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Case No: HC-2017-001399

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

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

Date: 20/11/2020

Before:

MR JUSTICE MORGAN

- -

Between:

LLOYDS BANKING GROUP PENSIONS TRUSTEES LIMITED	**Claimant**
- and -	
(1) LLOYDS BANK PLC	
(2) HBOS PLC	
(6) SECRETARY OF STATE FOR WORK AND PENSIONS	
(8) IVAN WALKER	**Defendants**

- -
- -

Edward Sawyer (instructed by **Allen & Overy LLP**) for the **Claimant**
Keith Rowley QC and Andrew Mold QC (instructed by **Herbert Smith Freehills LLP**) for the **First and Second Defendants**
Patrick Halliday (instructed by **Government Legal Department**) for the **Sixth Defendant**
Andrew Short QC and Nicholas Hill (instructed by **Walkers Solicitors**) for the **Eighth Defendant**

Hearing dates: 4-7, 11-13 May and 29-30 October 2020

- -

Approved Judgment

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

Covid-19 Protocol: This judgment is to be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be 10.30 am on 20 November 2020.

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MR JUSTICE MORGAN:

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PART I: INTRODUCTORY MATTERS

Introduction

1. On 26 October 2018, I gave a judgment in these proceedings. The neutral citation of that judgment is [2018] EWHC 2839 (Ch) and it is reported at [2019] Pens LR 5. On 6 December 2018, I gave a short supplemental judgment dealing with a point which had been raised as to the form of the order to be made to give effect to the earlier judgment. The neutral citation of the supplemental judgment is [2018] EWHC 3343 (Ch) and it is reported at [2019] Pens LR 6. I will refer to both judgments together as "the 2018 judgment".

2. The 2018 judgment dealt with a large number of issues but, for present purposes, it is not necessary to restate the conclusions which I then reached. It suffices to say that the main topic considered in that judgment was whether there was an obligation on the trustee of various defined benefit occupational pension schemes to equalise benefits in relation to male and female members of the schemes. I held that there was such an obligation which arose under EU law. In those circumstances, it was not necessary to consider separately the position under the domestic equality legislation. At [254] of the 2018 judgment, I left open the possibility that the domestic equality legislation might go further than Article 157. However, it was not argued that the domestic legislation was narrower in its scope than Article 157: see the submission for the Banks recorded at paragraph [230] of the 2018 judgment. I also dealt with the arguments arising as to the methods which could be used to achieve the required equalisation of benefits. I then dealt with some of the consequences of the fact that the trustee of the schemes had not performed its obligation to equalise at an earlier point in time, when it ought to have done. One such consequence was that it was obliged to pay arrears of pension to certain pensioner members.

3. The 2018 judgment also explained that the parties had agreed what should happen in relation to those cases where members of other pension schemes had transferred into the schemes with which I was concerned. In those cases, the schemes with which I was concerned had received transfer payments and had taken on the transferring-in members as members of the schemes. In some cases, the transfer payments were inadequate in the sense that they did not reflect the rights which the transferring-in members had to equalisation of the benefits they had accrued in their earlier pension schemes. Nonetheless, the parties to these proceedings agreed that, as a result of the decision of the European Court of Justice in *Coloroll Pension Trustees Ltd v Russell* [1995] ICR 179 ("*Coloroll*"), the receiving schemes were liable to equalise benefits in relation to transferring-in members, even in relation to benefits which accrued in the period before the transfer.

The order of 3 December 2018

4. On 3 December 2018, I made an order to give effect to the 2018 judgment. The order contained a number of definitions, including the following:

    i) "*Barber* window" means the period from 17 May 1990 to 5 April 1997 (both inclusive);

ii) "GMP" means guaranteed minimum pension earned by a member pursuant to Part III of the PSA 1993 (and predecessor legislation) in respect of service from 6 April 1978 to 5 April 1997 (both inclusive);

iii) "Schemes" means the Lloyds Bank Pension Scheme No 1, the Lloyds Bank Pension Scheme No 2 and the HBOS Final Salary Pension Scheme (each a "Scheme");

iv) "Trustee" means the Claimant as trustee of each of the Schemes and any successor trustee(s).

5. The Order determined and declared, in particular:

> "2. Where male and female Scheme members with equivalent age, service and earnings histories would have accrued unequal GMP in respect of service in the *Barber* window, the Trustee is obliged to adjust benefits payable under each of the Schemes in excess of the GMP in order that the total benefits received by male and female members with equivalent age, service and earnings histories are equal;
>
> …
>
> 5.In relation to the Trustee paying arrears of equalised benefits to beneficiaries of each Scheme:
>
> 5.1. Subject to 5.2 below, beneficiaries are entitled to receive arrears of payments due to them;
>
> 5.2. The period for which beneficiaries are entitled to receive arrears of payments is governed by the rules of the Schemes which deal with the period of time more than six years before a claim for payment of arrears;
>
> …
>
> 8. In principle, the Trustee's obligation to equalise benefits for the effect of unequal GMP applies to benefits accrued on a contracted-out salary-related basis in other schemes during the *Barber* window which have been transferred into any of the Schemes;
>
> …"

The outstanding issues

6. In the remainder of this judgment, I will use the definitions which have been referred to above and, in particular, I will refer to the Trustee and to the Schemes in accordance with the definitions of those terms.

7. The 2018 judgment and the order of 3 December 2018 did not deal with another issue, or set of issues, which had been identified prior to the 2018 judgment. Those issues concerned the position of the Trustee of the Schemes in relation to cases where a member of the Scheme had transferred out of the Scheme and the Trustee of the Scheme had made a transfer payment to a receiving scheme. In those cases, because the Trustee had not equalised benefits in relation to male and female members, there will have been some cases where the transfer payment was less than it ought to have been if the Trustee had taken into account its obligation to equalise benefits. The issues essentially related to whether the Trustee remained under an obligation to anyone, and if so to whom, and if so in what way, to do anything about the fact that the transfer payments it had made had been inadequate.

8. Following the order of 3 December 2018, the parties formulated the issues which they would wish the court to decide in relation to inadequate transfer payments made by the Trustee of the Schemes. There would potentially be issues as to whether the Trustee owed an obligation to a transferring member and/or whether it owed an obligation to the receiving scheme. In the event, the issues as formulated by the parties do not ask the court to determine the position as between the Trustee of the transferring scheme and the receiving scheme but are confined to the position as between the Trustee of the transferring scheme and the transferring member. I will now refer to the List of Issues as formulated by the parties which are to be dealt with in this judgment.

The List of Issues

9. The List of Issues adopted the definitions in the order of 3 December 2018 together with three further definitions:

    i) "equalise" means to equalise benefits for the effect of unequal GMPs as required by paragraph 2 of the order of 3 December 2018;

    ii) "transfers in" (and cognate terms) refers to benefits accrued in another occupational pension scheme during the *Barber* window on a salary-related contracted-out basis in respect of which a transfer value has been received by any of the Schemes;

    iii) "transfers out" (and cognate terms) refers to benefits accrued in any of the Schemes during the *Barber* window on a salary-related contracted-out basis that have been transferred out of the Scheme in question.

10. It was also agreed for the purpose of the List of Issues:

> "Save to the extent necessary to answer question 7(c), the following questions leave aside, and are without prejudice to, the effect of any contractual obligations that may have been undertaken in relation to particular transfers out of the Schemes and any individual estoppels that might arise out of any representations made upon particular transfers out of the Schemes."

11. The Issues are:

Issue 1

In principle, does the Trustee's obligation to equalise apply in relation to the following transfers out:

(a) transfers out to a DB occupational pension scheme that was at the time of transfer

(i) contracted-out on a salary-related basis or

(ii) contracted-out on a money purchase basis or

(iii) contracted-in;

(b) transfers out to a DC occupational pension scheme that was at the time of transfer

(i) contracted-out on a salary-related basis or

(ii) contracted-out on a money purchase basis or

(iii) contracted-in;

(c) transfers out to an overseas pension scheme which, under its governing law, is not subject to an obligation to equalise transferred-in benefits?

Issue 2

In principle, does the Trustee's obligation to equalise apply in relation to transfers out to a personal pension scheme?

Issue 3

Without prejudice to the generality of issues 1-2, does the Trustee's obligation to equalise apply in relation to the transfers out mentioned in those issues if:

(a) the receiving scheme has no employer, or no employer obliged or able to make sufficient additional contributions, to fund equalisation of transferred-in benefits;

(b) the receiving scheme has wound up.

Issue 4

If the Trustee is obliged in principle to equalise in respect of transfers out, what does the Trustee's obligation require, and (without prejudice to the generality of that question):

(a)

(i) Is the Trustee obliged in principle to make an equalisation top-up payment to the trustees or managers of the scheme which directly received the transfer from the Scheme; and

(ii) if the answer to (i) would otherwise be yes, is that still the case if the member has subsequently transferred out of, or otherwise ceased to be a member of, that receiving scheme, or in those circumstances should the payment be made to the member's current or most recent scheme or pension arrangement?

(b) Alternatively:

(i) is the Trustee obliged to provide a residual benefit under the relevant Scheme;

(ii) does the Trustee have the power to choose whether to provide a residual benefit or to make a top-up payment?

(c) Is any obligation or power to provide a residual benefit unconditional or does it only arise if the Trustee is unable to make a top-up payment (e.g. because the receiving scheme is unwilling to accept such a payment or no longer exists)?

(d) If the answer to 4(a) is yes but the Trustee is unable to make an equalisation top-up payment to the trustees or managers of the relevant scheme or pension arrangement (for example, because they will not accept such payment), is the Trustee obliged or entitled to make a payment of the relevant amount directly to the transferred-out member?

(e) As regards the amount of any top-up payment:

(i) Is there a single legally-required way to calculate the top-up payment, and in particular is the Trustee obliged to calculate it:

(1) using the financial and demographic assumptions, calculation methodologies and legal basis for calculating benefits that were current at the transfer date, so as to identify the transfer amount that would have been paid had GMP equalisation been implemented at the transfer date and calculated at the effective date of the original transfer value calculation; or

(2) using the financial and demographic assumptions, calculation methodologies and legal basis for calculating benefits that will be current at the point when GMP equalisation is implemented for transfers out (and taking account of actual experience) and calculated as at a current date?

(ii) should the Trustee add interest to the amount of the top-up payment, and if so should it be at the rate of 1% above base rate simple interest from the date of the transfer out, or should some other rate of return (and if so what) be added?

(f) Is the Trustee under an obligation proactively to identify and calculate any shortfalls in previous transfers out and take steps to equalise them, or is the Trustee entitled to wait until a request is made by the receiving scheme or by the transferred-out member?

(g) Is the payment by the Trustee of any equalisation top-up payment to the trustees or managers of the receiving scheme a sufficient discharge of the Trustee's obligation?

Issue 5

In cases where liability for a member's GMP has been retained by the relevant Scheme but the excess has been transferred out (for example, upon a transfer out to a contracted-in receiving scheme):

(a) Is the Trustee required to equalise the remaining benefits within the Scheme, and if so must it do so by creating a new excess benefit for a member of the disadvantaged sex?

(b) If the Trustee is under an obligation to equalise in respect of transfers out, should any uplift conferred under 5(a) above be netted off against any equalisation top-up payment (or residual benefit as per issue 4(c)) in respect of the transferred-out excess?

Issue 6

Having regard to the above, if there is an in-principle obligation on a transferring scheme to equalise in relation to transfers out, and the transfer was made to one of the Schemes in which the Trustee is in principle obliged to equalise transfers in (see paragraph 8 of the Order of 3 December 2018), what effect, if any, does the existence of the concurrent obligations have on the Trustee's obligation to equalise transfers in?

Issue 7

If the Trustee is under an obligation to equalise in respect of transfers out, is that obligation discharged and/or not enforceable by relevant Scheme members:

(a) by virtue of any of the following statutory provisions (and their predecessors):

(i) s 99 PSA 1993 for individual transfers;

(ii) s 73(2) and (4) PSA 1993 for individual or bulk transfers;

(iii) the actuarial certification procedures contained in reg 7(3) of the Transfer Values Regs 1996 (for individual transfers out before 1 October 2008) or reg 12(3) of the Preservation Regs 1991 (for bulk transfers out).

(b) by virtue of the transfer out provisions in the relevant Scheme rules [examples to be identified].

(c) by virtue of express discharges granted by members in the sample documents identified by the parties?

Issue 8

Having regard to any applicable limitation periods and the Schemes' forfeiture provisions, if the Trustee is under an obligation to equalise in respect of transfers out, should the Trustee make an equalisation top-up payment (or create a residual benefit as per issue 4(c) or make a payment to a transferred-out member as per issue 4(d)) in respect of an unequalised transfer out which took place more than 6 years before 15 May 2017?

12. The List of Issues referred to the Pension Schemes Act 1993 as the PSA 1993. I will use the same definition and I will refer to the Pensions Act 1995 as the PA 1995.

13. In summary, and paraphrasing the List of Issues:

(1) Issues 1 to 3 ask whether the Trustee's GMP equalisation obligation applies in relation to transfers out of the Schemes to various types of receiving scheme.

(2) Issue 1(a) asks if the obligation applies to transfers out to a defined benefit occupational pension scheme; Issue 1(b) asks if the obligation applies to transfers out to a defined contribution occupational pension scheme; Issue 1(c) asks if the obligation applies to transfers out to an overseas pension scheme.

(3) Issue 2 asks if the obligation applies to transfers out to a personal pension scheme.

(4) Issue 3 asks, without prejudice to the generality of Issues 1 to 2, if the obligation applies where the receiving scheme has no employer obliged or able to fund additional contributions or where the receiving scheme has wound up.

(5) The remaining issues assume that the Trustee's GMP equalisation obligation does apply in relation to transfers out.

(6) Issue 4 asks what that obligation requires the Trustee to do, in particular:

(a) whether to make a top-up payment to the receiving scheme (and, if so, what happens where the member is no longer a beneficiary of that scheme);

(b)-(c) whether to recognise a residual benefit under the Schemes;

(d) whether to pay the member direct;

(e) the method for calculating any top-up;

(f)-(g) the extent to which the Trustee must now take active steps to equalise transfers out.

(7) Issue 5 deals with the situation where a member has made a transfer of his excess benefits leaving his GMP behind in the Schemes (a "partial transfer"). This Issue asks whether the Trustee is obliged to equalise the remaining GMP, and, if so, how that obligation interacts with equalisation of the transfer out of the excess.

(8) Issue 6 asks how the GMP equalisation obligation applies if *both* the receiving and the transferring schemes are obliged to equalise the transferred benefits.

(9) Issue 7 asks whether the GMP equalisation obligation is discharged and/or not enforceable by reason of discharges under:

(a) legislation, namely,

(i) the statutory discharge in the cash equivalent transfer value legislation (section 99 PSA 1993);

(ii) the statutory provisions for the transfer out of early leavers' benefits (section 73 PSA 1993);

(iii) the Regulations providing for actuarial certification of transfers out under the above primary legislation;

(b) the rules of the Schemes governing transfers out; or

(c) standard forms signed by members and submitted to the Trustee upon transferring out of the Schemes.

(10) Issue 8 asks whether any time limits apply to the Trustee's GMP equalisation obligation in respect of transfers out.

14. There is a carve-out in the List of Consequential Issues to exclude the effect of any contractual obligations or individual estoppels that might arise in relation to particular transfers out. The purpose of the proceedings is, so far as possible, to resolve points of principle that will apply to the generality of transfers from the Schemes, carving out any bespoke obligations that might arise on the specific facts of particular cases. The carve-out is itself subject to an exception for Issue 7(c) (discharges by reason of terms in standard forms): however, it is proposed that Issue 7(c) be answered narrowly by reference to five sample forms, so there is no need to carry out a wider factual investigation of discharge forms signed by members.

The parties and the representation order

15. The Claimant is the Trustee as defined in the order of 3 December 2018. The First and Second Defendants are the "Principal Employers" in relation to the Schemes. I will refer to them as "the Banks". The parties who were originally named as the Third, Fourth, Fifth and Seventh Defendants are not material to the Issues with which this judgment is concerned. The Sixth Defendant is the Secretary of State for Work and Pensions who was joined to the proceedings for the purposes of participating in the hearing which led to the 2018 judgment. The Sixth Defendant has remained a party to

the proceedings and was represented by counsel at the trial of the Issues now arising and addressed me in relation to some, but not all, of the issues.

16. The Eighth Defendant is a solicitor who was involved in the earlier stages of the proceedings and who was selected as an appropriate representative party for the purposes of a representation order to which I will now refer.

17. I was asked to make a detailed representation order which appoints the Banks as representative parties and also appoints the Eighth Defendant as a representative party to ensure that in relation to every issue which arises, the representative parties are appointed to argue the case in favour of the parties whom they represent and so that I heard adversarial argument on that issue. An exception to this was that the Banks and the Eighth Defendant invited the Claimant to put forward submissions in relation to two issues and the Claimant did so. I will make a representation order in the terms which have been agreed and I have approved. In view of the detailed terms of the representation order it is not necessary to set out that detail in this judgment.

18. Mr Sawyer appeared on behalf of the Trustee. Mr Rowley QC and Mr Mold QC appeared on behalf of the Banks. Mr Halliday appeared on behalf of the Secretary of State for Work and Pensions. Mr Short QC and Mr Hill appeared on behalf of the Eighth Defendant. I am grateful to them for their considerable assistance.

The order in which I will take matters

19. At the hearing, and even more so since the hearing, it has seemed to me that the determination of the Issues requires me to focus on domestic law, rather than EU law. It is primarily domestic law, in the form of the relevant statutes and regulations, and the rules of the Schemes , rather than EU law, which dealt with the transfers which have occurred in this case. The domestic legislation and the Rules of the Schemes make detailed provision for such transfers and need to be analysed and applied.

20. At the hearing, the parties began by making detailed submissions in relation to Issues 1 to 3. It emerged that the parties saw Issues 1 to 3 as raising issues of EU law and the answer to Issues 1 to 3 would not deal with the position under domestic law. The argument in relation to Issues 1 to 3 was that because, under EU law, some of the receiving schemes were liable to equalise benefits for transferring-in members, that exonerated the Trustee from any obligation to take any remedial action. It was also said that even where a receiving scheme was not liable to equalise in relation to transferring-in members, the Trustee was still released from liability to take any remedial action. The submissions in relation to Issues 1 to 3 went into considerable detail as to the position of various different kinds of receiving schemes. The parties made far-reaching submissions which would have major implications for various kinds of receiving schemes but such schemes were not represented at the hearing. Having heard some of the submissions in relation to Issues 1 to 3, I indicated that I would derive greater help from being taken to the domestic legislation and the Rules of the Schemes. In the event, the parties concluded their submissions on Issues 1 to 3 and then turned to the domestic legislation and the Rules of the Schemes.

21. As it happened, the parties had prepared their arguments to deal with the domestic legislation and the Rules of the Schemes only at the stage of addressing Issue 7. I

therefore heard submissions in relation to Issue 7 before dealing with Issues 4 to 6, which was not ideal.

22. In the course of preparing this judgment, I found that I needed to deal with various points which I considered arose in relation to the domestic legislation and the Rules of the Schemes but which had not really been addressed at the earlier hearing. As a result, I restored the case for two days of further argument which focussed on those points.

23. In this judgment, I will describe the relevant legislation and the Rules of the Schemes. The questions arising in this case potentially cover a lengthy period, from 17 May 1990 to the present time. The legislation has been amended on a number of occasions over the years. I will attempt to divide the entire period into a small number of shorter periods in order to refer to the different provisions which need to be considered. It will be necessary to set out some of the relevant provisions of the legislation and of the Rules.

24. Before I address the specific Issues, I will describe what went wrong in the way in which the Trustee operated the legislation and the Rules over the years. I will then seek to identify the obligations (if any) on the Trustee and the rights and remedies (if any) available to the transferring members. As part of that analysis, I will need to address the possibility, contended for by the Banks, that the legislation and/or the Rules provide that, although things have gone wrong, the Trustee does not have any obligation to transferring members and they have no rights against the Trustee. Having carried out that analysis, I will then work through Issues 4 to 8 in that order. Finally, I will address Issues 1 to 3.

The relevant legislation

25. There are two sets of legislative provisions, which deal with transfers by members of pension schemes, which are relevant in this case. The two sets of provisions were referred to as "the cash equivalent legislation" and "the preservation of benefit legislation". The two sets of provisions are entirely different and operate in different ways. Section 129 of the PSA 1993 provides that the cash equivalent legislation, and any regulations made under it, override any provision of a relevant scheme to the extent that the provision of the scheme conflicts with the legislation. Conversely, section 131 of the PSA 1993 provides that the preservation of benefit legislation does not have direct effect in relation to any scheme and does not prevent a scheme from providing benefits on an ampler scale or in a way more favourable to beneficiaries. Section 132 of the PSA 1993 requires the trustee of a scheme to bring non-compliant rules of a scheme into conformity with the preservation of benefit legislation.

PART II: THE CASH EQUIVALENT LEGISLATION

The cash equivalent legislation

26. The Social Security Act 1985 inserted section 52B into the Social Security Pensions Act 1975, with effect from 1 January 1986. Section 52B provided that schedule 1A to the 1975 Act (also inserted by the 1985 Act) was to have effect. Part II of schedule 1A dealt with Transfer Values. These provisions were re-enacted as Chapter IV of Part IV

of the PSA 1993. Chapter IV of Part IV of PSA 1993 comprised sections 93 to 101. The parties agreed that it was not necessary to consider the provisions of schedule 1A to the Social Security Pensions Act 1975 separately from the provisions of Chapter IV of Part IV of the PSA 1993 as both sets of provisions were to the same effect.

27. Schedule 1A to the Social Security Pensions Act 1975 and Chapter IV of Part IV of the PSA 1993, as enacted, were supplemented by the Occupational Pension Schemes (Transfer Values) Regulations 1985.

28. The provisions dealing with transfer values were changed as a result of amendments made to the PSA 1993 by the PA 1995. After these amendments, the relevant provisions of the PSA 1993 continued to be in Chapter IV of Part IV, comprising sections 93 to 101 as amended. These amended provisions came into force on 6 April 1997.

29. Also with effect from 6 April 1997, the Occupational Pension Schemes (Transfer Values) Regulations 1985 were repealed and replaced by the Occupational Pension Schemes (Transfer Values) Regulations 1996.

30. Chapter IV of Part IV of the PSA 1993 was subsequently amended on a number of occasions and, in particular, extensive amendments were made by the Pension Schemes Act 2015. The relevant provisions, as amended, were moved into Chapter 1 of Part 4ZA of the PSA 1993. However, the parties agreed that for the purposes of deciding the issues in this case I could take the provisions of Chapter IV of Part IV of the PSA 1993 as they were following the amendments made by the PA 1995 with effect from 6 April 1997.

31. The Occupational Pension Schemes (Transfer Values) Regulations 1996 were amended by the Occupational Pension Schemes (Transfer Values) (Amendment) Regulations 2008 with effect from 1 October 2008.

32. The period which is potentially relevant in this case is the period from 17 May 1990 to the present time. The parties agreed that, for the purpose of describing the cash equivalent legislation for that period, it was appropriate to divide that period into three, as follows:

    i) 17 May 1990 to 5 April 1997, when the position was governed by schedule 1A to the Social Security Pensions Act 1975, re-enacted by Chapter IV of Part IV of the PSA 1993, and supplemented by the Occupational Pension Schemes (Transfer Values) Regulations 1985; I will refer to this period as the period from 1990 to 1997;

    ii) 6 April 1997 to 30 September 2008, when the position was governed by Chapter IV of Part IV of the PSA 1993, as amended, and supplemented by the Occupational Pension Schemes (Transfer Values) Regulations 1996; I will refer to this period as the period from 1997 to 2008; and

    iii) from 1 October 2008 onwards, when the position was governed by Chapter IV of Part IV of the PSA 1993, as amended, and supplemented by the Occupational Pension Schemes (Transfer Values) Regulations 1996 as

amended by the Occupational Pension Schemes (Transfer Values) (Amendment) Regulations 2008; I will refer to this period as the period from 2008 onwards.

33. I will summarise the basic provisions of Chapter IV of Part IV of the PSA 1993 as they applied, in the period from 1997 to 2008 and from 2008 onwards, in the case of a member of one of the Schemes who wished to transfer out of the relevant Scheme. In that period, the member could apply under section 93A for a statement of entitlement of the amount of the cash equivalent of his accrued benefits. Armed with a statement of entitlement, the member was then entitled under section 94 to that cash equivalent. Under section 95, the member could apply to the Trustee requiring it to use the cash equivalent in one of the ways permitted by the legislation and specified by the member. For example, the member could require the Trustee to use the cash equivalent in order to acquire transfer credits under the rules of another occupational pension scheme or rights under the rules of a personal pension scheme or to purchase an annuity. The legislation dealt with the way in which the cash equivalent was to be calculated.

34. Before 6 April 1997, the statutory provisions operated in a similar but not identical way to that which I have just described. The major difference was that the earlier provisions did not include section 93A of the PSA 1993 which provided for a statement of entitlement. The introduction of section 93A also led to other amendments of Chapter IV of Part IV which took effect from 6 April 1997.

35. With that introduction, I will now consider the cash equivalent legislation in more detail in each of the three periods.

The period from 1990 to 1997

36. In this period, I will refer to the provisions of Chapter IV of Part IV of the PSA 1993, as enacted, and the Occupational Pension Schemes (Transfer Values) Regulations 1985.

37. By section 93(1)(a) of PSA 1993, as enacted, it was provided that Chapter IV of Part IV applied to any member of an occupational pension scheme whose pensionable service terminates at least one year before normal pension age and who on the date when it terminates has accrued rights to benefit under the scheme. By section 93(1)(b), Chapter IV of Part IV of PSA 1993 as enacted also applied to a member of a personal pension scheme who has accrued rights to benefit under the scheme.

38. Section 94(1) of PSA 1993, as enacted, provided:

> "**94.— Right to cash equivalent.**
>
> (1) Subject to the following provisions of this Chapter—
>
> (a) a member of an occupational pension scheme acquires a right, when his pensionable service terminates, to the cash equivalent at the relevant date of any benefits which have accrued to or in respect of him under the applicable rules; and

> (b) a member of a personal pension scheme acquires a right to the cash equivalent at the relevant date of any benefits which have accrued to or in respect of him under the rules of the scheme."

39. Section 95(1) of PSA 1993, as enacted, provided:

> "**95.— Ways of taking right to cash equivalent.**
>
> (1) A member of an occupational pension scheme or a personal pension scheme who acquires a right to a cash equivalent under this Chapter may only take it by making an application in writing to the trustees or managers of the scheme requiring them to use the cash equivalent to which he has acquired a right in whichever of the ways specified in subsection (2) or, as the case may be, subsection (3) he chooses."

40. Section 95(2) listed the ways of taking a right to a cash equivalent available to a member of an occupational pension scheme. These ways were:

i) acquiring transfer credits under the rules of another occupational pension scheme, the trustees or managers of which were able and willing to accept payment in respect of the member's accrued rights and where the other scheme satisfied prescribed requirements;

ii) acquiring rights under the rules of a personal pension scheme, the trustees or managers of which were able and willing to accept payment in respect of the member's accrued rights and where the other scheme satisfied prescribed requirements;

iii) purchasing one or more annuities from certain insurance companies in certain circumstances;

iv) subscribing to other pension arrangements which satisfied prescribed requirements.

41. Section 95(3) of the PSA 1993, as enacted, listed the ways of taking a right to a cash equivalent available to a member of a personal pension scheme.

42. Section 96 of the PSA 1993, as enacted, contained further provisions as to the exercise of the option under section 95. Section 96(1) provided:

> "**96.— Further provisions concerning exercise of option under s. 95.**
>
> (1) A member may exercise the option conferred by subsection (1) of section 95 in different ways in relation to different portions of his cash equivalent, but a member who exercises that option must do so—

(a) in relation to the whole of his cash equivalent; or

(b) if subsection (2) applies, in relation to the whole of the balance mentioned in subsection (3).”

43. Section 96(2) and (3) permitted a partial transfer in relation to a member’s accrued benefits where the transfer was in respect of the part of the accrued rights which was the excess over GMP.

44. Section 97 of the PSA 1993, as enacted, provided:

“**97.— Calculation of cash equivalents.**

(1) Cash equivalents are to be calculated and verified in the prescribed manner.

(2) Regulations may provide—

(a) that in calculating cash equivalents account shall be taken—

(i) of any surrender, commutation or forfeiture of the whole or part of a member's pension which occurs before the trustees or managers of the scheme of which he is a member do what is needed to comply with what he requires under section 95;

(ii) in a case where subsection (2) of section 96 applies, of the need to deduct an appropriate amount to provide for the liabilities mentioned in subsection (3) of that section; and

(b) that in prescribed circumstances a cash equivalent shall be increased or reduced.

(3) Without prejudice to the generality of subsection (2), the circumstances that may be specified by virtue of paragraph (b) of that subsection include—

(a) in the case of an occupational pension scheme, the length of time which elapses between the termination of a member's pensionable service and his exercise of the option conferred by this Chapter or regulations made under it;

(b) failure by the trustees or managers of the scheme to do what is needed to carry out what a member of the scheme requires within 6 months of the date on which they receive an application from him under section 95; and

(c) the state of the funding of the scheme.

(4) Regulations under subsection (2) may specify as the amount by which a cash equivalent is to be reduced such an amount that a member has no right to receive anything."

45. Section 99 of the PSA 1993, as enacted, provided:

"**99.— Trustees' duties after exercise of option.**

(1) Where—

(a) a member has exercised the option conferred by section 95; and

(b) the trustees or managers of the scheme have done what is needed to carry out what the member requires,

the trustees or managers shall be discharged from any obligation to provide benefits to which the cash equivalent related except, in such cases as are mentioned in section 96(2), to the extent that an obligation to provide such guaranteed minimum pensions or give effect to such protected rights continues to subsist.

(2) Subject to the following provisions of this section, if the trustees or managers of a scheme receive an application under section 95, they shall do what is needed to carry out what the member requires—

(a) within 12 months of the date on which they receive the application; or

(b) in the case of a member of an occupational pension scheme, by the date on which the member attains normal pension age if that is earlier.

(3) If—

(a) disciplinary proceedings or proceedings before a court have been begun against a member of an occupational pension scheme at any time before the expiry of the period of 12 months beginning with the termination date; and

(b) it appears to the trustees or managers of the scheme that the proceedings may lead to the whole or part of the pension or benefit in lieu of a pension payable to the member or his widow being forfeited; and

(c) the date before which they would (apart from this subsection) be obliged under subsection (2) to carry out what the member requires is earlier than the end of the period of 3

> months after the conclusion of the disciplinary or court proceedings (including any proceedings on appeal),
>
> then, subject to the following provisions of this section, they must instead do so before the end of that period of 3 months.
>
> (4) The Board may grant an extension of the period within which the trustees or managers of the scheme are obliged to do what is needed to carry out what a member of the scheme requires—
>
> (a) in any case where in the opinion of the Board—
>
> (i) the scheme is being wound up or is about to be wound up;
>
> (ii) the scheme is ceasing to be a contracted-out scheme or, as the case may be, an appropriate scheme;
>
> (iii) the interests of the members of the scheme generally will be prejudiced if the trustees or managers of the scheme do what is needed to carry out what is required within that period; or
>
> (iv) the member has not taken all such steps as the trustees or managers can reasonably expect him to take in order to satisfy them of any matter which falls to be established before they can properly carry out what he requires;
>
> (b) in any case where the provisions of sections 52 to 54 apply; and
>
> (c) in any case where a request for an extension has been made on a ground specified in paragraph (a) or (b), and the Board's consideration of the request cannot be completed before the end of that period.
>
> (5) A request for an extension under subsection (4) may only be made by the trustees or managers.
>
> (6) If the Board are satisfied—
>
> (a) that there has been a relevant change of circumstances since they granted an extension, or
>
> (b) that they granted an extension in ignorance of a material fact or on the basis of a mistake as to a material fact,
>
> they may direct that the extension be shortened or revoke it."

46. Section 100 of the PSA 1993, as enacted, permitted a member to withdraw an application which he had made under section 95.

47. Regulation 3 of the Occupational Pension Schemes (Transfer Values) Regulations 1985 provided:

> "**3.— Manner of calculation and verification of cash equivalents**
>
> (1) The cash equivalents mentioned in paragraph 12(1) are to be calculated and verified in such manner as may be approved in particular cases by—
>
> (a) a Fellow of the Institute of Actuaries; or
>
> (b) a Fellow of the Faculty of Actuaries; or
>
> (c) a person with other actuarial qualifications who is approved by the Secretary of State, at the request of the trustees of the scheme in question, as being a proper person to act for the purposes of these regulations in connection with that scheme,
>
> and in this regulation *"actuary"* means any person such as is referred to in sub-paragraph *(a), (b)* or *(c)* of this paragraph.
>
> (2) The cash equivalents mentioned in paragraph 12(1) are to be calculated and verified by adopting methods and making assumptions which—
>
> (a) if not determined by the trustees of the scheme in question, are notified to them by an actuary; and
>
> (b) are certified by an actuary to the trustees of the scheme as being consistent—
>
> (i) with the requirements of Schedule 1A,
>
> (ii) with "Retirement Benefit Schemes—Transfer Values (GN11)" issued by the Institute of Actuaries and the Faculty of Actuaries, current on the date when these regulations come into operation, and
>
> (iii) with the methods adopted and assumptions made, at the time when the certificate is issued, in calculating the benefits to which entitlement arises under the rules of the scheme in question for a person who is acquiring transfer credits under those rules."

48. Regulation 4 of the Occupational Pension Schemes (Transfer Values) Regulations 1985 was headed "Increases and reductions of cash equivalents". Regulation 4(1) dealt with discretionary benefits. Regulation 4(2) dealt with a case where the whole or any part of the relevant benefits had been surrendered, commuted or forfeited and referred to the cash equivalent being reduced "before the trustees of the scheme do

what is needed to comply with what the member requires". Regulation 4(3) referred to an actuary certifying that the scheme did not have sufficient assets to meet its liabilities. Regulation 4(4) provided:

> "(4) If the trustees of a scheme fail without reasonable excuse to do what is needed to carry out what a member of the scheme requires within 6 months of the relevant date, that member's cash equivalent shall be increased by—
>
> (a) the interest on that cash equivalent, calculated on a daily basis over the period from the relevant date to the date on which the trustees carry out what the member requires, at the same rate as that payable for the time being on judgment debts by virtue of section 17 of the Judgment Act 1838; or, if it is greater,
>
> (b) the amount, if any, by which that cash equivalent falls short of what it would have been if the relevant date had been the date on which the trustees carry out what the member requires."

49. Regulation 4(5) dealt with a case where the member is intending to use the cash equivalent in the way provided for in section 95(2)(a) by acquiring transfer credits in another occupational pension scheme and the receiving scheme has undertaken to provide benefits at least equal in value to the cash equivalent of the accrued benefits in the transferring scheme for a sum less than that cash equivalent. Regulation 4(5) provided that the cash equivalent is reduced to the lesser sum.

50. Regulation 3(2)(b)(ii) of the 1985 Regulations referred to the Guidance Note (GN11) issued by the Institute of Actuaries and the Faculty of Actuaries. GN11 set out guidelines to be used by an actuary for the purposes of the statutory provisions and the 1985 Regulations. Paragraph 2.1 of GN11 stated that the purposes of the guidelines were to ensure that members of pension schemes could be assured that the transfer value applied to them fairly reflected their reasonable expectation of benefits available on withdrawal. Paragraph 2.2 of GN11 stated that the actuary should bear in mind that his "advice" might be made available to third parties who could reasonably be expected to rely on it. Paragraph 3.1 of GN11 stated that it was a fundamental requirement that a transfer value should represent the actuarial value of the benefits which would otherwise have been preserved. Paragraph 3.3 of GN11 referred to increases. Mr Short suggested that these included increases to give effect to the obligation to equalise benefits. I do not agree; the paragraph is dealing with different kinds of increases but not to the carrying out of a calculation to ensure that benefits are equalised as between male and female members. Paragraph 3.4 of GN11 stated that the actuary should use reasonable assumptions. Paragraph 5.1 of GN11 referred to it not being necessary for each transfer value to be authorised separately by the actuary so that an actuary could, for example, provide tables for use by the trustees and administrators for calculating the amount of any transfer value payable. Paragraph 5.2 stated that the actuary should inform the trustees of the basis on which benefits had been brought into account in assessing transfer values and should inform the trustees of the basis of the calculation of transfer values in a form suitable for possible

transmission to members. I was told that paragraph 5.2 was deleted at some point before 6 April 1997.

51. I was also referred to regulation 6 of the Occupational Pension Schemes (Disclosure of Information) Regulations 1986. That regulation provided for a trustee of a scheme to provide certain information on request, including the information referred to in paragraph 8 of Schedule 2 to these Regulations. That paragraph referred to information as to the cash equivalent and, in particular, an estimate of its amount and as to the accrued rights to which it related.

The operation of the cash equivalent legislation in the period 1990 to 1997

52. I have now set out the relevant provisions dealing with cash equivalent transfers in the period 1990 to 1997. It was not in dispute before me that the provisions were not operated correctly. As I have explained, although the Trustee was obliged to equalise benefits under the Schemes it did not do so. When a transferring member applied to the Trustee to take the cash equivalent of his benefits under the statutory provisions, the Trustee did not include any figure to reflect the missing equalisation of benefits when it calculated the cash equivalent of the benefits which had accrued to or in respect of the member. The result was that, in some cases, the cash equivalent which was used for the purposes of the statutory provisions was lower than it ought to have been. Those members who, in the past, received the benefit of a cash equivalent which was lower than it ought to have been, are now able to point out that the Trustee underpaid the amount of the transfer value when it transferred a sum to a receiving scheme as requested by the transferring member. The Banks' primary response to this case is to say that the Trustee was discharged under section 99 of the PSA 1993 from any liability to remedy that state of affairs. However, before considering the submissions in relation to section 99 of the PSA 1993, I need to analyse the way in which things went wrong and (absent a discharge under section 99) the steps which would be open to a member to seek a remedy.

53. The statutory provisions in this period applied in the same way to occupational pension schemes and personal pension schemes. By section 94, a member of a scheme was entitled to the cash equivalent of his accrued benefits. In the present cases, those accrued benefits included the right to equalised benefits even though, contrary to the law, the Trustee was not providing equalised benefits. Section 97 provided that cash equivalents were to be calculated and verified in the prescribed manner which took one to the 1985 Regulations, in particular to regulations 3 and 4.

54. Regulation 3 of the 1985 Regulations did not provide for the amount of the cash equivalent to be certified or verified by an actuary. Regulation 3 did refer to an actuary performing certain functions. The actuary was required to approve the manner in which the cash equivalent was to be calculated and verified but the cash equivalent did not have to be calculated and verified by the actuary himself. GN11 was consistent with this as it explained (at paragraph 5.1) that the actuary need not authorise separately each cash equivalent.

55. Regulation 3(2) of the 1985 Regulations referred to the adoption of methods and the making of assumptions. The methods and assumptions might be determined by the

trustees of the relevant scheme or notified to the trustees by an actuary. The methods and assumptions were to be certified by an actuary as being consistent with the statutory provisions, with GN11 and with what was done when calculating the benefits provided to persons transferring into a scheme.

56. If an actuary gave a certificate as required by regulation 3(2)(b) and the Trustee then carried out a calculation which made a mistake as to the operation of the rules of the Scheme or as to the facts of a particular case or made a mathematical error, there was no question of the actuary's certificate being conclusive and binding on the transferring member as to the calculation of the cash equivalent. That was because the actuary had not certified the amount of the cash equivalent wrongly calculated by the Trustee.

57. Mr Rowley relied on *Cornwell v Newhaven Port & Properties* [2005] Pens LR 329 as an example of a case where a scheme actuary was given the task of determining, calculating and verifying a deficiency for the purposes of section 75 of the PA 1995. In that case, it was held that the parties were bound by the determination of the scheme actuary. That case is not in point here where the actuary was not given the task of calculating the amount of the cash entitlement.

58. I did not understand Mr Rowley to contend that a member was bound by the calculation carried out by the Trustee but if he did intend to put forward that contention, I would not accept it. The Trustee was required to calculate and verify the amount of the cash equivalent. There was nothing in the statute to say that a member was bound by a calculation which the Trustee had carried out and which was not in accordance with the statutory provisions. The Trustee was not even given the power to "determine" the amount of the cash equivalent. The wording of section 97 of the PSA 1993, as enacted, referred to the cash equivalent being "calculated and verified"; this wording is to be contrasted with the wording of section 75(5) of the PA 1995 which referred to the deficiency being "determined, calculated and verified". Therefore, the transferring member was entitled to point out that the calculation was wrong, whether that was because the Trustee made a mistake as to the operation of the rules, or as to the facts of a particular case or even made a mathematical error.

59. In the present context, the reason why the calculation of the cash equivalents was wrong and the resulting figure was too low was because the person carrying out the calculation left out of account the increases in benefits which were needed to comply with the Trustee's legal obligation to equalise benefits. It has not been suggested that these increases were left out of account because an actuary had certified under Regulation 3 that they ought to have been left out of account. Indeed, I was shown an example of a certificate given by an actuary in accordance with GN11 and, as Mr Short pointed out, all of the methods and assumptions used in the certificate were compatible with the necessary calculation being carried out in a way which reflected the obligation of the trustee to equalise benefits.

60. The result of the above is that the cash equivalents in this period were calculated on an erroneous legal basis and by a person in circumstances where the statute and the 1985 Regulations did not provide that the calculation was to be conclusive and binding on the transferring member.

61. The question then is: what, if anything, is the Trustee now obliged to do? Section 94 conferred on the member a right to the cash equivalent of his accrued benefits. The transferring member exercised that right under section 95. Under section 99(2), the Trustee was obliged to do what was needed to carry out what the member required within 12 months of the member's application. As explained, the Trustee did not perform the duty on it when it transferred a sum which was less than the cash equivalent of the benefits to which the member was entitled. As I will explain later, the breach of duty was committed when the Trustee made an inadequate transfer payment. Thereafter, the breach of duty was not remedied and a court could order the Trustee belatedly to perform its duty to the transferring member by making a top-up payment to the receiving scheme. The Trustee is also able without a court order to perform its duty belatedly. This is the position unless something in the legislation, or the Rules of the Scheme, or an agreement between a member and the Trustee, has released the Trustee from that obligation.

62. The PSA 1993, as enacted, provided that the right of the member and the duty of the Trustee was by reference to the cash equivalent of the member's benefits at the date of the original application for a transfer of the cash equivalent.

Does regulation 4(4) of the 1985 Regulations apply?

63. Mr Short submitted that, in a case where the transfer payment previously made to the receiving scheme was lower than it ought to have been, the transferring member was entitled to an increase in his cash equivalent in accordance with the alternatives provided by regulation 4(4) of the 1985 Regulations. I have set out regulation 4(4) earlier in this judgment. That regulation was made pursuant to paragraph 14(3) and (4)(a)(ii) of schedule 1A to the Social Security Pensions Act 1975, later re-enacted as section 97(3)(b) of the PSA 1993.

64. Regulation 4(4) refers to the trustees failing, without reasonable excuse, to do what is needed to carry out what a member of the scheme requires within 6 months of the relevant date, which is the date of the application under section 95 of the PSA 1993.

65. The main object of regulation 4(4) is clear enough. A transferring member would be potentially disadvantaged if there were a significant delay between the relevant date, by reference to which his cash equivalent has been valued, and the date of transfer of that sum. Regulation 4(4) only applies where the delay between the date of the application and the transfer date is six months or more. If there is that length of delay, then the transferring member is protected by regulation 4(4). Regulation 4(4) provides for two alternative possibilities.

66. One possibility deals with the case where there has been an increase in value of the relevant benefits between the date of the application and the transfer date. If, by the transfer date, the value of the accrued benefits would be higher than the earlier cash equivalent value at the date of the application, then the member is entitled to that higher value: see regulation 4(4)(b). If the value would be lower, then the member remains entitled to the original cash equivalent value.

67. The other possibility is that the member is entitled to have interest on the original cash equivalent for the period of delay as an alternative to being entitled to the increase in

value between the date of the application and the transfer date. This possibility may be of interest to the member where there was no increase in value in that period or any such increase was only modest. Interest is added at the rate prescribed pursuant to section 17 of the Judgment Act 1838. The member is entitled to choose whichever of these two possibilities gives rise to the higher figure.

68. It is not difficult to see how regulation 4(4) operates in a typical case of delay on the part of a trustee. What is more difficult is how, if at all, regulation 4(4) operates where the trustee does not delay the transfer but instead pays an inadequate transfer sum. This case involves the Trustee making an inadequate transfer payment for a particular reason (i.e. ignoring the obligation to equalise) but if regulation 4(4) were to apply to such a case then the regulation would also have to apply to any case where a trustee had made an inadequate transfer payment, whether as a result of a mathematical miscalculation, or a mistake as to the identification of the member's benefits, or some other mistake of law or of fact.

69. Mr Short submitted that if the transfer payment was inadequate for whatever reason and the error was not corrected within six months of the date of the application, the member can rely on regulation 4(4). He says that in such a case, the trustee has failed to do what the member required. I can see that the reference to the trustee's failure in regulation 4(4) could be read that way. However, regulation 4(4) is difficult to apply to such a case. The regulation refers to "the cash equivalent" and that would seem to refer to the cash equivalent correctly calculated at the date of the application.

70. For example, if the correct transfer payment should have been £10,000 and the sum transferred was £9,900, regulation 4(4)(b) would seem to entitle the member to receive an increased cash equivalent which would be the cash equivalent to which the member would be entitled if the transfer had been made on the date on which the trustee later does carry out what the member required which, presumably, would be the date when the trustee pays the shortfall of £100 to the receiving scheme. If it takes five years to correct the original error, the appropriate cash equivalent might have risen to, say, £12,000. Taken literally, the member would be entitled to receive £12,000 overall being the original £9,900 plus the shortfall of £100 plus the increase of £2,000 pursuant to regulation 4(4)(b).

71. Similarly, using the same example, the member would be entitled to the shortfall of £100 plus interest on £10,000 for the period from the date of the application to the date when the £100 (plus the interest) was paid to the receiving scheme.

72. Mr Short says regulation 4(4) should not be applied in this literal way in a case of an underpayment, as distinct from a total failure to pay the cash equivalent. On the above example, Mr Short suggested that, for the purposes of regulation 4(4)(b), the underpayment of £100 (rather than the whole cash equivalent of £10,000) would be revalued at the later date. However, it is difficult to see what interpretation to place on regulation 4(4), or what words to read into regulation 4(4), to reach that result.

73. Mr Short suggested a different example from the one I have referred to above. He pointed out that a transferring member with a right to a cash equivalent could require the trustee to buy two different annuities. If the cash equivalent were, for example,

£100,000, the member could require the trustee to buy annuity A for £50,000 and annuity B for £50,000. If the trustee bought annuity A but delayed for more than six months in buying annuity B, Mr Short suggested that the member should be able to rely on regulation 4(4)(b). Again, he did not explain how regulation 4(4)(b) would operate in such a case; perhaps, one would recalculate the total cash equivalent and then say that the trustee, having bought annuity A should have 50% of the increased value to spend on annuity B. Again, Mr Short did not explain how to interpret regulation 4(4)(b) to produce that result.

74. I recognise that for the purposes of regulation 4(4)(a), it might be possible to read the reference to "the cash equivalent" as a reference to "the cash equivalent or part thereof" and calculate interest on the amount of the shortfall rather than the full amount of the cash equivalent. However, if it is not appropriate to read regulation 4(4)(b) as applying to a case where an inadequate transfer payment has been made, the result would seem to be that it was not intended that any of regulation 4(4) would apply to such a case.

75. In the end, I am not persuaded that regulation 4(4) does apply in the present case. It is difficult to see how regulation 4(4) would operate in a case where the trustee had not delayed in relation to the full amount of the cash equivalent but had made a prompt transfer payment, albeit in an inadequate amount. On balance, I consider that one should read "fail to do what is needed to carry out what the member requires" as only applying to a case of a total failure. It was suggested that such a reading would be inconsistent with the meaning which it was submitted I should give to certain words in section 99(1) of the PSA 1993. Both regulation 4(4) and section 99(1) refer to "what is needed to carry out what the member requires". For section 99(1), it is submitted that it had to be shown that trustees "have done" what is needed and that cannot be shown where they have not done everything which is needed. Conversely, for regulation 4(4), what has to be shown is that the trustees "failed" to do what is needed and they had not failed if they had not wholly failed. In any case, the context of the two provisions is different.

76. In any case, regulation 4(4) only applies where the trustees have failed "without reasonable excuse" to do what is needed. Mr Short submitted that at all times since 17 May 1990, the Trustee in this case was obliged to equalise benefits and simply failed to do so; there was no reasonable excuse for that failure. Mr Rowley on behalf of the Banks submitted that it would not be appropriate for the court on the documents alone, and without evidence from the Trustee as to why it did not equalise benefits in the past, to make the sort of findings of fact which would be necessary to determine that the Trustee acted at all times "without reasonable excuse". Mr Rowley submitted that the Trustee would be able to put forward the reasonable excuse that there was considerable uncertainty prior to my 2018 judgment as to whether a trustee should take steps to equalise benefits and, equally importantly, what method a trustee should use for that purpose.

77. I agree that I am not able in the present proceedings on the basis of the material before me, and more importantly, in the absence of potentially relevant material, to conclude that the Trustee at all times failed to do what was needed "without reasonable excuse" for the purposes of regulation 4(4).

78. I note at this point that it is agreed that on other grounds, quite apart from regulation 4(4), the Trustee is obliged to pay a sum representing interest on the shortfall for the period from the date of the original payment to the date that the shortfall is made good.

Was the Trustee discharged under section 99 of the PSA 1993, as enacted?

79. Having identified the breach of duty by the Trustee pursuant to section 99 of the PSA 1993, as enacted, prima facie it would be open to a member to bring proceedings for an order that the Trustee now performs the outstanding duty upon it and to pay the shortfall together with interest to the receiving scheme. However, the Banks submitted that the transferring members have no rights against the Trustee to require a remedy of what has occurred because the effect of section 99 of the PSA 1993, as enacted, was that the Trustee was discharged from any obligation to provide benefits to which the cash equivalent related. The Banks said that this means that the Trustee was discharged from any continuing obligation to the transferring member and, in particular, any obligation to make a top-up payment to a receiving scheme.

80. In presenting the case for the Banks, Mr Rowley concentrated on the provisions of the PSA 1993, as amended, which were in force from 6 April 1997, and on the 1996 Regulations, and did not develop separate submissions as to the relevant provisions in force from 1990 to 1997. However, as will be seen, the amendments which took effect from 6 April 1997 allow the Banks to put forward arguments that are not available to them for the period 1990 to 1997. For that period, I plainly must consider and apply the provisions which were then in force without regard to the later amendments.

81. The arguments as to the operation of the provisions in force in the period 1990 to 1997 arise in this case in the context of an underpayment of a transfer value because of the failure to equalise benefits. However, both the transferring members and the Banks recognised that the provisions have to be interpreted and applied to other cases where a trustee has paid a sum as a transfer value which is less than it ought to have been. This could arise in a number of ways. Examples are where a trustee had made a mistake as to the transferring member's rights in relation to accrued benefits; this could have arisen where a trustee had misread the rules of the scheme or any relevant statutory provision or had made a mistake as to the particular facts relating to the transferring member. Another example could be where a trustee had made a mathematical error in the calculation. So the question arises: if a trustee pays a transfer value and it is subsequently demonstrated that the payment was less than it ought to have been, objectively assessed, does the transferring member retain any right against the trustee? The Banks maintain that in all such cases, the transferring member retains no such right. The transferring members maintain the opposite.

82. The answer to the question posed must be arrived at by construing the statutory provisions and the 1985 Regulations. It was not said that there is any decided case directly in point. Although I was referred to the decision of the Chancellor (Sir Andrew Morritt) and of the Court of Appeal in *Eastearly Ltd v Headway plc* reported at [2009] Pens LR 1 and [2010] ICR 153, respectively, I did not find anything in those decisions of any real help as to the interpretation of section 99 of the PSA 1993, as enacted (nor as it was later amended).

83. The Banks' argument was that the transferring member lost the right to challenge the calculation if the transfer was made in accordance with that calculation; the Banks' case was based on their interpretation of section 99, to which I now turn.

84. Section 99 provides that where the member has exercised the option conferred by section 95 ("requiring [the trustees] to use the cash equivalent to which he has acquired a right in [the way specified]") and the trustees "have done what is needed to carry out what the member requires", then the trustees are discharged from any obligation "to provide benefits to which the cash equivalent related".

85. The parties' submissions focussed on the phrases "the trustees have done what is needed to carry out what the member requires" and "benefits to which the cash equivalent related". The first of these phrases is used in a number of places in section 99 and (in a different context) in regulation 4 of the 1985 Regulations. Mr Rowley submitted (although he really put this submission forward in relation to the provisions as amended from 6 April 1997) that the Trustee has done what is needed to carry out what the member requires when it pays the sum which it has calculated as the cash equivalent to the recipient selected by the transferring member pursuant to section 95. Mr Short submits that the Trustee has not done what was needed to carry out what the member requires when the Trustee has not calculated the cash equivalent properly and has paid a sum to the recipient which is less than the cash equivalent calculated in accordance with the statute and the 1985 Regulations.

86. I do not accept Mr Rowley's submission as to the operation of section 99. What the transferring member requires under section 95 is that the Trustee uses the cash equivalent to which he has acquired a right in the way specified by him. The requirement of the transferring member is not restricted to the specification of the type of recipient of the cash equivalent. The requirement of the transferring member includes a requirement that the Trustee uses the cash equivalent to which the member is entitled. The Trustee does not do what is needed to carry out what the member required if it does not pay to the recipient the cash equivalent to which the member has acquired a right but it only pays a lower figure than that cash equivalent.

87. Mr Rowley submitted that this interpretation of section 99 meant that the express discharge provided by section 99 would not achieve anything which could not have been equally achieved without an express discharge. He submitted that if a transferring member identifies a recipient for the cash equivalent and the Trustee pays the full amount of a correctly calculated cash equivalent then it would be obvious that the transferring member had taken all of his benefits under the transferring scheme and the Trustee of the transferring Scheme had no further obligation to the transferring member. Since that result would have been obvious, it did not need to be the subject of an express discharge. Accordingly, the argument went, the express discharge in section 99 must be doing something else and that was to deal with a case where the Trustee had not paid the full amount of the cash equivalent to which the member had acquired a right.

88. I do not accept this submission as to the express discharge in section 99. First of all, the express discharge does serve a purpose in that the discharge is from the obligation to provide the benefits to which the cash equivalent related. Those benefits include

benefits which could potentially accrue to a survivor or a dependant of the transferring member. All of those benefits are to be taken into account in calculating the cash equivalent. The express discharge is not restricted to obligations owed to the member himself but includes obligations owed to a survivor or a dependant. Further, in any case, even if the express discharge did cover the same ground as the implicit discharge arising in a case where the Trustee had paid the full amount of the correctly calculated cash equivalent, it may have been considered desirable to spell out the discharge in express terms rather than leaving such a discharge to be implied.

89. Then Mr Rowley argued that I should not regard the discharge in section 99 as being exclusively for the benefit of the Trustee who had miscalculated the cash equivalent but instead I should regard the discharge as being for the benefit of all the members remaining in the Scheme who would know that the transferring member had left the Scheme and had no further rights under it. Mr Rowley suggested that the purpose of section 99 was to achieve finality for all concerned and that purpose would be frustrated if it were held that, after a transfer of part of the sum of money which ought to have been transferred, a transferring member would remain entitled to point out that the sum of money transferred had been wrongly calculated and had been inadequate to give effect to a member's rights under these provisions.

90. I see nothing inappropriate in a construction of section 99 which allows a transferring member to point out that the sum transferred was inadequate. The Trustee (and the remaining members) are entitled to finality when the Trustee has complied with its obligations under the statutory provisions and are not entitled to finality when the Trustee has not so complied. Accordingly, in relation to the period 1990 to 1997, the Trustee was not discharged under section 99 of PSA 1993 from its obligation to pay a correctly calculated cash equivalent to the receiving scheme.

91. I ought to refer to a further argument as to the operation of section 99 of the PSA 1993, as enacted. Mr Short submitted that any discharge pursuant to section 99 is restricted to the discharge of obligations to provide "benefits to which the cash equivalent related". He submitted that when the Trustee calculated a cash equivalent which related to benefits which did not include the increases required to produce equalised benefits, then the cash equivalent did not relate to those increases. He contended that, as a result, the obligation to pay those increased benefits was not discharged. He accepted that this submission would not be open to a transferring member in a case where, for example, the Trustee had made a mathematical error in calculating the cash equivalent; in that case, the benefits to which the cash equivalent related would be all of the member's benefits even though the amount of the cash equivalent was miscalculated and there was an underpayment to the recipient. He said that in the present case "a slice of the benefits" had been omitted when calculating the cash equivalent.

92. Mr Rowley submitted that as the transferring member had wanted all of his benefits to be included in the cash equivalent and as the Trustee had provided a figure for that cash equivalent, with neither party intending to exclude any benefits to which the transferring member was entitled, then (for the purposes of section 99) the cash equivalent related to all of the transferring member's benefits including benefits at an increased level following equalisation.

93. I am inclined to think that Mr Rowley is right about the meaning of "the benefits to which the cash equivalent related" but it is unnecessary to reach a final view in the light of my earlier conclusion that the Trustee did not obtain a discharge under section 99 when it did not pay the cash equivalent to which the transferring member had acquired a right in accordance with section 95.

94. There is a further point which was not argued but which seems to me to have force. Where section 99(1) operates to discharge a trustee, the discharge is from the obligation to provide benefits to which the cash equivalent related. However, the relevant obligation in this case was not an obligation on the Trustee to provide benefits under the Scheme but was the obligation pursuant to section 94 and section 99(1) to make the appropriate transfer payment. That transfer payment is not to be considered as a benefit under the Scheme but is a right conferred by statute and it was not intended to be the subject of the discharge under section 99(1), which only operated when the Trustee had performed the obligation to make the transfer payment.

95. Mr Rowley contended that the case put forward on behalf of a transferring member produced the result that the Trustee of the transferring Scheme had only transferred a cash equivalent in relation to a part only of the member's benefits and, it was said, the PSA 1993 as enacted did not permit such a transfer (save in the special case provided for by section 96(2)). It was submitted that I could not accept an argument which produced the result that the Trustee had done something which it had no power to do. However, it is clear that the Trustee has power to transfer the cash equivalent in respect of all of a member's benefits. If it transpires that the Trustee has transferred a sum which is less than the sum which ought to have been transferred, then the Trustee remains able to top-up the transfer sum and in that way exercise its power, and belatedly perform its obligation, to transfer the cash equivalent in respect of all of the member's benefits. There might have been something in Mr Rowley's argument if I were to hold that a failure by the Trustee to pay the full amount of the cash equivalent of a member's benefits meant that the member was able to enjoy the benefit of the sum transferred and also to enjoy a continuing right to some residual benefits under the transferring Scheme. However, that is not the position.

96. Later in this judgment, I will consider whether the Trustee obtains a discharge from its obligation under the Rules or pursuant to agreements made by a member with the Trustee.

97. In relation to the period 1990 to 1997, I conclude under the PSA 1993, as enacted, and the 1985 Regulations, that:

    i) the transferring member was entitled, under sections 94 and 95 of the PSA 1993, as enacted, to have the benefit of the cash equivalent, at the date of the original application under section 95, of his then accrued benefits;

    ii) in some cases, the Trustee committed a breach of that duty and the Trustee is liable to the transferring member for that breach;

    iii) the transferring member cannot rely on regulation 4(4) in the circumstances being considered in this case;

iv) the Trustee is not able to rely on section 99 to claim a discharge from all obligations to provide benefits to a transferring member where the cash equivalent paid did not include the increases required to equalise benefits;

v) the transferring member is prima facie entitled to apply to the court for an order that the Trustee perform the outstanding duty on it;

vi) the Trustee is able belatedly to perform its duty even without an order of the court.

98. The above is a summary of the position under the legislation. However, as will be seen, this summary is not affected by the rules of the Schemes which refer to the position under the legislation but do not alter it from the foregoing summary.

The period from 1997 to 2008

99. In this period, I will refer to the provisions of Chapter IV of Part IV of the PSA 1993, as amended by the PA 1995, and the Occupational Pension Schemes (Transfer Values) Regulations 1996.

100. It is helpful to refer to the background to the amendments made by the PA 1995. The provisions of Schedule 1A to the Social Security Pensions Act 1975, later re-enacted as Chapter IV of Part IV of the PSA 1993, were considered in the Report of the Pension Law Reform Committee, Cm 2342-I ("the Goode Report") published in September 1993. At paragraphs 4.7.45 to 4.7.49, the Report discussed a number of problems with the operation of the cash equivalent transfer provisions. The problems which were identified included delays at various stages in the process and uncertainty due to a member not knowing what the cash equivalent would be. I was not shown any passage in the Goode Report which discussed the operation of the discharge provisions or which suggested that trustees ought to be discharged even when they had not paid the full amount of the cash equivalent of a member's accrued benefits.

101. The Goode Report was followed by a White Paper, "Security, Equality, Choice: The Future for Pensions", Cmnd 2594, which included proposals to speed up the transfer process and to protect members during it. I was not shown any part of the White Paper which suggested that trustees ought to be discharged even when they had not paid the full amount of the cash equivalent of a member's accrued benefits.

102. Chapter IV of Part IV of the PSA 1993 was then amended by the PA 1995 with effect from 6 April 1997 and, from the same date, the 1996 Regulations replaced the 1985 Regulations. The major change which was made by the amendments was the introduction of section 93A of the PSA 1993 which conferred on a member of a salary related occupational pension scheme a right to a statement of entitlement. Other amendments were then made to deal with the introduction of this new right into the pre-existing provisions.

103. Section 93 of the PSA 1993 was amended to include a description of an occupational pension scheme which was salary related: see section 93(1A). The description applied to an occupational pension scheme which was not a money purchase scheme or which

did not fall within a prescribed class. The Schemes being considered in the present case were salary related occupational pension schemes within this description.

104. Section 93A provided:

> "**93A.— Salary related schemes: right to statement of entitlement.**
>
> (1) The trustees or managers of a salary related occupational pension scheme must, on the application of any member, provide the member with a written statement (in this Chapter referred to as a *"statement of entitlement"*) of the amount of the cash equivalent at the guarantee date of any benefits which have accrued to or in respect of him under the applicable rules.
>
> (2) In this section—
>
> *"the applicable rules"* has the same meaning as in section 94;
>
> *"the guarantee date"* means the date by reference to which the value of the cash equivalent is calculated, and must be—
>
> (a) within the prescribed period beginning with the date of the application, and
>
> (b) within the prescribed period ending with the date on which the statement of entitlement is provided to the member.
>
> (3) Regulations may make provision in relation to applications for a statement of entitlement, including, in particular, provision as to the period which must elapse after the making of such an application before a member may make a further such application.
>
> (4) If, in the case of any scheme, a statement of entitlement has not been provided under this section, section 10 of the PA 1995 (power of the Regulatory Authority to impose civil penalties) applies to any trustee or manager who has failed to take all such steps as are reasonable to secure compliance with this section."

105. Section 94(1) was amended and sections 94(1)(aa) and 94(1A) were inserted. Section 94(1), as amended, provided:

> "**94.— Right to cash equivalent.**
>
> (1) Subject to the following provisions of this Chapter—
>
> (a) a member of an occupational pension scheme other than a salary related scheme acquires a right, when his pensionable service terminates (whether before or after 1st January 1986),

> to the cash equivalent at the relevant date of any benefits which have accrued to or in respect of him under the applicable rules; and
>
> (aa) a member of a salary related occupational pension scheme who has received a statement of entitlement and has made a relevant application within three months beginning with the guarantee date in respect of that statement acquires a right to his guaranteed cash equivalent;
>
> (b) a member of a personal pension scheme acquires a right to the cash equivalent at the relevant date of any benefits which have accrued to or in respect of him under the rules of the scheme.
>
> (1A) For the purposes of subsection (1)(aa), a person's "guaranteed cash equivalent" is the amount stated in the statement of entitlement mentioned in that subsection."

106. Section 95(1), as amended, provided:

> "**95.— Ways of taking right to cash equivalent.**
>
> (1) A member of an occupational pension scheme or a personal pension scheme who acquires a right to a cash equivalent under paragraph (a), (aa) or (b) of section 94(1) may only take it by making an application in writing to the trustees or managers of the scheme requiring them to use the cash equivalent to which he has acquired a right in whichever of the ways specified in subsection (2) or, as the case may be, subsection (3) he chooses."

107. Section 97(3) was amended and section 97(3A) was inserted and they provided:

> "(3) Without prejudice to the generality of subsection (2), the circumstances that may be specified by virtue of paragraph (b) of that subsection include—
>
> (a) in the case of an occupational pension scheme, the length of time which elapses between the termination of a member's pensionable service and his exercise of the option conferred by this Chapter or regulations made under it;
>
> (b) failure by the trustees or managers of the scheme to do what is needed to carry out what a member of the scheme requires within 6 months of the appropriate date;
>
> (c) the state of the funding of the scheme.
>
> (3A) For the purposes of subsection (3), the

"appropriate date" —

(a) in the case of a salary related occupational pension scheme, is the guarantee date (within the meaning of section 93A), and

(b) in any other case, is the date on which the trustees receive an application from the member under section 95."

108. Section 99, as amended, provided:

"**99.— Trustees' duties after exercise of option.**

(1) Where—

(a) a member has exercised the option conferred by section 95; and

(b) the trustees or managers of the scheme have done what is needed to carry out what the member requires,

the trustees or managers shall be discharged from any obligation to provide benefits to which the cash equivalent related except, in such cases as are mentioned in section 96(2), to the extent that an obligation to provide such guaranteed minimum pensions or give effect to such protected rights continues to subsist.

(2) Subject to the following provisions of this section, if the trustees or managers of a scheme receive an application under section 95, they shall do what is needed to carry out what the member requires—

(a) in the case of a member of a salary related occupational pension scheme, within 6 months of the guarantee date, or (if earlier) by the date on which the member attains normal pension age,

(b) in the case of a member of any other occupational pension scheme, within 6 months of the date on which they receive the application, or (if earlier) by the date on which the member attains normal pension age, or

(c) in the case of a member of a personal pension scheme, within 6 months of the date on which they receive the application.

(3) If—

(a) disciplinary proceedings or proceedings before a court have been begun against a member of an occupational pension

scheme at any time before the expiry of the period of 12 months beginning with the termination date; and

(b) it appears to the trustees or managers of the scheme that the proceedings may lead to the whole or part of the pension or benefit in lieu of a pension payable to the member or his widow being forfeited; and

(c) the date before which they would (apart from this subsection) be obliged under subsection (2) to carry out what the member requires is earlier than the end of the period of 3 months after the conclusion of the disciplinary or court proceedings (including any proceedings on appeal),

then, subject to the following provisions of this section, they must instead do so before the end of that period of 3 months.

(3A) In this section, "guarantee date" has the same meaning as in section 93A

(4) The Regulatory Authority may, in prescribed circumstances, grant an extension of the period within which the trustees or managers of the scheme are obliged to do what is needed to carry out what a member of the scheme requires.

(4A) Regulations may make provision in relation to applications for extensions under subsection (4).

(6) If the Regulatory Authority are satisfied—

(a) that there has been a relevant change of circumstances since they granted an extension, or

(b) that they granted an extension in ignorance of a material fact or on the basis of a mistake as to a material fact,

they may direct that the extension be shortened or revoke it.

(7) Where the trustees or managers of an occupational pension scheme have not done what is needed to carry out what a member of the scheme requires within six months of the date mentioned in paragraph (a) or (b) of subsection (2)—

(a) they must, except in prescribed cases, notify the Regulatory Authority of that fact within the prescribed period, and

(b) section 10 of the PA 1995 (power of the Regulatory Authority to impose civil penalties) shall apply to any trustee or manager who has failed to take all such steps as are reasonable to ensure that it was so done.

> (8) Regulations may provide that in prescribed circumstances subsection (7) shall not apply in relation to an occupational pension scheme."

109. Regulation 1 of the Occupational Pension Schemes (Transfer Values) Regulations 1996 adopted the definitions of "appropriate date", "cash equivalent" and "guarantee date" in the above statutory provisions.

110. Regulation 6 of the 1996 Regulations provided:

> "**6.— Guaranteed statements of entitlement**
>
> (1) The guarantee date in relation to a statement of entitlement such as is referred to in section 93A of PSA 1993 (salary related schemes: right to statement of entitlement) must be within a period of three months beginning with the date of the member's application under that section for a statement of entitlement, or, where the trustees of the scheme are for reasons beyond their control unable within that period to obtain the information required to calculate the cash equivalent mentioned in section 93A(1) of PSA 1993, within such longer period as they may reasonably require as a result of that inability, provided that such longer period does not exceed six months beginning with the date of the member's application.
>
> (2) The guarantee date must be within the period of ten days (excluding Saturdays, Sundays, Christmas Day, New Year's Day and Good Friday) ending with the date on which the statement of entitlement is provided to the member.
>
> (3) A member who has made an application under section 93A(1) of PSA 1993 for a statement of entitlement may not within a period of twelve months beginning on the date of that application make any further such application unless the rules of the scheme provide otherwise or the trustees allow the member to do so.
>
> (4) Subject to paragraph (3), any application for a cash equivalent made by a member of a salary related scheme which does not result in the member acquiring a right to a guaranteed cash equivalent under section 94(1)(aa) of PSA 1993 shall be treated as if it were an application under section 93A(1) of that Act for a statement of entitlement."

111. Regulation 7(1) – (3) of the 1996 Regulations provided:

> "**7.— Manner of calculation and verification of cash equivalents**

(1) Except in a case to which, or to the extent to which, paragraph (2) or (5) applies, cash equivalents are to be calculated and verified in such manner as may be approved in particular cases by the scheme actuary or, in relation to a scheme to which section 47(1)(b) of the PA 1995 (professional advisers) does not apply, by—

(a) a Fellow of the Institute of Actuaries;

(b) a Fellow of the Faculty of Actuaries; or

(c) a person with other actuarial qualifications who is approved by the Secretary of State, at the request of the trustees of the scheme in question, as being a proper person to act for the purposes of these Regulations in connection with that scheme

and, subject to paragraph (2), in this regulation and in regulations 8 and 11*"actuary"* means the scheme actuary or, in relation to a scheme to which section 47(1)(b) of the PA 1995 does not apply, the actuary referred to in sub-paragraph (a), (b) or (c) of this paragraph.

(2) Where the member in respect of whom a cash equivalent is to be calculated and verified is a member of a scheme having particulars from time to time set out in regulations made under section 7 of the Superannuation Act 1972 (superannuation of persons employed in local government service, etc.), that cash equivalent shall be calculated and verified in such manner as may be approved by the Government Actuary or by an actuary authorised by the Government Actuary to act on his behalf for that purpose and in such a case *"actuary"* in this regulation and in regulations 8 and 11 means the Government Actuary or the actuary so authorised.

(3) Except in a case to which paragraph (5) applies, cash equivalents are to be calculated and verified by adopting methods and making assumptions which—

(a) if not determined by the trustees of the scheme in question, are notified to them by the actuary; and

(b) are certified by the actuary to the trustees of the scheme —

(i) as being consistent with the requirements of Chapter IV of Part IV of PSA 1993,

(ii) as being consistent with "Retirement Benefit Schemes-Transfer Values (GN11)" published by the Institute of Actuaries and the Faculty of Actuaries and current at the

guarantee date, or if the cash equivalent is of money purchase benefits, at the relevant date,

(iii) as being consistent with the methods adopted and assumptions made, at the time when the certificate is issued, in calculating the benefits to which entitlement arises under the rules of the scheme in question for a person who is acquiring transfer credits under those rules, and

(iv) … .

112. Regulation 8(1) of the 1996 Regulations provided:

> "**8.— Further provisions as to calculation of cash equivalents and increases and reductions of cash equivalents (other than guaranteed cash equivalents)**
>
> (1) A cash equivalent such as is mentioned in section 93A of PSA 1993 shall not be reduced under this regulation once it has become a guaranteed cash equivalent and a direction such as is mentioned in paragraph (2) shall not affect such a cash equivalent unless it is made before the guarantee date."

113. Regulation 9 of the 1996 Regulations provided:

> "**9.— Increases and reductions of guaranteed cash equivalents**
>
> (1) This regulation applies to a guaranteed cash equivalent when a statement of entitlement has been sent to a member of a salary related scheme by the trustees of the scheme.
>
> (2) Where all or any of the benefits to which a guaranteed cash equivalent relates have been surrendered, commuted or forfeited before the date on which the trustees do what is needed to carry out what the member requires, that part of the guaranteed cash equivalent which relates to the benefits so surrendered, commuted or forfeited shall be reduced to nil.
>
> (3) Where a scheme has on or after the guarantee date begun to be wound up, a guaranteed cash equivalent may be reduced to the extent necessary for the scheme to comply with section 73 of the PA 1995 and regulations made under that section.
>
> (4) If, by virtue of regulations made under section 73 of the PA 1995, section 73 of that Act applies to a section of a scheme as

> if that section were a separate scheme, paragraph (3) shall apply as if that section were a separate scheme and as if the references therein to a scheme were accordingly references to that section.
>
> (5) If a member's guaranteed cash equivalent falls short of or exceeds the amount which it would have been had it been calculated in accordance with Chapter IV of Part IV of PSA 1993 and these Regulations it shall be increased or reduced to that amount.
>
> (6) In a case where two or more of the paragraphs of this regulation fall to be applied to a calculation, they shall be applied in the order in which they occur in this regulation except that where paragraph (5) falls to be applied it shall be applied as at the date on which it is established that the guaranteed cash equivalent falls short of or exceeds the proper amount."

114. Regulation 10 of the 1996 Regulations provided:

> "**10.— Increases of cash equivalents on late payment**
>
> (1) Subject to paragraph (2), if the trustees of a scheme, having received an application under section 95 of PSA 1993, fail to do what is needed to carry out what the member requires within six months of the appropriate date the member's cash equivalent, as calculated in accordance with regulations 7 to 9, shall be increased by the amount, if any, by which that cash equivalent falls short of what it would have been if the appropriate date had been the date on which the trustees carry out what the member requires.
>
> (2) If the trustees of a scheme, having received an application under section 95 of PSA 1993, fail without reasonable excuse to do what is needed to carry out what the member requires within six months of the appropriate date the member's cash equivalent, as calculated in accordance with regulations 7 to 9, shall be increased by—
>
> (a) interest on that cash equivalent calculated on a daily basis over the period from the appropriate date to the date on which the trustees carry out what the member requires, at an annual rate of one per cent. above base rate; or, if it is greater,
>
> (b) the amount, if any, by which that cash equivalent falls short of what it would have been if the appropriate date had been the date on which the trustees carry out what the member requires."

115. Regulation 11(1) of the 1996 Regulations provided for the disclosure of certain information, as set out in schedule 1 to the Regulations, to an active member of any pension scheme. Paragraph 1 of schedule 1 referred to information as to whether any cash equivalent would be available to a member together with an estimate of the amount of such cash equivalent and the accrued rights to which it related.

116. Regulation 11(4) of the 1996 Regulations required that a statement of entitlement to a guaranteed cash equivalent should include a statement that a member had no right to make an application for a guaranteed statement of entitlement within 12 months of the last such application and that a member must submit any application to take the guaranteed cash entitlement within three months of the guarantee date.

117. Regulation 11(5) of the 1996 Regulations provided:

> "(5) Where a cash equivalent shown in the statement of entitlement is reduced or increased under regulation 9, the trustees must notify the member of that fact in writing within ten days (excluding Saturdays, Sundays, Christmas Day, New Year's Day and Good Friday) and such notification must—
>
> (a) state the reasons for and the amount of the reduction or increase;
>
> (b) indicate the paragraph of regulation 9 which has been relied upon; and
>
> (c) state that the member has a further three months, beginning with the date on which the member is informed of the reduction or increase, to make a written application to take the cash equivalent shown in the statement of entitlement as so reduced or increased."

118. It can be seen that the amendments to the PSA 1993 which were made by the PA 1995 introduced new provisions as to a statement of entitlement in relation to the cash equivalent. The right to such a statement was conferred by section 93A and other provisions were amended in consequence of the introduction of section 93A.

119. It is to be noted that the right to a statement of entitlement only applied to a member of an occupational pension scheme which was a salary related scheme. However, Chapter IV of Part IV, which conferred a right to a cash equivalent, also applied to members of occupational pension schemes which were not salary related schemes and to members of personal pension schemes. Thus, as regards these other persons, the PSA 1993 was not relevantly amended by the PA 1995. The original provisions as to the calculation of the cash equivalent and as to the discharge of the trustee (by section 99) remained unaffected. Accordingly, in the case of such members of such schemes, if a trustee calculated the cash equivalent wrongly and transferred an inadequate sum to the recipient chosen by the transferring member, the trustee was not discharged under section 99.

120. However, Mr Rowley contended that the introduction of section 93A of the PSA 1993 and the consequential amendments to the other relevant sections required the court to look again at the arguments which I have earlier considered and, in particular, to interpret afresh the critical words in section 99 which referred to the trustee having "done what is needed to carry out what the member requires".

The operation of the cash equivalent legislation in the period 1997 to 2008

121. As with the period from 1990 to 1997, it is helpful to consider what went wrong in the period from 1997 to 2008 and to consider what are the rights (if any) of a transferring member and what obligations (if any) remain on the Trustee.

122. Section 93A(1) conferred on the transferring member a right to a statement of entitlement of the amount of the cash equivalent at the guarantee date of his accrued benefits. Section 97(1) provided that cash equivalents were to be calculated and verified in the manner prescribed by Regulations, i.e. the 1996 Regulations. The 1996 Regulations applied to both cash equivalents and guaranteed cash equivalents. Regulation 7 of the 1996 Regulations was in similar terms to regulation 3 of the 1985 Regulations to which I earlier referred. Regulation 7 of the 1996 Regulations referred to the involvement of an actuary. The actuary was not required to determine the amount of the cash equivalent. Instead, under regulation 7(1), he had to approve the manner of its calculation. Further, under regulation 7(3), the actuary was to certify that the methods and assumptions to be used in the calculation conformed to the statutory requirements and GN11, amongst other things.

123. Thus, just as under the 1985 Regulations in force in the period 1990 to 1997, if an actuary gave a certificate as required by regulation 3(2)(b) and the Trustee then carried out a calculation which made a mistake as to the operation of the rules of the scheme or the facts of a particular case or made a mathematical error, there was no question of the actuary's certificate being conclusive and binding on the transferring member because the actuary had not certified the amount of the transfer value wrongly calculated by the Trustee. Further, there was no provision in the statute or in the 1996 Regulations which expressly stated that the Trustee's calculation was conclusive and binding on the transferring member. Therefore, the transferring member was entitled to point out (certainly up until the point that a transfer payment was made) that the calculation was wrong, whether that was because the Trustee made a mistake as to the operation of the rules or the facts of a particular case or even made a mathematical error.

124. Under the PSA 1993, as enacted, there was no legal difficulty in the way of the Trustee recalculating the cash equivalent at the date of the original calculation in a way which reflected the transferring member's rights to equalised accrued benefits. The position is more complicated under the PSA 1993, as amended with effect from 6 April 1997, and the 1996 Regulations.

125. What went wrong in this case in the period 1997 to 2008 was that when the Trustee provided to members statements of entitlement, which were purportedly provided pursuant to section 93A of the PSA 1993, as amended, those statements of entitlement did not correctly state the amount of the cash equivalent at the guarantee date of the

benefits which had accrued to the member. The wrong calculation was specifically because the Trustee had failed to equalise benefits and had failed to reflect the level of equalised benefits in its calculation.

126. The difficulty which arises is to determine the consequences of statements of entitlement, provided or purportedly provided, in that way. In the course of argument, a large number of possibilities were identified. In summary, Mr Rowley submitted that the erroneous statements of entitlement were valid statements of entitlement and fell to be treated as such under the PSA 1993, as amended. Thus, the statements identified the guaranteed cash equivalents, the member was entitled to require the Trustee to pay the guaranteed cash equivalent to the receiving scheme and when the Trustee did so, the Trustee was discharged from its obligation to provide benefits to the member and was not obliged to make good the shortfall in the amount of the transfer payment.

127. Mr Short put forward alternative cases. He submitted that the original statements of entitlement were valid but they ought now to be corrected under regulation 9(5) of the 1996 Regulations.

128. In the alternative, if regulation 9(5) was not available to lead to a correction of a statement of entitlement, Mr Short submitted that the purported statements of entitlement were invalid and did not qualify as statements of entitlement as referred to in the legislation. On this basis, the member was entitled to require the Trustee to perform its original duty to provide a correct statement of entitlement identifying the correct guaranteed cash equivalent and when that was done, the member was entitled to require that cash equivalent to be transferred to the receiving scheme. There was then discussion as to the form of a new statement of entitlement provided a considerable time after the original application for a statement of entitlement. There was also discussion as to the status of the member in the period since he was provided with the purported statement of entitlement and the figure stated in that statement was paid to the receiving scheme. Similarly, there was discussion as to the validity of the payment which had been made to the receiving scheme.

129. Mr Halliday submitted that the original statements of entitlement were valid and that they could be corrected under regulation 9(5) of the 1996 Regulations; he also submitted that they could be corrected in order to bring about compliance with the statutory provisions, even if regulation 9(5) did not apply.

130. Arising from these submissions, I plainly need to consider whether the purported statements of entitlement were valid for the purposes of the legislation. The parties agreed as to the approach I ought to adopt in order to answer that question. They agreed that I should construe the legislation, that I should consider the consequences of the rival interpretations and then I should determine what Parliament must be taken to have intended as the consequence of serving a purported statement of entitlement which left out of account equalised benefits.

131. The approach which I ought to adopt has been considered and explained in *Osman v Natt* [2015] 1 WLR 1536, in particular at [24]-[25] per Sir Terence Etherton, C. It is no longer helpful to ask, when analysing the problem, whether a statutory provision,

which has not been complied with, is mandatory or directory. Instead, one construes the statute and assesses the importance and purpose of the statutory requirement in the context of the statutory scheme as a whole. I comment that in this case there is particular difficulty in carrying out that exercise because there is considerable dispute as to what are the consequences of the various answers to the problem and I will have to form a view as to what the consequences would be if the statement of entitlement were valid and also if it were invalid.

132. It is right to refer straightaway to two matters. The first is the wording which refers to a statement of entitlement in section 93A(1) and the second is the ability to correct a statement of entitlement pursuant to regulation 9(5) of the 1996 Regulations.

133. I will refer to regulation 9(5) of the 1996 Regulations first. Regulation 9(5) was made pursuant to section 97(2)(b) and 97(3)(b) of the PSA 1993, as amended. By reason of regulation 9(1), regulation 9(5) applies where a statement of entitlement has been provided. Regulation 9(5) provides:

> "If a member's guaranteed cash equivalent falls short of or exceeds the amount which it would have been if it had been calculated in accordance with Chapter IV of Part IV of the 1993 Act and these Regulations it shall be increased or reduced to that amount."

134. It can fairly be said that regulations 9(1) and 9(5) show that it is possible to have an effective statement of entitlement even where the cash equivalent in the statement of entitlement has not been calculated in accordance with the legislation. That is a powerful argument for saying that a failure to calculate correctly the cash equivalent does not invalidate the statement of entitlement but simply leaves it open to being corrected.

135. Mr Short submitted that if regulation 9(5) of the 1996 Regulations applied even after the inadequate transfer payment was made, then the availability of the power to correct the statement of entitlement would be a reason for holding that the statement of entitlement was effective although liable to be corrected. However, if regulation 9(5) only applied before the transfer payment was made, then he would contend that the statements of entitlement containing the errors in this case were invalid.

136. Section 93A(1) describes a "statement of entitlement" as "a written statement of the amount of the cash equivalent at the guarantee date of any benefits which have accrued to or in respect of [a member] under the applicable rules". Mr Short says that, if regulation 9(5) was not available to correct a statement of entitlement, a statement which states the amount of the cash equivalent of some only of the benefits plainly does not comply with this description of a statement of entitlement and the non-compliance goes to the heart of the statutory purpose which is to inform the member of the correct amount of the cash equivalent. As against that, Mr Short appeared to accept that a statement of entitlement which stated the wrong figure, perhaps as the result of a mathematical error, but which was based on the correctly identified benefits, would not be invalid.

137. At this point, I ought therefore to consider how regulation 9(5) applies and, in particular, whether it applies after an inadequate transfer payment has been made.

138. The scheme of the legislation is that the provision of a statement of entitlement is a first step in the process. The statement of entitlement informs the member of the extent of his entitlement. Based on that statement, he can decide whether to require a transfer to proceed. If he does so require, he is entitled to have the figure in the statement of entitlement transferred to the receiving scheme. Sections 97(2) and (3) permit regulations to be made providing for a cash equivalent, including a guaranteed cash equivalent, to be increased or reduced. The relevant regulation is regulation 9 of the 1996 Regulations.

139. Regulation 9(1) presupposes that there has been a valid and effective statement of entitlement which identifies the guaranteed cash equivalent. Regulations 9(2), (3) and (4) all deal with reductions in the guaranteed cash equivalent. Regulation 9(2) expressly refers to the relevant event occurring before the date on which the trustees do what is needed to carry out what the member requires. Regulation 9(3) refers to the relevant event being on or after the guarantee date; regulation 9(4) operates in the same way. It is to be expected that in a case which comes within regulations 9(2), (3) or (4), the guaranteed cash equivalent will in fact be reduced before the transfer payment is made. Regulation 9(2) only applies where the relevant event occurred before the transfer payment was made. This also seems likely to be the position with the events referred to in regulations 9(3) and (4).

140. With regulation 9(5), the matter which leads to an increase or reduction in the amount of the guaranteed cash equivalent is the state of affairs at the guarantee date which is, of course, before the transfer payment is to be made. If the recalculation of the guaranteed cash equivalent is done before the transfer payment is made, then there is no difficulty. The question is: can the guaranteed cash equivalent be recalculated after the transfer payment is made?

141. Regulation 9(5) refers to the possibility that the guaranteed cash equivalent is either increased or reduced. As to the possibility that the guaranteed cash equivalent is reduced, there are obvious difficulties if that were to happen after the transfer payment has been made. Mr Short suggested that a reduction in the amount of the guaranteed cash equivalent would be the first step which would enable the transferring scheme to bring a claim in restitution against the receiving scheme, seeking the return of part of the transfer payment which had been made. An examination of that possibility would require a detailed analysis of the legal position but that did not occur in the course of submissions. In the absence of a proper examination of that possibility, my reaction is that there would be considerable difficulty in the transferring scheme asserting a claim to restitution. Further, if the transferring scheme would have a claim in restitution, it is not clear to me why the transferring scheme would need to revise the statement of entitlement as distinct from simply showing what the correct calculation ought to have been. Yet further, if the receiving scheme had to return part of the transfer payment, would it then be entitled to claw back benefits from the transferring-in member?

142. If regulation 9(5) were to be construed to permit an increase in the guaranteed cash equivalent after the transfer payment was made, it could be said that there would be no real difficulty in giving effect to that possibility. There is nothing expressly stated in section 97(2) or (3) or regulation 9 itself which rules out this possibility. However, the context of regulation 9 and the way in which it permits reductions in certain cases certainly discourages the idea that regulation 9(5) could permit an increase after the transfer payment has been made. Indeed, regulation 9(6) simply says that regulation 9(5) is to be applied as at the date when it is established that the guaranteed cash equivalent falls short of or exceeds the proper amount.

143. If regulation 9(5) were construed in the way contended for by Mr Short a lot of the problems caused by the underpayment in relation to the transfer payment go away. It would then be straightforward to hold that a statement of entitlement which identifies the wrong guaranteed cash equivalent was a valid statement of entitlement, albeit open to correction. If the statement of entitlement were valid, then the member would have had the right to require the trustee to transfer the sum identified in the statement of entitlement and the trustee would have had power to make that transfer. It would also be possible to hold that the member would retain the right to require a recalculation pursuant to regulation 9(5) but would not be entitled to receive benefits under the transferring scheme as if the transfer payment had never been made. It would also be possible to say that section 99 of the PSA 1993 did not take away the member's right to a recalculation under regulation 9(5) either because that right is not part of the member's benefits within section 99(1) or because the Trustee has not done what was needed to carry out what the member required when it had not provided a correctly calculated statement of entitlement.

144. There is a further complication if the wrongly calculated statement of entitlement were held to be invalid and that complication goes away if it were held to be valid. If it were invalid, then the member could require the trustee belatedly to provide a correctly calculated statement of entitlement. That statement of entitlement would have to have a guarantee date which complies with regulation 6 of the 1996 Regulations, made pursuant to section 93A(2) of the PSA 1993, as amended. If there were a long delay between the date of the original application under section 93A and the provision of a correctly calculated statement of entitlement, it would not be possible for the trustee to comply with both regulation 6(1) and regulation 6(2). I recognise that such a difficulty would arise in any case where there was delay of more than six months from the date of application for a statement of entitlement but the difficulty would certainly arise in the type of case I am now considering.

145. It was also pointed out that if the wrongly calculated statements of entitlement in this case were invalid, then that would expose the Trustee to the imposition of a civil penalty pursuant to section 93A(4). I do not regard that possibility as containing a clear pointer to the answer to the question I am now considering. If it was felt that the degree of fault on the part of the Trustee was non-existent or slight, then that would be reflected in the decision on the penalty. At this stage, I will not comment on whether that would be the right assessment of the possible fault in this case.

146. It is also necessary to consider the implications of regulation 11(5) of the 1996 Regulations. I have set out regulation 11(5) earlier in this judgment. It is

straightforward to apply regulation 11(5) in relation to a notification which is required to be made (pursuant to that regulation) before a transfer payment is made. Regulation 11(5)(c) refers to the member having a further three months, following the notification, within which to apply to take the guaranteed cash equivalent, as reduced or as increased. It can be argued that regulation 11(5)(c) indicates that the notification under regulation 11(5), and therefore the recalculation under regulation 9(5), must take place before the member has "taken" the transfer payment. It can then be argued that regulation 9(5) is not available where there has been a statement of entitlement (albeit identifying the wrong cash equivalent) and the member has already elected to take that cash equivalent and that amount has already been paid to the receiving scheme. As against that, if one held that regulation 9(5) did apply to an increase which was established after the first transfer payment was made, then one could hold that regulation 11(5)(c) simply did not apply because the member had already applied to have a transfer and that application is treated as extending to the case where the cash equivalent is increased under regulation 9(5).

147. I have now identified the principal arguments as to whether a wrongly calculated statement of entitlement, which leaves out of account certain benefits to which the member is entitled, is valid or invalid. If regulation 9(5) did not permit a wrongly calculated cash equivalent in a statement of entitlement to be increased, after a transfer payment has been made, then there would be an argument for saying that the statement of entitlement containing such an error should be held to be invalid. Conversely, if regulation 9(5) did permit such an increase, then there is a strong argument for saying that such a statement of entitlement would be valid, albeit liable to be corrected. Whether regulation 9(5) does permit such an increase after a transfer payment has been made involves a difficult question of construction. There are certainly strong arguments in support of the conclusion that regulation 9(5) does not permit such an increase. Conversely, the strongest argument, in favour of holding that regulation 9(5) does permit such an increase, is the argument that if regulation 9(5) did not permit such an increase then the incorrectly calculated statement of entitlement would be invalid which would result in very unwelcome consequences.

148. Regulation 9(5) provides that in the circumstances which come within that regulation, the guaranteed cash equivalent "shall be increased or reduced to that amount". Mr Short's argument appeared to be that the regulation imposed an obligation on a trustee and that the obligation was a continuing obligation. He submitted that the obligation had to be complied with whether the result was an increase or a reduction in the guaranteed cash equivalent. I am not persuaded to accept Mr Short's argument in its entirety. I have difficulty with the submission that the obligation under regulation 9(5) continues at all times after the transfer payment is made. I have particular difficulty with that suggestion in relation to a possible reduction in the guaranteed cash equivalent. However, I do not consider that I have to go as far as Mr Short does in order to produce a workable solution in this case.

149. The workable solution is that the obligation on a trustee under regulation 9(5) continues at all times until the transfer payment is made. If the guaranteed cash equivalent ought to be increased under regulation 9(5) before the transfer payment is made and the trustee does not increase it, then at that point the trustee commits a breach of the obligation imposed by regulation 9(5). That does not mean that the

member loses all of his rights to the correct cash equivalent. Nor does it mean that a trustee is not answerable for its failure to perform its obligation. The trustee does not become free of its obligation under regulation 9(5) by failing to perform it. The workable solution comes about because in a case where the trustee has broken its obligation under regulation 9(5), the member is entitled to come to court for a remedy. The appropriate remedy will be or include an order that the trustee belatedly perform the obligation on it, recalculate the guaranteed cash equivalent and make a top-up payment to the receiving scheme. If the trustee can be ordered to remedy its breach of obligation, the trustee can also do so without a court order being made. The trustee is then belatedly performing its obligation under regulation 9(5).

150. Balancing the different considerations and applying the approach in *Osman v Natt*, I consider that Parliament should be taken to have intended that a trustee who has failed to perform its obligation under regulation 9(5) can be ordered by the court to do so even after a transfer payment has been made and, as a result, Parliament should be taken to have intended that a wrongly calculated statement of entitlement is a valid statement of entitlement for the purposes of section 93A of the PSA 1993, albeit open to be corrected.

Does regulation 10 of the 1996 Regulations apply?

151. I next need to consider whether, in a case where the Trustee has made a transfer payment which was calculated on a basis which left out of account the member's right to equalised benefits, the member can rely on regulation 10 of the 1996 Regulations. Mr Short submitted that the member could and Mr Rowley and Mr Halliday submitted that the member could not.

152. Regulation 10(2) of the 1996 Regulations is in much the same terms as regulation 4(4) of the 1985 Regulations. Regulation 10 of the 1996 Regulations has been somewhat redrafted to reflect drafting changes introduced when the PSA 1993 was amended with effect from 6 April 1997. Further, the rate of interest referred to in regulation 10(2) is 1% above base rate rather than the rate prescribed pursuant to section 17 of the Judgment Act 1838. Nonetheless, the same arguments apply to regulation 10(2) of the 1996 Regulations as applied to regulation 4(4) of the 1985 Regulations. For the reasons I gave earlier in relation to regulation 4(4) of the 1985 Regulations, I am not persuaded that regulation 10(2) applies where the Trustee has made a transfer payment which was calculated on a basis which left out of account the member's right to equalised benefits. Further, regulation 10(2) only applies where the trustee has failed to act "without reasonable excuse" and I have already held that at this stage in this case I am not able to make a finding as to whether the Trustee failed to act without reasonable excuse.

153. Regulation 10(1) is not limited to the case where a trustee acted without reasonable excuse but is otherwise in the same terms as regulation 10(2)(b). It follows that I am not persuaded that regulation 10(1) applies where the Trustee has made a transfer payment which was calculated on a basis which left out of account the member's right to equalised benefits.

Was the Trustee discharged pursuant to section 99 of the PSA 1993 in relation to transfers in the period 1997 to 2008?

154. When I earlier considered how the PSA 1993 worked, I indicated that where a trustee had not performed its obligation under regulation 9(5) of the 1996 Regulations, it would not be right to hold that the trustee was discharged from that obligation. I will now add some further comments on that matter.

155. Section 99 refers to the trustees having done "what is needed to carry out what the member requires". Where the Trustee has not performed its obligation under regulation 9(5), it cannot be said that the Trustee has done what is needed to carry out what the member requires. Further, I am inclined to hold that because any discharge under section 99 only applies to "the obligation to provide benefits to which the cash equivalent related", the obligation to increase the guaranteed cash equivalent under regulation 9(5) does not come within that phrase.

156. These conclusions are also supported by the following wider considerations:

i) I have already held that, in the circumstances being considered in this case, in the period from 1990 to 1997, section 99 of the PSA, as enacted, did not result in a trustee being discharged from its obligation to make a top-up payment;

ii) the background to the 1997 amendments to the PSA 1993 included the Goode Report and the following White Paper; those documents did not disclose any intention to change the position in relation to the discharge of a trustee;

iii) section 99 of the PSA 1993 was not itself amended so that if section 99 resulted in a discharge of a trustee in the period from 1997 onwards, that would have come about as an unintended side effect of the amendments to the other provisions which were designed to be of benefit to members;

iv) the amendments to the PSA 1993 which took effect from 6 April 1997 only applied to a salary related occupational pension scheme whereas the remainder of Chapter IV of Part IV of the PSA 1993 continued to apply as before to other kinds of pension schemes and in relation to those other pension schemes, my conclusion as to section 99 not leading to a discharge in the circumstances considered in this case would continue to apply.

Conclusion in relation to the cash equivalent legislation in the period 1997 to 2008

157. Accordingly, in relation to the period 1997 to 2008, I conclude that, under the 1993 Act, as amended, and the 1996 Regulations:

i) the transferring member was entitled, under regulation 9(5) of the 1996 Regulations, to have the original guaranteed cash equivalent, which was wrongly calculated in the original statement of entitlement, increased to the amount which ought to have been calculated in relation to the member's benefits on the basis that those benefits had been equalised;

ii) where the Trustee did not perform its obligation under regulation 9(5) prior to making the transfer payment, the Trustee committed a breach of its obligation at that time;

iii) a transferring member is entitled to apply to the court for an order that the Trustee belatedly perform that obligation; the Trustee is also able to perform its obligation belatedly;

iv) the transferring member cannot rely on regulation 10(1) or 10(2) in the circumstances being considered in this case;

v) the Trustee is not able to rely on section 99 to claim a discharge from its liability as described above.

158. As was the position in relation to the legislation in force from 1990 to 1997, the position under the legislation is not altered by the rules of the Schemes.

The period from 2008 onwards

159. In this period, I will refer to the provisions of Chapter IV of Part IV of the PSA 1993, as amended by the PA 1995, and the Occupational Pension Schemes (Transfer Values) Regulations 1996 as amended by the Occupational Pension Schemes (Transfer Values) (Amendment) Regulations 2008. I will refer to the provisions of the Regulations as at 1 October 2008.

160. Regulation 6 of the 1996 Regulations was amended in a way which is not material to the present discussion.

161. Regulation 7 of the 1996 Regulations was significantly amended by the introduction of a new regulation 7 together with new regulations 7A to 7E. The new provisions are very detailed and it is not necessary to set out all of them but I will set out part of the new regulation 7 and regulations 7A and 7B.

162. Regulation 7(1) – (3) provided:

> "**7.— Manner of calculation and verification of cash equivalents — general provisions**
>
> (1) Subject to paragraphs (4) and (7), cash equivalents are to be calculated and verified—
>
> (a) by calculating the initial cash equivalent—
>
> (i) for salary related benefits, in accordance with regulations 7A and 7B; or
>
> (ii) for money purchase benefits, in accordance with regulation 7C,
>
> and then making any reductions in accordance with regulation 7D; or

(b) in accordance with regulation 7E.

(2) The trustees must decide whether to calculate and verify the cash equivalent in accordance with paragraph (1)(a) or (b), but they can only choose paragraph (1)(b) if they have had regard to any requirement for consent to paying a cash equivalent which is higher than the amount calculated and verified in accordance with paragraph (1)(a).

(3) The trustees are responsible for the calculation and verification of cash equivalents and initial cash equivalents."

163. Regulation 7A provided:

"**7A.— Manner of calculation of initial cash equivalents for salary related benefits**

(1) For salary related benefits, the initial cash equivalent is to be calculated—

(a) on an actuarial basis; and

(b) in accordance with paragraph (2) and regulation 7B.

(2) The initial cash equivalent is the amount at the guarantee date which is required to make provision within the scheme for a member's accrued benefits, options and discretionary benefits.

(3) For the purposes of paragraph (2), the trustees must determine the extent—

(a) of any options the member has which would increase the value of his benefits under the scheme;

(b) of any adjustments they decide to make to reflect the proportion of members likely to exercise those options; and

(c) to which any discretionary benefits should be taken into account, having regard to any established custom for awarding them and any requirement for consent before they are awarded."

164. Regulation 7B provided:

"**7B.— Initial cash equivalents for salary related benefits: assumptions**

(1) The trustees must use the assumptions determined under this regulation in calculating the initial cash equivalent for salary related benefits.

> (2) Having taken the advice of the actuary, the trustees must determine the economic, financial and demographic assumptions.
>
> (3) In determining the demographic assumptions, the trustees must have regard to—
>
> (a) the main characteristics of the members of the scheme; or
>
> (b) where the members of the scheme do not form a large enough group to allow demographic assumptions to be made, the characteristics of a wider population sharing similar characteristics to the members.
>
> (4) The trustees must have regard to the scheme's investment strategy when deciding what assumptions will be included in calculating the discount rates in respect of the member.
>
> (5) The trustees must determine the assumptions under this regulation with the aim that, taken as a whole, they should lead to the best estimate of the initial cash equivalent."

165. It was not suggested that regulation 7D was material in this case. Under regulation 7E, if the Trustee uses an alternative method of calculating and verifying the cash equivalent, the cash equivalent must be higher than it would have been if it had been calculated and verified in accordance with regulation 7(1)(a).

166. Regulations 9, 10 and 11 were amended in a way which is not material to the present discussion.

167. Under the 1996 Regulations, as amended with effect from 1 October 2008, the Trustee is responsible for the calculation and verification of the amount of the cash equivalent. By regulation 7(1), the cash equivalent is to be calculated and verified in accordance with regulations 7A and 7B. By regulation 7A(2), the initial cash equivalent is the amount at the guarantee date which is required to make provision within the scheme for a member's accrued benefits, options and discretionary benefits.

168. In the present case, in the period from 2008, when the Trustee calculated the cash equivalents, it failed to calculate them in accordance with regulation 7A(2) because it left out of account the amount of the increase in benefits needed to equalise benefits between male and female members. I do not read regulations 7 and 7A as if they provided that the calculation of the Trustee is to be final and binding on a member, even if erroneous. The position remains the same as at all times since 1990.

169. The position is, therefore, that the amendments to the 1996 Regulations made with effect from 1 October 2008 do not change anything as regards regulation 9(5) of the 1996 Regulations or the operation of the discharge provision in section 99 of the PSA 1993 as amended with effect from 6 April 1997. In this respect, the position in the

period from 2008 is therefore the same as the position in the period from 1997 to 2008.

PART III: THE PRESERVATION OF BENEFIT LEGISLATION

The preservation of benefit legislation

170. The preservation of benefit legislation is in Chapter I of Part IV of the PSA 1993 which is headed "Preservation of Benefit under Occupational Schemes". These provisions came into force on 7 February 1994 but they re-enacted provisions which were contained in schedule 16 to the Social Security Act 1973. Thus, from the *Barber* date of 17 May 1990 until the present time, provisions dealing with the preservation of benefits have been in force.

171. It was agreed at the hearing that it was sufficient to refer to the provisions in Chapter I of Part IV of the PSA 1993 and it was not necessary to refer to the earlier legislation. The relevant provisions of the PSA 1993 have been amended over the years but the points which arise in relation to these provisions are not really affected by the amendments; the same points can be made whether one refers to the PSA 1993, as enacted, or to the PSA 1993 in its current form.

172. The first point to note about these provisions is that they are not overriding requirements within section 129 of the PSA 1993, unlike the cash equivalent legislation in Chapter IV of Part IV of the PSA 1993. Instead, section 131 of the PSA 1993 provides that nothing in Chapter I of Part IV applies with direct effect to any scheme or precludes a scheme from being framed so as to provide benefits on any ampler scale. By section 132 of the PSA 1993, the trustees and managers of an occupational pension scheme are required to take such steps as are open to them to bring the rules of the scheme into conformity with the requirements of Chapter I of Part IV. It is agreed in this case that all of the rules of the various Schemes are in conformity with the requirements of Chapter I of Part IV.

173. Chapter I of Part IV of the PSA 1993 is concerned with the preservation of benefits for members whose pensionable service is terminated before normal pension age. The principal provisions provide for what is called "short service benefit". The provisions are relevant in the present context because section 73(2) provides for the possibility that the rules of a scheme might permit the member's accrued rights to be transferred to another occupational pension scheme with a view to acquiring transfer credits for the member under that other scheme or to be transferred to a personal pension scheme with a view to acquiring rights for the member under the rules of that scheme. Section 73(4) provides that these possibilities may only be by way of complete or partial substitute for short service benefit. Section 73(4) also provides that these possibilities may only be with the consent of the member unless the case comes within a case prescribed by Regulations.

174. Section 73(3) of the PSA 1993 provides that the possibility of a transfer out of short service benefit is something which is additional to any obligation imposed by Chapter IV of Part IV of the PSA 1993, dealing with cash equivalents, to which I have already referred.

175. Regulations have been made which prescribe the cases which come within section 73(4) of the PSA 1993, where a scheme may effect a transfer of a member's short service benefit in return for transfer credits or rights in another pension scheme, without the consent of the member. I was referred to various iterations of the Occupational Pension Schemes (Preservation of Benefit) Regulations 1991. These were originally made under schedule 16 to the Social Security Act 1973 but they continued to apply for the purposes of section 73(4) of the PSA 1993. The 1991 Regulations have themselves been amended on a number of occasions. I was also referred to Regulations which preceded the 1991 Regulations but they are not relevant to anything which I am now asked to decide. The various iterations of the Regulations are referred to in the judgment in *Pollock v Reed* [2016] Pens LR 129.

176. Regulation 12 of the 1991 Regulations, as amended from time to time, provides a measure of protection to members in the case of a transfer in respect of their rights where the transfer is made without their consent. The parties are agreed that I should proceed on the basis that regulation 12 of the 1991 Regulations as amended from time to time was complied with at all times in relation to transfers without the consent of members. I was given the explanation for this agreement that transfers without members' consent involved bulk transfers out where the rights of the members under the receiving scheme were the same as the rights of the members under the transferring scheme. In so far as regulation 12 of the 1991 Regulations as amended from time to time required a certificate from an actuary that the transfer credits under the receiving scheme were broadly no less favourable than the rights to be transferred, that was always the case and an actuary had always certified accordingly. There was no suggestion that any other requirement of regulation 12 as amended from time to time had not been complied with.

177. In the present case, the preservation of benefit legislation and the rules of the Schemes which have been made compatibly with that legislation are potentially relevant as follows. Those rules have been relied on by the Trustee in two ways. The way which is more significant involves bulk transfers out, without the consent of the relevant members. The second way involves transfers which, for one reason or another, did not qualify as cash equivalent transfers under Chapter IV of Part IV of the PSA 1993 and were instead made, with the consent of the relevant member, under the rules which had been made compatibly with the preservation of benefit legislation. I will refer to these as the individual rule-based transfers.

178. In relation to the individual rule-based transfers, I will have to examine the rules of the various Schemes as Mr Short submitted that the rules had not been operated properly when the Trustee, in the process, left out of account a member's right to equalised benefits. However, those submissions might not be relevant in the case of bulk transfers for various reasons including the fact that bulk transfers often took effect pursuant to arrangements which involved ad hoc modifications of the rules which would otherwise apply. I was provided with some documents in relation to some "mirror-image" bulk transfers. A "mirror-image" bulk transfer is one where the rights of the members under the receiving scheme are the same as the rights of the members under the transferring scheme. It was agreed that mirror-image transfers were valid and effective and no further top-up payments fell to be made in those

cases. In these circumstances, I was not asked to discuss the position of any mirror-image bulk transfers under the rules of the various Schemes.

179. In relation to bulk transfers, I was asked to deal with one question only. This question was raised by Issue 7(a)(ii) (insofar as it related to bulk transfers) and (iii) (insofar as it referred to regulation 12 of the 1991 Regulations). The question is whether, in the case of mirror-image bulk transfers out, the Trustee is discharged from an obligation to equalise in respect of such transfers by virtue of section 73(2) and (4) of the PSA 1993 and regulation 12 of the 1991 Regulations is that.

180. Section 73(2) provides that subject to subsections (3) to (5), a scheme may "instead of providing short service benefit" provide for the member's accrued rights to be transferred to another pension scheme in return for transfer credits or rights under that scheme. Subsections (3) and (5) of section 73 are not material. Section 73(4), read together with regulation 12 of the 1991 Regulations, has the effect that the alternative of transfer credits under another scheme may only be by way of complete or partial substitute for short service benefit, without the consent of the member, if regulation 12 is complied with.

181. As explained, I am asked to proceed on the basis that regulation 12 has always been complied with in the case of mirror-image bulk transfers out. The transfer credits provided as part of the bulk transfer out are provided to the members "instead of" the transferring scheme providing short service benefit to them. This means that in the case of a mirror-image bulk transfer out in respect of a member's short service benefit, the member ceases to be entitled to short service benefit from the transferring scheme. Accordingly, the answer to the question I am asked is: the Trustee is discharged from an obligation to equalise in respect of mirror-image bulk transfers out by virtue of section 73(2) and (4) and Regulation 12 of the 1991 Regulations.

182. Section 73(4) refers to the transfer credits being a complete or partial substitute for short service benefit. I have proceeded on the basis that all of the bulk transfers which have occurred in relation to these Schemes have been transfers of all of the short service benefit to which the members were entitled.

PART IV: THE RULES OF THE SCHEMES

Introduction to the Rules

183. I was asked to construe four sets of rules. I will refer to each set of rules separately. In relation to each set of rules, I will first consider the rules which apply to cash equivalent transfers under Chapter IV of Part IV of the PSA 1993. I will then consider the rules which apply to individual rule-based transfers. I will not consider how the rules apply to bulk transfers out in view of the agreement of the parties that I should not do so.

The No 1 Scheme Rules with effect from 1 May 2012

184. The relevant rules of the No 1 Scheme Rules with effect from 1 May 2012 are General Rule 11.2 and Special Rules B-G at Special Rule 9.3. These rules provide:

General Rule 11.2

"***Transfers to other pension schemes and arrangements***

This General Rule applies separately to each Section (but, for the avoidance of doubt, does not apply in respect of a transfer from one Section to the other – see General Rule 11.3 (transfers between Sections) instead).

Instead of providing benefits under the Scheme for any person or persons, the Trustee may transfer such assets as it considers appropriate from the relevant Section (after considering advice from the Actuary) to another pension scheme or arrangement or to an insurance company, so that benefits will be provided under the other scheme or arrangement, or by the insurance company, for the person or persons concerned. If the Principal Employer agrees, the Trustee may transfer assets in respect of part only of a person's benefits under the relevant Section.

The transfer must comply with the Contracting-out and Preservation Laws. It must also be a "recognised transfer" under Section 169 of the Finance Act 2004 (recognised transfers)."

Special Rules B-G at Special Rule 9.3

"***Right to transfer or "buy-out"***

A Member who leaves Service with a preserved pension at least a year before Normal Retirement Date can require the Trustee to use the cash equivalent of his or her benefits (including death benefits) to buy one or more annuities, or to acquire rights under another occupational pension scheme or a personal pension scheme, in accordance with the Transfer Value Laws."

185. I will first consider Special Rule 9.3 which refers to the Transfer Value Laws. This phrase is defined in the Rules as referring to the provisions of Chapter IV of Part IV of the PSA 1993. Special Rule 9.3 essentially reflects the rights conferred by these statutory provisions. Special Rule 9.3 does not contain further provisions as to the nature of the obligation on the Trustee nor as to the circumstances in which the Trustee is discharged. I have already expressed my conclusion as to the meaning and effect of the cash equivalent legislation in the period of time covered by this Rule, which is the period from 1 May 2012 onwards, both as regards the nature of the obligation of the Trustee and as to the fact that the Trustee is not discharged if it makes an inadequate transfer payment.

186. I will now refer to the rule which applies to an individual rule-based transfer out.

187. General Rule 11.2 refers to the Preservation Laws which is defined in the Rules to refer to Chapter I of Part IV of the PSA 1993, which includes section 73. General Rule 11.2 specifically states that the trustee may transfer assets in respect of part only of a person's benefits but this can only be done "if the Principal Employer agrees".

188. At this stage, I am dealing with the possible application of General Rule 11.2 to individual transfers rather than bulk transfers. I can see that the Principal Employer might have been involved to some extent in a bulk transfer but it does not seem likely

that the Principal Employer would have been involved with individual transfers, which did not come within the cash equivalent legislation but which were dealt with under this Rule. Although I do not have specific evidence about any such case which involved the Principal Employer, I will deal with this Rule on the basis that what the member and the Trustee intended was that there would be a transfer out in relation to all of the member's benefits but when the Trustee assessed what transfer of assets there ought to be to a receiving scheme, the Trustee did not take into account the fact that the member was entitled to equalised benefits. I will proceed on the basis that such a case did not involve an agreement by the Principal Employer to a transfer of part of the member's benefits.

189. The Trustee's power under General Rule 11.2 permits the Trustee to transfer such assets "as it considers appropriate". What is the position if the assets considered to be appropriate, in particular, the amount of the transfer payment was assessed without regard to the member's right to equalised benefits?

190. In answer to that question, Mr Rowley submitted that the decision of the Trustee as to the amount of the transfer payment was a valid decision which may not be disregarded or set aside by the court. Alternatively, he would submit that it was at most a voidable decision which has not been set aside. Mr Short submitted that such a decision was void.

191. Whether a particular decision on the amount of the transfer payment was valid or voidable or void ought to involve the court in a detailed assessment of what the decision was and how it was made. I am not asked to carry out that exercise in any particular case. Instead, I am asked to proceed on the basis that all that is currently known about such a decision is that, when it was made, the Trustee left out of account the member's right to equalised benefits. Beyond that, I do not know what consideration the Trustee gave to the assessment of the appropriate transfer payment.

192. It is now established by the decision of the Supreme Court in *Pitt v Holt* [2013] 1 AC 108 that a decision made by a trustee which involves "inadequate deliberation", for example, by failing to consider relevant matters, is voidable, rather than void, but only voidable if the decision involved a breach of duty by the trustee.

193. In the present case, on the assumption that the Trustee did fail to consider relevant matters, its decision would be voidable but only if the decision involved a breach of duty by the Trustee. Mr Short submitted that I could find that such a decision did involve a breach of duty. Mr Rowley submitted that the question whether something involved a breach of duty was a fact sensitive exercise and I could not decide that question on the material before me, where I have not been given relevant evidence as to the circumstances in which a particular decision was made. I agree that it is not appropriate, given the form of these proceedings, to rule on whether a particular decision of this kind involved a breach of duty by the Trustee.

194. In the absence of a finding of a breach of duty, a decision by a trustee will be valid even if it involved inadequate deliberation. Further, even if such a decision were voidable, it is valid and binding until set aside on the application of, normally, an aggrieved member. There is no application before me to set aside such a decision. If

there were to be such an application and the decision was held to be voidable then the court would have to consider all defences raised to the application to set aside the decision and whether the court ought to set the decision aside.

195. Mr Short sought to escape from this result by contending that the relevant decision was void. He cited *Pitt v Holt* at [88] where Lord Walker of Gestingthorpe JSC referred to *In re Beloved Wilkes Charity* (1851) 3 Mac & G 440 at 448 and to *Kerr v British Leyland (Staff) Trustees Ltd* (1986) [2001] WTLR 1071. Mr Short did not take me to *Kerr v British Leyland* but I have considered it. It is difficult to get much of general principle out of that case and certainly not more than that which Lord Walker said at [88]. What Lord Walker seems to be saying, by reference to that decision, is that there can be cases where the trustee's power only arises in particular circumstances and the power may be expressed in terms whereby the court can decide whether those circumstances exist with the result that the trustee's own assessment of whether those circumstances exist is not binding on the parties or the court. However, General Rule 11.2 is not expressed in terms of that sort.

196. Mr Short also referred to *Harris v Shuttleworth* [1994] Pens LR 47 at [36] where Glidewell LJ stated that when a trustee made a decision as to the operation of the rules of a pension scheme, the trustee had to ask itself the right question. That proposition is not in dispute. However, I do not see that that decision discussed whether a failure to ask the right question leads to a decision which is void rather than voidable. In most cases, failure to ask the right question would involve inadequate deliberation which would mean that the decision would be voidable if it involved a breach of duty.

197. This reasoning produces the result that at the present time in this litigation I must proceed on the basis that the Trustee made a decision pursuant to General Rule 11.2 as to the amount of the transfer payment and that decision was an effective decision for the purposes of that Rule. Therefore, the Trustee has validly exercised the power under that Rule. The Rule provides that the making of the transfer payment is "instead of providing benefits under the Scheme". It follows that while the decision as to the amount of transfer payment remains effective and is not set aside, the member is not entitled to claim any benefits under the Scheme. Further, as the power conferred by the Rule has been exercised, it is not open to the member to require the Trustee to reconsider the exercise of that power and to exercise it again and, on this occasion, to arrive at a different decision as to what transfer payment is appropriate.

The No 1 Scheme Rules with effect from 1 July 1989

198. The relevant rules of the No 1 Scheme Rules with effect from 1 July 1989 are Special Rules II-V at Special Rules 10C, 10E and 16E. These Rules provide:

Special Rule 10C

"***Right to transfer or "buy-out"***

A Member with a preserved pension who ceases to be in Pensionable Service at least a year before Normal Retirement Date has a right to require the Trustees to use the cash equivalent of his preserved benefit in whichever of the following ways (or combination of them) he chooses:-

(a) to buy one or more "buy-out" policies from one or more Insurance Companies chosen by the Member and willing to accept payment on account of him. The policies must satisfy the conditions of Rule 10D below; or

(b) to acquire rights under another scheme whose trustees or managers are able and willing to accept him. The receiving scheme must either:-

(1) have Revenue Approval;

(2) be a statutory scheme as defined in Section 612(1) of the Income and Corporation Taxes Act 1988;

(3) be a personal pension scheme approved under Chapter IV of Part XIV of the Income and Corporation Taxes Act 1988; or

(4) be approved by the Inland Revenue for this purpose.

The transfer must satisfy the conditions of Rule 10E below.

The Member can exercise this right by application in writing to the Trustees at any time up to a year before Normal Retirement Date (or, if later, 6 months after he leaves).

The cash equivalent will be calculated by the Trustees on the basis of advice from the Scheme Actuary which complies with the Transfer Value Laws.

If a Member with a preserved pension is too close to Normal Retirement Date to qualify automatically as above, the Trustees have a discretion to allow him to make a choice as described in this Rule. They may impose such conditions as they consider appropriate.

Where the Trustees have used the cash equivalent of the Member's preserved benefit as described in this Rule, they will be discharged from any obligation to provide benefits to which the cash equivalent related.

(See also Rule 16E and Appendix "A" and Rule 16F)."

Special Rule 10E

"***Conditions for transfer payments***

The Trustees may transfer a Member's accrued rights to GMP to another scheme only if the receiving scheme is either: -

(1) a Contracted-out scheme;

(2) a scheme that was formerly Contracted-out and which the Occupational Pensions Board is under a duty to supervise in accordance with Section 49 of the Social Security Pensions Act 1975; or

(3) an appropriate personal pension scheme.

If the receiving scheme is, or was, Contracted-out on a salary related basis, it must accept liability for GMPs. Otherwise it must use the value of the Member's accrued

rights to GMP to provide money purchase benefits for or in respect of him. Unless the receiving scheme is a personal pension scheme, the Member must have entered employment with an employer that contributes to it or, if it is a "Section 49 scheme", used to contribute to it. If the receiving scheme is a "Section 49 scheme", the transfer must be approved by the Occupational Pensions Board.

If the above conditions are not satisfied, the transfer must be of the cash equivalent of only that part of the Member's benefit that exceeds GMP. If the receiving scheme is an occupational pension scheme which is not a Contracted-out scheme, or if it is a personal pension scheme which is not an appropriate scheme, and if its trustees or managers are willing to have transferred to it only the cash equivalent of that part of the Member's benefit that exceeds GMPs, the Trustees will remain liable for GMP.

However, they may discharge this liability by means of a "buy-out" policy which satisfies the requirements of Rule l0D, or by paying a transfer premium under the Social Security Pensions Act 1975. In any other case, the Trustees cannot be required to make a transfer payment unless the Member also requires them to use his accrued rights to GMP in one of the ways described in Rule l0C.

Special Rule 16E

"***Trustees' discretion to transfer-out***

The Trustees may transfer such assets as they determine to be appropriate (after considering the advice of the Scheme Actuary) to another scheme so that benefits will be provided under the other scheme for any person or persons who would otherwise have received benefits under the Scheme. The receiving scheme must be of a type specified in (b) of Rule 10C.

The receipt of the accepting trustees or managers will discharge the Trustees from liability in respect of the persons concerned. The Trustees will inform the accepting trustees or managers of the amount of Member's contributions and any restrictions on their refund.

In exercising their powers under this Rule, the Trustees will comply with any undertakings they give to the Inland Revenue.

If a Member has been Contracted-out, a transfer payment will only discharge the Trustees from liability to pay GMPs in the situations permitted under the Contracting-out Laws from time to time. The situations permitted under these Laws at the date of these Rules are set out in Appendix "A".

Where a Member's consent is not obtained the Trustees must be reasonably satisfied that the transfer payment is at least equal in value to the Member's entitlement under the Rules."

199. Special Rules 10C and 10E reflect the cash equivalent legislation in force at the date of the Rules. Special Rule 10C refers to the Transfer Value Laws which is defined in the Rules as referring to the law as to transfer values introduced by the Social Security Act 1985, i.e. Schedule 1A to the Social Security Pensions Act 1975.

200. Special Rule 10C provides for the member to exercise his right under that Rule by applying to the Trustee. The Rule provides for the cash equivalent to be calculated by

the Trustee on advice from the scheme actuary which complies with the Transfer Value Laws. The Rule does not provide for the Trustee's calculations to be final and binding on the relevant member. In this case, the Trustee disregarded its obligation to equalise benefits as between male and female members. Under the cash equivalent legislation in the period from 1990 to 1997, the Trustee is obliged to redo the calculation and to pay a top-up to the receiving scheme. Under the cash equivalent legislation for the period from 1997 onwards, the Trustee can be ordered to redo the calculation pursuant to regulation 9(5) of the 1996 Regulations and to pay a top-up to the receiving scheme.

201. Special Rule 10C provides that when the Trustee has used the cash equivalent of the member's benefits, the Trustee will be discharged from any obligation to provide benefits to which the cash equivalent related. When the Trustee has made the top-up payment referred to above, the Trustee is discharged from the obligation to provide benefits.

202. Special Rule 10C essentially reflects the rights conferred by the Chapter IV of Part IV of the PSA 1993 at the relevant time (1989 to 2012). I have already expressed my conclusions as to the meaning and effect of that legislation in the periods of time covered by this Rule, which are the periods from 1990 to 1997, from 1997 to 2008 and from 2008 onwards, both as regards the nature of the obligation of the Trustee and as to the fact that the Trustee is not discharged if it makes an inadequate transfer payment.

203. I will now refer to the rule which applies to an individual rule-based transfer out.

204. The relevant rule is Special Rule 16E. The relevant parts of that Rule are the words conferring a power on the Trustee to transfer such assets "as they determine to be appropriate" and the provision that the receipt of the trustee or manager of the receiving scheme "will discharge the Trustees from liability in respect of the persons concerned". I note that the last part of Special Rule 16E which refers to the Trustee being reasonably satisfied that the transfer payment is at least equal in value to the member's entitlement under the Scheme does not apply to a transfer with the consent of the member.

205. The position in relation to Special Rule 16E is essentially the same, and for the same reasons, as I described when dealing with General Rule 11.2 of the Rules of this Scheme which were in force from 1 May 2012.

The No 2 Scheme

206. The relevant No 2 Scheme Rules with effect from 31 December 1991 are General Rule 55.1 to 55.5 and General Rule 56. These Rules provide:

General Rule 55.1

"Arrangements to which transfers can be made

At the request in writing of a Member the Trustee may (and shall if the Member is exercising his right to a cash equivalent under the Pensions Act) apply the Transfer Value (calculated as provided below) in one or more of the following ways:

(a) as a transfer value to secure transfer credits under an occupational pension scheme approved under Chapter I, Part XIV, Taxes Act;

(b) as consideration for a contract with an Insurance Company to secure benefits in the name of the Member or, if appropriate, his spouse or other beneficiary;

(c) as a transfer value to a Personal Pension Scheme of which the Member is a member;

(d) as a transfer value to such other recipient as may be approved for this purpose (whether generally or in any particular case) by the Inland Revenue."

General Rule 55.2

"Transfer Value

The Transfer Value shall be equal to:

(a) if:

(i) the Member ceases to be in Pensionable Service more than one year before NRD,

(ii) the Member applies in writing to exercise the option conferred on him by Chapter IV, Part IV, Pensions Act on or before the date which falls on whichever is the later of:

(aa) one year before NRD, and

(bb) six months after the date his Pensionable Service ceases,

(iii) the Member does not withdraw that application and

(iv) the Member's pension, or benefits in lieu of all or any part of it, have not become payable,

the cash equivalent calculated and verified in the manner prescribed by the Pensions Act but subject to the provisions for increases or reduction as provided in that Act;

(b) in any other case, such amount as the Trustee is satisfied equals the value to the benefits which have accrued to or in respect of the Member under the Scheme after effect has been given to the Revaluation Requirements;

or, in either case, such greater amount as the Trustee decides and the Principal Company approves."

General Rule 55.3

"**Contracting-out**

A Transfer Value shall only be paid in respect of the liability for a GMP under Rule 53 to:

(a) the trustees or managers of an occupational pension scheme which is established in the United Kingdom and which is a contracted-out scheme and then only in the circumstances and on the conditions specified in s.20 or s.50, Pensions Act; or

(b) a Personal Pension Scheme which is an appropriate scheme {within the meaning of s.7, Pensions Act); or

(c) an lnsurance Company; or

(d) any other recipient approved (whether generally or in any particular case) for this purpose by the Occupational Pensions Board.

A transfer shall be made under this Rule in respect of a Member only in circumstances where the payment of the transfer will extinguish the liability (if any) in respect of that Member for the GMP under Rule 53 unless the transfer is being made to an occupational pension scheme which is not a contracted-out scheme or to a Personal Pension Scheme which is not of a kind described in (b) above. If the transfer does nor extinguish the liability for the GMP then (i) the GMP will continue to be payable under the Scheme unless the liability is discharged by the payment of a state scheme premium or otherwise as permitted under the Contracting-out Requirements and (ii) if the Transfer Value is to be calculated pursuant to Rule 55.2(b) the amount which would otherwise be the Transfer Value shall be reduced by the amount which the Trustee determines is required to meet the liability for the GMP."

General Rule 55.4

"**Conditions**

Notwithstanding the foregoing provisions of this Rule:

(a) nothing in this Rule shall impose a duty on the Trustee to apply a Transfer Value in circumstances where such a duty is not imposed on them under the Pensions Act or to provide a Transfer Value of an amount greater than that arising under that Act;

(b) any application of a Transfer Value under this Rule shall be subject to the Overriding Requirements;

(c) when making any transfer to another occupational pension scheme the Trustee shall (i) ascertain from the administrator of the receiving scheme the section and the Act of Parliament under which the receiving scheme is approved if it be so approved and (ii) notify to the administrator of the receiving scheme of (aa) the amount of the contributions (and any interest thereon) paid by the Member to the Scheme and (bb) when required by Revenue Approval in the case of a Member who is not subject to the Earnings Cap, the amount which may be paid by way of commutation of pension and

(cc) any restrictions applicable to the Transfer Value (including any notified to the Trustee on a transfer being made to the Scheme);

(d) when the Transfer Value is to be applied as consideration for a contract with an Insurance Company:

(i) if the Member is exercising the option conferred on him under Chapter IV, Part IV, Pensions Act, the contract shall comply with the prescribed requirements referred to in paragraph 13(2)(b) of that Schedule; and

(ii) in any other case, the contract shall only contain provisions (including limitations on assignments and surrender) consistent with Revenue Approval, the Preservation Requirements and, where GMPs are included, the Contracting-out Requirements;

but otherwise shall be on such terms and conditions as the Insurance Company agrees with the Member or the Trustee;

(e) where a transfer is to be made to a Personal Pension Scheme, a FSAVC Scheme or an Insurance Company, the Trustee shall supply to the trustees or managers or administrators of that Personal Pension Scheme or FSAVC Scheme or to the Insurance Company (as applicable) such certificates (if any) as the Trustee may be required to give as a condition of Revenue Approval; and

(f) the provisions of this Rule shall be subject to any undertakings to the Inland Revenue."

General Rule 55.5

"***Discharge***

In any case where:

(a) a Member has exercised the option conferred on him by Chapter IV, Part IV, Pensions Act or by this Rule, and

(b) the Trustee has done what is needed to carry out what the Member requires,

the Trustee shall, subject to Rule 55.3, be discharged from any obligation to provide benefits to or in respect of the Member. The Trustee shall, so far as the law permits, also receive such a discharge if in any respect the Trustee has deviated from the requirements of Chapter IV, Part IV, Pensions Act or the foregoing provisions of this Rule but the interests of the Member have not been adversely and materially affected or the Member consented to such deviation, subject always to Revenue Approval. Furthermore, the Trustee shall not be under any liability as to the application of any Transfer Value paid in accordance with this Rule."

General Rule 56

"***Group transfers-out***

Subject to any undertakings given to the Inland Revenue, the Trustee may:-

(a) with the consent of the Members concerned, or

(b) in the circumstances described in regulation 12 of The Occupational Pension Schemes (Preservation of Benefit) Regulations 1991, without the consent of the Members concerned,

pay a transfer in respect of one or more Members or other persons (the "Transferring Beneficiaries") to the trustees or managers of another scheme (the "Receiving Scheme") which is approved under Chapter I, Part XIV, Taxes Act or which is approved for the purposes of this Rule by the Inland Revenue. The transfer shall be of such amount (whether in cash or assets) as the Trustee shall determine as comparing reasonably in value with the benefits in lieu of which the transfer is being made or such greater amount as the Trustee decides and the Principal Company approves.

In connection with any such transfer:

(i) the Trustee shall ascertain under which Act of Parliament and section thereof the Receiving Scheme is approved by the Inland Revenue if it be so approved;

(ii) the Trustee shall also in relation to each Member who is one of the Transferring Beneficiaries notify the trustees or managers of the Receiving Scheme of (aa) the amount of contributions (and any interest thereon) paid by the Member to the Scheme, (bb) when required by Revenue Approval in the case of a Member who is not subject to the Earnings Cap, the amount which may be paid by way of commutation of pension and (cc) any restrictions applicable to the Member and the transfer (including any notified to the Trustee on a transfer being made to the Scheme); and

(iii) where such transfer relates to benefits referable to contracted-out employment, such transfer shall be made only in the circumstances described in, and on the conditions specified in, s.20 or 50, as applicable, of the Pensions Act and The Contracting-out (Transfer) Regulations 1985.

If a transfer is made in accordance with the foregoing provisions of this Rule, no further benefits shall be payable under the Scheme to or in respect of the Transferring Beneficiaries unless the transfer is being made to an arrangement which is not a contracted-out scheme in which event the GMPs shall continue to be payable under the Scheme (the liability for which the Trustee may discharge by paying a State scheme premium or otherwise as permitted under the Contracting-out Requirements). Furthermore, the Trustee shall not be under any liability as to the application of the cash or assets so transferred."

207. General Rule 55 refers to the Pensions Act which was defined in the Rules as referring to the PSA 1993. General Rule 55.4 refers to the Overriding Requirements which phrase is defined to include the Preservation Requirements (where they are applicable) which is itself defined as referring to the preservation requirements of the PSA 1993.

208. General Rule 55.1 provides that where the member is exercising his right under the cash equivalent legislation, the Trustee is required to apply the Transfer Value in a specified way. General Rule 55.2(a) defines the Transfer Value in such a case as being the cash equivalent calculated and verified in the manner prescribed by the PSA 1993 but subject to the provisions for increases and reductions as provided in the PSA 1993. Thus, the Rules in this respect reflect the position under the cash equivalent legislation.

209. General Rule 55.5 provides for a discharge of the Trustee in two circumstances. The main provision applies where the Trustee has "done what is needed to carry out what the Member requires". This provision potentially applies where a member has exercised the right to a cash equivalent under Chapter IV of Part IV of the PSA 1993. The Trustee is discharged if the Trustee "has done what is needed to carry out what the Member requires". When considering the cash equivalent legislation, I explained what the member was entitled to and what the Trustee was obliged to do and why the Trustee was not discharged under section 99 of the PSA 1993 until the Trustee had made a top-up payment to the receiving scheme. The same reasoning applies to the main discharge provision in General Rule 55.5.

210. The alternative provision applies where the Trustee has deviated from the relevant requirements but the interests of the member have not been adversely and materially affected or where the member consents to the deviation. Subject to a possible case of de minimis, the member will be adversely and materially affected by a deviation which results in the Trustee making a top-up payment which is less than the correctly calculated cash equivalent of the member's benefits. Further, this alternative provision only applies "so far as the law permits". Pursuant to section 129 of the PSA 1993, the cash equivalent legislation overrides any rule of a scheme to the extent that the rule conflicts with the legislation. Accordingly, the law does not permit this alternative discharge provision to take away a right conferred on a member by the cash equivalent legislation. This alternative discharge provision also refers to a case where the member has consented to the deviation. I will consider later in this judgment whether a member did agree to give the Trustee a discharge in relation to its obligation to make a top-up payment but apart from that possibility it was not argued that there were cases where a member consented to a deviation within General Rule 55.5.

211. I will now refer to the rule which applies to an individual rule-based transfer out.

212. General Rule 55.1 confers on the Trustee a power ("may") to apply the Transfer Value by acquiring for the member rights in various ways such as acquiring transfer credits under an occupational pension scheme. The relevant part of the definition of Transfer Value in General Rule 55.2 is in Rule 55.2(b) which refers to "such amount as the Trustee is satisfied equals the value to (*sic*) the benefits which have accrued to or in respect of the Member under the Scheme".

213. Where the Trustee has assessed the amount of the cash equivalent but there had been inadequate deliberation by reason of the Trustee leaving out of account the member's right to equalised benefits, the position as regards the Trustee's assessment is the same, and for the same reasons, as I described when considering General Rule 11.2 of

the Lloyds No 1 Scheme with effect from 1 May 2012. The present position is that the Trustee's assessment is an effective assessment for the purposes of General Rule 55.2(b).

214. In those circumstances, it is necessary to consider the discharge provisions in General Rule 55.5. The main discharge provision applies where the Trustee has done what is needed to carry out what the member required. In a case where the Trustee has made a valid and effective assessment, pursuant to General Rule 55.2(b), of the amount of the transfer payment and has transferred that sum to a receiving scheme, I consider that the Trustee has done what the member required. It is therefore not necessary to consider the alternative discharge provision which applies where the Trustee has deviated from the Rules.

The HBOS Scheme

215. The relevant Rules of the HBOS Scheme Rules with effect from 15 May 2006 (as amended) are General Rule 9.1, 16.6 and 19.2 (although General Rule 19.2 was amended with effect from 6 April 2015). These Rules provide:

General 9.1

> *"**Right to transfer or buy-out***
>
> *A member who leaves Service with a preserved pension at least a year before Normal Retirement Date can require the Trustees to use the cash equivalent of his or her benefits to buy one or more annuities, or to acquire rights under another pension scheme or arrangement, in accordance with the Transfer Value Laws."*

General Rule 16.6

> ***"Contracting-out***
>
> *The Trustees will operate the Scheme in accordance with the Contracting-out Laws that apply to salary-related contracted-out schemes. These Rules will be treated as including Rules to the same effect as any rule that must be included for the Scheme to be contracted-out in relation to a Member's Service.*
>
> *This Rule overrides all other provisions of the Scheme, except those that are in accordance with the PSA 1993."*

General Rule 19.2

> *"**Transfers to other pension schemes and arrangements***
> *Instead of providing benefits under the Scheme in respect of any person, the Trustees may transfer assets to another pension scheme or arrangement (including any person who is permitted by the Financial Services and Markets Act 2000 to effect or carry out contracts of long-term insurance), so that benefits will be provided under the other scheme or arrangement in respect of the person concerned. If the Trustees so decide, a Member may take a transfer of their additional voluntary contributions separately from their other benefits in the Scheme.*

> *HBOS will decide the amount of the transfer payment after considering advice from the Actuary. However, the amount will not exceed the proportionate share of the Scheme's assets in respect of that person's benefits, unless the Trustees agree by a Qualified Majority to the transfer of a larger amount.*
>
> *The transfer must comply with the Contracting-out and Preservation Laws. It must also be a "recognised transfer" under Section 169 of the Finance Act 2004 (recognised transfers).*"

216. General Rule 9.1 refers to the Transfer Value Laws which phrase is defined in the Rules as referring to the laws on transfer values in Chapter IV of Part IV of the PSA 1993. General Rule 9.1 reflects the provisions of Chapter IV of Part IV of the PSA 1993.

217. I will now refer to the rule which applies to an individual rule-based transfer out.

218. General Rule 19.2 refers to the Preservation Laws which phrase is defined in the Rules as referring to the laws on preservation of benefit in Chapter I of Part IV of the PSA 1993. General Rule 19.2 provides that HBOS (i.e. HBOS plc) rather than the Trustee will decide the amount of the transfer payment after considering advice from the Actuary. There was argument as to the nature of this power conferred on HBOS. However, assuming that HBOS is to be considered as a fiduciary in relation to the exercise of this power, the position of a decision by HBOS would be essentially the same as the decision of the Trustee pursuant to General Rule 11.2 of the No 1 Scheme which I considered earlier. The position at present therefore is that the decision by HBOS is a valid and effective decision as to the amount of the transfer payment pursuant to General Rule 19.2.

219. General Rule 19.2 provides that, in the event of transfer within General Rule 19.2, benefits will be provided by the other scheme or arrangement "instead of" the Trustee providing benefits under the transferring scheme. This means that, following the transfer, the Trustee is not obliged to provide benefits under the Scheme. Further, as the power conferred on HBOS by General Rule 19.2 has been exercised, it is not open to the member to require HBOS to reconsider the exercise of that power and to exercise it again and, on this occasion, to arrive at a different decision as to what transfer payment is appropriate.

Other arguments as to the Rules

220. Mr Short advanced a large number of other arguments as to why the Rules of the various Schemes could not be effective to discharge the Trustee from its liability for having disregarded its obligation to equalise benefits for male and female members, even if the Rules purported to provide expressly for such a discharge. It was said that an express discharge of liability of the kind I have just referred to would:

    i) be contrary to Article 157;

    ii) be contrary to the equal treatment rule formerly in section 65 of the PA 1995;

iii) be contrary to the sex equality rule in section 67 of the Equality Act 2010;

iv) be overridden by section 144(1) of the Equality Act 2010 (on the basis that the various Rules were a "contract" within that subsection);

v) be contrary to the rule of construction that a person is not entitled to take advantage of his own wrong.

221. In relation to transfers which were made under the cash equivalent legislation I have held that the members remain entitled to top-up payments and the Trustee is not discharged from its obligations in that respect. As regards transfers which were bulk transfers made under Chapter I of Part IV of the PSA 1993, I have not been asked to deal with those transfers. As regards individual rule-based transfers, it is agreed that the relevant rules conform to Chapter I of Part IV of the PSA 1993. As regards those individual transfers, the decisions made by the Trustee (or in the case of one Scheme, by HBOS) as to the amount of the transfer payment are at present valid and effective decisions. It may be open to an aggrieved member to apply to the court for an order setting aside such a decision on the ground that there was inadequate deliberation amounting to a breach of duty by the Trustee (or HBOS). The court could then determine what order should be made. If the earlier decision were set aside, then a fresh decision ought to be made having regard to the member's right to equalised benefits.

222. Although Mr Short made general submissions to the effect that a discharge provided by the Rules could not be effective under the various principles referred to above he did not explain how those principles would allow the court to disregard a valid and effective decision as to the amount of the transfer payment nor how the ability of a court to set aside a voidable decision would not comply with those principles. In these circumstances, I will proceed on the basis that the decisions made in relation to the transfer payments in the case of individual rule-based transfers are at present valid and effective with the result that the member takes the benefit of the transfer payment instead of retaining rights under the transferring Schemes.

223. Having analysed the legislation and the rules which deal with the various kinds of transfers out which have occurred in this case, I will now address the specific Issues which have been raised. I will leave Issues 1 to 3 to the end of this discussion and will otherwise take the issues in turn.

PART V: THE ISSUES CONSIDERED

Issues 4(a), (b), (c) and (d)

224. Issues 4(a), (b), (c) and (d) are:

> **4. If the Trustee is obliged to equalise in respect of transfers out, what does the Trustee's obligation require, and (without prejudice to the generality of that question):**
>
> **a.**

> **(i) Is the Trustee obliged in principle to make an equalisation top-up payment to the trustees or managers of the scheme which directly received the transfer from the Scheme; and**
>
> **(ii) if the answer to (i) would otherwise be yes, is that still the case if the member has subsequently transferred out of, or otherwise ceased to be a member of, that receiving scheme, or in those circumstances should the payment be made to the member's current or most recent scheme or pension arrangement?**
>
> **b. Alternatively,:**
>
> **i. is the Trustee obliged to provide a residual benefit under the relevant Scheme;**
>
> **ii. does the Trustee have the power to choose whether to provide a residual benefit or to make a top-up payment?**
>
> **c. Is any obligation or power to provide a residual benefit unconditional or does it only arise if the Trustee is unable to make a top-up payment (e.g. because the receiving scheme is unwilling to accept such a payment or no longer exists)?**
>
> **d. If the answer to 4(a) is yes but the Trustee is unable to make an equalisation top-up payment to the trustees or managers of the relevant scheme or pension arrangement (for example, because they will not accept such payment), is the Trustee obliged or entitled to make a payment of the relevant amount directly to the transferred-out member?**

225. In view of my conclusions as to the effect of the Rules of the various Schemes in relation to individual rule-based transfers and in view of the parties' agreement that I need not deal with bulk transfers out, these Issues only arise in relation to transfers made under the cash equivalent legislation.

226. Issue 4(a)(i) and Issue 4(b)(i) ask whether the Trustee is obliged to make an equalisation top-up payment to the receiving scheme or to provide a residual benefit to the member under the transferring Scheme. In relation to these Issues, the Banks contended that the Trustee's obligation is to make a top-up payment (although they submitted in relation to Issue 7 that the Trustee has been discharged from this obligation). The transferring members contend that the Trustee's obligation is to provide "a residual benefit" to the transferring member. The transferring members use the phrase "a residual benefit" rather than "a residual pension". They say that the starting point is that the member's entitlement is to a residual pension but they add that it would be open to the Trustee to convert that right into a lump sum which could be paid as an authorised payment in compliance with the provisions as to authorised payments in the Finance Act 2004.

227. Earlier in this judgment, I analysed the cash equivalent legislation in detail. I reached the conclusions that:

i) in relation to the period from 1990 to 1997, the Trustee was in breach of duty under the PSA 1993 by failing to pay to the receiving scheme a correctly calculated cash equivalent so that the Trustee can now be ordered by the court to top-up the earlier underpayment which it made; in those circumstances, the Trustee remains able, belatedly, to perform its duty;

ii) in relation to the period from 1997 onwards, the Trustee was obliged, pursuant to regulation 9(5) of the 1996 Regulations, to recalculate the guaranteed cash equivalent in the original statement of entitlement; the member can seek an order from the court that the Trustee perform that obligation and then to pay to the receiving scheme a top-up of the earlier underpayment which it made; in those circumstances, the Trustee remains able, belatedly, to perform its duty.

228. Accordingly, the answer to Issue 4(a)(i) is "yes" and the answer to Issue 4(b)(i) is "no".

229. Issue 4(b)(ii) asks whether the Trustee has the power to choose whether to provide a residual benefit or to make a top-up payment. The answer is: no. The Trustee had a duty to calculate the cash equivalent correctly, it broke that duty and it can now be ordered to make a top-up payment. The Trustee is not able to require a member to accept a residual benefit. Conversely, a member is not entitled to require the Trustee to provide a residual benefit rather than a top-up payment. The Trustee is entitled to perform the duty on it and not provide an alternative. It would be open to the Trustee and a member to agree an alternative to the Trustee performing its duty to make a top-up payment.

The special cases referred to in Issue 4 (a), (c) and (d)

230. The answers I have given to Issue 4(a)(i) and 4(b)(i) and (ii) will cover the case where the transferring member has become a member of a receiving scheme and has remained a member of that scheme up until the point at which the Trustee is required to make a top-up payment to that receiving scheme and the receiving scheme is willing to accept the top-up payment.

231. Other sub-issues in Issue 4 refer to other possible circumstances and ask the court to identify the obligations or the powers of the Trustee in such circumstances. Issue 4(a)(ii) asks what is to happen: "if the member has subsequently transferred out of, or otherwise ceased to be a member of, that receiving scheme" and "should the payment be made to the member's current or most recent scheme or pension arrangement"? The answer suggested by Mr Short is that the Trustee should make the top-up payment to the member's current or, as a matter of last resort, to the member's most recent scheme or pension arrangement. The answer suggested by Mr Rowley is that, if the transferring member has ceased to be a member of the receiving scheme, then the Trustee is not obliged to make a top-up payment to that scheme or to any subsequent scheme to which the member later transferred.

232. Issue 4(c) asks the question whether any obligation or power to provide a residual benefit only arises if the Trustee is unable to make a top-up payment, e.g. because the receiving scheme is unwilling to accept such a payment or no longer exists. The Banks' position is that there is no obligation or power to provide a residual benefit to the transferring member but if they are wrong about that, then the same only arises where the Trustee is unable to perform its obligation to make a top-up payment. Mr Short had argued that the Trustee was obliged to provide a residual benefit in any event, and not to make a top-up payment, but, in view of my earlier decision about the obligation to make a top-up payment, he would say that the Trustee is obliged to provide a residual benefit if it could not make a top-up payment.

233. Issue 4(d) asks: "if the Trustee is unable to make an equalisation top-up payment to the trustees or managers of the relevant scheme or pension arrangement (for example, because they will not accept such payment), is the Trustee obliged or entitled to make a payment of the relevant amount directly to the transferred-out member?" Mr Short says that in such a case the Trustee should pay a residual pension but the Trustee can make a top-up payment to the transferring member rather than another scheme if the transferring member consents. Mr Rowley says that the Trustee has no such obligation but in the alternative he says that the Trustee could make the top-up payment directly to the transferring member.

234. It can be seen that the various answers given to these questions refer to the possibilities that:

    i) the Trustee does not make a top-up payment;

    ii) the Trustee makes a top-up payment to the original receiving scheme even though the transferring member is no longer a member of that scheme;

    iii) the Trustee makes a top-up payment to the member's current scheme or most recent scheme or pension arrangement;

    iv) the Trustee makes a top-up payment to the transferring member direct; or

    v) the Trustee provides a residual benefit to the transferring member.

235. The submissions made to me in relation to these various possibilities did not go much beyond an identification of the result contended for and then an assertion that that was the right result. I explained earlier that a member is entitled to require the Trustee to make a top-up payment to the receiving scheme and the member is entitled to apply to the court for an order requiring the Trustee to make that top-up payment. The various circumstances referred to in Issue 4 are where the member has ceased to be a member of the receiving scheme or where the Trustee is not able to make a top-up payment because the receiving scheme (for some reason) will not accept a top-up payment.

236. The cash equivalent legislation does not provide an answer to these further questions arising under Issue 4. The outcome in a particular case would therefore seem to turn on what the parties might agree, or what a court might order, in those circumstances. It seems likely that if those circumstances did arise in a particular case, the parties would agree on a solution to the difficulty. It seems likely that a member would be

prepared to agree a solution under which he received something of benefit and the solution would be influenced by the preferences of the individual member rather than by any result which is mandated by the cash equivalent legislation.

237. If the parties did not agree on the solution to the difficulty and the member applied to the court for relief, it would emerge in the circumstances described in Issue 4 that an order that the Trustee make a top-up payment to the original receiving scheme might not be a suitable order. I was not addressed on how the court would then go about its task of deciding what order to make. However, I can see that the court might consider making an order for the payment of compensation in lieu of a mandatory order that the Trustee perform its duty.

238. There is a further possible complication which might affect the answers to these questions. That relates to the position of the original receiving scheme or, possibly, a scheme to which the transferring member subsequently transferred. In this case, I have not heard any submissions as to whether the transferring Scheme owed an obligation to the receiving scheme (or any subsequent scheme) to make a top-up payment to it. It is possible that in some circumstances the transferring Scheme did owe such an obligation to the original receiving scheme, either under the statutory provisions or, more probably, pursuant to the arrangements made between the two schemes at the time that the inadequate transfer payment was made. This possibility could give rise to a conflict between any claim made by the transferring member against the transferring Scheme and a claim made by the receiving scheme against the transferring Scheme. The two claims might seek quite different results. If it were to be held that the transferring Scheme was under an obligation to the receiving scheme to make a top-up payment to it, that might rule out some of the other possibilities identified in the course of argument.

239. If the Trustee were faced with competing claims by the transferring member and the original receiving scheme, the Trustee may well wish to interplead and ask the court to determine the position. In those circumstances, the court would have the benefit of the competing arguments and would know the specific circumstances of the rival parties.

240. Having reflected on the possible different answers referred to above and the need to know the circumstances in particular cases, I am not persuaded that I can provide any further answers of general application. However, I can comment that if a transferring member brought proceedings and established that the Trustee had made an inadequate transfer payment in the past, the court would be reluctant to hold that supervening events meant that the Trustee was no longer obliged to make any payment to anyone. In these circumstances, I will leave Issues 4(a)(ii) and 4(c) unanswered. However, the parties did make submissions which might be relevant to Issue 4(d) and I will now refer to those submissions.

241. The parties identified certain rules in three of the Schemes which were said to be potentially relevant to Issue 4(d). The rules identified were General Rule 10.2 of the Lloyds No 1 Scheme (with effect from 1 May 2012), Rule 60.4 of the Lloyds No 2 Scheme and Rule 18.2 of the HBOS Scheme.

242. General Rule 10.2 of the Lloyds No 1 Scheme is headed "Trivial commutation lump sums". General Rule 10.2 contained four paragraphs. The first paragraph referred to a Member or other person giving up benefits under the Scheme in return for a lump sum. Mr Short submitted that, in certain circumstances, the first paragraph of this rule would allow the Trustee to pay a lump sum to a member or other person if the member or other person asked the Trustee to do so. Mr Short suggested that many transferring members would prefer to receive a small lump sum rather than a small residual pension.

243. The second paragraph of General Rule 10.2 referred to the value of a person's benefits and to the Trustee paying a lump sum instead of the person's pensions and other benefits. Mr Short also submitted that in some cases, the second paragraph of that rule allowed the Trustee to pay a lump sum even without the consent of the member or other person. He submitted that in a case which fell within Issue 4(d), it would be likely that the circumstances referred to in the rule would exist. He also explained that in many cases the lump sum would be an authorised payment for the purposes of the Finance Act 2004 either because it would be a lump sum payment after a relevant accretion and/or a trivial commutation payment. The third paragraph of General Rule 10.2 referred to converting pension to a lump sum.

244. Mr Rowley agreed with Mr Short's submissions in relation to the rule and the Finance Act 2004. The Trustee did not make any submissions on these points. Thus, there is no issue between these three parties on these points. I was asked to make a declaration that I was satisfied that these contentions were correct.

245. If the issue had been whether the Trustee had power to pay a lump sum to a Member instead of paying a small residual pension, I consider that General Rule 10.2 would potentially apply as the small residual pension would be a pension or a benefit. However, I am much less clear that General Rule 10.2 can cover the case where the Trustee has failed to make the correct transfer payment to the receiving scheme and now wishes to pay a lump sum to the transferring member instead of making that top-up payment. The rule appears to be dealing with a case where the Member or other person is entitled to receive a benefit and instead of that benefit, the Member or other person is paid a lump sum. That suggests that the benefit itself is not a lump sum. In the present case, it is being suggested that the rule can apply to the right to a top-up payment, which is a lump sum which ought to have been paid to someone other than the transferring member.

246. I did not hear any adversarial argument on this issue. I consider that I ought not to make a declaration on this issue. I am not asked to make a declaration by consent and, in any case, I would not do so as I am not persuaded that the proposed declaration would be correct. I will not make a declaration otherwise than by consent in the absence of being persuaded by adversarial argument. I will simply not rule on the point.

247. Next, I was referred to Rule 60.4 of the Lloyds No 2 Scheme which was headed "Commutation of small pensions on retirement". I was not invited to declare that this Rule in its present form would allow the Trustee to pay a lump sum to a transferring member instead of making a top-up payment to some other scheme although I

understand that the Banks might be prepared to argue that it did. However, I was shown Rule 78 which allows amendments to the scheme and it was suggested that it would be open to the Principal Company, as referred to in Rule 78, with the approval of the Trustee to amend the rules to permit the payment of a lump sum in the type of case envisaged by Issue 4(d).

248. Mr Rowley did not ask me to hear argument as to the true construction of Rule 60.4 and he agreed with Mr Short that the rule could be amended in an appropriate way under Rule 78. In these circumstances, I will not make any declaration as to the meaning of Rule 60.4. There is at present no issue as to the power to amend but, more relevantly, there is no draft of an amended rule to which I could refer in any declaration. Accordingly, I will say nothing further about Rules 60.4 and 78.

249. The third of the rules to which I was referred in relation to Issue 4(d) was Rule 18.2 of the HBOS Scheme which is headed "Trivial commutation lump sums". Mr Short said that this rule would allow the payment of a lump sum in the type of case envisaged by Issue 4(d) where the transferring member consented, but not otherwise. Mr Rowley agreed with this interpretation. I was told that the parties might in the future raise the question whether Rule 18.2 could be amended to remove the requirement of the member's consent and that might give rise to an argument as to whether such an amendment was precluded by being an amendment which would have an adverse effect on the member.

250. The position with Rule 18.2 of the HBOS Scheme might give rise to a similar point to the one I mentioned in relation to the Lloyds No 1 Scheme and indeed an additional point. The rule refers to a Member giving up all of his or her benefits under the Scheme in return for a lump sum. It might be open to argument that the transferring member is not a Member when he has transferred out of the scheme even though he retains an entitlement to require the Trustee to make a top-up payment which for some reason cannot be made. There is the further point as to whether such an entitlement amounts to "benefits under the Scheme". For the same reasons as I gave in relation to General Rule 10.2 of the Lloyds No 1 Scheme it is not appropriate for me in the absence of adversarial argument to make a declaration on those points.

251. As to the suggestion that there might be argument before me in the future as to the power to amend Rule 18.2, I cannot deal with that possibility at this stage but I can comment that if I am asked to deal with that argument I would wish to be satisfied that there would be real utility in doing so and that it was not premature or hypothetical or otherwise of no value for the court to be asked to deal with questions which might arise as to a possible amendment to the rules.

Issue 4(e)

252. Issue 4 (e) asks:

> **"As regards the amount of any top-up payment:**
>
> **(i) Is there a single legally-required way to calculate the top-up payment, and in particular is the Trustee obliged to calculate it:**

> **(1) using the financial and demographic assumptions, calculation methodologies and legal basis for calculating benefits that were current at the transfer date, so as to identify the transfer amount that would have been paid had GMP equalisation been implemented at the transfer date and calculated at the effective date of the original transfer value calculation; or**
>
> **(2) using the financial and demographic assumptions, calculation methodologies and legal basis for calculating benefits that will be current at the point when GMP equalisation is implemented for transfers out (and taking account of actual experience) and calculated as at a current date?**
>
> **(ii) should the Trustee add interest to the amount of the top-up payment, and if so should it be at the rate of 1% above base rate simple interest from the date of the transfer out, or should some other rate of return (and if so what) be added?"**

253. This Issue only arises in relation to transfers under the cash equivalent legislation. I have analysed that legislation earlier in this judgment. In accordance with that analysis, the answer to Issue 4(e)(i) is that there is a single legally required way to calculate the top-up payment and it is for the Trustee to calculate it.

254. In the case of cash equivalent transfers in the period 1990 to 1997, the right of the member is to a cash equivalent as provided in section 94(1) of the PSA 1993, as enacted. Section 97 of that Act and the 1985 Regulations provide for the calculation of the cash equivalent. Section 99(2) obliges the Trustee to pay a top-up payment so that the earlier transfer payment is topped up to the cash equivalent. Mr Short argued that the member was in addition entitled to an increase in the cash equivalent in accordance with regulation 4(4) of the 1985 Regulations. For the reasons given earlier in this judgment, I do not accept that submission.

255. In the case of cash equivalent transfers in the period from 1997 onwards, a member was entitled to have the guaranteed cash equivalent in the original statement of entitlement increased in accordance with regulation 9(5) of the 1996 Regulations. That regulation requires the cash equivalent to be calculated in accordance with the cash equivalent legislation, as amended with effect from 6 April 1997. The relevant provisions are sections 94 and 97 of the 1993 Act, as amended, and regulations 6, 7 and 8 of the 1996 Regulations (in the period from 1997 to 2008) and regulations 6, 7 and 7A to 7E of the 1996 Regulations, as amended, (from 2008 onwards). Mr Short argued that the member was in addition entitled to an increase in the cash equivalent in accordance with regulation 10 of the 1996 Regulations. For the reasons given earlier in this judgment, I do not accept that submission.

256. Issue 4(e)(ii) asks whether interest should be added to the top-up payment. The Banks and the Eighth Defendant agreed that interest should be added but they disagreed as to

how interest is to be calculated. Mr Rowley submitted that the top-up payment should bear simple interest at 1% above base rate. Mr Short submitted that the Trustee should pay interest equivalent to the increases or investment returns that the member would have received from the receiving scheme if the correct transfer payment had been made originally. He added that in the absence of evidence as to such increases or returns, the Trustee should pay interest at a rate that reflects the increases paid by the Scheme.

257. In the 2018 judgment, at [453]-[463], I considered in some detail the question of interest in relation to arrears of pension. I awarded simple interest at 1% above base rate. Mr Rowley submitted that my earlier reasoning applied in the same way to the present issue as to interest on the top-up payment.

258. Mr Short submitted that one of the matters I took into account in the 2018 judgment on the subject of interest was the fact that the extra pension which should have been paid would probably have been spent by the pensioners, rather than saved: see at [457]. He submitted that the position would have been different with a transfer payment. The purpose of the transfer was for the transferring member to invest that money either into a defined contribution scheme, expected to produce an investment return, or into a defined benefit scheme where the payment would have been converted into rights at rates which were current at the date of the transfer. He submitted that an award of interest should reflect what the transferring member had actually lost on the facts of his particular case. It should therefore be open to the transferring member to demonstrate what he had lost and that loss should then be compensated. If the transferring member did not produce evidence of such a loss, then he should be awarded interest at a rate equivalent to the rate of revaluation applied to pension (in excess of GMP).

259. Mr Short relied on the decision of the Court of Justice in *Marshall v Southampton H. A. (No. 2)* [1994] QB 126. That case concerned compensation for discrimination on the grounds of sex in an employment context. One of the issues arising related to an award of interest on the compensation awarded. The Court of Justice held that an award of interest should be part of the compensation for the wrong which had been done. The Court of Justice said, at [24], that the court or tribunal should take measures to guarantee real and effective judicial protection and to have a real deterrent effect on the employer. At [25], it was said that the particular circumstances should be taken into account and that there should be financial compensation for the loss and damage sustained. At [31], it was said that an award of interest "in accordance with the applicable national rules" should be an essential component of compensation for the purposes of restoring real equality of treatment. I note that, in *Marshall*, the Advocate General (Van Gerven) said at [31] of his Opinion that the rate of interest was for the national court to decide but that the interest should be commensurate with a claimant's loss of purchasing power caused by the effluxion of time and should be related to the inflation rate and to the usual interest on capital.

260. It was not in dispute that the statements of principle in *Marshall* as to the award of interest applied in the present case and there was no dispute as to whether the court should award interest on the top-up payment. As to the rate of interest, the Court of Justice left that to be determined in accordance with the national rules as to interest.

The Advocate General said the same; his general remarks about purchasing power, inflation and interest on capital are broadly in accordance with the national rules as to interest which apply in this jurisdiction.

261. Mr Rowley responded to Mr Short's submissions as to the losses suffered by transferring members. As to the alleged loss suffered by a member who transferred into a defined contribution scheme, Mr Rowley reminded me that in the period with which I am concerned, where base rate was often higher than its current very low level, an award of 1% above base rate, could be several percentage points which might match the return on an investment in a defined contribution scheme. Further, he said that the return on a defined contribution scheme might have been very disappointing, particularly if one took into account management charges. As to the alleged loss suffered by a member who transferred to another defined benefit scheme, the effect of *Coloroll* was that the receiving scheme was obliged to provide to that member the benefits he would be entitled to if the transfer payment had reflected the member's equalised accrued benefits in the transferring scheme. As to the suggestion that the rate of interest should be equivalent to the rate of revaluation applied to the excess pension in the relevant Scheme, he pointed out that such rates were subject to a cap. On that point, I would be inclined to infer that Mr Short must have considered that a transferring member would be better off using that revaluation rate even when subject to a cap as compared with interest at 1% above base rate.

262. It is agreed that I have jurisdiction to direct that interest is paid on the top-up payment. It is also not in dispute that I should apply the principles in *Marshall* which essentially direct me to apply the national rules in this jurisdiction in order to achieve real and effective judicial protection for the member and deterrence for the Trustee and to reflect the incidence of inflation and the availability of interest on capital.

263. I conclude that the top-up payment should bear interest at 1% above base rate. I have considered whether to say that that rate should be only a default rate and that it should be open to the transferring member to produce evidence of actual loss in which case the actual loss should be awarded. There is something to be said in principle for that possible approach. However, I am also entitled to take into account the practicalities of the situation. In the majority of cases, the amount of the top-up payment will be modest. The calculation of that top-up payment will involve considerable expenditure of time and involve considerable cost. In many cases, the cost of the exercise will exceed the amount of the top-up payment. I am therefore reluctant to provide for a procedure which will increase the cost of administration and involve only modest sums of interest. I have considered whether to permit this possibility in a case where the top-up payment exceeds a certain limit but I prefer to have administrative simplicity and to adopt a procedure which will apply across the board. As to the suggestion that I adopt the revaluation rate from time to time, I am not clear as to what, if any, practical difficulties that might entail as compared with a formula which uses 1% above base. Again, in view of the comparatively modest sums involved, I prefer to adopt a method which is well used and well understood. Accordingly, the rate of interest will be 1% above base rate.

Issue 4(f)

264. In view of my decision in principle that the Trustee is liable to the transferring member to make a top-up payment to the receiving scheme, Issue 4(f) asks:

> **"Is the Trustee under an obligation proactively to identify and calculate any shortfalls in previous transfers out and take steps to equalise them, or is the Trustee entitled to wait until a request is made by the receiving scheme or by the transferred-out member?"**

265. I will address this question in the first instance in relation to the cash equivalent legislation and I will then make a brief comment in relation to individual rule-based transfers. When I analysed the cash equivalent legislation, I explained the nature of the relevant obligation on the Trustee in the period from 1990 to 1997 and then in the period from 1997 onwards.

266. Some of the submissions made to me in relation to this question appeared to be based on the idea that the Trustee was under a continuing obligation to make a top-up payment. Whether the Trustee was under a continuing obligation to make a top-up payment, which obligation was broken on each day that it was not performed, is a subject which I need to consider when I consider Issue 8, dealing with limitation. At that stage, I will reach the conclusion that the relevant obligations were not continuing obligations of that kind. Rather, they were obligations to make the correct top-up payment by a date which is now in the past but where a member would be entitled to apply to the court for an order that the Trustee make a top-up payment in order to remedy the previous breach of its obligation. In the light of this conclusion, I will deal succinctly with the parties' submissions on Issue 4(f).

267. Mr Short submitted that the Trustee is obliged to be proactive in this respect. He put his case on the basis of both domestic law and EU law. As to domestic law, he submitted that the Trustee owed a fiduciary duty to a transferring member to make the necessary top-up payment. As a fiduciary, it was said that there was a duty to the member to be proactive in the ways identified in Issue 4(f). As to EU law, Mr Short relied on *Coloroll* at [39]. The Court of Justice said that there was a duty on the national court to make use of all means available to it under domestic law to ensure ultimate performance of this obligation. The Court of Justice then gave the example of the court ordering that the sums to which members were entitled must be paid by the trustees out of the scheme's assets "even if no claim has been made against the employer or the employer has not reacted to such a claim". Mr Short submitted that the court ought therefore to give an answer to Issue 4(f) which would be most likely to result in members being paid by the Trustee even though no claim had been made by a member against the Trustee.

268. Mr Rowley submitted that the Trustee was not under an obligation to act proactively in the ways identified in Issue 4(f). Accordingly, he submitted that the Trustee could wait until a claim was made by a transferring member and only then did the Trustee need to deal with the claim. If a transferring member made such a claim after the expiry of a relevant time limit for that claim then the Trustee could rely on the expiry of the time limit and decline to make any top-up payment. He submitted that when the original transfer payment was made, the transferring member ceased to be a member

and any previous fiduciary obligation owed to him then came to an end. Accordingly, the Trustee would not be a fiduciary in relation to the obligation to make a top-up payment. It would follow, said Mr Rowley, that the Trustee could treat a potential claim by a transferring member for a top-up payment in the same way as it could treat any other potential claim which did not involve a breach of a fiduciary obligation; that is, the Trustee could wait to see if a claim were made and then react to it.

269. Mr Rowley accepted that if the Trustee did owe a fiduciary obligation in relation to the top-up payment, then the position would be different and the Trustee would be obliged to be proactive. However, he suggested that the most that the Trustee was obliged to do was to take reasonable steps to identify any receiving scheme to which a top-up should be paid. As to Mr Short's reliance on *Coloroll* at [39], Mr Rowley submitted that what was being considered by the Court of Justice was the principle of effectiveness and that principle was satisfied by the transferring member having the right to make a claim against the Trustee requiring it to make a top-up payment. The principle of effectiveness did not require the Trustee to be proactive but allowed the Trustee to wait to see if a claim were made to which the Trustee would then respond.

270. I invited Mr Sawyer to comment on the duty of a fiduciary to be proactive in relation to the performance of a fiduciary obligation which it owed. He accepted that a trustee was obliged to ascertain the trusts on which he held trust property and then he was obliged to give effect to those trusts.

271. Thus, there was agreement between these parties that if the obligation of the Trustee to the transferring member to make a top-up payment to the receiving scheme was a fiduciary obligation, then the Trustee was obliged to be proactive in order to perform that obligation.

272. I will now explain my approach in relation to this Issue. When the Trustee made an inadequate transfer payment in the past, the Trustee committed a breach of fiduciary duty. The fiduciary duty was broken once and for all at that point and there was not a continuing fiduciary duty to make the top-up payment. However, the member is entitled to apply to the court for an order that the Trustee make a top-up payment and the top-up payment is to be made from assets held on trust by the Trustee.

273. In these circumstances, if the Trustee applied to the court for directions as to what it should do, a number of considerations would be relevant, as follows:

    i) the Trustee had committed breaches of fiduciary duty;

    ii) the members are entitled to apply to the court for orders that the Trustee make top-up payments;

    iii) the Trustee retained the trust assets from which the top-up payments are to be made;

    iv) as explained later, the Trustee cannot rely on a time bar, whether under the Rules or under the Limitation Act 1980, to resist the claim of members to top-up payments;

v) the Trustee needs to know which of the trust assets should remain available to make top-up payments which the court might order the Trustee to make.

274. The circumstances listed above would incline the court to give directions to the Trustee that the Trustee ought to deal with the problem caused by the inadequate transfer payments and the possibility that members might ask the court to order the Trustee to make top-up payments rather than do nothing. If that is the direction which the court would be likely to give then it is open to the Trustee to decide for itself to take that approach and indeed to decide that the matter is sufficiently clear that an application to the court for directions is not needed so that the Trustee should decide for itself that it will deal with the problem and not fail to do so.

275. At the hearing, I asked the parties whether the court could take into account wider considerations if it were asked to give directions as to what the Trustee should do. There was evidence as to the sums involved by way of top-up payments in a range of cases and the cost of administration involved in the Trustee being required to be proactive in the way identified in Issue 4(f). In some cases, the amount of the top-up payment will be modest and will be exceeded, even greatly exceeded, by the administrative costs involved in relation to that modest sum. I also understand that the administrative costs will have to be paid out of the assets of the relevant Scheme and ultimately the Trustee will seek to pass on those costs to the Banks. At the hearing, in response to my question, it was agreed that I should not at this stage reflect considerations of that kind in the answer to Issue 4(f). I was told that the Trustee would consider the answer given to Issue 4(f) and decide for itself what course it would adopt.

276. In these circumstances, all that I can usefully say is that the Trustee does need to be proactive in that it must consider the rights and obligations which I have identified, the remedies available to members and the absence of a time bar and then determine what to do.

277. The above discussion of Issue 4(f) related to transfers which had been made under the cash equivalent legislation. I will now briefly comment on the position in relation to individual rule-based transfers. I have already explained that in relation to individual rule-based transfers, it might be open to a member to contend that the decision made by the Trustee (or HBOS, as the case may be) is open to challenge on the ground that the decision as to the amount of the transfer payment involved inadequate deliberation by the Trustee (or HBOS) and that there was a breach of duty by the Trustee (or HBOS). In that way, an aggrieved member could bring a claim for an order setting aside the relevant decision. Whether a trustee should itself bring such a claim for an order setting aside its own decision was considered by the Court of Appeal and by the Supreme Court in *Pitt v Holt* [2012] Ch 132 at [130] (Court of Appeal) and [2013] 2 AC 108 at [69] (Supreme Court). The position is that it would be inappropriate "in general" for the Trustee to take the initiative of commencing such proceedings but Lord Walker, [2013] 2 AC at [69], suggested that there might, for practical purposes, be no other suitable person to bring the matter before the court.

Issue 4(g)

278. Issue 4(g) asks:

> **"Is the payment by the Trustee of any equalisation top-up payment to the trustees or managers of the receiving scheme a sufficient discharge of the Trustee's obligation?"**

279. The Banks and the Eighth Defendant agree that the general position is that the Trustee who makes a top-up payment to the receiving scheme will obtain a discharge of the Trustee's obligation to the member to make the transfer payment. It is not argued on behalf of the transferring members that the Trustee has any general obligation to see that the receiving scheme pays to the transferring member the benefits to which the transferring member is entitled under the receiving scheme. That would clearly have been the position if the Trustee had paid the correct transfer sum in the first place and is not affected by the fact that the Trustee ends up paying the correct transfer sum in two stages, first the inadequate transfer payment and secondly the top-up payment. Further, it is straightforward to read the statutory provisions and the rules as providing for a discharge in such a case.

280. That is the general position. However, the transferring members suggested that the position might be different in a case which came within Issue 4(a)(ii) where the transferring member who initially became a member of the receiving scheme has transferred out of the receiving scheme or otherwise ceased to be a member of that scheme. I have already explained that it is not appropriate for the court at this stage, and in general terms, to deal with Issue 4(a)(ii) and for the same reason I will not consider whether a case of that kind would justify a different answer to Issue 4(g).

Issue 5

281. Issue 5 asks:

> **"In cases where liability for a member's GMP has been retained by the relevant Scheme but the excess has been transferred out (for example, upon a transfer out to a contracted-in receiving scheme):**
>
> **(a) Is the Trustee required to equalise the remaining benefits within the Scheme, and if so must it do so by creating a new excess benefit for a member of the disadvantaged sex?**
>
> **(b) If the Trustee is under an obligation to equalise in respect of transfers out, should any uplift conferred under 5(a) above be netted off against any equalisation top-up payment (or residual benefit as per issue 4(c)) in respect of the transferred-out excess?"**

282. It is agreed between the Banks and the Eighth Defendant that this issue does not arise if:

i) the member's GMP is retained by the relevant Scheme i.e. was not transferred out when the excess was transferred out;

ii) when the excess was transferred out, the transfer payment was an underpayment because the Trustee had failed to equalise benefits as between male and female members; but

iii) the Trustee then makes a top-up payment to the receiving scheme to make good the earlier underpayment.

283. In the case described in the last paragraph, the GMP left in the scheme will not involve equality between male and female members in relation to the GMP because of the inherent inequality which exists in the calculation of GMPs. But the member whose GMP is left in the scheme will be treated equally overall if the ultimate transfer payment (if one takes into account the original underpayment and then the top-up payment) reflects equalisation of benefits. The position in relation to equal treatment is the same whether the correct transfer payment was paid in the first place or whether an underpayment is followed by the correct amount of top-up payment. In such a case it is not suggested that the Trustee is obliged, in addition to making a top-up payment, to create a new excess benefit in the Scheme where the GMP is retained.

284. Thus, it is agreed that the question only arises if the Trustee does not have to make a top-up payment and, in particular, in a case where the Trustee is relieved from making a top-up payment by reason of the answers given to Issues 1 to 3 based on the suggested effect of the decision in *Coloroll*. I have not yet set out my reasoning in relation to Issues 1 to 3 in this judgment but I can indicate at this point that I will not reach the conclusion that the Trustee's obligation to make a top-up payment in accordance with domestic law is removed by EU law or by anything said in *Coloroll*. That means that Issue 5 does not arise and I will not consider what the answer would be if it did arise.

Issue 6

285. Issue 6 asks:

> **"Having regard to the above, if there is an in-principle obligation on a transferring scheme to equalise in relation to transfers out, and the transfer was made to one of the Schemes in which the Trustee is in principle obliged to equalise transfers in (see paragraph 8 of the Order of 3 December 2018), what effect, if any, does the existence of the concurrent obligations have on the Trustee's obligation to equalise transfers in?"**

286. Issue 6 arises if two conditions are satisfied. The first condition is that there is an in-principle obligation on the trustee of a transferring scheme to equalise in relation to transfers out. So far in this judgment I have held that the trustee of a transferring scheme committed a breach of obligation when it made an inadequate transfer payment and can be required by the transferring member to make a top-up payment to the receiving scheme. As will be seen, when I deal with Issues 1 to 3, I will continue

to hold that there is such an obligation on the trustee of the transferring scheme. The second condition is that the transfer is made to one of the Schemes the subject of this litigation and the Trustee of one of those Schemes is under an obligation to equalise benefits for members who have transferred into one of those Schemes. As Issue 6 recognises, I have already held (by my order of 3 December 2018) that the Trustee of the Schemes is under that obligation.

287. Issue 6 then asks: what is the effect of the existence of the obligation on the trustee of a transferring scheme on the obligation of the Trustee of one of the Schemes? Issue 6 is different from the other Issues in that it concerns the position of the Trustee as the trustee of a receiving Scheme whereas the other Issues related to the position of the Trustee as the trustee of a transferring Scheme.

288. The answer to this question is that the existence of the obligation on the trustee of a transferring scheme does not alter the obligation of the Trustee of the Schemes. They are concurrent obligations and, in law, both fall to be performed.

289. The performance by the trustee of the transferring scheme of the obligation on it may have an effect on the Trustee of one of the Schemes as a receiving scheme. In accordance with my earlier reasoning, the obligation on the trustee of a transferring scheme is to make a top-up payment to the receiving Scheme. If that obligation is performed, then the Trustee of one of the Schemes as a receiving scheme will receive a top-up payment and it can add that top-up payment to its assets and that will assist it to perform its obligation to the transferring in member to equalise the benefits of that member under the receiving scheme.

290. I understand that the above description of the position was not in the end in dispute.

Issue 7(a)

291. Issue 7(a) asks:

> **"7. If the Trustee is under an obligation to equalise in respect of transfers out, is that obligation discharged and/or not enforceable by relevant Scheme members:**
>
> **a. by virtue of any of the following statutory provisions (and their predecessors):**
>
> **i. s 99 PSA 1993 for individual transfers;**
>
> **ii. s 73(2) and (4) PSA 1993 for individual or bulk transfers;**
>
> **iii. the actuarial certification procedures contained in reg 7(3) of the Transfer Values Regs 1996 (for individual transfers out before 1 October 2008) or reg 12(3) of the Preservation Regs 1991 (for bulk transfers out);**

Issue 7(a)

292. The answers to Issue 7(a) are provided by my earlier analysis of:

i) the cash equivalent legislation in Chapter IV of Part IV of the PSA 1993 (which includes section 99) and the 1985 and 1996 Regulations; and

ii) the preservation of benefit legislation in Chapter I of Part IV of the PSA 1993 and the 1991 Regulations.

293. The answers are:

i) Issue 7(a)(i): no;

ii) Issue 7(a)(ii): sections 73(2) and (4) of the PSA 1993, together with the rules of the Schemes made pursuant to those sections, provide for a discharge in the case of individual rule-based transfers for so long as the decision as to the amount of the transfer payment remains a valid and effective decision; as to bulk transfers, on the assumption, which I am asked to make, that the mirror-image bulk transfers were made in accordance with regulation 12 of the 1991 Regulations and the rules of the Schemes, then the Trustee is discharged from the duty to provide benefits under the Schemes;

iii) The certification procedures in regulation 7 of the 1996 Regulations do not alter the result that the Trustee is not discharged in relation to transfers under Chapter IV of Part IV of the 1993 Act; I am asked to assume that the certificates pursuant to regulation 12 of the 1991 Regulations were valid in the case of mirror-image bulk transfers and, on that basis, there is a discharge in the case of mirror-image bulk transfers as stated in ii) above.

Issue 7(b)

294. Issue 7(b) asks:

> **"If the Trustee is under an obligation to equalise in respect of transfers out, is that obligation discharged and/or not enforceable by relevant Scheme members:**
>
> **…**
>
> **(b) by virtue of the transfer out provisions in the relevant Scheme rules [examples to be identified]."**

295. I have analysed the various rules earlier in this judgment. In relation to transfers under Chapter IV of Part IV of the PSA 1993, the relevant rules do not provide for a discharge. In relation to individual rule-based transfers, the relevant rules provide for a discharge for so long as the decision as to the amount of the transfer payment remains a valid and effective decision.

Issue 7(c)

296. Issue 7(c) asks:

> **"If the Trustee is under an obligation to equalise in respect of transfers out, is that obligation discharged and/or not enforceable by relevant Scheme members:**
>
> **…**
>
> **(c) by virtue of express discharges granted by members in the sample documents identified by the parties?"**

297. I will address this question in relation to transfers under the cash equivalent legislation. In relation to such transfers, the question is whether the Trustee is discharged from its obligation owed to the member to make a top-up payment to the receiving scheme. As I have held that the Trustee is not required to provide a residual benefit to the member, I will not consider whether the discharge form could be construed to discharge the Trustee from a liability to provide a residual benefit.

298. I did not receive any submissions as to whether the discharge forms relied upon by the Banks in relation to cash equivalent transfers would be relevant, in relation to an individual rule-based transfer, if a transferring member applied to set aside a decision by the Trustee (or HBOS, as the case may be) as to the amount of the transfer payment, on the basis of inadequate deliberation by the Trustee (or HBOS), and I will not address that question in the absence of any claim to set aside such a decision on that basis.

299. I have been asked to consider Issue 7(c) by reference to five sample forms. Mr Rowley submits that in the case of each form, the member who signed the form agreed that the transfer payment made by the Trustee produced the result that the Trustee was discharged from any further liability to the member under the transferring scheme (and, in particular, the liability to the member to make a top-up payment to the receiving scheme). Mr Short submitted the contrary and raised a series of arguments as to how and why the transfer forms relied upon by Mr Rowley did not have the result for which he contended. Mr Short submitted that in the case of a member signing any one of the five sample forms, that member remained entitled to rights under the transferring scheme whether those rights took the form of requiring the Trustee to make a top-up payment or to provide a residual pension to the member; as explained, I will only consider the liability to make a top-up payment.

300. I will consider each of the five sample forms separately and in turn. I will discuss in detail the points which arise in relation to the first of the sample forms and then I will consider the way in which my conclusions in relation to that form apply to the four other sample forms.

The first form

301. The first standard form is the current form used for the No 1 Scheme. The relevant wording is in a Transfer Agreement which the member is asked to sign, having been provided with a statement of entitlement to a guaranteed cash equivalent. The Transfer Agreement includes an instruction from the member to the Trustee to pay the

cash equivalent or transfer value to the identified receiving scheme. The form contains three statements to which I was referred (the underlining in the text below was added by the Trustee as emphasis at the hearing and is not in the original). The relevant wording is:

> "Is the receiving pension plan willing and able to accept any contracted-out liabilities arising from GMP/section 9(2B) rights (if applicable)?
>
> Yes □ No □"
>
> …
>
> "I understand that:
>
> - The payment will be instead of the benefits due, or benefits that would have been due to me or in respect of me, my spouse, civil partner, dependants or any other potential beneficiaries, arising from my membership of the Scheme;
> - The benefits provided by the receiving pension plan may be in a different form and of a different amount to those which would have been due under the Scheme;
> - Unless I have contracted-out benefits in the Scheme and the receiving pension plan is contracted-out on a salary-related basis, there is no statutory requirement on the receiving pension plan to provide for survivors' benefits out of the transfer payment.
>
> I agree that on payment of the transfer to the receiving pension Scheme:
>
> - Where the transfer is of the whole of my entitlement under the Scheme, I release and discharge the Trustee Directors of the Scheme from all liability to provide benefits to me or in respect of me, my spouse, civil partner, dependants or any other potential beneficiaries arising from my membership of the Scheme;
> - Where the transfer is of part of my entitlement under the Scheme, I release and discharge the Trustee Directors of the Scheme from all liability to provide those benefits to me or in respect of me, my spouse, civil partner, dependants or any other potential beneficiaries which are included in the transfer; and
> - I will protect the Trustee Directors against any costs, claims, demands or expenses which may become due as a result of the payment."
>
> …
>
> "By signing this agreement:
>
> - I understand all the conditions detailed above.
>
> …
>
> - I agree to the payment of the transfer value as described above to the receiving pension plan."

302. Mr Short submitted that when construing the release and discharge pursuant to this form, I would be assisted by the approach of the House of Lords in *BCCI v Ali* [2002] 1 AC 251 which concerned a general release by an employee of claims against his employer. In particular, the House of Lords considered earlier authority as to whether a general release extended to rights and claims of which the employee was not aware and could not have been aware. What I derive from this decision is that a general release is to be construed applying ordinary principles as to the interpretation of contracts and those principles require the court to have regard to the background to the contract and the context in which the provision was entered into: see per Lord Nicholls at [26]. The House of Lords did not go so far as to say that there was a rule of law that a general release could not extend to rights and claims of which the employee was unaware and could not have been aware; instead, the earlier cases which considered that type of situation established "a cautionary principle" which should inform the approach of the court. If (which there is not) there were a rule which said that a general release would not be applied to a set of facts where the party to the release was unaware of, and could not have been aware of, a particular claim, then the outcome in a particular case could turn on the specific facts. In the present cases, I think it likely that for much of the period from 17 May 1990 to the present, members of these schemes were unaware of the obligation on the Trustee to equalise benefits; it is likely that they were also unaware that the Trustee had not performed that obligation. Whether it could be said that they could not have been aware of that obligation may be open to argument, particularly in more recent times. It seems that some members have signed releases in this standard form even after this litigation began. However, I repeat that the House of Lords did not lay down any such rule of law. The meaning of a release in any particular case is a matter of construction, having regard to all admissible background circumstances, but *BCCI v Ali* shows that there may be circumstances in which a general release ought not to be given its full literal meaning.

303. The first question which arises in relation to this form is: where the form results in a release and a discharge, from what liability is the Trustee released and discharged? In the present case, I need to ask whether there is a release of the liability of the Trustee to the member to make a top-up payment to the receiving scheme.

304. A liability on the part of the transferring scheme to make a top-up payment to the receiving scheme is not a liability to provide benefits "to" the member but the standard form goes on to refer to a liability to provide benefits "in respect of the member" and this phrase is then followed by a number of identified types of person such as a spouse or a dependant. There is room for argument as to how to read this part of the standard form but I will assume in favour of the Trustee that the effect of the wording is that the Trustee is released and discharged from all liability to provide benefits to the member or in respect of the member. A top-up payment would be a payment "in respect of the member". The question then is: is the liability to make a top-up payment a liability to provide "benefits" in respect of the member? I consider that a top-up payment would not be within the reference to "benefits". I would contrast the case of a member remaining a member and taking benefits under a scheme with the case of a member leaving the scheme and not taking benefits under the scheme but instead turning those benefits into a transfer payment which he takes in order to acquire benefits under a receiving scheme. I am assisted in reaching that

conclusion by the consideration that if it had been intended that the Trustee should be released from an obligation to make a top-up payment to correct the Trustee's earlier failure to pay the correct transfer sum, the language ought to have been more clear and specific. If I am wrong about the meaning of "benefits" in this form, then I will go on to consider whether the wording provides for a discharge of the liability to make a top up payment to a receiving scheme.

305. The wording of this standard form falls to be considered in the following circumstances:

i) the member has applied for a transfer of all of his entitlement under the transferring scheme;

ii) the Trustee has provided a statement of entitlement which professes to state the cash equivalent of all of the member's accrued benefits;

iii) in calculating the cash equivalent, the Trustee has wrongly left out of account a sum to which the member is entitled, namely the sum required to equalise benefits as between male and female members;

iv) the member is expected to believe that the statement of entitlement correctly states the cash equivalent of all of his accrued benefits;

v) the member wishes the cash equivalent to be transferred to the receiving scheme;

vi) the claim which the member now makes requires the Trustee to make a top-up payment to the receiving scheme.

306. In this standard form, the member is asked to state, and does state, that he understands that the payment of the cash equivalent is instead of the benefits that would have been due to him or in respect of him arising from his membership of the scheme. In a typical case, that will be an accurate statement of what the member understands. If the standard form had stopped there, it might be said that a member who correctly records his understanding is not disabled from later pointing out that his understanding was incorrect, in view of the Trustee's failure to include a sum to equalise benefits when calculating the cash equivalent, and then seeking a remedy on that account. However, the standard form does not stop with a statement as to the member's understanding. The standard form continues with an agreement by the member that he releases and discharges the Trustee from liability to provide benefits to him or in respect of him. This release takes effect "where the transfer is of the whole of my entitlement under the Scheme". This phrase is open to interpretation. Mr Rowley submits that where a member asks for a cash equivalent in relation to all of his accrued benefits, and not just part of them, and receives a cash equivalent on that basis, then the transfer is of the whole of the entitlement of the member under the scheme and the release and discharge applies. Conversely, Mr Short contends that where the Trustee has produced a statement of entitlement which omits a relevant part of the member's entitlement, namely, the sum needed to equalise benefits between male and female members of the scheme, then the resulting transfer is not of the whole of the member's entitlement under the scheme. As with earlier submissions which I have

considered, these arguments as to the construction of the standard form could arise in other cases where the Trustee has wrongly calculated the cash equivalent whether as a result of a misreading of the rules of the scheme or a misapprehension as to the relevant facts or by reason of a mathematical error. Whatever is the correct construction of the standard form will apply in the same way to these other situations.

307. Pursuant to this form there is only a release "where the transfer is of the whole of my entitlement under the Scheme". That phrase is open to interpretation. I prefer Mr Short's interpretation to the effect that the transfer is not of the whole of the member's entitlement under the scheme in a case where the Trustee has not included a sum which it was obliged to include in order to equalise benefits between male and female members. Although Mr Rowley's interpretation is a possible one, it is not the most ordinary or natural reading of the language. It involves giving a purposive meaning to the language but on the assumption that the purpose is to bring about the certainty of a release for the Trustee even where the Trustee has failed to perform its obligations to the member and, as a result, the transfer payment was inadequate. I am not satisfied that it should be assumed that that was the purpose of the provision. The purpose of the provision is not very different from the purpose of section 99 of the PSA 1993 which is to discharge the Trustee where it has performed its obligations to the member but not otherwise.

308. The result is that I do not construe the standard form as providing the Trustee with a release where it has made an inadequate transfer payment.

309. Insofar as there was any reliance on the wording which referred to the member protecting the Trustee Directors against any costs, claims, demands or expenses which might become due as a result of the payment of the transfer sum, I do not see that as preventing the member claiming a top-up payment to be made to the receiving scheme. This provision deals with claims that are made as a result of the Trustee making the original payment and does not deal with the liability of the Trustee to make a top-up payment. The obligation to make a top-up payment which remained outstanding became due under the legislation and did not become due as a result of making an inadequate transfer payment.

The second form

310. The second standard form is the 2016 version used in relation to the No 2 scheme. The relevant wording is in a Transfer Agreement which the member is asked to sign, having been provided with a statement of entitlement to a guaranteed cash equivalent. The statement of entitlement states that: "the Trustees are unable to complete any discharge forms relating to sex equality". It was suggested to me that this was a reference to the Trustee not providing a form to the receiving scheme to the effect that the Trustee had equalised benefits on the basis of sex equality. The statement also provided that whilst every care had been taken in its preparation, it was not binding if any error or omission should subsequently be discovered. The Transfer Agreement includes an instruction from the member to the Trustee to pay the cash equivalent or transfer value to the identified receiving scheme.

311. The standard form contains two statements to which I was referred (the underlining in the text below was added by the Trustee as emphasis at the hearing and is not in the original). The relevant wording is in these terms:

> "I acknowledge that, on my transfer of benefits as requested:
>
> - I will have no further benefits payable to or in respect of me from the scheme in respect of the above transfer value(s), and
>
> - The Trustee shall not be liable for any claims which may subsequently be made against them by any person in respect of the transferred benefits.
>
> If the transfer is to a defined contribution / money purchase arrangement, then I confirm that;
>
> - I have received a statement from the receiving scheme showing the benefits to be awarded in respect of the transfer payment, and I accept that:
>   - The benefits to be provided by the receiving scheme may be in a different form and of a different amount to those payable by the Scheme, and
>   - There is no statutory requirement for the receiving scheme to provide survivors benefits from the transfer payment."
>
> …
>
> "I agree to indemnify the trustee of the above scheme against any losses, claims, demands which may be made by or against the scheme in consequence of Lloyds Banking Group Pensions Trustees Limited agreeing to transfer my benefits without the production of my Preserved Pension Certificate."
>
> …
>
> "[Signed by receiving scheme:] (d) Where the transfer includes liability for an 'Equivalent Pension Benefit' and/or 'Guaranteed Minimum Pension' and/or 'Protected Rights', we accept that liability in the Receiving Scheme, and in the event of a subsequent transfer to another scheme, we undertake to obtain a similar undertaking from the trustees of such a scheme and agree to indemnify the trustee of the Transferring Scheme against any claims or demands in respect of such benefits."

312. By this standard form, the transferring member acknowledges that he will have no further benefits payable to him or in respect of him in respect of the above transfer value. I consider that the reference to "benefits" does not extend to any entitlement of the member to require the Trustee to make a top-up payment to the receiving scheme. A top-up payment would be in respect of the member but would not be a further benefit within the wording of the standard form. In addition, this construction derives some support from the statement in the standard form that the transfer statement is not binding if any error or omission should subsequently be discovered.

313. The standard form states that the Trustee is not to be liable for claims made by any person in respect of the transferred benefits. I interpret the reference to "any person" as meaning "any person other than the member himself". This interpretation is based on the fact that a claim by the member himself is dealt with separately in the first bullet point.

314. If I were wrong to reach the above conclusions, there would be other points to consider as to the meaning of "in respect of the above transfer value(s)" and "in respect of the transferred benefits" but it is not necessary to discuss those matters.

315. The result is that I do not construe the standard form as providing the Trustee with a release where it has made an inadequate transfer payment.

The third form

316. The third standard form is the current form used for the HBOS Scheme. The relevant wording is in a Transfer Agreement which the member is asked to sign, having been provided with a statement of entitlement to a guaranteed cash equivalent. The Transfer Agreement includes an instruction from the member to the Trustee to pay the cash equivalent or transfer value to the identified receiving scheme. The form contains three statements to which I was referred (the underlining in the text below was added by the Trustee as emphasis at the hearing and is not in the original).

317. The relevant wording is:

> "Is the receiving pension plan willing and able to accept any contracted-out liabilities arising from GMP/section 9(2B) rights (if applicable)?"
>
> …
>
> "I understand that:
>
> - <u>The payment will be instead of the benefits due, or benefits that would have been due to me or in respect of me, my spouse, civil partner, dependants or any other potential beneficiaries, arising from my membership of the Scheme;</u>
> - The benefits provided by the receiving pension plan may be in a different form and of a different amount to those which would have been due under the Scheme;
> - Unless I have contracted-out benefits in the Scheme and the receiving pension plan was contracted-out on a salary-related basis before 6 April 2016, there is no statutory requirement on the receiving pension plan to provide for survivors' benefits out of the transfer payment.
>
> I agree that on payment of the transfer to the receiving pension plan:
>
> - Where the transfer is of the whole of my entitlement under the Scheme, <u>I release and discharge the Trustee of the Scheme from all liability to provide benefits to me or in respect of me, my spouse, civil partner,</u>

dependants or any other potential beneficiaries arising from my membership of the Scheme;

- Where the transfer is of part of my entitlement under the Scheme, I release and discharge the Trustee of the Scheme from all liability to provide those benefits to me or in respect of me, my spouse, civil partner, dependants or any other potential beneficiaries which are included in the transfer; and
- I will protect the Trustee against any costs, claims, demands or expenses which may become due as a result of the payment."

…

"**Member declaration**

By signing this agreement:

- I understand all the conditions detailed above.

…

- I agree to the payment of the transfer value as described above to the receiving pension plan."

318. The third standard form is in essentially the same terms as the first standard form and my conclusions in relation to the first standard form apply here also. The result is that I do not construe the standard form as providing the Trustee with a release where it has made an inadequate transfer payment.

The fourth form

319. The fourth standard form is the 2008 version used in relation to the HBOS Scheme. The relevant wording is in a Transfer Agreement which the member is asked to sign, having been provided with a statement of entitlement to a guaranteed cash equivalent. The Transfer Agreement includes an instruction from the member to the Trustee to pay the cash equivalent or transfer value to the identified receiving scheme. The form contains a statement to which I was referred (the underlining in the text below was added by the Trustee as emphasis at the hearing and is not in the original). The relevant wording is:

- "We [*"We" is HBOS plc for and on behalf of the Trustees*] confirm that in respect of the period since 17th May 1990, there has been no difference in the benefits provided, or in the rate of pension accrual, for and in respect of men and women under our scheme. This applies both for the period up to, and for the period after, normal pension age. We also confirm that the normal pension age under our scheme at the date the transferring member left was the same for men and women.
- If the receiving scheme is a contracted-in arrangement, it will be unable to accept responsibility for payment of the guaranteed minimum pension/post 97 component. These elements of the transfer value can be transferred to an annuity policy or as an alternative may remain in the HBOS Final Salary Pension Scheme. Please ensure that the transfer value is adjusted accordingly.

> **Please obtain independent financial advice before proceeding with the transfer**."
>
> …
>
> "I discharge the Trustees of the HBOS Final Salary Pension Scheme (the "Scheme") from all liability in respect of my benefits under the Scheme (including any benefits payable on my death to my spouse and/or my dependants)."
>
> …
>
> "Scheme Retirement Ages equalised at ages 62 (01/04/1987) – GMP not equalised"

320. I consider that the terms as to discharge in the standard form do not result in a discharge of any entitlement which a member may have to require the transferring scheme to make a top-up payment to the receiving scheme; this is on the basis that "my benefits under the Scheme" do not extend to the entitlement to make such a top-up payment.

321. The result is that I do not construe the standard form as providing the Trustee with a release from any obligation it might have to make a top-up payment.

The fifth form

322. The fifth standard form is the 2005 version used in relation to the HBOS Scheme (Halifax Retirement Fund). The relevant wording is in a Transfer Agreement which the member is asked to sign, having been provided with a statement of entitlement to a guaranteed cash equivalent. The Transfer Agreement includes an instruction from the member to the Trustee to pay the cash equivalent or transfer value to the identified receiving scheme. The form contains a statement to which I was referred (the underlining in the text below was added by the Trustee as emphasis at the hearing and is not in the original). The relevant wording is:

> - "We [*"We" is HBOS plc for and on behalf of the Trustees*] confirm that in respect of the period since 17th May 1990, there has been no difference in the benefits provided, or in the rate of pension accrual, for and in respect of men and women under our scheme. This applies both for the period up to, and for the period after, normal pension age. We also confirm that the normal pension age under our scheme at the date the transferring member left was the same for men and women
> - If the receiving scheme is a contracted-in arrangement, it will be unable to accept responsibility for payment of the guaranteed minimum pension/post 97 component. These elements of the transfer value can be transferred to an annuity policy or as an alternative may remain in the Halifax Retirement Fund. Please ensure that the transfer value is adjusted accordingly. **Please obtain independent financial advice before proceeding with the transfer**."
>
> …

> "I discharge the Trustees of the Halifax Retirement Fund (the "Fund") from all liability in respect of my benefits under the Fund (including any benefits payable on my death to my spouse and/or my dependants)."

323. The only difference between the fifth standard form and the fourth standard form is that the fifth standard form does not have the wording "GMP not equalised". Nonetheless, I would construe the fifth standard form in the same way as I have construed the fourth standard form.

324. The result is that I do not construe the standard form as providing the Trustee with a release from any obligation it might have to make a top-up payment.

Other arguments as to the forms

325. I have now held that none of the five forms which I was asked to consider had the effect of discharging the Trustee from its obligation owed to the member to make a top-up payment to the receiving scheme. In each case, I have held that that conclusion is arrived at on the true construction of the form.

326. At the hearing, Mr Short raised a large number of other arguments which he said would produce the result that the forms did not have effect to discharge the Trustee from its obligation to make a top-up payment. In view of my earlier conclusions, it is not necessary for me to consider these arguments. However, for completeness, I will briefly identify the matters which were considered in the course of those arguments. The matters were:

i) should the wording be construed against the background of the statutory provisions and, in particular, section 99 of the PSA 1993 so that the wording is interpreted as an attempt to state the effect of that section; if on its true construction, that section did not provide for a discharge of the member's right to a residual pension, then neither would the wording in the standard form;

ii) was the wording (whatever precisely it means) intended to have contractual effect as creating new rights and obligations or was it simply an attempt, accurately or otherwise, to refer to the operation of the statutory provisions; on that point, Mr Short relied on the reasoning in *Briggs v Gleeds* [2015] Ch 212 at [146]-[150] as to whether statements were to be construed as taking effect pursuant to pre-existing rights and obligations or as giving rise to a contract which created new rights and obligations in place of the pre-existing ones;

iii) if the wording was not simply referring to the operation of the statutory provisions, was there consideration for the discharge allegedly given by the member when the Trustee was under a pre-existing obligation to the member to pay the full amount of the cash equivalent of the member's accrued benefits and the Trustee had only partly performed its obligation; Mr Rowley submitted that the case was to be analysed as a settlement of a dispute as to the amount payable although I note that there was no sign of any dispute in any of the cases to which I was referred; on the other hand, one standard form stated that "GMP not equalised" and yet the member appeared to agree to a discharge of

"all liability in respect of my benefits under the Scheme" without any qualification;

iv) if the wording would otherwise have had contractual force and effect, was it rendered unenforceable by section 91 of the PA 1995, as an impermissible commutation or surrender of a right to a future pension or was section 91 of the PA 1995 inapplicable on the ground that the right of a member to have a future pension where benefits have been equalised as between male and female members was not established or clear cut at the time of the relevant discharge; Mr Rowley sought to avoid the operation of section 91 of the PA 1995 on that basis by relying on *HR Trustees Ltd v German* [2011] ICR 329 and the cases at first instance which followed that decision;

v) if the wording would otherwise have had contractual force and effect, was it rendered unenforceable by section 144 of EA 2010;

vi) if the wording would otherwise have had contractual force and effect, was it rendered unenforceable by reason of Article 157.

327. The answer to Issue 7(c) is: no.

Issue 8

328. Issue 8 asks:

> **"Having regard to any applicable limitation periods and the Schemes' forfeiture provisions, if the Trustee is under an obligation to equalise in respect of transfers out, should the Trustee make an equalisation top-up payment (or create a residual benefit as per issue 4(c) or make a payment to a transferred-out member as per issue 4(d)) in respect of an unequalised transfer out which took place more than 6 years before 15 May 2017?"**

329. 15 May 2017 was the date of issue of the Claim Form in this case. The parties are agreed that time does not run after that date against a transferring member who could otherwise assert a claim against the Trustee.

330. In relation to Issue 8, Mr Rowley addressed me first and I then heard from Mr Short. Mr Rowley relied on the rules of the various Schemes and on the Limitation Act 1980.

331. I will begin by referring to the rules of the various Schemes. In the 2018 judgment, when dealing with a claim for arrears of pension payments, I was asked to deal with the issues arising in relation to five specific rules and also to consider the application of section 92(5) of the PA 1995. At this hearing, I was asked again to address the same rules.

332. For convenience, I will refer to the relevant rules as follows:

i) "Rule 1" is rule 62.9 of the Lloyds Bank Pension Scheme No. 2 Rules dated 21 December 1995;

ii) "Rule 2" is rule 9.5 of Part III (Capital Bank Section Specific Rules) of the Rules of the legacy Bank of Scotland 1976 Pension Scheme;

iii) "Rule 3" is rule 24.1 of Part IV (Bank of Wales Section Specific Rules) of the Rules of the legacy Bank of Scotland 1976 Pension Scheme;

iv) "Rule 4" is rule 16.3 of the HBOS FSPS;

v) "Rule 5" is rule 8.2 of the Lloyds Bank No. 1 scheme.

333. Rule 1 provides:

> "**62.9 Failure to claim benefit**
>
> No beneficiary shall be entitled to claim any instalment of pension or other benefit to which he is entitled under the Scheme more than 6 years after that instalment has fallen due for payment."

334. Rule 2 provides:

> "**9.5 Forfeiture of unclaimed benefits**
>
> Any sum which may have become due to a Member or other person entitled to benefit under the Rules shall be forfeited if it has not been claimed during a period of at least six years from the date upon which that sum became due, but, if the sum formed one payment of a pension or annuity the right to such pension or annuity shall not thereby be extinguished."

335. Rule 3 provides:

> "**24 Unclaimed benefits**
>
> 24.1 If any pension or benefit or any instalment remains unpaid to and unclaimed by the person to whom it is payable for a period of six years from the date it became payable, then the entitlement to it shall be extinguished and it shall be retained by the Trustees in the Fund.
>
> 24.2 Any unclaimed AVC Interest shall be held by the Trustees on trust for the AVC Member or his estate as the case may be."
>
> [An AVC was an Additional Voluntary Contribution paid by a Member under Rules 19 or 20 of these Rules. An AVC Interest was the interest in the Fund which a Member had in respect of his AVCs.]

336. Rule 4 provides:

> "**16.3 Benefits not assignable**
>
> Benefits under the Scheme are subject to restrictions imposed by Sections 91 to 93 of the PA 1995 (assignment and forfeiture, etc). These restrictions are intended generally to ensure that benefits are paid only to the person entitled under these Rules, rather than to any other person. The restrictions prevent benefits from being assigned, commuted, surrendered, charged, or forfeited, except in specified circumstances.
>
> However, there are exceptions to the restrictions imposed by Section 91 to 93 . To the extent permitted by those exceptions:
>
> …
>
> 16.3.4 the Trustees will forfeit any benefit if the person entitled to the benefit does not claim it within six-years of the date on which it becomes due."

337. Rule 5 provides:

> "**8.2 Assignment, forfeiture, etc**
>
> Benefits under the Scheme are subject to restrictions imposed by Sections 91 to 93 of the PA 1995 (assignment and forfeiture, etc). These restrictions are intended generally to ensure that benefits are paid only to the person entitled under these Rules, rather than to any other person. The restrictions prevent benefits from being assigned, commuted, surrendered, charged, or forfeited, except in specified circumstances.
>
> However, there are exceptions to the restrictions imposed by Sections 91 to 93 . To the extent permitted by those exceptions:
> …
>
> 8.2.5 the Trustee may also reduce a person's benefits, or decide that a person's benefits will be forfeited, in any other circumstances allowed by sections 91 and 92 of the PA 1995 .
>
> However, General Rules 8.2.1 and 8.2.4 do not apply to GMPs, and this General Rule 8.2 does not apply to any lump sum or instalment of pension that falls due for payment before the benefit otherwise ceases to be payable."

The application of the rules

338. At the hearing, the parties proceeded on the basis that these five rules were valid and effective so that the issue was whether, on the true construction of these rules, the rights of a transferring member were forfeited by reason of the passage of time. At the hearing, it was not settled whether the rights of a transferring member were to require the Trustee to make a top-up payment to the receiving scheme or to a residual benefit. At this stage in the judgment, I have now held that the right of the transferring member, where the transfer was made under the cash equivalent legislation, is a right to require the Trustee to make a top-up payment to the receiving scheme. I therefore need only consider the effect of the rules on that basis and I need not consider how they might apply if a transferring member was entitled to a residual benefit.

339. Although this was not argued at the hearing, it occurs to me that the rules which are now relied upon by the Banks as effecting a forfeiture of such a right might not be effective for that purpose on the basis that they are in any event overridden by section 129(1) of the PSA 1993.

340. Section 129(1) of the PSA 1993 provides that the provisions of Chapter IV of Part IV of the PSA 1993, and any regulations made under that Chapter, override any provision of a scheme to which they apply to the extent that it conflicts with them. I note that section 129(3)(d) includes a forfeiture provision in the definition of "a protected provision" which is not overridden but that definition is not relevant to the rights under Chapter IV of Part IV of the PSA 1993. Thus, if a rule of a Scheme did conflict with the right of the transferring member under Chapter IV of Part IV of the PSA 1993 or the regulations made under that Act, then the legislation would override the rule of the Scheme. If a rule of the Scheme purported to take away the right of the transferring member under the legislation, as Mr Rowley submits it did, then that rule would conflict with the legislation and would be overridden.

341. The parties proceeded on the basis that a forfeiture rule could be valid if it came within section 92(5) of the PA 1995. I can see that if section 92 did so provide then, as a later enactment, it could have altered the position under +section 129 of the PSA 1993. However, the question is: does section 92 of the PA 1995 alter the position under section 129 of the PSA 1993 in relation to the right of a transferring member to require the Trustee to make a top-up payment to the receiving scheme?

342. Section 92(1) of the PA 1995 provides that, subject to later provisions, "an entitlement to a pension under an occupational pension scheme or a right to a future pension under such a scheme" cannot be forfeited. The words which I have quoted also appear in sections 91 and 93 of the PA 1995. "Pension" is defined by section 94(2), for the purposes of sections 91 to 93, as including "any benefit under the scheme and any part of a pension and any payment by way of pension". Even with this definition, I doubt if the right of a transferring member to require the Trustee to make a top-up payment to the receiving scheme is "an entitlement to a pension under an occupational pension scheme or a right to a future pension under such a scheme". I recall that regulation 9(2) of the 1996 Regulations mentions the case of forfeiture but that regulation refers to forfeiture of the benefits under the scheme which are used for the computation of the cash equivalent rather than forfeiture of the right to require the Trustee to make a top-up payment to the receiving scheme. I incline to the view that the relevant right is a right conferred by statute to leave the scheme and to acquire

rights under a different scheme rather than a benefit under the scheme which is the subject of the rules. The relevant right can be viewed as a statutory right even though the existence of the statutory right is also reflected in the rules of the scheme. If so, section 92(1) does not add anything to, nor detract from, the effect of section 129(1) of the PSA 1993 to which I have referred.

343. If the right of a transferring member to require the Trustee to make a top-up payment to the receiving scheme is not within section 92(1) of the PA 1995, then it is not relevant to consider whether a forfeiture provision is excluded from the operation of section 92(1) by section 92(5) of the PA 1995.

344. For the avoidance of doubt, I add that section 129(1) of the PSA 1993 does not affect the operation of the Limitation Act 1980 as that Act is not "any provision of a scheme".

345. If the effect of the five rules is as contended for by Mr Rowley and if my doubt is well founded, then those rules would be overridden in that respect by section 129(1) of the PSA 1993. I have not restored the case for further argument on this point because I have in any event concluded that the rules, on their true construction, do not have the effect contended for by Mr Rowley. I will now deal with the issues as to construction of the rules.

346. Mr Rowley submitted that when the Rules were initially drafted it was very unlikely that anyone had foreseen the circumstances which I am now asked to consider. However, he also pointed out that it is often the case that the court is asked to construe a contractual provision and apply it in circumstances which had not been foreseen when the contract was entered into. In such a case, the court applies the ordinary principles of construction of commercial instruments. Mr Short submitted that as the relevant rules provided for forfeiture of rights, they should be construed narrowly. I will begin by giving the language of the rules its ordinary meaning but, given that the wording provides for forfeiture of rights, I will not be inclined to give the wording a wide or expansive meaning unless ordinary principles of construction justify that course.

Rule 1

347. Mr Rowley submitted that the entitlement of the transferring member to require the Trustee to make a transfer payment to the receiving scheme was a "benefit to which he is entitled under the Scheme" within Rule 1. He said that if the transferring member did not claim in relation to an underpayment of that benefit within the specified six year period, the right to make such a claim was forfeited.

348. Mr Short submitted that Rule 1 only dealt with "instalments" and the claim in this case was not a claim to an instalment made more than six years after the instalment fell due for payment.

349. The rules of the relevant Scheme did not define pension or benefit or, indeed, instalment. Rule 60.2 provided for a pension to be paid by monthly instalments. The rules provided for an annual pension but they also provided for payment of lump sums. Mr Short submitted that the lump sums did not need to be claimed and so Rule

1 was not dealing with lump sums. He is right that a member had an option to give up part of a pension in return for a lump sum and that option had to be exercised before the first instalment of pension was paid. He is also right that if that option was not exercised in time, it was not the purpose of Rule 1 to provide a further six years in which it could be exercised or claimed. However, the rules do provide for other lump sums which would be capable of being claimed: see, for example, rules 10(a) and 12.4(a).

350. I consider that the ordinary meaning of Rule 1 is that it is concerned with claims to "instalments". It applies to a pension or other benefit but only if they are payable by instalments. The purpose of Rule 1 is to provide for a time limit for claiming past instalments which had not been paid. On that basis, the entitlement of a transferring member to require the Trustee to make a transfer payment to a receiving scheme is not payable by instalments and is not within Rule 1.

351. At the hearing I raised the possibility that where the initial transfer payment was inadequate so that the transferring member could require the Trustee to make a top-up payment, it could be said that the top-up payment was an instalment of a benefit. I do not think that that is the right analysis. Applying the ordinary meaning of Rule 1, the top-up payment is not an instalment within the rule. Accordingly, Rule 1 does not operate to forfeit the member's right to require the Trustee to make a top-up payment.

352. Further, I do not consider that the entitlement of the transferring member to require the Trustee to make a top-up payment to the receiving scheme was a "benefit to which he is entitled under the Scheme" within the meaning of Rule 1.

Rule 2

353. Rule 2 refers to any sum which may have become due to a Member or other person entitled to benefit under the Rules and provides that it is to be forfeited if not claimed during a period of six years from the date upon which that sum became due. I have to apply this wording to a case where the transferring member had a right to require the Trustee to make a transfer payment to the receiving scheme and the Trustee made an underpayment to the receiving scheme. On the ordinary reading of Rule 2, the sum in question was not due to the member as the Trustee was not obliged to pay that sum to the member and he was not entitled to receive it from the Trustee. The receiving scheme was not an "other person entitled to benefit under the Rules" because the rules did not confer on the receiving scheme an entitlement to benefit. Accordingly, on the ordinary meaning of Rule 2, the rule does not operate to forfeit the member's right to require the Trustee to make a top-up payment. I can see that in some circumstances it might be argued that "a sum due to a member" would extend to a case where a member was entitled to require the Trustee to pay a sum to a third party but that is not the ordinary meaning of the phrase. Given that Rule 2 is a forfeiture provision, I consider that it should be given its ordinary meaning and not an extended meaning and on that basis Rule 2 does not operate to forfeit the member's right to require the Trustee to make a top-up payment.

Rule 3

354. I doubt if the right of a transferring member to require the Trustee to make a top-up payment to the receiving scheme is "any pension or benefit or any instalment" for the purposes of this Rule. If that right were such a benefit, then it would be the case that the top-up payment was "unpaid to … the person to whom it is payable". i.e. the receiving scheme. It is also right that the benefit was "unclaimed by the person to whom it is payable" i.e. the receiving scheme. However, it was not argued, and not established, at the hearing that the receiving scheme had any right to claim the payment. In those circumstances, it cannot have been intended that the right (which is the right of the transferring member) would be lost because it was not claimed by the receiving scheme (who did not have a right to claim it) and even, for example, in a case where the transferring member had claimed the right. Accordingly, I hold that Rule 3 does not operate to forfeit the member's right to require the Trustee to make a top-up payment.

Rule 4

355. Rule 4 refers to "[b]enefits under the Scheme" and refers to sections 91 to 93 of the PA 1995. This suggests that "benefits under the Scheme" is a summary of what is referred to in sections 91 to 93 of the PA 1995 as "an entitlement to a pension under an occupational pension scheme or a right to a future pension under such a scheme". Rule 4 also explains that sections 91 to 93 of the PA 1995 are intended generally to ensure that benefits are paid only to the person entitled under the Rules rather than to any other person. Further, Rule 4 provides that any benefit is forfeited "if the person entitled to the benefit does not claim it" but only "to the extent permitted by these exceptions" and that is a reference to section 92(5). That subsection states that section 92(1) "does not prevent forfeiture by reference to a failure by any person to make a claim for pension".

356. I consider that the right of a transferring member to require the Trustee to make a top-up payment to a receiving scheme is not a "benefit under the scheme" for the purposes of Rule 4 but is to be regarded as a statutory right to leave the scheme and to acquire benefits under a different scheme. Accordingly, Rule 4 does not operate to forfeit the member's right to require the Trustee to make a top-up payment.

Rule 5

357. Rule 5 is similar to Rule 4 in that I conclude that the right of a transferring member to require the Trustee to make a top-up payment to a receiving scheme is not a "benefit under the scheme" for the purposes of Rule 5. Accordingly, Rule 5 does not operate to forfeit the member's right to require the Trustee to make a top-up payment. Although not now relevant, I note that Rule 5 does not provide for an automatic forfeiture of a right which comes within Rule 5 but gives the Trustee a discretion as to whether to treat the right as forfeited.

A claim

358. If I had held that any of Rules 1 to 5 was effective to lead to a forfeiture of the transferring member's right to require the Trustee to make a top-up payment to the receiving scheme, then it would be necessary to deal with Mr Short's submissions as to what constituted "a claim" for the purposes of Rules 1 to 5. Mr Short submitted that

at least some of the transferring members had made a claim within six years of the date on which the transfer payment was due and, accordingly, the right to require the Trustee to make a top-up payment to the receiving scheme had not been forfeited. He submitted:

> "… where members have requested the transfer of all of their rights (or all of their rights save for GMP) under the Scheme they have made a request for all of their rights as (if necessary) calculated in accordance with the Sex Equality Rule and/or Article 157. As such, as a matter of fact, they have already made claims for the purposes of these Rules. In the absence of such a claim, there could have been no transfer at all. Furthermore, it cannot have been intended by the parties to the various deeds that members (rather than the Trustee) should have been responsible for correctly calculating and verifying the figures involved."

359. Mr Rowley submitted that the principles to be applied were the same as the principles I stated in the 2018 judgment when I dealt with what he said was the same question as to whether pensioner members had made claims in relation to the part of a pension which had been underpaid.

360. In the 2018 judgment, I recorded that it was agreed that a "claim" for the purpose of the various forfeiture rules (and for the purpose of section 92(5) of the PA 1995) did not require the bringing of an action making such a claim. That agreement was plainly right. The various references to making a claim are quite different from the wording of the Limitation Act 1980 which refers to the bringing of an action. The 2018 judgment also held that where a pension was in payment and the Trustee made underpayments of the pension whereby arrears of the pension became due, the claim which was referred to in the various forfeiture rules (and in section 92(5) of the PA 1995) was a claim to the arrears. Whilst that approach to arrears of pension instalments allows Mr Rowley to argue that the same approach should be adopted in relation to the top-up payment, I consider that it would be necessary to consider separately the case of a claim to a top-up payment as the factual circumstances will not necessarily be the same as in the case of arrears of pension payments.

361. Whether a "claim" has been made for the purposes of the various rules is a matter of fact in each case. Mr Short's written submissions referred to 14 examples of the paperwork which was generated in relation to transfers which had taken place over many years. However, I did not receive specific submissions in relation to these examples.

362. Given my conclusions that Rules 1 to 5 do not apply in the way contended for by the Banks, it is not necessary in this case to deal with any question as to what is "a claim". I might have been prepared to deal with the question for the sake of completeness but in the absence of specific submissions as to Mr Short's 14 examples, I do not think it would be right for me to consider the many pages which relate to each case and form my own view as to whether a claim was or was not made in that case.

363. All that I will say on this subject is:

i) in principle, it ought to be possible to have a "claim" at a time which is before the Trustee makes any transfer payment to a receiving scheme;

ii) in a typical case, merely following the steps required by Chapter IV of Part IV of the PSA 1993, leading to a wrongly calculated cash equivalent and the transfer of that sum to a receiving scheme, would not involve making a claim, for the purposes of the Rules, of the right to require the Trustee to make a top-up payment to the receiving scheme;

iii) the position may be different with an application made by a member before April 1997 under Chapter IV of Part IV of the PSA 1993, as enacted; in such a case, one would have to consider exactly what the transferring member asked for and determine whether the request, even if expressed in general terms, amounted to a claim to a transfer payment which reflected the full extent of the member's accrued benefits so that, years later when the member pursues a claim to a top-up payment, the member can say that at an earlier time he claimed a sum which included the top-up payment and that sufficed as a claim for the purposes of the relevant rules.

The Limitation Act 1980

364. The submissions in relation to the Limitation Act 1980 were relatively concise. Mr Rowley said that the cause of action which could be asserted by a transferring member against the Trustee would be within section 2 or within section 21(3) of the 1980 Act. He further submitted that the cause of action accrued at the date of the original transfer to the receiving scheme. He then said that the case did not come within section 21(1)(b) of the 1980 Act because the claim by the transferring member was not a claim to "recover" trust property from the trustee.

365. Mr Short submitted that the case did not come within section 2, or even section 8, of the 1980 Act because the claim would be for an order that the Trustee do perform its duty or obligation and was therefore within section 36 of the 1980 Act. He further submitted that the claim would not come within section 21(3) because the claim would be for an order that the Trustee perform its duty and as part of that submission he described the claim as one to enforce performance of a continuing duty on the Trustee. If necessary, he submitted that he could rely on section 21(1)(b) on the basis that the claim would be to recover trust property from the Trustee.

366. To resolve these differences, it is essential to identify the cause of action which a transferring member could advance in this case. Earlier in this judgment, when I analysed the relevant legislation, I described the nature of the claim which a transferring member could bring. At this stage in the judgment, I only need to deal with claims under the cash equivalent legislation and only with claims in relation to a top-up payment. To recap what I said earlier:

i) in relation to the period from 1990 to 1997, the relevant right (conferred by section 94) is a member's right to a transfer of the cash equivalent of his benefits at the date of his application (under section 95) and the duty of the

Trustee (imposed by section 99(2)) is to do what is needed to carry out what the member requires; the duty is therefore to transfer the correctly calculated cash equivalent to the receiving scheme;

ii) in relation to the period from 1990 to 1997, the member's claim would be for an order of the court that the Trustee do belatedly perform the duty identified in i) above;

iii) in relation to the period from 1997 onwards, the Trustee's duty is to increase the amount of the guaranteed cash equivalent identified in the statement of entitlement; this duty is imposed by regulation 9(5) of the 1996 Regulations; following the increase in the guaranteed cash equivalent, the duty of the Trustee (imposed by section 99(2)) is to do what is needed to carry out what the member requires; the duty is therefore to transfer the correctly calculated cash equivalent to the receiving scheme;

iv) in relation to the period from 1997 onwards, the member's claim would be for an order of the court that the Trustee do belatedly perform the duty identified in iii) above.

367. The various sections of the 1980 Act refer to the date on which the right of action accrued. As regards the right of action in relation to the period from 1990 to 1997, the right of action accrued on the date of the original transfer when the Trustee transferred a sum which was less than the correctly calculated cash equivalent. That was when the Trustee committed a breach of its duty. That breach continued unremedied at all times thereafter but there was no fresh breach of duty on each day that the earlier breach remained unremedied. At the hearing in May 2020, Mr Short accepted that the cause of action accrued at the date of the original transfer. At the hearing in October 2020, Mr Short changed his position and submitted that the duty was a continuing duty on the Trustee. I consider that Mr Short's original stance was the correct one and I reject the submission that the relevant duty was a continuing duty which involved a fresh breach of duty every day that the Trustee failed to make a top-up payment.

368. As regards the right of action in relation to the period from 1997 onwards, the right of action accrued on the date of the original transfer when the Trustee transferred a sum which was less than the correctly calculated cash equivalent. That was when the Trustee committed a breach of its duty under regulation 9(5) of the 1996 Regulations and section 99 of the PSA 1993. That breach continued unremedied at all times thereafter but there was no fresh breach of duty on each day that the earlier breach remained unremedied. The position is in that respect the same as in the earlier period.

369. Given that the relevant claim would be for an order that the Trustee perform its duty, the claim would come within section 36 which refers to a claim for an injunction or for other equitable relief. Section 36 cross-refers to sections 2 and 8, in particular, and provides that the time limits under sections 2 and 8 shall not apply to a claim for an injunction or other equitable relief. I did not receive any submissions as to whether a member would have a claim for compensation for breach of duty and it is therefore not necessary to consider whether such a claim would be within sections 2 or 8, or even section 9.

370. The above reasoning means that the only section of the 1980 Act which now needs to be addressed is section 21. I considered various points arising in relation to section 21 in the 2018 judgment and I will proceed on the basis that what I then said at paragraphs [426]-[437] of that judgment was a correct statement of the law. However, the questions which now arise as to section 21 are not answered by what I said in that judgment.

371. Section 21(3) refers to an action by a beneficiary to recover trust property or in respect of a breach of trust. It was not said that the fact that the obligation of the Trustee was based on the statutory provisions meant that it was not also an obligation owed by the Trustee to the member under a trust. Mr Rowley positively asserted that the cause of action would be in respect of a breach of trust and Mr Short did not contend otherwise.

372. Mr Short's submission was that the cause of action was for the enforcement of a continuing duty on the Trustee. That submission does not involve saying that the cause of action did not involve a breach of trust but rather that the cause of action accrued from day to day. I do not accept that submission. The obligation was to make a payment by a certain date. That obligation was broken when that date was passed and the payment was not made. At that point, a cause of action accrued to the member to bring proceedings to seek a remedy for that breach of obligation. The fact that the breach remained unremedied did not mean that there was a fresh breach on every day that the breach remained unremedied. The fact that the court could make an order after the original date for performance of the obligation requiring a remedy of the breach did not mean that the obligation was a continuing one for the purposes of limitation.

373. It follows that the cause of action would be in respect of a breach of trust within section 21(3). Section 21(3) also refers to an action by a beneficiary to recover trust property. Mr Rowley, with one eye on the similar wording of section 21(1)(b), would no doubt say that the action would not be to recover trust property. As will be seen, when I consider section 21(1)(b), Mr Short does submit that the action is to recover trust property so that submission ought to produce the result that the claim would be within section 21(3) (subject to Mr Short's submission as to when the cause of action accrued).

374. Before finally deciding whether the cause of action would be within section 21(3), I need to ask whether the cause of action qualifies as "not being an action for which a period of limitation is prescribed by any other provision of this Act". By reason of section 36, none of sections 2, 8 or 9, or any other section, prescribe a period of limitation for the claim. The final matter to note is that section 36 does not disapply section 21(3) in the case of a claim for an injunction or other equitable relief. In the result, I hold that the cause of action would be within section 21(3). Section 21(3) prescribes a period of limitation of 6 years from when the cause of action accrued.

375. Section 21(1)(b) provides that no period of limitation shall apply to an action by a beneficiary under a trust, being an action to recover from the trustee trust property in the possession of the trustee. I considered the phrase "trust property in the possession of the trustee" in the 2018 judgment at paragraph [430] onwards. On the basis of that

reasoning, I hold that the Trustee's obligation is to make a top-up payment from "trust property in the possession of the trustee" within the meaning of that phrase in section 21(1)(b).

376. Accordingly, the critical question is whether the cause of action would be "to recover from the trustee trust property" within section 21(1)(b). I need to consider what, in this context, is meant by "recover"? Recovering trust property is also referred to in section 21(3). Section 9 refers to "an action to recover any sum recoverable by virtue of any enactment". Other sections of the 1980 Act use the verb "recover": see sections 3, 6, 10, 12, 15, 18, 19, 20, 22, 27A, 27B and 37 as further examples.

377. Mr Rowley asserted that the cause of action of a transferring member would not be an action to "recover" trust property because the trust property, the top-up payment, would not be paid to the transferring member but would be paid to the receiving scheme. Mr Short asserted that the action would come within the phrase: an action "to recover" trust property. Neither counsel referred to any authority, whether in relation to section 21, or in relation to any other section of the 1980 Act which used the verb "recover".

378. It is reasonably plain that the word "recover" in the 1980 Act is not limited to a case where the claimant was at an earlier point in time in possession of the relevant property, had lost it and was now seeking to "recover" it. It is perfectly permissible to speak of a claimant "recovering" damages. In most if not all of the sections of the 1980 Act, which use the verb "recover", the usual case, if not the only case, involves a payment being made to the claimant or possession being taken by the claimant. The question then is: in the context of section 21, is it of the essence that the trust property is paid over to the claimant or does it suffice if the claimant obtains an order from the court that the Trustee pays a part of the trust property to a third party at the direction of the claimant.

379. Section 21(1)(b) refers to "an action to recover from the trustee trust property". The subsection contemplates an action by a claimant. However, the subsection does not use any phrase such as "recovery by the claimant". No doubt in a typical case within section 21(1)(b), if the claim succeeded, the court would order the trustee to transfer the trust property to the claimant. But the wording could be applied to a case of a claimant seeking an order that the trust property is taken from the trustee and paid to a third party at the direction of the claimant.

380. I have considered whether the policy behind section 21 throws any light on the present issue. The policy behind section 21(3) is the same as the policy behind the 1980 Act as a whole to prevent the litigation of stale claims. That policy would point in favour of holding that a transferring member should not be able to bring a claim for an order for the making of a top-up payment many years after the original breach of trust. However, the policy behind section 21(3) is supplanted by the different policy behind section 21(1)(b). With that subsection, as explained in the 2018 judgment at paragraphs [430]-[431], the policy is to enable a beneficiary to enforce the performance of a trust where the trustee remained in possession of the trust fund; the trust fund was considered to be in the possession of the beneficiaries under the trust.

381. I consider that the word "recover" in section 21(1)(b) is capable of bearing a meaning which could extend to a case where the order sought by the transferring member is that the Trustee makes a top-up payment to the receiving scheme. The fact that the transferring member seeks the order, relies on his rights in relation to the trust property, will obtain the benefit of the top-up payment as a member of the receiving scheme and the payment is made at his direction, is enough to bring the case within the word "recover". In the light of the policy behind section 21(1)(b), as the word "recover" is capable of applying to the type of order which would be sought in this case, I hold that it does so apply.

382. I was not asked to consider the possible application of section 32 of the 1980 Act.

383. It was not argued that the claim to a top-up payment would be governed by section 134 of the Equality Act 2010.

Issues 1 to 3

384. Issues 1 to 3 are as follows:

> **"Issue 1**
>
> **In principle, does the Trustee's obligation to equalise apply in relation to the following transfers out:**
>
> **(a) transfers out to a DB occupational pension scheme that was at the time of transfer**
>
> **(i) contracted-out on a salary-related basis or**
>
> **(ii) contracted-out on a money purchase basis or**
>
> **(iii) contracted-in;**
>
> **(b) transfers out to a DC occupational pension scheme that was at the time of transfer**
>
> **(i) contracted-out on a salary-related basis or**
>
> **(ii) contracted-out on a money purchase basis or**
>
> **(iii) contracted-in;**
>
> **(c) transfers out to an overseas pension scheme which, under its governing law, is not subject to an obligation to equalise transferred-in benefits?**
>
> **Issue 2**
>
> **In principle, does the Trustee's obligation to equalise apply in relation to transfers out to a personal pension scheme?**

Issue 3

Without prejudice to the generality of issues 1-2, does the Trustee's obligation to equalise apply in relation to the transfers out mentioned in those issues if:

(a) the receiving scheme has no employer, or no employer obliged or able to make sufficient additional contributions, to fund equalisation of transferred-in benefits;

(b) the receiving scheme has wound up."

385. These Issues all relate to the position of the Trustee following the making of an inadequate transfer payment to a receiving scheme. In view of my earlier conclusions, the only "obligation to equalise" which comes within these issues arises in relation to transfers under the cash equivalent legislation, Chapter IV of Part IV of the PSA 1993. These Issues now fall to be addressed against a background where:

i) the Trustee was obliged under EU law and domestic law to equalise benefits as between male and female members;

ii) under domestic law, when calculating the amount of a transfer payment, the Trustee was obliged to include in the transferring member's accrued benefits, the member's right to have benefits equalised as between male and female members;

iii) under domestic law, if the Trustee failed to include in the transferring member's accrued benefits, the member's right to have benefits equalised as between male and female members, then the Trustee is obliged to make a top-up payment to the receiving scheme;

iv) under domestic law, the Trustee is not discharged from the obligation to make a top-up payment to the receiving scheme by reason of any statutory provision, or any regulation, or by any rule of the Scheme or by reason of the discharge forms to which I was referred;

v) in ii), iii) and iv) above I expressly referred to the position under domestic law; I have not yet considered how these matters would be dealt with under EU law, as that was not necessary up to this point.

386. Mr Rowley explained that an answer in his favour in relation to Issues 1 to 3 would only deal with the position under EU law. Against the background referred to above, that means that an answer in his favour in relation to these Issues will not affect the result of this case as I have held that the Trustee is obliged to make a top-up payment to a receiving scheme under domestic law.

387. Nonetheless, I will address Issues 1 to 3 but only at appropriate length in view of the fact that the answers to those Issues will not affect the result of this case.

388. All of Issues 1 to 3 relate to the position of the Trustee following the making of an inadequate transfer payment to a receiving scheme. However, Mr Rowley argued that the position of the Trustee might depend upon the position of the receiving scheme. His first submission was that if it can be established that the receiving scheme is, under EU law, liable to pay equalised benefits to the transferring-in member, even in relation to benefits which accrued before the transfer, EU law produces the result that the transferring scheme is released from any obligation owed to the transferring member to make a top-up payment to the receiving scheme. The argument was that EU law produced the result that the transferring member did not have a right to equalised benefits from the receiving scheme and, in addition, a right to require the transferring scheme to make a top-up payment to the receiving scheme; it was argued that, if EU law did impose an obligation on the receiving scheme, then it must follow that it removed any such obligation from the transferring scheme.

389. Mr Rowley made a second submission which was, if he were right in his first submission, the same result applied under EU law even where the receiving scheme was not obliged to equalise benefits in the way described above.

390. As I understand it, this series of propositions was not based on general principles but was based on the ruling of the Court of Justice in *Coloroll*. Before me, it was agreed by everyone that *Coloroll* does say that, in EU law, where the receiving scheme is a defined benefit occupational pension scheme, it is liable to pay equalised benefits to the transferring-in member, even in relation to benefits which accrued before the transfer. Indeed, in the order I made following the 2018 judgment, I so held in relation to the Schemes in their capacity as receiving schemes.

391. As Issues 1 to 3 indicate, the parties do not agree as to how *Coloroll* is to be applied in relation to a receiving scheme which is not a defined benefit occupational pension scheme. I received detailed submissions on that question. However, before considering that question, it would seem to be useful to address the case where the receiving scheme is a defined benefit occupational pension scheme, where there is an undisputed obligation to equalise benefits for transferring-in members. In such a case, the question I will first consider is: does *Coloroll* hold that in such a case, under EU law, the transferring scheme does not owe an obligation to the transferring member to make a top-up payment to the receiving scheme?

392. In relation to *Coloroll*, I was taken in detail through:

    i) the judgment of Sir Donald Nicholls V-C in the Chancery Division when he referred questions to the Court of Justice and the reference itself: see [1993] Pens LR 89;

    ii) the report of the Judge-Rapporteur (Mancini), reported at [1993] Pens LR 89 and at [1995] ICR 179;

    iii) the Opinion of the Advocate General (Van Gerven), reported under the heading of *Ten Oever v Stichting Bedrijfspensioenfonds* [1995] ICR 74, the name of one of the five other cases which were considered by the Court of Justice at the same time as *Coloroll*; and

iv) the judgment of the Court of Justice, reported at [1995] ICR 179.

393. In *Coloroll*, the Court of Justice considered a number of questions which had been referred to it. It is only necessary for present purposes to refer to question 5(2) which was in these terms:

> "5.(2) When an employee has transferred from one scheme to another, for example, on a change of job, and liability has been accepted by the receiving scheme for the payment of benefits in return for a transfer payment from the trustees of the former scheme, does article 119 apply so as to require those benefits to be increased by the scheme where necessary to reflect the principle of equality? If so, how do the principles laid down in answer to question 2 apply in such circumstances?"

394. The decision of the Court of Justice in relation to question 5(2) was given at paragraphs [94]-[99] of its judgment where it said:

> "94. The essence of the second part of the High Court's fifth question is whether, in the event of the transfer of pension rights from one occupational scheme to another owing to a worker's change of job, the second scheme is obliged, on the worker reaching retirement age, to increase the benefits it undertook to pay him when accepting the transfer so as to eliminate the effects, contrary to article 119, suffered by the worker in consequence of the inadequacy of the capital transferred, that being due in turn to the discriminatory treatment suffered under the first scheme.
>
> 95. The rights accruing to the worker from article 119 of the E.E.C. Treaty cannot be affected by the fact that he changes his job and has to join a new pension scheme, with his acquired pension rights being transferred to the new scheme.
>
> 96. Consequently, when the worker enters retirement he is entitled to expect the scheme of which he is then a member to pay him a pension calculated in accordance with the principle of equal treatment.
>
> 97. Where, particularly in consequence of insufficient funding, that does not happen, the paying scheme should in principle do everything to bring about a situation of equality, if need be by making a claim under national law for the necessary additional sums from the scheme which made an inadequate transfer.

> 98. However, since in the ***Barber*** judgment the court limited the direct effect of article 119 so as to allow it to be relied on in claims for equal treatment in the matter of occupational pensions only in relation to benefits payable in respect of periods of service subsequent to 17 May 1990, neither the scheme which transferred rights nor the scheme which accepted them is required to take the financial steps necessary to bring about a situation of equality in relation to periods of service prior to 17 May 1990.
>
> 99. The answer to the second part of the fifth question must therefore be that, in the event of the transfer of pension rights from one occupational scheme to another owing to a worker's change of job, the second scheme is obliged, on the worker reaching retirement age, to increase the benefits it undertook to pay him when accepting the transfer so as to eliminate the effects, contrary to article 119, suffered by the worker in consequence of the inadequacy of the capital transferred, that being due in turn to the discriminatory treatment suffered under the first scheme, and it must do so in relation to benefits payable in respect of periods of service subsequent to 17 May 1990."

395. It was this passage, and in particular paragraph [99], which led the parties before me to accept that a receiving scheme, which is a defined benefit occupational pension scheme, is obliged to provide equalised benefits to a transferring-in member even in relation to benefits which accrued before the transfer and even where the transfer payment was inadequate because the transferring scheme did not equalise benefits when calculating the transferring member's accrued benefits. Although, the Court of Justice referred to the particular case of a transferring member transferring to a new scheme on the occasion of changing his job, it was not argued before me that that limited the type of case in which the obligation of the receiving scheme arose.

396. The question then arises as to what the Court of Justice envisaged in relation to the position of the transferring scheme following the transfer. The Court of Justice did refer to the position of the transferring scheme. First, it referred to the discriminatory treatment suffered by the transferring member under the transferring scheme: see paragraphs [94] and [99]. Secondly, it referred to the inadequacy of the capital transferred: see paragraphs [94] and [99]. Thirdly, it referred to the possibility that the receiving scheme might be able to claim additional sums from the transferring scheme: see paragraph [97]. The Court of Justice contemplated that the receiving scheme might be able to bring such a claim under national law; it did not refer to the possibility of the receiving scheme being able to bring such a claim under EU law. Fourthly, the Court of Justice made the point that the effect of the *Barber* judgment was confined to periods of service subsequent to 17 May 1990; this comment was

made in relation to the transferring scheme as well as the receiving scheme: see paragraph [98]. The comment in paragraph [98] did not say anything further about the nature of the liability of the transferring scheme in relation to periods of service after 17 May 1980.

397. It seemed to be accepted by the Banks that the Trustee would be in breach of EU law, specifically Article 157 of the Treaty on the Functioning of the European Union, for having made transfer payments where male and female members were not treated equally, unless they could point to something in the judgment in *Coloroll* which had the effect of releasing the Trustee from liability for the consequences of its breach. For example, it was not argued that the making of the transfer payment was not "pay" within Article 157 or that a breach of Article 157 could only occur at the time when a pension came into payment so that the making of a transfer payment before that time could not involve a breach of Article 157.

398. I am unable to see anything in the judgment in *Coloroll* which states either expressly or by implication that, after the transfer, the Trustee ceases to be liable for the consequences of its breach of Article 157 or that the transferring member ceases to have any rights under EU law against the transferring scheme. The Court of Justice contemplated that the transferring scheme might be liable to the receiving scheme, albeit under national law. That comment by the Court of Justice does not seem to me to carry the implication that it was ruling that the transferring scheme was released from any obligation which it owed to the member. The Court of Justice expressly referred to the fact that the transferring scheme had discriminated against the transferring member and had made an inadequate transfer payment. Those comments provide no support for the idea that the Court of Justice would have thought it appropriate to release the transferring scheme from liability to the member for its actions and omissions.

399. Similarly, the fact that the Court of Justice commented on the rights of the member as against the receiving scheme and did not mention the rights of the member as against the transferring scheme does not carry the implication that the member had no rights against the transferring scheme.

400. Mr Rowley relied on the reference in paragraph [94] of *Coloroll* to "the transfer of pension rights from one occupational pension scheme to another". He suggested that the Court of Justice was holding that on the making of the transfer payment (even an inadequate transfer payment) to the receiving scheme, the transferring member's rights had been transferred so that they were rights against the receiving scheme with the result that they ceased to be rights against the transferring scheme. I do not consider that, by the use of that phrase, the Court of Justice was giving a ruling as to the effect of a transfer. The effect of a transfer is a matter of domestic law and is not a matter of EU law. I have referred to the domestic law which provides for the effect of a transfer. In fact, it is somewhat misleading to refer to the member's pension rights being transferred from one scheme to another. The receiving scheme does not step into the shoes of the transferring scheme and owe to the transferring member the identical obligations to those owed by the transferring scheme. Instead, if the transfer proceeds correctly, what happens is that the member ceases to have any rights against the transferring scheme in return for the transferring scheme paying the correct

transfer payment to the receiving scheme and upon that payment being received by the receiving scheme, that scheme confers upon the transferring member new rights on the terms of the receiving scheme. The new rights of the transferring member can be different from the former rights of the transferring member. It is not a case of rights being transferred but a case of a sum of money being transferred.

401. I have held that the transferring scheme is liable under domestic law to make a top-up payment to the receiving scheme. I can see no reason why the transferring scheme would not be liable under EU law in the same way for the consequences of its breach of EU law. There is no difficulty in the member having rights to equalised benefits under the receiving scheme and also having a right to require the transferring scheme to make a top-up payment to the receiving scheme. Such a remedy might be of real value to the member and I do not see why the Court of Justice would have wished to take away that remedy from the member.

402. Mr Rowley suggested that his approach was supported by provisions in the TUPE Regulations and he cited *Martin v Lancashire County Council, Bernadone v Pall Mall Services Group Ltd* [2001] ICR 197, which concerned regulation 5(2) of the Transfer of Undertakings (Protection of Employment) Regulations 1981. That case established that regulation 5(2) had the effect, where there was a change of employer within the Regulations, that the liability of the first employer to the employee became the liability of the second employer and, accordingly, the first employer ceased to be liable. That shows that there is no reason why there cannot be legislation which has that effect. It may even indicate that it is sometimes desirable to legislate to produce that effect. However, there is no such legislation in point in the present case.

403. Apart from what was said, or rather not said, in *Coloroll*, Mr Rowley did not rely on any general principle of EU law which would produce the result for which he contended. Accordingly, I conclude that *Coloroll* does not decide that there is no liability on the transferring scheme after the transfer to make a top-up payment to the receiving scheme. Conversely, I hold that, in addition to its liability under domestic law to make a top-up payment, the Trustee of the transferring scheme owes the same liability under EU law.

404. Mr Sawyer put a slightly different argument which went as follows: if the transferring scheme owed an obligation under EU law to make a transfer payment which reflected equalised benefits and it failed to perform that obligation and if the receiving scheme were liable under EU law to pay equalised benefits even in respect of benefits which accrued in the period before the transfer, then the transferring scheme was not after all in breach of its obligation because it has produced a state of affairs where the member was entitled to receive equalised benefits from the receiving scheme. I do not accept that argument. Whether the transferring scheme is in breach of its obligation to the member does not depend on whether the member has suffered any loss or whether the only party adversely affected is the receiving scheme. Even if the receiving scheme is now liable to pay equalised benefits to the transferring-in member, there was still a breach of obligation on the part of the transferring scheme. The question then is whether the member has a remedy for the breach of the obligation. In the ordinary case, the member would have a legitimate interest in requiring the transferring scheme to make a top-up payment. The top-up payment will be paid to the receiving scheme

and that will help it, even if only to a modest extent, to perform its obligation to the transferring-in member to pay that member's equalised benefits.

405. I have considered the arguments on Issue 1(a) in relation to a case where the receiving scheme was a defined benefit occupational pension scheme which was liable to equalise benefits, as decided in *Coloroll*. The other questions in Issues 1 to 3 considered other types of receiving scheme and other circumstances. In the course of argument, there was considerable debate as to whether other receiving schemes would owe a duty to a transferring-in member to equalise benefits which had accrued before the transfer. In the light of my decision as to what *Coloroll* decided it will not affect the result in this case whether or not these receiving schemes did or did not have such a duty to equalise. I hold that in all of the cases referred to in Issues 1 to 3, the transferring scheme owes an obligation to the transferring member, under EU law, to make a top-up payment to the receiving scheme.

406. Whether, for example, a receiving scheme, which is a defined contribution scheme, owes a duty to equalise benefits which accrued before the transfer to that scheme is a question which would be of considerable importance to such a scheme. No such scheme was represented before me. Although the submissions I heard on behalf of the Banks, the Eighth Defendant and the Trustee sought to put both sides of the argument, I do not intend to make a decision which, although purely obiter, would impact on the position of such a scheme. Such a decision is not necessary to determine the outcome in this case, would be obiter and might matter to third parties who are not represented in these proceedings.

407. Accordingly, in relation to Issues 1 to 3, I hold that the Trustee of the transferring Scheme owes an obligation to the transferring member, under EU law as well as domestic law, to make a top-up payment to the receiving scheme. As I held earlier, that obligation is not discharged by the making of the original inadequate payment, whether the discharge is said to have occurred under legislation or the rules of the Schemes or the discharge forms to which I have been referred.

PART VI: THE OVERALL RESULT

The overall result

408. Despite the length of this judgment and the large number of points which were argued, it is possible to express the overall result succinctly.

409. In the case of transfers made under the cash equivalent legislation the position is:

i) the Trustee owed a duty to a transferring member to make a transfer payment which was correctly calculated and which reflected the member's right to equalised benefits;

ii) the Trustee committed a breach of that duty in some cases by making an inadequate transfer payment;

iii) the breach occurred at the time of the transfer;

iv) the Trustee remains liable to the transferring member for its breach of duty;

v) the Trustee is not discharged from that liability by any statutory provision or any rule of the Schemes or by any agreement with the transferring member;

vi) a transferring member is entitled to seek a remedy against the Trustee and, in particular, an order from the court that the Trustee belatedly perform its duty to pay the correct transfer payment;

vii) a claim by a transferring member for an order that the Trustee belatedly perform its duty is not time barred, either under the rules of the Schemes or under the Limitation Act 1980;

viii) the Trustee is able belatedly to perform its duty even without an order of the court.

410. In the case of bulk transfers under the preservation of benefit legislation, I am asked to assume that regulation 12 of the 1991 Regulations was complied with. Where regulation 12 has been complied with and the bulk transfer was in accordance with the rules of the transferring Scheme, then the transferring members are entitled to benefits under the receiving scheme and are no longer entitled to benefits under the transferring Scheme.

411. In the case of individual rule-based transfers, the Trustee acted under a power conferred by the rules of the Scheme which were in accordance with the preservation of benefit legislation. As the power has been exercised, the transferring member no longer has rights under the transferring scheme unless the court sets aside the exercise of the power and the transferring member can require the Trustee to exercise the power afresh. The transferring member can only ask the court to set aside the earlier exercise of the power if the Trustee had committed a breach of duty when exercising the power. Whether the Trustee committed a breach of duty in that way would require an investigation of the relevant circumstances which was not carried out at this trial.

412. I will ask counsel to prepare a minute of order to give effect to this judgment.