Neutral Citation Number: [2024] EWHC 317 (Ch)

Case No: PE-2019-000003

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

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

Date: 19/02/2024

Before :

HH JUDGE DAVIS-WHITE KC
(SITTING AS A JUDGE OF THE CHANCERY DIVISION)

- -

Between :

AVON COSMETICS LIMITED	**Claimant**
- and -	
(1) DALRIADA TRUSTEES LIMITED	
(2) MICHELLE PARCZUK	
(3) KAROL LEWANDOWSKI	
(4) ANNA TOLLEY	
(5) NEREU DALTIN NETO	
(6) JOHN PAUL WATSON	
(together the present Trustees of the Avon Cosmetics Pension Plan)	
(7) RICHARD PINNOCK	
(as Representative Beneficiary)	**Defendants**

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- -

Mr Richard Hitchcock KC and Ms Lydia Seymour (instructed by **Eversheds Sutherland (International) LLP**) for the **Claimant**

Mr Paul Newman KC (instructed by **Blake Morgan LLP**) for the **First to Sixth Defendants**

Mr Keith Bryant KC and Ms Naomi Ling (instructed by **Penningtons Manches Cooper LLP**) for the **Seventh Defendant**

Hearing date: 14 January 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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HH JUDGE DAVIS-WHITE KC

HH Judge Davis-White KC :

Introduction

1. This is the second judgment by me in these proceedings. The proceedings raise questions as to the validity of one of a number of amendments made to a pension scheme referred to as the Avon Cosmetics Pension Plan (the "Plan"). The first judgment has neutral citation [2024] EWHC 34 (the "First Judgment"). It should be read with this judgment and sets out the facts in more detail and adopts definitions which are used in this judgment.

2. When this matter came before me I made two representation orders. Having heard from the parties before me I then approved a compromise entered into between those parties. I said that I would provide brief reasons for both decisions later in writing. These are those reasons.

3. As I explained in the First Judgment:

> *"[2] In short, the trust documents under which the Plan operated contained a power of amendment (the "Power of Amendment"). That Power of Amendment was subject to a proviso or fetter (the "Fetter"). The Fetter prevented any amendment which, at the date it was made, affected prejudicially (a) any pension in payment at that date or (b) any rights accrued or secured up to the date on which the amendment was made.*
>
> *….*
>
> *[4] The relevant amendment that I was asked to consider comprised but one part of a series of amendments going well beyond simply affecting accrued rights falling within paragraph (b) of the Fetter. I am asked to assume that one part of that series of amendments (the "relevant CARE amendment") did however prejudicially affect rights falling within paragraph (b) of the Fetter.*
>
> *[5] The change in question affected (or purported to affect) the accrued benefit rights of certain persons who, at the date of amendment, were continuing in service (i.e. employment). By "accrued rights" I mean pension rights that had already been acquired, though not then in payment. Such entitlements arose in respect of the relevant members' service before the date of amendment.*
>
> *[6] At the time of the amendments, the accrued benefit rights of the relevant persons were measured by reference to (eventual) final salary. The change made by the relevant CARE amendment was to sever this link to final salary. Instead, under the amendment, the relevant member was treated as having retired at or about the date of the amendments. For these purposes, that employee's then salary was taken as being their "final salary". That benefit, that is, the amount to which the member would have been entitled if they had then retired, with his or her then (frozen) final pay, was to be valued and thereafter treated like a deferred benefit, being made subject to statutory revaluation each year by the applicable rate of the Retail Price Index (the*

"RPI") (subject to the maxima set by the Pensions Schemes Act 1993). I refer to this ongoing changed position as involving benefits being determined on the "Revaluation Basis" and the position prior to amendment as being that benefits were determined on the final salary basis or "FS Basis".

[7] As I have said, the amendments as a whole affected more than the accrued rights, as at the date of the amendments, of those in continuing service and whose benefits had, prior to such amendment, been linked to final salary. As regards what had been the Final Pay Section of the Plan, that part of the Plan was closed, and so, as regards the future, benefits in respect of future service were also no longer based upon final salary but upon Career Average Revalued Earnings ("CARE"). The amendments as a whole have been referred to before me as the "CARE Amendments".

[8] More recently, it has been identified that, as regards accrued benefits as at the date of amendment for those whose accrued benefits were, prior to the amendment, to be valued on an (eventual) FS Basis, the CARE Amendments are capable of prejudicing some of these members. In the case of each relevant member, the precise effect on that member's accrued benefits of the CARE Amendments (if valid) can only be assessed when their benefits crystallise on retirement or other leaving of employment. Nevertheless, the current actuarial assessment is that, in financial terms, certain persons will be better off under the CARE Amendments and that others will be worse off. In the first case, this will be a result of, during the relevant period of service after the date of the amendments, the rate of inflation being higher than the increases in salary of the relevant persons. In the latter case, it is the result of the member's salary increases being greater than the rate of inflation.

[9] The first category of members, that is those who are better off under the relevant CARE amendment, has been referred to before me as "Revaluation Winners" . The second category of members, that is those who are worse off under the relevant CARE amendment, has been referred to before me as "FS Winners". As I have said, it is only possible to know precisely what the financial effect of the relevant CARE amendment (if valid) will have been on any particular individual member when their rights crystallise. That is because it is only at that point that the precise applicable RPI position will be known and the relevant final salary will be known.

[10] In the case of FS Winners, it appears that the CARE Amendments are ones that, on the face of things, have or may have prejudiced the relevant members' accrued rights in a manner that is not permitted by the Fetter. The ultimate question raised by the proceedings is therefore what the consequence is of the Power of Amendment being exercised in such a way as results in a situation that may not have been permitted by the Fetter.

[11] As originally conceived, the proceedings were to answer the question of whether or not the CARE Amendments were invalid such that members' rights in respect of the relevant accrued benefits could not be determined in all cases on the Revaluation Basis. If the Fetter had that effect then it was considered (on advice) that the consequence would be that the relevant accrued rights would be calculated on the Revaluation Basis (as per the CARE Amendments) but with what was called an "Underpin", namely that if a calculation based on the

unamended FS Basis yielded a greater value that would be substituted for the value achieved by applying the Revaluation Basis. Put another way, members' entitlements in respect of the relevant accrued benefits would be provided by way of an underpin entitling them to benefits calculated on the basis of the better of the FS or the Revaluation Bases. Thus, it was considered that the court would be deciding whether the relevant amendment was in breach of the Fetter and, if it was, precisely how the FS Winners' accrued entitlements as a consequence should be dealt with.

[12] The broad basis for the assumption that the Underpin would apply if the Fetter operated to prevent the CARE Amendments taking effect, as regards relevant accrued rights at the date of amendment, in full was as follows:
(1) If the CARE Amendments prejudiced FS Winners, that was prevented by the Fetter. To that extent, under the Underpin, such persons would receive, as regards their accrued rights as at the date of amendment, the higher value by reference to the FS Basis;

(2) However, to the extent that the CARE Amendments resulted in members receiving a higher value in respect of their accrued rights as at the date of amendment as a result of the application of the Revaluation Basis as applied by the CARE Amendments, then such persons were not prejudiced, the Fetter did not apply, and they did not need to rely upon the Underpin, which had no application with regard to such persons."

4. The First Judgment dealt with the position of the Revaluation Winners and, in particular, whether the relevant CARE amendment was effective in relation to such persons. The doubt about their position arose in the event that the change purportedly effected by the relevant CARE amendment was invalid, by reason of the Fetter, in relation to FS Winners. Would that invalidity also affect the change effected by the relevant CARE amendment as regards Revaluation Winners? The First Judgment decided that in circumstances of the invalidity of the relevant CARE amendment in relation to FS Winners (if that were the case), the relevant CARE amendment nevertheless was effective in relation to Revaluation Winners. In such circumstances, the overall position would be that the relevant CARE amendment would operate as regards both FS Winners and Revaluation Winners but that there would be an underpin which had the effect that as regards all relevantly affected members they would receive the greater of a pension on the Revaluation Basis or the FS Basis. Of course, if the relevant CARE amendment was not invalidated by the Fetter, the Revaluation Winners' position would be the same (but with no underpin operating).

5. The remaining questions turned on the effect of the Fetter and, in particular, whether it invalidated the relevant CARE amendment as regards FS Winners and, if so, how their relevant benefits were to be ascertained.

6. As I indicated in the First Judgment, it was anticipated that this issue would be the subject of a compromise negotiated between relevant representatives of the parties concerned and that the court would be invited to approve such compromise pursuant to the provisions of CPR r19.9 and especially 19.9(5) and (6).

Representation Orders

7. At the commencement of the second hearing, which led to this judgment, I made representation orders under CPR r19.9. Before explaining those orders and the reasons for

which I made them I have to explain in a little more detail some of the parties in relation to whom the representation orders operated.

8. In the First Judgment the classes of Revaluation Winners and FS Winners were explained. The FS Winners have an obvious interest in asserting that the relevant CARE amendment is not effective in relation to them (either because it is invalid in total or by reason of an underpin). The Revaluation Winners have an interest in asserting that the relevant CARE amendment is effective as regards FS Winners. That is because, on current expectations, the Plan would have to meet significantly greater liabilities were FS Winners to be entitled to a pension calculated on the FS Basis. In paragraph 14 of the First Judgment the estimate of the extra liabilities to the Plan on the basis of the FS Basis being applied to the relevant rights of FS Winners as an underpin was set out. The updated figure, as at 1 January 2024 and made on the assumptions contained in a report from Towers Watson Limited dated 17 October 2023 was £8.7 million.

9. There are four further sub-categories of members (or former members) within the overall class of FS Winners that I need to identify. They are as follows (the "FS Sub Categories"):

   (1) FS Transferees: These are FS Winners who have transferred their benefits out of the Plan to another pension arrangement;

   (2) FS Dependants: these are persons who receive benefits from the Plan as a result of their relationship with an FS Winner who is now deceased;

   (3) Lifetime Allowance Members ("LAM"): these are former members of the Plan who ceased to earn benefits within the Plan in circumstances in which they reached (or were about to reach) the Lifetime Allowance (in tax terms) applicable at the relevant time, and would therefore have been at risk of significant tax charges had they continued to accrue benefits for future pensionable service in the Plan. The Claimant's policy had been to offer these members the option of continuing to earn benefits within the Plan and accept the potential Lifetime Allowance Tax charge in the event that benefits exceeded the lifetime allowance or to elect to receive an annual cash allowance to reflect the employer pension contributions to which they would have been entitled had they remained members of the Plan. There are three such members identified in the Schedule to the Claim Form (in its final amended form).

   (4) LAM Transferees: these are LAMs who transferred out of the Plan prior to the commencement of the current proceedings on 1 February 2019. There are three such members identified in the Second Schedule to the Claim Form (in its final amended form).

10. Given the slightly different positions of each of the relevant classes falling within the FS Sub-categories, slightly different terms to those agreed in respect of the main FS Winners have been agreed.

11. As before, the Claimant, the principal employer, has been represented by Mr Hitchcock KC and Ms Seymour, instructed by Eversheds Sutherland (International) LLP. In the negotiation process that I will come on to describe, the Claimant's lawyers have acted on the basis that representation orders would be made and that the Claimant would be appointed to represent all those whose interest it is to argue that the relevant CARE

amendment was validly made and that it applies across the board to all relevant members, including (without limitation) FS Winners. The form of order that I made appointed the Claimant representative of all Plan members (and those claiming through them) other than those whose interests were represented by the representation order made in relation to the seventh defendant.

12. Mr Newman KC, instructed by Blake Morgan LLP, continues to act for the first to 6th defendants, Trustees of the Plan. As such, the Trustees and their lawyers have been neutral with regard to the negotiation process that I have mentioned. Particular responsibility has been assumed (a) to ensure that all interested parties are properly before, or represented before the court; (b) to ensure that any court order (and any compromise) is workable from the point of view of its clarity and its application in the onwards administration of the Plan and (c) more generally, to provide assistance to the court. The Trustees (and their lawyers) have not been involved in the negotiation process leading to the proposed compromise. However, they have been engaged with the parties in connection with drafting issues that arose from the compromise that had been reached. They are content that the compromise is workable and sufficiently certain from their perspective. There is also a witness statement in evidence from Mr Charles Rodgers of Willis Towers Watson, the scheme actuary, confirming his opinion that the compromise is "actuarially feasible".

13. Mr Keith Bryant KC and Ms Naomi Ling, instructed by Penningtons Manches Cooper LLP, act for the 7th Defendant, Mr Pinnock. He (and his legal team) have acted on the assumption that a representation order would be made appointing him as the representative of those whose interests it would be for the relevant CARE amendment to have been invalid, namely the FS Winners, FS Transferees, FS Dependants, LAMs and the LAM Transferees. Mr Pinnock in fact falls within the category of a LAM because although he has transferred his benefits out of the Plan he did so after February 2019.

14. I set out the relevant parts of CPR 19.9(2) in the First Judgment. Essentially, and for present purposes, the class of persons who are to be represented must have the same interest in a claim and it must further the overriding objective to appoint the representative. There are various service requirements under CPR r19.9(4) which I am satisfied are met in this case.

15. I was satisfied that the representation orders as sought should be made in this case.

16. The court has decided that it is permissible to appoint representatives by reference to specific issues rather than requiring separate claim forms to be issued each raising separate issues to enable separate representation orders to be made (*Capita ATL Pension Trustees Ltd v Zurkinskas* [2010] EWHC 3365 (Ch); [2011] 1 WLR 1274).

17. The relevant identified parties in relation to which each of the Claimant and the 7th Defendant were appointed representatives, as among themselves and on the issue in question, each had the same interest in the issue. If and to the extent that it might be said that there was the possibility of one sub-category of FS Winners ("A") on a particular negotiation having an interest contrary to another sub-category ("B") (on the basis that negotiated benefits to be conferred on B should be minimised as potentially affecting the Plan's capacity to meet liabilities to A), I am satisfied that for the same reasons given by Briggs J (as he then was) in *Thompson v Fresenius Kabi Ltd* [2013] Pens LR 157 (see especially paragraphs [14] to [16]), which I consider apply also to the facts here, the representation orders that I made were suitable in this case and that there was no need either to refuse to make the order (in whole or part) as regards the 7th Defendant or to require a further and different representative to be appointed in relation to one or more of the categories of interest represented by the 7th Defendant.

18. It clearly furthered the overriding objective to have representative persons conducting negotiations and carrying forward the litigation (see e.g. *Archer v Travis Perkins plc* [2014] EWHC 1362 (Ch); [2014] Pen LR 311 at [14]-[17] and *De La Rue plc v De La Rue Pension Trustee Ltd* [2022] EWHC 48 (Ch) at paragraph [6]).

19. The Plan Members have been kept informed of the progress of the litigation and of hearings (see comments of Vos J (as he then was) in *Industrial Acoustics Company Ltd v Crowhurst.* [2012] Pen LR 371 and also Trower J in the *De La Rue* case at paragraph [7]).

20. The relevant parties that have been appointed as representatives had agreed this. On the evidence before me, they have clearly been properly and fully advised as to the merits of such appointment and of the compromise which they now ask the court to sanction.

Approval of compromise: the principles

21. I turn to the application to approve the compromise. As a result of the representation orders that I have made, CPR 19.9(5) and (6) require the court's approval to such a compromise. Further, the court must be satisfied that it is for the benefit of all the represented persons. If so satisfied the court may, but is not obliged to, give its approval. As Briggs J put it in the *Fresenius Kabi* case (supra):

> *"in a case such as the present where both parties to the compromise are acting in a representative capacity the court must therefore be satisfied that the compromise is mutually beneficial, i.e. to all the persons who will be bound by it if approved. Thus, the court will need to be persuaded that it strikes a fair balance between the competing arguments."*

22. In this case I have been assisted by the sight of confidential opinions from Mr Hitchcock and Ms Seymour for the Claimant and Mr Bryant and Ms Ling for the 7th Defendant. This followed the practice established in *Re Moritz (Deceased)* [1960] Ch 251 and approved in the pension context in *Capita ATL Pension Trustees v Zurkinskas* (supra) and which has been adopted in many cases.

23. Among other things the latter opinion contained an Appendix, which I understand to have been agreed between the lawyers for the Claimant and the 7th Defendant setting out a chronology of the extensive negotiations that have taken place from 2019 up to April 2023. There was then something of a hiatus whilst the matters leading to the First Judgment were explored and prepared for that court hearing. Obviously, more recently, more time has been expended in agreeing some of the detailed drafting to give effect to the compromise agreed.

The issue

24. As I explained in the First Judgment:

> *"[32] The Plan was established from 1 January 1960 by an Interim Trust Deed dated 23 December 1959.*
>
> *[33] At the time relevant to these proceedings the power of amendment applicable to the Plan was contained in a Definitive Deed and Rules dated 29 November 1999. Clause 22 of the Definitive Deed provided (so far as relevant) as follows:*

> *'22. **Alterations***
> *(1) Subject to subclauses (2), (3) and (4), the Trustees may from time to time amend this deed or the Rules with the consent of the Principal Employer. An amendment must be made by a deed executed by the Principal Employer and the Trustees. An amendment may be made even after termination of the Plan or after it is has started to be wound up.*
> *…*
> *(4) The power of amendment in subclause (1) is subject to section 67 of the Pensions Act 1995 (which restricts the making of changes affecting entitlements or accrued rights) and to the following restrictions*
> *(a) it may not be exercised in any way which affects prejudicially*
> *(i) any pension in payment at the date on which the amendment takes effect,*
> *or*
> *(ii) benefits accrued or secured up to the date on which the amendment takes effect…."*

[34] As I have said, the Fetter for present purposes is that in clause 22(4)(a)(ii).

….

[37] The CARE Amendments were contained in a Deed of Amendment dated 3 October 2006. By clause 3 of that Deed it was provided (so far as relevant for present purposes):

> *'3 With effect from 30 September 2006 Rule 2 shall be deleted in its entirety and replaced with the following:*
> *"2. **Membership***
> ***Closure of entry to Career Average section and closure of accrual under the Final Pay section and the establishment of the New Money Purchase section***
> *(1) With effect from 30 September 2006:*
> *(a) The Final Pay Section shall be closed to further benefit accrual;*
> *…*
> *(2) Any member of the Plan who was in Pensionable Employment in the Final Pay section on 29 September 2006 and who remained in Pensionable Employment on 30 September 2006, either in the Career Average Section or the New Money Purchase section shall have their benefits accrued in the Final Pay Section treated, for the purposes of Rule 18, as if they became an Early Leaver whose Pensionable Employment ceased on 30 September 2006 ….*
> *…*
> *(4) All members of the Final Pay Section who are in Pensionable Employment on 29 September 2006 will automatically become Members of the Career Average Section with effect from 30 September 2006 in respect of Pensionable Employment accrued from 30 September 2006…."'*

[38] As later summarised by the Watson Wyatt Report of 25 September 2019:

> *"The Final Pay section of the Plan closed to future accrual on 30 September 2006. Active members at this date became deferred pensioner members of this section and benefits accrued up to 30 September 2006 were*

> *treated as if the member had opted to the leave the Plan at that date with accrued benefits receiving statutory revaluation (linked to either the Retail Prices Index or Consumer Prices Index, as appropriate) to their retirement date. From 1 October 2006, all active members joined either the Career Average section of the Plan or the New Money Purchase section."*

25. Of course, if the matter ultimately proceeded to a court ruling there would only be two possible answers to the question: either the breaking of the link to final salary would be valid or it would not. Not surprisingly the proposed compromise does not involve such a binary answer.

The proposed compromise

26. The proposed compromise is set out in a schedule to a draft order. In broad terms it provides as follows:

(1) The FS Winners (leaving aside the sub-categories that I have earlier identified) will receive benefits calculated on a Revaluation Basis plus 70% of the difference between benefits calculated on a FS Basis and benefits calculated on a Revaluation Basis.

(2) FS Dependants who are in receipt of benefits from the Plan will have such sums recalculated. In so far as they are receiving benefits from the Plan as a result of their relationship with an FS Winner who is now deceased, their benefits will be recalculated on the basis of the higher pension to which the relevant FS deceased member would have been entitled as a result of the compromise.

(3) FS Transferees will be entitled to receive from the Plan (in lieu of sums to which they would have been entitled) the sum of the additional amount with which they would have been credited on transfer had the value of their transferred benefits, so far as relates to pre-amendment service, been increased by 63% of the difference between the benefits calculated on an FS Basis and the benefits calculated on a Revaluation Basis that they have in fact received. The 632% figure is best understood as being 90% of the 70% that is receivable by FS Winners (other than the sub-categories).

(4) LAMS shall have a choice:

(a) where they have retained benefits in either the Final Pay Section or Career Average Section of the Plan, of being treated in the same manner as FS Winners (excluding the sub-categories), that is in receiving the 70% figure mentioned in (1) above; or

(b) a one-off payment from the Claimant (not the Plan) in the amount set out next to their membership number in a schedule. This sum equates to a sum which is equal to their first full annual payment following opting out of active pensionable service in the Plan.

(5) LAM Transferees shall receive a one-off payment from the Claimant (not the Plan) in the amount set out in a schedule. This sum equates to 90% of their first full annual payment following opting out of active pensionable service in the Plan.

The rationale for the compromise

27. The starting point is the position of FS Winners (leaving aside the sub-categories). As regards this there is a question as to whether the relevant CARE amendment is effective or not to break the link with final salary and to require benefits to be calculated on a Revaluation Basis for FS Winners. Although the first instance decisions seem to suggest that such an amendment is ineffective, the Claimant asserts (a) that as a matter of construction on the particular facts here, earlier cases (and especially *re Courage Group's Pension Schemes* [1986] 1 WLR 495 and subsequent cases, primarily *IMG Pension Plan, HR Trustees Ltd v German* [2010] Pens LR 23; *Briggs v Gleeds (Head Office)* [2014] 3 WLR 1469 and *Sterling v Sterling Insurance Group* [2015] EWHC 2665) can be distinguished, support for the approach that the Claimant says should be applied being gained from the recent decision in *Newell Trustees Limited v Newell Rubbermaid UK Services Ltd* [2024] EWHC 48 (Ch) and/or (b) that on an appeal, there is more than a real prospect of overturning the line of cases following *Re Courage Group's Pension Schemes* and, given the sums at stake, the Claimant has the will and resources to take this matter to appeal.

28. It does not seem to me necessary to rehearse all the arguments and counter-arguments. Suffice it to say that in the confidential opinions put before me Counsel for each side has made an assessment of the prospects of success of the arguments put forward by the Claimant and 7th Defendant in the manner commended in *Capita ATL Trustees v Zurkinskas* (supra) at paragraphs [23]-[25] and *Thompson v Fresenius Kabi Ltd* (Supra). Each "side" considers that a 30% chance of success for the Claimant's arguments on the merits falls within a band of realistic and proper assessment. Furthermore, all represented parties benefit from the sort of generic benefits of the saving of costs, certainty and speed of result that I will come onto.

29. As regards FS Transferees, the starting point is that, under the compromise, they would also receive 70% of the difference between what they have or will receive on a Revaluation Basis and the greater sum that they would receive on an FS Basis. The arguments and prospects of success on this general point mirror those already considered. However, there is a potential further hurdle facing this class in that (a) they are likely to have signed releases which may, on their particular wording, be efficacious as compared with the wording of those before the court in the case of *Lloyds Banking Group Pensions Ltd v Lloyds Bank plc* [2020] EWHC 3135 (Ch); [2021] Pens LR 10 ("Lloyds 2") (and which the court held to be inadequate to be efficacious in this respect) and/or (b) there is potential litigation risk of Lloyds 2 being challenged on any appeal in this case. Recognising these extra hurdles for this class, the relevant parties have each ascribed a fairly modest further "discount" of 10% to the percentage chances of this class establishing a full entitlement to their pensions being calculated on an FS Basis. The result is that under the compromise, they would receive 90% of the 70% in question (that is 63%). Again, this class benefits from some of the more general benefits of a compromise that I will come onto.

30. As regards LAMS they have the option of taking what the FS Winners would obtain under the compromise or, in the alternative, a cash payment in the sum of their first year's annual payment. So far as the offer contains the alternative of the 70% calculation provided to all FS Winners this class is no worse off. The alternative cash sum payment was not calculated on the basis of any attempt to put a value on their claim as FS Winners. Rather, it reflected the possibility that such members might prefer this

option to avoid any adverse tax charge arising from the Lifetime Allowance Tax Charge (which would now not be of concern for the 2023/4 tax year given legislative changes). Indeed, rather it was a pragmatic alternative offer to achieve a settlement with a small group of members which would permit a compromise binding all relevant members. Both confidential opinions support this compromise.

31. As regards LAM Transferees, they cannot be offered the FS Winners' position under the compromise as an option because they do not have any remaining plan benefits. However, the proposal is that they should receive a cash payment calculated in the same way as for LAMs but reduced by 10% for the same sort of reasons that FS Transferees have a 10% reduction in what they receive compared with the position of FS Winners. Again, both confidential opinions support this proposal.

32. Furthermore, the LAM position has resonance for Mr Pinnock because he himself is a LAM. The proposal as regards that class means that he retains a real interest in the overall proposals.

33. There are other parts of the compromise that I should mention. Among others these include:

(1) In general, the calculation to determine whether a member is an FS Winner and the amount by which their entitlements on an FS Basis of calculation will exceed those on a Revaluation Basis will be calculated as at the point of entitlement of the member to access benefits but with certain exceptions namely:

(a) In the event that the Trustees resolve to secure the Plan's benefits with an insurer, a date or dates selected by the Trustees to secure either a buy-in or buy-out of the Plan's benefits;

(b) On a member transferring benefits out of the Plan (whether or not in anticipation of the circumstances in (a)), in which case the date will be the date of such transfer out; or

(c) In the event that the member opts out of active membership of the Plan, in which case the date will be the date on which the active membership ends and thereafter the Revaluation Basis will apply until the earlier of the date on which the benefit becomes payable and the date on which the benefits are transferred out of the Plan; or

(d) Within the discretion of the Trustees acting reasonably and with the objects of the Order in mind, if similar circumstances to the above apply to a member, then the date will be set by the Trustees who, with the agreement of the Claimant, shall also determine which calculation applies.

34. As regards the general principle, the case of *Newell Trustees Ltd v Newell Rubbermaid UK Services Ltd & Putland* [2024] EWHC 48 (Ch) is clearly distinguishable. In that case the relevant comparison calculation was undertaken as at the date of transfer of the accrued benefits from an FS Basis of calculation to a money purchase basis of benefit. Here the severing of the FS link is in favour of an ongoing CARE Revaluation Basis. I am satisfied that the general basis of the calculation process adopted by the proposals is appropriate.

35. As regards the encroachments on the general principle as to the date of calculation, these are consistent with it, save the very last. As regards the first encroachment, this is a situation where benefits would be crystallised by reason of the closure of the Plan (or relevant part thereof). The second and third are again circumstances where a specific member's benefits will become crystallised. The final derogation is to provide flexibility but protections are built in by reason of the Trustees' fiduciary duties and the express duty to act with the objects of the compromise in mind. This is a sensible compromise to enable benefits under the Plan to be protected.

36. The compromise also involves no payment of interest on any payments now to be made and some administrative provisions regarding, for example, a discretion given to the Trustees to set an appropriate timetable and how to deal with "missing" members or their personal representatives. There are also protections directed at protecting the tax position. These all seem sensible provisions which benefit all members by bringing clarity and certainty.

37. Finally there is the question of the date from which the relevant CARE amendment should take effect. This arises because the Deed effecting the amendment is dated 3 October 2006, but purports retrospectively to effect the amendment as from 1 October 2006. The compromise is worded on the basis that the change takes effect from 3 October 2006. I am satisfied that this element of the compromise benefits all members by reason of the certainty it brings. I am also satisfied that the potential arguments available (most likely for Revaluation Winners) are not so strong as to require any percentage benefit or financial reward to be ascribed to those who would benefit from arguments in favour of the relevant Deed having retrospective effect. In this respect, there is a question of the proportionality of taking up time negotiating over the two day period in question and I was also referred to section 67 of the Pensions Act 1995 and *Shannan v Viavi Solutions UK Ltd* [2016] Pens L.R. 193 at [67].

38. In addition to the rationales for the proposals that I have explained, there are further factors pointing to benefits to all parties from the proposals:

    (1) Avoidance of litigation and its costs (as in *Zurkinskas* case at paragraph [27]; *Travis Perkins* case at paragraph [21] and see *R (on the application of Cowl) v Plymouth City Council* [2002] 1 WLR 803 at [27]);

    (2) Resolution of uncertainty and simplification and clarification of benefits to be paid (see *Zurkinskas* case at paragraphs [27], [28]; *Travis Perkins* case at [21]);

    (3) Speeding up of distributions (at least as regards "catch up" payments) (see *Zurkinskas* case at paragraph [29]).

39. I was satisfied that the compromise brings advantages to all involved and is for the benefit of all those represented by respectively the Claimant and the 7th Defendant. I considered that it was wholly appropriate to exercise my discretion to approve the compromise and duly did so.

40. For completeness, I should also confirm that I agree with the submission of Mr Hitchcock and Ms Seymour that s91 of the Pensions Act 1995 is no bar to the compromise of the dispute. In broad terms this section prevents members of a scheme surrendering an entitlement to a pension or right to a future pension under the scheme.

This section has been held not to apply to compromises of the sort in question in this case (see *IMG Limited v German and HR Trustees Limited* [2011] ICR 329 at [29]-[30]; *Re Gleeds Retirement Benefits Scheme* [2017] Pens L.R. 4).

41. Finally, I would like to express my thanks to all Counsel and their respective legal teams for their help in and about the case and its trial (and document) management.