John Dix v Sigma Group Ltd

Jurisdiction:	Jersey
Judge:	Sir William Bailhache, Jurats Olsen, Austin-Vautier
Judgment Date:	28 May 2021
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Text

[2021] JRC 159

ROYAL COURT

(Samedi)

Before:

Sir William Bailhache, Commissioner, and Jurats Olsen and Austin-Vautier

Between
John Dix
Plaintiff
and
Sigma Group Limited
Defendant

Advocate M. P. Boothman **for the Plaintiff**.

Advocate A. D. Hoy **for the Defendant**.

Authorities

Income Tax (Jersey) Law 1961.

Trusts (Jersey) Law 1984.

Midland Bank Trust Company (Jersey) Limited and Other v Federated Pension Services [1995] JLR 352.

Re Pantone485 Limited [2002] BCLC 266.

Employment.

THE COMMISSIONER:

Introduction

1 The Plaintiff commenced these proceedings by Order of Justice dated 25 th January 2019. Between 1 st March 1989 and 31st August 2013, the Plaintiff had been employed by the Defendant or its predecessor company. He was a director of the Defendant until about 2000, but continued thereafter as a senior manager. The Defendant was and is involved in data processing both in Jersey and Guernsey, and in the sale of information technology equipment and know-how as well as other related businesses.

2 At the time the Plaintiff commenced his employment with the Defendant, he was issued with a copy of the Members' Pension Guide. The Pension Scheme (the “Scheme”) appeared to satisfy the Plaintiff's requirements, as it was a contributory final salary scheme, set up as a trust with all the funds in the Scheme kept separate from his employer's finances. In his evidence, the Plaintiff indicated that it was important to him that the benefits which he would accrue under the Scheme would be separate from the success or otherwise of the Defendant. The present claim concerns the actions of the Defendant, whether as Trustees or Founder of the Scheme or as employer, at the time when the scheme was wound up in 2008, leading to benefits being made available to the Plaintiff which fell short of those he was expecting.

Pension Scheme and Rules

3 It is appropriate to start with a short description of the relevant terms of the Scheme and the Rules.

4 The Scheme was established by a declaration of trust (the “Trust Deed”) made by Channel Data Processing (Jersey) Limited (“CDP”) as the Founder on 10 th August 1988. The Trust Deed established irrevocable trusts commencing on 1 st October 1987, the object being to

provide benefits for such of the directors and employees of the Founder and for the directors and employees of any employer to which the scope of the Scheme is extended as are admitted to membership ("the Members"), those benefits being secured by contributions made by the Founder and any such employer, and, where the Founder so determined, by the contributions of such directors and employees as well. The Founder agreed by the Trust Deed to adopt Rules within two years of the date of execution of the document which would enable the scheme to be approved under the Income Tax (Jersey) Law 1961 (the "1961 Law"). The Founder was also the sole trustee of the Scheme. The fact that the Defendant was the Founder and the trustee clearly gave rise to potential conflicts which we will review later, but it was not unusual at the time and, indeed, may not be wholly unusual even today. Mr Stephen Moore ("Mr Moore"), who is a director of the Defendant, told us in cross-examination that the purpose of the Scheme was not to benefit the Defendant but to secure the goodwill of the employees.

5 It was an integral part of the Scheme that the benefits provided on death or retirement would be capable of approval under Article 131 of the 1961 Law. These benefits would be provided by assurance policies effected with the Norwich Union Life Insurance Society ("the Society"), which would be vested in the Trustees – this was set out in the recitals and in Clause 3 of the Trust Deed. The following provisions of the Trust Deed are relevant:-

> ***"1. The Founder hereby establishes the scheme under irrevocable trusts to commence on the 1st day of October 1987. The object of the Scheme is to provide benefits for such of the directors and employees of the Founder ….. as are admitted to membership thereof (hereinafter "the Members") secured by contributions of the Founder …. and where the Founder has so determined by contributions of such directors and employees***
>
> ***…***
>
> ***3. Any policy or policies of assurance providing benefits under the Scheme shall be effected with the Society and vested in and held by the Trustees upon trust to hold apply and dispose of the proceeds thereof in accordance with the provisions of the rules (herein called "the Rules") which the Founder undertakes to adopt not later than twenty four months after the date of execution hereof in a form which will enable the Scheme to obtain approval under the Jersey Law***
>
> ***…*** .
>
> ***5. The Founder may at any time should be alter or modify by deed all or any of the provisions of this Declaration, but no alteration or modification shall be made which reduces the benefits of any of the Members at the date of such alteration or modification without their consent in writing or which prejudices approval of the Scheme under the Jersey Law. Upon making such alteration or modification the Founder shall give written notice thereof to the Trustees***
>
> ***6. Any lump sum benefit which becomes payable under the Scheme on the***

death of any of the Members before the Rules are adopted pursuant to Clause 3 hereof, shall be paid in accordance with the terms of the explanatory literature hereinbefore referred to

…

8 The trusts hereby created shall be determined on whichever of the following dates shall first occur namely:-

(i) The date of expiration of a period of 100 years from the commencement of the Scheme;

(ii) The date (if any) which the Trustees may at their discretion determine prior to the date specified in paragraph (i) of this Clause"

6 CDP transferred its business to the Defendant on or around 19 th February 1993, and with it the Scheme. We have not seen any formal documentation in this respect, and Mr Moore told us that CDP was subsequently wound up. Both parties have treated the Scheme as if it were commenced by the Defendant in 1988, and we see no reason not to do so in those circumstances. On behalf of the Defendant, Mr Moore accepted that the Defendant is to be treated as the Founder.

7 By providing in Clause 5 of the Trust Deed that the Founder, and not the Trustees, has the power to alter the terms of the Trust Deed and, if such alteration is made, the Founder must give written notice to the Trustees, it is emphasised that the Deed is made by the Founder as employer. That the employer had control of the Scheme is also emphasised by the obligation of the Founder to make the Rules, which were in fact made by the Founder on 28 th October 1988 (the "Original Rules").

8 By contrast with the power to alter the Trust Deed, which lies with the Founder, Clause 8 of the Trust Deed confers upon the Trustees, and not upon the Founder or employer, the power at their discretion to determine the Trusts created by the Trust Deed. It is appropriate to emphasise that distinction at an early stage because the Founder, the Trustees, and the employer are all one and the same company.

9 A draft of this judgment was supplied to the parties for correction for factual errors. Advocate Boothman has informed us that his note of the evidence is that the following statement is incorrect, namely that a copy of the Original Rules was provided to the Plaintiff. We have checked our note of the Plaintiff's evidence which is to this effect. Accordingly we have not made any change to it. However, we do not think that even if we are wrong on this point of evidence, it has any effect on the decision to which we have come because the Plaintiff does not take issue with the Original Rules.

10 In essence, the Original Rules provided for contributions from both employer and employee

into the Scheme. These contributions were initially fixed at 5%, but they were increased at some point to 6% and later to 9.75%. They provided for normal pension age as the age of 60, and on a Member achieving that age and retiring, he would be entitled to 1/60th of his final salary multiplied by however many years of full-time service he had given the company. The Scheme was more sophisticated than that brief summary, but that summary suffices for the purposes of this present introduction. It may simply be worth adding that in the event of death in service, the widow of the Member would receive 50% of the pension which the Member would have received, had he retired at the date he died.

11 Clause 13 of the Original Rules provides as follows:

> ***" DISCONTINUANCE***
>
> ***(i) The Employer [which was defined in the Rules as the Founder and, essentially, any other employer joining the Scheme] may discontinue his Contributions to the Scheme at any time.*** If he does so, the Members shall thereupon discontinue their Contributions and pension benefits shall be calculated in accordance with Rule 11(1)(a) as if the Members had left service at the date of discontinuance. Any benefit under Rule 10 in respect of the death of a Member before the Normal Pension Age while in the service of the Employer shall cease. Subject to the foregoing modifications, the Scheme shall remain in full force. If a Member subsequently ceases to be in the service of the Employer before the normal pension age he shall be entitled to benefits in accordance with Rule 11 as if he had left service at the date contributions were discontinued except that paragraph (2)(e) of that Rule shall not apply .
>
> ***(ii) The Founder may, if they deem/it deems it desirable to do so, arrange for contributions by and in respect of all Members to cease and proceed to wind up the Scheme from such date thereafter as the Founder shall decide.*** In this event, the benefits secured to the date of discontinuance shall be dealt with accordance with Rules 12 and 15."

12 Rule 12 deals with transfers to another scheme and in the circumstances of this case, that did not arise. However, it is necessary to review Rule 15 which is in these terms:

> ***" WINDING UP***
>
> ***On the winding up of the Scheme or a proportionate part of it, the entitlement to benefits of existing pensioners and Members who had previously left service shall remain unaltered and all other Members shall be entitled to benefits calculated in accordance with Rule 11(1)(a) as if the Members had left Service on the date of winding up and the policies or the proceeds thereof shall be applied as follows:-***
>
> ***(i) Firstly, in payment of all costs and expenses of the Trustees*** .

(ii) Secondly, in securing non-assignable and non-commutable pensions for existing pensioners equal in amount to their existing pensions under these Rules .

(iii) Thirdly, in securing pensions payable to Members or other beneficiaries to which entitlement to payment has already arisen including the pension and other benefits in respect of Members who have attained Normal Pension Age but have deferred retirement .

(iv) Fourthly, in securing for prospective pensioners (with associated death benefits if applicable) commencing at the Normal Pension Age of the amounts secured by Member's Voluntary Contributions which have not been secured under paragraph (iii) of this Rule .

(v) Fifthly, in securing as far as the policies permit non-assignable and save as hereinafter provided non-commutable pensions (with associated death benefits) for prospective pensioners commencing at the Normal Pension Age of the amounts to which they are entitled, provided that

(a) the pension may at the request of the Member be altered at the date of winding up to commence immediately for any Member who is within 10 years of the Normal Pension Age at the date of winding up and has retired from all remunerated employment or who has retired on account of incapacity and the provisions of Rule 8(i) shall apply to such pension, or

(b) the pension may be commuted for an immediate cash payment at the absolute discretion of the Founder where the Member is in the opinion of the Employer in exceptional circumstances of serious ill-health ,

(c) no pension shall exceed the Maximum Approvable Pension for the period of service up to the date of winding up of the Scheme nor shall the associated death benefits exceed the limits set out in Rule 10 ,

(d) the pension may be commuted at the Normal Pension Age to the extent provided by Rule 8(i) as though the Rule had effect at that time provided that for this purpose the Member's final remuneration shall be calculated as if the winding up date were the Member's date of retirement .

(iii)[sic] Sixthly, if any balance remains after the policies or the proceeds thereof have been applied as above it shall be paid to the Employer……."

13 Rule 18 deals with claims:

"CLAIMS

No Member or beneficiary shall have any claim, right or interest upon to or in respect of the pension and other benefits under the Scheme except under and in accordance with these Rules and the liability of the Trustees in respect of any Member or beneficiary shall be limited to the moneys received from the Society under the Policies."

14 Rule 19 deals with alterations:

"ALTERATIONS

The Founder may from time to time alter or modify all or any of the provisions of these Rules provided that no such alteration or modification shall be made which reduces the benefits of a Member already accrued at the date of such alteration or modification and provided that written notice thereof is given to the Trustees."

15 New Rules (the "New Rules") were adopted by the Defendant as Founder on 17 th July 2006, and are expressed to be effective as of 1 st November 1990. These Rules were not the subject of consultation with the Plaintiff who was unaware of them until he received discovery in the course of these proceedings. He therefore had not been asked to agree the alterations, and had not agreed them. He told us in evidence that there were provisions in the New Rules, particularly in relation to Clause 21 (see below) dealing with surplus assets with which he was not sure he agreed. For the purposes of this case, we do not think that Clause 21 applies, but in other respects, having looked at the Original and the New Rules, we think that in material terms they are so similar that we could proceed on the basis of the New Rules. However, because of the requirement that the Plaintiff and the other members of the Scheme needed to agree if there were any changes which reduced their accrued benefits and there is no evidence they did so, it is safer to proceed on the basis of the Old Rules. In this judgment, unless the context otherwise requires, when we use the expression "the Rules", we mean the Old Rules.

16 However, because the question has arisen, we mention briefly the provision in relation to surplus assets at Clause 21 of the New Rules:

"Surplus Assets

If an actuarial valuation of the Scheme shows that the value of the Scheme's assets exceeds the value of the Scheme's liabilities the Founder may do any of the following:

(a) Agree a reduction at the rate at which contributions are being paid or a temporary cessation of contributions to the Scheme by the employer or Members or both;

(b) Pay some or all of the surplus to the employer …… provided that prior to the payment of any surplus to the employer(s) the expressed permission of the Comptroller of Income Tax shall be obtained by the person having the management of the Scheme;

(c) Increase any benefits under the Scheme to any extent that they consider appropriate consistent always with the Scheme remaining approved."

17 For the avoidance of doubt, we do not think that Clause 21 of the New Rules has any application in this case. It is true that in the June 2008 valuation there was on one analysis a surplus of £388,000 in respect of the market value of the assets over the past service liability (which includes those members who had not currently reached normal retirement age). Nonetheless, the whole structure of Clause 21 of the New Rules is based on the premise of the Scheme continuing in existence. In the present case, the Scheme was wound up, and Clause 21 does not apply, even if the New Rules were the applicable rules.

18 The draft of this judgment was circulated to counsel in the usual way inviting comments on typographical or factual errors. Advocate Hoy responded to say that in his view there was a factual error in paragraph 15 above which was of significance because of the Court's conclusions in paragraph 52 of the draft (paragraph 54 of this judgment). The error was said to be that the changes made in the New Rules did not affect the Plaintiff's benefits and therefore the power in the Founder to make alterations to the Rules could be exercised without his agreement. Thus it was contended that the New Rules should be applied.

19 We accept that there was no reduction in the financial benefits which would accrue to the Plaintiff under the New Rules; but we consider that, consistent with clause 5 of the Trust Deed, we are entitled to construe the word "benefit" as including the protection which the Plaintiff could expect from having his pension rights held in trust. As we come on to say later in this judgment, we think that the fact under the New Rules some references to "the Trustees" have been replaced with references to "the Founder" is immaterial because the obligations of the Founder were and remained fiduciary obligations pursuant to the trusts of the Trust Deed and any rules made thereunder. In our view, the distinction between the Old Rules and the New Rules is thus irrelevant for the purposes of this case – and if at any point in the analysis that view should turn out to be wrong, then that only goes to justify the conclusion that the New Rules did affect the Plaintiff's benefits and thus required his consent. Either way, it is the Old Rules which we think it is safer to apply.

The Scheme in practice

20 The Court heard from Ms Charlotte Guillaume a director of Rossborough Financial Services Limited ("Rossborough"). She told us that Rossborough was retained by CDP to provide advice on pensions, life and investment business and to provide administrative services with respect to the Scheme. It was through Rossborough that CDP took out a

deferred annuity policy with the Society. The Scheme was in fact an insurance product which included standard documentation, including Scheme rules and a Scheme actuary, the latter being an employee of the Society. In 1988, when the Scheme was set up, insurance products of this nature were not uncommon.

21 Ms Guillaume said in evidence that the Society was the last provider of this type of policy in the market in Jersey. Once the Society had decided to stop providing such policies, there was no replacement possibility and in 2007/8, the deferred annuity contracts which the Society had previously been entering were being withdrawn. It was this change which lay behind the discussions held with the Defendant at that time, to which we will come later.

22 It had in fact become obvious by 2002 that the final salary schemes were becoming very expensive for employers. The contribution structure under the Original Rules was that each Member should contribute 5% of his or her annual salary, and the balance necessary to secure the benefits under the Rules was to be provided by the employer. Under the New Rules, the Member's contribution was calculated at the rate of 9.75% of salary and, again, the employer had to contribute an amount which, applied together with the Member's contributions, would secure the benefits which both the Original and the New Rules provided for.

The changes in 2003

23 In his actuarial valuation report as at 1 st March 2002, issued in December that year, the Scheme Actuary recommended a total contribution rate of 27.7%. This would involve the Defendant making a contribution of approximately 18% of the employees' salaries, a considerable increase on previous contributions. In its role as employer, the Defendant considered that it did not wish to continue to make such contributions. There were some discussions with the employees, and also, separately, with the Society which was itself looking to close down the insurance product which it had previously offered. In 2003, the Society therefore offered the Defendant an opportunity to move to a different administration system – it could remain with the existing deferred annuity structure, but in that case it would have to bear the full running costs of the Society continuing to administer the structure, or, alternatively, the Defendant had the opportunity of switching to a new unitised with profits structure. To persuade the Defendant to move to that system, it would receive an incentive payment (the “incentive payment”) of £337,420, to be paid into the then current transfer value of the fund, which it would keep in full if it remained on that structure for 5 years. Rossborough advised the Defendant to accept that alternative offer, advice which it followed. In addition, employer contributions to the Scheme were increased to 10% of the Scheme's salary, such contributions to be matched by the employees. The total contributions, at 20%, remained below the level recommended by the Scheme's actuary, which meant that the Scheme would very likely be under funded. The Defendant may or may not have taken the decision in 2003, to wind up the Scheme five years later but it was certainly looked upon as a possibility, and it was necessary to keep the Scheme in place for that period in order to receive the incentive payment. That payment was in fact paid into

the pooled fund of the Scheme, thereby increasing the likelihood that the Defendant as Trustees would have the funds to pay Members their benefits. Had the Defendant kept the Scheme going until 2008 without having the incentive payment, the Scheme's Members would be likely to have received a lower benefit in 2008, than they actually received.

24 The employees were informed of the decision which the Defendant had made in 2003, and all of them could have opted out of the Scheme at that stage. None chose to do so. Subsequently, the Society updated its final salary pension scheme rules – they had to be compliant with Article 131 of the 1961 Law, and at the same time the update was intended to make the administration of the Scheme easier and presumably therefore cheaper for the Society. The New Rules were supplied to Rossborough in November 2004, and supplied by Rossborough to the Defendant in December 2004. There is nothing significant in the delay but they were ultimately signed off by Mr Moore on behalf of the Defendant on 17 th July 2006.

25 Mr Alan Royle was a director of the Defendant from its formation until May 2013. In the early years he was directly involved in the Scheme on behalf of the Defendant, but he had a heart attack in May 2003 and was off work for three months. In evidence he said that he did not resume his trustee work in relation to the Scheme until September 2003, and even then took a back-seat role until the middle of 2004. He said that he was not involved in the administration of the Scheme from 2003 onwards. When Mr Moore gave his evidence, there was a slight suggestion that the Plaintiff and Mr Royle were those primarily concerned at the administration of the Scheme for the Defendant in 2003, something which both Mr Royle and the Plaintiff denied. On this point, although much of the correspondence is addressed to Mr Royle, we accept his and the Plaintiff's evidence and take the view that from early 2003 it was primarily Mr Moore who was responsible for the decisions taken by the Defendant. We note that there was a board meeting of the Defendant held on 25 June 2003, and a further meeting held at Rossborough's offices on 30 th June 2003, attended by Mr Moore and Mr Robert Sillars two directors of the Defendant and Mr Peter Daniell of Rossborough. The absence of Mr Royle from those meetings, which was prior to his heart attack, is consistent with the notes of a board meeting of the Defendant held on 25 th March 2003, which indicated that Mr Royle was to be removed from the distribution list of information about the Scheme which might well be thought to be understandable given that he was at that stage the largest potential beneficiary of it.

26 A formal letter from the Society by which it offered the incentive payment if the Trustees were willing to change the Scheme to a modern unitised with profits structure was sent on 8 th May 2003. That structure involved the use by the Society of the contribution payments from the employer and the employees for the purpose of buying units in the Norwich Union Life and Pensions With-Profit Fund at the offer price. On the transfer out of the Scheme, or its winding up, the Society would pay out the bid value of the units at the time of transfer. It had the right to increase the value by adding an additional bonus or decrease the value by applying a Market Value reduction. It is the subsequent dealing by the Defendant with this payment from the Society in 2008 on the winding up of the Scheme which lies at the heart of this litigation.

27 The proposal was considered by the board of the Defendant on 25 th June 2003, without Mr Royle in attendance. It was concluded that the Defendant would contribute no more than 10% of Scheme salaries, and it was agreed that if all the Members of the Scheme were not willing to contribute the difference of 15%, the Scheme would be wound up. The resolution was that the offer by the Society should be accepted, but as this was on condition that the Scheme was live for the next five years, the winding up would be postponed until March 2008, and during that period the Members would be expected to match the employer's contribution. The resolution concludes that “upon winding up, the assets of the Scheme would be used to secure pensions for the Members.”

28 The Minutes then conclude:

> *“The Trustees of the Scheme having understood the above conclusions agreed to liaise with the Members and determine the way forward.”*

29 It appears to us that the proper construction of these Minutes is that they reflect a meeting of the Defendant quã employer until the paragraph just cited when, the employer and the Trustees being the same, the Trustees are charged to take forward liaison with the Members. We note that Mr Royle had not been present at the meeting until that point. The discussion was apparently summarised for him and he is said to have agreed with the conclusions.

30 There was a meeting between the Defendant, as Trustees, with five members of the Scheme on 30 th June 2003. On 9 th July, the Plaintiff sent an email to Mr Moore to ask for a copy of the final version of the letter from the Trustees to the Members which had been discussed; he received the response that the Defendant had informed Rossborough that it was going to continue with the defined scheme for the next five years and that the Society's offer — to switch to the modern unitised product in return for the enhancement of approximately £330,000 to the transfer value of the fund — had been accepted. A letter was subsequently sent on 14 th July 2003, to the Plaintiff and to the other members of the Scheme, which in its material parts said this:

> *“…….*
>
> *It was explained to you at this meeting [on 30 June] that with the enhancement of approximately £330,000k to the transfer value of the Scheme offered by Norwich Union in return for switching to the modern unitised product, the current funding is estimated by the actuary to be sufficient to provide all Members with the benefits earned based on salary and service to 28 February 2003.* The Actuary is currently recommending a *future funding rate, from both employee and employer combined, of 25% of Scheme salaries.* This is a significant increase over current rates and because of the small membership could escalate in the future. We therefore believe that we have no option other than to wind up this Scheme and seek alternative ways of helping you to provide for

your retirement.

You will recall that Peter Daniell of Rossborough Financial explained to you during the meeting that it is necessary for the Scheme to remain in force for 5 years from March 2003, in order that the full extent of the additional payment from Norwich Union is captured. For this period the Sigma Group will increase its contribution to 10% of your Scheme salary which by the Rules of the Scheme will be matched by an equivalent contribution from yourself. This will give a total funding rate of 20% of Scheme salary which is below the level of 25% recommended by the Scheme Actuary and may result in benefits being less than 1/60th per year of service level.

At the end of this 5-year period, this Scheme will be wound up and you will then have a choice. The fund will be allocated equitably to each of you based upon contributions made by and on your behalf, period of membership etc. You may then either:

Transfer this fund to the existing Sigma Group Money Purchase Scheme.

Use it to purchase a deferred annuity contract to secure a pension from this Scheme at retirement.

With the permission of the Comptroller of Income Tax transfer this fund to a personal pension scheme.

Please note that as stated above, the Fund may not be sufficient to provide a pension in accordance with the 1/60th per year of service formula.

Upon the winding up of this Scheme you will be eligible to join the Sigma Group Money Purchase Scheme which will enable us to continue to contribute to your retirement."

31 The Plaintiff gave evidence that in the light of the assurances in relation to the benefits to be paid and the fact that the Defendant had indicated that there was no other option but to wind the Scheme up, he reluctantly agreed to go along with the closure plans and funding for the Scheme by the Society.

32 We find as a fact that the Defendant had resolved in 2003 that it would no longer make the employer's contributions to the Scheme with effect from 2008 once the 5-year period required by the Society in respect of the incentive payment had expired. There is, however, no indication that the Trustees at that stage had taken any decision with regard to closure of the Scheme.

The events of 2008

33 In his evidence, the Plaintiff indicates that he was informed in March 2008 that the Scheme

was to be closed, but that the Defendant would continue to make the employer's contribution to each employee as an addition to their monthly salary payment. The employees were not apparently informed of the discussions that were taking place between the Defendant, Rossborough and the Society during the following months. On 11 th July 2008, there was a meeting between Mr Moore and Ms Guillaume concerning the Scheme. Ms Guillaume's file note in its material parts is as follows:

> *"When the incentive payment was made to the Fund by NU five years ago, it had been the intention to keep the Scheme running for a 5-year minimum only and then to wind up immediately once the potential claw back period had expired.* However given the favourable state of the Scheme funding the Trustees/employer may decide to keep the Scheme going.
>
> *Steven advised Charlotte that there is a meeting at Sigma on Monday 14 July to discuss the future of the Scheme and he wanted to make sure that he fully understood the options available to the employer*.
>
> *Charlotte explained that the Scheme can continue in its current form with or without future contributions payable (the employer does not have to follow the Actuary's advice on zero contributions).* There are three retirements due within the next five years who comprise the vast majority of the Scheme liabilities – mostly John Dix and Alan Royle.
>
> *Charlotte advised that if the employer does decide to keep the Scheme going then after these two have retired and had benefits paid out then the Scheme should be wound up*.
>
> *Charlotte explained that if minimum cash equivalent transfer values were to be paid to all members then the Scheme is in surplus.* On wind up this surplus could be used to enhance members transfer values or could be paid back to the employer where it would be taxable as a trading receipt.
>
> *The Actuarial Report includes reference on page 9 to the estimated deferred annuity cost if the Trustees were to wind up the Scheme and seek individual deferred annuity contracts for all members based on salary and service to the winding update.* However, during the meeting, Charlotte tried to telephone Norwich Union to check if they are currently offering a deferred annuity option for winding up final salary schemes and the answer is that they are not.
>
> *Therefore, these figures are largely irrelevant*. Charlotte explained to Steven Moore that the Trustees either keep the Scheme going in its current format and wind up after Alan and John have retired or they wind up the Scheme with immediate effect and pay transfer values to all members, either minimum CETV or enhanced TV to use up all or part of the Scheme surplus." (emphasis added)

34 We should at this stage clarify the different bases for calculation of the entitlements of members as advised by the Society. In 2003, the Society had produced a document setting out alternative values for these entitlements – the cash equivalent transfer value basis and

the non-profit deferred annuity basis. The former was expressed to be based on the members' leaving service benefits and calculated using the transfer rates prevailing on the relevant date. The latter – the deferred annuity basis — value represented the cost of securing the liabilities by the purchase of non-profit deferred annuities from the Society on the terms in force on the relevant date. The latter cost was considerably higher than the former. It was never in doubt that the cash equivalent transfer value did not necessarily equate to the cost of securing the benefits which the Scheme was expressed to deliver.

35 It is to be noted that the file note of Ms Guillaume referred to above does not touch on whether there were any obligations in law on the Defendant as Trustees of the Scheme. The discussion seems to have assumed that the Defendant had a choice as to whether to adopt the cash equivalent transfer basis or the deferred annuity basis and, because the Society was no longer in the market of producing deferred annuity contracts of this kind (hence the comment the figures were largely irrelevant), it followed that the cash equivalent transfer basis would be adopted. The only question was whether there would be a minimum cash equivalent transfer or an enhanced cash equivalent transfer and it was up to the Defendant which it chose.

36 In his evidence, Mr Moore informed us that continuing the Scheme in his view would have been unfair five years later to the one person remaining within it. Investment rates were falling every day, and he considered they had made the right decision. In relation to the last paragraph of Ms Guillaume's note, he indicated that he thought this would be an employer's decision – to keep the Scheme going or to wind it up. In his view, the employer could wind up the Scheme. Mr Moore was not entirely clear as to his evidence for dealing with the surplus. On 15 th July 2008, the Defendant had written to Rossborough to confirm that it had resolved to wind up the Scheme with effect from 31 st August 2008. The language of his letter is that:

> *"At a meeting of the Directors of Sigma Group Limited …..* the Trustees of the above Scheme agreed to close the said Scheme as at 31 August 2008.
>
> *It was further agreed that the Members would receive the cash equivalent transfer value of the benefits given up as at 31 August 2008*.
>
> *……."*

37 In his witness statement Mr Moore said that as Trustees the Defendant opted to pay the entirety of the surplus to itself as employer pursuant to Rule 15(iv) of the new Rules and Section 10 of the unitised group defined the benefit policy schedule. It is to be noted that he did not claim that Rule 21 of the New Rules applied. He said that this decision was taken in order to protect the interests of its employees and creditors of Sigma. He went on that *"it was resolved by Sigma (as employer) that should Sigma's financial stability improve sufficiently, some of the surplus could be distributed to the members of the Scheme."*

38 In his evidence to us, he said that this was a bit of legalese. His view was that the employer

had to agree to the handling of the surplus and that was his understanding of the position.

39 The reference to Section 10 of the Unitised Group Defined Benefit Policy is to a document produced by the Society in 2003. Section 10 provides:

> *"Winding up the Scheme.* If the Scheme is wound up under the terms of the Scheme Rules, benefits will be secured for the Members of the Scheme. It may be necessary for the employer to pay further contributions to provide the Members' benefits in full. Before we advise you of the values attributable to individual
>
> *Members' benefits, we will cancel all units held.* The value of the units, less any charges, will be placed on deposit. The value of the money deposited will be used in accordance with the Scheme Rules.
>
> *Surplus money may be returned to the employer, provided the Scheme Rules allow.* Any refund will be subject to Jersey tax. We reserve the right to charge for additional services ……"

40 There does not appear to have been a board meeting to resolve the withdrawal from the Scheme as notified to Rossborough on 15 th July 2008, but Mr Moore was clear that there would have been board agreement to do so. When asked about the application of the surplus, he said that this was a decision of the employer. The Defendant was in a very difficult financial position at that time with its back against the wall. He was informed that the employer had control over the surplus and the employees were paid all their dues. That was how he understood the position. He thought the Trustees were there to make sure that the Rules were followed. The responsibility they had was both to the Members and the employer; but the Trustees were not part of the decision taking process on winding up.

41 There is some confusion in the evidence generally, insofar as this is concerned. We note from an email sent by Mr Royle to Ms Guillaume on 15 th July that he said that there was a recent meeting of the Board of the Sigma Group, Trustees of the Defined Benefit Pension Scheme, who voted to terminate the Scheme. The three existing contributing members of the Scheme at that time were given the choice of taking the transfer value of the Defined Benefit Pension Scheme into the Group Unit Linked Scheme; alternatively they might be able to set up three individual Retirement Annuity Trust schemes. He indicated to Ms Guillaume that he wished to meet her to discuss those options.

42 When he gave his evidence to us, Mr Royle said that this recent meeting had occurred on 14 th July and had been attended by him, Messrs. Moore and Sillars. He had voted against the proposition to bring the Scheme to an end, but Messrs Moore and Sillars had voted in favour of it. Mr Royle told us that he felt the role of the Defendant as Trustees was to look after the interests of the Members. In his view this was a decision taken to look after the interests of the Defendant, which was altogether a different matter. Following the meeting, Mr Royle went to see Ms Guillaume to discuss the matter further and what she said made

him even more uncomfortable. By emails sent on 25 th July and 6 th August he set out his objections. He was painfully aware of the then current cash flow difficulties of the Defendant because he was a director; but he did not feel that as Trustees, the decision made was in the best interests of Members, albeit it was clearly in the best interests of the Defendant.

43 In his email of 25 July he said:

> *"Without doubt the decision that we as Trustees made, which was to terminate the Scheme and allocate the 'cash equivalent transfer values' to the individual members, was legal.* However following the advice given to me by Charlotte, I am very clear as to what the impact of that decision is. By offering the 'cash equivalent transfer value', the statutory minimum offer, the Trustees are *offering the members an inferior pension arrangement that will fall considerably short from that provided under the existing scheme*.
>
> *Whereas had we proposed to use the 'deferred annuity buy-out basis' to value the members transfer value, then the members would have had the opportunity of receiving a pension entitlement similar to that promised under the original Pension scheme, but without the security of that scheme.* Obviously it goes without saying, that the members had been contributing to this scheme, in some cases for more than 30 years, and throughout that time they have demonstrated the highest degree of loyalty towards the Company. Charlotte did express surprise at the decision that we as Trustees have made, because in her local experience, the 'deferred annuity buy-out basis' is the normal route Trustees take under these circumstances."

44 Mr Royle therefore concluded with the suggestion that they revisit the decision taken.

45 He sent the second email (on 6 th August 2008), to Mr Sillars alone. He reiterated that the decision which had been taken by the Trustees was morally wrong. He suggested perhaps, in the spirit of compromise, the surplus should be split on a 50:50 basis.

46 No doubt it was as a result of that email that the Defendant considered further the allocation of the funds which would be received on closure of the Scheme. Thus it was that on 20 th August 2008, Mr Moore wrote to the Plaintiff to indicate that although it would be a few months after 31 st August before the allocated funds would be available for transfer, it would be possible for the Plaintiff to transfer the fund he received into the Sigma Group money purchase scheme if he wished. Mr Moore went on to say that as a result of the closure of the Scheme, a surplus of funds would be repaid to the Defendant. The Directors of the Defendant were legally obliged to protect the interests of its employees and creditors and considered that the surplus funds must be held for the benefit of those employees and creditors and not paid over to Scheme Members. He went on to give this assurance:

> *"The Directors have agreed that the Sigma Group will hold the surplus funds in*

a separate account and as soon as financial circumstances permit and the Directors consider that any distribution will not have a detrimental effect on the stability of the Sigma Group then 50% of this surplus together with income earned on that 50% will be distributed to the Scheme Members. If the monies distributed are paid into a Jersey tax approved pension vehicle then we confirm that you will not be liable to Jersey Income Tax on said distribution.

We must stress that any funds repaid to the Sigma Group Limited are due to and become an asset of the Sigma Group Limited and as such are controlled by the Directors. Any decision to transfer monies to Scheme Members will be entirely at the discretion of the Directors of the Sigma Group."

47 Given the financial situation of the Defendant at that time, this assurance remained a pious hope – indeed Mr Moore described it to us in evidence as "naïve". Whatever might have been expected to be the position in relation to the surplus, the outcome was worse than predicted. Rossborough advised in September 2008 that the current value of the Scheme assets was such that the figure attributable to the Plaintiff was £270,186.76. Unfortunately, by the time that the discharge forms were executed and the money transmitted, the Society had imposed a market value reduction on all transfers out of the With Profit fund. As a result, the Plaintiff's new transfer value was £235,847, and this was the sum ultimately paid to him, being the cash equivalent transfer value as recommended by the Scheme Actuary. There is no dispute that it was insufficient to provide him with the benefits he had accrued under the Scheme to that date. The surplus of £223,320 ("the surplus") was paid to the Defendant in its capacity as employer. Furthermore, notwithstanding the assurances contained in Mr Moore's letter of 20 th August 2008, the Defendant does not appear to have taken any steps to open a separate account to hold the surplus and on receipt of the funds, the Defendant's bank combined the accounts and thus reduced the amount of the Defendant's indebtedness to the bank by the amount of the surplus. Had the Defendant appreciated that these – and the rest of the surplus kept by the Defendant — were trust monies which were required to be kept separate under Article 21(6) of the Trusts (Jersey) Law 1984 as amended (hereinafter called the "1984 Law") this would not have occurred.

48 The parties very helpfully identified five questions which the Court had to consider:

(i) Did the Defendant (acting as a Trustees) properly apply the proceeds of the policies in the required order of distribution under the applicable Rules? (the distribution question).

(ii) Was the transferred amount adequate to secure the amounts to which the Plaintiff was entitled under the applicable Rules (the transferred amount question) If not, can the Plaintiff challenge that value?

(iii) What is the quantum of the Plaintiff's claim?

(iv) Does the exclusion clause in Clause 18 of the New Rules prevent a successful claim (the exclusion question)?

(v) Is any claim time barred by reason of prescription (the prescription question)?

49 There is some duplication between the first and the second questions but in their formulation and indeed in the meticulous preparation of an agreed bundle and in the focus of their submissions, the Court has been much helped by counsel and we express our appreciation to them.

The Distribution Question

50 Before addressing this issue directly, there are three preliminary points to be addressed.

51 The first of these is the question as to whether the Old Rules or the New Rules are to apply. For the reasons we have given, we apply the Old Rules.

52 The second preliminary point which we mention, which is consistent with our view that the right course is to apply the Old Rules, is related to the use of the term “Founder” in the New Rules. By and large, with exceptions only in respect of paragraphs 2, 5(i) and 19, of the New Rules, the word “Trustees” is not used at all. That is in contrast to the Old Rules, where the expression “the Trustees” applies on numbers of occasions – at paragraph 3, which indicates that the benefits are to be insured by individual policies or master policies effected by the Trustees with the Society, and those policies shall be held in the name of the Trustees; in paragraph 12 dealing with transfer arrangements with other potential approved schemes; at paragraph 13 dealing with the right to wind up the Scheme; at paragraph 15 dealing with the responsibility for winding up; at paragraph 18, limiting the liability of the Trustees; and at paragraph 20 dealing with taxation. In all these paragraphs in the New Rules, the reference to “the Trustees” has been replaced with a reference to *“the Founder”*. We note that both in the Old Rules and the New Rules there is also reference to the expression “the employer”. There is clearly a distinction between the obligations of the employer under the Rules, whether the Old Rules or the New Rules, and the obligations of the Founder and/or the Trustees. In our view it is necessary to identify whether the functions of the Founder under the New Rules are Trustees functions and in our judgment it is clear that they are. By recital (ii) under the Trust Deed, the Founder, which made the Declaration of Trust in the first place, is recorded as having *“elected to be the first Trustees of the Scheme”* and the definition of *“the Trustees”* is said to mean the Founder *“in its capacity as Trustees”*.

53 Furthermore, all the obligations of the Founder under both the Old and the New Rules are fiduciary obligations – starting with the whole object of the Scheme as set out in the Trust Deed which is to provide benefits for such of the Directors and employees of the Founder as are admitted to membership, benefits which are to be provided by contributions from both the employer and the employees.

54 Accordingly, wherever we have come across a reference to the “Founder” in the New Rules, we would have construed it as a reference to the Founder in its capacity as Trustees. In case we are incorrect in that view, we have applied the Old Rules as there is no evidence that the New Rules were agreed by the Plaintiff and they would, if we are wrong in our conclusion of them, adversely affect his claim for benefits because the Defendant would not, in all the cases in the Old Rules where it was acting as Trustees, on this hypothesis necessarily be acting in that capacity under the New Rules.

55 The third preliminary point which arises in our judgment is the need to distinguish between the Trust which is a relationship between the Founder/Trustees and the Members/beneficiaries; and the investments of the Trust, namely in the policies with the Society, which are in effect a relationship between the Founder/Trustees and the Society as a provider of those policies. It is important to emphasise that the Society can be required to provide whatever sums of money as it is legally obliged to provide pursuant to the policies; but the obligation of the Trustees is to provide the benefits which it is required to provide under the terms of the Trust and Rules. This conclusion has consequences for the purposes of consideration of the distribution question.

56 We have noted that Rule 13(ii) of the Old Rules enables the Founder to arrange for contributions to cease and proceed to wind up the Scheme. It is not entirely clear why this paragraph was drafted in the way it was, especially given the partial duplication with Rule 13(i), but we can be clear that the trusts declared in the Trust Deed did not come to an end because by clause 8 of that deed only the Trustees could so resolve. It follows that the Trust Deed imposed overarching trusts in respect of the winding up of the Scheme which neither the Old nor the New Rules could displace.

57 Section 10 of the Unitised Group Deferred Benefit Policy does not change the trusts which applied. It confirms that on winding up, benefits will be secured for the Scheme members. By its anticipation of the employer having to make further contributions to secure the payment of Members' benefits in full, it implicitly recognises that the proceeds of the policy are governed by the trusts of the Scheme. It is only if there is a surplus that the possibility of a return of funds to the employer becomes a possibility.

58 It is clear from the evidence of both Mr Moore's letter to Rossborough on 15 th July 2008, and of Mr Royle both orally and in his email of 15 th July 2008 to Rossborough that, although they may not have appreciated it, the decision of Messrs Sillars, Moore and Royle to close/wind up the Scheme was a decision taken by them on behalf the Defendant in its capacity as Trustees/Founder, and not as Directors of the Defendant, in its capacity as the employer. Indeed, although the employer had the right to discontinue its contributions under the Rules, the power to take a decision to wind up did not lie in the employer but in the Trustees. For the reasons given in paragraphs 51 to 54 above, we think the position is the same under the New Rules. In particular, Rule 13(ii) must in our judgment mean that a decision of the Founder to arrange for contributions of members to cease, leading to a winding up of the Scheme is a decision which has to be taken in the interests of the

Members and not the employer – if it were otherwise, there would be no point in having the provision made in Rule 13(i), which permits the employer simply to cease making contributions at its option at any time. As a result of that decision to wind up, the provisions of Rules 12 and 15 applied. It does not appear that any request was made by any member, including the Plaintiff, for the transfer of Scheme assets (i.e. the policy or policies) into a different retirement benefit scheme or personal pension plan permitted by the Comptroller of Income Tax; at all events, we have not received any evidence as to whether the amount of money that was transferred to the receiving Scheme was insufficient to provide the benefits to which the Plaintiff was entitled under the Rules. Indeed, the absence of any such evidence seems consistent with the evidence given to us by Ms Guillaume, who told us that there was no other pension plan in the market in 2008, which achieved the same results as that which hitherto had been offered by the Society.

59 We are therefore driven back on Rule 15 – the winding up provisions – to determine the nature of the Defendant's obligations as Trustees on receipt of the proceeds of the policies or policy.

60 The trust obligation under Rule 15 is to secure, as far as the policies permit, non-assignable and non-commutable pensions with associated death benefits for prospective pensioners commencing at the normal pension age *"of the amounts to which they are entitled"*. The Founder as Trustees, in receipt of the monies from the Society, was required to secure such pensions, if it could, to the same extent as the Members of the Scheme were entitled to receive at that date – 1/60th of final salary multiplied by the number of years of pension service accrued. The reference to *"as far as the policies permit"* is a reference to utilising the whole of the proceeds of those policies if that should be necessary to provide for the pensions in question. Insofar as the policies provided a surplus or balance, then only at that stage was the balance to be available for the employer.

61 It was not for the Society to determine whether the amount payable under the policies was sufficient to provide the pensions in question. That was a matter for the Founder as Trustees. In fact, it has not done so, relying on the advice from Rossborough and the Society that the cash equivalent transfer value was the appropriate method of calculation of the benefits to be available to the employees because the Society was no longer providing deferred annuity policies. By paying a proportion of the amount of proceeds to the employer as it has, the Founder is in breach of trust because it has not utilised as much of the proceeds of the policies as were necessary in securing for prospective pensioners the pensions to which they would ultimately be entitled had they left the Scheme at that date; and there is a shortfall. We therefore answer the distribution question by concluding that the Defendant did not properly apply the proceeds in the required order of distribution under Rule 15 of the Rules.

The Transferred Amount question.

62 The Court heard evidence from Mr David Holmes, a Fellow of the Institute and Faculty

Actuaries, having some 20 years' experience of the life insurance and pensions industries. He therefore is an expert actuary, and was instructed by the Plaintiff. He was asked to consider whether the amount transferred to the Plaintiff by the Defendant was adequate to secure the amount to which he was entitled under the applicable rules of the Scheme, and to provide an opinion on whether the full cash equivalent transfer of the Plaintiff's pension was paid to him. If he was of the view that the amount received by the Plaintiff was not in line with his entitlement under the pension scheme, then he was asked to give an indication of the losses as a result.

63 The key evidence given by Mr Holmes, which it did not seem to us was materially challenged by Advocate Hoy, was to the following effect. The market cost of an equivalent deferred annuity contract (a buy-out basis) would be higher than a conventional cash equivalent transfer value. Although the Society may not have been in the market for providing deferred annuity contracts in 2008, other insurance companies he thought were. By implication, he thus disagreed with Ms Guillaume (see paragraph 31 above) that the figures for deferred annuity contracts were irrelevant. However, the actuarial valuation report as at 1 st March 2008, makes it clear that the Scheme would have had insufficient funds to secure benefits for Members on a buy-out basis and therefore would not have been sufficient to pay the equivalent amount to all Members in full.

64 Mr Holmes accepted that if one were applying the conventional cash equivalent transfer value to the Plaintiff's pension benefit as at 18 th October 2008, using the basis and methodology indicated by the actuary, the assessed value of £235,847.28 was reasonable, on the basis that it fell within the range which he assessed of £233,000 to £237,000. He did not consider that if the full cash equivalent transfer value was the right value to apply, any loss to the Plaintiff was established in the transfer value actually taken by the Society's actuary.

65 He also did not consider that the reduction in the cash equivalent transfer value between August 2008 and October 2008, was unexpected – there were external factors such as the financial issues with Fannie Mae and Freddy Mac, the US mortgage buyers and the bankruptcy of Lehman Brothers which caused equity markets to fall sharply with a flight to lower risk assets, which in turn resulted in an increase in gilt values and a fall in corporate bond values. As a result of those external features, and taking into account that he considered the actuary's transfer value calculation in August was in any event generous, he thought it was unsurprising that the value in October was significantly lower. Mr Holmes emphasised that a higher transfer value could have been achieved by applying some of the balance of any surplus. Mr Holmes expressly did not comment on whether the transfer should have been calculated on a buy-out basis which would have resulted in a higher transfer value. We will return to his evidence at a later stage in relation to quantum calculations.

66 As set out above, in our judgment it is important to distinguish the different relationships – the relationship between the Trustees and Members, and the relationship between the

Trustees and the Society. It seems clear that there was no promise on the part of the Society to secure enough from the policy to pay the pension benefits which were contemplated at the contribution rates which were originally set. Those benefits might have been achievable, but it would result in contribution rates at a considerably higher figure which the employer – and possibly each employee – was not willing to pay.

67 Equally, there was no obligation on the part of the Trustees towards the Members to provide the pension benefits which the Scheme envisaged. That is clear from the fact that the Scheme itself contemplated that the employer could unilaterally discontinue its conditions to the Scheme. The issue which faces us, therefore, is not one which is connected with the continuity of benefits, but a construction of Rule 15 of the Scheme which contains the winding up provisions – we are assessing the quantum of benefit that comes from a closed Scheme.

68 Unfortunately, Rule 15 does not provide which of the two approaches might be taken on winding up – the buy-out basis or the cash equivalent transfer value. That seems to have been left to the discretion of the Trustees, whether under the Old Rules or the New Rules. Even if it had been left to the Founder, we have found that the Founder was acting as Trustees for the purposes of the Scheme, and accordingly the difference between the two Rules is in this sense insignificant. Nonetheless, despite the apparent discretion, it is right to have regard to the purpose of the trusts declared by the Trust Deed and the Rules. It was the creation of a tax efficient scheme for providing at the cost of the employer and employees retirement pensions linked to the final salary of the employees, with other defined benefits.

69 The fact is that the cancellation of the policies resulted in a sum of money being paid to the Founder as Trustees. The monies were received on the trusts of the Scheme even though the Scheme was coming to an end. As a result, in our judgment the Trustees had an obligation to apply the monies received as far it could in securing the benefits which the Scheme contemplated. In our judgment, it is not sufficient to adopt Mr Royle's approach that it was morally wrong for the Founder, as employer, to take the surplus to itself – it was in fact a breach of trust by the Founder as Trustees to do so. The Trustees only held a surplus for the employer to the extent that there was a genuine surplus, all the benefits for the Members which were anticipated by the Scheme having been fully paid out. We accept the Plaintiff's contention that there was in fact no surplus. The actuarial valuation in March 2008 indeed shows that to be so because the buy-out basis was the correct approach which the Founder should have taken. To adopt the cash equivalent transfer value did not secure the benefits to which the employees as members of the Scheme were entitled.

70 If the Founder had not also been the employer, we think it would have been much easier for Messrs Sillars, Moore and Royle to have reached this conclusion. The fact that the Founder was not an independent Trustees in our judgment led it into error in approaching the matter as it did.

71 We are asked whether, in the circumstances, the Plaintiff can challenge the application of the transfer value, and it is clear in our judgment that he can. He challenges the Trustees to perform the terms of the Trust. They have not applied the monies transferred by the Society by securing as far as possible the benefits to which the Plaintiff was entitled and are thus in breach of trust.

What is the Quantum of the Plaintiff's claim?

72 In his Order of Justice, the Plaintiff claims a number of declarations against the Defendant in respect of the substance of what we have found to be a breach of trust. He also claims an account of all proceeds or policies paid out the Scheme by reason of breach of trust and damages with interest. There is a potential difficulty in reaching a final figure of damages at this stage for the breach of trust which we have found to have been established. This is because, as Mr Holmes said in his evidence to us, there was insufficient value in the policy or policies issued by the Society to buy equivalent deferred annuity contracts on a buy-out basis in respect of all the Members of the Scheme at the time that winding up took place.

73 Mr Holmes was asked to assess the approximate calculation of loss which the Plaintiff had used to estimate the reinstatement value of benefits lost as a result of the decision of the Trustees to provide a cash equivalent transfer value in lieu of a replacement deferred annuity. His conclusion was that there was an annual shortfall of £4,422.63 compared with the Scheme pension to which the Plaintiff had been entitled at that time, namely May 2012. He thus calculated the present value of the monthly shortfall from 1 June 2012 to 1 st March 2020, accumulated with interest at 2.5%, to amount to £38,260. Based on a current annuity rate of £3,960 per £100,000 purchase price, the cost to replace the income shortfall from April 2020, would be £111,680.00, plus Mr Holmes calculation suggested that the Plaintiff should have damages in the sum of £149,940.00. This figure which was found in his report was the one he qualified slightly when giving oral evidence. He said that he thought there was some variables but the figure was broadly correct. However, it might be appropriate to allow a slight discount of 0.8% which would bring the figures to just below £149,000.00. This would be the cost of reinstatement of the pension to which the Plaintiff was entitled under the Scheme.

74 The difficulty with this approach is that we are not possessed of sufficient information to enable us to estimate the extent of the claims of other Members under the Scheme. We have found that the Defendant, as Trustees, acted in breach of trust by not using what was described as the surplus to achieve something closer to a buy-out value of the pensions which the Scheme was intended to deliver. The remedy for that breach of trust is for the Defendant to make good the amount of that surplus which it removed. This is particularly important because of the evidence as to the actuarial valuation of the fund in March 2008, which suggests that, on an equivalent deferred annuity contract (buy-out) basis, there was insufficient under the Scheme to secure benefits for all Members.

75 It is accordingly impossible to place a figure on the value of the Plaintiff's claim at present.

What is needed is an account from the Defendant with further evidence which will disclose the extent to which all Members of the Scheme as at the date of winding up are to share in the total value of the policies, and indeed whether there is any surplus left over (which seems very unlikely) which would then be for the Defendant itself. This conclusion is particularly relevant given the exclusion question which is set out below.

76 It may well be that Mr Holmes could be invited to consider how much it would have cost in 2008 to buy deferred annuity contracts for the remaining employees in the Scheme. If this sum was greater than the amount of the surplus, then one would turn to the exclusion question. If it is less than the surplus, then a different quantification exercise would be necessary to establish whether, after making proper provision for the members, and subject only to any further claims against the Defendant as Trustees, there was a smaller surplus available for payment to the Defendant as employer.

The exclusion question

77 The issue here turns around Rule 18 of the Rules which for convenience we repeat:

> ***"No Member or beneficiary shall have any claim right or interest upon to or in respect of the pension and other benefits under the Scheme except under and in accordance with these Rules and the liability of the Trustees in respect of any Member or beneficiary shall be limited to the moneys received from the Society under the Policies."***

78 In our judgment, the relationship between the Founder/Trustees and the Members is absolutely focused upon the proceeds of the insurance policies which would be available through the Society – it was the same under both the Old Rules and the New Rules. In the circumstances, Rule 18 means that the Defendant, as Founder/Trustees responsible for the delivery of pension benefits to Members, cannot be liable to the Members for more than the sums received under the policies.

79 The validity of the exculpation clause turns on the construction of the Trust Deed and Rules, subject to any restrictions imposed by statute. Any ambiguity in the clause would be resolved against the Trustees relying on it. However, the court takes into account that the Defendant is not a paid professional trustee which held itself out as having an expertise in the management of trust funds which might merit a higher duty of care than that imposed on an ordinary person. These propositions can all be taken from *Midland Bank Trust Company (Jersey) Limited and Other v Federated Pension Services* [1995] JLR 352.

80 In the present case, we understand that the Rules were provided to the Plaintiff, but even on the case his advocate has put subsequent to receiving the draft judgment – see paragraph 9 above – he was aware of the substance of them because he did have a copy of the Members' Pension Guide. Both are clear insofar as the exclusion clause is

concerned. He must be taken to have realised their terms and continued his employment with the Defendant in that knowledge. We do not see any lack of equity in applying them. However, the extent of the exclusion is limited – it does relate to the value of the policies, which means that a member cannot claim that if the policies did not provide sufficient to discharge his expectation of the final salary pension under the Rules, the Trustees nonetheless had to provide such benefits; but it does not exculpate the Trustees from any claims for damages for breach of trust which are properly payable, as for example can be justified under Article 30 of the 1984 Law.

81 Properly construed, Clause 18 of the Rules means only that the liability of the Trustees in providing benefits under the Rules is limited to the extent of the Trust Fund, i.e. the value of the policies. We do not consider that Article 30(10) of the 1984 Law, which provides that "Nothing in the terms of a trust shall relieve, release or exonerate a trustee from liability for breach of trust arising from the trustee's own fraud, wilful misconduct or gross negligence" has any relevance to the dispute between the parties here because Clause 18 of the Rules does not purport to do so. In short, Rule 18 does not prevent a claim for breach of trust, but it does limit claims to benefits under the Rules to the amount which is available under the policy.

82 Article 45 of the 1984 Law confers upon the Court the power to relieve a trustee from personal liability. We have considered this provision, as Advocate Hoy requested that we should. In our judgment there is no reason to relieve the Defendant of liability. To do so would be to make the Members a scapegoat for saving the Defendant money in 2009. Independent trustees would never have considered that to be an appropriate action, and we do not do so either.

The Prescription Question

83 The Defendant asserts that the proceeding is founded in breach of trust and that they are prescribed as they have not been brought within 3 years of the earlier of the date of knowledge of the breach of trust or the final accounts. As the breach of trust occurred in 2008/2009, when the transfer values of the pension scheme policy were paid to Members, the latest that it could be argued that the Plaintiff had any knowledge of any breach of trust was at the time of his letter of complaint namely, 4 th July 2015. Thus the Defendant submits that the proceedings, having commenced on 25 th January 2019, 4 1/2 years later, are out of time.

84 Article 57 of the 1984 Law is in these terms, so far as is relevant:

> ***"(1) No period of limitation or prescription shall apply to an action brought against a trustee–***
>
> ***(a) in respect of any fraud to which the trustee was a party or to which the***

trustee was privy; or

(b) to recover from the trustee trust property –

(i) in the trustee's possession ,

(ii) under the trustee's control, or

(iii) previously received by the trustee and converted to the trustee's use .

(2) Where paragraph (1) does not apply, the period within which an action founded on breach of trust may be brought against a trustee by a beneficiary is 3 years from –

(a) the date of delivery of the final accounts to the beneficiary; or

(b) the date on which the beneficiary first has knowledge of the breach of trust ,

whichever is earlier."

85 The Defendant asserts that Article 57(1)(b)(iii) does not apply because:

(a) The Trust property held by the Trustees was a policy with the Society which was never in the Trustees' possession.

(b) The proceeds of the policy were paid by the Society directly to the Members and the proceeds were thus not in the Trustees' possession or once paid away under its control. The surplus was paid directly to the employer's bank account by the Society.

(c) The Trustees had no bank account to hold the proceeds from the policy and could not have had possession or control of the proceeds.

(d) The Trustees was not permitted to hold, and did not hold, the proceeds of the policy or other cash, which was with the Society, for a pension scheme authorised by the Comptroller of Income Tax. It was only entitled to hold the policy because if it held anything more, the pension scheme could no longer be considered a fully insured scheme approved by the Comptroller.

(e) The employer was entitled to the surplus by Clause 15(iv) of the New Rules governing the Trust and by Clause 21 of the New Rules, and therefore the proceeds were no longer trust property on the winding up or discontinuance of the Scheme. We have already found Clause 21 of the New Rules to be inapplicable.

86 We regard these assertions as to why Article 57(1)(b)(iii) should not apply to be unworthy of serious attention. It is clear that the Society was not itself a trustee. It had a relationship

with the Founder/Trustees by virtue of the terms upon which the policy was issued. From the moment the policies were to be realised, the most that can be said of the Society's role was that as the paying party under the policy or policies it held the proceeds of those policies for the Founder/Trustees who held them for those entitled to the monies under the Scheme. The control over where those monies went lay with the Founder/Trustees. It is clear that even the Defendant's advisers, Messrs Rossborough, accepted that this was so in all the advice which was given to the Defendant at the time. By instructing the Society to make payment of the alleged surplus directly to itself as employer, the Trustees are deemed to have had possession of the monies in question. It would be little short of outrageous if the Defendant could rely on the conflict of interest which it had in order to establish that when it gave instructions for payment to be made to itself as employer, it, as trustee, never had possession or control of those proceeds. The fact that it had no bank account to hold the proceeds from the policy did not mean that it did not have control over where the proceeds were paid.

87 Nor in our judgment is it relevant that the Trustees were not permitted to hold anything other than the policy in order to enable the pension scheme to be an approved scheme for tax purposes. The tax consequences in our judgment are something completely separate. The Scheme and its Rules created a series of rights in the Members which cannot be avoided by an artificial argument of this kind. Article 57 of the 1984 Law was clearly intended to ensure that a trustee could not plead prescription where there was a claim against it to recover monies or other trust property which it had converted to its own use. That is absolutely the case here. The Defendant as trustee had control over the disposition of the surplus and at its instigation that surplus was paid by the Society directly to the Defendant as employer. In one form or another, Article 58(1)(b) of the 1984 Law applies. In *Re Pantone485 Limited* [2002] BCLC 266, the High Court took the approach that it should look at the substance of what had taken place for the purposes of considering the application of Section 21(1)(b) of the Limitation Act 1980. We think that is the approach which is absolutely right in this case too.

88 Finally, in that connection, the employer was not entitled to some or all of the surplus. The Defendant is not entitled to dip in and out of possession of trust property by claiming that at the relevant time either it was or not a trustee or was or was not the employer. That may be one of the consequences of operating under the conflict of interest which it had and we have no hesitation in so holding.

89 For all these reasons we find that the Defendant is liable to apply the surplus in accordance the Rules of the Scheme amongst the Members at the date of winding up. We leave over for later determination after further argument the question of such further sum that ought to be paid by the Defendant into the Scheme monies for distribution amongst the Members – it seems to us *prima facie* likely that some further sums ought to be paid because a trustee should not profit from his breach of trust, but we will await further argument on quantum in that respect.