Neutral Citation Number: [2005] EWHC 446 (Ch)

Case No: HC03 C03881

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22nd March 2005

Before :
THE HONOURABLE MR JUSTICE PATTEN

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Between :

MNOPF Trustees Limited	**Claimant**
- and -	
(1) F T Everard & Sons Limited **(2) Pandoro Limited** **(3) Everard (Guernsey) Limited**	**Defendants**

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Nicholas Warren QC and **Caroline Furze** (instructed by **Baker & McKenzie**) for the **Claimant**
Christopher Nugee QC and **Paul Newman** (instructed by **CMS Cameron McKenna**) for the **First Defendant**
Andrew Simmonds QC and **Barbara Rich** (instructed by **Freshfields Bruckhaus Deringer**) for the **Second Defendant**
Brian Green QC and **Michael Tennet** (instructed by **Sacker & Partners**) for the **Third Defendant**

Hearing dates: 8th - 11th March 2005

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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.

....
Mr Justice Patten

Mr Justice Patten :

Introduction

1. This is an application by the Trustee of the Merchant Navy Officers Pension Fund ("the Scheme") for a determination as to which types of employer fall within the definition of "Participating Employers" under the current rules of the Scheme ("the Rules"). The issue has arisen because on 8th June 2000 the Trustee executed a deed of amendment ("the 2000 Deed") which varied the definition of "Participating Employers" in Rule 3 and inserted into the Rules a new Rule 5.2A in order to remedy a funding deficiency of some £194m in what is described in the Rules as the Post-1978 Section of the Scheme.

2. Looked at in broad terms, the principal dispute is whether employers who ceased to employ active members of the Scheme prior to the date of the rule change can be made liable to fund the deficiency in the Post-1978 Section of the Scheme. If the answer to that question is yes, then a subsidiary issue arises as to whether all employers who have ever participated in the Scheme remain so liable or whether employers who ceased to have active members in their employment prior to 6th April 1978 (when the Scheme was divided into the Pre-1978 and Post-1978 Sections) are, as a result of that change, excluded from any potential liability to contribute to the making good of deficiencies in the funding of the Post-1978 Section benefits.

3. The current trust deed and rules which govern the construction and operation of the Scheme are those dated 25th June 1999. Unless otherwise stated, references in this judgment to the Trust Deed or the Rules are references to the 1999 version of those documents. In Rule 3 "Participating Employers" is a defined term. The opening words of Rule 3 provide that:

> "In the Trust Deed and in these Rules the following expressions have the following meanings unless inconsistent with the context."

"Participating Employers" means

> "such companies or firms as may have become Participating Employers in accordance with Clause 6.0, or which have previously become Participating Employers under other documentation which then governed the Scheme."

4. Clause 4.0 of the Trust Deed applies to it the definitions contained in the Rules. Clauses 6.0 and 6.1 of the Trust Deed provide as follows:

> "6.0 A company or firm may take part in the Scheme and so become a Participating Employer if:
>
> (i) the Trustees determine that it falls within one of the categories set out in Clause 6.1 below

(ii) it agrees to enter into the form of agreement set out in the First Appendix to this Trust Deed, or in such other form as shall be determined by the Trustees

(iii) its participation will not prejudice Approval.

6.1 A Participating Employer must be either:

(i) an employer of British Merchant Navy Officers and/or former British Merchant Navy Officers (whether or not the employer is resident for tax purposes in the UK) who the Trustees in their absolute discretion determine to be eligible to be a Participating Employer; or

(ii) an employer of staff engaged in the administration of the Scheme or the National Sea Training Trust or other institution or undertaking formed for purposes connected with or relating to the British Merchant Navy as the Trustees in their absolute discretion may from time to time determine to bring within the Scheme.

In the case of a Participating Employer who is not resident for tax purposes in the UK, the Trustees may enter into such special arrangements with such Participating Employer as the Trustees in their absolute discretion may consider appropriate including variation in the calculation of contribution and benefit according to the particular circumstances of the participation."

5. The agreement referred to in clause 6.0(ii), which is contained in the First Appendix to the Trust Deed, is in the following terms:

"FORM OF AGREEMENT FOR
PARTICIPATING EMPLOYERS

To: THE TRUSTEES OF
THE MERCHANT NAVY OFFICERS PENSION FUND

WE, of

having received a copy of the Trust Deed and Rules dated 199[ ], constituting and regulating the Merchant Navy Officers Pension Fund HEREBY AGREE to assume and be bound by the obligation undertaken by Participating Employers thereunder or under any subsequent variation that

> may be made therein and promptly to pay to the Scheme all contributions due under the Rules.
>
> DATED 199[ ]"

6. This has been the form of agreement used throughout the life of the Scheme and the only change has been one of nomenclature. Until 1st December 1992 the defined term used was "Employers", after which it changed to "Participating Employers". No-one has suggested that this effected any change of substance for the purposes of what I have to decide.

7. In order to be presented with the necessary arguments on the issues raised in the Part 8 Claim Form, the Trustee seeks, and I will make, representation orders dividing past and present employers of members of the Scheme into three classes. The first class, which is represented by the First Defendant, F T Everard & Sons Limited, consists of employers which have in the past become Participating Employers, but which as at 8th June 2000 employed no active members in the Scheme. They did, however, continue to employ, up to and including the rule change on 8th June 2000, at least one British Merchant Navy Officer or other employee who, by virtue of clause 6.1 of the Trust Deed, would have permitted them to become a Participating Employer.

8. The second class, represented by the Second Defendant, Pandoro Limited, consists of Participating Employers which (like the first class) had no active members in their employment as at 8th June 2000 but also did not retain as employees over the same period either a British Merchant Navy Officer or any other employee who would have satisfied the provisions of clause 6.1 or its predecessors. This distinction between the first and second classes of employers has been made in order to allow Mr Simmonds QC, on behalf of the Second Defendant, to argue that a Participating Employer only ceased to be a Participating Employer if it not only had no active members as employees as at 8th June 2000, but also had no employees at that date in the categories specified under clause 6.1 of the Trust Deed.

9. The third class, represented by the Third Defendant, Everard (Guernsey) Limited, is made up of all companies or firms who became Participating Employers and continued to employ active members of the Scheme as at 8th June 2000.

10. This scheme of representation has enabled me to hear full argument on the various alternative constructions of "Participating Employers" in relation to the rule change which took effect on 8th June 2000. It was not, however, possible to find a company which had been a Participating Employer (or Employer as it was then called) in relation only to the period covered by the Pre-1978 Section of the Scheme, and Mr Warren QC (who appears for the Trustee) was therefore obliged to put to the Court the argument that liability for the deficiency in the funding of the Post-1978 Section benefits could not fall on Participating Employers who had no active members in their employment after 5th April 1978.

11. During the course of the argument it became apparent to me that if the correct construction of the Trust Deed and Rules meant that a Participating Employer ceased to be a Participating Employer once it no longer employed active members of the Scheme, it was at least seriously arguable that the same consequence would follow in respect of a Participating Employer who remained a Participating Employer as at 8th

June 2000, but thereafter ceased to have any active members as employees. There is at least one company which falls into this category and which has indicated in correspondence that it wishes to advance this argument if the First and Second Defendants succeed in their arguments on the first issue. If the Third Defendant is right, the point does not of course arise. It has therefore been agreed that this issue should be postponed and only added to the Part 8 Claim if I give judgment on the current issues in favour of the First or Second Defendants.

The Scheme

12. The Scheme is an exempt approved occupational pension scheme whose primary purpose is to provide pensions for officers of the British Merchant Navy. It was established by a trust deed and rules dated 29th October 1937, which defined membership as restricted in the first instance to officers of the British Merchant Navy employed in vessels to which the National Maritime Board Officers Rates of Pay Agreements applied. The definition included specific categories of officer, but enabled those categories to be expanded in the future to include shore-based staff. "Employers" was similarly defined, but again with power to expand the classes of shipowner that might qualify.

13. The Scheme is and always has been an industry-wide scheme which enables qualifying employers to participate and so provide retirement benefits for officers and others in their employment who satisfy the conditions for membership of the Scheme. It therefore enabled officers to enjoy continuity in their pension provision, notwithstanding that they might from time to time change employer. Provided that they continued to work for a Participating Employer, they could continue to build up pension entitlement under the same scheme.

14. The evidence is that, unlike many other industry-wide schemes, this one is not and never has been subdivided into separate sections for each scheme employer. As set up, the Scheme assets were available to provide benefits for all members in accordance with the table of benefits annexed to the 1937 Trust Deed. It provided benefits in the form of a defined pension entitlement expressed as a fixed amount per annum for each £1 jointly contributed to the Scheme. This amount varied according to the age of the member at the time of payment. Rule 8 of the 1937 Rules provided for each member to contribute 9d in the £1 for every £1 of his pay and for the Employer to match that contribution. Rule 10 provided as follows:

> "Subject to the provisions of these Rules every Member shall be entitled on retirement at the age of 65 years or older to a pension of the amount (to be payable for five years certain) which will be secured in accordance with the Table or other Table in force for the time being appended to these Rules by the contributions paid jointly in equal shares by the Employer and the Member to the Fund and no Member who continues in service after attaining the age of 65 years shall be entitled on his retirement to any larger pension than would have been payable if he had retired on attaining that age."

15. The Scheme continued on this basis until 6th April 1978, although on four occasions between 1937 and 1968 the table of benefits was revised. In 1978 a new trust deed

and set of rules came into effect. The 1978 Trust Deed preserved the basis of membership of the Scheme and the Rules continued the definition of "Employers" in similar terms, but with the express inclusion of "such other employers who were participating in the Scheme on 5.4.78". This therefore took account of prior exercises by the Management Committee of its power under the 1937 Deed to invite additional classes of employer to subscribe to the Scheme.

16. As already indicated, the original 1937 Trust Deed and Rules provided for pension benefits on a money purchase basis. Following the passing of the Social Security Pensions Act 1975 the Scheme was reconstituted so that each member, in relation to contributory service after 6th April 1978, became entitled to a pension calculated by reference to salary earned during the relevant period of service, adjusted so as to take into account any rise in national average earnings between the payment of salary and the commencement of pension benefits. The Scheme was therefore divided into two sections, the Pre-1978 Section and the Post-1978 Section. Clause 8(a) of the 1978 Deed provided as follows:

> "The Fund shall be divided into two sections. A first Section to be named the Pre-1978 Section comprising the funds constituting the Fund as at the 5th April 1978 and as provided under Rule 5(b) and all subsequent earnings thereon out of which Section shall be paid the benefits secured by contributions to the Fund in respect of service before the 6th April 1978. A second Section to be named the Post-1978 Section comprising the funds and earnings thereon secured by contributions (except as provided under Rule 5(b)) to the Fund in respect of service on and after the 6th April 1978 out of which Section shall be paid the benefits secured by contributions paid to the Fund in respect of service after that date. The two Sections shall be the subject of separate accounts and valuations and all provisions of the Rules relating to accounts and valuation shall be subject to this overriding provision. Under no circumstances shall benefits payable out of one Section of the Fund be payable out of the other Section nor shall any deficit on one Section be made good out of the other Section. Any surplus arising on a Section shall be employed solely for the purposes of that Section as if constituting a separate Fund.
>
> The investments and moneys comprising the two Sections of the Fund shall at all times be kept entirely separate and shall not be allowed to become intermixed."

17. The Pre-1978 Section continued after 5th April 1978 to provide benefits on the basis of the revised table, but new rules governed pensionable service after that date. Rule 6(a) of the 1978 Rules provided that:

> "Subject to the provisions of these Rules, every Member shall be entitled on retirement at Normal Pension Age or older to a pension

> (i) in respect of Service prior to the Appointed Day, of annual amount secured to him at that date under the Rules in force immediately prior to that date; and
>
> (ii) in respect of Post-1978 Service for which contributions are received by the Fund, of annual amount equivalent to 1/40th of his Pension Denominator for each year of such Post-1978 Service and proportionately for part of a year."

18. A complication was that the Scheme benefits payable under the Scheme as it stood at 5th April 1978 were under-funded, and Rule 5(b) of the 1978 Rules imposed on "Employers" not only a liability to contribute 12.16% of Pensionable Salary, as defined, for periods of pensionable service by active members after 5th April 1978, but also a liability for

> "additional contributions to be paid to the Pre-1978 Section of the Fund to fund liabilities in respect of past Service already accrued prior to the Appointed Day [6th April 1978], namely
>
> (i) .62% of such Pensionable Salary for a period of 14½ years from the Appointed Day;
>
> (ii) .93% of such Pensionable Salary for a period of 4 years from the Appointed Day; and
>
> (iii) 2.11% of such Pensionable Salary for a period of 15 years to be counted from June 1974."

The burden of making up the existing deficiency was therefore imposed on employers who continued to participate as "Employers" in the Scheme (or joined it before October 1992) and not on employers who had ceased to employ active members of the Scheme by 5th April 1978 and therefore never became liable to pay "Pensionable Salary" as defined.

19. A new Trust Deed and Rules took effect on 1st December 1992 and it was in this version of the Rules that the defined expression "Participating Employers" first appears. As indicated earlier, no change of substance was involved. These were in turn replaced by a new Trust Deed and Rules on 27th January 1995, which remained in force until the current Deed and Rules took effect on 25th June 1999.

The Rule Change

20. As at 31st March 2004 the Scheme (including both sections) had 2,553 active members, 22,427 pensioners and 31,143 deferred pensioners. The Scheme has been closed to new members since 1st November 1996. Under Rule 29 of the 1999 Rules the assets and liabilities of the Scheme are subject to a 3-yearly valuation by the Scheme actuary. Recent valuations took place on 31st March 2000 and 16th March 2001. The first of these (which valued the Scheme assets and liabilities as at 31st March 1999) indicated that there was a deficiency of £55m in respect of past service liabilities for the Post-1978 Section (valued on an ongoing basis). The second

valuation (as at 31st March 2000) showed a corresponding deficiency of £8m in respect of past service liabilities. The most recent actuarial valuation (dated 25th March 2004), which valued the Scheme assets and liabilities as at 31st March 2003, showed a deficiency in respect of past service benefits, again valued on an ongoing basis, of £194m for the Post-1978 Section. The Pre-1978 Section is in surplus to the tune of £167m.

21. The 31st March 2000 valuation caused the Trustee to consider what needed to be done in order to remove the deficiency in the funding of the Post-1978 Section liabilities. Mr Peter McEwen, one of the directors of the Trustee, says in his first witness statement that this raised two matters of particular concern and difficulty for the Trustee. The first concerned the extent to which Participating Employers would be liable for any additional contributions that would be necessary to meet the deficiency. Rule 29.0 provides for the Trustee to instruct the actuary to carry out triennial valuations of the Scheme and then sets out what the Trustee must do in order to deal with any disclosed deficiency. Rule 29.2 provides that:

> "If, as a result of the Actuary's report, it shall appear that there is a deficiency or anticipated deficiency in the Scheme's resources, the Trustees shall consider what if any action, having regard to any recommendations made by the Actuary in his report, should be taken either by way of increasing contributions or decreasing benefits to render the Scheme solvent. If necessary, the Trustees shall take such steps as are herein laid down for amendment of the Trust Deed and the Rules, or if the deficiency or anticipated deficiency cannot be made good, for the winding up of the Scheme."

22. The Trustee (after consultations with current contributing employers) took the view that it was not appropriate to fund the deficiency through increased contributions from such employers, and that the fairest way of dealing with the problem was to divide liability for the deficiency between all employers who had ever participated in the Scheme after 5th April 1978, according to the proportion which each such Participating Employer's liability in the Scheme bore to the total liabilities of all such Participating Employers.

23. The Trustee's other concern was that, faced with the prospect of having to fund a deficiency, some Participating Employers with active members in their employment would attempt to leave the Scheme by transferring such employees to other non-participating companies. Therefore, in order to preserve the status quo, a deed of amendment was executed by the Trustee on 8th June 2000, which replaced the definition of "Participating Employers" in Rule 3 with the following definition:

> " "Participating Employers" means such companies or firms as may have become Participating Employers in accordance with Clause 6.0, or which have previously become Participating Employers under other documentation which then governed the Scheme. No company or firm shall cease to be a Participating Employer either as a result of ceasing to employ Active Members on or after 8 June 2000 or otherwise as a result of ceasing to employ persons in the categories described in Clause

> 6.1 of the Trust Deed on or after that date or otherwise (save in accordance with Rule 5.2A.)"

The 2000 Deed also introduced a new Rule 5.2A:

> "Without prejudice to Rule 5.2, each Participating Employer (whether or not employing Active Members and whether or not employing persons in the categories described in Clause 6.1 of the Trust Deed) shall make such further contributions (if any), which may include lump sum contributions, from time to time as may be decided by the Trustees, having regard to the advice of the Actuary, in order to reduce or eliminate any deficiency or anticipated deficiency in the Scheme's resources. Such deficiency shall be calculated for this purpose by reference to the ongoing basis of calculation adopted in the then most recently completed actuarial valuation of the Scheme (that is, the basis which assumes that the Scheme remains in full operation), with such modifications, if any, as the Trustees shall determine having regard to the advice of the Actuary in order to take account of the lapse of time and any events during the intervening period. For the purposes of the calculations in this Rule 5.2A, the Trustees and the Actuary shall take into account, to the extent that they consider it appropriate:
>
> (i) the proportion of the amount of the deficiency or potential deficiency which the Scheme's liabilities attributable to employment with that Participating Employer bear to the total amount of the Scheme's liabilities attributable to employment with all of the Participating Employers;
>
> (ii) any lump sums or other contributions paid, payable or prospectively payable by any Participating Employer for the purpose of reducing or eliminating a deficiency or potential deficiency, whether under this Rule 5.2A, Section 75 of the Pensions Act 1995 or otherwise; and
>
> (iii) any debt which, in the opinion of the Trustees, is unlikely to be recovered.
>
> A Participating Employer may, if the Trustees consent, cease to be a Participating Employer for the purposes of the Scheme on such date as the Trustees shall determine if it shall make such contributions (or undertakes to do so in terms satisfactory to the Trustees) as the Trustees, having regard to the advice of the Actuary, shall determine, or if the Trustees, having regard to such advice, shall determine that no such contribution shall be required. Such determination shall be made in accordance with this Rule 5.2A, but having regard to such basis of calculation as the Trustees may reasonably determine in order to protect the interests of the Members."

24. Both the First and Second Defendants accept that if they remained subject to the Rules as Participating Employers, as defined in Rule 3, as at 8th June 2000, then they are bound by the changes in the Rules effected by the 2000 Deed. Their case, however, is that they never became subject to the rule change and the new regime which it introduced, because they had ceased to employ active members of the Scheme prior to 8th June 2000, when the changes took effect. The only difference between their respective positions is the point taken by Mr Simmonds on behalf of the Second Defendant, that it is arguable that the First Defendant (unlike the Second Defendant) did not cease to be a Participating Employer as at 8th June 2000, because it retained in its employment British Merchant Navy Officers and therefore could have qualified as a Participating Employer under clause 6.1 of the Trust Deed. I shall deal first, therefore, with the argument on which they make common cause.

Participating Employers

25. The 2000 Deed was executed by the Trustee in exercise of its powers contained in clause 30 of the Trust Deed. This provides that:

> "The provisions of the Trust Deed or of the Rules may be varied or added to in any way by Deed executed under the seal of the Trustees. Every such variation must first be approved by a majority of the full number of Participating Employers' representatives and also a majority of the full number of the Members' representatives serving as Trustees or as directors on the board of any corporate Trustee which approval must first be signified either by a resolution passed by such majorities or by an instrument in writing signed by such majorities PROVIDED that no variation or addition shall be made which:
>
> (a) would have the effect of changing the main purpose of the Scheme, namely the provision of pensions for Members on retirement or of giving to the Participating Employers or any of them a right to the return of their contributions or any part thereof; or
>
> (b) would operate in any way to diminish or prejudicially affect the rights of any person in receipt of a pension or the pensionable or other rights already earned by any Member or former Member; unless the Actuary shall advise that no other course is reasonably practical having due regard to the interests of all persons interested in the Fund; or
>
> (c) would be contrary to the principle that the Participating Employers and the Members shall be equally represented both in the membership of the Trustees and on the board of any corporate Trustee."

Subject to the express safeguards and limitations contained in the proviso, the power is a general one, which enables the Trustee to vary the Trust Deed or the Rules in any way. The power may therefore be exercised so as to impose on Participating

Employers (as defined) obligations which they had not previously been subject to under the Scheme. Both Mr Nugee QC (for the First Defendant) and Mr Simmonds accept that. The real issue, therefore, is a more complex one than simply whether the First and Second Defendants were Participating Employers within the meaning of Rule 3, although that issue lies at its heart. It also involves a consideration of whether they undertook a more restricted range of obligations as a result of signing what have been referred to as the accession agreements, the current version of which I set out earlier in paragraph 5 of this judgment.

26. Mr Nugee's argument (which Mr Simmonds largely adopted on this point) begins with an acceptance that the definition of Participating Employers in Rule 3 does embrace all employers who have ever participated in the Scheme, whether under what is currently the Clause 6.0 machinery or "under any other documentation which then governed the Scheme". The addition of those words makes it clear, in my judgment, that it is intended to be a comprehensive definition by reference to the entry qualifications at the relevant time. Mr Nugee accepted in terms that the First Defendant was a Participating Employer when the 1992 Trust Deed and Rules came into effect and that his clients are within the literal meaning of the definition. But it is necessary, he says, to construe the Scheme as a whole.

27. The emphasis in the definition on employers who have "become" Participating Employers in the manner specified, and the absence of any reference to the circumstances in which a company or firm might cease to be a Participating Employer, is relied on by both sides of the argument. Mr Green QC (for the Third Defendant) submits that this confirms that an employer who has become a Participating Employer remains one indefinitely, regardless of whether it continues to employ active members of the Scheme. Mr Nugee, on the other hand, says that the absence of any express provision for a former employer to withdraw from the Scheme upon ceasing to employ active members is unusual, and that the emphasis in the definition on Participating Employers by reference to their entry into the Scheme demonstrates the limited nature of the definition and provides the reason why it may have to be given a more limited meaning, depending on the context in which it is used.

28. What is, however, common ground is that as a starting point the definition of Participating Employers in Rule 3 is very wide. If one concentrates for the moment on the Post-1978 period, it clearly applies to any company or firm which has become a Participating Employer in that period. I understand that, following the execution of the 1978 Trust Deed, all employers who continued to employ active members of the Scheme after 5th April 1978 were required to execute new accession agreements. The Rule 3 definition of Participating Employers applies in terms to them and to any employer who has subsequently participated in the Scheme. There is no ambiguity in the meaning of the defined term as set out in Rule 3. It is, however, a defined term and, like all defined terms, it will apply "unless inconsistent with the context". The Rules and the Trust Deed therefore leave open the possibility that Participating Employers may be given a different and perhaps narrower meaning in certain places.

29. Against this background one can turn to consider the Rules and the provisions in the Trust Deed which determine whether the clause 30 power was exercised so as to bind the First and Second Defendants. Rule 29.2, which prescribed what the Trustee must do in the event of a deficiency, makes no reference at all to Participating Employers.

It requires the Trustee to consider various options, varying from increasing contributions to winding up the Scheme. It also expressly envisages that the remedying of the deficiency by increasing contributions may necessitate the amendment of the Trust Deed and the Rules.

30. At one point in the argument it seemed to me that the reference to the need for amending the Trust Deed and the Rules might be an indication that the draftsman wished to make express provision for machinery which did not involve merely "increasing" contributions and could therefore be made to apply to employers who no longer had active members in their employment. But a limited amount of research into the origin of this rule indicates that this would not be justified.

31. Rule 8 of the 1937 Rules provided for matching contributions and a table of defined benefits. It was a scheme which could therefore have led to a surplus or a deficit, depending on whether the actuarial and investment assumptions underlying the table proved to be correct. Clause 9 of the 1937 Trust Deed dealt with the possibility of a deficiency in funding and at clause 9(b) provided that:

> "If, as a result of his report, it shall appear that there is a deficiency or anticipated deficiency in the Fund's resources the Committee shall consider what, if any, action having regard to the recommendations of the Actuary should be taken, either by way of increasing contributions or decreasing benefits to render the Fund solvent and, if necessary, shall take such steps as are hereinafter laid down for amendment of this Deed or the Rules, to amend this Deed or the Rules accordingly."

The use of the word "accordingly" suggests that the power of amendment was to be used for the purpose of increasing contributions as a means of remedying the deficiency. The same formula was retained in Rule 28(a) of the 1978 Rules, but in Rule 29(1) of the 1992 Rules the word "accordingly" is omitted, and this form of drafting has continued into the 1999 Rules.

32. There is nothing in the 1992 Rules to suggest that any change of substance was intended. The removal of the word "accordingly" coincided with the addition of the reference to winding up the Scheme and looks to be no more than stylistic. It also has to be borne in mind that any changes in contribution rates prior to 1992 required an amendment to the Scheme. The reference to taking steps to amend the Trust Deed and the Rules is no more than a recognition of this and does not, therefore, justify any further inference as to what type of employer might be potentially liable for contributions in the circumstances of a deficiency.

33. However, it is, I think, also impossible to construe Rule 29.2 as limiting the Trustee's power under clause 30 of the Trust Deed to amendments which merely increase the liability of employers under what is now Rule 5.2. There are two reasons for this. The first is the one already stated, which is that clause 30 contains a general power of amendment unfettered by any other provision in the Trust Deed or Rules and limited only by the express terms of the proviso. This is, I think, accepted by both Mr Nugee and Mr Simmonds. Mr Nugee conceded that clause 30 did allow the Trustee to impose the burden of additional contributions under the new Rule 5.2A if his clients were Participating Employers at the date of the 2000 Deed. The second reason is that

it is clear from the nature of the Scheme in its original Pre-1978 form that the reference to increasing contributions in clause 9(b) of the 1937 Trust Deed was not limited to an adjustment of contributions made under Rule 8(b) of the 1937 Rules. As Mr Green pointed out, any contributions made under Rule 8 would automatically have been factored into increasing the benefits defined in the table under Rule 10. They could not lead to a reduction in any deficiency except by a rule change which treated them as additional contributions which did not count towards the employee's pension entitlement. The reference in clause 9(b) to increasing contributions could not therefore have been intended to limit any amendments to an increase in Rule 8(b) contributions by an employer in respect of an active member in its employment. There is no obvious reason for giving what is now Rule 29.2 a narrower meaning. It continues to apply to both sections of the Scheme.

34. The consequence of all this is that the combination of Rule 29.2 and clause 30 of the Trust Deed give to the Trustee a wide power to amend, which enables it to impose the Rule 5.2A regime on any Participating Employer for the time being. Given that the definition of "Participating Employers" in Rule 3 does include the First and Second Defendants, what is it, then, that provides the context which justifies displacing the ordinary defined meaning of that expression in favour of a narrower class of Participating Employer?

35. Mr Nugee began by reminding me that there is no presumption that past employers should be required to make up any deficiency in the fund which provides benefits for their former employees. Some schemes, as one knows, provide for a fund in deficit to be wound up; others for the employers to make up the deficit. Sometimes it is a combination of the two. The Scheme makes no precise provision as to how a deficiency in the assets should be dealt with and instead throws the burden on the Trustee of having to choose between various options. Whilst those can include the option of imposing on employers a liability for additional contributions, the question of how far that net can be spread must depend upon whether employers at the relevant date were intended to be included as potentially liable.

36. Mr Nugee submits that it begs the question to say that the liability can be imposed on any employer who was a Participating Employer (as defined) on 8th June 2000. Rule 29 and clause 30 make no reference at all to Participating Employers in relation to what I have to decide and do not assist the Trustee. The Trustee's ability to pass that liability to the First and Second Defendants depends not on whether they were or are Participating Employers within the Rule 3 meaning of that term (which is admitted), but rather on whether they agreed to subject themselves to that exercise of the Trustee's powers by signing the accession agreement.

37. Mr Nugee is obviously right in his submission that what matters in the first instance is to identify the obligations which his client undertook by executing the accession agreement. The only link between the Trustee and an employer is contractual. The Trustee's ability to enforce the provisions of the Rules against any company or firm therefore depends upon that employer having agreed to submit to those obligations. But under the accession agreement which it signed, the First Defendant agreed to assume and to be bound by "the obligation undertaken by Employers thereunder or under any subsequent variation that may be duly made therein". If "Employers" (or now "Participating Employers"), when used in the agreement, was intended to have the full width of meaning provided for by the definition in Rule 3, then that is really

the end of the First and Second Defendants' opposition to the 2000 rule change. They accept that they fall within that definition and will thereby have signed up to whatever changes in the liabilities of Participating Employers the Trustee has chosen to make. If, however, the reference to Employers or Participating Employers in the various accession agreements was intended to designate only those employers who from time to time retained active members of the Scheme in their employment, then, on Mr Nugee's argument, this will have bound them only to the obligations which apply to that limited class of employer alone. This will include the liability to contribute under what is now Rule 5.2, but not the liability to contribute under the new Rule 5.2A. At various times during the argument both Mr Nugee and Mr Simmonds referred to their clients as having ceased to take part in the Scheme once they no longer had active members in their employment. But that is not, as I see it, the correct analysis. Neither the First Defendant nor the Second Defendant have ever ceased to be part of the Scheme. As already noted, there was no express provision for a Participating Employer to withdraw from the Scheme until the limited changes made in the Rules by the 2000 Deed. The accession agreements bound them to the Scheme for its duration. But their liability during the life of the Scheme depends on the powers and the degree of control which they have conferred on the Trustee under the terms of the accession agreements which they signed.

38. The focus of the argument has therefore been on whether the parties intended to give Participating Employers or Employers, when used in the accession agreement, a more limited meaning than those expressions would bear if interpreted in accordance with the definition in Rule 3. Mr Nugee in his written submissions described Mr Green's construction of the agreement as having nothing to recommend it except pedantic literalism. It would, he said, require all former employers who had ever participated in the Scheme to remain, so to speak, on the hook, even though their employees who were members had long since moved on to other employment or retired. Their potential liability would moreover continue even if they had ceased (as in one case) to own or operate any merchant ships and were now carrying on a completely unrelated business.

39. The more limited construction of "Participating Employers" in the accession agreement for which he contends is said to be a more normal use of language consistent with the concept of a "participating" employer as one who takes part in the Scheme. This description fits an employer who continues to contribute towards the pensions of active members, but is not appropriate, he submits, to describe an employer who has ceased to do so. Mr Nugee also relies on the history of the Scheme provisions, which he says indicates that the core function of a Participating Employer was to make contributions towards the pension entitlement of active members under what is now Rule 5.2. Prior to the execution of the 2000 Deed they had no other obligations as such. The other provisions of the Trust Deed also indicate that the references to Participating Employers are intended to denote Participating Employers in the sense for which Mr Nugee contends. Examples given are Rule 19.2, which entitles Participating Employers to receive copies of documents, and Rule 23.0, which provides that membership of the Scheme is not to restrict the right of Participating Employers to dismiss members in their employment These will, he says, have little or no relevance to employers with no active members as employees. The same point is made in relation to Rule 31.0, which requires any decision to wind up the Scheme to be assented to by a majority of Participating Employers and members.

40. The principles of construction relevant to a pension scheme were identified by Arden LJ in her judgment in *British Airways Pension Trustees Limited v. British Airways Plc* [2002] EWCA Civ 672. Whilst explaining that there are no special rules of construction to be applied, Arden LJ considered that the following factors are likely to be relevant to a consideration of a pension scheme. They can be summarised as follows:

   (1) Members of a scheme are not volunteers: the benefits which they receive under the scheme are part of the remuneration for their services and so are in a different position in some respects from beneficiaries of a private trust;

   (2) a pension scheme should be construed so to give a reasonable and practical effect to the scheme;

   (3) 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;

   (4) 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;

   (5) the function of the Court is to construe the document without any predisposition as to the correct philosophical approach;

   (6) a pension scheme should be interpreted as a whole: the meaning of a particular clause should be considered in conjunction with other relevant clauses.

41. None of this is controversial. But it is important to bear in mind that the degree to which any relevant background fact may influence the construction of the words used in a document will obviously depend on the importance it assumes in the overall context of the Deed. Although at least one of Arden LJ's propositions is directly based on the speech of Lord Hoffmann in *ICS v. West Bromwich Building Society* [1998] 1 WLR 896, this is not in fact a case in which I am being asked to depart from any conventional use of language. It is accepted on both sides that the Rule 3 definition of Participating Employers is clear and that the only issue is whether (as provided in Rule 3) the words are to be given a different or lesser meaning in the context in which they are used. This is because Mr Nugee and Mr Simmonds have to accept that there is at least one instance in the Rules of Participating Employers being used to describe both present and former employers of active members. This is clause 30.0(a), which prevents the Trust Deed and Rules from being amended so as to return contributions to Participating Employers. Another example (although not one which is formally conceded) is almost certainly Rule 31.1, which provides for the distribution of any ultimate surplus on a winding up of the Scheme. The relevant part of the Rule states that:

> "Lastly, any surplus then remaining shall, subject to complying with the requirements of the 1995 Act, be paid to the

> Participating Employers in such manner as the Trustees may determine to be just and equitable."

42. Mr Green does not of course accept that the examples given by Mr Nugee are in fact instances in which the Rules use "Participating Employers" in a restricted sense, but I do not have to resolve that, because the existence of even a single example of what might be termed the wide meaning of the phrase confirms that the ordinary and, I think, literal meaning of the definition contained in Rule 3 was intended by the draftsman to apply, absent indications to the contrary. Mr Nugee's attack on what he describes as Mr Green's literal approach is therefore limited to the particular context of the accession agreement. But it must follow from this that the factors which are relied upon to justify the limitation of the meaning of "Participating Employers" to current employers of active members will only be admissible for this purpose if they are somehow relevant to the construction of the accession agreement rather than to the Scheme as a whole. General arguments to the effect that it would be unfair or inappropriate to include any employers bar those with active members at the relevant time as Participating Employers are met by the fact that this is what the draftsman has done.

43. The accession agreement in its current form is a contract by the employer to "assume and be bound by the obligation undertaken by Participating Employers thereunder or under any subsequent variation that may be made therein". Although the word "obligation" is used in the singular, it was originally used in the plural in the 1937 Rules and Trust Deed, and the deletion of the letter "s" may be no more than typographical. In any event everyone accepts that the singular, if necessary, includes the plural. Mr Nugee's case is that the only obligation or obligations assumed by a Participating Employer in the Trust Deed and Rules is the obligation to contribute now contained in Rule 5.2. It follows from this, he says, that "Participating Employers", as used in the accession agreement, should be limited to the type of Participating Employer who is at the relevant time under that obligation: i.e. an employer which still has active members as employees.

44. His argument therefore accepts (as it must) that the word "thereunder" refers back to the current Trust Deed and Rules, which are mentioned in the first line of the agreement. If the agreement had stopped there, it might not have mattered very much how one interpreted "Participating Employers". The employer would have agreed only to abide by the obligation or obligations contained in the Trust Deed and Rules at the date of the agreement, and the only obligation to contribute, as such, was that contained in what is now Rule 5.2. His liabilities would therefore have been limited by the reference to obligations rather than by any particular meaning to be attributed to "Participating Employers". But the draftsman obviously realised that it was necessary to bind the incoming employer not only to the existing Trust Deed and Rules but also to any subsequent variation in them, and it is these words which ultimately lead, in my judgment, to the rejection of Mr Nugee's submissions about the construction of the phrase "Participating Employers", when used in the agreement.

45. The word "therein" refers back to the Trust Deed and the Rules. The obligations assumed by the employer are those under the Trust Deed and Rules "or <u>under</u> any subsequent variation that may be made therein". This is clearly a reference to a subsequent variation in the Trust Deed and Rules and not in the obligation referred to. It makes no sense to talk of assuming obligations "undertaken by Participating

Employers . . . under any subsequent variation that may be made [in the obligation]". On this basis the employer signed up not only to the existing obligations of Participating Employers but also to any further obligations which might be imposed on them by the Trustee from time to time. Mr Nugee's argument therefore depends upon treating the fact that the reference to the "obligation" of the Participating Employers in, say, 1981 only consisted of what is now Rule 5.2 as determining the type of obligation which could thereafter be imposed by a variation of the Trust Deed. The practical effect of this, if right, would be to exclude the power of variation contained in clause 30 of the Trust Deed from being exercised so as to add to the obligations of Participating Employers as defined in Rule 3. Because of the terms of the accession agreement, no such variation could ever bind any employers who no longer had active members in their employment.

46. It seems to me that this construction of the agreement is inconsistent both with the express provisions of clause 30 and also with the structure of the Scheme in general. Clause 30.0 allows the provisions of the Trust Deed and of the Rules to be "varied or added to in any way". As already stated, that power is general in terms, subject only to three express limitations on its exercise. It would be an odd form of drafting, to say the least, to choose in effect to emasculate the power to amend by relying on the use of a defined term in a subsidiary document being interpreted in a restricted but unstated way. Not only is this an obscure method of drafting, but it results in giving a wide power with one hand and then taking it away with the other. The method of drafting which forms the basis of the construction advanced by Mr Nugee and Mr Simmonds becomes even more curious when one takes into account the reference to "Participating Employers" in clause 30.0(a) (no return of contributions to Participating Employers), which is conceded to be a reference to Participating Employers in the wide sense of the Rule 3 definition. It seems to me that the construction advanced by Mr Green is both the more natural way of interpreting a professionally drawn document of this kind and the one which creates a structure that does in fact cater for many of the concerns about unfairness expressed by Mr Nugee and Mr Simmonds.

47. Rule 29.2 does no more than to require the Trustee to take steps, if necessary by amendment, in order to cure a deficiency in past service benefits. It is, I think, quite unrealistic to suppose that the draftsman of the Scheme considered that this could be achieved simply by increasing the level of contributions from employers who happened to retain active members in the Scheme at any particular time, and for the reasons already stated it is now accepted that the rule does not limit the options in that way. What it does is to give the Trustee a wide discretion as to how to cure the deficiency, which it must exercise in the light of the circumstances at the time. There is nothing in Rule 29.2 which limits the Trustee's available remedies to any particular sub-class of Participating Employers or even to seeking increased or additional contributions. There is no reference as such to Participating Employers in the rule, and the Trustee may decide either to reduce benefits or to wind up the Scheme.

48. Clause 30 is also widely drawn and is not of course limited to variations designed to deal with deficiencies. It is a general power of amendment and has to be interpreted as such. Consistently with the wide scope of Rule 29.2, it can be exercised (as it has been) so as to deal with deficiencies in past service benefits by requiring contributions from all classes of Participating Employers as defined. Mr Nugee and Mr Simmonds

accept this, because of the absence in either Rule 29.2 or clause 30 of any reference to Participating Employers in relation to the power to remedy deficiencies by altering the provisions about contributions. Their argument is that, notwithstanding these wide powers of amendment, all that their clients signed up to was a liability limited to the obligations imposed, or to be imposed, on those employers who retained active Scheme members.

49. Against an accepted background of a widely drawn power to cater for deficiencies by amending the Scheme liabilities, it is, in my judgment, difficult to identify any particular contextual considerations which require one to give "Participating Employers", when used in the accession agreements, anything but its usual defined meaning. It is important to bear in mind that the accession agreements were signed when an employer entered the Scheme and were not intended to do more than to subject that employer to the obligations, both present and future, which a Participating Employer under the Scheme would be subject to. It is therefore almost impossible, in my judgment, to see why the parties did not intend to give "Participating Employers" the same meaning which it bears in Rule 3. To give it any other meaning is to assume that no incoming employer was ever intended to be subject to the full scope of the provisions of the Scheme. That simply makes no sense.

50. The answer to Mr Nugee's points about possible unfairness is that the Trustee is given a discretion under Rule 29.2 as to how to deal with the problem of a deficiency, and it can exercise that discretion in a way which takes into account any well-founded arguments that the imposition of liability for additional contributions would be either unjust or disproportionate. On Mr Nugee's argument that discretion is denied to the Trustee. It can only exercise its Rule 29.2 powers so as to bind a limited class of employer. The incidence of liability is therefore entirely random and potentially unbalanced. I do not accept that this is what can have been, or was, intended.

51. In these circumstances it is unnecessary for me to deal at any length with Mr Simmonds' alternative argument that a Participating Employer would only cease to be a Participating Employer for the purposes of the accession agreement and the Scheme if it ceased to employ anyone within the classes of employee referred to in clause 6.1 of the Trust Deed. Even if I had been with Mr Nugee on his construction of the agreement, I would have rejected this argument. There is absolutely nothing in the wording of the agreement or in its relevant context to justify an inference that liability should be maintained when the employer ceased to have active members as employees, but should cease when its workforce no longer corresponded to that described in clause 6.1. It seems to me to import even greater uncertainty and to lack any obvious rationale. In the event, however, I reject Mr Simmonds' submissions for the same reasons that I have rejected those of Mr Nugee. It has also been unnecessary for me to deal with Mr Green's submissions to the effect that his construction of the Trust Deed and the Rules is the only one which is consistent with Inland Revenue practice from time to time in relation to schemes of this kind. Although I think that there is something to be said for that argument, I prefer to base my judgment on what seems to me to be the obvious structure of the Scheme.

Pre-1978 Employers

52. In the light of my decision on the first question, it does become necessary to consider whether the Trustee is entitled to require Pre-1978 employers to contribute to the

deficiency which has arisen in the Post-1978 Section. By Pre-1978 employers I mean employers who ceased to have active members as employees prior to 6th April 1978, when the Scheme was divided into two sections. Mr Warren QC, who for the reasons explained earlier has taken on the burden of arguing this point, does not submit that the Pre-1978 employers are not Participating Employers within the meaning of Rule 3. He accepts that the definition covers all employers who have ever participated in the Scheme. But, he says, the division of the Scheme into two sections under the 1978 Deed had the effect of requiring the two sections and their assets to be kept separate and envisaged that the assets of each section would be used exclusively to fund the benefits provided by that section.

53. These provisions have been incorporated into the current Trust Deed and Rules, and I propose to concentrate on those provisions. Clause 14.3 of the Trust Deed states that:

> "The Fund is divided into a Pre 1978 Section and a Post 1978 Section.
>
> The two Sections shall continue to be segregated and be the subject of separate accounts and valuations but the Trustees shall have power for the purpose of investment only to pool the assets comprising the two Sections and apply the provisions of the Trust Deed and Rules relating to investment to the single, pooled fund."

This division is carried right through the life of the Scheme, to the extent that in Rule 31.0 there is provision enabling the separate winding up of each section:

> "It shall be competent for the Trustees to so resolve that one Section of the Scheme only shall be determined. In any event, on a winding-up, each Section of the Scheme shall be the subject of a separate winding-up with the intent that no benefit payable out of one Section shall be paid out of the other Section but that each Section shall be employed solely for the purpose of providing benefits in respect of Service covered by that Section."

Similarly, a surplus arising in one section cannot be shared with the other section: see Rule 29.3.

54. Consistently with this, each section must maintain separate accounts and valuations (Trust Deed clause 14.3) and benefits under the two sections are separately calculated, thereby preserving the distinction between the bases of provision which led to the division between the Pre- and Post-1978 Sections of the Scheme: see Rule 6.0.

55. Mr Warren submits that the effect of the division in accordance with these provisions was to create what are in effect two schemes, and that it would be inconsistent with the scrupulous separation of assets and liabilities for employers who only participate in the Pre-1978 period of the Scheme to be asked to contribute to a Post-1978 deficiency in liabilities.

56. In support of this argument Mr Warren treated me to an almost philosophical analysis of what a scheme and a section of a scheme comprises. A scheme is not, he said, simply the Trust Deed or the Rules. There have to be members, assets and liabilities as well, operating under the constitution laid down by the Scheme documents. Once the Scheme is sectionalised, it becomes unnecessary to consider the provisions applicable only to the Post-1978 Section. The only relevant provisions are those (to which I have referred) which govern the constitution of the Pre-1978 Section of the Scheme. They indicate that a complete separation of assets and liabilities was intended, which should be given effect to in relation to the incidence of liability now under consideration.

57. This approach seems to me to be a little too conceptual. As Mr Warren, I think, accepts, the starting point for a consideration of the potential liabilities of Pre-1978 employers has to be the 2000 Rule Change contained in what is now Rule 5.2A and the accession agreements which the Pre-1978 employers signed. The Pre-1978 employers are (for the reasons set out in relation to the first question) Participating Employers within the definition of that term in Rule 3. This is accepted. They therefore submitted to the obligation contained in the Trust Deed and Rules current at the time and to any obligations contained in a variation of those documents. Although the 1978 Deed created what might be regarded as two separate funds, with clear restrictions on the use of assets to the provision of benefits for the members entitled under these sections, it preserved the rules about dealing with deficiencies (Rule 29.2) and the power to amend (clause 30) as general powers exercisable by reference to the "Scheme" rather than to the individual sections within it. The Scheme is defined to mean:

> "the Merchant Navy Officers Pension Fund governed by the Trust Deed and Rules."

58. Absent any express provision to that effect, I cannot see anything in the sectionalisation of the Scheme which suggests that the power to cure deficiencies is not capable of being exercised on a scheme-wide basis. This is, I think, evident in the absence from the definition of "Participating Employers" of any reference to the sections, even in relation to the Post-1978 period, notwithstanding that the Pre-1978 and Post-1978 Sections are also defined terms in the Rules. They were included so as to define the benefits payable, for example, under Rules 6.0 and 6.2, where they are widely used. But they do not feature at all in relation to Rule 29.2, nor did they do so in the equivalent provisions of the 1978 Trust Deed or Rules.

59. It seems to me that the Trust Deed and the Rules were intended to give the Trustee a wide discretion as to how to deal with deficiencies in either section of the Scheme, and not to pre-judge how that discretion should be exercised. Arguments as to whether it would be appropriate for Pre-1978 employers to contribute to Post-1978 liabilities fall to be considered, and have been, as part of that process. In that way the consequences of sectionalisation can be addressed, but not in a prescriptive way. If the draftsman had intended otherwise, he had the definitions available to enable him to say so. It is noteworthy that Mr Green, who contends for this construction of the Trust Deed and Rules, expressly declined to maintain that the Trustee should exercise his discretion so as to seek contributions from Pre-1978 employers.

Conclusions

60. I will therefore answer question 2.1 in the claim form in terms of option (1) and question 2.2 to the effect that Pre-1978 employers are included in the class of Participating Employers, from whom the Trustee may seek contributions in accordance with Rule 5.2A.

61. I will hear Counsel on the form of order and on any other consequential matters arising from this judgment. It is right that I should record my gratitude to all Counsel for the assistance I have received. I also wish to offer my congratulations to Mr Warren, whose appointment as a High Court Judge was announced after the hearing of this application.