to the 1995 Act as it stood at the date the Rules were finalised, or the date at which the individual became a deferred member of the Scheme. 'State pension age' is defined solely by reference to paragraph 1 of Part 1 of Schedule 4 to the 1995 Act.

- No provision was made in the Rules, such that reference to the 1995 Act does not include any subsequent amendments to the legislation. So, reference to 'State pension age' in the Rules should be considered to mean the age at which the member becomes eligible to receive their State Pension, even though the legislative changes may not have been foreseen by the Trustee.

- There is no need to depart from the words used in the Rules to give effect to the purpose of the SSS provisions. This approach is consistent with the line of authorities, ending recently with the case of *De La Rue plc v De La Rue Pension Trustee Ltd* (2022).

- The Trustee should reinstate the payment of the SSS to Mrs S and redress any payments due from age 65 that she should already have received.

- Mrs S had suggested that she will become eligible for the State Pension when she reaches the age of 66 years and 6 months, but the Adjudicator set out his understanding that she will receive her State Pension at age 66. This was in line with the changes brought about by the Pensions Act 2011.

- The Trustee's offer of £1,500 was sufficient recognition of the distress and inconvenience Mrs S has suffered.

28. The Trustee did not accept the Adjudicator's Opinion and the complaint was passed to me to consider. The Trustee provided further comments in response to the Opinion, which are summarised as follows:-

- The Adjudicator's assertion that the purpose of the SSS is to provide a scheme member with a bridging pension until they reach SPA is unsupported. The Rules provide that the SSS is paid until 'State pension age', as defined in the Rules, is reached. This is the point at which the SSS ceases, not the member's SPA in practice.

- It is not disputed that the age at which the SSS ceases is defined by the stated provision in the 1995 Act, but this is not the higher SPA.

- 'State pension age' is defined only by reference to a provision in the 1995 Act. It did not include that the age may be further adjusted through subsequent legislation. Express reference would be required in order for amendments, or indeed any replacement legislation, to be applied. The Rules do not include any other interpretative recitals or other provisions which suggest that legislative references in the Rules shall be updated from time to time.

- There is nothing in the drafting of the Rules to suggest the parties contemplated that legislative provisions should be read to include subsequent legislation, nor that they intended to leave open the possibility that it would flow through to the definition of SPA and automatically increase the benefits in the Scheme. This is unsurprising, given that the impact of subsequent legislation would have not been known when the Rules were drafted.

- There is no basis for an approach under which express language is included in the Rules to stop the application of subsequent amendments to legislation. Hence, this kind of approach is never seen in practice.

- It disagrees that the Adjudicator's approach is consistent with the recent line of authorities ending with the *De La Rue* case, as it is at odds with the judgments in those cases.

- The correct approach to the construction of pension scheme provisions was authoritatively restated by Lord Hodge in *Barnardo's v Buckinghamshire* (2019). Lord Hodge said that the particular characteristics of pension schemes meant that it was appropriate for the Court to give weight to textual analysis, by concentrating on the words which the drafter has chosen to use and attaching less weight to the background facts.

- The importance, in a pensions context, of starting with the language used was emphasised by Sir Geoffrey Vos MR in *Britvic Plc v Britvic Pensions Ltd* (2021). The proper approach has been summarised by Trower J in *De La Rue plc v De La Rue Pension Trustee Ltd* (2022).

- The authorities emphasise an approach to construction which gives weight to textual analysis. The Adjudicator's view is inconsistent with this and has interpreted the definition of 'State pension age' to require subsequent amendments to be incorporated, based on his view of what was intended in 2001. The general approach of the courts has been to do the 'minimum violence' possible to the drafting of a contract when construing a provision. Given that there is no express suggestion in the drafting of the Rules that it had been contemplated that the purpose of the SSS was to follow any changes to the SPA, it is reasonable that the current drafting, without the inclusion of any implied terms, would be sensible.

29. I have considered the Trustee's comments, but they do not change the outcome. I agree with the Adjudicator's Opinion.

## Ombudsman's decision

30. The additional benefit available to some members through the SSS comes to an end in the Rules at 'State pension age'. 'State pension age' is defined in the Rules as having "the meaning given by the rules in paragraph 1 of Part 1 of Schedule 4 of the Pensions Act 1995…" (i.e. it cross refers to the 1995 Schedule). If a member's underlying SPA changes in the 1995 Schedule, does that mean that 'State pension age' for the purposes of the Rules also changes?

31. So, the question at the heart of this complaint can be distilled to a simple:

    31.1. is the reference to 'State pension age' in the Rules 'dynamic', and linked to underlying changes in the legislation, so that it is defined by reference to the actual SPA (as Ms S argues – and so, for her, the SSS should continue to age 66), or

    31.2. is it 'fixed' and set by reference to the legislation as it stood at the point the Rules were executed[3] (as the Trustee argues, so that the SSS for Ms S would end when she turns 65)?

32. In my experience, to avoid uncertainty and disputes of this nature, many scheme rules look to include a general interpretation provision. I was not able to find such a provision in the Rules (or other governing documents provided by the Trustee), and one has not been drawn to my attention[4].

33. The Trustee looks to make a virtue of this, and argues that an interpretative provision of the type mentioned above is explicitly required in order to incorporate future adjustments or changes to legislation that are referred to in the rules of a pension scheme. It says "express reference would be required in order for subsequent amendments … to be applied"[5]. Essentially, the Trustee's position is that references to statutory provisions in scheme rules are to be read, as a starting position, as excluding future amendments unless otherwise expressly provided for, rather than vice versa.

34. However, the Trustee does not provide any authority to support this proposition. Similarly, I have not found any authority either (nor, indeed, any direct authority for the contrary position).

[3] Putting to one side the Trustee's administrative practice of fixing it instead at the member's date of leaving.
[4] Similarly, I have examined the Interpretation Act 1978 to see if that provides assistance – but it does not.
[5] The Trustee, and its legal advisers, also looked more widely at 'replacement' legislation (as opposed to 'amended' legislation). I have not sought to address that point here as it is not relevant to the complaint at hand – as I point out below, the key legislative reference used by the Rules for the purposes of defining 'State pension age' has remained constant, and it is only the underlying provisions in that paragraph that have changed.

35. In the absence of specific guidance, this becomes a matter of construction. As a starting point, it is clear to me that where the drafting of scheme rules looks to paraphrase legislation, there is a risk the rules diverge if the legislation changes in the future. To deal with that risk, draftsman can, and often do, cross refer to the specific legislation to allow for the rules to move with those changes (particularly, as is the case here, where the legislation is not overriding).

36. The most obvious example of that has been the difference in which the Government's decision, in 2011, to use the Consumer Prices Index (**CPI**), rather than the Retail Price Index (**RPI**), as the basis for the statutory method of increasing and revaluing pensions affected different pension schemes. The schemes that hardcoded RPI into their rules found that the ability to utilise CPI was limited. In contrast, scheme rules that cross referred to the statutory requirements were in the most part dynamic, and found that the use of CPI was automatically imported into the pension increases or revaluation provided by the scheme.

37. A decision to hardcode a reference to RPI into rules, or instead make reference to the statutory method (resulting in the use of CPI), was often not a conscious 'policy' decision. For example, Nugee J discussed, *obiter*, this point and the tracking of legislation generally[6] in *Carr v Thales Pension Trustees* [2020] EWHC 949 (Ch)[7]:

> "It was I think usually a matter of happenstance which technique was adopted, and I doubt most drafters thought it made any practical difference at all. It was only once CPI was adopted by the Government in place of RPI that it could make a difference because schemes which simply cross-referred to the statutory requirements of s51 PA 1995 found that their indexation provisions tracked the Government's switch to CPI, whereas those that had expressly referred to RPI in their rules did not. But that was I suspect very often just a fortuitous effect of the drafting technique adopted rather than any conscious decision."

38. I make those points only by way of illustration, not least as the statutory provision cross referenced in this complaint is different in its nature to those in the RPI/CPI cases. However, the cases arising from the RPI/CPI shift are of considerable assistance in setting out how I should construe Rule 5.5 – particularly *Barnardo's v Buckinghamshire and others*[8] (**Barnardo's**), which the Trustee agrees sets out the approach I should use as an aid to the construction of Rule 5.5. An extract of Lord Hodge's discussion from this case, which I have considered in detail together with other recent cases that have applied the approach in *Barnardo's*[9], is quoted in Appendix 2.

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[6] Rather than in respect of the Thales Pension Scheme specifically, which did have a helpful, express interpretation provision (see paragraph 41). However, Nugee J does not suggest that his *obiter* comment, set out above, would only apply to schemes that had such an interpretation provision.
[7] At paragraph 64.
[8] [2018] UKSC 55
[9] Notably *Britvic v Britvic Pensions* [2021] EWCA Civ 867 and *De La Rue v De La Rue Pension Trustee* [2022] EWHC 48 (Ch)

39. Pointing to the distinctive characteristics of a pension scheme, *Barnardo's* sets out that "… these characteristics make it appropriate for the court to give weight to textual analysis, by concentrating on the words which the draftsman has chosen to use and by attaching less weight to the background factual matrix".

40. Those characteristics apply here and, in my view, the better meaning of Rule 5.5, having applied textual analysis to it, is the 'dynamic' construction of that provision. That was also the position the Adjudicator had reached in his Opinion. He was not looking to import words or meaning into the provision. Rather, to me, he was simply looking at the words on the page, and deciding whether it was the fixed or dynamic reading of the cross-reference in question that was most natural – and in that regard I agree with his conclusion.

41. Indeed, to me the analysis deployed by the Trustee risks exactly the mischief it seeks to criticise the Adjudicator for – a departure from the textual analysis that it seeks to promote. The Trustee invites me, in the absence of a general interpretation provision, or specific words in Rule 5.5, to read into that rule (and it seems the Rules as a whole) that references to legislation are to be set in aspic at the point of execution. For that reason, the Trustee goes on to say that "one never sees such express language in practice [i.e. language excluding the application of subsequent amendments to legislation]" because "there is no need for it". However, in doing so it is asking me to "depart from plain language" and recognise the sort of background context or industry practice that may "give some strained meaning to … the words used" in the Rules. Lord Briggs in *Safeway Ltd v Newton*[10], as approved by Lord Hodge in *Barnardo's*, cautions against such an approach[11].

42. I too have looked at the words on the page, and to me the language indicates that the dynamic approach to the definition of 'State pension age' is to be preferred.

43. The Rule invites a user to test the payment of a member's SSS (if indeed one had been payable) against the 'State pension age', a term defined in the Rules. At that point, the SSS will cease to be paid. A reader, looking at the words on the page, is then invited to turn, for the meaning of 'State pension age', to "the rules in paragraph 1 of Part 1 of Schedule 4 to the Pensions Act 1995" (i.e. the 1995 Schedule). The age found in the 1995 Schedule has differed depending on when the test was carried out. In Mrs S's case, her pension came into payment in October 2018 – and at that point, looking at the 1995 Schedule, the relevant 'State pension age' was 66. There is nothing in Rule 5.5, or the Rules as a whole, that would ask a reader in 2018 to look back at the date the deed was executed in 2001, and then trace back what the 1995 Schedule provided for at that point, when determining what her 'State pension age' should be in 2018. To infer that requirement "departs from plain language". Similarly, Mrs S will reach 66 later in 2024 and, in order to test whether the SSS should cease payment for the purposes of the Rules, the administrator would need to look at the 1995 Schedule once again to see whether 'State pension age' has been reached.

[10] [2018] Pens LR 2
[11] *Barnardo's*, at para 15, and reproduced in full in the Appendix.

44. This, to me, is the clear reading of the Rule. It does not require any strained interpretation, or reading in of additional meaning or language. Indeed, I note that the specific legislative reference used by the Rules for the purposes of defining 'State pension age'[12] has remained constant and 'live' throughout the life of the Rule – and it is only the words contained within that reference that have changed. Both the journey and destination remain the same.

45. This is in contrast to the Trustee's approach which, as I point out above, does require some 'strain' to conclude that the fixed construction is correct. Had the draftsman wanted to, unambiguously, ensure the fixed construction of the Rule, it could have been achieved, simply, through a few additional words (or, indeed, through use of the specific ages contained in 1995 Schedule at the time the Rules were executed – dispensing with the need for the cross reference altogether). For example, the definition of Final Salary in the Rules sets out explicitly the points in time at which a member's final salary should be tested against the 'earnings cap'[13]. That is not to say that express wording is necessary to stop future amendments to legislation being carried through – rather it is necessary to alter what the plain reading of the wording of the Rule would otherwise be.

46. To me the 'dynamic' construction also appears consistent with a reading of the Rules as a whole (following on from Lord Hodge's judgment in *Barnardo's*[14]). The draftsman has 'fixed' the interpretation of some provisions at a particular time (as with the reference to the earnings cap referred to above), while in other cases there are statutory references where the underlying provisions have similarly changed and which have not been fixed (and that, on the face of it, would likely be read as 'dynamic' – as, otherwise, there would seem to be some risk of non-compliance)[15].

[12] I.e. the cross reference to "…*the rules in paragraph 1 of Part 1 of Schedule 4 to the Pensions Act 1995*…".
[13] "*Final Salary cannot, however, exceed the amount of the Earnings Cap at the date on which the Member leaves Employment, reaches Normal Pension Date or dies, whichever occurs first, except as described in Rule 17.3*."
[14] At paragraph 23: "*Fourthly, it is trite both that a provision in a pension scheme or other formal document should be considered in the context of the document as a whole and that one would in principle expect words and phrases to be used consistently in a carefully drafted document, absent a reason for giving them different meanings*."
[15] By way of just one example, in the investment power within the Rules (Rule 21.2) there is a reference to "*The Trustees will exercise these powers in accordance with Sections 36 and 40 of the Pensions Act 1995 (choosing investments and restriction on employer related investments)*" – provisions that have changed since the date of execution.

47. Likewise, Lord Hodge also referred to the long-term nature of pension schemes being one of their distinctive characteristics[16], that leads to a preference for textual analysis. At the time of executing the Rules, the SPA was already in the process of changing (and this was the reason for the equalisation of pensionable ages for men and women contained in the 1995 Schedule). In drafting the governing documentation for pension schemes there is some anticipation, indeed expectation, that laws will change. Indeed, the fact that the Rules, despite being executed in 2001, remain of relevance, despite the very many changes of legislation since then. In that context, it is also in my view more reasonable to read Rule 5.5 as being 'dynamic'.

48. Even if this was not the intended outcome of the drafting, which I make no comment on, it is clearly not an unworkable construction. Rather, in my view, it is the preferred construction and, as a result, for the purposes of Rule 5.5, Mrs S' 'State pension age' is as currently set out in the 1995 Schedule: age 66 (i.e. her SPA).

49. I uphold Mrs S' complaint.

## Directions

50. Within 28 days of the date of this Determination, the Trustee shall:-

- Reinstate payment of the correct SSS to Mrs S, which should continue until her State Pension becomes payable at age 66.
- Redress any SSS payments that were due to Mrs S but have not been paid to date. This redress should have additional interest applied, at the base rate for the time being quoted by the Bank of England, calculated from the dates these payments should have been paid to the date of settlement.
- If the redress for the previous 'missed' payments, as outlined in bullet point two above, means that Mrs S' is liable for a higher amount of income tax, compared with the tax she would have paid if she had continued to receive the SSS when she reached age 65, the Trustee should also pay redress to Mrs S to the cover the additional tax due.

51. Pay £1,500 to Mrs S for the distress and inconvenience she has suffered.

**Dominic Harris**

Pensions Ombudsman

12 June 2024

[16] *Barnardo's*, at para 14, and reproduced in full in the Appendix.

## Appendix 1 – Extract from the Rules

***"5.1 Retirement at Normal Pension Date***

A Member who leaves Employment at Normal Pension Date will receive a pension for life at a yearly rate of 1/60th of Final Salary for each complete year of Pensionable Employment, plus an additional 1/720th for each additional complete month, with a maximum of two thirds of Final Salary…

***…5.5 State Scheme Supplement***

A Member who leaves Employment before State pension age and is entitled to pension under Rule 5 will, until State pension age, have his or her pension calculated using Final Salary without reducing Salary by an amount equal to the Pensionable Deduction.

Any increase made to the Member's pension during that time which are referable to the supplement will not continue to be paid after State pension age.

No account will be taken of the supplement for the purpose of calculating benefit payable under Rule 8 (pensions for spouses Dependants and children).

For the purpose of this Rule, State pension age has the meaning given by the rules in paragraph 1 of Part 1 of Schedule 4 to the Pensions Act 1995 (rules for equalisation of pensionable ages for men and women)…

***…9.1 Preserved Pension***

A member who leaves Employment before Normal Pension Date with at least 2 years' Qualifying Service (see Rule 9.3) will receive a pension for life from Normal Pension Date of an amount calculated as described in Rule 5.1.

The pension will be increased before payment as follows:

9.1.1 the pension in excess of GMP will be increased by the percentage required by the Revaluation Laws (which is approximately equal to the percentage rise in the cost of living between the date the Member leaves Employment and Normal Pension Date, with a maximum of 5% per year compound); and

9.1.2 the GMP will be increased as required by the Contracting-out Laws."

# Appendix 2 – Extract of Lord Hodge's discussion of the judgement for Barnardo's v Buckinghamshire (2019)

"***Discussion***

***The construction of pension schemes***

13. In the trilogy of cases, Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900, Arnold v Britton [2015] AC 1619 and Wood v Capita Insurance Services Ltd [2017] AC 1173, this court has given guidance on the general approach to the construction of contracts and other instruments, drawing on modern case law of the House of Lords since Prenn v Simmonds [1971] 1 WLR 1381. That guidance, which the parties did not contest in this appeal, does not need to be repeated. In deciding which interpretative tools will best assist in ascertaining the meaning of an instrument, and the weight to be given to each of the relevant interpretative tools, the court must have regard to the nature and circumstances of the particular instrument.

14. A pension scheme, such as the one in issue on this appeal, has several distinctive characteristics which are relevant to the court's selection of the appropriate interpretative tools. First, it is a formal legal document which has been prepared by skilled and specialist legal draftsmen. Secondly, unlike many commercial contracts, it is not the product of commercial negotiation between parties who may have conflicting interests and who may conclude their agreement under considerable pressure of time, leaving loose ends to be sorted out in future. Thirdly, it is an instrument which is designed to operate in the long term, defining people's rights long after the economic and other circumstances, which existed at the time when it was signed, may have ceased to exist. Fourthly, the scheme confers important rights on parties, the members of the pension scheme, who were not parties to the instrument and who may have joined the scheme many years after it was initiated. Fifthly, members of a pension scheme may not have easy access to expert legal advice or be able readily to ascertain the circumstances which existed when the scheme was established.

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

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

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

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

17. It is nevertheless relevant to the construction of pension schemes that they are drafted to comply with tax rules so as to preserve the considerable benefits which the United Kingdom's tax regime confers on such schemes. They must be construed "against their fiscal backgrounds": *National Grid Co plc v Mayes* [2001] 1 WLR 864, para 18 per Lord Hoffmann; *British Airways Pension Trustees Ltd v British Airways Plc* [2002] Pens LR 247, Arden LJ at para 30. In this case, the CIR guidance on approval of schemes, which is contained in the practice note on occupational pension schemes (IR 12 (1979)), forms part of the relevant background. In the footnote to para 6.14 of that guidance, the CIR stated:

> "Increases in the cost of living may be measured by the index of retail prices published by the Department of Employment or by any other suitable index agreed for the particular scheme by the Superannuation Funds Office."

It appears therefore that the CIR, in giving discretionary approval to a scheme, would not have objected to a scheme which empowered its trustees to substitute an appropriate index for the RPI. This is relevant background as it means that there was no CIR constraint which might influence the construction of the words in dispute. This contrasts with the National Grid case in which the fiscal background was directly relevant to the interpretation of a phrase in the scheme. The tax regime did not allow an employer to be paid part of a surplus of scheme funds, which had already received tax exemptions when payments were made into the scheme. But the tax regime did not prohibit the release of a debt due by the employer to the scheme which had not had those tax advantages. This assisted the House of Lords to construe narrowly a provision in the scheme which prohibited the making of scheme moneys payable to the employers. In the present case, as Lewison LJ stated at para 32 of his judgment, the draftsman of the scheme did not track the wording of the Revenue guidance in the Definition but chose different language. The scheme could have empowered the trustees to select an index as an alternative to the RPI. The question is whether it did so.

18. Finally, a focus on textual analysis in the context of the deed containing the scheme must not prevent the court from being alive to the possibility that the draftsman has made a mistake in the use of language or grammar which can be corrected by construction, as occurred in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101 , where the court can clearly identify both the mistake and the nature of the correction."