The Pensions Ombudsman

PO-9061 PO- 9059 PO- 7262

Ombudsman's Determination

Applicant	Mr S
	and
	Mr E, Mr N (together the **Additional Applicants**)
Scheme	Staveley Industries Retirement Benefits Scheme (**SIRBS**)
Respondent(s)	SIRBS Pension Trustee Limited (**the Trustee**)
	Staveley Industries Plc
	PS Independent Trustee Limited

Complaint summary

1. Mr S's complaint against the Trustee, Staveley Industries Plc, the previous employer, and PS Independent Trustee Limited, the SIRBS manager is that his pension in payment increases were reduced to 3% per annum. He says that he is entitled to 5 % per anum increases as stipulated in the SIRBS rules.

2. The Additional Applicants' complaints set out above have been associated with Mr S's complaint by my office. This means that the conclusions set out below in respect of Mr S's case apply equally to the Additional Applicants. For clarity, there are differences in relation to the underlying facts for each individual but these have no material effect on the overall conclusion.

Summary of the Ombudsman's decision and reasons

3. The complaint should be upheld. This is because Mr S is entitled to 5% increases, subject only to Inland Revenue limits which have now been repealed.

Detailed Determination

Material facts

4. In March 1977, Staveley Industries Plc established the Supplementary Benefits Scheme which subsequently became known as the Staveley Executive Pension Scheme (SEPS).

5. Mr S was a SEPS Category A member and retired from Staveley Industries Plc in July 1992.

6. Under SEPS rule 11, Mr S was entitled to a 5% annual increase, except in so far as rule 20 imposed the Inland Revenue restrictions contained in the appendix to the rules; the appendix restricted increases to the greater of 3% and RPI, but provided that the Management Committee may pay a higher sum where the Inland Revenue permits.

7. Mr S received a statement from the Trustee in July 1992 stating,

 "Increase of Pension

 Pension in course of payment under the Scheme will be increased on each 1st January by 5%. At the discretion of the Trustees, increases at a higher level may be awarded."

8. In 1998 Mr S was transferred from SEPS to Staveley Industries Retirement Benefits Scheme (SIRBS) on the basis of an agreement that the benefits he would receive under SIRBS would be no worse than under SEPS.

9. Mr S received a letter from the Trustee dated 24 July 1998 saying,

 "From 1 August 1998, SIRBS will provide benefits for you which are exactly the same as they would have been under SEPS if the merger had not taken place. I would like to reassure you that your entitlement to benefits will not alter in any way"

10. Staveley Industries Plc transferred the assets from SEPS into SIRBS in September 1998. The 7 September 1998 Transfer Agreement stated,

 "Benefits for transferring pensioners and deferred members

 8. …SIRBS will provide benefits which are the same as those that would otherwise have been provided under SEPS.

 Benefits for transferring active members

 9. (a) benefits for pensionable service under SIRBS …which are the same as those…for pensionable service under SEPS…"

11. On 6 April 2006 the system of taxation for UK pension schemes was simplified, commonly referred to as ‘A-Day’. These simplifications included the removal of the then Inland Revenue limits meaning that there was no longer a limit on how much an individual could save in a pension scheme. This was, however, subject to certain statutory transitional arrangements which provided for schemes, if specific criteria were met, to continue to apply the Inland Revenue Limits during a transitional period, but with the power to terminate the transitional period by amendment of the rules.

12. HMRC wrote to Mr S on 17 June 2006 in response to an earlier letter from him. The writer of the letter said,

    “New Pensions regime from April 2006: Primary and Enhanced protection

    A pension that came into payment before 6 April 2006 may be increased at a rate of 5% per annum and remain within the “permitted margin”.

    If a pension increases at no more than the “permitted margin” there will not be a benefit crystallisation event under section 216 FA 2004.”

13. Mr S received a letter from the Chairman of the Trustee in December 2008 regarding his pension increase effective from 1 January saying,

    “ The Trustees are pleased to advise that in accordance with the Scheme Rules, your pension in payment will be increased by 5% with effect from 1 January 2009.”

14. Mr S received further similar letters from the Chairman of the Trustee in 2010, 2011 and 2012 saying that his pension receives fixed increases of 5% per annum.

15. On 20 May 2013 Punter Southall wrote to Mr S on behalf of the Trustee informing him that his benefits had reached HMRC limits and that his pension increases would be limited to 3% per annum.

16. Mr S received a letter from the Secretary to the Trustee dated 25 August 2015 in which it states,

    “Rule 17.6 of SIRBS (Tax status of SIRBS) specifically says that:

    “In spite of the changes made by the Finance Act 2004, the limits that previously applied to the amount and form of benefits under SIRBS, and to contributions to SIRBS, continue to apply, expect where Staveley and the Trustees agree otherwise and subject to [other exceptions that are not relevant to your case]”. Rule 17.6 applies to you just as it applies to every other member of SIRBS.

    The limits that applied before 6 April 2006 to the amount and form of benefits under both SEPS and SIRBS still apply in spite of the changes made by the

Finance Act 2004. This is because the limits that applied before 6 April 2006 form part of the Rules of both SEPS and SIRBS.

The Finance Act 2004 did not modify or re-enact the limits applicable to exempt approved schemes. The Act repealed the laws about "exempt approved schemes" and replaced them with a completely new tax regime that did not include any limits on benefits or contributions…In particular, the repeal of the previous tax regime does not have the incidental effect of increasing benefits that were previously subject to the limits that formed part of that tax regime."

Summary of Mr S's position

17. He is entitled to pension in payment inceases of 5% per annum subject to the limits set out in the SEPS rules to limit increases to the higher of a) 3% or b) whatever higher increases HMRC may permit. HMRC confirm in their letter to him of 17 June 2006 that pension in payment increases at 5% per annum may be paid by schemes.

18. The 7 September 1998 Transfer Agreement states that the SIRBS would not be amended in a way that adversely affected his benefits. When the merger took place , SEPS members were also promised by letter of 24 July 1998 that the SEPS rules would continue to apply to their benefits, such that pension increases would continue to be those under SEPS, which states clearly a contractual obligation that the basic entitlement is 5%. These documents establised the terms on which the SIRBS promised to carry out the obligations of the SEPS in relation to benefits and entitlements. A right to a contingent benefit such as having increased HMRC limits applied to revised limits would rank as a benefit. The Trustee therefore cannot rely on the 2008 Deed change in denying him his claim to 5% increases, due to the promises and assurances given in these 1998 documents.

19. The Finance Act 2004 permits 5% increases to a pre-2006 pension.

20. HMRC guidance RPSM 1104400 has been withdrawn and replaced with PTM088300 which covers pre 2006 pensions and permits 5 % increases without causing a benefit crystallisation event.

21. It is incorrect for the Trustee to suggest that the HMRC limits set out in the Appendix to the SIRBS rules are discretionary. There is no record of the Trustee applying these limits in a discretionary way.

22. The Trustee misled Mr S by stating that the reason for the pre 2006 HMRC limits continuing to apply was solely due to the effect of the Registered Pension Schemes (Modification of the Rules of Existing Schemes) Regulations 2006 (the 2006 Regulations).

23. Following the A-day changes, there are no longer revenue limits on annual increases.

24. Under the transitional provisions in the 2006 Regulations, the Trustee was entitled to operate the SIRBS on the basis that the revenue limits still applied. However, once those transitional provisions ceased to have effect, Mr S would be entitled to 5% increases, there being no relevant revenue limit to "cap" those increases at a lower level.

25. The amendment made to SIRBS by deed of 4 February 2008 could not operate to diminish any accrued rights Mr S had, either (i) because he had a contractual entitlement to the benefits provided for by SEPS, or (ii) because as against Mr S, the amendment was invalid under section 67 of the Pensions Act 1995.

26. A previous Ombudsman determination for Mr J Greenhalgh (reference 16295/3) deals with a similar issue. In this determination the Ombudsman uses wording that describes limits to pension increases that are permitted by HMRC. The lack of any apparent need to analyse this wording beyond its obvious meaning in Greenhalgh provides a clear example of how the equivalent wording in this complaint should be interpreted when considering what % per annum increase Mr S is entitled to.

Summary of the respondents' position

27. The Trustee does not dispute that:

    - Mr S was entitled to increases of 5% per annum, subject to revenue limits.

    - Mr S's entitlement to increases was not affected by the merger of SEPS into SIRBS.

    - The Revenue (HMRC) no longer require benefits (including increases to benefits) to be limited as a condition of favourable tax treatment. The same point is made in the Secretary to the Trustee's letter to Mr N of 3 August 2015, which says that the post-A-day regime "did not include any limits on benefits or contributions".

28. On the true construction of the SEPS rules, in the fiscal context in which they were designed and operated, Mr S was only ever entitled to increases limited by revenue limits; he never had an unrestricted entitlement to 5% increases. 5% was a qualified entitlement subject to a limit of 3% or RPI.

29. Mr S' entitlement under SEPS was carried over into SIRBS, and Mr S therefore never had a right to increases in excess of revenue limits as a SIRBS member.

30. The changes brought about by the Finance Act 2004 do not entitle Mr S to a construction of the SEPS rules on the footing that there are no longer revenue limits. The references to "Inland Revenue Limits" should not be read as ceasing to have meaning or effect, but should be read as continuing to apply the pre-A-day limits in IR12. The Finance Act 2004 contains nothing to suggest that its repeal of the previous tax regime was intended to increase the rights accrued by members under the previous tax regime and the 2006 Regulations show that HMRC took some

trouble to ensure that the Finance Act 2004 did not inadvertently increase the benefits to which anyone was entitled.

31. The limits therefore continued to apply, irrespective of the 2006 Regulations.

32. The 2006 deed to alter the rules of SIRBS confirmed the continued application of the revenue limits until 5 April 2011.The 2008 deed of amendment to SIRBS merely confirmed the continued application of the revenue limits. It is not the Trustee's case that the 2008 amendment imposed a new restriction on pension increases to which Mr S was not already subject.

33. The repeal of the "exempt approved schemes" provisions and the revenue limits should not be treated as having the "surprising and unfair" result of increasing benefits that were previously subject to the limits.

Conclusions

34. It seems to me that this complaint turns on a question of construction. Everything else follows from resolving that. For that reason I will not address every single point made by the parties, where they are not material to the construction issue.

35. If the true construction of the SEPS rules is as the Trustee contends, then Mr S has only ever had an entitlement to pension increases limited by the pre-2006 revenue limits (i.e. IR12). Accordingly, he is no worse off under SIRBS than he would have been under SEPS, and the 2008 deed of amendment had no impact on his rights, since it merely restated what was already the correct interpretation of the SIRBS rules (and which accorded with the SEPS rules). If this interpretation were correct, the only maladministration on the part of the Trustee has been in sending misleading letters to the applicants which do not fully explain the limits on their pension increases.

36. However, if Mr S is correct, and the true construction of the SEPS rules is that he was entitled to 5% increases, subject only to limits which have now been repealed by the Finance Act 2004, the consequences are different. The Trustee has not argued that such a right was lost on the merger of SEPS into SIRBS, or that the 2008 deed of amendment removed any such entitlement (and in view of section 67 of the Pensions Act 1995, it is difficult to see how they could contend for such effect). The Trustee accepts that Mr S is not entitled to lesser pension benefits than under the SEPS rules. So if Mr S is right about the construction of the SEPS rules, then it follows that he has a present entitlement to 5% increases.

37. In my view, Mr S's proposed construction of the SEPS rules is correct, and the Trustee's proposed construction is incorrect.

38. I say this because the combined effect of rule 11 and the definition of "increase percentage" is to confer explicitly upon Mr S an entitlement to 5% increases. There can be no suggestion that a member in Mr S's position was not envisaged as receiving such increases: the starting point is that they shall.

39. Rule 20 restricts benefits to the amounts set out in the Appendix to the rules, in order to satisfy revenue requirements. The Appendix provides that a pension may be increased up to the greater of 3% or RPI. The "Notes to the Appendix" state that:

40. "In any case where the Inland Revenue either generally or in any particular case permit payment of a higher sum by way of benefit or contributions than that described above, the Management Committee or the Member (as appropriate) may pay the higher sum."

41. The language of the "Notes to the Appendix" uses the word "may", which in my view is somewhat misleading. This does not seem to me to be saying that the Management Committee would have a discretion to pay a sum greater than the 3%/RPI limit. Rather, the word "may" is used to indicate that the Management Committee would in those circumstances be permitted to pay the higher sum i.e. they would not be prohibited from doing so. The imperative to pay the higher sum does not come from the Appendix at all, but rather from rule 11.

42. I also do not consider that the use of the word "permit" in this context means that the restriction of the higher of 3% or RPI was to apply unless the revenue actively decided that a "higher sum" could be paid. Rather, in this context "permit" appears to me to mean only that the revenue does not prohibit the payment of a higher sum.

43. The only way that these provisions work together logically is to understand them as saying:

    - Category A members are entitled to 5% increases.
    - The Trustee is not permitted actually to pay 5% increases, but must rather observe a revenue restriction of the higher of 3% or RPI.
    - But if the revenue does in fact permit more than 3% or RPI to be paid, then the Trustee is permitted to pay it, and to that extent the 5% entitlement is not restricted.
    - If the amount permitted by the revenue were more than 5%, members would have no entitlement to the higher amount, since their entitlement is derived from rule 11, and is 5%. Rule 20 and the Appendix serve only to limit that entitlement, not to confer any new entitlement.

44. I am supported in this view by what was said by Lewison J in *Armitage v Staveley Industries plc* [2004] Pens LR 385 at paragraphs 7 - 9] (set out in the appendix) and particularly the reference at paragraph 9 to the "entitlement" being to 5% under the SEPS rules, subject to the paragraph 3 limitation. It seems to me that Lewison J must have had in mind these rules working in the way that I have set out above. Nothing in the judgment of the Court of Appeal ([2006] Pens LR 191) would suggest otherwise, because although the Court of Appeal reversed Lewison J's decision, this was only based on its view of the correct construction of the letter from the company to Mr Armitage, and not any differing view of the scheme rules.

45. Similarly at paragraph 36, Lewison J said "the scheme rules gave Mr Armitage an entitlement to a 5 percent annual increase, capped, if applicable, by the Inland Revenue limits."

46. In the Court of Appeal, the Vice-Chancellor [at paragraph 38] appears expressly to envisage that Mr Armitage's pension paid by the trustees would increase if the revenue limit were to increase. That is only consistent with the construction of the SEPS rules I have set out, since on the Trustee's proposed construction a change to revenue limits would not have affected Mr Armitage's entitlement to annual increases – they would remain limited to 3%/RPI.

    I note that it follows if this is correct that Mr S always had a right to 5% increases subject to the revenue limits referred to in Rule 20 and the Appendix. Mr S does not need to rely on the Finance Act 2004 conferring any new right upon him.

47. On this analysis, it seems to me that far from being "surprising and unfair" that Mr S might be entitled to a higher pension as a result of the A-day changes, it in fact is exactly what was envisaged by the draftsman. The structure of the rules – conferring the 5% entitlement, limiting it, and then making the limitation itself subject to what the revenue actually permits from time to time – suggests that it was envisaged that the 5% entitlement could in fact be paid, if permitted by the revenue.

48. The simplest example would be if the revenue had changed their limits. If they had decided that it would be permissible to pay pension increases up to the higher of RPI or 6%, then it is very difficult to see how the rules and Appendix could be read as not then requiring 5% increases. Although there would still be revenue limits, they would have ceased to have any practical effect for the SEPS rules, since the 5% entitlement in rule 11 would from this time govern increases.

49. Whilst the draftsman probably did not specifically contemplate that revenue limits would be abolished altogether, the effect is the same as an increase – there is no meaningful difference between the abolition of the limit, and the revenue deciding on a figure which is not 3% or 6%, but is so high that it would never practically be exceeded.

50. In my view the difficulty in the argument for the Trustee is that it tries to freeze at a moment in time the SEPS rules, even though they explicitly provide a link, in the "Notes to the Appendix", to what the revenue will actually permit at the relevant time, rather than what was permitted when the rules were drawn up. Although in construing the SEPS rules I must consider the circumstances prevailing when they were made, I do not consider that the fact that no one at the time may have expected the revenue limits to be repealed in 2004 to justify a construction which ignores the words actually used, and in particular the link in the "Notes to the Appendix" to what the revenue actually permits at any particular time.

51. Furthermore, the Trustee's argument leads to a moderately absurd conclusion: that the rules, on the Trustee's construction, were only ever intended to permit increases

up to the higher of 3% or RPI and no more, but that in drawing up the rules, it was nevertheless decided to provide explicitly, and in the simplest terms, for category A members to receive 5% increases.

If this analysis were correct, the 5% increase entitlement would serve only as a limit: In other words, the Trustee's proposed construction reverses the clear structure of the rules. It treats category A members as being entitled to increases of the higher of 3% or RPI, subject to a 5% cap. The rules could have been drawn up in such terms. But that is the precise opposite of what the rules actually say: that the entitlement is to 5%, and 3%/RPI is the cap.

52. Mr S has raised the case of Mr J Greenhalgh 16295/3. However, I am not bound by previous Ombudsman determinations and each complaint is considered on its own merits. In any event, in that case the Ombudsman concluded that the applicant had no entitlement to have his pension augmented (so the context is quite different from Mr S's). The applicant's entitlement was not restricted to HMRC limits from time to time, but to the scheme's limits from time to time. But in Mr S's case, there is an express link to the HMRC limits from time to time, and there is no apparent provision for the Scheme's limits to be changed in a manner unfavourable to Mr S.

53. It follows from my findings above that Mr S was entitled to pension increases of 5%, subject to revenue limits in so far as still applicable. Under Regulation 4, the Trustee was required to continue to give effect to the revenue limits in IR12 until the transition period ended. In relation to SIRBS, this was on 4 February 2008. The deed of amendment of that date expressly provided in its amendment of rule 17.6 of the SIRBS rules (Revenue Approval) that the modifications made by the 2006 Regulations no longer apply to SIRBS. This was effective to bring to an end the effect of the 2006 Regulations in relation to SIRBS, pursuant to the Finance Act 2004, schedule 36, paragraph 3(2)(a) (as amended by the Finance Act 2005, schedule 10, paragraph 51) (if they had not already been disapplied by the 2006 deed).

54. The Trustee does not contend that the amendment deprived Mr S of an accrued right to 5% pension increases: its argument for its applicability to Mr S is that it was doing no more than restating the existing position. For the reasons set out above, I disagree. In my view, it purported to deprive Mr S of a valuable accrued right.

55. I therefore uphold Mr S's complaint.

Directions

56. I direct that within 28 days of this determination :

- The Trustee shall apply 5% revaluation to Mr S's pension in payment and send to Mr S confirmation that this has been done.

- The Trustee shall calculate the difference between the amount of pension increase Mr S has received since 4 February 2008 and what he would have received had the increase been based on 5% revaluation.

- The Trustee shall pay to Mr S the difference calculated above together with interest at the base rate payable by the reference banks from the due date to date of payment.
- The Trustee shall pay Mr S £500 for the significant distress and inconvenience he has suffered as a result of this matter.

Karen Johnston

Deputy Pensions Ombudsman
5 June 2018

Appendix

57. **Relevant extracts from the Staveley Executive Pension Scheme rules, made on 28 August 1996**

“ (m) “ Increase Percentage”means

(1) 5 per cent. in relation to Category A member…

11. Payment of Pension Benefits

(b) Every pension …in course of payment under the scheme shall be increased on each Pensions Increase Date by:-

(i) in the case of a pension payable to a member, the Increase percentage of the total of such pension …

17 General Rules About Benefits

17B. Pension increases

Each pension in payment will increase by 5% in each year…

Increases of pensions in payment

The maximum amount of a pension ascertained in accordance with previous provisions of this Appendix…may be increased by 3 per cent for each complete year or, if greater, in proportion to any increase in the index since the pension commenced.

Note to this Appendix

in any case when the Inland Revenue…permit payment of a higher sum by way of benefit …than that described above, the Management Committee …may pay the higher sum.

20 Limitation of Benefits

The Trustees will comply with all undertakings which the Inland Revenue require them to give as a condition of approving the Scheme.

The Appendix to these Rules form part of these Rules. It restricts the benefits that can be provided under the Scheme and the contributions that members can pay to the Scheme. The Inland Revenue require benefits and contributions to be limited to the amounts described in the Appendix as a condition of approving the Scheme.

If the Management Committee consider that a member is likely to be affected by these limits, they will write and tell the member.”

58. **Relevant extracts from the Staveley Industries Retirement Benefits Scheme Executive Section. These rules were effective as from 1 January 1999**

"15.7 Former members of the Staveley Executive Pension Scheme

All the assets of the Staveley Executive Pension Scheme (**SEPS**) were transferred to SIRBS in accordance with a transfer agreement dated 7 September 1998.

16.2 Pension increases

Each pension in payment will increase in each year by the lower of:

16.2.1 the percentage increase in the retail price index during a reference period agreed between Staveley and the Trustees; and

16.2.2 5%

17.6 Revenue Approval

The Trustees will comply with all requirements for Revenue Approval of SIRBS…

The Appendix to these Rules forms part of these Rules. It restricts the benefits that can be provided under SIRBS …The Inland Revenue require benefits…to be limited to the amounts described in the Appendix, as a condition of approving SIRBS. Greater amounts may be paid only if Revenue Approval of SIRBS would not be prejudiced.

Appendix Inland Revenue Limits

3. Increases of pensions in payment

The maximum amount of a pension ascertained in accordance with previous provisions of this Appendix…may be increased by 3 per cent for each complete year or, if greater, in proportion to any increase in the index since the pension commenced."

59. **Relevant extracts from the Deed to alter the Rules. This deed was made on 4 February 2008 (2008 Deed)**

"Relevant rules

3. SIRBS is governed by Rules made on 2 April 2004. A Special Edition of the Rules applies to Members of the Executive Section.

4. Rule 27 (alterations to SIRBS) says that theTrustees may, with the written consent of Staveley, alter the Rules at any time.

Alterations to SIRBS

5.In exercise of their power under Rule 27, the Trustees, with the consent of Staveley,alters both the main Rules and the Special Edition of the Rules as described in this deed.

Rule 17.6 (Revenue Approval)

12 Before 6 April 2006, SIRBS was approved under Chapter 1 Part 14 of the Income and Corporation Taxes Act 1988…As a condition of this approval , SIRBS was subject to various requirements including limits on the benefits…that could be paid. The details of these limits are contained in previous legislation, and in IR12 (2001).

In spite of the changes made by the Finance Act 2004, the limits that previously applied to the amount and form of benefits under SIRBS…continue to apply, except where Staveley and the Trustees agree otherwise …

The modifications made by the Registered Pension Schemes (Modification of the Rules of Existing Schemes) Regulations 2006 no longer applies to SIRBS."

60. **Relevant Paragraphs from Armitage v Staveley Industries plc [2004] Pens LR**

7 In the case of a Category A member the Increase Percentage was defined as 5 per cent. Accordingly, under the SEPS rules (leaving aside Inland Revenue limits) Mr Armitage was entitled, on early retirement, to a pension of two thirds of Final Pensionable Salary, actuarially reduced to take account of early payment, and increasing at the annual rate of 5 per cent compound.

8 Rule 20 said that the Scheme was designed for approval as an exempt scheme under the tax legislation. It went on to say:

The Appendix to these Rules forms part of these Rules. It restricts the benefits that can be provided under the Scheme and the contributions that members can pay to the Scheme. The Inland Revenue require benefits and contributions to be limited to the amounts described in the Appendix as a condition of approving the Scheme.

9 Paragraph 1 of the Appendix limited the initial pension to 1/60th of Final Remuneration for each year of Pensionable Service, with a maximum of 40. Final Remuneration is the subject of an elaborate definition which includes (amongst other things) benefits in kind that were assessable to income tax. Thus the definition of Final Remuneration in the Appendix differed from the definition of Final Pensionable Salary in the rules. Paragraph 3 of the Appendix limited increases in pensions to 3 per cent for each complete year or if greater, in proportion to any increase in the Index since the pension commenced. The Index was the retail prices index ("RPI"). The limitation on annual increases was a cap. It did not provide an entitlement. The entitlement was 5 per cent under the SEPS rules. Thus if, for example, RPI in a

particular year was 7 per cent, Mr Armitage would be entitled to a 5 per cent, not a 7 per cent, increase in his pension.

36 I do not mean to be critical of the drafting (and I certainly must not be sidetracked into construing the suggested implied term) but I do not think that this fits the bill. Any sum paid by Staveley (as opposed to SEPS) would not have been a payment out of an exempt authorised scheme. Consequently the Inland Revenue limits would not have applied to any payment made by Staveley. Thus to say that the terms of Mr Armitage's overall pension promise would be the same as it would have been under the scheme rules must, necessarily, mean the scheme rules without the cap, since the cap would not apply to a payment made by Staveley. Put another way, the scheme rules gave Mr Armitage an entitlement to a 5 per cent annual increase, capped, if applicable, by the Inland Revenue limits. But since the top up pension is not paid out of the scheme, the cap does not apply. Moreover, this implied term suggests a continuing link between the top up pension and the amount that SEPS was able to pay, which is not what Mr Hitchcock wants at all.

38 It might be possible to reformulate the implied term so as to result in the interpretation that Mr Hitchcock says is the right one. But the greater the difficulty in formulating the implied term, the less obvious the implication becomes. Equally the more complex the implied term becomes, the less obvious it becomes. I do not consider that this is a case in which I can properly imply a term.

61. **Extract from HMRC Guidance to IR12 (Inland Revenue Limits) – Section 9, Pension Increases**

9.1 A pension in course of payment may be increased up to the level of the maximum (residual) pension at retirement i.e. after reducing the maximum approvable pension by the annuity value of the pension foregone (if any) in exchange for a lump sum benefit or the provision of an allocated pension for a contingent beneficiary. It may also be further increased to take account of increases in the cost of living but should not exceed the maximum residual pension at retirement increased on a year-on-year basis by the greater of 3% or the increase in the Retail Prices Index in the year in question. Alternatively a pension below the maximum at retirement may be increased by a greater annual amount provided the increased pension remains within the limit in this paragraph.

9.4 Scheme rules may provide in advance for increases in pensions to counteract the effects of inflation. This provision may take the form of a commitment to raise pensions in step with the maximum increase described in paragraph 9.1 above but if this is considered impracticable, other acceptable formulae include:

a) fixed increases of not more than 3% per annum compound, whether or not the increase in the Retail Prices Index reaches that level, or
b) provision for regular review of pensions in payment and for increases (not exceeding the rise in the Retail Prices Index since the pension came into

payment or since the last increase) at the employer's or administrator's discretion, or

c) Limited Price Indexation as required by sections 51/54 of the Pensions Act 1995, that is,

increases reflecting the rise in the Retail Prices Index for the appropriate period subject to a maximum percentage of 5% per annum. (Although the Pensions Act provisions take effect from 6 April 1997, such increases need not be confined to pensions accrued after that date.)

Where there is scope, i.e. where the residual pension at retirement is below the Inland Revenue maximum, fixed percentage increases in excess of 3% per annum compound may be provided but must be capped by the limit in paragraph 9.1.

Increases on any of the above bases may be funded in advance to the extent that the liability can be actuarially justified. Assumptions of the rate of inflation must be reasonable in the light of long term trends in the cost of living.

62. **The Registered Pension Schemes Manual 1104400, issued by HMRC**

"The permitted margin where entitlement to the scheme pension arose before 6 April 2006.

The measure of P% on 5 April 2006 is subject to HMRC rules in force at that time. So the permitted margin, as calculated through P% can never breach the maximum pension permitted through HMRC rules at the time of retirement, re -valued each year by the greater of 3% or RPI".

…All of the above increases would be subject to the scheme provisions which limited the scheme pension to the pre A Day HMRC benefit limits".

63. **Finance Act 2004 , Schedule 32**

"11(1) This paragraph applies for the purposes of benefit crystallisation event …if the individual became entitled to the pension on or after 6th April 2006.

(4)The relevant annual percentage rate is—

(a) in a case where the pension is paid under a pension scheme, or an arrangement under a pension scheme, in relation to which the relevant valuation factor is a number greater than 20, the annual rate agreed by the Inland Revenue and the scheme administrator, and

(b) otherwise, 5% per annum."

64. **Finance Act 2004 , Schedule 36**

"3(2) Any modifications of the rules of a pension scheme made by the regulations have effect until the earlier of-

(a) the first date after 5th April 2006 on which amendments of the rules of the pension scheme which state that the modifications no longer apply in relation to it take effect, or

(b) the end of the tax year 2010-11 or such later time as the Board of Inland Revenue may by regulations prescribe."

65. **The Registered Pension Schemes (Modification of the Rules of Existing Schemes) Regulations 2006 – Regulation 4**

"(1) If the rules of an existing scheme, as they stood immediately before the commencement day, imposed a limit on a person's entitlement to any benefit, or liability to make any contribution, by reference to the permitted maximum (whether expressly or by necessary implication), paragraph (2) applies.

(2) If this paragraph applies, the permitted maximum shall continue to apply in respect of the transitional period."