Neutral Citation Number: [2025] EWHC 1445 (Ch)

Case No: PE-2024-000037

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

In the matter of the Renishaw Pension Fund

The Rolls Building
7 Rolls Building
Fetter Lane, London
EC4A 1NL

Date of hearing: Friday, 23 May 2025

Before:

HIS HONOUR JUDGE HODGE KC
sitting as a Judge of the High Court

- -

Between:

RENISHAW PLC

Claimant

- and -

(1) ROSS TRUSTEES SERVICES LIMITED
(2) LOUISE CALLANAN

Defendants

- -
- -

MR MICHAEL TENNET KC and **MR SEBASTIAN ALLEN** (instructed by **Stephenson Harwood LLP**) for the **Claimant**
MR SAUL MARGO for the **First Defendant**
MR ANDREW MOLD KC (instructed by **Gowling WLG (UK) LLP**) for the **Second Defendant**

- -

APPROVED JUDGMENT

Digital Transcription by Marten Walsh Cherer Ltd.,
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

HIS HONOUR JUDGE HODGE KC:

1. This is my extemporary judgment on the substantive hearing of a claim by Renishaw plc pending in the Pensions List of the Business and Property Courts of England and Wales under case number PE-2024-000037. The claimant, Renishaw Plc, is the principal employer under the Renishaw Pension Fund. The first defendant, Ross Trustees Services Limited, is the sole trustee of that fund. The second defendant, Louise Callanan, is an employee of Renishaw Plc and is proposed to be appointed as a representative member of the Fund to advance the case of all those who might wish to argue against the construction of the relevant provision for which the claimant contends. It is proposed that the first defendant, as sole trustee of the Fund, should be appointed to represent all those who might wish to support the claimant's construction.

2. The claimant is represented by Mr Michael Tennet KC, leading Mr Sebastian Allen (of counsel). The first defendant, which takes a neutral stance in the matter, is represented by Mr Saul Margo (also of counsel). The second defendant is represented by Mr Andrew Mold KC.

3. Each party has produced a separate witness statement. For the trustee of the Fund, the evidence takes the form of a witness statement, dated 14 November 2024, from Ms Katherine Ball. She is one of the three nominated representatives of the first defendant and is charged with the administration of the pension fund. For the claimant employer, there is a witness statement from Mr Robert Macdonald, dated 18 November 2024. He is a senior finance manager with the claimant employer and is its former head of group financing. Finally, and much more recently, and only after receiving the benefit of a written

opinion, dated 4 February 2025, from Mr Mold KC and Mr Ram Lakshman (of counsel) there is a witness statement from the second defendant, dated 13 February 2025. She is a current employee of the claimant and currently fills the role of director of additive manufacturing at that entity.

4. It is also pertinent for me to refer to an email from Mr Chris Edwards-Earl, a partner in Stephenson Harwood LLP, who represent the claimant. That email, dated 10 February 2025 and timed at 10.59, is to Gowling WLG (UK) LLP, which is the independent firm of solicitors appointed to represent the second defendant. That email is at page 607 of the hearing bundle, and confirms that reasonable searches have been conducted by the company for documents relevant to the current proceedings and that, in Mr Edwards-Earl's view, all of the documents relevant to the issues in these proceedings have been disclosed.

5. I should also mention a recent update that was sent by the first defendant, or the Renishaw Pension Fund, to fund members. That was expressed to be for information only and alerts the members to this hearing which, at that time, was listed in a window between 21 and 23 May at the Rolls Building. A link to the daily cause list was contained within that update. I have accessed that link this morning and have satisfied myself that it does take one to the cause list which shows this hearing as listed in this Court 9 today, so any member of the Fund who wished to attend this hearing has been afforded the opportunity of doing so. In the event, no one has availed themselves of that opportunity.

6. I make it clear that I have had the opportunity of pre-reading the skeleton arguments of Mr Tennet and Mr Allen for the claimant, of Mr Margo for the first defendant, and of Mr Mold for the second defendant. I have also availed

myself of the opportunity of reading the detailed, 30-page confidential opinion written by Mr Mold and Mr Lakshman for the benefit of the second defendant, in her representative capacity.

7. The matter before the court today is a short issue of construction. The court is required to determine the meaning and effect of rule 6A(2) of the rules scheduled to the definitive trust deed of the pension fund dated 6 October 1992 in their original form. That rule sets out the final salary benefits to which members are entitled under the pension fund on retirement. The specific issue raised by these proceedings concerns the way in which the 'money purchase underpin', introduced into the fund by the second sentence of rule 6A(2) of the 1992 rules, operates to increase a member's 'Final Salary Pension', as that is defined in the first sentence of rule 6A(2), *"if necessary"* - and I emphasise those words - by reference to what is identified in the second sentence of that sub-rule as the 'Member's Pension Account'. That is a hypothetical pot that broadly represents double the member's contributions into the Fund, as adjusted for investment returns.

8. In addition to the representation orders that are sought to bind all members of the Fund to the orders made by the court, there are two main heads of relief sought in the amended draft order. The first is a declaration as to the correct construction of the way what has been described as the 'Money Purchase Underpin' operates under rule 6A(2). The second is a declaration, which essentially follows on from the first declaration, that the way in which the money purchase underpin has in fact been operated as a matter of historic administrative practice, as described in Ms Ball's witness statement, is

consistent with the construction for which the claimant contends. That turns on the true scope of rule 6A(2) and the general practice of the fund since 1992 in applying rule 6A(2).

9. Ms Callanan's witness statement explains that the issues and relief sought have been considered in detail with the benefit of specialist legal advice from both solicitors and counsel. The conclusion that Ms Callanan has reached, in her intended capacity as the representative beneficiary, based upon that legal advice, is that there is no reasonable basis for opposing the relief the claimant seeks. She therefore does not oppose the relief sought by the claimant, as to which, as mentioned, the first defendant scheme trustee is neutral. However, it does remain incumbent upon the claimant to satisfy the court that the terms of the relief sought are appropriate.

10. I deal first with the relevant background, which is not challenged in the witness evidence. The claimant is a global engineering technology group with approximately 3,500 employees in the United Kingdom. It provides high precision technology for metrology and healthcare. It is the principal employer of the Fund, which was first established by an interim deed in July 1985, with a definitive deed and rules dating from 1988. The Fund is, or was, a conventional defined benefit pension scheme. It provides final salary benefits to members on their retirement at the accrual rate of one-sixtieth of their final pensionable salary for each year of pensionable service, as defined, subject to an upper cap, or limit, of forty years' service. The Fund closed to new entrants and future benefit accrual by a deed of amendment in 2007.

11. A decision had been made, in around 1991, to introduce the money purchase underpin to the defined benefit structure. Its purpose was to make it clear to members that they would be no worse off from participating in the defined benefit final salary structure compared with the position they would be in if they had instead participated in a personal pension scheme offering defined contribution, or money purchase, benefits. It is clear that the annual pension that would be produced from a money purchase arrangement is considerably less than the original cash sum used to purchase the pension because the capitalised value of an annual payment for life is inevitably considerably more than the annual payment itself. Introducing a money purchase underpin was apparently a common device in the pensions industry at that time. It was introduced to encourage employees to participate in occupational pension schemes, rather than being lured away by the additional flexibilities that personal pension arrangements were able to offer. Such devices were not designed fundamentally to change the principal benefit structure. The fact that defined benefits had typically been much more generous than money purchase benefits meant that the reality of a money purchase underpin was that it was unlikely to bite very often in practice.

12. It should be borne in mind that an underpin is a minimum level below which a member's final salary pension should not fall. It was never intended to be a basis for calculating a member's pension in every case. Mr Macdonald, in his evidence, addresses the background factual matrix leading up to the introduction of the money purchase underpin. The key points the court is invited to draw from the contemporaneous materials are as follows:

i) The common understanding of the trustee, the employer and the trustee's actuarial advisors was that the proposed structure to be introduced was a conventional money purchase underpin, intended to ensure that the benefits payable to members would be no less than those which would be secured by the individual money purchase fund.

ii) This underpin was being introduced as a marketing device to encourage employees, particularly younger ones, to participate in occupational pension schemes rather than to opt for a personal pension.

iii) The change was expected to have only a marginal increase on the Fund's overall liabilities, changing overall funding levels from 95% to between 93 and 94%.

iv) It was made clear to all members at the time that: (a) what was being introduced was a standard industry 'Money Purchase Underpin'; (b) the 'Money Purchase Account' that was being introduced to give effect to that underpin would then be used to purchase a pension; (c) the Money Purchase Account was intended to offer the same type of benefit that a member would look to from a personal pension; and (d) the effect was that the Fund would now guarantee for members the better of either a 'Final Salary' or a 'Money Purchase' scheme.

13. A newsletter was sent out to members in or around October 1992, the same month as the new amendments to the scheme rules were executed. The purpose of the relevant section of the newsletter was to announce, and explain, the effect of the introduction of the money purchase change that was being, or had just been, made to the Fund. The newsletter should therefore be treated as

admissible background factual matrix for the purposes of construction. It matters not whether it was sent before, or shortly after, the amendments were introduced.

14. I turn then to the issues of construction that arise out of rule 6A(2). The provisions in rule 6A set out how the members' core annual benefits were to be calculated by the trustee at the member's normal retirement date. They incorporated the wording that was introduced to give effect to the money purchase underpin. The relevant wording in rule 6A is as follows:

> *(1) On his retirement from the Service at Normal Retirement Date a Member shall be entitled to a pension of the amount specified in section (2) of this Rule.*
>
> *(2) Subject to Rule 14A [which sets out the Inland Revenue Limits] and to such other Rules as contain provisions affecting his entitlement to benefit the amount per annum of the pension referred to in section (1) of this Rule shall be equal to one sixtieth of the Member's Final Pensionable Salary multiplied by the number of years (with a maximum of forty) of his Pensionable Service ('the Final Salary Pension'). The amount of pension thus calculated shall, if necessary, be increased so as not to be less than the Member's Pension Account and for this purpose:-*
>
> *'Member's Pension Account' means an amount equal to twice the contributions paid by the Member under Rule 5B adjusted ... [for investment returns in the way prescribed in sub-paragraphs (a)-(d)].*

15. It may be seen that the wording of rule 6A(2) provided for two elements to the calculation of a member's annual pension. These have to be compared against each other. The first constituent element is the final salary pension. This is contained in the first sentence of rule 6A(2). It is the core benefit provided by the fund as a conventionally defined benefit pension accruing at a rate of one-sixtieth of the member's final pensionable salary for each year of pensionable service, up to a maximum of forty years.

16. The second constituent element is the underpin. This is contained in the second sentence of rule 6A(2). It provides the money purchase comparator against which the final salary pension has to be compared. If necessary, this is to be increased to ensure that it is not less than the member's pension account after it has been adjusted for investment returns.

17. There are two competing constructions of rule 6A(2) that are potentially available. The key issue of construction for the court is what the true comparator is in the second sentence of rule 6A(2) which has to be compared with a member's final salary pension as calculated in the first sentence. The alternative constructions to which rule 6A(2) gives rise are as follows:

    i) The *'Annual Pension Construction'*. Under this, the member's annual pension, calculated as their 'Final Salary Pension', falls to be compared with the level of the annual pension that could be purchased from the 'Member's Pension Account'.

    ii) The *'Entire Account Construction'*. Under this, the member's annual pension, calculated as their 'Final Salary Pension' falls to be compared with the level of the entire cash amount in the 'Member's Pension Account'.

18. Under the Entire Account Construction, the Member's Pension Account in the second sentence of rule 6A(2) - which is a hypothetical pot of money attributable to a particular member - would have to be treated as if it were an annual payment of that sum so that it could be compared with the annual Final Salary Pension rather than - as would be the case under the Annual Pension

Construction - being treated as a pot from which an annual payment could then be purchased as a conventional money purchase benefit.

19. The words in rule 6A(2), taken purely literally, could support the Entire Account construction. However, the consequence of adopting that construction would be to treat a sum equal to **twice** the total sum contributed by the member **over his entire working life** (subject to the forty years cap), together with all investment returns over the same period added in, as an **annual sum** to be paid to the member **each and every year of their retirement** (which might last 20 or 30 years).

20. The claimant's position is that this cannot have been what the parties meant in rule 6A(2). That is not only because that construction would render meaningless important language within both rule 6A(2) itself and also the wider terms of the 1992 trust deed and rules. It is also because it would result in the most obviously unworkable and irrational benefit structure, under which the Money Purchase Underpin would be more than ten times more valuable than a member's final salary benefits for comparable service. This would have the effect, on the evidence, of increasing the deferred and pensioner liabilities of the Fund from just over £140 million to nearly £1.6 billion. As Ms Ball explains in her witness statement, and as appears from a note on administrative practice from the Fund's current administrators, Barnett Waddingham, dated 9 July 2024, the Fund has at all times been administered and funded on the basis that the Annual Pension Construction is the correct approach. Conversely, the Fund has not been administered or funded on the basis that the Entire Account Construction is the correct approach.

21. At this point, it is appropriate to consider the relevant principles that apply to the construction of written instruments in general, and pension funds in particular. These are well -established in the case law. The starting point is the words used by the draftsman. This is not a literalist exercise, however, which focuses solely on parsing the wording of the particular clause. The essential task was explained by Lord Clarke in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900, and [2012] Bus LR 313. It has subsequently been approved in two later cases in the Supreme Court. The exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person - that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract - would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer that construction which is consistent with business common sense, and to reject the other.

22. The courts have consistently emphasised, in this context, the inherent flexibility in the construction process, so that the court will not bind parties to an intention which a reasonable person would not have understood them to have had. That is so not only where the words used are capable of bearing more than one meaning - that is to say, in cases of ambiguity. It also applies where the words used are not capable of bearing a different meaning, but where something appears to have gone wrong with the actual wording used - that is to say, in cases of mistake. Essentially, for '*corrective'* construction to apply, two conditions are required: first, that it should be clear that something has gone

wrong with the language used; and secondly, that it should also be clear what a reasonable person would have understood the parties to have meant.

23. The leading case on construction in a pensions context is now the decision of the Supreme Court in *Barnardo's v Buckinghamshire* [2018] UKSC 55, [2019] ICR 495, and [2019] Pens LR 4. At paragraph 14, Lord Hodge (with whom the other members of the Supreme Court all agreed) explained that there are a number of distinctive characteristics of pension schemes that inform the construction process, and which reiterate the importance of giving weight to textual analysis. However, at paragraphs 16 and 18, Lord Hodge stressed that 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. He went on to point out that 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. That will be so where the court can clearly identify both the mistake and the nature of the correction. That approach was adopted by Nugee LJ in the later case of *Britvic plc v Britvic Pensions Ltd* [2021] EWCA Civ 867, [2022] 2 All ER 457, [2021] ICR 1648, and [2021] Pens LR 16. At paragraphs 75 to 77 of Nugee LJ's judgment, he said this:

> *75. I said above that not all questions of construction are of the same type. As well as choosing between rival interpretations, the Court can correct mistakes as a matter of construction. It is clear*

from the Supreme Court authorities that this is a separate interpretative tool from those involved in choosing between rival interpretations: see in particular Arnold v Britton at [78] and Barnardo's at [18], both per Lord Hodge JSC.

76. These cases are cases where there has been a drafting mistake. Sometimes the mistake is a simple transposition obvious on the face of the document, as where John is written for Mary, or Landlord for Tenant, or a decimal point is put in the wrong place. Sometimes the language of the contract as written is obviously garbled: KPMG LLP v Network Rail Infrastructure Ltd [2007] EWCA Civ 363 was an example of this type of case. In such a case the mistake is plain enough, and the issue becomes whether it is also obvious what the provision was intended to be. Sometimes however the mistake does not readily appear when reading the provision, but it becomes apparent on examination that this cannot have been what the drafter meant, as it makes no rational sense. Chartbrook was a case of this type, where the formula on its natural reading led to a wholly irrational result that, in the judgment of the House of Lords, could not possibly have been what was meant. Another example was my decision in Sterling Insurance Trustees Ltd v Sterling Insurance Group Ltd [2015] EHWC 2665 (Ch) where adding the word 'due' to 'accrued' led to such odd consequences that I was persuaded that it must have been included by mistake.

> *77. This type of case is in principle quite different from the type where there are two rival interpretations. In such a case it is not a question of choosing which interpretation is more consistent with commercial or business common sense, or gives more reasonable and practical effect to a scheme. They are unusual cases, 'fortunately rare', because we do not easily accept that people have made linguistic mistakes, particularly in formal documents, and it requires a 'strong case' to persuade the Court that the interpretation is sufficiently irrational to justify the conclusion that there has been a mistake: Chartbrook at [14]-[15].*

24. In their written skeleton argument Mr Tennet and Mr Allen identify the following specific points of principle that are of particular relevance to this case:

(1) It is clearly established, at the highest level, that the interpretative tools available to the court in construction cases include the correction of drafting mistakes.

(2) The approach to adopt in such cases requires the court to be satisfied of two matters. The first is that there is a clear mistake in the wording used in the document. The second is as to the nature of the correction that ought to be made to cure that mistake.

(3) This is not a separate legal jurisdiction, such as rectification, but merely part of a unitary process of construction.

(4) As a result, the primary focus in ascertaining whether or not there is a clear mistake, and what the cure for that mistake should be, as with the process of

construction generally, should be on the words used in the document itself. However, the court can, and should, also have regard to the background, the context of the relevant factual matrix in which the words were adopted, and the rationality of the consequences that flow from the words that have been used.

(5) In determining the solution to adopt, there is no conceptual limit to the amount of *'red ink'* the court will apply to give effect to what a reasonable person would have understood the parties to have meant in addition to, or in place of, the words actually used.

25. In his written skeleton argument, Mr Mold places particular emphasis upon the distinctive characteristics that apply when considering the rules of a pension scheme, and which make it appropriate for the court to give weight to textual analysis by concentrating on the words used rather than the broader factual matrix. However, Mr Mold points out that at the same time Lord Hodge was clear that the emphasis on textual analysis as an interpretative tool does not derogate both from the need to avoid undue technicality and also to have regard to the practical consequences of any construction. The provisions of a pension scheme should, wherever possible, be construed so as to give reasonable and practical effect to the pension scheme itself.

26. In the case of a pension scheme, the admissible context includes the fact that scheme documents are drafted to comply with tax rules so as to preserve the considerable benefits which this country's tax regime confers on such schemes. The rules of a pension scheme must therefore be construed against their fiscal background. Mr Mold also emphasises that, in some circumstances, the principles of corrective construction can be used to address a mistake in the

drafting of the document. Mr Mold recognises that it requires a strong case to persuade the court that something must have gone wrong with the language of pension scheme documents. In deciding whether there is such a clear mistake, however, the court is not confined to reading the document without regard to its background or context. As the exercise is part of a single task of interpretation, the background and context, including the fiscal context, must always be taken into consideration. There is no limit to the amount of *'red ink'*, or verbal rearrangement or correction, which the court is allowed to make. All that is required is that it should be clear that something has gone wrong with the language, and that it should be clear what a reasonable person would have understood the parties to have meant.

27. Mr Mold also refers to the *Britvic* case, where the court considered the application of the principles of corrective construction in the context of a pension scheme. In particular, it was there held that:

(1) The authorities suggest that corrective construction should be confined to cases where something has obviously gone wrong in a description, a date, a figure, or a calculation, and where the correct description, date, figure, or calculation is obvious from the material before the court.

(2) Corrective construction cases are ones where there has been a drafting mistake. Sometimes it may simply be a transposition, obvious on the face of the document. Sometimes the language is obviously garbled. But sometimes the mistake does not readily appear when reading the provision, but it only becomes apparent on examination that this cannot have been what the drafter meant, because it makes no rational sense. An example of this type of case is

Chartbrook v Persimmon, where the relevant formula in the document, on its natural reading, led to a wholly irrational result that, in the judgment of the House of Lords, could not possibly have been what the parties meant. Another example was the decision in *Sterling Insurance Trustees Limited v Sterling Insurance Group Limited* [2015] EWHC 2665 (Ch) where adding the word *'due'* to '*accrued'* led to such odd consequences that Nugee J was persuaded that it must have been included by mistake.

28. The factual background is described in the witness statements of Mr Macdonald and Ms Ball; and it is unnecessary for me to set it out in detail. The relevant documents are set out at paragraph 26 of Mr Mold's skeleton argument. The way in which the Fund was administered in practice is also set out in the evidence, and is summarised at paragraphs 27 through to 29 of the skeleton argument filed on behalf of the second defendant.

29. It is appropriate for me to now address the application of the relevant principles to rule 6A(2). The claimant submits, and I accept, that this is a case where there has been a clear mistake in the drafting of rule 6A(2), and where both the mistake, and the solution required to correct it, are obvious, not only from the document itself, but also its surrounding factual matrix. So far as the clear mistake in drafting is concerned, the parties cannot possibly have meant that the words used in rule 6A(2) should operate in a way that arises under the entirely literalist Entire Account Construction. No reasonable person, with the relevant background knowledge, could possibly read rule 6A(2) in that way. It would not only result in impossible drafting inconsistencies within the 1992 trust deed

and rules themselves, but it would also result in a self-evidently unworkable, and unintended, rewriting of the entire benefit structure of the pension scheme.

30. This clear mistake in the drafting is apparent from the following:

31. First, under the Entire Account Construction, the second sentence of rule 6A(2) would not operate as an *'underpin'*, in the sense of providing a minimum level below which a member's final salary pension could not fall. Rather, if the Entire Account Construction were to be applied, the second sentence of rule 6A(2) could never fulfil that function because it would effectively guarantee, for any given member, that the 'Money Purchase Underpin' would exceed his or her final salary pension. It would effectively become a basis for calculating the member's pension in every case. That is for the following reasons:

(1) The rate of accrual under the Final Salary Pension provided under the first sentence of rule 6A(2) is the conventional one-sixtieth of salary, equating to an annual accrual rate of 1.67%.

(2) Under the second sentence of rule 6A(2), a member would **as a minimum** accrue benefits at a rate of 8% of salary for each and every year of service because that would represent double the member's contribution rate of 4% of salary.

(3) Simply on the face of rule 6A(2), therefore, the Money Purchase Underpin accrual rate would appear to be at least five times higher than the Final Salary Pension accrual rate in the first sentence.

(4) Indeed, this understates the rate of accrual because the draftsman included an adjustment to the 8% accrual to provide members with the benefit of the investment returns achieved by the Fund over time.

32. Although Final Salary Pension accrual will be based on Final Salary and the Money Purchase Underpin is effectively based on average salary, that would not begin to negate the superiority of the 'underpin' if the Entire Account Construction were correct. That is because: (i) any increase to a member's Final Salary will also necessarily increase the average salary, and (2) the compounding effect of investment returns will take the final accrual rate of the underpin benefit well above 8% of salary each year. Indeed, after taking into account these matters, the generosity of the so-called underpin, compared to the primary benefit, becomes even more stark. The figures provided by Mr Macdonald show that the liabilities attributable to the 'underpin' on the Entire Account Construction are close to 11.5 times the cost of the Final Salary Pension benefits for comparable periods of service.

33. The inordinate generosity of the underpin benefits relative to the Final Salary Pension benefit on the Entire Account Construction (even if not the precise quantification of that disparity) would have been readily apparent to any reasonably informed reader of the document. In particular, it is clear just from the document itself that under the Entire Account Construction, not only would the words used stipulate that the basic accrual rate would be five times higher in terms of the percentage of salary added each year, but they would also stipulate that the 'underpin' accrual rate be further boosted by a percentage equal to the total investment returns earned on the entire defined contribution

pot each year. The fact that this would have increased the rate of accrual for the 'underpin' benefit relative to the Final Salary Pension benefit by even more than the five times would consequently have been obviously foreseeable.

34. It follows that the drafter cannot have intended the Entire Account Construction. That is because, had they done so, they would have seen that the wording in the second sentence of rule 6A(2) would not be operating as an 'underpin' at all. Far from 'underpinning' the primary final salary benefits, they would effectively be replacing those primary benefits.

35. If the intention behind the second sentence in rule 6A(2) had been to create a higher benefit for members then their Final Salary Pension, that pension would have been the underpin to the money purchase benefits, and not the other way round. Indeed, given the huge disparity in the generosity of the Money Purchase 'Underpin' benefits compared with the basic Final Salary Pension benefits, for all practical purposes the required comparison built into rule 6A(2) would be unnecessary because, in practice, the Money Purchase Underpin would always be higher. If that had been the intention, it would have been far simpler and clearer simply to give members a benefit based on the Member's Pension Account without any reference to their Final Salary at all. There would have been no need for the inclusion of the two words *'if necessary'*.

36. Despite all that, the drafter of the 1992 trust deed and rules took the trouble to replicate the Final Salary Pension structure of rule 6A(2) from the previous 1988 version as well as the related provisions in the 1992 trust deed and rules required to give effect to the Final Salary Pension structure. Therefore, the drafter cannot

credibly have intended for those provisions to have no effective bearing on the Fund's benefit structure.

37. Second, on the Entire Account Construction, the second sentence of rule 6A(2) would not operate as any recognisable form of defined contribution or money purchase benefit. It would therefore be clear to any reasonably informed reader that something had gone wrong with the wording that had been used. The Member's Pension Account provided for a capital sum to be nominally allocated to a member in the same way as any other defined contribution or money purchase arrangement. However, a capital sum is not an annual pension, and so the element that is clearly missing from the drafting under the Entire Account Construction is the requirement that the capital sum is then used to *'purchase'* an annual pension in the conventional way so as to turn it into a conventional money purchase benefit. In particular:

(1) The essential structure of any defined contribution or money purchase benefit has historically been that the contributions collected on behalf of members are used to purchase an annual pension payable until their death. That is why defined contribution benefits are treated as synonymous with money purchase benefits.

(2) This was not only a feature of the fact that defined contribution schemes do not have balance of cost funding from an employer, and so the contributions made on behalf of members are limited to those made to constitute their defined contribution pot. It was also due to the requirement set out in Inland Revenue Model Rules for Defined Contribution Schemes published in July 1991 which

enabled defined contribution schemes to achieve Inland Revenue approved status.

(3) Under the Entire Account Construction, however, the entire sums collected on behalf of the member to fund their pension benefits on retirement (including any investment returns earned on those contributions) would be spent on the first year's pension payment. There would therefore be nothing left to fund any further payments at the same annual level for the rest of the member's retirement.

(4) The entire pot - including any investment returns achieved on it - would simply be exhausted in the first year rather than using that pot (as a conventional money purchase benefit scheme would do) to purchase a pension payable for the lifetime of the member.

38. It follows from the foregoing that if the Entire Account Construction were correct, the underpin being offered would have been by reference to an entirely unrecognised form of benefit. That, in itself, would have led any reasonable reader, possessed of a basic understanding of the purposes of the scheme and its tax approved status, to conclude that the intention of the drafter in amending rule 6A was to provide an conventional Money Purchase Underpin of a type that was commonly being introduced to defined benefit pension schemes at that time; and that reference to the requirement to use the member's pension account to purchase a pension was either implicit or had been omitted in error.

39. Third, the second sentence of rule 6A(2) would not operate to achieve the wider aims and objectives of introducing the Money Purchase Underpin. The Entire Account Construction would be wholly inconsistent with what the background

documents reveal to have been the objectively ascertained aim of the amendment. This was to provide a '*Money Purchase Underpin'* as was communicated to scheme members. The Entire Account Construction was neither an *'underpin'* - because it could never operate as such - nor a *'money purchase'* benefit - because it would not involve anything being '**purchased'** with the Member's Pension Account, which is the hallmark and very essence of any money '*purchase'* benefit. It would therefore abjectly fail to achieve the sole objective for introducing those words.

40. Nor would it do anything to address the entire rationale for introducing a Money Purchase Underpin. This was to offer a form of personal pension underpin to ensure that younger members, in particular, were not tempted away to invest in less beneficial, but more flexible, personal pension alternatives. Under the Entire Account Construction, the second sentence of rule 6A(2) would not operate in any way as a personal pension scheme because it would be offering benefits that were not funded by the contributions paid, as would be the case for any personal pension scheme.

41. Fourth, the second sentence of rule 6A(2) would operate to produce irrationally generous benefits. It is nonsense, even conceptually, to assume, in the real world, that the employer of the Fund would contemplate offering returns on an investment which would require the employer after (say) 20 years to pay the investor, every single year, a sum equal to the original investment, together with all the investment growth achieved over that entire 20-year period. It would mean that the member would effectively be receiving 100% of their investment, plus 100% of the total investment returns on that investment, each year for as

long as they should live. That would result in the deferred and pensioner liabilities of the Fund increasing from just over £140 million to nearly £1.6 billion. The Money Purchase Underpin would then become over ten times more generous than the Final Salary Pension for comparable service. The Entire Account Construction would require not just all the capital, but also all the investment returns, to be paid out in one go in the first year. It would follow that every other year, the entirety of all past investment returns would have to be recontributed by the employer, who would consequently be denied the benefit of the compounding investment return on the assets of the Fund to finance future benefits. That is a critical feature of all other balance of cost occupational schemes.

42. Fifth, the benefits payable under rule 6A(2) would inevitably exceed the defined benefit limits imposed by the Inland Revenue. The Inland Revenue requirements are admissible as an aid to construction. They form an important part of the fiscal background. This inevitable result could have led (prior to the introduction of the Pensions Act 2004 reforms) to the Fund losing its approved status, with the significant adverse tax consequences that would entail.

43. So, for all these reasons, it is clear that there was a mistake in the wording of rule 6A(2) in the context of the deed and the pension scheme as a whole. There is a clear mistake. Is the nature of the correction required to address that mistake clear on the face of the scheme trust deed and rules? In my judgment, it is. What is missing from the Money Purchase Underpin, as drafted, is the conventional money purchase concept that the hypothetical pot represented by

the Member's Pension Account should be used to *'purchase'* an annual pension. It is that concept of the *'purchase'* of an annual pension which:

(1) enables the second sentence of rule 6A(2) to operate as a conventional *'money purchase'* comparator;

(2) enables the words introduced to operate as a true *'underpin'*;

(3) prevents the Final Salary Pension structure from being entirely overridden;

(4) enables an *'apples with apples'* comparison to be made between a final salary **annual** pension and a money purchase **annual** pension in the first and second sentences of rule 6A(2) respectively; and

(5) enables the operation of rule 6A(2) to function with minimal adverse costs implications as originally intended.

44. Whilst there is no limit to the amount of *'red ink'* the court is able to apply to provide the correct solution where it is clear what that solution should be, in this case the solution is not only clear but is easily achieved with minimal *'red ink'*. That is to be done by simply adding, by construction, the missing concept of *'purchase'*, as set out in the revised draft order. Having done so, the relevant comparator for the Final Salary Pension becomes, not the Member's Pension Account as a cash lump sum but, rather, 'the annual amount of pension that could be purchased with' the Member's Pension Account. I am satisfied that such a construction is consistent with the way in which, in practice, the Fund has been administered ever since the change to the rules was made in 1992, as set out in the evidence.

45. The revised draft order makes it clear, from its final recital, that the claimant seeks no wider declaration extending beyond the scope of Rule 6A(2) as so construed. The claimant is not seeking any wider declaration that the approach hitherto adopted as a matter of administrative practice may not be invalid for any other reason than it was within the scope of rule 6A(2) as so construed. The *'carve-out'* recital leaves open the potential for other conceptual challenges to past administrative practice on entirely different grounds, such as grounds specific to an individual member's circumstances, including any mistakes that may have been made in the calculation of an individual member's benefits. The revised draft order is not seeking to attempt to extinguish any claims or other rights that members may have, independently of the subject-matter of the present construction application.

46. For the first defendant, Mr Margo's skeleton makes it clear that the trustee is neutral as to the substantive issues raised by the construction claim. He recognises that the trustee has a three-fold role in these proceedings. The first is to ensure that all interested parties are properly represented. The second is to ensure that any order made by the court is appropriate and workable from the point of view of the administration of the Fund. The third is to be available to provide any further assistance to the court should this be required.

47. Addressing the first of those roles, the trustee is satisfied that the proposed representation orders enable the court to be satisfied that it has heard full argument on behalf of all those who may be interested in the outcome of the application. Mr Margo makes it clear that the trustee is also satisfied that proper steps have been taken to ensure that all affected members have been notified of

the proceedings. Thus far, there has been only one member query. That took the form of an enquiry as to the background of the application and whether it arose from any complaint from a member. The trustee is satisfied that an appropriate response has been provided to that enquiry.

48. So far as the trustee's second role is concerned, the effect of the order is to confirm that the correct interpretation of rule 6A(2) aligns with existing administrative practice. Thus the proposed revised draft order is appropriate and administratively workable. The order also makes it clear that no beneficiary is prevented from asserting any right or claim based upon an allegation that the calculation of their final salary pension was inappropriate, unsuitable, or inaccurate for any reason other than the issue of construction which the court is resolving in these proceedings. The trustee is satisfied that the order is appropriate to leave no room for doubt as to the intended scope of paragraph 2.

49. So far as the second defendant, as representative fund member is concerned, Ms Callanan's witness statement explains that the issues and the relief sought by the claimant have been considered by her in detail, with the benefit of specialist legal advice from solicitors and counsel. The conclusion reached by Ms Callanan, based upon that legal advice, is that there is no reasonable basis for opposing the relief sought by the claimant. The purpose of the money purchase *'underpin'* was to make it clear to members that they would be no worse off from participating in the defined benefit final salary structure when compared with the position they would have been in had they been participating instead in a personal pension scheme which offered defined contribution, or money purchase, benefits. Ms Callanan recognises, on advice, that whereas with the

defined benefit final salary pension, a member is entitled to a pension calculated as a proportion of his or her final salary, under a defined contribution, or money purchase, arrangement, a member has a right to the annual pension that could be purchased in the open market using a pot comprised of the contributions made to the scheme by or on behalf of the membe,r together with the investment returns achieved on those contributions. Inherent in all defined contribution arrangements prior to the additional pension freedoms introduced in 2015 was the concept of securing a pension by way of a purchase, which converts the cash sum allocated to that member into the annual pension. It is axiomatic that the annual pension produced from such a money purchase arrangement will be considerably less than the original cash sum used to purchase the pension because the capitalised value of an annual payment for life is inevitably considerably more than the annual payment itself. The Annual Pension Construction gives effect to that principle; whereas the Entire Account Construction does not.

50. In his skeleton argument on behalf of the second defendant, Mr Mold addresses the position of the scheme members. Having carefully considered the application and the confidential opinion, and having discussed the matter in detail with her specialist pension solicitors and counsel, the second defendant does not oppose the relief sought by the claimant. She understands her role as a representative party; and she is willing to be appointed to act in a representative capacity. The representation order proposed is in a standard form, commonly adopted in pension cases. On her behalf, Mr Mold has considered the legal issues, the factual background, the way in which the Fund has been administered in practice, and the terms of the draft order. In his

skeleton argument, he addresses the communications there have been with scheme members at paragraphs 34 to 36. The conclusion at which the second defendant and her legal team have arrived, having scrutinised the claim very carefully, and taken into account the available evidence, applicable legal principles, and relevant analysis is that the relief sought by the claimant cannot sensibly be resisted.

51. For the reasons that I have given, this is a clear case where the principle that has become known of one of *'corrective'* construction applies. There is a clear mistake, in the sense that something has gone wrong with the language of rule 6A(2). It is also clear what a reasonable and informed person would have understood has gone wrong, and what needs to be done to correct it. The solution is for rule 6A(2), in its original form, to be construed as meaning that a member's Final Salary Pension is, if necessary, to be increased so as not to be less than the annual amount of the pension that could be purchased with the Member's Pension Account (as defined in the second sentence of rule 6A(2)). It follows on from that that the way in which the Fund has been administered over the years since 1992 is consistent with that construction.

52. In order to give effect to those declarations, I will appoint the claimant to represent all those with an interest in arguing in favour of the declaration sought; and the second defendant will be appointed to represent all those with an interest in arguing against that declaration. I will therefore make an order in the terms of the revised draft, subject to the various additions and revisions I have already discussed with counsel.

- - - - - - - - - - -

Marten Walsh Cherer hereby certifies that the above is an accurate and complete record of the proceedings or part thereof.

Digital Transcription by Marten Walsh Cherer Ltd
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP
Tel No: 020 7067 2900. DX: 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com