Neutral Citation Number: [2012] EWHC 3757 (Ch)

Case No: HC12C00610

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

The Rolls Building
Royal Courts of Justice

Date: 20/12/2012

Before :

HHJ DAVID COOKE

- -

Between :

Roger Ivor Sarjeant (1) **Philip Howard Burditt (2)** **Frank Holden (3)**	**Claimant**
- and -	
Rigid Group Limited	**Defendant**

- -
- -

Keith Rowley QC (instructed by **Eversheds LLP**) for the **Claimants**
Andrew Simmonds QC and Joseph Goldsmith (instructed by **Harvey Ingram Shakespeares**) for the **Defendant**

Hearing dates: 31 October 2012

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HHJ DAVID COOKE

HHJ David Cooke :

1. The claimants are between them the trustees of the Rigid Containers Group Staff Pension Fund and the Rigid Containers Group Works Pension Fund. The defendant is the principal employer under both schemes. The schemes were established to provide final salary benefits for employees of the defendant and certain associated companies. Both schemes went into winding up in July 2000, following service of notices by the employer to terminate them which took effect on 31 May 2000 in the case of the Staff scheme and 3 June 2000 in the case of the Works scheme. This was not because of any insolvency of the employer companies, which continue in business and are and have always been solvent. It is well known that many other defined benefit schemes have been closed in similar circumstances.

2. At the time the winding up commenced, both schemes were assessed by the scheme actuaries as being fully funded, indeed in a slight surplus, on the "Minimum Funding Requirement" (MFR) basis provided for by the Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996. Section 75 Pensions Act 1995 provides however that if in the course of winding up it is found that at the "applicable time" a scheme has a deficiency of assets, the employer is required to pay in to the scheme an amount equal to the deficiency. This is known as the "debt on the employer" obligation, and I am grateful to Mr Rowley for his summary of how that obligation came into being and has evolved over time with changing legislation.

3. The legislation applicable to these schemes is section 75 and the Occupational Pension Schemes (Deficiency) Regulations 1996 ("the Deficiency Regulations") as they both were in force at the dates the schemes were terminated in 2000. At that time the Deficiency Regulations required that any deficiency of assets should be calculated by valuing the liabilities of the scheme on the MFR basis. The calculation has to be done at the "applicable time" and it is common ground that this time may be selected by the trustees at any point during the winding up. It has not been, but the evidence includes an estimate from the scheme actuary that if the position had been calculated at 30 September 2009 there would have been a deficiency of £3.1m in the Staff scheme and £1.2m in the Works scheme. It is not thought that the deficiency would be any less if calculated at the present time.

4. However the winding up of the schemes requires the trustees to apply the assets of the schemes to buy out the members' benefits by purchasing annuity policies from an insurance company. The cost of doing so (referred to as the "buy out cost") substantially exceeds the value of the same benefits as valued on the MFR basis so that even if the employer pays in the whole amount of the section 75 debt, the assets will not be sufficient to purchase for the members benefits equivalent to those they expected from the schemes.

5. Since 2000, further changes in the Deficiency Regulations mean that in the case of schemes going into winding up after 15 February 2005 their liabilities are to be assessed on the buy out basis, so that the employer is obliged by section 75 to make up the full cost of securing the benefits by purchase from an insurer.

6. The issue in this case arises because the trustees wish to implement what is known as a "Headway" arrangement designed to increase the amount recoverable from the

employer. If they are able to do so, the actuary's estimate at 30 September 2009 was that this would result in an additional liability for the employer of £1.9m in the Staff scheme and £1.6m in the Works scheme, £3.5m in all. This would improve the position of the members, but still not be enough to fund the full buy out cost of their benefits.

7. The "Headway" arrangement is so called after the case in which it was held to be effective provided the steps required were permitted by the rules of a scheme, namely *Headway Plc v Eastearly Ltd* [2009] EWCA Civ 793. It requires that the trustees go through three stages:

   i) they apply all or virtually all the presently available assets in a "partial buy out"; i.e. purchasing benefits from an insurer as far as the assets available will allow;

   ii) they then fix the "applicable time" for calculating the section 75 debt and recover it from the employer; and lastly

   iii) the amount recovered is then applied in purchasing further benefits for the members.

8. In that case Mr Simmonds appeared for the trustees promoting the arrangement. At para 7 of the judgment of the Court of Appeal Lord Neuberger MR described the effect of the scheme using a numerical example given by Mr Simmonds:

> "A. Assume the Scheme has assets of £10m and liabilities calculated at (a) £20m on the full buy-out basis and (b) £15m on the prescribed section 75 basis.
>
> B. If the Trustee adopts the conventional approach and collects the section 75 debt before buying out members' benefits, the Employer will be liable to pay the £5m section 75 shortfall and there will remain a £5m deficit on buyout.
>
> C. If the Trustee adopts the partial buy-out route, it will apply the £10m assets in buying out half (i.e. 10/20) of the Scheme liabilities [- stage one]. The Trustee will then fix an "applicable time" for section 75 purposes. At that time the Scheme's liabilities on the prescribed section 75 basis will be £7.5m (i.e. 50% of £15m because half of the liabilities are bought out at stage one) and the assets will be nil. The section 75 debt is therefore £7.5m rather than £5m [- stage two]. The Trustee will collect this and will accordingly have an extra £2.5m available to meet the remaining buy-out cost of £10m [- stage three].
>
> D. The difference in outcome is accounted for by the fact that, under the partial buy-out route, the liabilities discharged at stage one are effectively valued on the buy-out basis rather than on the prescribed section 75 basis."

9. The question for this court is whether the Rules of the schemes, properly construed, permit the trustees to effect the buy out in stages, so that they can interpose the fixing of the "applicable time" in the manner described. It is common ground that there is no power in statute or elsewhere to undertake a staged buy out if it is not permitted by the rules. There is a second issue raised by agreed amendment to the Claim form, which is whether the Rules permit a partial buy out of Guaranteed Minimum Pension ("GMP") rights of any member.

10. As to the principles of construction, Mr Rowley referred me to the judgment of Arden LJ in *British Airways Pension Trustee Ltd v British Airways Plc* [2002] EWCA Civ 672, in which she said:

> "26. There have been several reported cases about the interpretation of provisions of pension schemes in recent years. There are no special rules of construction but pension schemes have certain characteristics which tend to differentiate them from other analogous instruments. I mention some of those characteristics in the following paragraphs.
>
> 27. First, members of a scheme are not volunteers: the benefits which they receive under the scheme are part of the remuneration for their services and this is so whether the scheme is contributory or non-contributory. This means that they are in a different position in some respects from beneficiaries of a private trust. Moreover, the relationship of members to the employer must be seen as running in parallel with their employment relationship. This factor, too, can in appropriate circumstances have an effect on the interpretation of the scheme.
>
> 28. Second, a pension scheme should be construed so to give a reasonable and practical effect to the scheme. The administration of a pension fund is a complex matter and it seems to me that it would be crying for the moon to expect the draftsman to have legislated exhaustively for every eventuality. As Millett J said in *Re Courage Group's Pension Schemes* [1987] 1 WLR 495 at 505:
>
>> "[its] provisions should wherever possible be construed so as to give reasonable and practical effect to the scheme, bearing in mind that it has to be operated against a constantly changing commercial background. It is important to avoid unduly fettering the power to amend the provisions of the scheme, thereby preventing the parties from making those changes which may be required by the exigencies of commercial life."
>
> In other words, it is necessary to test competing permissible constructions of a pension scheme against the consequences they produce in practice. Technicality is to be avoided. If the consequences are impractical or over-restrictive or technical in

practice, that is an indication that some other interpretation is the appropriate one. Thus in the National Grid case, to which I refer below, where there was a choice of possible constructions, Lord Hoffmann held that the correct choice depended "upon the language of the scheme and the practical consequences of choosing one construction rather than the other." (see [2001] 1 WLR 864 at 887, paragraph 53).

29. Third, in pension schemes, difficulties can arise where different provisions have been amended at different points in time. The effect is that the version of the scheme in issue may represent a "patchwork" of provisions: see per Robert Walker J in the National Grid case. Pension schemes are often subject to considerable amendment over time. The general principle is that each new provision should be considered against the circumstances prevailing at the date when it was adopted rather than as at the date of the original trust deed: see per Millett J in Re Courage Group's Pension Schemes, above, at 505 – 506. Likewise, the meaning of a clause in the scheme must be ascertained by examining the deed as it stood at the time the clause was first introduced…

30. Fourth, as with any other instrument, a provision of a trust deed must be interpreted in the light of the factual situation at the time it was created. This includes the practice and requirements of the Inland Revenue at that time, and may include common practice among practitioners in the field as evidenced by the works of practitioners at that time. It has been submitted to us that the factual background is only relevant if the document is ambiguous. I do not accept this submission, which is inconsistent with the approach laid down by Lord Hoffmann in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896. In Lord Hoffmann's words "[i]nterpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background that would reasonably have been available to the parties in the situation in which they were at the time of the contract" (912H). Lord Hoffmann also distinguished the meaning of the words to be found in dictionaries from the meaning of documents:

> "(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally

> happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] A.C. 749."

31. Fifth, at the end of the day, however, the function of the court is to construe the document without any predisposition as to the correct philosophical approach. Both sides urged on us their respective philosophical approaches. Mr Inglis-Jones submitted that the overall approach of the APS Trust Deed was favourable to the members. BA submitted that it should be remembered that this was a balance of cost scheme and so the fact that there was a surplus meant that the employer had paid too much. As Brooke LJ, giving the judgment of this Court (Nourse, Schiemann, Brooke LJJ), said in the National Grid case [2000] ICR 174, 193

"The solution to the [problem of construction in that case] lies within the terms of the scheme itself, and not within a world populated by competing philosophies as to the true nature and ownership of an actuarial surplus."

In the same case, in the House of Lords, the beneficiaries of the scheme argued that the surplus represented their contributions or their deferred remuneration. Lord Hoffmann rejected this approach. He expressed the view that, once it was established that the employer could exercise powers conferred by a scheme in its own interests, "I do not see the relevance of the way in which the surplus was funded" (page 869G). I discuss the National Grid case in detail below.

32. Sixth, a pension scheme should be interpreted as a whole. The meaning of a particular clause should be considered in conjunction with other relevant clauses. To borrow John Donne's famous phrase, no clause 'is an Island entire of itself.' "

11. The Rules of the two schemes in this case are similar but not quite identical. However it is agreed that nothing turns on such differences as do exist, so that in general I need refer only to the provisions of the Staff scheme. The principal relevant provisions are in Rule 21 and are as follows:

"21 TERMINATION OF THE SCHEME (See also the Contracting-out Provisions)

21A GENERAL

The Principal Employer may terminate the Scheme by written notice to the Trustees...

21B WINDING UP THE SCHEME

> If the Trustees decide not to defer winding up the Scheme then… they will tell all Members … that the winding up has started…
>
> 21C APPLICATION OF SCHEME ASSETS
>
> (a) Except as described in … the Contracting-out Provisions, the Trustees will wind up the Scheme by buying in the names of beneficiaries insurance policies or annuity contracts from the UK office or branch of an Insurance Company...
>
> (c) … Benefits will be provided as nearly as practicable the same as [beneficiaries'] entitlements under the Scheme, calculated as if all Members still in Pensionable Service when the winding up started had then left with a Preserved Pension under rule 9B (regardless of the length of their Qualifying Service). If any assets remain the Trustees may increase all or any of the benefits or provide additional benefits to any extent that they consider appropriate …"

The rule then goes on to provide for an order of priority to be applied if the assets are insufficient to buy out the benefits of all members in full.

12. On its face, sub-rule (a) directs and empowers the trustees to wind up the scheme by buying "policies" in the plural. A possible construction would be that this refers to buying one policy for each member, and no doubt that would be one permitted mechanism. But in practice, as would no doubt have been known when the Rules were drafted and adopted, what tends to happen is that the trustees will seek to purchase umbrella policies under which an insurance company will contract to provide benefits to all the members of the scheme, or at least a group of them, as far as possible similar to those that they would have enjoyed under the scheme itself. That practice is, as is clear from the judgment of Arden LJ referred to above, a matter which can be taken into account in construing the Rules. It will presumably be less costly to buy such an umbrella policy rather than a large number of individual policies, because the insurance company with a large enough range of beneficiaries to provide for may make more reliable actuarial assumptions about mortality rates, for instance, across the group.

13. On the face of it, there is nothing in the language of the Rule to suggest that the trustees could not if they so chose buy more than one such policy. A number of circumstances might be postulated in which it could be advantageous to do so. Conceivably, for instance, the trustees might find that one insurance company was prepared to offer a better rate to take on (say) those members whose pensions were already in payment, but another quotes more advantageous terms to take on those with deferred benefits. Thus, even if all the benefits were to be bought out at the same time, the trustees might wish to do so by buying either individual policies in the name of each member, or one or more umbrella policies each dealing with a group of members. There is no obvious reason why they should be prevented from taking any of these courses.

14. Mr Rowley suggested another possibility; conceivably a particular insurer might be prepared to offer favourable annuity rates for a group policy, but only up to a limited amount so that it would be necessary to purchase a top up policy from another insurer to provide the whole entitlement of the members.

15. Mr Simmonds' principal point was that Rule 21C does not confer a power on the trustees to buy insurance policies; it imposes a duty on them to wind up the scheme by buying such policies. The powers conferred on them should be construed to be only those that are necessary to comply with the duty. The duty, he said, could not be discharged until the liabilities of the scheme had been discharged in full and so the only power necessarily to be implied was one which, when exercised, discharged all the liabilities of the scheme.

16. Mr Simmonds did not seek to say that this required that the power be exercised by buying one policy and one policy only. It would have been impossible to do so, given the express reference in the language of the Rule to "policies" in the plural. He was willing to accept that in the circumstance posed by Mr Rowley, the trustees could legitimately take advantage of the favourable annuity rates offered by one insurer, and buy a top up policy or policies from another or others. From that point onwards, it seemed to me, his proposed construction ran into considerable practical difficulties. If two or more policies are to be bought, must the trustees do so simultaneously, in order that the combination discharges their duty entirely? That would require that negotiations with all the insurers involved are brought to a conclusion at exactly the same time. If this were not possible for any reason, must the trustees hold back from concluding a deal with one insurer in order to wait for all the arrangements to be put in place together? If they did so, they might find market conditions changing against them such that they lose an opportunity.

17. Mr Simmonds did not go that far. It would be enough, he suggested, if the trustees set out to acquire one or more policies which together would satisfy their liabilities in total, provided that they did so as part of a composite programme which, when implemented, would achieve that result. But if it were possible to do that, what would be the limits on any such programme? Would all the steps in it need to have been commenced at the same time, or even decided upon at the same time? If they do not all have to be concluded at the same time, why should it not be envisaged that other events may happen (such as the realisation of additional assets) between one step and another?

18. Suppose, for instance, the realisation of the assets of the scheme takes place over a protracted period. For the moment, I disregard the recovery of the section 75 debt from the employer. It is easy to envisage that this might be the case. Some assets such as traded securities may be easily realisable, but even if they are, the trustees might be advised that in some cases realisation ought to be deferred (eg in the expectation that stock prices will rise). Other assets may take time, perhaps a considerable time, to realise; unquoted securities such as investments in private companies, or development land, would be obvious examples. Must the trustees wait until the entire process of realisation is concluded before they can apply any of the assets towards purchasing policies which will satisfy the scheme's liabilities? If they do so, and annuity rates move against them, the policies eventually purchased would provide lower benefits to the members. If faced with a situation in which all of the assets of the scheme cannot be realised within a reasonable time, why should they not,

for instance, be able to purchase one policy which provides for the benefits to members insofar as possible from the assets then in hand, while they continue to pursue the realisation of any remaining assets, using the proceeds subsequently received to purchase a further policy or policies in due course?

19. The fallacy in Mr Simmonds' argument, it seems to me, is that it effectively works backwards from the point that he seeks to establish, i.e. that the Rules do not permit a partial buyout. He frames the duty on the trustees to wind up the scheme as if it were a duty that can only be accomplished in one fell swoop, and from that he argues that the powers they are given to achieve that duty may only be exercised in such a way as to achieve that swoop.

20. There is in my judgment nothing in the way in which the duty is expressed in Rule 21 to require that it should be achieved in an all or nothing way, even if that proposition were expanded to include the sort of difficult to define single programme that Mr Simmonds was prepared to concede. It would in my judgment be "over restrictive", to borrow from the language used by Arden LJ, to interpret it in that way, rather than to permit the trustees to take a number of steps towards the winding up of the scheme without necessarily having to have decided on, or even identified, what all of the steps in that direction would eventually be before they take the first. The duty on them would not be fully performed until all of the assets of the scheme have been applied for that purpose, but that is no reason why they should not start the process, and no reason why any step they take towards that end should not be seen as being towards or part of the performance of their duty and so one that they have power to take.

21. To return to the analogy of a winding up process in which realisation of the assets is for some reason protracted, it is plainly proper (to put it no higher) for the trustees to seek to achieve the best realisation of the assets, and equally, in circumstances where that will not or may not be sufficient to buy out all the liabilities to members, to seek to manage the process in a way which will minimise the deficiency. If, for instance, the scheme owns an asset such as a piece of development land it would be proper for them to consider whether it should be realised immediately or whether that realisation should be deferred, perhaps in order to obtain a planning permission, or some easement or additional land which would enhance its value, or even simply to await better market conditions. It would in my judgment be equally proper for them to consider whether it would be advisable to seek to apply some or all of the assets previously realised in purchasing policies for the benefit of members without waiting for the final realisation to be achieved. If they decide to do so, that purchase would in my judgment be in performance of their duty to wind up the scheme, and within their powers. As and when the land is realised, further funds will become available which may be applied in the purchase of a further policy or policies.

22. If that is so, I can see no distinction between realising investment assets of the scheme and determining the "applicable time" which will lead to the calculation of the amount of the section 75 debt. That debt is also an asset of the scheme, albeit that its amount may not have been determined and that it may be an asset of a contingent nature if, for instance, it is not immediately apparent that the scheme will have a deficiency of assets when the winding up commences. The Trustees may select any time after the commencement of the winding up, provided that the relevant employers have not suffered a "relevant insolvency event" and as long as the scheme remains a scheme "which is being wound up". The last matter seems to me to be no restriction at all,

since the winding up of an insolvent scheme requires that the section 75 debt be realised, so that even if all of the other assets have been collected and applied in the purchase of policies, the winding up is not complete until the "applicable time" has been fixed and the section 75 debt calculated and collected as far as possible.

23. Mr Simmonds made a subsidiary submission that since the possibility of entering into a *Headway* type arrangement could not have been contemplated when the scheme was drafted, there is no reason to think that the draughtsman intended to confer on the trustees the power to enter into such an arrangement. But I see nothing special in that context about such an arrangement. In relation to other assets of the scheme, it would plainly be a matter for the trustees' discretion what order they should be realised in, and there will be other assets (land is again an obvious example) in respect of which the order of realisation may have a bearing on the eventual total received. If the trustees could (as in my judgment they can) choose to apply some or all of the assets in hand towards the purchase of policies at any intermediate stage in that process, they may equally do so when the asset remaining to be realised, or one of them, is the section 75 debt.

24. Mr Simmonds placed some weight on other provisions of the Rules relating to other circumstances in which the trustees might purchase a policy to buy out a member's benefits. Rule 14F provides as follows:

> “14F TRUSTEES' DISCRETION TO "BUY OUT"
>
> Instead of providing benefits under the Scheme in respect of a Member, the Trustees made buy a "buy out" policy in the name of the Member or other beneficiary from the UK office or branch of an Insurance Company…
>
> The Trustees will calculate the amount of the premium after considering actuarial advice. The Trustees must be reasonably satisfied that the premium is at least equal in value to the entitlement under the Rules of the Member or other person concerned. ”

Subject to stated exceptions, the trustees are required to obtain the member's consent before exercising this power.

25. This he said did not expressly confer power to buy out benefits in part. Further, the words "Instead of providing benefits" and the requirement that the premium paid be "at least equal in value to the entitlement under the Rules of the Member…" indicated that it was an all or nothing provision. Even if this were right, it would in my judgment be of little assistance in construing Rule 21. Rule 14 deals with the exercise of a discretion by the trustees in circumstances where the scheme is continuing in operation. There is no possibility of providing anything short of the member's full entitlement and thus no relevant consideration of how to minimise the risk of any shortfall. The power in Rule 14 may be exercised in the case of a single member, although no doubt it could also be exercised in respect of a group of them at the same time. No doubt the trustees would only exercise their discretion if and when they had funds available to make the purchase. But the circumstances are likely to be very different to those which arise and are dealt with under Rule 21, which envisages that

all the assets of the fund are to be liquidated and the benefits of all the members are to be secured by buyout policies, with the possibility of shortfall and the need to exercise judgment and discretion in the process with a view to avoiding or minimising that risk.

26. Furthermore, although there is no issue relating to Rule 14F before me, I doubt whether, properly construed in accordance with the principles set out by Arden LJ, it is truly a discretion that can only be exercised on an all or nothing basis. No doubt, the purchase of a policy must be "instead of providing benefits under the scheme" but I see no reason why the "benefits" for which alternative provision is made need be all of the benefits to which the member is entitled. The Trustees might, for instance, find it advantageous to purchase a death in service policy in the name of a member or members, instead of providing that benefit under the scheme itself. The references to other beneficiaries suggest that the power may be exercised in respect of derivative benefits without necessarily doing so in respect of benefits payable to the member himself. The premium paid is to be assessed on the basis of actuarial advice as being "equal in value to the entitlement" of the member, but that wording seems to me to be just as much applicable whether the "entitlement" is to the whole of the benefits payable under the scheme in respect of a particular member, or some or all of those benefits however identified.

27. Rule 10 includes the following provisions:

> “10. MEMBERS RIGHT TO TRANSFER OR "BUY OUT"
> 10A GENERAL
>
> A Member who ceases to be in Pensionable Service at least a year before Normal Pension Age has a right to require the Trustees to use the cash equivalent of the pension (if any) under Rule 9B in whichever of the following ways (or combination of them) the Member chooses: -
>
> (a) to buy one or more annuities from one or more Insurance Companies …or
>
> (b) to acquire rights under another scheme …
>
> Where the Trustees have used the cash equivalent of the Member's pension in accordance with this Rule, they will be discharged from any obligation to provide the benefits to which the cash equivalent related.”

The pension referred to in Rule 9B is, in general, the preserved pension to which an early leaver will be entitled to when he reaches Normal Pension Age. It represents the whole of the benefits that such a member is then entitled to from the scheme.

28. I see more force in the submission that this option is only available to the member if he exercises it in respect of the whole of the cash equivalent of his preserved benefits. There is certainly no express provision for the exercise of the option in respect of part only of that cash equivalent. Although it would not be impossible to construe it in another way, the reference to requiring the Trustees to "use" in specified ways the

cash equivalent of a benefit which necessarily comprises the whole of the member's entitlement seems to suggest that the whole of the entitlement must be used in those ways.

29. I do not however think this assists Mr Simmonds in relation to the issue I have to decide. Rule 10 provides for an option to be exercised by the member rather than the trustees. There is obvious sense from the point of view of administration of the scheme that if he exercises it he must do so on an all or nothing basis. Furthermore, given that he may choose to have his funds applied in buying more than one policy, if the Rule means that he must have identified all those policies when he exercises the option, that too would appear to be a sensible requirement. The Trustees will then have to calculate one cash amount, and will know what to do with it. The fact that these arrangements make sense in this context seems to me to have no bearing on what Rule 21 means in the entirely different context in which the trustees are realising all the assets of the scheme, in a process which may be protracted as discussed above, and need to make decisions of their own as to what to do with those assets, rather than following the instructions given to them by the member.

30. I conclude therefore that the Rules do, in general, permit the application of funds by way of partial buyout in the way required to implement the *Headway* scheme. It may be worth saying that it appears that what may be in contemplation is either that two separate policies are purchased, one each side of the determination and collection of the section 75 debt, or that one policy may be purchased and later, after the section 75 debt is collected, topped up by payment of a further premium to secure additional benefits for members. Either course is in my view permitted; if a policy is so structured that additional benefits may be secured under it by additional payment, the process by which the initial and further premiums are paid is in my view all part of 'buying' the policy as the trustees are required to do by Rule 21, particularly in light of the purposive and practical principles of construction set out by Arden LJ.

31. Is the position any different in relation to the buyout of GMP entitlements? The Court of Appeal held in *Headway* that the relevant legislation did not preclude a partial buyout of GMPs, with the result that scheme trustees could effect such an arrangement if either (i) they obtained the consent of each member concerned (which has not been sought in this case) or (ii) the scheme Rules permitted it.

32. The two schemes with which I am concerned deal with GMPs in appendices. The parties had only been able to locate that relating to the Works scheme at the hearing, which is entitled "Overriding Appendix- GMP Model Rules". It is incorporated by Rule 23A of the Works scheme Rules. The general overriding nature of the appendix is stated by paragraph 2.2 of the appendix itself:

> “This Appendix overrides any inconsistent provisions elsewhere in the Scheme except provisions which are necessary in order that Inland Revenue approval… is not prejudiced.”

33. The equivalent appendix for the Staff scheme cannot presently be located. It is presumed to be in similar terms, because firstly both schemes use documentation largely in the standard forms of Norwich Union, and secondly the Works scheme appendix follows closely the form of Model Rules attached to Memorandum No 77 (OPB) published jointly by the Inland Revenue Superannuation Funds Office and the

Occupational Pensions Board and setting out requirements to be met by schemes seeking approval as contracted out schemes. Mr Rowley kindly provided me with a copy of that memorandum after the hearing, having checked that it is in the form current both in 1994 and in 1996 (when the Works and Staff scheme Rules were respectively adopted). Although the Model Rules were not compulsory, it is a reasonable assumption that if they were adopted for one scheme they would have been for the other. I proceed on that assumption.

34. The relevant provisions of the Appendix are in para 9:

> "9. Transfers of GMPs out of the Scheme
>
> 9.1 Conditions for transfer of GMPs
>
> A transfer payment made out of the Scheme may only include a member's accrued rights to GMPs … if the following conditions are fulfilled. These conditions depend on the type of scheme or policy to which the transfer is being made:-
>
> (1) All transfers …
>
> The receiving scheme or policy must be … an annuity policy of the type described in section 52 C of the 1975 Act.
>
> (2) … section 52C annuity policies
>
> The receiving … policy must provide the Member and the Member's Widow or Widower with GMPs equal to their accrued GMPs under the Scheme up to the date of transfer …"

Paragraph 13 of the appendix is headed "Winding up of the Scheme", but its provisions deal only with the priority in which the assets of the scheme are to be applied, and do not affect the provisions of the main scheme in relation to winding up, referred to above.

35. This, as Mr Simmonds submits, can only sensibly be construed as requiring that the receiving policy must provide a benefit which is equivalent to the whole accrued entitlement to a GMP. Since this is a condition which must be fulfilled in order that any transfer payment may be made which includes a member's right to GMPs, it follows that no such payment can be made which will only secure a partial buyout of the GMP entitlement. This is so even if it is intended that a further payment will be made in due course which will secure the balance of that entitlement; the precondition for the first payment cannot be satisfied by the expected making of a second payment.

36. Mr Rowley submitted that it would be perverse to construe the model Rules that were provided to implement the legislative contracting out regime in a manner that prohibited a step which, as the Court of Appeal found in *Headway*, was permitted by that legislation. But the Court of Appeal did not find that the legislation expressly provided for the *Headway* type arrangement; only that it did not preclude it, and since it is clear that the possibility of implementing a *Headway* arrangement was not contemplated at the time when the relevant legislation was enacted or when the

Memorandum to which the model Rules are attached was published, it is not in my view surprising that the drafting of the model Rules can now be seen to be in this respect more restrictive than the legislation.

37. No doubt this is also the reason why the provisions of the appendix in relation to GMPs are not consistent in this respect with the provisions of the main scheme as they apply to transfer payments in respect of other benefits. Nevertheless, it is in my view clear as a matter of construction that in so far as GMP benefits are concerned, the provisions of the appendix override the main scheme Rules. Not only is this stated in the appendix, but Rule 21 in each scheme refers to the appendix in its heading, and (in relation to the staff scheme) the provisions for application of assets in Rule 21C are stated to apply "except as described in… the Contracting out Provisions", the definition of which includes the contracting out appendix. It was not suggested that the omission of those words in the Works scheme Rules makes any difference.

38. In relation to the question raised by amendment then, I conclude that a partial buyout of GMP benefits is not possible without the consent of the member involved. Whether that provides an obstacle that cannot be overcome in implementing the proposed *Headway* arrangement is not a question that was canvassed before me.