**PO-16892**

# Ombudsman's Decision

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| **Applicant** | Mr R |
| **Scheme** | Thales UK Pension Scheme (TOPS section) (**the Scheme**) |
| **Respondent(s)** | Thales Pension Trustees Limited (**the Trustee**) |
| | Thales UK Limited (**Thales UK**) |

## Complaint summary

1. Mr R's complaint concerns the Trustee's decision to change the index used to calculate annual increases on his Scheme benefits.

2. On 29 September 2016, the Trustee announced that it intended to increase Scheme benefits annually going forward based on the consumer prices index (**CPI**), rather than the more favourable retail prices index (**RPI**). The consequence of the change of index is that Mr R's annual pension increase is likely to be lower.

## Summary of the Ombudsman's decision and reasons

3. The complaint is upheld against the Trustee and Thales UK, and to put matters right the Trustee shall increase Mr R's pension in line with RPI.

4. My reasons for reaching this decision are explained in more detail below.

## Detailed Determination

### Material facts, including submissions from the parties

5. Mr R is a pensioner member of the Scheme. Increases to Mr R's pension are calculated in accordance with Rule 1.11(b) of the Thales Optronics Pension Scheme (**TOPS**) Rules, dated 31 May 2000 (the **2000 Rules**); the TOPS having merged into the Thales UK Pension Scheme (the **Main Scheme**).

6. When the Trustee announced the change in September 2016, it also confirmed that it would be retrospective. The Trustee said that CPI ought to have replaced RPI for Scheme pension increases to coincide with other legislative changes which came

into effect in January 2011. This would have meant that Scheme members, such as Mr R, had been overpaid since 2011, as their pension benefits would have increased at a higher rate since that time.

7. The Trustee agreed to "write-off" the alleged overpayments but said there would be no further annual increases until Scheme members' benefits matched the level that they would have been had they increased in line with CPI since 2010. But this means therefore, that the alleged overpayments have not been "written off" in their entirety.

8. Mr R argues that the 2000 Rules state that pension increases are to be made using RPI and, therefore, he believes his pension should continue to be based on the percentage increase in the RPI.

9. Under Rule 1.11 (b) of the 2000 Rules, the rate of increase to be applied to annual pension benefits is:

> "(i) in respect of the part of the Member's pension which relates to Qualifying Pensionable Service completed on and after 6 April 1997, **the percentage increase in the retail prices index over the year ending 30 September in the calendar year prior to that in which the increase is due to take place subject to a maximum of 5 per cent as specified by order under Section 2 of Schedule 3 of the Pension Schemes Act**, and
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> (ii) in respect of the excess part of the Member's pension which relates to Qualifying Pensionable Service completed prior to 6 April 1997 (if any) over an amount of pension which when expressed as a weekly rate is equal to the guaranteed minimum pension, **the percentage increase in the retail prices index over the year ending 30 September in the calendar year prior to that in which the increase is due to take place subject to a maximum of 5 per cent as specified by order under Section 2 of Schedule 3 of the Pension Schemes Act.**" [bold added]

10. Mr R argues that the above clearly states pension increases should be made in line with RPI.

11. In response, the Trustee has highlighted that, in Rule 1.11(b) of the 2000 Rules, RPI is mentioned in reference to Section 2 of Schedule 3 of the Pension Schemes Act (see Appendix A), and the Pension Schemes Act means the Pension Schemes Act 1993 (**the Act**). The Trustee argues that, once the Secretary of State had started to use CPI, instead of RPI, as the relevant index to determine the statutory pension increases, as set out in annual orders made under Section 2 of Schedule 3 to the Act (as explained in paragraph 12 below), the reference in the 2000 Rules to RPI had become obsolete. It followed that CPI should be used instead of RPI, in calculating increases to pensions in payment under Rule 1.11(b) of the 2000 Rules.

12. The Act confers powers on the Secretary of State to make annual orders specifying the revaluation percentages to be used in calculating pension increases.

Historically, this was RPI. However, as part of the June 2010 Budget, the government announced that it intended to change the index on which to base statutory pension increases from RPI to CPI. This change was subsequently brought into effect on 1 January 2011, via the Occupational Pensions (Revaluation) Order 2010 (SI 2010/2861) (**the 2010 Order**, see Appendix B).

13. The Trustee argues that RPI was only used to calculate pension increases before 2010, as this reflected the index that had been used to calculate the percentage increases set out in the annual revaluation orders made by the Secretary of State under the Act (the **Orders**). Once the 2010 Order came into effect, statutory pension increases ceased to be based on increases in RPI and were instead based on increases in CPI; the reference to RPI was no longer applicable.

14. Mr R argues that the 2000 Rules hard-code RPI as the basis upon which annual increases ought to be calculated. However, the Trustee argues that the 2000 Rules indicate that the relevant index at any time will be the one used to calculate the percentage increases set out in the Order which applies at that time. The relevant index at the time the 2000 Rules were drafted was RPI, and RPI was specifically referred to in the 2000 Rules, along with reference to paragraph 2 of Schedule 3 to the Act, under which the Orders were (and still are) made.

15. The Trustee has conceded that it sought legal advice regarding the 2010 Order in August 2010 (the **2010 Advice**), and the legal advice at the time, in the absence of any comments from Thales UK, was that the Trustee "take a cautious approach and adopt RPI" in relation to pension increases under Rule 1.11(b), as the requirements under the 2000 Rules were not clear.

16. In the 2010 Advice, the effect of the Government's switch from RPI to CPI on different benefits: pensions in payment, revaluation in deferment and the build-up of career average revalued earnings (**CARE**) benefits, were noted. Further, it was observed that "the impact of the changes of the [Main Scheme] is affected by the particular Rules of the [Main Scheme]". The 2010 Advice in relation to increases to pensions in payment under the Main Scheme was that CARE pension increases would remain linked to RPI following the Government's change to CPI, unless the Government introduced any exemption to Section 67 of the Pensions Act 1995[1] or legislated to override scheme rules. This was because the relevant Rules of the Main Scheme stated that increases to CARE pensions in payment were to be calculated by reference to RPI.

17. The 2010 Advice noted that whether CPI or RPI applies, following the Government's switch from RPI to CPI as the basis for the Orders, was arbitrary and turned upon the specific provisions of the rule in question.

[1] Broadly, Section 67 of the Pensions Act 1995 prevents the amendment of benefits relating to past pensionable service from being amended in a way that would affect those benefits detrimentally, unless certain conditions are met.

18. The 2010 Advice observed that Rule 1.11(b) of the 2000 Rules was ambiguous, so the Trustee was advised to "take a cautious approach and adopt RPI". The Trustee did not seek advice from counsel at that time and continued to apply RPI, in accordance with the 2010 Advice. Thales UK had no involvement in the Trustees' process of seeking and obtaining the 2010 Advice and did not independently review or verify that advice.

19. In 2015/16, as part of an ongoing review of benefits, Thales UK's actuarial and legal advisers informed Thales UK that, in their opinion, the correct interpretation of Rule 1.11(b) would be that pension increases were linked to the Orders, so CPI should have applied from 2010/11 when the Government had first applied CPI as the basis of the figures contained in the Orders. Thales UK then instructed leading counsel to consider the matter further. In counsel's opinion, Rule 1.11(b) conferred no right on the member to pension increases based on RPI. The more favourable interpretation of Rule 1.11(b) was that pension increases were made in accordance with the Orders, because paragraph 2 of Schedule 3 to the Act referred to the Orders, which did not refer directly to an index, but instead to "the increase in the general level of prices in Great Britain".

20. In response to Thales UK's view that an automatic switch to CPI should have occurred in 2010, the Trustee sought its own advice from leading counsel. Counsel's advice was that a court would give prominence to the statutory reference in Rule 1.11(b) and so would find that the 2000 Rules did provide for an automatic switch to CPI in 2010/11. Counsel advised that the Scheme should be administered on that basis.

21. Counsel's advice was explained to the Trustee in a meeting on 21 September 2016, during which time the Trustee's lawyers were in further discussion with counsel about his advice. Following the conclusion of those discussions, at a Trustee meeting on 6 December 2016, the Trustee Board considered counsel's advice, noting also: the 2010 Advice; Thales UK's preferred interpretation of Rule 1.11(b) (see paragraph 19); and counsel's high level of expertise and experience of understanding how courts would construe scheme rules. The Trustee decided to adopt counsel's advice, "subject to a final search for and review of the documents relating to the implementation of the Post 1997 rules in the 2000 deed". The Trustee's solicitors carried out that search and review of the documentation, but found nothing specific, from and around the relevant time, concerning pension increases. The Trustee's lawyers obtained confirmation from counsel that his advice remained unchanged and the Trustee finalised its decision to adopt counsel's advice.

22. As a result, the Trustee retrospectively changed the index used, agreeing an augmentation with Thales UK so that the resulting 'overpayment' of benefits would not be recovered from members. However, the Trustee also decided to freeze pension increases for future years until the amount of the pension in payment had

become equal to what it would have been had increases been based on CPI from April 2011.

23. I have not seen a copy of the advices received by Thales UK or the Trustee from their respective counsel. The Trustee has, however, made it clear that its submissions (paragraph 26) reflect the legal advice that it received from counsel in 2016. The Trustee has also supplied a redacted copy of an extract from an email exchange between the Trustee's legal advisers and counsel, dated 11 October 2016. In this email exchange, the Trustee's legal advisers referred to counsel's view that the Rule 1.11(b) had "built in a link to statute" and asked a further question; whether counsel considered that the Section 67 certificate that had been provided by the Scheme actuary in respect of the 2000 Rules, from which it appeared that the Scheme actuary had been specifically asked to consider the pension increase provisions, had been validly given "such that the amendment of the indexation provision was effective". The Trustee's legal advisers stated that they presumed that the Scheme actuary had given the section 67 certificate "because he focussed upon what the rate under [the Act] was at that time, rather than considering whether the new provision had the potential to be disadvantageous to members if the statutory provisions changed in the future, or that he only focussed on the wording in the rest of the provision". The Trustees' legal advisers also asked counsel to confirm his view whether there should have been an "automatic switch to CPI for affected members in respect of all pensionable service". Counsel answered both questions affirmatively.

24. The Trustee's (proposed) actions may have impacted on other members; but I have only considered the complaint brought by Mr R and whether Rule 1.11(b) has been applied correctly as it relates to him.

## Adjudicator's Opinion

25. Mr R's complaint was considered by an Adjudicator in my office, who concluded that Mr R's complaint should be upheld. The Adjudicator's findings are summarised below:-

    25.1. Whether Mr R's pension ought to be increased annually in line with RPI or CPI depends on a proper construction of the relevant 2000 Rules. In this instance, the 2000 Rules are ambiguous.

    25.2. Rule 1.11(b) could potentially provide for pension increases by two methods: 1) by identifying the index to be used to determine pensions increases, thus 'hard coding' RPI as the relevant index (**method 1**); or 2) by referring to the statute under which the statutory method of determining pension increases is set out. Under this method, the relevant index will depend on which index is used to determine statutory increases under the current legislation (**method 2**).

25.3. The Adjudicator considered that method 1 was the appropriate way of interpreting the 2000 Rules. In concluding this, the Adjudicator noted that:-

25.3.1. Section 2, Schedule 3 of the Act does not refer directly to any index. Instead, the "percentage increase in the general level of prices in Great Britain" is referred to. If the Trustee, at the time of drafting, had intended simply to replicate what happened under statute, it could have used the same wording as that of the statute, rather than referring directly to the "retail prices index". As it is, the 2000 Rules refer explicitly to the retail prices index. If method 2 were to be used for constructing the 2000 Rules, the retail prices index would not have needed to have been explicitly referred to.

25.3.2. Case law (e.g. *National Grid Company plc v Mayes [2001] UKHL 20*) allows a consideration of previous versions of the Scheme's Trust Deed and Rules to be used for the purposes of interpretation, unless expressly stated otherwise. Applying this, the Adjudicator noted that Rule 4.4.4 of the preceding Scheme Rules dated 1 June 1991 (**the Previous Rules**) stated that the annual increase would be the lesser of 5% or the increase in the Relevant Retail Prices Index within the last 12 months. Rule 4.4.4(i) of the Previous Rules then said that if RPI was altered, then all subsequent variations in that pension will be on a basis determined by the Trustees having regard to the alteration made to the Retail Prices Index (**the proviso**).

25.3.3. The proviso had been considered in the recent Thales case (*Thales UK Ltd v Thales Pension Trustees Ltd [2017] EWHC 666 (Ch)*), and the judge found that, as RPI had been "*otherwise altered*" by the incorporation of UK house price index (**HPI**) in 2008, the Trustee was required to apply the above proviso and select the "nearest alternative" to RPI. In that case, the nearest alternative was RPI incorporating UK HPI, not CPI.

25.3.4. The limits of the Trustee's discretion to select another index under the Previous Rules might not have been known when the current 2000 Rules were drafted. However, the Adjudicator considered that a reasonable person would conclude that, if the parties had intended to word Rule 1.11 of the 2000 Rules differently from Rule 4.4.4 of the Previous Rules, in order to provide greater flexibility to choose the index to apply to pensions increases, the parties would have used clearer wording to that effect rather than referring directly to one particular index. The Adjudicator believed it could reasonably be inferred that the parties expressly intended to narrow down the choice of index by referring directly to the "retail prices index",

rather than referring to the "percentage increase in the general level of prices in Great Britain" as the statute does.

25.3.5. Finally, the Adjudicator noted there is no express wording in the 2000 Rules which grants the Trustee any discretion to choose an index other than the "retail prices index" for increasing pensions in payment. The absence of any express discretion to vary the index under the 2000 Rules distinguishes this case from those in which the court has found that there was a discretion to switch to CPI (or any other index) under the relevant scheme's rules.

26. The Trustee did not accept the Adjudicator's Opinion and requested a Determination, particularly as the outcome of this matter it says could have extreme financial consequences of around £20 million if the decision favoured method 1 and it would be significant for all stakeholders. At that point Thales UK also joined the complaint, and the matter was passed to me to consider. The Trustee and Thales UK provided their further comments, raising the following points:-

26.1. The Deputy Pensions Ombudsman (**Deputy Ombudsman**) had previously issued a Determination (reference PO-17674) concerning the same provision and did not uphold the complaint. In that Determination, the Deputy Ombudsman stated that the interpretation the Trustee has placed on Rule 1.11(b) is a reasonable one, formed after proper consideration of the legal advice it received in 2016.

26.2. The approach in PO-17674 was also followed in an Opinion issued by a Senior Adjudicator from this office (reference PO-18553).

26.3. The Trustee wishes to understand how the Determination and Opinion, mentioned above, can be reconciled with my Determination in this case should I uphold the complaint. This is in order to provide a clear outcome it says so that it knows how to administer Rule 1.11(b).

26.4. The percentage stated in the Order made in 2000 (when the 2000 Rules came into effect) was the result of applying the lower of RPI and 5%. The view of counsel, instructed by the Trustee in 2016, was premised on the assertion that the lower of 5% and "retail prices index" were referred to by the 2000 Rules simply to explain to the reader what the reader would have found by looking at the Order. The references to RPI and 5% were there to help the reader understand how the Order operated at the time of drafting, not knowing, at that time, that the statutory position would change in the future. Counsel surmised that lay trustees or Scheme members might not understand a standalone statutory reference. Counsel did not consider that the potential divergence of the outcome under the Orders and RPI capped at 5% should affect the interpretation of Rule 1.11(b), and pointed out that the interpretation of the Rule at that time was what mattered.

26.5. If the Act was not the correct reference point, then it would not be explicitly referred to under the 2000 Rules. It is irrelevant as to whether the Act explicitly referred to RPI. The 2000 Rules direct the reader towards the correct legislation to refer to, and the index to be used will be dependent upon what that legislation states at the time, which is currently for CPI to be applied under the relevant Order.

26.6. The legal advice obtained in 2015/16 by Thales UK (see paragraph 19) was reviewed by separate counsel instructed by the Trustee in September 2016, given that it conflicted with the 2010 Advice (see paragraphs 15 to 21). Separate counsel also agreed that a court would interpret Rule 1.11(b) as instructing CPI to be used for annual increases under the 2000 Rules from 2011. In doing so, leading counsel referenced *Royal Mail Group Ltd v Evans & Others [2013] EWHC 1572 (Ch)* (**Royal Mail**), which the Trustee and Thales UK request that I consider. As mentioned above in paragraph 23, the advices received by the Trustee and Thales UK from their respective counsel have not been shared with my office.

26.7. The Trustee has also cautioned, and argued, against looking to the Previous Rules, making reference to paragraphs 69 to 73 of *National Grid Co Plc v Mayes [1997] Pens. L.R. 157*, and paragraphs 54 and 55 of *Stevens v Bell [2001] O.P.L.R 135*. Counsel had advised the Trustee that, by virtue of the certificate given by the Scheme actuary under Section 67 of the Pensions Act 1995 (**1995 Act**), when the 2000 Rules were adopted the Previous Rules referred to by the Adjudicator were of no further relevance to Mr R and the change of wording regarding increases to pensions in payment was valid for all of Mr R's benefits relating to all of his pensionable service.

26.8. The Trustee has agreed that there is no flexibility for the Trustee to choose the index to be applied for pension increase purposes; the question is whether RPI is hard-wired or whether the increases should automatically follow those set out in the annual Orders.

27. In addition, in response to the Preliminary Decision that I issued in respect of this complaint in January 2019, Thales UK has raised the following points:-

27.1. The reference to the Order, in Rule 1.11(b), was only necessary because that Order, specifying the appropriate percentage increase, was to be the controlling factor. There would have been no need to have included the legislative reference to the Order if all that was prescribed by Rule 1.11(b) was escalation by reference to RPI subject to a maximum of 5%.

27.2. The Orders specified neither the index, nor the reference period on which they were based, nor the 5% maximum rate imposed by Schedule 3 of the Act. The Orders merely specified the percentage applicable. Therefore, an

explanation of what the Orders were doing needed to include an explanation of the 5% maximum rate, which was applicable.

27.3. Within the Definitions section of the 2000 Rules, the term "Index" is defined as "the Government's Index of Retail Prices"; that is RPI. The draftsman has not used that defined term in Rule 1.11(b) of the 2000 Rules. If the draftsman had intended RPI to be hard-wired as the basis for pension increases under Rule 1.11, the draftsman would simply have referred to "the Index", as he did in Rule 5.3(G) and in the definition of "Final Remuneration", when defining the overriding limit for escalation. The fact that the draftsman appropriately used the defined term for RPI in connection with escalation in Rule 5.3(G) positively reinforces the conclusion that he intended a different result; that is in Rule 1.11 he did not intend RPI to be hard-wired for escalation in Rule 1.11. The fact that the draftsman deliberately did not use the defined term for RPI, that is the "Index", indicates that Rule 1.11 was not hard-wiring in RPI.

27.4. The draftsman's purpose or intention was to replicate the operation of Section 51(2) of the 1995 Act (**Section 51(2)**). Hence Rule 1.11 prescribed the same reference period as applied for the "appropriate percentage" under Section 51(2) of the 1995 Act, by virtue of the cross-reference under Section 54(3) of the 1995 Act (**Section 54(3)**); namely the year up to the prior 30 September. Since the draftsman's evident purpose or intention was to replicate the operation of Section 51(2), this entailed drafting Rule 1.11 so that the percentage for escalation was the revaluation percentage for that reference period "specified in the order under paragraph 2 of Schedule 3 to the Pension Schemes Act 1993", as the "appropriate percentage" referred to in Section 51(2) was defined, in Section 54(3), by reference to the Order. That is what the draftsman did (albeit also providing a potentially useful explanation of what such revaluation orders were doing). Rule 1.11(b) should be interpreted in accordance with that evident purpose and intention.

27.5. The wording of Rule 1.11 closely tracked the wording of the definition of "appropriate percentage" in Section 54(3). By placing the legislative cross-reference at the end of paragraph (i) of Rule 1.11(b), after the reference to "a maximum of 5 per cent", the draftsman was using the same syntax as that used in Section 54(3). In that context, the word order used in Rule 1.11 is entirely explicable and natural and supportive of the conclusion that Rule 1.11 has the same effect as Section 51(2) and Section 54(3).

27.6. *Royal Mail* illustrates that the Court has treated another draftsman's references to increases in line with "the retail prices index" as merely a "shorthand" for the increases in fact applicable under a statutory provision. Thales UK has referred me to paragraph 82 of *Royal Mail*, in which Asplin J (as she then was) accepted the submission of Christopher Nugee QC (at

paragraph 47) that the shorthand reference to "the retail prices index" should be 'read down' and interpreted (by reference to the rest of the wording of the clause) as applying only the increases prescribed by statute. The same approach should apply here. Rule 1.11's final phrase, referring to "the percentage increase…specified by order under Section 2 of Schedule 3 of the Pensions Schemes Act" (to which meaning and weight must be accorded) likewise requires the reference to the retail prices index to be interpreted as "merely a shorthand for the increases specified by the revaluation "order"'. Treating Rule 1.11 as hard-wiring in RPI ignores, and fails to accord meaning and weight to, the final phrase of the clause.

27.7. In taking into account common practice in the pensions world in and before 2000, the fact that it was common practice to summarise and/or explain the effect of the legislation without intending to alter the application and effect of that legislation should be considered. The application and effect of the legislation in this case is manifested by the final phrase of Rule 1.11(b), which states that the increase was "as specified by order under Section 2 of Schedule 3 of the Pension Schemes Act" that applied.

27.8. Instruments setting up long-term commercial structures are more susceptible to dynamic interpretation, allowing for interpretation flexibly against an evolving legislative context which was not in contemplation when the instrument was drafted. Thales UK has quoted an extract from 'The Interpretation of Contracts (6th edition 2016) at paragraph 5.15 (page 284), in which Sir Kim Lewison states:

> "Where a contract is in the nature of a constitutional instrument…there is more justification for adopting a dynamic approach to interpretation, rather than ascertaining the meaning that the contract bore at the date of its creation.
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> But where a court has a choice between a static or a mobile interpretation, the result of adopting a mobile interpretation is not to change the scope of the underlying contract. As it was put in *Debenhams Retail Plc v Sun Alliance and London Assurance Co Ltd [[2005] 3 E.G.L.R. 34]*, the court must
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> 'promote the purposes and values which are expressed or implicit in the wording, and to reach an interpretation which applies the … wording to the changed circumstances in a manner consistent with them'."

27.9. Here, where Rule 1.11's reference to the "retail prices index" was plainly merely a shorthand or "useful explanation" summarising the effect of each "order under Section 2 of Schedule 3 of the Pension Schemes Act", that reference should be given a dynamic, updating interpretation, giving due weight and primacy to the final phrase of the clause and the evident purpose of its wording. Thales UK has directed me to the case of *Lloyds*

*TSB Foundation for Scotland v Lloyds Group plc [2013] UKSC 3, [2013] 1 WLR 366*, for example at paragraphs 23 to 25, 31, 34, 50 and 52.

28. The Trustee and Thales UK have requested that I issue a clear Determination on the correct interpretation of Rule 1.11(b) with the above in mind.

## Conclusions

29. The reason that this complaint has been made is because the Trustee and Thales UK have looked to automatically change the RPI index to CPI when applying Rule 1.11(b) and thereby resulting in a decrease in Mr R's accrued benefits. Section 67 of the Pensions Act 1995, and the restriction in the Scheme's amendment power under Rule 4.17(b) of the 2000 Rules[2], prevent the Trustee from amending Rule 1.11(b) retrospectively. Therefore, the only way in which the change from RPI to CPI in respect of past service benefits can be made, is to rely on the ambiguity under Rule 1.11(b) by interpreting this Rule in a manner which enables the change to have taken place automatically.

*Previous cases*

30. As a matter of law, I am not bound by my own Determinations, or those of the Deputy Ombudsman's or any previous Ombudsman.

31. The question that was investigated and determined by the Deputy Ombudsman in PO-17674 was not whether the correct index had been applied, but whether the Trustee had been through a satisfactory process in deciding to apply CPI and made a reasonable decision having been through that process. It is distinguishable from this case, where Mr R's complaint concerns the interpretation of Rule 1.11(b) itself, not the process that had been applied, resulting in the Trustee's decision to interpret Rule 1.11(b) in the manner in which it did.

32. In her decision, the Deputy Ombudsman stated clearly that the Trustee's decision to follow the legal advice that it had received in 2016 (the 2010 Advice not having been disclosed to us), see paragraph 35 below, was reasonable in the circumstances. The Deputy Ombudsman did not go as far as considering in detail the construction of Rule 1.11(b), or what its interpretation should be, as the complaint was treated as concerning the manner in which the Trustee had reached its decision, as opposed to the substance of that decision.

33. By contrast for Mr R's complaint, I have been expressly asked to consider the construction of Rule 1.11(b) and, on that basis, determine what I consider to be the correct application of Rule 1.11(b) in respect of Mr R's benefits.

[2] Rule 4.17(b) of the 2000 Rules provides that the amendment power cannot be exercised in a manner which would or might affect the entitlement or Accrued Rights of any Member or other person with an entitlement to benefits under the Scheme unless the Trustee has satisfied itself that the certification or consent requirements of regulations made under Section 67 of the Pensions Act 1995 have been met.

34. The interpretation of Rule 1.11(b) was in question in complaint PO-18553. Notably though, that case never reached Determination stage and I may issue a Determination which reaches a different outcome from an adjudicator's opinion. Whilst I acknowledge that this may not be ideal, it will be the case, from time to time, that I do not agree with an adjudicator's opinion and I will ultimately issue a Determination with a different outcome, as I am entitled to do.

35. It should also be noted that when my office previously considered these complaints (paragraphs 31 and 34), it was not known that the Trustee had received conflicting advice, that is the 2010 Advice. It is of particular concern that this was not disclosed during the previous investigations, particularly when the Deputy Ombudsman was considering the process the Trustee followed in reaching its decision. My office was only alerted to the 2010 Advice by Mr R (in his capacity as a former trustee of the Scheme).

*Construction of Rule 1.11(b)*

36. As set out in paragraph 18 above, the 2010 Advice supported Mr R's view that the Government's switch from RPI to CPI, as the basis for the figures contained in the Orders, did not result in pension increases under Rule 1.11(b) being calculated by reference to CPI. Further, changes to the legislation governing increases to pensions in payment do not permit pension scheme rules to be amended retrospectively so that CPI can be applied to pension increases where the pension is already in payment and where the rules require RPI to be applied. Whether or not RPI was 'hard coded' into a pension scheme's rules depends entirely on the specific wording of the relevant scheme rule.

37. I consider that there is nothing modifying, altering or qualifying the words" retail prices index" or the 5% per cent cap. So I have construed the words in their ordinary and natural meaning. As a matter of common sense, since the draftsman expressly used the words "retail prices index", I consider that that is the index by reference to which he intended pensions in payment to increase.

38. Under the 'contra proferentem' rule, where there is ambiguity in a term of a contract, that term will be interpreted against the party who put forward that term. Whilst the 2000 Rules are not themselves a contract between Mr R and the Trustee and/or Thales UK, case law has established that the contra proferentem rule applies also to trusts which derive from a contractual and commercial relationship. Although pension scheme rules are not themselves a commercial contract, they derive from the contract of employment between the sponsoring employer and the member and the benefits paid from the scheme in question are "delayed remuneration for the employee's work during his period of employment"[3].

[3] Harris v Lord Shuttleworth [1993] PLR 39, at paragraphs 13 to 14

39. As a general principle of the construction of a document, it is necessary to consider what a reasonable person drafting the document would have intended the words used to mean[4]. Such a hypothetical reasonable person would have been in the position of the parties who drafted and agreed the document and would have had all of the background knowledge available to those parties, other than (as a general rule) details of previous negotiations and any other statements of intention that would be perceived as subjective.

40. On 31 May 2000, when the 2000 Rules came into effect, a reasonable person drafting Rule 1.11(b) would have had access to the legislation governing statutory increases to pensions in payment. It is not disputed that annual statutory pension increases were set out in the Order for the relevant year. Nor is it disputed that Section 2 of Schedule 3 to the Act (in force on 31 May 2000) did not refer expressly to RPI, and referred to the "percentage which appears to [the Secretary of State] to be the percentage increase in the general level of prices in Great Britain during the period which is the reference period" in relation to the period of increase in question.

41. The Trustee has submitted (see paragraph 26.4) that the mention of the "retail prices index" under Rule 1.11(b) was intended only to explain to the reader how pensions increases, that were set out in the Orders, were calculated at the time of drafting the 2000 Rules. This is because no specific index was referred to in the Act under which the Order was made. I do not accept that clarity is the only purpose for expressly referring to RPI in Rule 1.11(b).

42. Any reasonable draftsman would have known, when drafting the 2000 Rules, that the index on which the figures shown in the Orders were based, may at any future point following a change in Government policy, change from RPI to any other index. Rule 1.11(b) does not provide that an Order has to be followed in future years if the premise of the rate referred to in the Order ceases to be RPI. Therefore, the most natural conclusion is that the express inclusion of the reference to RPI in Rule 1.11(b) was to ensure that RPI remained the applicable index under Rule 1.11(b); regardless of any future changes to the index under paragraph 2 of Schedule 3 to the Act.

43. In any event, I cannot reconcile the Trustee's explanation (in paragraph 41) when I consider that Rule 1.11(b) expressly refers to the 5 per cent cap, which was already expressly stated in the Act (at the relevant time) under which the Order was made. As this would therefore have been clear to anyone who had looked at paragraph 2 of Schedule 3 to the Act, having the words expressing a 5% cap in the Rule was therefore simply not necessary. Paragraph 2(3) of Schedule 3 to the Act (in force on 31 May 2000) provided that the revaluation percentage for each revaluation period was:

    (a) the percentage which appears to him to be the percentage increase in the general level of prices in Great Britain during

[4] Reardon-Smith Line Ltd v Hansen-Tangen [1976] 1 WLR 989

> the period which is the reference period in relation to that revaluation period; or
>
> (b) the maximum rate, whichever is the less". The "maximum rate" was defined, in relation to a revaluation period of 12 months, **as 5 per cent**, under paragraph 2(6) of Schedule 3 to the Act.

44. On the basis that I consider that Rule 1.11(b) has 'hard coded' pension increases based on RPI, capped at 5% per cent; and any reliance on the statutory pension increase provisions under the 1995 Act (see Appendix C), which Thales UK said it was trying to replicate the intention of (see paragraph 27.4 above), is irrelevant, as the statutory increases under Section 51(2) of the 1995 Act, did not apply to schemes that already provided pension increases at a rate at least as generous as that under Rule 1.11(b).

45. Additionally, the words used in Rule 1.11(b) do not even replicate the wording of paragraph 2 of Schedule 3 to the Act. Thales UK has submitted that the syntax of Rule 1.11(b) was meant to track that of Section 54(3) of the 1995 Act in force on 31 May 2000, and that the effect of Rule 1.11(b) was supposed to be the same as that of Section 51(2) of the 1995 Act, which was as follows:-

> Section 51(2) of the 1995 Act (in force on 31 May 2000), provides for statutory increases to pensions in payment to be made by reference to the "*appropriate percentage*"; and
>
> Section 54(3) of the 1995 Act (in force on 31 May 2000), provides that the appropriate percentage was defined as "*the revaluation percentage for the latest revaluation period specified in the Order under paragraph 2 of Schedule 3 to the Pension Schemes Act 1993 (revaluation of accrued pension benefits) which is in force at the time of the increase*".

46. However, in replicating the effect of Section 51(2) of the 1995 Act in force on 31 May 2000, by expressly setting out that effect, the draftsman has hard coded the legislation as at 31 May 2000 into Rule 1.11(b). This means that any pension increases under Rule 1.11(b) will not have changed as a consequence of the subsequent amendments to that legislation (see paragraph 48).

47. I do not consider that the draftsman's purported intention is relevant, and I have not seen any evidence of it. I see no reason why the draftsman's alleged intention should supersede the actual effect of having hard coded the legislation, as at 31 May 2000, to Mr R's detriment.

48. As indicated in paragraph 46, the relevant legislation was subsequently amended, by the Pensions Act 2008, with effect on and after 6 April 2009; so that statutory annual increases in pension benefits relating to pensionable service completed before 6 April 2005, were subject to a maximum of 5%, and those relating to

pensionable service completed on and after 6 April 2005, were subject to a cap of 2.5%, as has been expressly set out in paragraph 2 of Schedule 3 to the Act since 6 April 2009[5]. Section 51 of the 1995 Act, provides for Limited Price Indexation, which in 2000 was RPI and is now CPI. If the intention had been to reflect Section 51(2) of the 1995 Act, rather than to codify its effect as at the date of drafting, that provision should have been mentioned expressly in Rule 1.11(b), which it is not.

49. As reference is made to the 5% cap expressly in Rule 1.11(b), notwithstanding that this is also stated in the primary legislation of both the Act and the 1995 Act, the draftsman has, by referring to the 5% cap without reference to the legislation, hard-coded it.

50. I conclude that Rule 1.11(b) hard coded RPI subject to a cap of 5%, as the relevant index. Reference to the Order was simply to enable the reader to ascertain the percentage increase in RPI that applied in any given year. But it was not necessary to refer to the Order, because the percentage increase could also have equally been ascertained by referring directly to the figures published by the Office of National Statistics for the relevant reference period. The Orders are merely subordinate legislation, referred to by empowering the governing Rule 1.11(b) in place of paragraph 2 of Schedule 3 to the Act. Unlike paragraph 2 of Schedule 3 to the Act however, Rule 1.11(b) refers expressly to RPI.

*Barnardo's v Buckinghamshire and others [2018] EWCA Civ 1064*

51. Additionally, as has been acknowledged by Lord Hodge in the recent Supreme Court judgment of *Barnardo's v Buckinghamshire and others [2018] EWCA Civ 1064*, (***Barnardo's***) the characteristics of a pension scheme's governing rules make it "appropriate for the court to give weight to textual analysis, by concentrating on the words which the draftsman had chosen to use and by attaching less weight to the background factual matrix than might be appropriate in certain commercial contracts" (paragraph 15)[6].

52. In the *Barnardo's* judgment, the word order of the provision in question was taken into account as a relevant factor in the provision's interpretation (paragraph 21). Similarly, in this complaint, I consider the word order of Rule 1.11(b) to be relevant. Had the intention of the draftsman been to provide increases only by reference to the Orders, I consider that the more natural way of drafting Rule 1.11(b) would have been to refer to the Order first and then follow it with an explanation of what index currently applied concerning the Order.

---

[5] The new version of Paragraph 2(3) of Schedule 3 and new Paragraph 2(3A), which came into effect under the Pensions Act 2008, provide for an "appropriate higher revaluation percentage", subject to "the higher maximum rate" and an "appropriate lower revaluation percentage", subject to a "lower maximum rate", which are defined, in paragraph 2(6) as amended by the Pensions Act 2008.

[6] The following cases were cited: *Spooner v British Telecommunications plc [2000]* Pens LR 65, Jonathan Parker at paras 75-76; *BESTrustees v Stuart* [2001] Pens LR 283, Neuberger J at para 33; and *Safeway Ltd v Newton* [2018] Pens LR 2, Lord Briggs, giving the judgment of the Court of Appeal, at paras 21-13.

53. Thales UK has explained that the word order reflected that of the definition of "appropriate percentage" in Section 54(3) of the 1995 Act (in force on 31 May 2000), the operation of which it sought to replicate. However, without any express reference to Section 54(3), I do not consider that a reasonable person would have made a link to Section 54(3) or appreciated that the word order under Rule 1.11(b) sought to replicate it. Therefore, I consider that the effect is that the meaning of Section 54(3) in force on 31 May 2000, including the method by which the "appropriate percentage" was reached at that time, has been hard-coded into the 2000 Rules.

54. Although the draftsman has not adopted the Inland Revenue defined term "Index" which also means retail prices index, I am not persuaded that the ordinary, natural meaning should not apply to these words. The wording of the Inland Revenue limits under Part 5 of the 2000 Rules does not need to be read together with the wording of Rule 1.11(b) in interpreting Rule 1.11(b), as there is no evidence that Rule 1.11(b) was drafted with Part 5 of the 2000 Rules in mind, other than for the application of the cap on pensions increases provided by Rule 5.3(G).

55. That cap was necessary in order to maintain the Scheme's inland revenue approval under the tax regime that was in force at the time, but did not affect the manner in which pension increases were calculated, under Rule 1.11(b), before applying the limit where necessary.

56. The term "Index" is used also in the definition of "Final Remuneration", which is used in Part 5 of the 2000 Rules. The individual rules that set out the formula for calculating benefits under the 2000 Rule do not refer to Final Remuneration. However, each of those individual rules is also made subject to Part 5. Clearly, before the limits under Part 5 can be applied, the benefit calculation needs to have been carried out under the relevant rule in Part 1.

57. This reinforces my point in paragraph 54 above that Part 5, and the use of the defined term "Index" within it, serves only to limit the benefits under the Scheme, as was required at the time of drafting for the Scheme's continued inland revenue approval. It is clear that, beyond applying those limits on benefits, Part 5 bears no other relationship with Part 1 of the 2000 Rules.

58. This is in contrast to the circumstances of the *Barnardo's* case, in which the definition of "Retail Prices Index" in question was clearly related to the parallel definition under the inland revenue limits appendix to the scheme rules, which contained further detail as to who could have replaced the RPI with a different index for the purposes of calculating pension increases under that scheme's rules.

*Further considerations*

59. In the case of *Mettoy Pension Trustees Ltd v Evans [1990] 1 WLR 1587*, Warner J set out the distinctive factors to be taken into account when interpreting a pension

scheme's trust deed. Of particular note in this case is Warner J's comment that consideration should be given to common practice in the pensions world.

60. I do not consider that 'hard-coding' pension increases by reference to RPI capped at 5% was at all uncommon in 2000, as is evidenced by the amendments made to Section 51, by the Pensions Act 2011, in order to ensure that schemes with rules drafted in that manner would not be subject to a CPI underpin in the event that the increase in RPI were to be lower than that in CPI in any given increase reference period.

61. Thales UK has submitted that it was also common practice, on and before 2000, for the effect of legislation cited in pension scheme rules, to be summarised or explained without intending to alter the application and effect of that legislation. Thales UK has said that, by using the words "as specified by order under Section 2 of Schedule 3 of the Pension Schemes Act", the Orders are to apply in calculating pensions increases.

62. However, the syntax of Rule 1.11(b), which, Thales UK has explained, seeks to mirror that of Section 54(3) in force on 31 May 2000, makes for unnatural reading and does not support Thales UK's explanation. If the intention had been to apply the Order and also to explain how the figure contained in the Order had been calculated, then as I said, the natural and logical way of doing that would have been to have referred to the Order first and then to provide the explanation of the calculation behind the figure contained in the Order. It has also been found appropriate for the court to give weight to 'textual analysis' (see *Barnardo's*, paragraph 51 above).

*Royal Mail Group Ltd v Evans & Others [2013] EWHC 1572 (Ch)*

63. The Trustee has requested that I consider the case of *Royal Mail Group Ltd v Evans & Others [2013] EWHC 1572 (Ch)* and submits that advice from counsel obtained in 2016, was based on the application of that case. In *Royal Mail*, benefits from one scheme (the Post Office Pension Plan ("**POPP**")) had been transferred into another scheme (**the "Executive Plan"**). A particular group of the members whose benefits were transferred into the Executive Plan (**the "Relevant Members"**) had been entitled, under POPP, to have their benefits increased in accordance with the statutory increases which, at the time when the transfer occurred, were calculated by reference to the RPI.

64. The scheme rules that governed the benefits, provided to the members whose benefits had been transferred into the Executive Plan, contained a rule governing the increases to be applied to the Relevant Members under the Executive Plan. That rule provided that Relevant Members who "had been entitled to have their pension in payment or in deferment increase without limitation in line with the retail prices index shall continue to be so entitled under [the Executive Plan]" in relation to both past and future service (**Royal Mail Rule**).

65. The Court was asked to determine which of the following interpretations of the above Rule was correct:-

    65.1. the Royal Mail Rule referred to the actual increases that were applicable under the POPP Rules at that time (as statutory increases were based on RPI at that time, and the reference to RPI was therefore shorthand for referring to increases under the Pensions Increase Act 1971) (**1971 Act**) and applying the same provision under the Executive Plan (the words "continue" and "so entitled" being key); or

    65.2. the Royal Mail Rule could have the effect of granting RPI-based increases to the Relevant Members on the basis that, in fact, Relevant Members were entitled to RPI-based increases when the Royal Mail Rule was drafted (RPI having been the index that was applied under the relevant statute at that time).

66. The court found in favour of the interpretation at paragraph 65.1, on the basis that:-

    66.1. interpretation at paragraph 65.2 required the words "continue" and "so entitled" to be ignored completely and so interfered with the drafting more than interpretation in paragraph 65.1;

    66.2. there was no entitlement to uncapped RPI increases under the POPP Rules that could be continued;

    66.3. as the Relevant Members had been entitled to pension increases based on the 1971 Act prior to the transfer, it made commercial sense for that entitlement to continue;

    66.4. the Relevant Members had not been entitled 'in fact' to unlimited RPI increases, as they were all still in active service so had not reached the stage where any pension increases applied; and

    66.5. there was no mechanism, under the Royal Mail Rule, by which an RPI increase could be applied (for example, it was not stated which period of increase in RPI would be considered for the purpose of calculating pension increases).

67. I do not consider the Royal Mail case to assist the Trustee and Thales UK in this complaint for the following reasons:-

    67.1. Had the Royal Mail Rule applied to Mr R, then Mr R would, as a pensioner member, have received an increase in RPI as he would have 'in fact' been so entitled.

    67.2. Royal Mail is distinguishable. It addresses the applicability of enhanced benefit provisions between two schemes to relevant members, so what had been provided under the first scheme was directly relevant to the writing and interpretation of the rules of the second scheme.

67.3. The Royal Mail Rule in *Royal Mail* referred to a previous entitlement and the basis of increase provided under that rule was expressed as a continuation of that previous entitlement. In this case, there is no reference to the Previous Rules in Rule 1.11(b). At the time of drafting the 2000 Rules, the only link between Members' increase entitlement under the Previous Rules and under Rule 1.11(b) was the requirement, under Section 67 of the 1995 Act, that members' subsisting rights were not adversely affected. As the Trustee has submitted, the certificate issued by the Scheme actuary under Section 67 of the 1995 Act ended any such link back to the Previous Rules when the 2000 Rules were adopted on 31 May 2000. Rule 1.11(b) is not drafted by reference to Rule 4.4.4 of Previous Rules and I do not consider that Rule 4.4.4 should be considered part of the factual background to the drafting of Rule 1.11(b)[7].

67.4. Asplin J based her decision, in Royal Mail, against applying uncapped RPI increases, partly on the ground that interpreting the Royal Mail Rule so as to apply unlimited RPI-based increases would have required the reader to ignore certain words which linked the rule in question back to the previous entitlement. Construing Rule 1.11(b) in this case as providing RPI-based increases capped at 5% does not require any such words to be ignored, quite the contrary.

67.5. Another reason given by Asplin J in *Royal Mail*, for not interpreting the Royal Mail Rule to allow an entitlement to unlimited RPI increases, was that no mechanism for calculating those increases was set out in the rule. In this case, Rule 1.11(b) clearly provides for the rate of increase to be the percentage increase in RPI "*over the year ending 30 September in the calendar year prior to that in which the increase is due to take place*", capped at 5%.

67.6. Finally, Asplin J found that, if she were incorrect in her analysis, applying the principles voiced by Lord Clarke in the case of *Rainy Sky v Kookmin Bank [2011] 1 WLR 2900*, the Court would be entitled to prefer a construction (where there was more than one possible construction of a rule) which was consistent with business common sense. I do not consider that expressly providing for pensions to increase by reference to RPI capped at 5%, which reflected the statutory method of increase at that time, would have been inconsistent with business common sense. It did not provide members with any entitlement greater than their entitlement under the Previous Rules had been and did not go beyond the statutory minimum increase at that time.

[7] As explained in paragraph 75 below, developments in case law since the Adjudicator issued her Opinion (in which she considered Rule 4.4.4, as part of the factual background to the drafting of Rule 1.11(b)), has resulted in my attaching little weight to any comparison between pension increase provisions under the Previous Rules and the 2000 Rules).

68. I do not agree with Thales UK's submission that, following *Royal Mail*, the reference to "the retail prices index" should be regarded as shorthand for the increases applicable under statute. The Royal Mail Rule was constructed so as to refer back to the members' previous entitlement under POPP, which had been to pensions increases as provided by the 1971 Act. Whilst, in practice, pensions had been increased in line with RPI under the 1971 Act, members who remained in active service and whose pensions had therefore not yet come into payment, and been increased, had not become entitled to pensions increases based upon any particular index. As Christopher Nugee QC submitted (paragraph 48 of *Royal Mail*), if the reference to "retail prices index" were to be read literally, none of the Relevant Members would qualify for pensions increases under the Royal Mail Rule of the Executive Plan.

69. In Mr R's case, the context differs from that of *Royal Mail*. Rule 1.11 is not drafted by reference to any previous entitlement of the Scheme's members and reading Rule 1.11 as an entitlement to pensions increases based on RPI would not serve to exclude any members.

70. Thales UK has cited paragraph 82 of *Royal Mail*, in which Asplin J agreed with Mr Nugee's submission that "retail prices index" should be read as shorthand for the provisions that had applied to the Relevant Members under POPP, otherwise words linking the rule in question back to the Relevant Members' previous entitlement under POPP would be rendered useless. Thales UK has submitted that treating Rule 1.11 as hard-wiring in RPI "ignores, and fails to accord meaning and weight to, the final phrase of the clause". I disagree that interpreting Rule 1.11 in that way would result in the reference to the Order being ignored or given insufficient weight or meaning. Applying method 1 to the interpretation of Rule 1.11(b), reference to the Order would have been included, at the time of drafting, to enable the reader to refer to the Order to access the figure representing the percentage increase in RPI in order to be able to apply the RPI increase, subject to a 5 per cent upper limit, as required by Rule 1.11(b).

*Dynamic interpretation*

71. Thales UK has submitted that "long-term commercial structures are more susceptible of dynamic interpretation flexibly against an evolving legislative context which was not in contemplation when the instrument was drafted", quoting a passage from a textbook on contracts in which a case concerning a commercial lease is cited. A pension scheme is not itself a commercial structure. The parties to a pension scheme's trust deed and rules are not engaged in trade or commerce with one another, as has been pointed out in Barnardo's at paragraph 14. That, and other distinctive characteristics of a pension scheme[8] have been recognised by

[8] The other characteristics listed in paragraph 14 of *Barnardo's* as being specific to a pension scheme are: that it is a formal legal document, prepared by skilled and specialist draftsmen; it is an instrument designed to operate in the long term, defining people's rights long after the economic and other circumstances, which

judges as making it "appropriate for the court to give weight to textual analysis, by concentrating on the words which the draftsman has chosen to use and by attaching less weight to the background factual matrix than might be appropriate in certain commercial contracts" (paragraph 15 of *Barnardo's*). Therefore, I do not consider it appropriate to apply principles specifically relating to commercial structures and agreements to a pension scheme's rules.

72. However, I have also reviewed the case that Thales UK has mentioned in its submissions[9]. *Lloyds* concerned the construction of a covenant contained in a commercial deed between a bank and a charitable foundation. Changes to accounting rules, which occurred after the covenant had been entered into, resulted in the fees payable by one party to another under the covenant, being significantly higher than had been envisaged. That situation had not been contemplated or foreseeable and, according to uncontradicted expert evidence, had been "unthinkable" when the covenant was entered into. The question, as stated in paragraph 23 of *Lloyds*, was how the deed's language best operated in the "fundamentally changed and entirely unforeseen circumstances in the light of the parties' original intentions and purposes". It was held that the law as it had been when the deed was entered into was relevant, on the basis that the changes concerned had been unthinkable at the time when the term was negotiated. That the changes had been "unthinkable" distinguished *Lloyds* from other cases.

73. I do not consider that Lloyds assists the Trustee's and Thales UK's case. Paragraph 2 of Schedule 3 to the Act did not refer to any particular index as being applicable in determining the increases to be set out in the Orders. Whilst it was commonly known that RPI was used when the 2000 Rules were drafted and came into effect, as I have found, the draftsman must have reviewed the legislation and seen that it was open to the Secretary of State to apply a different index in the future. It cannot be said that changing the index for use in the Orders was unforeseeable. With that in mind, if the draftsman had intended Rule 1.11 to follow the statute so that whichever index was used by the Secretary of State could also be used under Rule 1.11, it seems short sighted of the draftsman to have failed to include any words to make that intention clear.

*Reference to Previous Rules*

74. I note that the Trustee has advised caution against referring to Previous Rules for assistance in interpreting current 2000 Rules, as per paras 69 to 73 of *the National Grid case ([1997] Pens. L. R. 157)*, and paras 54 to 55 of *Stevens v Bell ([2001] OPLR 135)*. I do not agree that the cases the Trustee has referred to should prevent

existed at the time it was signed, may have ceased to exist; the scheme confers important rights on parties, the members of the pension scheme, who were not parties to the instrument and who may have joined the scheme many years after it was initiated; and members of a pension scheme may not have easy access to expert legal advice or be able readily to ascertain the circumstances which existed when the scheme was established.

[9] Lloyds TSB Foundation for Scotland v Lloyds Group plc [2013] UKSC 3, [2013] 1 WLR 366 (***Lloyds***)

me from looking to the Previous Rules which were in force immediately before the 2000 Rules came into effect.

75. However, I do consider that the point made by Lord Hodge in the 2018 Supreme Court judgment of the *Barnardo's* case at paragraph 26 of the judgment is relevant. Lord Hodge's view was that, where the replacement of the earlier scheme rules has involved a "*wholesale re-drafting of the earlier rules in which the draftsman may or may not have had regard to the wording of the earlier rules, with the result that there is no basis for assuming that the draftsman's use of different words points to an intention to achieve a different meaning*", the previous rules can be of little or no assistance in interpreting the present rules. It seems to me that the 2000 Rules did involve a "*wholesale re-drafting*" of the Previous Rules, so it follows that little weight should be given to any comparison between the Previous Rules and the 2000 Rules in construing Rule 1.11(b). In any event, my conclusion that method 1 is the correct method of interpreting Rule 1.11(b) would not be altered by attaching (or not attaching) any weight to such a comparison.

*Section 67 certificate*

76. Lastly, the Trustee has highlighted that the 2000 Rules were certified under Section 67 of the 1995 Act by the Scheme actuary, which had the effect of disapplying the Previous Rules in relation to active members of the Scheme on 31 May 2000, when the 2000 Rules came into effect. However, whilst the certification may have covered either RPI-based increases or statutory increases as they were at the time, I do not see how the certification provides me with any authority as to the interpretation of Rule 1.11(b).

*Concluding thoughts*

77. For the reasons I have set out in paragraphs 29 to 76 above, I agree with Mr R's interpretation of Rule 1.11(b) and not that of the Trustee's and Thales UK's. Therefore, I uphold Mr R's complaint. Rule 1.11(b) can no longer be read by reference to the Orders, as the percentage increases set out in the Orders are now based on CPI, not RPI. The percentage increases to be applied under Rule 1.11(b) now need to be ascertained by:

    77.1. referring directly to the figures, published by the Office of National Statistics, which show the percentage changes to the RPI (all items); and

    77.2. applying a 5% upper limit on those percentage changes where relevant.

*Estoppel arguments*

78. I have not needed to consider any potential reliance by Mr R on the doctrine of estoppel by convention or estoppel by representation. However, I acknowledge that, had I found in favour of the Trustee, Mr R could have raised an argument based on estoppel, to which I would have given serious consideration, albeit that the Trustee contends otherwise.

## Directions

79. Within 56 days of the date of this Determination the Trustee shall:-

    79.1. Increase Mr R's pension in payment in line with RPI, capped at 5%;

    79.2. If arrears in pension benefits have accrued as a result of the Trustee freezing Mr R's pension increases, then the Trustee shall pay such arrears accrued to Mr R; and

    79.3. The Trustee shall add simple interest to the arrears, paid at the base rate for the time as set by the Bank of England.

**Anthony Arter**
Pensions Ombudsman

12 December 2019

**PO-16892**

**Appendix A**

***Schedule 3 of the Pensions Act 1993 – in force on 31 May 2000***

*The revaluation percentage and the appropriate revaluation percentage*

2(1) For the purposes of paragraph 1 the Secretary of State shall in each calendar year by order specify a revaluation percentage for each period which is a revaluation period in relation to that order.

(2) A period is a "revaluation period", in relation to an order under this paragraph, if it is a period which —

(a) begins with 1st January 1986 or with an anniversary of that date falling before the making of the order; and

(b) ends with the next day after the making of the order which is 31st December.

(3) The revaluation percentage which the Secretary of State is to specify in relation to each revaluation period is —

(a) the percentage which appears to him to be the percentage increase in the general level of prices in Great Britain during the period which is the reference period in relation to that revaluation period; or

(b) the maximum rate,

whichever is the less.

(4) The Secretary of State may estimate the percentage increase mentioned in sub-paragraph (3)(a) in such manner as he thinks fit.

(5) For the purposes of that sub-paragraph, the reference period in relation to a revaluation period is —

(a) in the case of the revaluation period beginning on 1st January 1986, the period which begins with 1st October 1985 and ends with the last day before the making of the order which is 30th September; and

(b) in the case of the revaluation periods with later commencement dates, the period which —

(i) begins with the last day before the commencement of the revaluation period which is 1st October; and

(ii) ends with the last day before the making of the order which is 30th September.

(6) For the purposes of sub-paragraph (3)(b) "the maximum rate", in relation to a revaluation period, is—

(a) in the case of a revaluation period of 12 months, 5 per cent.; and

(b) in any other case, the percentage that would be the revaluation percentage had the general level of prices increased at the rate of 5 per cent. compound per annum during the reference period in question.

(7) In paragraph 1 “the appropriate revaluation percentage” means the revaluation percentage specified in the last calendar year before the date on which the member attains normal pension age as the revaluation percentage for the revaluation period which is of the same length as the number of complete years in the pre-pension period.

**PO-16892**

## Appendix B - Orders

### The Occupational Pensions (Revaluation) Order 2000 No 3085

The Secretary of State for Social Security, in exercise of the powers conferred by paragraph 2(1) of Schedule 3 to the Pensions Schemes Act 1993 hereby makes the following Order:

…….

**2 The revaluation percentage for each revaluation period**

For the purposes of paragraph 2(1) of Schedule 3 to the Pensions Schemes Act 1993, the revaluation percentage for each revaluation period specified in column 1 below is the percentage specified in column 2 in relation to that period.

| Column1 | Column 2 |
|---|---|
| Revaluation period | Revaluation percentage |

### The Occupational Pensions (Revaluation) Order 2010 No 2861

The Secretary of State for Work and Pensions, makes the following Order in exercise of the power conferred by paragraph 2(1) of Schedule 3 to the Pensions Schemes Act 1993:

…….

**2 The higher and lower revaluation percentage for each revaluation period**

For the purposes of paragraph 2(1) of Schedule 3 (methods of revaluing accrued pension benefits) to the Pensions Schemes Act 1993, for each revaluation period specified in column 1 below, the higher revaluation percentage is the percentage specified in column 2, and the lower revaluation percentage, if any, is the percentage in column 3, in relation to that period.

| Column 1 | Column 2 | Column 3 |
|---|---|---|
| Revaluation period | Higher revaluation percentage | Lower revaluation percentage |
| 1st January 2010 - 31st December 2010 | | |

## Appendix C

## Pensions Act 1995 as in force on 31 May 2000

### *Section 51*

*"51 Annual increase in rate of pension*

(1) …this section applies to a pension if –

…

(b) apart from this section, the annual rate of the pension would not be increased by at least the appropriate percentage of that rate."

### *Section 54*

*"54 Sections 51 to 53: Supplementary*

(3) …

"appropriate percentage", in relation to an increase in the whole or part of the annual rate of a pension, means the revaluation percentage for the latest revaluation period specified in the order under paragraph 2 of schedule 3 to the Pension Schemes Act 1993 (revaluation of accrued pension benefits) which is in force at the time of the increase (expressions used in this definition having the same meaning as in that paragraph)".