Neutral Citation Number: [2015] EWHC 3685 (Ch)

Case No: HC-2015-002589

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Rolls Building
Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/12/2015

Before :

THE HON MRS JUSTICE ASPLIN DBE

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Between :

(1) DEREK JOHN POLLOCK
(2) ROGER STEPHEN HOAD
(3) JOHN FULTON IRWIN
(4) INDEPENDENT TRUSTEE SERVICES LIMITED
(5) ROGER CHARLES ABRAHAM
(6) JAMES BILLINGHURST
(7) CATHERINE MERLANE
(in their capacity as Trustees of the Halcrow Pension Scheme) **Claimants**

- and -

(1) COLIN REED
(2) HALCROW GROUP LIMITED
(3) THE BOARD OF THE PENSION PROTECTION FUND
(4) THE PENSIONS REGULATOR **Defendants**

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Andrew Spink QC, Edward Sawyer and Simon Atkinson (instructed by **Sackers & Partners LLP**) for the **Claimants**
Jonathan Evans QC (instructed by **DLA Piper UK LLP**) for the **First Defendant**
Robert Ham QC and **Jonathan Chew** (instructed by **Hogan Lovells International LLP**) for the **Second Defendant**
Andrew Mold (instructed by **Herbert Smith Freehills LLP**) for the **Third Defendant**
Michael Tennet QC, Jonathan Hilliard and **Bobby Friedman** (instructed by the **Pensions Regulator**) for the **Fourth Defendant**

Hearing dates: 25-28 August, 2, 5 and 7 October 2015

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Judgment

Mrs Justice Asplin :

1. This is a Part 8 Claim by the present trustees of the Halcrow Pension Scheme (respectively the "Trustees" and "HPS"). The Claim arises as a result of a proposed transfer of the assets and liabilities of HPS to a new occupational pension scheme

known as "HPS2" which is intended to be established for that purpose on specific terms (the "Transaction"). The nature of the Transaction and the circumstances in which it arises have caused the Trustees to seek declarations in respect of four legal issues and in addition, to seek the blessing of the Court for their decision to enter into it. In fact, the third and fourth issues have been compromised and are no longer before the court.

2. The Second Defendant Halcrow Group Limited is the Principal Employer of HPS ("HGL"). The First Defendant Mr Colin Reed is a member of HPS and it is intended that a representation order be made pursuant to CPR 19.7 in his favour. It is intended that he represent all the members and other beneficiaries of HPS in relation to the propriety of the Trustees' proposed exercise of their powers to enter into the Transaction, that he represent those beneficiaries in whose interests it is to object to the Transaction on the basis of any legal objections concerning the scope of the Trustees' powers or the legal effectiveness of any steps within the Transaction and lastly, that he represent those beneficiaries in whose interests it is to oppose the declarations sought in relation to what have become known as Issues 1 and 2 (to which I will refer below). It is also proposed that the Trustees represent those beneficiaries in whose interests it is to argue in favour of the Transaction and the declarations sought. I am happy to make representation orders on that basis. The Third and Fourth Defendants are the Pension Protection Fund (the "PPF") and the Pensions Regulator respectively. The PPF has been joined to the proceedings only in relation to Issue 2 (which raised certain legal issues about the impact of the Transaction on whether the PPF could later assume responsibility for HPS2). As I explain below, in the light of my decision on Issue 1, Issue 2 was not then argued before me. The Pensions Regulator has been joined because of the potentially wide-ranging consequences of the Transaction for underfunded occupational pension schemes generally.

3. HPS is a defined benefit occupational pension scheme with approximately 3,300 members. It is in severe deficit and HGL is unable to make it good. In fact, it has not been possible to agree a contribution schedule for the period from 2011 and employer contributions are still being paid on the basis of the 2008 actuarial valuation. There is a solvency deficit of £600 million and a deficit on the PPF basis of £226 million. The position is described as unsustainable and independent advice from BDO obtained by the Trustees is to the effect that the present position is not viable.

4. HGL itself is heavily balance sheet insolvent and is only able to continue as a going concern because of substantial support from its American parent company, CH2M Hill Companies Ltd, ("CH2M"). CH2M has indicated that it no longer intends to support HGL financially in a manner which would enable it in turn to contribute to HPS at an acceptable level. This indication caused proposals to be made which have crystallised in the form of the Transaction. In fact, it is suggested that unless the Transaction is completed, HGL will be placed into administration and as a result HPS will in all likelihood go into the PPF. This would result in members' benefits being reduced to PPF compensation levels which generally are less generous than the benefits under HPS. However, if the Transaction is completed, members will be transferred to HPS2 under which they would receive benefits which in many cases are better than PPF compensation and in all cases are at least equal to PPF compensation.

5. The details of the Transaction are set out in legally binding Heads of Terms dated 16 April 2015 which were amended on 10 August this year. The essential elements of the Transaction are as follows:

   i) HPS would be wound up and all of its assets and liabilities transferred to HPS2;

   ii) HGL would be the sponsoring employer for the purposes of HPS2 which would have a new corporate trustee;

   iii) the benefits under HPS2 would be the same as under HPS but for the fact that future increases to pensions in payment and in deferment would be at the statutory minimum rather than the higher level prescribed in the present rules of HPS although the Principal Employer would have an absolute discretion to consider non-statutory increases to pensions in payment on an annual basis;

   iv) except for a minimum period of accrual for two members to ensure that HGL would be a statutory employer under HPS2 and to meet contracting out requirements HPS2 would be closed to future accrual HPS2 would be subject to a 'PPF underpin' to ensure no member of HPS2 would receive less than the PPF compensation which he or she would have received had HPS entered an assessment period as at the date of the transfer; and for those members whose HPS2 benefits would be at or only just above the level of PPF compensation, an additional £3 million would be paid into HPS2 to augment their benefits above that level;

   v) CH2M would guarantee HGL's payment obligations capped at a maximum of £120 million;

   vi) contributions would be £5.5 million per annum increasing in line with CPI capped at 3% plus expenses and PPF Levy. However, they would be reduced initially to reflect the payment of a section 75 debt owed to the HPS by Halcrow Water Services Ltd, a participating employer in HPS;

   vii) contributions are to be based on a recovery period of around 18 years and an initial split of 50:50 return seeking assets and liability matched assets with de-risking to occur by 2043; and

   viii) following the transfer to HPS2 the Trustees will calculate a section 75 debt in respect of HGL in HPS at nil and release Halcrow Holdings Limited, an intermediate parent company, from a guarantee it had provided to the HPS and the Halcrow participating employers from further liabilities in respect of the HPS.

   It is not in dispute that the security of the benefits is higher in HPS2. Further, despite having the same Principal Employer, the Trustees consider HPS2 to be a sustainable scheme.

6. Having taken a large amount of professional advice the Trustees are satisfied that the Transaction is in the best interests of the members of HPS and they have agreed to carry it out subject to the Court determining the legal issues to which I shall refer and

giving its approval. The Heads of Terms also contain provisions which enable the Trustees not to proceed with the Transaction if they no longer consider it to be in the best interests of the members of the HPS or if they would otherwise be in breach of fiduciary duty in doing so. Mr Reed did not identify any ground for opposing the Trustees' application for approval and he therefore submitted that "approval should be granted" (albeit making clear that this did not mean he agreed that the decision made by the Trustees that Project Gravity was in the best interests of members was correct). I should add that Mr Evans QC, on Mr Reed's behalf, made clear that the information available to those advising Mr Reed had been limited in some respects and that the conclusions reached on his behalf should be understood in that light. I shall return to the issue of propriety below.

Procedural Background and Privacy

7. This matter came before the Court in some haste as a result of CH2M's indication that financial support sufficient to allow HGL's accounts to be signed on an ongoing basis as at 30 September 2015 would not be provided if the Transaction were not approved. The Part 8 Claim was issued on 26 June 2015 and an order for an expedited trial and privacy amongst other things, was made by Hildyard J on 3 July 2015. On that occasion, the Trustees applied for permission to serve notice on the PPF under CPR r.19.8A. That application was contested by the PPF and a compromise then reached by which the PPF was joined to the proceedings but only in relation to Issue 2 and with costs protection. The Pensions Regulator was joined generally to the proceedings after its joinder was initially opposed by the Trustees.

8. For the Transaction to have any realistic prospect of succeeding it was and is said that it was and is essential to maintain the confidentiality of the application and the highly sensitive commercial information associated with it. There is real concern expressed by Mr Martin of the Independent Trustee Services Limited, one of the Trustees, in his witness statement, that if that information were publicly available the effect on HGL's business would be sufficiently serious that it might be plunged into insolvency in any event and, as a result, HPS might fall into the PPF. As I have already mentioned, the sensitivity has resulted in the information available to Mr Reed and his advisers being restricted and his ability to discuss this matter with other members having been curtailed entirely.

9. When the hearing commenced on 25 August 2015, I considered the issue afresh and decided to continue the order in relation to confidentiality and this matter was heard in private. In my judgment, given the sensitive and confidential nature of the financial and commercial information surrounding the present position of HGL and the possible withdrawal of support by its ultimate parent and the fact that were it made public the object of the hearing, being the approval and completion of the Transaction, might well be defeated, to the detriment of all concerned, it was appropriate to diverge from the general rule that a hearing should be in public. I also considered it to be appropriate and necessary in support of that confidentiality to continue the orders made by Hildyard J in relation to the content of and access to the Court File.

10. At the hearing on 25 August 2015, it rapidly became apparent that the time estimate was wholly inadequate to deal with the three remaining issues, one of which had

already been compromised. At that stage, the third issue was also compromised and it was agreed that the remainder of the trial timetable would be devoted solely to Issue 1 in the Agreed List of Issues, Issue 2 and the question of propriety being adjourned to the beginning of October to a further hearing of similar length.

11. On 28 August 2015, at the end of the hearing in relation to Issue 1, a question arose as to the validity of the Rules upon which submissions had been made in relation to Issue 1(b) and whether, in fact, those rules applied to all of the membership of the HPS. As a result, lengthy investigations and discussions took place. At the resumed hearing on 2 October 2015, it was agreed that the Rules in question applied to all of the membership but a question remained as to their validity in the light of section 67 Pensions Act 1995. Two additional sub-issues had been agreed. However, it was also agreed that the additional sub-issues only arose if Issue 1(b) was answered in a way which depended upon the Rules which had been the subject of submissions, being rules 15.5(2) and 15.3(5) of the 2010 Rules of HPS, being valid. It was also agreed that if Issues 1(a) and (b) were answered in the way for which Mr Reed and the Pensions Regulator contend, there would be no cause to argue Issue 2.

12. With some reluctance I have concluded that in my judgment, Issues 1(a) and (b) should be answered in the way for which Mr Reed and the Pensions Regulator contend. I informed the parties of my decision at the commencement of the hearing on 5 October 2015. I set out my reasons below. As a result of my decision, I heard no argument in relation to Issue 2 to which I shall refer no further. As I did hear argument in relation to Issue 1(c) I will set it out for the sake of completeness. However, it is accepted that none of the sub-sub-issues of 1(c) arise in the light of my decisions in relation to Issues 1(a) and (b). In the circumstances, I do not intend to summarise the submissions made in relation to Issue 1(c) or to comment upon them, save to the extent that they are relevant to Issues 1(a) and (b).

13. In addition, I heard submissions from Mr Spink QC on behalf of the Trustees, in relation to the propriety of the Trustees' decision making process in relation to the Transaction and read the written submissions on behalf of Mr Reed. I shall return to the propriety issue below for the sake of completeness.

The Remaining Issues

14. Issue 1 is formulated as follows:

> "Whether, in relation to the proposed transfer of assets and liabilities from HPS to HPS2, the certificate to be issued by the Scheme Actuary under regulation 12(3)(a) of the Preservation Regulations (the "1991 Regs") can lawfully and properly be granted on the basis that the relevant comparison to be made, when considering whether the transfer credits to be acquired for each member under HPS2 are broadly no less favourable than the rights to be transferred, is between (i) the PPF Benefits that would be payable if HPS entered the PPF on the Transfer Date and (ii) the benefits under the rules of HPS2. If some other comparison is to be made, what is it and how must it be made?"

15. This breaks down into a number of sub-issues which are as follows:

i) Sub-issue 1(a): Does the comparison between the transfer credits to be acquired under the rules of the HPS2 and the rights to be transferred under the rules of the HPS require the Scheme Actuary: to compare the rights to benefits under the HPS with the rights to benefits in HPS2 or to form a view of the ability of each scheme respectively to pay those benefits and to take that into account when comparing the benefits?

ii) Sub-issue 1(b): If the answer to sub-issue 1(a) is a comparison of rights to benefits with no account being taken of the ability to pay the benefits in question where the transferring scheme is ongoing, does it make any difference if the transferring scheme is in winding up?

iii) Sub-issue 1(c): If the answer to sub-issue 1(a) or sub-issue 1(b) is that the actuary must form a view of the ability of the transferring or receiving schemes to pay the benefits then:

i) Sub-sub-issue 1(c)(i): May the Scheme Actuary act on the basis of instructions from the Trustees as to the ability of the two schemes to pay the benefits or should he form his own view?

ii) Sub-sub-issue 1(c)(ii): As regards the *"rights to be transferred"* from the HPS in winding up, when considering the HPS's ability to pay benefits:

1. Sub-sub-sub-issue 1(c)(ii)(1): Should the Scheme Actuary (or the Trustees if relevant) have regard to potential moral hazard recoveries?

2. Sub-sub-sub-issue 1(c)(ii)(2): If the Scheme Actuary concludes, or the Trustees (if relevant) conclude, that the HPS would (but for the transfer) enter the PPF, should he/they regard the members' rights as being equivalent to the PPF compensation they would receive if the HPS entered the PPF?

iii) As regards the *"transfer credits to be acquired… under the receiving scheme"*, when considering the HPS2's ability to pay benefits:

1. Sub-sub-sub-issue 1(c)(iii)(1): May the Scheme Actuary take the transfer credits to be the benefits conferred under the rules of the HPS2 if he is satisfied (or the Trustees if relevant are satisfied) that the HPS2 is a viable scheme at the date of the transfer?

2. Sub-sub-sub-issue 1(c)(iii)(2): To the extent that the Scheme Actuary considers (or the Trustees if relevant consider) that there is a possibility of the HPS2 failing in future, may he (or the Trustees if relevant) regard the members' rights in that eventuality as being equivalent to the PPF compensation those

> members would receive if the HPS2 entered the PPF (assuming no change in the PPF compensation rules)?

I will now turn to each of Issues 1(a) and 1(b) in turn.

Issue 1(a)

16. It is an essential element of the Transaction that a bulk transfer of members' rights from HPS to HPS2 takes place without their consent. In order to effect such a transfer it is essential amongst other things, to obtain an actuarial certificate pursuant to the Occupational Pension Schemes (Preservation of Benefit) Regulations 1991 SI 1991/167 (the "1991 Regulations"), regulation 12(2), (3) and (4B) and Schedule 3. As I have already mentioned, in this case, the headline benefits in HPS2 are not as extensive as those in HPS but it is not disputed that the security for the payment of those benefits is greater. The essence of Issue 1(a) and Issue 1(b) for that matter, is whether when giving an actuarial certificate fulfilling the requirements of regulation 12 and Schedule 3 of the 1991 Regulations, despite more restricted headline benefits in HPS2, the scheme actuary can take into account the greater security in that scheme when determining whether the rights transferred and the transfer credits obtained are "broadly no less favourable".

(i) The relevant legislation and regulations

17. Issue 1 as a whole is concerned therefore with the construction to be placed upon regulation 12(3) and Schedule 3 of the 1991 Regulations which are concerned with the preservation of short service benefit and contain the prescribed requirements referred to in section 73 Pension Schemes Act 1993 (the "PSA 1993") in which such rights can be transferred without consent. "Short service benefit" is defined in section 71(2) PSA 1993 by reference to the provision which a scheme is required to make in certain circumstances for members whose pensionable service is terminated before normal pension age. In such circumstances, the member is to be entitled to benefit "consisting of or comprising benefit of any description which would have been payable under the scheme as long service benefit whether for himself or others and calculated in accordance with this Chapter."

18. Section 73(1) PSA 1993 goes on to provide that subject to exceptions which are irrelevant for this purpose, short service benefit must be payable directly out of the scheme's resources or assured to him by means which are prescribed. The relevant sub-sections of section 73 then provide as follows:

> "(2) Subject to subsections (3) to (5), a scheme may, instead of providing short service benefit, provide –
>
> (a) for the member's accrued rights (including any transfer credits allowed under the scheme) –
>
> (i) to be transferred to another occupational pension scheme with a view to acquiring transfer credits for the member under the other scheme…

> …
>
> (4) The alternatives specified in subsection (2)(a) and (b) may only be by way of complete or partial substitute for short service benefit –
>
> (a) if the member consents; or
>
> (b) in such other cases as may be prescribed."

The meaning of "rights" and "transfer credits" is set out in s 181(1) PSA 1993 as follows:

> "…rights", in relation to accrued rights (within the meaning of section 73, 136 or 179) or transfer credits, includes rights to benefit and also options to have benefits paid in a particular form or at a particular time;

and

> "…transfer credits" means rights allowed to an earner under the rules of an occupational pension scheme by reference to –
>
> (a) a transfer to the scheme of, or transfer payment to the trustees or managers of the scheme in respect of, any of his rights (including transfer credits allowed) under another occupational pension scheme or a personal pension scheme, other than rights attributable (directly or indirectly) to a pension credit, or
>
> (b) a cash transfer sum paid under Chapter 5 of Part 4 in respect of him, to the trustees or managers of the scheme."

19. As I have already mentioned, regulation 12 of the 1991 Regulations prescribes the circumstances in which a transfer may be made to another occupational pension scheme without the member's consent. The relevant parts of regulation 12 (as presently in force) provide as follows:

> "(1) For the purposes of section 73(4) of the [Pension Schemes] Act [1993], a scheme may provide for the member's accrued rights to be transferred to another occupational pension scheme (as described in section 73(2)(a)(i) of the Act) without the member's consent where the conditions set out in paragraphs (2) and (3) of this regulation are satisfied.
>
> …
>
> (2) The condition set out in this paragraph is that the rights of a member are being transferred from the transferring scheme to the receiving scheme and either –

(a) the transferring scheme and the receiving scheme relate to persons who are or have been in employment with the same employer; or

(b) the transferring scheme and the receiving scheme relate to persons who are or have been in employment with different employers, the member concerned is one of a group in respect of whom transfers are being made from the transferring scheme to the receiving scheme, and either –

(i) the transfer is a consequence of a financial transaction between employers; or

(ii) the employers are companies or partnerships bearing a relationship to each other such as is described in regulation 64(2) of the Occupational Pension Schemes (Contracting-out) Regulations 1996 (meaning of expression "connected employer").

(3) The condition set out in this paragraph is that –

(a) the relevant actuary gives a certification, by completing the certificate in Schedule 3, in relation to the members' rights in the receiving scheme;

(b) the relevant actuary sends that certificate to the trustees or managers of the transferring scheme;

(c) the transfer takes place within 3 months of the date of the relevant actuary's signature in the certificate; and

(d) there are no significant changes to the benefits, data and documents used in making the certificate (see the benefits, data and documents specified in the certificate) by the date on which the transfer takes place.

(4) For the purposes of making the certification in paragraph 1 of the certificate in Schedule 3, where long service benefit in the transferring scheme is related to a member's earnings at, or in a specified period before, the time when he attains normal pension age then, in the case of a member in pensionable service at the date of transfer, the value of the rights to be transferred shall be based on pensionable service (including any transfer credits) in the transferring scheme up to that date and projected final pensionable earnings.

(4A) For the purposes of [making the certification in paragraph 2 of the certificate in Schedule 3], the [relevant

> actuary] shall, in considering whether there is good cause, have regard to all the circumstances of the case and in particular –
>
> (a) to any established custom of the receiving scheme with regard to the provision of discretionary benefits or increases in benefits; and
>
> (b) to any announcements made with regard to the provision of such benefits under the receiving scheme.
>
> …"

Schedule 3 of the 1991 Regulations contains a pro forma actuarial certificate, the relevant part of which provides as follows:

> "1. I certify that in my opinion, the transfer credits to be acquired for each member under the receiving scheme in the categories of member covered by this certificate are, broadly, no less favourable than the rights to be transferred.
>
> 2. Where it is the established custom for discretionary benefits or increases in benefits to be awarded under the transferring scheme, I certify that in my opinion, there is good cause to believe that the award of discretionary benefits or increases in benefits under the receiving scheme will (making allowance for any amount by which transfer credits under the receiving scheme are more favourable than the rights to be transferred) be, broadly, no less favourable."

(ii) History behind the 1991 Regulations – the context

20. As submissions were made at some length in relation to the history of the 1991 Regulations and their subsequent amendment, I shall set out the relevant details. In fact, the preservation of short service benefit in order to prevent those who left service early from being penalised, was first introduced in Schedule 16 of the Social Security Act 1973. The first regulations were made in 1973 but did not deal with transfer without consent (the "1973 Regulations"). The transfer of members' accrued rights without consent was first introduced by the Contracting out and Preservation (Further Provisions) Regulations 1978 (the "1978 Amending Regulations"). By virtue of regulation 3 of the 1978 Amending Regulations a new regulation 6(4) was inserted into the 1973 Regulations and by regulation 6(4)(b)(ii) a transfer was allowed to be made between schemes where amongst other things:

> "…in the opinion of the trustees or administrator of the scheme from which the transfer is made, the transfer credits acquired by the member under the other scheme are at least equal in value to the rights transferred"

21. Thereafter, the 1973 Regulations were replaced by the Occupational Pension Schemes (Preservation of Benefit) Regulations 1984/614 (the "1984 Regulations"). The

prescribed alternatives were set out in regulation 12 and were similar to those in regulation 6 of the 1973 Regulations. However, by virtue of regulation 26 an additional requirement was imposed that to the reasonable satisfaction of the trustees the alternative to short service benefit "exceed or compare reasonably with the amount contributed" by the member. The 1984 Regulations were amended with effect from 1 January 1986 by the Occupational Pension Schemes (Preservation of Benefit) Amendment Regulations 1985, SI 1985/1926 (the "1986 Regulations"). While the Occupational Pensions Board retained its powers under regulation 12(4)(a), the language of regulation 12(4)(b) was amended as follows:

> "(4) A scheme rule may make provision–
>
> (a) in any case where the Board consider it reasonable for such provision to be made for any of the alternatives mentioned in paragraph 1(a)(ii), (e) or (f) to be substituted for short service benefit without the member's consent;
>
> (b) for the alternative specified in paragraph 9(2)(a) of Schedule 16 (transfer of member's accrued rights to another scheme) to be provided by way of substitute for short service benefit without the member's consent in any case where (without prejudice to regulation 19(2))–
>
> (i) by virtue of regulations made under section 38 of the [Social Security] Pensions Act [1975] provision is made in the Scheme for the member's accrued rights to guaranteed minimum pensions to be transferred to another scheme without his consent;"

22. The requirements of the trustees' comparison of the value of the benefits moved to regulation 12(7)–(10), which provided amongst other things:

> "(7) In any case where the rules of the scheme make provision for the alternative specified in paragraph 9(2)(a) of Schedule 16 (transfer of member's accrued rights to another scheme with a view to the acquisition for him of transfer credits under the other scheme) to be substituted for short service benefit without the member's consent (whether under paragraph 4(b)(i) or regulation 19(2)), they shall also contain provisions requiring the trustees or managers of the scheme to be reasonably satisfied that where, on the date when the accrued rights are transferred, the circumstances specified in paragraph (9) obtain, the payment made by them to the trustees of the other scheme equals or exceeds the value specified in paragraph (10).

…

(10) The value mentioned in each of paragraphs (5) to (7) is–

(a) where the alternative is by way of complete substitute for short service benefit, the value, on the date mentioned in that paragraph, of any benefits which have accrued to or in respect of the member in question under the applicable rules;

(b) where the alternative is by way of partial substitute for short service benefit, the value, on that date, of the relevant part of any benefits which have so accrued."

23. The 1991 Regulations revoked the 1984 Regulations (as amended by the 1986 Regulations) with effect from 28 February 1991. They were preceded by a report of the Occupational Pensions Board (the "OPB") entitled "Protecting Pensions" of February 1989 produced in accordance with section 66 Social Security Act 1973 which was addressed to the Secretary of State for Social Security (the "1989 Report") and a Report in relation to the draft 1991 Regulations, being the product of a consultation process, which was dated 14 December 1990 (the "1990 Report"). In paragraph 10.28 of the 1989 Report headed "Safeguard on Transfer" under the sub-heading "Equivalence of benefit" in relation to bulk transfers reference was made to a comparison of the corresponding "features" of transferring and receiving schemes and the proposal made was for a "broad equivalence of rights and expectations acquired in the new scheme to those given upon the old" which should be assessed on an "overall basis." This was mirrored in the recommendation at paragraph 10.32. The 1990 Report, the relevant recommendations of which were accepted, stated in relation to the proposed regulation 12 dealing with bulk transfers without consent, that "the full worth of pension benefits, in relation to … past service, including final pay linkage and pension increases" should be maintained. It was also noted that actuarial guidelines were to be produced.

(iii) Iterations of the 1991 Regulations

24. The provisions of regulation 12 of the 1991 Regulations have been amended ten times since they first came into force. However, only four of the amendments relate to the actuarial certification requirements. The original regulation 12 in force from 28 February 1991 to 27 September 1992 provided where relevant, as follows:

"(1) For the purposes of paragraph 9(3) of Schedule 16 [of the Social Security Act 1973], a scheme may provide for the member's accrued rights to be transferred to another occupational pension scheme (as described in paragraph 9(2)(a) of Schedule 16) without the member's consent where–

> (a) the scheme is being wound up and the transfer is to another scheme that applies to employment with the same employer; or
>
> (b) the conditions set out in paragraphs (2) and (3) of this regulation are satisfied.
>
> …
>
> (3) The condition set out in this paragraph is that an actuary certifies to the trustees or managers of the transferring scheme that the transfer credits to be acquired for the members under the receiving scheme are at least equal in value to the rights to be transferred.
>
> (4) When calculating the value of any rights for the purposes of this regulation, the actuary must comply with the requirements of sub-paragraphs (a) and (b), namely–
>
> (a) the actuary must value all benefits that have accrued to or in respect of the members under the applicable rules and, for members in service at the date of transfer, the value of those benefits must be based on pensionable service in the transferring scheme up to that date and projected final pensionable earnings; and
>
> (b) where it is the established custom for additional benefits to be awarded from the transferring scheme at the discretion of the trustees or the employer, the actuary must take into account the value of any such additional benefits as will accrue to the members in question if the custom continues unaltered."

25. Sub-regulations 12(3) and 12(4) were amended once again with effect from 1 September 1993 by the Occupational Pension Schemes (Preservation of Benefit) Amendment Regulations 1993, SI 1993/1822 (the "1993 Amendments"). The 1993 Amendments introduced the "broadly, no less favourable" test (which is materially the same as the test which appears in the form of the 1991 Regulations currently in force) in the following way:

> "(3) The condition set out in this paragraph is that an actuary certifies to the trustees or managers of the transferring scheme that–
>
> (a) the transfer credits to be acquired for each member under the receiving scheme are, broadly, no less favourable than the rights to be transferred; and

> (b) where it is the established custom for discretionary benefits or increases in benefits to be awarded under the transferring scheme, there is good cause to believe that the award of discretionary benefits or increases in benefits under the receiving scheme will (making allowance for any amount by which transfer credits under the receiving scheme are more favourable than the rights to be transferred) be, broadly no less favourable.
>
> (4) For the purposes of paragraph 3(a), where long service benefit in the transferring scheme is related to a member's earnings at, or in a specified period before, the time when he attains normal pension age then, in the case of a member in pensionable service at the date of transfer, the value of the rights to be transferred shall be based on pensionable service (including any transfer credits) in the transferring scheme up to that date and projected final pensionable earnings."

26. The Report of the OPB following consultation upon the draft of the 1993 Regulations had included the following:

> "Draft Regulation (3)(a)
>
> 3. We support the suggestions made by several organisations that the regulation should make it clear that the comparison of values should be for each member, and not for the group as a whole. We suggest that clarification is necessary so that there is only need to ensure there is broad equivalence of benefits; it should not be essential for each element in the benefit package to be exactly the same as that element in the new scheme.
>
> 4. We suggest the wording should be amended to the 'transfer credits to be acquired for each member under the receiving scheme are broadly equivalent to the rights to be transferred'."

27. Regulation 12(3) was further amended with effect from 6 April 1997 by the Personal and Occupational Pension Schemes (Miscellaneous Amendments) Regulations 1997, SI 1997/786, (the "1997 Amendments"). These introduced an express reference to the security of members' benefits in the following way:

> "(3) The condition set out in this paragraph is that an actuary certifies to the trustees or managers of the transferring scheme that–

> (a) the transfer credits to be acquired for each member under the receiving scheme are, broadly, no less favourable and, if that scheme were wound up immediately after the transfer, would not be likely to be materially less secure than they would be if the transferring scheme were wound up immediately before the transfer than the rights to be transferred; and
>
> (aa) no beneficiary or contingent beneficiary under the transferring scheme will receive materially inferior benefits in the receiving scheme; and
>
> (b) where it is the established custom for discretionary benefits or increases in benefits to be awarded under the transferring scheme, there is good cause to believe that the award of discretionary benefits or increases in benefits under the receiving scheme will (making allowance for any amount by which transfer credits under the receiving scheme are more favourable than the rights to be transferred) be, broadly no less favourable."

28. The amendments introduced by the 1997 Amendments were, however, removed with effect from 1 October 1999 by the Occupational Pension Scheme (Preservation of Benefit) Amendment Regulations 1999, SI 1999/2543 (the "1999 Amendments"). The explanatory memorandum to the 1999 Amendments, merely states:

> "These Regulations further amend regulation 12 of the Occupational Pension Schemes (Preservation of Benefit) Regulations 1991 in respect of the matters which are required to be certified by an actuary before the accrued rights of a member of an occupational pension scheme ("the transferring scheme") may be transferred to another such scheme ("the new scheme") without that member's consent.
>
> The amendments require that, where the transferring scheme is one which must have a scheme actuary, it is that actuary who must provide any certificate for the purposes of regulation 12; and they remove the requirement for certification as respects the security of a member's rights, and the benefits which will be received, in the new scheme."

Submissions and further materials relied upon in relation to Issue 1(a)

29. In summary, Mr Spink QC on behalf of the Trustees submits that when determining whether the transfer credits in HPS2 are "broadly no less favourable" than the rights under HPS, the actuary should take into consideration the security of the benefits in each of the schemes and therefore, the likelihood of the benefits being paid. Given the parlous state of HPS and the likelihood that it will enter the PPF if the Transaction does not go ahead and in the light of the fact that benefits exceed PPF compensation in HPS2, the scheme will have the benefit of a £3m augmentation payment and a guarantee up to £120m from HGL's American parent and that HPS2 is considered a viable scheme, it is said that despite the reduction in headline benefits, it would be open to the Scheme Actuary to provide the certificate under regulation 12 and Schedule 3 of the 1991 Regulations.

30. Mr Ham QC on behalf of HGL however, submits that the correct approach is that the actuary may take into account a variety of factors which he considers relevant, including the security of benefits, when arriving at his opinion for the purposes of the certification process but is not under an obligation to do so. Both Mr Evans QC on behalf of Mr Reed and Mr Tennet QC on behalf of the Pensions Regulator submit that the exercise requires the comparison of the headline package of benefits in the transferring and receiving schemes and as a result, they say that the security of the benefits whether in the HPS or in HPS2 is not relevant.

(i) Wording of regulation 12 and the actuarial certificate

31. Mr Spink on behalf of the Trustees submits that the interpretation of regulation 12 for which the Trustees contend is consistent with what he describes as its wide wording. He points out that "favourable" is not defined in the regulation but that its Oxford English Dictionary definition is: "Attended with advantage or convenience; facilitating one's purpose or wishes; advantageous, helpful, suitable." He says that when determining the question of whether the position is favourable or advantageous, the likelihood of receipt of the benefit in question is relevant. As a result, it is necessary to take account of whether benefits are less secure in the receiving scheme because it is more poorly funded or because its employer covenant is weaker or, in fact, they are more likely to be received than in the transferring scheme. He submits that this is reinforced by the use of "broadly" which connotes a holistic approach and imports an element of discretion into the exercise. He also draws attention to the express reference to "value" in regulation 12(4) and submits that its inclusion is consistent with the Scheme Actuary undertaking a more than merely nominal comparison of the rights to be provided under the rules of the transferring and receiving schemes. He says that the "value" of a pension benefit depends, at least in part, on the likelihood of its being paid.

32. Both Mr Tennet QC on behalf of the Pensions Regulator and Mr Evans QC for Mr Reed take the opposite view. They say that the words are clear and that there is no ambiguity. They say that the Trustees place an enormous amount of weight upon the use of "opinion", "favourable" and "broadly" in regulation 12(3) which they cannot bear. They submit that those words are entirely apt for the task in hand, being the comparison of the headline rights in the transferring and receiving schemes and that

the words are deliberately open textured to enable the actuary properly to compare differing bundles of headline rights, differently expressed.

33. Mr Evans also points out that regulation 12(3) requires a comparison of "rights" and "transfer credits" and not the chances of them being satisfied. Both terms are defined and no mention is made of security or likelihood of payment of benefits in either definition. Mr Evans with whom Mr Tennet agrees also submits that on a bulk transfer the question of security is one for the trustees of a transferring scheme, once the actuarial certificate is obtained. Furthermore, he points to the fact that the certificate itself makes clear that it is neither authorisation for nor a recommendation to the trustees to make the bulk transfer. He says therefore, that there is no need for the actuary to be concerned with the issue of security and if, in fact, he is required to do so it is a replication of the trustees' function. He also submits that the actuary is not as well placed to determine such issues as the trustees of a scheme, is not an employer covenant specialist and would have to seek third party information which might be commercially sensitive, rely upon the instruction of the trustees or advice provided to them, or obtain his own advice, were he properly to take security into account in the certification process. This raises the questions which are set out in the numerous sub-sub-issues under Issue 1(c). Mr Evans also submits that such an exercise would be extremely complicated, particularly where the financial position of the schemes in question was not as stark as it is in this case.

34. Both Mr Evans and Mr Tennet also say that if the actuary were required to take security of benefits into account, the legislation would have said so expressly. Such a direction is absent from regulation 12(4) which relates to paragraph 1 of the certificate and refers to the "value of the rights to be transferred". In fact, that sub-regulation deals with the situation in which long service benefit and therefore, short service benefit was related to a member's earnings over a particular period. Regulation 12(4A) on the other hand, which relates to the certificate at paragraph 2 which concerns discretionary benefits, provides for consideration of whether there is "good cause having regard to all the circumstances of the case." Mr Evans points out that in contrast to paragraph 1 of the certificate and regulation 12(4) both regulation 12(4A) and paragraph 2 of the certificate are drafted in wider terms to enable the actuary to look outside the terms of the rules themselves. Had that been intended in relation to "rights" and "transfer credits" under paragraph 1, he says it would have said so. Furthermore, in circumstances where the actuary is required to look outside the rules and may have to rely upon information obtained from others, Mr Evans says that it is significant that the form of the certificate he is required to give is materially different. He is only required to assert that he has "good cause to believe." He says that similar wording would have been used in paragraph 1 of the certificate had that been the case there.

35. Mr Evans also draws attention to regulation 12(3)(d) which is one of the conditions which must be fulfilled for a bulk transfer of accrued rights without consent to take place. It provides that between the date on which the certificate is given and the transfer actually takes place there should have been no significant changes to the benefits, data and documents used in making the certificate. He points out that there is no mention of a change in the relative security of the schemes or a reduction in the strength of the employer covenant. Nor is there mention of such issues or for that matter, of the employer at all in the list of data relied upon which is set out at the end

of the certificate. The list contains reference to benefits compared, data used, "key actuarial assumptions to value the rights, transfer credits, any discretionary benefits and any discretionary increase in benefits" and documents used.

(ii) Broad discretion

36. Mr Spink on behalf of the Trustees also compares the width of the wording in the certification for the purposes of preservation with the much more prescriptive requirements in the case of contracting out. The general requirements for certification in relation to salary-related contracted out schemes post 6 April 1997 are set out in section 9 PSA 1993, one of which is that the scheme complies with section 12A. Section 12A PSA 1993 in turn provides that the scheme must satisfy the "statutory standard". The statutory standard is explained in s 12A(3)–(6):

> "(3) For the purposes of this section, a scheme satisfies the statutory standard if the pensions to be provided for such persons are broadly equivalent to, or better than, the pensions which would be provided for such persons under a reference scheme.
>
> (4) Regulations may provide for the manner of, and criteria for, determining whether the pensions to be provided for such persons under a scheme are broadly equivalent to, or better than, the pensions which would be provided for such persons under a reference scheme.
>
> (5) Regulations made by virtue of subsection (4) may provide for the determination to be made in accordance with guidance prepared from time to time by a prescribed body.
>
> (6) The pensions to be provided for such persons under a scheme are to be treated as broadly equivalent to or better than the pensions which would be provided for such persons under a reference scheme if and only if an actuary (who, except in prescribed circumstances, must be the actuary appointed for the scheme in pursuance of section 47 of the Pensions Act 1995) so certifies."

37. By contrast with regulation 12, regulation 23 of The Occupational Pension Schemes (Contracting-out) Regulations 1996 SI 1996/1172 (the "Contracting-out Regulations") sets out in precise detail how the Scheme Actuary is to determine whether pensions are "broadly equivalent". Furthermore, schedule 3 of the Contracting-out Regulations contains seventeen paragraphs, setting out in detail what steps the Scheme Actuary must take when completing a reference scheme test certificate.

38. Mr Evans says that it is a non sequitur to argue that the absence of a detailed and prescriptive list of considerations to be taken into account such as those set out for the purposes of the Contracting-out Regulations leads to the conclusion that the scheme actuary has a broad discretion to take into account what he will, including the security of benefits under regulation 12(3).

39. Mr Evans also drew my attention to a number of other circumstances by way of analogy. First, he referred to what has become known as a "GAD passport" provided in order to certify a scheme as "broadly comparable" for the purposes of making provision for pension benefits of members transferring from a public sector scheme. He says that it is clear from the guidance notes that security is not taken into consideration in those circumstances and that is an indicator that the same approach should be taken in relation to "no-consent transfers" in the private sector. Secondly, he says that it is of note that the Transfer Values Regulations in relation to the cash equivalent legislation contained in Part IV Chapter IV PSA 1993 (the "Transfer Values Regulations") which requires a member's cash equivalent to be calculated by reference to his accrued benefits contain an express mechanism for reduction as a result of under-funding whereas such express wording is absent from regulation 12.

40. Thirdly, he referred me to *Urenco UK v Urenco UK Pension Trustee* [2012] EWHC 1495 (Ch), a case concerning a transfer to which the "broadly comparable" GAD Passport arrangements applied in addition to a statutory requirement imposed by the Energy Act 2004 that the receiving scheme provide benefits "no less favourable" than under the transferring scheme. The case was not concerned with the question of the relevance of security. For the most part it was concerned with the existence of a power of amendment and how possible future changes in benefits were to be taken into consideration under the "no less favourable" test. Although he pointed out at [43] that it was not clear that funding was a relevant factor when deciding whether the scheme in question was an "appropriate pension scheme", Warren J noted that it provided an illustration of the practical difficulty in making a comparison when taking account of factors which impact differently on different schemes. At [44] – [45] he took the same view as to the practical difficulties of taking the amendment powers in transferring and receiving schemes into account. Mr Evans submits that this approach supports the view that the practical difficulty of assessing security is a relevant factor to take into account when interpreting the terms of the exercise to be undertaken under the regulation 12 certificate.

41. Warren J also adopted a snapshot view of the benefits available under the two schemes when performing the "no less favourable" test. Mr Evans says that by analogy, such an approach should be adopted here and that greater certainty can be achieved in a comparison of the benefits provided under each set of rules without the complication which is caused by bringing present and future security into account.

(iii) Purpose of the Preservation legislation

42. Thirdly, Mr Spink submits that the purpose of the preservation legislation was and is to protect the members where their rights are being transferred without their consent and in such circumstances it is counterintuitive to require the scheme actuary to ignore the relative financial position of the two schemes when carrying out the certification process. He says that to do so reduces the practical safeguard created by regulation 12 and would be contrary to the spirit of the Goode Report, being the Report of the Pension Law Review Committee chaired by Professor Sir Roy Goode which was published on 30 September 1993 (the "Goode Report").

43. It is not in dispute that it is legitimate to have regard to the content of the report where relevant when construing the pensions legislation enacted as a result of its recommendations. Paragraphs 4.7.25 and 4.7.26 of the Goode Report make reference in the context of bulk transfers and mergers to the protection afforded by the actuary's certificate having also referred to the guidance provided by the actuarial profession to enable actuaries to be consistent when issuing certificates under the regulations. Mr Spink points out that the first version of the guidance to the actuarial profession (known as GN16) included in paragraph 1.4 the following:

> "The general principles are that the members who are to be transferred will acquire past service rights (including any additional benefits) in the receiving scheme at least broadly equivalent to those rights (including any additional benefits) given up in the transferring scheme and that there will not be a significant loss of security for members being transferred."

The second version in force from 1 September 1993, shortly before the Goode Report was published, contained the same paragraph 1.4 and in addition contained the following:

> "2.8 In giving the certificate, the actuary needs to take into account the financial strengths of the transferring and receiving schemes but only to the extent that the financial strengths affect the rights and any discretionary benefits or increases in benefits of the transferring members. The actuary should make it known to the trustees that he has taken no account of the financial strengths of the principal and participating employers in giving the certificate."

Mr Spink submits therefore, that both GN16 and the Goode Report the recommendations of which were accepted by the Government, are useful indicators when construing regulation 12 and that they proceed on the basis that security of benefits is a relevant consideration.

44. In this regard, Mr Spink also relies upon passages from the judgment of Neuberger J (as he then was) in *South West Trains Ltd v Wightman* [1998] PLR 113 which he says arise in an analogous context, albeit that he accepts that the learned judge was not considering the relative security of the benefits in question. The case was concerned with circumstances arising from the transfer of assets and liabilities from the British Rail Pension Scheme to the new Railways Pension Scheme following privatisation of the railways under Schedule 11 Railways Act 1993. Article 6 of the Railway Pensions (Protection and Designation of Schemes) Order 1994, which was made under Schedule 11 provided where relevant that:

> "(1) Any amendment of an occupational pension scheme which would otherwise have the effect of making the relevant pension rights of a protected person less favourable than the relevant pension rights in his designated scheme shall have no effect in relation to those rights.

> …
>
> (5) The trustees of a scheme to which a transfer value is paid in accordance with this Order shall provide, to or in respect of the person for whom it was paid, relevant pension rights which –
>
> i. as respects such rights which accrued up to the date of the transfer, are no less favourable than the relevant pension rights which were the relevant pension rights of the protected person in question immediately before his transfer under the scheme from which he was transferred; and
>
> ii. as respects the accrual of relevant pension rights after that date, are no less favourable than the relevant pension rights which he had under his designated scheme.

45. South West Trains, one of the new employers on privatisation, rationalised the pay of train drivers. Instead of paying £11,000 per annum plus a raft of extras, it was agreed that drivers would be paid £25,000 per annum although pensionable pay was agreed at £18,000. The definition of pay for pension purposes referred to the £11,000 figure which had been increased to £25,000. Neuberger J stated at [47] – [53]:

> "47 On behalf of the drivers, Mr Etherton contended that the amendment contained in the deed reflecting the alleged binding pensions agreement would fall foul of Article 6(1), and would therefore be of no effect. His argument proceeds as follows. Each driver who was employed by the Board is 'a protected person', and his 'relevant pension rights in his designated scheme' are the pension rights, as defined in paragraph 6(3), which, as at 31 May 1994, he had under the BRPS. As at 31 May 1994 under the BRPS he had the right to have his pension assessed at a figure fixed by reference to his years of service as a driver and the whole of his 'Final Average Pay', which effectively means the whole of his Pay in his final year of service. In other words his pension was to be based on the whole of his final year's salary. The amendment effected by the deed would result in his pension being based only on a proportion of that salary; accordingly it would fall foul of Article 6(1). In other words, the effect of the proposed amendment, so far as years of service before restructuring are concerned, would be to fix a driver's pension by reference to his previous Pay of £11,950 subject to increase, and not his actual Pay of £25,000 subject to increase; and, so far as years of service after restructuring are concerned, it would be to fix his pension on the basis of £18,000 subject to increase, rather than his actual Pay of £25,000 subject to increase. In these circumstances, he contends that each protected driver's 'relevant pension rights' under the RPS, if it were made the

subject of the proposed amendment would become 'less favourable' than that driver's relevant pension rights' under the BRPS.

48 It appears to me that this argument falls foul of practical common sense. The combined effect of Article 6(1) and paragraph 6(2) and (3) is to require one to compare the pension rights, which a protected person will have immediately after a proposed amendment to the new scheme, with the pension rights which he had on 31 May 1994 under the old scheme. As at 31 May 1994, each driver had a right to a pension at a figure based on his period of service and his pay, which was then £11,000 subject to increase and not on his allowances which were an average of £11,000 per annum. The effect of the proposed amendment would be, at least on the face of it:

> (1) to retain those pension rights so far as pension is assessed by reference to the period of service before restructuring, as the pension will be based on £11,950 subject to increase which, in January 1997 terms, is similar to £11,000 subject to increase in May 1994; and
>
> (2) to improve those pension rights substantially so far as any period of service after re-structuring is concerned, because the pension will be calculated on the basis of £18,000 subject to increase (rather than £11,000 or £11,950 per annum subject to increase).

49 However, while practical common sense should not be ignored, the correctness of the argument must ultimately turn on the construction of the 1994 Order, and Schedule 11 under which it was made.

50 Mr Etherton contended that, on the proper construction of Schedule 11 and of the Order, it is not permissible to look at the matter in this (as I see it, practical) way; one has to confine oneself substantially to the terms of the two pension schemes, and not to figures outside the scheme. I do not consider that is correct. Before turning to the detailed consideration of the provision of Schedule 11 and the 1994 Order, it is illuminating to consider the way in which the deed has in fact been drafted. The deed distinguishes between 'basic pay' (£11,950 per annum as at present) and the balance of the total pay (being £13,050 per annum as at present) of which part (namely £6,050 per annum as at present) is 'Restructuring Premium'. Accordingly, under the BRPS, a driver's pension was calculated by reference only to his 'Pay', both in respect of past and future years of service, whereas, under the RPS as amended, his pension would be calculated by reference to

'Basic Pay', for past service but is calculated by reference to the aggregate of 'Basic Pay' and 'Restructuring Premium' in respect of the period after restructuring.

51 One could only compare a pension based on 'Basic Pay' and 'Restructuring Premium' in the RPS as amended, with a pension based on Pay under the BRPS by going outside the terms of the two schemes and looking at the figures. That is inevitable once the terms, definitions and/or basis of assessment of the new scheme are different from those of the old scheme. Either any such amendment is impermissible in principle under Article 6(1), which seems unlikely, or one must, contrary to Mr Etherton's submissions, look at the figures.

52 To much the same effect, Mr Christopher Nugee, on behalf of Mr Butler, raised the question as to how one could see if an amendment fell foul of Article 6(1) if, for instance, it involved replacing Rule 5A(2)(i) of the Section with '1/75th of Final Average Pay'; one would have to consider whether that was 'less favourable' than the present '1/60th of Final Average Pay less 1/40th of Final Average Basic State Pension'. In order to do that one would inevitably have to go outside the four corners of the deed to discover the level of state pension. Mr Etherton, to my mind quite rightly, accepted that such an amendment would be permissible if it could be shown to be 'no less favourable': so too, if the Trustee decided to change an income provision in the RPS (mirroring the BRPS) to a combination of a capital payment and reduced income. If that is right, it seems to me that it must be unexceptionable to look outside the four corners of the BRPS, and of the RPS as amended, in order to discover, on the figures, whether the drivers' relevant pension rights under the RPS, as amended, would be 'less favourable' than their relevant pension rights under the BRPS as at 31 May 1994.

53 Turning to the provisions of Schedule 11 and the 1994 Order, I consider that, as a matter of construction, Mr Etherton is not correct in contending that the terms of Schedule 11 and the 1994 Order prevent one from looking outside the terms of the two schemes in order to see if one is 'less favourable' than the other. In its desire to protect pension rights of employees of the Board on privatisation, the legislature is likely, in my view, to have been concerned to protect practical rights sounding in money as opposed to more hypothetical legal or conceptual rights. It seems to me that clear words would be required before the court should be persuaded that, when deciding whether a person's pension rights are 'less favourable' than before, it should be confined to comparing different provisions in different pension schemes, rather than looking at the differences between the financial results under the two schemes…"

Mr Spink submits that this is a further strong indicator that in order to protect rights being transferred more than a nominal comparison is required. He says that it is necessary to look to practical rights sounding in money and not merely to headline or hypothetical benefits.

46. Mr Evans however, points out what he describes as the irony of relying upon the purpose of protecting benefits whilst advocating the Transaction in which headline benefits are in fact reduced, by taking account of security. Mr Tennet adds that the *SWT* case is not authority for consideration of the security of the benefits within respective schemes. On the contrary, he says that Neuberger J was faced with different definitions for the purposes of pensionable pay and therefore, in order to compare headline benefits, considered the value of those headline benefits. Mr Tennet points out that there is no reference in the judgment to evidence as to the relative security of the benefits within the schemes.

(iv) Evolution of the Preservation Regulations, Statements of Policy and Consultation documentation

47. Mr Spink accepts that what he calls the archaeology of the 1991 Regulations is only relevant to construction in the round. He also accepts that Explanatory Notes and Memoranda and Statements of Policy whilst being of assistance in the process of construction are not determinative. In fact, with regard to the relevance of consultation material and Explanatory Notes and Memoranda to the construction/interpretation exercise, Mr Spink took me to two short extracts from *PNPF Trust Company Limited v Taylor & Ors* [2010] PLR 261 at [479] - [480] and [516] - [517], to Craies on Legislation (9th edition 2008) at paragraph 27.1.11 and to *Melville Dundas Ltd (in receivership) & Ors v George Wimpey UK Ltd & Anr* [2007] 1 WLR 1136 per Lord Neuberger at [65] where he took into account the fact that a particular statutory construction was consistent with the observations in the consultation paper which preceded the publication of the relevant Bill relating to the statute in question.

48. Mr Spink submits that it is clear that there was a wide and broad test which included the need to take account of security of benefits as a factor, that a specific additional test in relation to winding up was included in 1997 and removed in 1999 but that the underlying requirement remained unchanged. He says that such a construction is consistent with the task of value comparison to be carried out by the Trustees under the 1984 version of the regulations and what he describes in his written opening as the gradual broadening of the language of regulation 12 of the 1991 Regulations.

49. This he says is consistent with the statements of policy intent which are of assistance if the Court were to conclude that there is an ambiguity in regulation 12. In this regard he referred me to the Report of the Occupational Pensions Board on the Draft of the Occupational Pension Schemes (Preservation of Benefit) Amendment Regulations 1992 which preceded the 1993 Amendments. Its recommendation in relation to draft regulation 3(a) was:

> "Draft Regulation (3)(a)
>
> 3. We support the suggestions made by several organisations that the regulation should make it clear

that the comparison of values should be for each member, and not for the group as a whole. We suggest that clarification is necessary so that there is only need to ensure there is broad equivalence of benefits; it should not be essential for each element in the benefit package to be exactly the same as that element in the new scheme.

4. We suggest the wording should be amended to the 'transfer credits to be acquired for each member under the receiving scheme are broadly equivalent to the rights to be transferred'."

50. He also referred me to a letter from the Department of Social Security to Mr Greenlees of Sacker & Partners in his capacity as a representative of the Association of Pension Lawyers (the "APL") dated 19 November 1996 seeking his views in relation to proposed amendments to regulations including regulation 12 of the 1991 Regulations. The relevant material was set out in annex 4 to the letter in the following form:

"**D. BULK TRANSFERS WITHOUT CONSENT**

1. Some commentators have suggested that there is some inconsistency between the wording of Regulation 12(3) of the Occupational Pension Schemes (Preservation of Benefit) Regulations 1991 (SI 1991/167) and the actuarial Guidance Note GN16 on bulk transfer values. The aim is to lay an amending regulation in the New Year so that the requirements of secondary legislation dovetail more precisely with GN16. The amending legislation would come into effect in April 1997.

2. It is proposed that:

   (a) Regulation 12(3)(a) of the Preservation of Benefit Regulations 1991 is amended to clarify the original policy intention which is to ensure that no member, beneficiary or contingent beneficiary receives a materially inferior benefit in the receiving scheme following a bulk transfer without the members consent.

   (b) that an additional requirement is inserted into Reg 12(3), namely that the actuary is satisfied that there will not be a significant loss of security for members being transferred."

51. The letter in response from the APL, the issues having been discussed by the Legislative and Parliamentary Committee of the APL, was dated 19 December 1996. The opinion was expressed that the proposed drafting moved the regulations closer to the then version of the actuarial guidance GN16 and in doing so it would "exacerbate

existing problems in a way for which there is no logical justification." The writer went on to set out specific comments in relation to the proposed amendments under (a) and under (b) to address the difficulties in the context of security which had already been raised in previous correspondence and added that "whatever detailed criteria may be laid down by regulations, assessment of security aspects involves judgment rather than calculation. Matters of judgment should be left to the trustees: that is, after all, why they are appointed …"

52. The Department responded by letter of 4 February 1997. At paragraph 2 it stated that the Government's basic position on transfers without consent was that the regulations should ensure that members' rights were properly protected. The writer went on to refer to the Pensions Law Review Committee (which it is accepted is a reference to the Goode Committee) and noted that that committee considered that an actuarial certificate represents an appropriate protection. The writer went on at paragraphs 4 to 6 inter alia, as follows:

> "4. As explained in Annex D to my letter of 19 November, the aim of the proposed amendment is simply to make it quite clear that actuarial Guidance Note GN16 is consistent with the wording of regulation 12, and with the underlying policy intention.
>
> 5. Turning to the detailed points listed under (a) in your letter … Sixth indent As already explained, it is settled policy that protection should not be confined to value in circumstances of no-consent bulk transfer.
> …
>
> 6. Moving on to your comments about the "Security" aspect, covered in the indents to your section (b), you seem to be saying that no regard should be paid to loss of security. I am afraid we do not agree: we feel that a comparison of members' security in the two schemes is entirely appropriate. Neither do we believe that the proposed wording of this amendment should widen the position beyond the existing scope of GN16. The amendment puts the policy intention beyond doubt."

A further response from the APL dated 10 February 1997 amongst other things, reiterated that a member's interest in a pension scheme is generally measured by reference to their value, questioned the reference to "settled policy" in the light of the fact that regulation 12 was drafted by reference to "transfer credits", stated that security was "important only to the extent that it was adequate to ensure the payment of benefits" as opposed to a comparison of relative levels of security and reiterated that it was the trustees who were in a position to consider relative security.

53. In the meantime, a formal consultation document was sent out by the Department of Social Security in relation to the 1997 Regulations, under cover of a letter of 10 January 1997. Under "Details of changes" the proposed change to insert wording which would introduce an express reference to the security of members' benefits by way of the 1997 Regulations was described as follows:

> "… The policy intention is to align regulations more closely with the professional actuarial guidance note (GN16) that deals with bulk

> transfers. The latter, as currently drafted, accurately reflects the policy intention but some commentators have suggested that the guidance note imposes more onerous requirements than the legislation intended."

54. Mr Spink draws particular attention to "makes clear" and the reference to the Goode Report and submits that the policy intention of regulation 12 before the insertion of the additional provision in relation to winding up in 1997, was that it should also encompass consideration of the relative security of the benefits in the transferring and receiving schemes.

55. Lastly in this regard, Mr Spink drew my attention to the consideration given to regulation 12 of the 1991 Regulations and the certification process in particular in the process of enacting the Welfare Reform and Pensions Act 1999 ("WRPA 1999"). Section 37 inserted a new Part IVA into PSA 1993 in order to provide for pension sharing on divorce. In particular, a new s 101D was inserted, which is in the following form:

> "(1) Subject to subsection (2) and section 101E, a person's pension credit benefit under a scheme must be –
>
> …
>
> (c) payable directly out of the resources of the scheme, or
>
> (d) assured to him by such means as may be prescribed.
>
> (2) Subject to subsections (3) and (4), a scheme may, instead of providing a person's pension credit benefit, provide–
>
> (a) for his pension credit rights under the scheme to be transferred to another occupational pension scheme or a personal pension scheme with a view to acquiring rights for him under the rules of the scheme, or
>
> (b) for such alternatives to pension credit benefit as may be prescribed.
>
> (3) The option conferred by subsection (2)(a) and (b) is additional to any obligation imposed by Chapter II of this Part.
>
> (4) The alternatives specified in subsection (2)(a) and (b) may only be by way of complete or partial substitute for pension credit benefit-
>
> (a) if the person entitled to the benefit consents, or

(b) in such other cases as may be prescribed."

56. The Explanatory Notes to WRPA 1999 printed on 10 February 1999, refer expressly to the certification process under regulation 12 of the 1991 Regulations and note that this process is designed to protect and secure members' benefits. The explanatory memorandum states in respect of section 101D(4) PSA 1993:

> "Subsection (4) mirrors the provisions to protect early leavers in section 73(4) of the Pension Schemes Act 1993. We intend to use the regulation-making power to prescribe conditions similar to those set out in regulation 12(3) of the Preservation of Benefit Regulations, which rely on actuarial certification to ensure that pension credit benefits are adequately protected and secure if transferred without the consent of the former spouse."

57. WRPA 1999 came into force for the purposes of making regulations on 11 November 1999, after the 1999 Amendments to the 1991 Regulations had come into force which removed the express reference to the security of members' benefits which had been inserted in 1997. Mr Spink submits nevertheless that it is apparent that Parliament considered the protection and security of members' benefits to be important on a bulk transfer without members' consent and that these considerations remained even after the express reference to security had been removed from the test set out in regulation 12(3). He says that regulation 10 of the Pension Sharing (Pension Credit Benefit) Regulations 2000 SI 2000/1054 (the "Pension Sharing Regulations") supports this conclusion. The Pension Sharing Regulations were made on 13 April 2000 and laid before parliament on 19 April 2000 and came into force in December that year. They made provision for the transfer of a person's pension credit rights without consent subject to actuarial certification in relation to transfer credits and the rights transferred on a "broadly no less favourable" basis. In fact, regulation 10(3) was in materially similar terms to regulation 12(3) of the 1991 Regulations then in force.

58. Furthermore, Mr Spink points out that the Occupational and Personal Pension Schemes (Miscellaneous Amendments) Regulations 2011 (the "2011 Regulations") by which the 1991 Regulations were further amended so that they are in their present form, the certification requirement having been moved to a schedule, also amended the Pension Sharing Regulations in the same way, the actuarial certificate for the purposes of regulation 10(3) being all but identical to that for regulation 12(3) of the 1991 Regulations. Mr Spink submits therefore, that it would be a very odd interpretation if the scheme actuary were precluded from taking into account security under regulation 12(3) of the 1991 Regulations in circumstances where the explanatory memorandum to WRPA 1999 refers expressly to the preservation and security of members' benefits being reliant upon those actuarial certificates.

59. Mr Tennet QC on behalf of the Pensions Regulator whose submissions in this regard Mr Evans adopts, takes the opposite stance. He asks rhetorically, "if security is a relevant factor in the certification exercise, when was that requirement introduced and how?" He says that there was clearly no requirement to consider security under Schedule 16 Social Security Act 1973 and the 1973 Regulations or at the time of the 1978 Amending Regulations which required the trustees to be of the opinion that the

"transfer credits" to be acquired are "at least equal in value" to the "rights to be transferred."

60. Secondly, as a matter of plain English, he says that this has nothing to do with security of those rights or transfer credits at all and had it, an express reference would have been made. "Rights" and "transfer credits" were defined in materially the same way as they are for the purposes of section 181 PSA 1993 and that the test of "at least equal in value" is apposite to the consideration of two sets of headline benefits and not of the risk that those benefits will not be paid. Thirdly, he says that if the trustees considered that the security was insufficient in the receiving scheme they would not have made the bulk transfer in any event and therefore, it was unnecessary to include that factor within the regulation and lastly, that the "at least equal in value test" would have been unworkable and insufficiently certain if security of the benefits were a factor. He points out that if security were a factor under the "at least equal in value" test, it would have been necessary not only to show that the headline benefits were the same or better but also that there was a better chance of receiving the benefits in the receiving scheme.

61. In relation to the 1984 Regulations which required a comparison by the trustees of the alternative to short service benefit and the contributions made, Mr Tennet says that it could only work on the basis of the value of headline benefits and either the requirement would be too cumbersome if security were taken into account or it would introduce by the back door a requirement that the receiving scheme was always 100% funded. He says the same in relation to the 1986 Regulations and submits that those regulations are wholly inconsistent with the Trustees' argument that the focus is on the value including the security of the benefits in the receiving scheme. In fact, the 1986 Regulations concentrate on the value of the accrued rights in the transferring scheme on the date of the transfer.

62. Mr Tennet says that the same was true under the 1991 Regulations and that the content of both the OPB Report of February 1989 and the Report on the draft 1991 Regulations following the consultation of December 1990 are consistent with an intention to require a comparison of headline benefits and the features of those bundles of rights. He points out that no mention is made in either document of the likelihood of the benefits being paid and that it would be extraordinary not to have done so if that was the intention. It is not in dispute that the 1991 Regulations are not inconsistent with the recommendations.

63. Mr Tennet also submits that the change to the "no less favourable" test in 1993 did not render security a relevant factor. He drew attention to the Command Paper containing the Report of the OPB in relation to the draft of the 1993 Regulations which refers to consideration of "each element in the benefit package" and he says therefore, that it is consistent with consideration of the value of each bundle of headline rights. He also drew attention to the different wording used in relation to discretionary benefits in regulation 12(3)(b). He says that it is important to note that where the actuary was required to look outside the rules of the schemes, to look into the future and possibly rely upon third parties, it was recognized that he would only be able to certify on the basis that he had "good cause to believe".

64. He went on to submit that although the 1996 consultation documentation refers to a wide security test, the amendment actually made was additional to the original requirement and was narrowly confined. He says that that proposal and the explanation set out above, is not in fact, consistent with it already being required to take security into account and that when read with the Department of Social Security's response of 4 February 1997, that is clear.

65. In any event, he referred me to paragraphs 27.1.12 and 27.1.12.3 of *Craies on Legislation*, in the 10th edition, at which it is stated that guidance issued by government departments as to the meaning of legislation cannot change the natural meaning of the words or be a reliable indication of legislative intention of the legislature as a whole and that there is no reason why the court should give more weight to the Government's opinion of what legislation means than anyone else.

66. Mr Tennet points out that the additional requirement was removed in 1999 and in doing so no change to the original requirement was effected. Mr Tennet also submitted that the passing reference in the Goode Report to GN16 is a slender branch upon which to rely and that in any event, the requirement for security to be taken into account was included in 1997 in narrow form expressly as an additional requirement by reference to winding up and was removed in 1999.

67. Further with regard to the 2011 Regulations, Mr Tennet submits that the form of the Explanatory Note is further support for the conclusion that security is not to be taken into account. It makes reference to the withdrawal of GN16 and the need for an actuary to certify that the value of benefits remains broadly the same after the transfer. At that stage, GN16, to which I shall refer in more detail, did not contain reference to security.

68. Lastly in this regard Mr Tennet points out that at the stage that the Welfare Reform Bill was introduced to the House on 10 February 1999, which was also the date on which the Explanatory Notes were printed, regulation 12(3) did, in fact, contain reference to security. However, the reference to security was removed as from 1 October 1999 by the 1999 Amendments and the final amendments to the Bill were made in the House of Lords on 13 October 1999. He submits therefore, that the Explanatory Notes to the Bill take the matter no further forward and in any event little or no weight should be given to them in the circumstances.

69. In this regard, Mr Evans submits that it is extraordinary to suggest that an express reference to the consideration of security was deliberately removed but that the removal nevertheless made implicit once more what had been express. In that regard, he also reminded me that the second paragraph of the Explanatory Note to the 1999 Amendments state expressly that those regulations "remove the requirement for certification as respects the security of a member's rights." The explanation therefore was not delimited in any way. Thereafter, in 2005 the requirement to consider security was removed from GN16 and in 2011 it was withdrawn and the form of the certificate placed in the schedule to the 1991 Regulations. He says therefore, that there is no room for security to be taken into consideration whether on the face of the regulation or having taken account of the further materials which Mr Spink prays in aid.

(v) Actuarial Guidance Notes in more detail

70. Lastly, Mr Spink prays in aid Actuarial Guidance Note GN16 for the purpose of demonstrating that actuaries are capable of taking into account the relative security of members' benefits when carrying out the certification process. The first version of GN16, in effect from 28 February 1991 until 1 September 1993 made reference at paragraph 1.4 to rights in the receiving scheme being "at least broadly equivalent" to the rights given up and "that there will not be a significant loss of security for members being transferred." At paragraph 2.5 reference is made to the need to be satisfied that the past service rights to be granted in the receiving scheme in respect of each member "is not less than the value of the members' past service rights including additional benefits in the transferring scheme". It goes on at paragraph 2.7 to state that a certificate should not be given unless the actuary is satisfied that "in the event of the winding up of the receiving scheme immediately following the transfer" the benefits of the transferring members would not be "materially less than those payable in the event of the winding up of the transferring scheme immediately before the transfer." The last relevant paragraph is 2.8 which is in the following form:

> "In giving the certificate, the actuary needs to take into account the financial strengths of the transferring and receiving schemes and of the principal and participating employers but only to the extent that the financial strengths affect the rights (including any additional benefits) of the transferring members."

71. The second version in force from 1 September 1993 until 1 February 1996 contained the same references and in addition a reference at paragraph 2.8 to the need to take into account the comparative financial strengths of the schemes, but to make clear that the financial position of the principal and participating employers had not been considered. The third version in force from 5 April 2005 made reference to legal advice to the effect that the better view was that consideration of the extent to which rights might be satisfied in practice was not relevant to the certification process. This was a reference to advice received from Christopher Tidmarsh QC in March 2005.

72. In relation to the various forms of GN16, Mr Tennet points out that the first version which came into force on 28 February 1991 bore little resemblance to the 1991 Regulations and contained different tests in paragraphs 1.4, 2.5 and 2.7. He says therefore, that it is of no assistance in determining the construction of the 1991 Regulations and drew my attention to the fact that it had created an immediate reaction amongst pension lawyers at the time who considered that it imposed a more stringent test than that contained in the 1991 Regulations. In relation to the second version, effective from September 1993, Mr Tennet drew attention to the reversal of the requirement in paragraph 2.8 of the first version to take account of the financial strengths of the employers. He submits that if in fact, security was a relevant factor all along, the financial strength of the employer was a key factor and should have been taken into account. Mr Tennet also referred me to a lecture given by Nicholas Warren QC (as he then was) to the APL Conference in October 1995 in which he noted the unsatisfactory nature of GN16 and that it went way beyond the statutory requirement, amounting to legislation by "actuarial fiat."

(vi) Nature of the Actuarial Certificate

73. Although Mr Ham QC on behalf of HGL emphasised that as a result of the structure of the Transaction, the Actuary would come to give his certificate at the stage at which HPS had already gone into winding up and that accordingly, it is unnecessary to decide the wider question posed in Issue 1(a), it seems to me that his submissions in relation to the nature of the actuarial certificate which he made in relation to Issue 1(b) relate equally to Issue 1(a).

74. He referred me to *Barclays Bank plc v Nylon Capital LLP* [2012] 1 All ER 912 in particular at [33] and [34] per Thomas LJ and the judgment of Lord Neuberger MR at [63] - [65]. In essence, the Court of Appeal decided that the court will not generally intervene in a matter within the jurisdiction of an expert. However, the scope of that jurisdiction or the mandate afforded to the expert is a matter of law. Further, the extent of the expert's mandate must depend, in a case in which it arises out of contract, upon the words of the particular contractual provision and the documentary, factual and commercial matrix of the provision. In this case, Mr Ham says that the jurisdiction or mandate depends upon regulation 12(3) and the form of the certificate to be given, construed in the light of the admissible material.

75. He also referred me to *Cornwell & Ors v Newhaven Port & Properties* [2005] PLR 329 in which Lewison J as he then was considered whether the scheme actuary's determination of a deficiency of assets over liabilities and then in his opinion to determine what part of the section 75 Pensions Act 1995 debt should be apportioned to the particular participating employer could be challenged. He held that the question was what intention should be attributed to Parliament as to the effect of the actuary's determination. As a result of the wording of the Occupational Pension Schemes (Deficiency on Winding Up etc) Regulations 1996 he decided that the decision was that of the actuary. However, he did not rule out that the certificate could be attacked on the same grounds as a valuation under a contract or the possibility that the actuary could be liable for breach of statutory duty if he performed his functions negligently.

76. Mr Ham submits therefore, that regulation 12(3) assigns the task in question to the actuary alone and therefore, his decision can be impeached only on very narrow grounds and it is open to him to take account of all the factors which he considers relevant when reaching his opinion for the purposes of the certification process. He also says that as a result, the materials which are admissible as an aid to construction are severely limited. In fact, he relies upon *Homburg Houtimport BV v Agrosin Ltd Private Ltd & Anr* [2004] 1 AC 715 per Lord Hoffmann at [73] to [76] that the interpretation of a legal document involves ascertaining what it would mean to a reasonable person having all the background knowledge which is reasonably available to the person or class of persons to whom it is addressed. Mr Ham says that the regulation is addressed to the actuary and so I should only have regard to the materials which would naturally be available to such a class of persons. He suggests that this would not include much of the archaeology of the 1991 Regulations, consultation documentation and the explanatory notes and memoranda.

77. In response Mr Evans says simply that the question for the court here is what it is that the actuary must certify. It is for the court to determine the ambit of the exercise to be undertaken.

Conclusions in relation Issue 1(a)

78. Before turning to my conclusions in relation to sub-Issue 1(a), I should state that in my judgment, if one applies the test in the *Nylon* case, it is quite clear that the exercise in which the court is engaged in this case is the determination of the proper construction of the relevant regulation setting out the actuary's mandate, which is a question of law. The regulation being a public document is addressed to the public and in particular to actuaries and lawyers. I do not consider that the fact that the regulation requires the actuary to certify certain matters can restrict the background materials relevant to the exercise of construction solely to those available to actuaries. After all, the certification requirement is contained in a regulation which itself is part of a legal requirement. Furthermore, it seems to me that it is necessary to determine the proper construction of the regulation in order properly to set out the mandate or instruction to the actuary. The fact that the exercise itself is required to be conducted by the actuary and as Lewison J pointed out in *Cornwell v Newhaven*, will be impeachable only on very narrow grounds, does not prevent the court from determining the ambit within which the actuary should carry out his function.

79. I now turn to Issue 1(a) itself. In my judgment there is no ground for Mr Spink's construction. Regulation 12(3) construed in the light of the 1991 Regulations as a whole, section 73 PSA 1993 from which it emanates and the admissible background does not include the security of benefits as a factor to be taken into account by the actuary in the certification process.

80. First, in my judgment, if one construes the entirety of the 1991 Regulation (in its present form) as a whole, together with section 73 PSA 1993 from which it emanates, its meaning is clear. The actuary is required to compare transfer credits to be acquired and rights to be transferred in terms of the packages of rights and to come to the opinion that the transfer credits are "broadly no less favourable" than the rights. No express reference is made to the security of the rights or the transfer credits and in my judgment had it been intended that such a factor be taken into account, the regulations would have said so. The comparison to be carried out is likely to be a complex one given the wide variety of pension benefits which may be offered in the transferring and receiving schemes. However, it is one for which the scheme actuary is eminently suited.

81. Furthermore, I reject the argument either that account of the security of the benefits is implicit in paragraph 1 of Schedule 3 to the 1991 Regulations or that the exercise of opinion required is sufficiently wide that the actuary can in any event take that factor into account. It seems to me that Mr Spink seeks to place too great a weight upon what he describes as the wide wording and in doing so, divorces "opinion" and "broadly no less favourable" from their relevant context. Before turning to that context, I should say that in any event in my judgment, Mr Spink cannot gain the assistance from the use of the word "opinion" which he seeks. It seems to me that to suggest that it imports the consideration of the security of the benefits in the transferring and receiving schemes is to place much too much weight upon it. It is merely a means of importing or signifying the need to apply professional judgment in the certification task.

82. I consider the same to be true whether the word "opinion" is combined with "broadly no less favourable" or that phrase is considered alone. The certification required by regulation 12(3)(a) in the form contained in Schedule 3 is as to the member's rights

and requires a comparison of "rights" and "transfer credits" both of which are referred to in paragraph 1 of the certificate. It is in this context that the "broadly no less favourable" requirement should be approached. Both "rights" and "transfer credits" are defined for the purposes of the PSA 1993 and therefore, in the 1991 Regulations, in section 181 PSA 1993, in a way which in my judgment is naturally consistent with a reference to the package of rights in the transferring and receiving schemes. The definition of "transfer credits" refers expressly to rights "under the rules" of the receiving scheme and "rights" in the sense of accrued rights are defined to include "rights to benefit" and options to have them paid at a particular time or in a particular form. It seems to me that both are apt to refer to the respective bundles of headline rights and not to the more amorphous question of whether or how likely it is that those benefits will be paid. No reference is made expressly or it seems to me by implication to the security of those rights.

83. I have to say that I agree with Mr Tennet that the *SWT* case is of no assistance to Mr Spink in this regard. There is no reference to security in the *SWT* case at all and in fact, it seems to me that the comparison which Neuberger J was advocating was between the real value of headline benefits given the change in the definitions used. It seems to me that he was seeking a realistic means of comparing benefits differently defined. In my judgment, therefore, the authority does not take this matter much further.

84. This conclusion is also consistent with the difference between the wording of paragraphs 1 and 2 of the pro forma certificate contained in Schedule 3 which I consider to be a further indicator that such matters are not within the scope of the exercise which the actuary is required to carry out. As Messrs Tennet and Evans point out, where the actuary is being required to consider the likelihood of discretionary benefits being awarded and therefore, will have to look outside the rules of the schemes themselves and may be required to rely upon information from third parties, the form of the certificate and the opinion he is required to reach is different. He is only required to state that there is "good cause to believe" that the award of discretionary benefits or increases will be broadly no less favourable. Although the quality of the evaluation which would be required is slightly different, it seems to me that had the actuary been required to look outside the rules and the matters within his immediate actuarial expertise in the sense of his ability properly to compare different bundles of rights, but was required to consider relative funding and employer covenant strength when comparing rights and transfer credits for the purposes of paragraph 1, similar wording would have been included in order to protect his position.

85. In fact, it is accepted by Mr Spink on behalf of the Trustees that in most cases, if security were required to be taken into consideration, the exercise which the actuary would have to undertake would be extremely complex. It would require information to be obtained which might well be highly commercially sensitive and which would not necessarily be readily available to the actuary. It is for these reasons that the questions in the sub-sub-issues set out in Issue 1(c) were raised and in particular the question in Issue 1(c)(i) as to whether the actuary can rely on instructions from others. It seems to me that just as in the *Urenco* case (which arose in a different context) the complexity of the task and the position in which the actuary would be placed provide a further albeit small indicator that Mr Spink's construction is incorrect.

86. In this regard, I also place some weight upon the use of the phrase "value of the rights to be transferred" in regulation 12(4) and the condition contained in regulation 12(3)(d) that there are no significant changes "to benefits, data and documents used in making the certificate . . . by the date on which the transfer takes place." Although regulation 12(4) is directed towards a particular circumstance, nevertheless it makes reference to the "value" of the rights transferred. Further, in my judgment, had the security of the benefits been a relevant factor, it would have been particularly important to mention it expressly amongst the matters in relation to which no significant change must have taken place between certification and transfer for the purposes of regulation 12(3)(d). That regulation cross-refers to the items which the actuary is required to state that he has relied upon in the certification process. They include benefits, data and key actuarial assumptions but do not include matters pertaining to the security of the benefits.

87. Such a construction is also consistent with the fact that as the certificate itself makes clear it is neither authorisation for nor a recommendation to the trustees to make the bulk transfer. It is a statutory pre-condition for such a transfer, the decision whether to do so remaining with the Trustees who are required to exercise it in accordance with their fiduciary duties. When doing so, they are able to take account of the relative security of the benefits and are likely to be better placed to obtain the information relevant to such a consideration than the actuary. It is also not disputed that they are also more likely to be in receipt of relevant advice in relation to employer covenant strength. Furthermore, as a result of the *Nylon* line of cases, their decision exercised in the light of their fiduciary duties, is much more readily open to challenge than a conclusion reached by the actuary as part of the certification process. It seems to me that if security of benefits were part of the certification process carried out by the actuary there would be little left for the trustees to determine, the bulk of the discretion having been already exercised by the actuary who owes no fiduciary duties to the members of the scheme.

88. Further, I find Mr Spink's analogy with the Contracting-out Regulations of no assistance. The fact that factors are specified for consideration in one context does not lead to the conclusion that an absence of such a list in another situation means that it is open to the actuary under regulation 12 to take account of anything he might consider relevant.

89. I also agree with Mr Tennet that the passing reference to GN16 in the Goode Report is a slender branch upon which to rely. In any event, in the light of the express changes in the 1991 Regulations which took place thereafter, and in particular, in 1997 and 1999, it seems to me that for the most part the views of the Goode Committee to the extent that they should be afforded much weight at all, were water under the bridge.

90. To the extent that they are relevant, I am also fortified in my conclusion by the archaeology of the 1991 Regulations, the Explanatory Notes and Memoranda and the consultation material. I am grateful to adopt the common sense approach set out by Warren J in the *PNPF* case both in relation to Explanatory Notes and Memoranda and consultation materials which is consistent with the *Melville Dundas Ltd* decision. He held:

> "478. Mr Spink says this explicit and unequivocal statement that a debt is triggered if an employer 'ceases to have any employees in pensionable service to which the scheme applies' is a legitimate aid to construction: see for instance *R (Confederation of Passenger Transport UK) v Humber Bridge Board* [2003] EWCA Civ 842, [2004] QB 310 at [48]-[50] per Clarke LJ (with whom the rest of the Court agreed) holding that explanatory notes could be used 'to help decide both whether any words were omitted from [a statutory instrument] and, if so, what those words were' and concluding at [52] that 'the explanatory note … makes it clear beyond a peradventure what was intended'.
>
> 479. I do not doubt that, in appropriate circumstances, an Explanatory Note of this sort relating to a statutory instrument can be used as an aid to construction. Although not part of the instrument, the note 'is of use in identifying the mischief which the regulations were attempting to remedy': see Bennion on Statutory Interpretation (5th edition, 2008) at p265-266, citing *Coventry and Solihull Waste Disposal Co Ltd v Russell (Valuation Officer)* [1999] 1 WLR 2093 at 2103D-G. But like all aids to construction, it must be used with care. The note cannot be used, in my view, to create an ambiguity where none exists: if the meaning of the instrument is clear, a note which ascribes to the text a different meaning is not capable of overriding the clear meaning nor capable of creating an ambiguity where none exists. Similarly, if any ordinary meaning of the words used leads to an absurd conclusion (as in the *Confederation of Passenger Transport UK* case), or if it is clear that the draftsman has simply omitted something, the note can be referred to in order to produce a construction which eliminates the absurdity or fills the gap. But even in such a case, it must be possible to arrive at the end result by a process of construction (including the implication of terms). The Court cannot simply rewrite the legislation.
>
> 480. A note can therefore be used as an aid. But there may be other factors pointing to a construction inconsistent with the note in which case the conclusion may be that the draftsman of the note has misunderstood the meaning of the instrument. Alternatively, the note may reflect the intention of the sponsoring department which has not been effectively reflected in the text of the instrument."

Further, in relation to a Consultation Paper he held:

> "516. It is no doubt true that papers of this sort are admissible in evidence: see Craies on Legislation (9th edition, 2008) at paragraph 27.1.11 and *Melville Dundas Ltd v George Wimpey UK Ltd* [2007] UKHL 18, [2007] 1 WLR 136 at [65], per Lord Neuberger. However, it is rare that such papers, being

> after all only consultations, will point conclusively to a particular interpretation. Further, a consultation which expressed a view about the existing statutory provisions cannot affect the proper interpretation of such provisions.
>
> 517. In the present case, I can attach no significance at all to that statement on which Mr Spink relies. At most, it represents a departmental view about what the existing legislation means. But it acknowledges (inevitably), by using the word clarify, that there is a doubt. I do not know the basis for this departmental view, in particular I do not know whether it is a view expressed about the meaning of Regulation 6(4) alone or whether the view about the meaning of that provision is premised on the same approach being adopted to the key phrase in the earlier legislation and in the definition of 'the employer' in section 124. That the department may want, from their current policy perspectives, to reach the position for the past which they have now reached by new Regulations, I can understand. Their expressed views are quite probably driven in part by the desire. It is, in any case, for me to determine, as a matter of law, what these provisions mean and the views of the department carry little weight."

91. As Mr Spink accepted, the evolution or archaeology of the Regulations is only of assistance to construction in the round. However, in this case the evolution of the 1991 Regulations casts some helpful light on their construction in their present form. The use of the phrases "transfer credits" and "rights to be transferred" have been used throughout and defined in a consistent manner. I agree with Mr Tennet that as a matter of plain English the "at least equal in value" test in relation to those "transfer credits" and "rights" introduced by the 1978 Regulations leaves no room for questions of the security of the benefits. Had that been the intention, it seems to me that in the face of the words used, it would also have had to have been expressly referred to. The same is true in relation to the comparison to be conducted by the trustees for the purposes of the 1984 Regulations. The need to compare the alternative to short service benefit with contributions paid is most readily understood and achieved in relation to the value of headline benefits. I also agree with Mr Tennet that given that the contribution comparator could only be measured in terms of actual amount paid, to construe the 1984 Regulations as including a requirement to take security into account would have the effect of requiring the receiving scheme to be 100% funded in every case. I consider that that is a strong indicator that such a construction would be incorrect.

92. I also agree that the form of the 1986 Regulations is inconsistent with a focus on the value including the security of the benefits in the receiving scheme, which is inherent in the Trustees' approach. In my judgment, the focus of the 1986 Regulations is on the value of the accrued rights in the transferring scheme on the date of the transfer and therefore, does not lend itself to a construction which includes the security of the benefits.

93. As a matter of chronology I turn now to the 1989 Report and the 1990 Report on the draft 1991 Regulations, following the consultation of December 1990 which preceded

the first version of the 1991 Regulations. Although I attach relatively little weight to them, it seems to me that the reference to the comparison of "features" in the transferring and receiving schemes in the 1989 Report and to "full worth" of members' benefits in the 1990 Report are consistent with a headline benefit approach at that stage.

94. The same is true of the OPB Report in relation to the draft regulations prior to the 1993 Regulations which introduced the "broadly no less favourable" test. It contains references to a comparison of values of each member's benefits and suggested that it should be unnecessary that each element of a benefit package be exactly the same. In my judgment, those recommendations are entirely consistent with an intention to require a comparison of headline benefits and the features of bundles of rights and not the relative security of the benefits. I agree therefore, with Mr Tennet, first that the plain wording of the "no less favourable" test when introduced does not require security of the benefits to be taken into account and secondly, that to the extent that it is relevant, the OPB Report supports such a conclusion.

95. In my judgment, therefore, the 1991 Regulations as they stood immediately before the introduction of an express security test in 1997 should not be construed inherently to have included a requirement to take the security of benefits into consideration. In addition to the reasons I have already given, it seems to me that had that been the case, not only would regulation 12(3)(a) have been introduced in 1997 but the wording of the remainder of the regulation would also have been amended to include express reference to security more generally. I agree that the amendment which was actually made was narrowly confined and was expressed as an additional requirement. The references in the correspondence between the DSS and the APL and the consultation documentation concerning a wider proposal are therefore irrelevant on any view. In any event, I agree with Warren J that although consultation material is admissible it is rare that it will point conclusively to a particular interpretation and any view expressed about existing statutory provisions cannot affect their proper interpretation.

96. In any event, it seems to me that the content of the DSS letter to the APL referred to at paragraph 50 above is of no assistance to Mr Spink on any footing because it is ambiguous. In paragraph 3 it suggests that the proposed amendments will achieve the dovetailing between the 1991 Regulations and GN16 (which referred to the security of benefits) for the future. Paragraph 4(a) refers to clarification of the original policy intention which is to ensure that no member receives a materially inferior benefit. That statement in itself does not refer expressly to security at all and might be construed not to do so in the light of the content of paragraph 4(b). In any event, even if it were construed to include a reference to security, it is not clear whether in fact, it is accepted that the original intention was not fulfilled in the Regulations which needed amendment as a result. Furthermore, the meaning of paragraph 4(a) is not clear when read in the context of paragraph 4(b) which refers expressly to an additional requirement relating to loss of security. Suffice it to say that the actual meaning of the letter is unclear and as a result, I do not consider that it points conclusively to an interpretation of the 1991 Regulations as they stood or as amended which is contrary to the way in which I have interpreted them.

97. Further, to the extent that it purports to express a view as to the interpretation of the 1991 Regulations as they stood, it cannot affect their proper interpretation. The same is true of the Department of Social Security's letter of 4 February 1997 referred to at paragraph 52. In any event, it seems to me that once again the reference to the policy intention contained in the letter is ambiguous. It could easily be interpreted to mean a prospective intention. Yet again the same is true in relation to the statement in the formal consultation document sent out by the Department of Social Security in relation to the 1997 Regulations, under cover of a letter of 10 January 1997. Once again it is ambiguous as to whether the policy intention is merely prospective. Even if it amounts to the view of the DSS as to the policy intention at an earlier point, it is not clear when that intention took effect. In any event, in my judgment, no weight can be given to such correspondence which at best only reflects the view of a single government department.

98. I am further fortified in my conclusion as to the interpretation of regulation 12(3) by the removal in the 1999 Amendments of the narrow provision in relation to security which had been inserted in 1997. It seems to me that had it been Parliament's intention all along, that security should be taken into account generally as Mr Spink suggests, when the regulation was amended in 1999 to take out the specific requirement, the remainder would have been amended to make it quite clear in accordance with what he says was the intention all along, that security should be relevant in relation to the "broadly no less favourable" test. No such amendment was made. Furthermore, the Explanatory Memorandum to the 1991 Amendments merely states the requirement for certification as respects the security of a member's rights, and the benefits which will be received, in the new scheme is removed. If this is to be given any weight at all, it seems to me that it militates against Mr Spink's argument. On the face of it, the memorandum suggests that the security requirement is removed entirely. One is left in the curious position described by Mr Evans, that one is required to conclude that an express provision in relation to security was removed but that a longstanding general requirement in relation to security which was implicit in the use of the "broadly no less favourable" test remained. It seems to me that that is extremely unlikely.

99. I also accept Mr Tennet's submissions in relation to the Explanatory Notes to the Welfare Reform Bill. Their content may be explained by the date on which they were produced at which time, regulation 12(3) contained an express reference to security. That requirement was removed before the final amendments to the Welfare Reform Bill were made. Their content therefore, in some part, may be explained as a product of timing. In any event, as Warren J explained in the PNPF case, Explanatory Notes are of limited assistance in the process of construction.

100. Lastly, in this regard, I should add that I find no assistance in the content of the various forms of GN16 themselves over the period. Although the reference made to GN16 in various consultation documents and correspondence might have shed light on regulations themselves, I consider that guidance from the actuarial profession is too remote when standing alone, to be of assistance in the task of construction. This is despite the fact that the regulation in question is concerned with steps to be taken by the actuary. In fact, Mr Spink only sought to rely on GN16 for the proposition that actuaries considered that they were able to carry out the process of evaluating relative security. I accept them for that purpose alone. Had it been necessary I would have

concluded that the contents of GN16 were often divorced from the regulations and on occasion were internally inconsistent and as a result, were of no assistance in any event, in the task of interpreting regulation 12(3).

101. For all of the reasons I have set out, I do not consider therefore, that regulation 12(3) should be construed in a way which requires the actuary to consider the security of the benefits in the transferring and receiving scheme when giving a certificate under that regulation.

Issue 1(b)

102. What then in relation to Issue 1(b)? The Trustees contend that even if the regulation does not require security to be taken into account where the transferring scheme is ongoing, security does become relevant where that scheme is in winding up. In this case of course, as part of the Transaction, HPS will be in winding up at the time it is proposed that the certificate is given and the transfer to HPS2 is made. At this point, Mr Spink says that the quality of the members' rights has changed as a result of section 73 Pensions Act 1995 and/or Rule 15 HPS. He says that the rules and the legislation require the actuary to value the benefits which will actually be paid to the members and not merely to identify the benefits to which members are nominally entitled. At that stage therefore, the benefits are limited by the assets available to meet them.

(i) Relevant legislation

103. Mr Spink took me to section 73 Pensions Act 1995 (the "PA 1995") which sets out the statutory order of priorities of liabilities on a winding up of an occupational pension scheme. The relevant provisions for this purpose are as follows:

> "(3) The assets of the scheme must be applied first towards satisfying the amounts of the liabilities mentioned in subsection (4) and, if the assets are insufficient to satisfy those amounts in full, then–
>
> (a) the assets must be applied first towards satisfying the amounts of the liabilities mentioned in earlier paragraphs of subsection (4) before the amounts of the liabilities mentioned in later paragraphs, and
>
> (b) where the amounts of the liabilities mentioned in one of those paragraphs cannot be satisfied in full, those amounts must be satisfied in the same proportions.
>
> (4) The liabilities referred to in subsection (3) are–
>
> (a) where–
>
> (i) the trustees or managers of the scheme are entitled to benefits under a relevant pre-1997 contract of insurance entered into in relation to the scheme, and

> (ii) either that contract may not be surrendered or the amount payable on surrender does not exceed the liability secured by the contract,
>
> the liability so secured;
>
> (b) any liability for pensions or other benefits to the extent that the amount of the liability does not exceed the corresponding PPF liability, other than a liability within paragraph (a);
>
> (c) any liability for pensions or other benefits which, in the opinion of the trustees or managers, are derived from the payment by any member of voluntary contributions, other than a liability within paragraph (a) or (b);
>
> (d) any other liability in respect of pensions or other benefits."

104. Thereafter, section 73A PA 1995 sets out what the trustees are required to do as follows:

> "(1) This section applies where an occupational pension scheme to which section 73 applies is being wound up.
>
> (2) During the winding up period, the trustees or managers of the scheme–
>
> (a) must secure that any pensions or other benefits (other than money purchase benefits) paid to or in respect of a member are reduced, so far as necessary, to reflect the liabilities of the scheme to or in respect of the member which will be satisfied in accordance with section 73, and
>
> (b) may, for the purposes of paragraph (a), take such steps as they consider appropriate (including steps adjusting future payments) to recover any overpayment or pay any shortfall…"

Mr Spink points out that the member will no longer necessarily be paid their benefits in full but if necessary, they will be reduced. He says that the quality of the rights has been altered by the overriding legislation. He also draws attention to the requirement pursuant to section 231A(2) Pensions Act 2004 for the trustees to prepare a winding up procedure which must amongst other things:

> "(2)(c) give an indication of which of the accrued rights or benefits (if any), to which a person is entitled under the scheme, are likely to be affected by a reduction in actuarial value"

and that the information which must be given to the members under the Occupational and Personal Pension Schemes (Disclosure of Information) Regulations 2013 SI 2013/2734 (the "Disclosure Regulations"), schedule 8 includes:

> "(7) Either–
>
> (a) an indication of the extent to which (if at all) the actuarial value of accrued rights or benefits are likely to be reduced, or
>
> (b) a statement that there is insufficient information to provide such an indication.
>
> (8) Whether the member or beneficiary's benefits are reduced because the scheme's resources are not sufficient to meet its liabilities.
>
> (9) The amount of any reduction of the member's, or beneficiary's, benefits."

105. Further, Mr Spink pointed out that on the winding up, under the Occupational Pension Schemes (Winding Up) Regulations 1996 SI 1996/3126, (the "Winding Up Regulations") regulation 4(1) specifies the role of the Scheme Actuary in this process. In addition, in his submissions Mr Tennet referred me to sub-regulations 4(2), (5) and (6). For ease of reference, I set out all of the relevant sub-regulations here:

> "(1) The liabilities of a scheme to which section 73 applies and their amount or value must be determined, calculated and verified by the actuary of the scheme—
>
> (a) on the assumption that any questions relating to any person's entitlement to a pension or other benefit are to be determined as at the crystallisation date;
>
> (b) on the assumption that liabilities in respect of pensions or other benefits will be discharged by the purchase of annuities of the kind described in section 74(3)(c) (discharge of liabilities: annuity purchase) and include the expenses involved in discharging them;
>
> (c) subject to sub-paragraph (b) and paragraph (4), on the general assumptions specified in regulations 7(2), (3) and (7) to (10) and 8(2) of the MFR Regulations (determination and valuation of liabilities and further provisions as to valuation: methodology, assumptions, etc.) so far as they relate to the calculation and verification of liabilities; and
>
> (d) otherwise in accordance with any relevant FRC standards."

> (2) For the purpose of paragraph (l)(b) the actuary must estimate the cost of purchasing the annuities.
>
> . . . .
>
> (5) Paragraph (6) applies if, when the assets of the scheme are applied in accordance with section 73(3) towards satisfying any liability of the scheme mentioned in section 73(4), that liability, as calculated in accordance with the rules of the scheme (without any reduction by reason of its falling within a class of liability which is to be satisfied after another class), is in the opinion of the actuary fully satisfied by applying assets of a value less than the amount of that liability calculated in accordance with paragraph (1).
>
> (6) If this paragraph applies the amount to be taken as the amount of that liability for the purposes of section 73(3) is to be reduced accordingly."

106. Mr Spink points out that the legislation requires the pension liabilities to be "determined, calculated and verified" by the Scheme Actuary when the scheme is in winding up. He submits therefore, that it would be contrary to practical and legislative reality to ignore the effect of the Pensions Act 1995 on members' benefits when undertaking the regulation 12 certification process.

(ii) The Rules

107. As I have already mentioned, Mr Spink also relies upon the rules of the HPS which take effect in the event of a winding up. Rule 15.3 of the 2010 Rules of the HPS which are in force at present, is headed "WINDING-UP" and provides that the Trustees must wind up HPS in the manner set out in the Rule. Sub-rules 15.3(2) and (5) provide as follows:

> "(2) After the payment of any benefits which have already fallen due to be paid (including the distribution of lump sum death benefits) before the Termination Date, and after payment of all costs, charges and expenses of and incidental to the administration of the Scheme which have either fallen due before the Termination Date or which are incurred in the winding-up, and which in the Trustees' opinion cannot be recovered from the Participating Employers under rule 12.2(2), the Trustees must use the Scheme's assets to secure the benefits payable under the Scheme in the following order of priorities (subject to section 73 of the Pensions Act 1995 and in accordance with one or more of the methods in rule 15.6):-
>
> …
>
> (5) No assets shall be applied to provide benefits specified in any category set out in (2) above unless the liabilities of the preceding category have been fully discharged and to the extent

> that the remaining assets are not sufficient to discharge the liabilities of any category the benefits to be provided shall be reduced proportionately."

Rule 15.5 headed "DEFICIENCY ON WINDING-UP" specifies further what is to happen where there is a deficiency on a winding up in the following terms:

> (1) If the assets of the Scheme are insufficient to secure the benefits in full under rule 15.3 the Trustees shall invite the Participating Employers to make such contributions to the Scheme as may be required to secure the benefits in full, and in the same proportions as though the contributions were an ordinary contribution under rule 3.4.
>
> (2) The Trustees shall then secure benefits, so far as the Scheme assets permit, in the order of priority under rule 15.3. Any benefits not secured in full shall be secured on a proportionately reduced basis as determined by the Trustees on the advice of the Actuary.
>
> (3) Sections 75 and 75A of the Pensions Act 1995 (and regulations made under those sections) shall then apply to the Scheme as appropriate."

Rule 15.6 is headed "METHODS OF SECURITY BENEFITS" and sets out a variety of means by which the benefits may be secured including a transfer out to another scheme.

108. Mr Spink says therefore, given his role in the winding up it is not just relevant for the Scheme Actuary to consider the security of the benefits but it is fundamental and since a bulk transfer would occur at such a time it follows that for the purposes of the comparison in regulation 12, the Scheme Actuary needs to take account of the security of the members' entitlements. He also emphasises that "rights" for the purposes of section 73 is defined as including a "right to benefits" and therefore, on an insolvent winding up the effect is that the right to benefits is reduced.

109. Mr Ham appeared to shy away from a consideration of the role of the security of the benefits per se under Issue 1(a) and to concentrate on the effect of the Rules of the HPS in the context of a winding up. He submits that the actuary is concerned with a comparison of rights and transfer credits at a time when the HPS is in winding up and as a result, he must take account of the HPS winding up rule. He says that at that stage the benefits have been reduced proportionately under Rule 15.5(2) and there is nothing in the language of regulation 12(3) of the 1991 Regulations and/or GN16 which requires the actuary to certify other than on the basis of actuality. He submits that at that stage, the rights under the Rules correspond exactly with what can be delivered.

110. In response to the Regulator's argument that the actuary would still find it difficult to determine benefit security because he would need to evaluate all the recoveries which

the transferring scheme might make and the likelihood of those recoveries, Mr Ham says that the point is easily met. If the actuary is in doubt, he will wait before making the certification. He also says that the Regulator's point that if the rights are diminished and possibly extinguished as a result of the effect of section 73 PA 1995, there could never be a section 75 debt because the liabilities would have been reduced to the level of the assets, is bad. He draws attention to section 75(6) in this regard which provides that in calculating the value of the scheme liabilities for the purposes of that section, any provision of the scheme rules which limits the amount of its liabilities by reference to its assets is disregarded. Mr Tennet on the other hand submits that the sub-section is directly relevant because Mr Ham's argument turns on what he says is a diminution in the members' rights as a result of the operation of the rules of the scheme.

111. Furthermore Mr Ham emphasises that the 1991 Regulations create a situation in which an actuarial certificate is necessary and that it is for the actuary to form his opinion and take into account what he considers relevant. I have already dealt with this argument and rejected it to the extent that it is an attempt to shut the court out from determining the mandate or instructions to the actuary and to construe the regulation.

(iii) The Response – Legislation and Rules

112. In summary, in relation to both the arguments based upon sections 73 and 74 PA 1995 and upon the Rules of the HPS, Mr Evans submits that Messrs Ham and Spink are wrong because whether under the legislation or the Rules of the HPS the "rights" are not diminished by the deficiency on the winding up, it is the benefits actually paid which may be reduced. He points out that one needs the accrued rights as a constant in order to be able to determine the extent to which they have not been satisfied. He also makes the point that if the rights themselves were reduced by the insufficiency of assets there would be no warrant for increasing the benefits payable if further assets were recovered.

113. Mr Tennet adopts Mr Evans' submissions in this regard and also emphasises that the only reference to winding up in the 1991 Regulations was, in fact, deleted in 1999 and that it would be perverse to suggest that it should in some way be implied. Furthermore, he submits that to do so creates a lopsided approach and produces inconsistent conclusions depending upon whether the scheme is in deep financial difficulties or actually in winding up. He submits that if Messrs Spink and Ham are right, where a winding up has been triggered, the Scheme Actuary considers the security in the transferring scheme but not the relative security of benefits in the receiving scheme and if the winding up is yet to be triggered, he does not do so at all.

114. Mr Tennet also draws attention to the use of the phrase "satisfied in full" in relation to liabilities in section 73(3)(b) Pensions Act 1995. He says that the phrase makes no sense if in fact rights and as a result, liabilities are extinguished or diminished as a result of the inadequacy of the assets. He also drew my attention to the operation of section 74 PA 1995 and in particular, to sub-sections 74(2), (3) and (4). Section 74 is headed "Discharge of liabilities by insurance etc" and applies where an occupational pension scheme to which section 73 applies, is being wound up. The relevant parts of the section are in the following form:

> "…
>
> (2) A liability to or in respect of member of the scheme in respect of pension or other benefits . . . is to be treated as discharged (to the extent that it would not be so treated apart from this section) if the trustees or managers of the scheme have, in accordance with prescribed arrangements, provided for the discharge of the liability in one or more of the ways mentioned in subsection (3).
>
> (3) The ways referred to in subsection (2) are –
>
> > (a) by acquiring transfer credits allowed under the rules of another occupational pension scheme which satisfies prescribed requirements and the trustees or managers of which are able and willing to accept payment in respect of the member
>
> …
>
> (4) If the assets of the scheme are insufficient to satisfy in full the liabilities, as calculated in accordance with the [scheme rules] in respect of pension and other benefits . . . the reference in subsection (2) to providing for the discharge of any liability in one or more of the ways mentioned in subsection (3) is to applying any amount available, in accordance with section 73 in one or more of those ways"

115. Mr Tennet points out that under section 74(4) where the assets are insufficient to satisfy the liabilities in full the trustees are to be treated as discharged under section 74(2) in any one of the ways in section 74(3) if they apply the amount available under section 73(3). He emphasises the further reference to liabilities in full in section 74(4) and says that the provisions would become a nonsense unless they operated on the basis that the members' rights remained the same. Mr Tennet also submits that the Winding Up Regulations proceed on the basis of headline benefits and in this regard, referred me in particular to regulations 4(1), (2), (5) and (6). He submits that it is obvious that the structure of the regulation requires liabilities to be calculated first by reference to headline benefits in regulation 4(1) before any scaling back occurs under regulation 4(6).

116. Mr Tennet says therefore, that it is clear that the rights do not change. It is only when the assets have been applied to the liabilities in the statutory order and have been found to be insufficient that they are reduced. He also points out that at the time that the scheme actuary is required to give his certification for the purposes of a bulk transfer there is no diminution in liabilities. They remain the same until they are secured in a different way in accordance with section 74 and the Winding Up Regulations.

117. Lastly, he points out that the reference in Rule 15.5(2) to benefits which are not secured in full would be meaningless if benefits were extinguished or diminished by an insufficiency of assets.

Conclusion in relation to Issue 1(b)

118. In my judgment, there is no scope for a different construction or analysis of regulation 12(3) where the transferring scheme is in winding up from the situation where it is ongoing. The plain words of the regulation do not admit of such an inference and in that regard, I take some note of the fact that the only reference to the application of a different test on winding up was removed in 1999. In effect, it seems that by the Trustees' and the Employer's construction they wish to resurrect that provision but in free form for the Scheme Actuary to deal with within the ambit of his professional judgment. This cannot be correct.

119. In my judgment, it cannot be correct all the more so in the light of the anomalies it would create. Its application would depend solely upon timing in the sense of whether the certification occurred in a scheme once winding up had been triggered and would create different results where a scheme was extremely poorly funded but not in winding up. Furthermore, it would be likely to create the lopsidedness to which Mr Tennet referred.

120. In my judgment, the same is true in relation to the route taken by Messrs Spink and Ham whether by virtue of sections 73 and 74 PA 1995 or a combination of those provisions and the Rules. First, in my judgment, on a proper construction of sections 73 and 74, they do not effect a reduction in the right to benefits for the purposes of regulation 12. Those sections establish a priority order for the payment of benefits in the event of a winding up where it is envisaged that the assets may be insufficient to meet the liabilities in full. The provisions are then concerned with the application of assets to scheme liabilities and securing those liabilities in a way which will enable them to be treated as discharged to the extent that they would not be so otherwise. In summary, the liabilities of the scheme are defined in section 73(4) by reference to the pensions and other benefits. Thereafter, during the winding up period, under section 73A(2) the trustees are required to reduce pensions and other benefits in payment to reflect the extent to which liabilities will be met by assets in the winding up in order to avoid one class of member from gaining an advantage contrary to the statutory order of priorities. It seems to me that that is a reference to pensions and benefits in payment and is merely a practical matter. In my judgment, the fact that benefits in payment are reduced is not an indicator that the right to the benefits has itself been reduced.

121. Equally, section 74 is concerned with obtaining a discharge of liabilities to the extent that they would not otherwise have been discharged. In my judgment the section does not entail a diminution of the right to benefits itself. My conclusion is fortified by the terms of section 74(4) which is expressly tailored to enable a liability to be discharged despite the "assets of the scheme [being] insufficient to satisfy in full the liabilities, as calculated in accordance with the scheme rules". It seems to me that the sub-section would have been drafted in a completely different way if the application of the "amount available in accordance with section 73" was intended to extinguish or reduce the right to benefits itself to the extent that the assets fall short of liabilities. I

also agree with Messrs Tennet and Evans that such a construction would make a nonsense of section 75(6) PA 1995 which prevents a scheme's liabilities from being defined by reference to its assets. I agree with Mr Tennet that the provisions would become a nonsense unless they operated on the basis that the member's rights remained the same. The fact that all of the benefits may not be paid in full does not mean that there is a qualitative change in the members' rights when a scheme enters winding up.

122. I also agree with Mr Tennet that there is no diminution in the liabilities of the scheme by reason of section 74(4) which would have taken place at the time at which the actuary would be completing the certification process for the purposes of a bulk transfer without consent. Section 74(4) is concerned with the discharge of the liability by the application of the assets available. As Mr Tennet points out, the liabilities remain the same until they are secured in the specified ways. In my judgment, therefore, there is nothing in sections 73 and 74 PA 1995 to suggest that the accrued rights or the right to benefits themselves are diminished or extinguished as a result of the practical consequences of an insufficiency of assets.

123. This is also borne out or at least it is consistent with the trustees' obligation under section 231A(2) Pensions Act 2004 to indicate which of the accrued rights or benefits (if any), to which a person is entitled under the scheme, are likely to be affected by a reduction in "actuarial value." If it were intended that the rights themselves had been diminished it seems to me that reference would not have been made to a person's entitlement under the scheme as the relevant benchmark and to that benchmark having been affected by a reduction in actuarial value rather than the entitlement itself having been diminished or extinguished. In my judgment, the same is true in respect of the information which must be given to members under the Disclosure Regulations as to the extent to which the actuarial value of accrued rights or benefits is likely to be reduced. It seems to me that the regulations are drafted on the basis that the scheme liabilities remain unchanged but that benefits are reduced as a result of insufficiency of assets. This sheds no light upon the right to benefits which it seems to me must remain unchanged.

124. I do not consider that Mr Spink is assisted in this regard by the fact that the definition of "rights" for the purposes of regulation 12 and section 73 includes "rights to benefits". A distinction remains between the benefits paid and the rights to those benefits. For the purposes of regulation 12, it is the rights which have to be compared with the transfer credits. I have already found that this is a reference to headline benefits and I cannot see that that position changes merely because of the winding up.

125. It seems to me that regulations 4(1), (2), (5) and (6) of the Winding Up Regulations are similarly drafted. They refer to liabilities in respect of a person's entitlement under a scheme and the reduction of that liability in the circumstances specified in regulation 4(5). There is no suggestion that the entitlement itself is reduced. Furthermore, express reference is made in regulation 4(5) to the calculation of the liability in accordance with the rules of the scheme and the reduction of that liability for the purpose of section 73(3) if it can be satisfied by the application of assets of a lesser value than the amount of that liability calculated under regulation 4(1). In my judgment this is not the same as a reduction in entitlement or right to benefits itself and is a pragmatic provision merely enabling the actuary to attribute the lesser value

of the assets by which the liability has been "fully satisfied" to the liability itself. Regulation 4(5) makes express reference to the full satisfaction of the liability and therefore, in my judgment it is of no assistance to Mr Spink.

126. In my judgment, the same is true under the Rules of the HPS. I agree with Messrs Evans and Tennet that the references in Rule 15.5 to "benefits in full" would make little sense if, in fact, the right to benefits was extinguished or diminished as a result of an insufficiency of assets. It seems to me that both Rules 15.3(5) and 15.5(2) are concerned with the practicality of the discharge of liabilities and securing of benefits in relation to a category of benefits payable under the scheme for which the assets are insufficient. I agree with Mr Evans that all that the abatement provision in Rule 15.3(5) does is to give the Trustees a power to reduce all benefits in a priority category proportionately. The fact that benefits may have to be secured on a proportionately reduced basis pursuant to Rule 15.5(2), in my judgment, does not result in the right to the benefits themselves having been altered. As Mr Evans pointed out, if further scheme assets came to light, it is not suggested that those benefits which had been reduced would not be topped up as much as possible until they had reached the level of "benefits in full".

127. In my judgment, therefore, regulation 12(3) can no more be construed to include reference to the security of benefits if the transferring scheme is in winding up than it can if both the transferring and the receiving scheme are ongoing, whether as a result of section 73 and 74 PA 1995 or a combination of those provisions and the Rules of the HPS.

Propriety

128. In the light of my conclusions in relation to Issues 1(a) and (b) which result in the Transaction not being pursued, it is not strictly necessary for me to come to any conclusion as to the propriety of the Trustees' decision making process in relation to it. However, as I have already mentioned, I heard submissions in relation to propriety and read the relevant evidence in relation to the process undertaken and the copious amount of professional advice which was obtained. Accordingly, it is appropriate that I should make some comment.

129. It is not in dispute that the test to be applied was considered by Hart J in *Public Trustee v Cooper* [2001] WTLR 901 and was set out by Blackburne J in *Merchant Navy Ratings Pension Fund Trustees Ltd v Chambers & Ors* [2001] PLR 137 at [5]. There is no dispute that this matter falls within the second category described there, namely where the issue is whether the proposed course of action is a proper exercise of the trustees' powers, where there is no real doubt as to the nature of those powers and the trustees have decided how to exercise them but because the decision is particularly momentous, wish to obtain the blessing of the court for the action which they have resolved to take. Blackburne J went on at [7] to describe the threshold test for the provision of the court's blessing in this category of case. It is whether in reaching its decision the trustee has taken into account irrelevant, improper or irrational factors, or whether it has reached a decision that no reasonable body of trustees properly directing themselves could have reached.

130. In this case, having taken account of a broad range of professional advice as the project evolved, the Trustees concluded that subject to the determination of the Court in relation to the legal issues, it would have been in the best interests of the members of the HPS to enter into the Transaction. Legal advice has been obtained from solicitors and counsel, actuarial advice has been given by Mr Scott, the Scheme Actuary and by his firm, Lane, Clark & Peacock LLP and covenant advice has been obtained from BDO LLP.

131. Reliance upon expert professional advice in circumstances such as these was considered in the recent case of *Cotton & Moore v Brudenell–Bruce, Earl of Cardigan & Ors* [2014] EWCA Civ 1312. In that case, the court was asked to approve the sale of the principal asset of an estate to an existing buyer. There was no dispute as to the decision of the trustees to sell. What was in dispute was the process by which the sale should be achieved. Vos LJ with whom Black and Moore-Bick LJJ agreed stated at [72] that he did not accept that the trustees in that case were obliged to "second guess the professional view of the experts they had instructed" and at [77] commented that he did not think in that case that the trustees could be criticised for accepting the expert's clear view. Although the issue is different here, it seems to me that in just the same way, as part of the process of making their decision, the Trustees were entitled to rely upon the professional advice which they received and were not required to "second guess" it in any way. No question arises in this case as to whether those professional advisers fulfilled their duties to the Trustees.

132. In summary, subject to the determination of the legal issues with which this matter has been concerned and subject to the approval of the court, the Trustees concluded on the basis of the advice received that the Transaction was in the best interests of the members of the HPS because they concluded that: it was likely that CH2M would withdraw its support from HGL unless the Transaction was completed and as a result HGL would become insolvent; the covenant strength of HGL and its ability to pay contributions are insufficient to support the HPS and HGL would be unable to pay contributions at all if CH2M withdrew its support; there were no viable alternatives to the Transaction; HPS2 would be financially viable and the necessary deficit repair contributions could be paid by HGL and that as a £120m guarantee would be in place, it was likely that CH2M would continue to provide support in the future; HPS2 would provide benefits in excess of PPF benefits which would be received if the HPS went into the PPF, the Scheme Actuary having advised that benefits in HPS2 are estimated to be £65m more on a buy out basis than PPF compensation.

133. The proposal which formed the basis of the Transaction arose against the background of the last agreed triennial actuarial valuation as at 31 December 2008 which was completed in 2010, and which revealed a deficit of £210m on an ongoing basis and £395m on a solvency basis. Subsequent funding negotiations were protracted and resulted in December 2010 in the Trustees considering that they had no option but to agree lower funding rates than they would have liked. After the acquisition of the Halcrow Group including HGL in November 2011, it became apparent that HGL was reliant upon the support of CH2M in order to continue as a going concern. HGL's company accounts for the year ended 31 December 2012 were not filed until 27 March 2013 and in the meantime it had proved impossible to agree the valuation assumptions and a schedule of contributions for the purposes of the actuarial valuation report for HPS as at 31 December 2011.

134. In August 2013, the Trustees put forward a proposal on the basis that a reduction in future pension increases would be matched by an agreement by CH2M not to withdraw support for HGL. This was not pursued by the Trustees on advice from Counsel but in October 2014 HGL put forward the first proposal known as Project Gravity, which has since become the Transaction. It was considered at a Trustees' meeting on 6 November 2014. During the period from November 2014 to 24 February 2015, the Trustees considered the proposal and instructed BDO to consider it and available alternatives and to advise on covenant strength, the Scheme Actuary to advise on the proposals for scheme funding and investment policy in HPS2 and Sackers & Partners LLP who met with HGL's advisers. A counter-proposal was put to HGL prior to lengthy negotiations which took place on 24 and 25 February 2015. Thereafter, it was made clear that CH2M would only continue its support of HGL if its pensions obligations were restructured in the near future. The proposal was then revised and further professional advice upon the revised version was taken from each of the advisers and considered at a Trustees' meeting on 16 April 2015. Having done so, the Trustees decided unanimously to proceed with the Transaction subject to the caveats to which I have referred.

135. Their decision was re-visited in May 2015 as a result of what became known as the temporary pensions issue as a result of which if the HPS were to enter the PPF many pensioners and deferred members entitled to temporary pensions would receive higher levels of PPF compensation than the Trustees had previously understood to be the case. This led to an increase in the liabilities of HPS2 having an impact on its viability, the contributions and recovery plan and the employer covenant. It also altered the basis upon which the Trustees had decided to use the £3m benefit augmentation which formed part of the proposal. Further legal, actuarial and employer covenant/accountancy advice was obtained. Having considered that advice the Trustees concluded that they still wished to proceed with Project Gravity although there would be a higher number of members in HPS2 receiving benefits at around 100% of PPF compensation. There would still be a significant number of members who would be better off. They also decided to alter the basis upon which the £3m was applied to augment benefits.

136. The Trustees also considered and obtained advice from BDO in relation to the effects of the refinancing of £31m of HGL's borrowings by which unsecured lending from HSBC had been replaced by secured lending from CH2M which came to light around this time. The Trustees also considered questions raised by Mr Reed and his adviser Grant Thornton and received advice and answers from BDO. At their meeting on 10 June 2015, the Trustees considered the advice and decided that they still wanted to proceed with the Transaction on the basis that the security taken by CH2M would be released if the Transaction went ahead. Further advice in relation to the PPF underpin and the implications of Halcrow's 2015 results were considered at a meeting on 29 June 2015 and advice in relation to the impact of an equity investment in CH2M on 21 July 2015. Further advice was taken in relation to an issue raised on behalf of Mr Reed in relation to consultation which became Issue 3 and this was considered. Lastly, the Trustees' decision to proceed was confirmed at a meeting on 10 August 2015 at which further professional advice was received and considered in relation to what was termed the downside risks of the Transaction.

137. Having considered that evidence including the professional advice given, it is clear to me that the Trustees undertook a careful and proper review of all of the relevant issues and took full and proper professional advice in relation to all of the relevant issues which arose. The minutes of their numerous meetings and the evidence before the court, reveals a careful and proper consideration of those issues and that advice. In my judgment, the Trustees did not take account of any irrelevant considerations and the decision which they reached, subject to the determination of the legal issues and the approval of the court was one which a reasonable body of trustees acting reasonably could have reached on the basis of the information before it. As I have already mentioned, the Trustees' decision making process was scrutinised on behalf of Mr Reed who submitted that approval should be granted, albeit making clear that this did not mean that he agreed that the decision of the Trustees that Project Gravity was in the best interests of members was correct.

138. Had it been necessary and had I taken a different view in relation to the legal issues, I would have approved the Trustees' decision to enter into the Transaction.

139. This matter has been heard in private. In the light of the position in which HGL finds itself having considered the relevant provisions of the CPR I consider it appropriate that this judgment and any transcript of the hearing should remain private in the short term. I will hear further submissions as to the period and extent of that confidentiality.
