[2016] JMSC Civ 26

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. 2010HCV03149**

**IN THE MATTER OF THE TRUSTEE ACT, SECTION 41**

**AND**

**IN THE MATTER OF THE PENSIONS (SUPERANNUATION FUNDS AND RETIREMENT SCHEMES) ACT**

**AND**

**IN THE MATTER OF A CONSOLIDATING TRUST DEED BETWEEN GLENCORE ALUMINA JAMAICA LIMITED AND MANCHESTER PENSION TRUST FUND LIMITED DATED MARCH 10, 2005**

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| **BETWEEN** | **WYNETTE MILLER** | **FIRST CLAIMANT** |
| **AND** | **WINSTON CAMERON** | **SECOND CLAIMANT** |
| **AND** | **MARCIA TAI CHUN** | **THIRD CLAIMANT** |
| **AND** | **RADLEY RITCH** | **FOURTH CLAIMANT** |

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| **AND** | **KINGSLEY JARRETT** | **FIFTH CLAIMANT** |
| **AND** | **HOPETON McCATTY** | **SIXTH CLAIMANT** |
| **AND** | **UC RUSAL ALUMINA JAMAICA LIMITED** | **FIRST DEFENDANT** |
| **AND** | **TIMOTHY O'DRISCOLL** | **SECOND DEFENDANT** |
| **AND** | **ANDREY SHMALENKO** | **THIRD DEFENDANT** |
| **AND** | **IGOR DOROFEEV** | **FOURTH DEFENDANT** |
| **AND** | **THE MANCHESTER PENSION TRUST FUND LIMITED** | **FIFTH DEFENDANT** |
| **AND** | **THE FINANCIAL SERVICES COMMISSION** | **INTERESTED PARTY** |

IN CHAMBERS

**Michael Hylton QC, Kevin Powell and Sundiata Gibbs instructed by Hylton Powell for the claimants**

**Stephen Shelton QC and Christopher Kelman instructed by Myers Fletcher and Gordon for the defendants**

**Nicole Foster Pusey QC, Solicitor General, and Andre Moulton for the Financial Services Commission (interested party)**

**PENSION FUND – DISTRIBUTION OF SURPLUS – REFERAL BY PRIVY COUNCIL TO THE SUPREME COURT – TRUSTEES' APPLICATION FOR DIRECTIONS – APPLICABILITY OF THE PENSIONS (SUPERANNUATION FUNDS AND RETIREMENT SCHEMES) ACT, 2004 TO UNAPPROVED PENSION SCHEMES**

**February 5 and 29, 2016**

**SYKES J**

**[1]** The present case is about how JA$2.6b surplus of the private pension fund should be distributed. This pension plan is governed by what is called a consolidating trust deed made on March 10, 2005 between UC Rusal Alumina Jamaica Ltd (UC Rusal), the employer, and the Manchester Pension Fund Limited ('Manchester'). Manchester seems to have been the trustee of the pension fund at one point. However, by 2010, the six claimants ('the original trustees') came to be trustees. It appears that Manchester assisted the original in managing the pension fund.

**[2]** The Pensions (Superannuation Funds and Retirement Schemes) Act 2004 ('the 2004 Act' or 'the Act') was enacted and came into effect on March 1, 2005. Under that Act, all existing pension funds were to submit the trust deed to the regulator, known as the Financial Services Commission ('FSC'). The problem here is that no such trust deed was ever submitted to the FSC because UC Rusal and the trustees could not agree on the distribution of assets including any surplus that may arise.

**[3]** The back ground to this application is this: the claimants are trustees of a pension plan which is governed by the consolidating trust deed mentioned above. These trustees are called the original trustees meaning that they were the trustees before others were added by the court order of Cole-Smith J made on

August 19, 2010. In light of the failure to agree on the crucial clause, UC Rusal, on March 31, 2010, gave notice to the trustees and all the employees who were under the pension scheme that their employment would be terminated and the scheme would be discontinued as of the same March 31, 2010.

**[4]** In light of UC Rusal's decision, the lawyers for the original trustees then wrote to FSC and informed it that the plan was to be discontinued and that it was the intention of the trustees to wind up the fund and accordingly, the trustees were asking for the FSC's approval of the winding up in accordance with section 27 (4) the Act.

**[5]** Not only did UC Rusal terminate the employees, it also attempted to remove some of the original trustees. On May 27, 2010, the board voted to remove, at once, the first two claimants and replace them with the second, third and fourth respondents. Needless to say, the original trustees responded robustly and decisively. They commenced proceedings in the court alleging that their removal was invalid. They also sought injunctive relief.

**[6]** It appears that the parties were to agree provisions for disposal of the pension fund's assets including any surplus that may exist in the event of a winding up. The lack of agreement meant that they did not meet the six month deadline set by the 2004 Act which required all existing pension funds to submit their trust deed to the FSC for perusal and approval. The consequence was that the pension fund became an unapproved pension fund and that has continued down to this very day. The 2004 Act was the response to the Board's observation in the earlier case of **Air Jamaica v Charlton** [1999] 1 WLR 1399. The Act required existing pension schemes to conform to the standards of the legislation. This explains why it was necessary to submit the trust deed to the FSC for approval.

**[7]** The matter came before Cole-Smith J, during the long vacation of 2010, on August 19, 2010. By then the parties had sufficiently composed themselves and presented her Ladyship with a consent order. The order established, among other things, the pension fund was now to be managed by a 'coalition' of the

claimants, on the one hand, and the second and fourth respondents, as well as a Mr Ivan Irikov and a Mr Ivan Makarenko, on the other hand. The second and fourth respondents, Mr Ivan Irikov and Mr Ivan Makarenko shall be called the court-added trustees. The other relevant orders were that the claimants were not to make any decision regarding the distribution of or distribute any surplus without the agreement of all the trustees but there was the proviso that if they could not agree then the parties were at liberty to apply to the court for directions. In effect, regardless of the terms of the trust deed regarding the appointment of trustees, each side had 'their man or woman' on the board of trustees. This point will be addressed later in this judgment when the court addresses the role of trustees.

**[8]** The consent order also indicated that a Mr Astor Duggan, an actuary, would provide or make available to Mrs Constance Hall, UC Rusal's nominated actuary, 'all information, calculations and assumptions which may be used and made in the preparation of the Winding Up report, the scheme of distribution of the surplus and the winding up process generally' (para 6 of the consent order as quoted by Lord Mance at para 4 of Privy Council decision).

**[9]** Unsurprisingly, both actuaries took different views about some matters. These differences led to submissions before McIntosh J who directed that the surplus be distributed according to the Duggan recommendations. UC Rusal did not accept this and took the battle to the Court of Appeal which upheld McIntosh J. UC Rusal continued further to the Judicial Committee of the Privy Council which set aside part of the order of the Court of Appeal. Their Lordships advised that 'the case be remitted to the court at first instances to be reconsidered generally there in accordance with this judgment' (para 59 of the advice). The court cannot help but observe that even though the Board's advice is dated November 26, 2014, this further consideration is only now taking place. Their Lordships' advice is reported as **UC Rusal Alumina Jamaica Ltd & others v Wynette Miller & others** [2015] Pens LR 15; [2014] UKPC 39; Privy Council Appeal No 0086 of 2013.

**The present application**

**[10]** In response to this advice, the claimants filed a notice of application for court orders in which they are seeking;

> *Directions as to the potential significance of the Pensions (Super Annuation Fund and Retirement Scheme) Act, 2004 in relation to the way in which the discretion of the trustees of the Pension Plan for the employees of UC Rusal Alumina Jamaica Ltd should be exercised.*

**[11]** It is appropriate to point out that at the time the application was filed there was an issue of whether the 2004 Act applied to this pension plan, it being an unapproved pension scheme. This court no longer has to decide the applicability of the 2004 Act because all parties, including the FSC, have accepted that the 2004 Act applies. In fact, evidence was placed before the court that the FSC now has what may be described as a well-established practice of applying the provisions of the 2004 Act to all pension schemes, the unapproved as well as the approved. To date, the court is not aware of any decision or pending case where this practice has been challenged.

**[12]** The claimants, through their written submissions, have submitted that the following directions should be given:

> *(a) The winding up of the UC Rusal Pension Plan is subject to sections 27 to 32 of the Pensions (Superannuation Funds and Retirement Schemes) Act, 2004 and*
>
> *(b) In accordance with section 32 of the Pensions (Superannuation Funds and Retirement Schemes) Act, 2004, the FSC has the power to amend the scheme of distribution submitted by the trustees of the UC Rusal Pension Plan* ***if it believes that insufficient provisions have been made for inflationary conditions.*** (emphasis added)

**[13]** All the parties are agreed on (a). At first, there was an issue of whether the 2004 Act applied to this pension fund. This is no longer the case. The issue joined between the defendants and the FSC on the one hand and the original trustees on the other, is whether the words in bold should remain. But for this, there is no disagreement between the parties.

**The submissions**

**[14]** The learned Solicitor General, Mrs Foster Pusey QC, took the view that the words in bold need not be added because the winding up would be done by competent professionals who are experienced in these matters and they would be expected to take all relevant matters into consideration and act appropriately.

**[15]** Mr Michael Hylton QC emphasised that one of the main issues before the Board was whether there should be an increase benefits to take account of inflation. He submitted that the added words give effect to the matters the Board said ought to be taken into account.

**[16]** Mr Stephen Shelton QC indicated that the additional words were not necessary because the FSC would necessarily take all factors into account including the possibility of an increase for inflation and so there is no need to include the words.

**[17]** In the end, the court has come to the conclusion that the words in bold can be deleted. However, the guidance given by this court in this case will ensure that concerns of the original trustees are recognised and taken into account.

**The court's response**

**[18]** This court begins with an examination of the advice to Her Majesty. In that advice, Lord Mance stated at paragraph 11:

> *Before the Board and in post-hearing written submissions invited by the Board, the main focus was on issues of interpretation of the deed and rules, and in particular upon: (i) whether clause 18.1.3 is valid, and, if it is, (ii) what are the 'limitations' to which it refers and whether it is relevant in*

*this connection to have regard to the Income Tax Act as in force in 2005 and until 2008 or as amended in 2008, (iii) whether clause 18.1.3 relates to pensioners as well as current employees and (iv) whether there should be any further uplift for inflation out of the surplus.*

**[19]** The four issues identified by his Lordship were dealt. The first three were dealt with conclusively and there is nothing more for this court to do but to apply them. The fourth issue was not resolved and could not have been resolved by the Board because it involved a discretionary power vested in the trustees and that power may have to take account of the 2004 Act. That has not yet been done. The court will now go through each of the issues identified by the Board.

**The first issue was whether clause 18.1.3 of trust deed was valid**

**[20]** The Board resolved this issue in a definitive manner at paragraphs 16 – 23. The Board reversed the Court of Appeal on this point and concluded that the clause was valid.

**The second issue was what are the 'limitations' to which it [clause 18.1.3] refers and whether it is relevant in this connection to have regard to the Income Tax Act as in force in 2005 and until 2008 or as amended in 2008**

**[21]** The Board also resolved this issue matter decisively and this court cannot question that decision. From the advice it is clear that there as a document, called on approval by Lord Mance, dated March 8, 2006. The narrative of his Lordship suggested that that document was not before the Supreme Court and the Court of Appeal. At paragraphs 24 – 31, Lord Mance noted that before the production of the approval, the parties had argued the case on the basis of whether the word 'limitations' in clause 18.1.3 referred to limitations consistent with the pension plan as approved and the unamended Income Tax Act applied at the date of the approval, or whether 'limitations' referred to such limitations as are or would be consistent with the fund approved by the Commissioner of Income Tax if the amended pension plan had been presented to him after the 2008 amendment.

**[22]** After the approval was produced before the Board, Lord Mance concluded that 'after the coming into force of the amended Act [the 2008 amendment], the Fund continued to be approved under the approval dated 8 March 2006 from year to year for the purposes of that Act as amended.' In other words, the 2008 amendment to the Income Tax Act applied.

**The third issue was whether clause 18.1.3 relates to pensioners as well as current employees**

**[23]** The third issue was resolved just as conclusively as the previous two. Paragraphs 32 and 33 makes this plain enough. The contest was over the extent of the coverage of clause 18.1.3? Did it cover only 'employees who had joined the plan and were in pensionable service at the date of dissolution of the Fund' (UC Rusal's contention) or did it cover '[embrace] also current pensioners' (the claimant's contention)? The Board came down in favour of the claimants on this point.

**The fourth issue was whether there should be any further uplift for inflation out of the surplus.**

**[24]** The fourth issue was sent back to the Supreme Court for directions and further consideration.

**[25]** A reading of paragraphs 34 and 35 indicates that the Board took the view that augmentation of pension benefits had taken place in the past had in fact seen an adjustment for inflation. It is not clear whether there were several augmentations or it had occurred only once. The context of this case suggests that the augmentation(s) took place before the decision to wind up the fund was taken. That the Board was of the opinion that augmentation(s) had occurred in the past is found in paragraph 35. Lord Mance said:

> *That there should have been an augmentation for inflation is unsurprising in an environment where inflation has been substantial and in a context where Rusal's business was continuing and it had an active workforce as well as a body of retired pensioners or dependant spouses.* ***The***

> ***augmentation took place, presumably, under Rule 5.7,*** *set out in paragraph 10 above, although the proviso at the end of Rule 5.7 suggests one potential puzzle which the Board, fortunately, does not have to resolve. The unamended Income Tax Act , in force when the 2005 deed was agreed, made no reference to any possibility at all of augmentation of pensions above the two-thirds of retirement salary limit provided by the unamended section 44(2)(b) .* ***Yet it is difficult to think that pensioners receiving a full two-thirds of retirement salary pension were deprived of the inflation augmentation which other pensioners evidently received.*** (emphasis added)

**[26]** In the first section of this paragraph that is in bold, Lord Mance used the word 'presumably' in reference to rule 5.7 because the Board held that under that provision, augmentations, could take place and under the same rule, the trustees could decide to increase augmentations because of inflation. In other words, there was nothing in the rule that prohibited augmentations by reason of inflation.

**[27]** Support for this last stated conclusion is found at paragraph 37 where Lord Mance says:

> *But, putting the 2004 Act for the moment on one side, on the assumption that it cannot directly apply since the plan was never actually approved under it, clause 18.1.3 does not on its face help. Clause 18.1.3 provides only for augmentation of 'the liabilities for pensions under clause 18.1.2', and clause 18.1.2 refers to 'liabilities for pensions' and 'all other benefits provided for under the Plan'.* ***Nowhere in clause 18.1.2 or elsewhere in the plan is there any express liability for an inflation uplift****.* (emphasis added)

**[28]** Despite the absence of any express provision for increase in benefits to account for inflation, Lord Mance noted that such a possibility could in fact be accommodated in the plan as it presently stands on the basis that Rule 5.7 'contemplates on its face that any such increase or additional benefit will take place only at Rusal's request or at the trustees' discretion with Rusal's approval' (para. 38). In other words, the present wording of the plan was sufficiently flexible to permit the trustees, to contemplate legitimately, whether any additional benefits should be paid out, whether by reason of inflation or otherwise. Such a consideration would be legitimate even without the express wording to permit

increases attributable to inflation because previous augmentations had in fact taken place before and it was not inconsistent with the Rule 5.7 (para 35). On the point of previous inflation driven augmentation, Lord Mance noted '[t]hat there should have been an augmentation for inflation is unsurprising in an environment where inflation has been substantial and in a context where Rusal's business was continuing and it had an active workforce as well as a body of retired pensioners or dependant spouses' (para 35).

**[29]** Crucially, Lord Mance noted that Rule 5.7 still operated after the date of 'discontinuation' of the plan or after it was decided to wind up the plan. To put it another way, there was nothing in the plan that prevented the trustees from considering whether additional benefits should be granted whether on the ground of inflation or otherwise even after a decision to discontinue or wind up the plan had been taken.

**[30]** At paragraphs 39 and 40, the reasoning of the Board requires careful reading. It has already been pointed out that the Board did not consider that there was anything in the plan to say that Rule 5.7 could not continue to operate after the decision was made to wind up the plan (paragraph 39). The Board itself came up with what would have been a better argument, namely, that all rights crystallised at the date of the winding up and if this were the case then there was no room for Rule 5.7 to operate. It was in response to this better argument, thought of by the Board, that paragraph 41 was directed at neutralising. Lord Mance said paragraph 41:

> *The Board does not however consider that this is the right analysis of the position. It is apparent from the communications identified in para 2 above as well as from para 5 of the court's order dated 19 August 2010 that winding up was seen not as having occurred, but as a continuing or iterative process, during which a plan of distribution would be prepared, which it was, at least originally, contemplated would be submitted to the Financial Services Commission for approval under the 2004 Act and which the actuaries' reports would assist to finalise. Both the actuaries' reports approach the matter on that basis. Duggan's report also expressly refers to 'the trustees' (though this may only mean the first to sixth*

> *respondents) agreeing that allowances should be made for future inflation (para 6.4).*

**[31]** The Board went on to expressly say at paragraph 43:

> *The Board therefore considers that Rusal was correct in accepting that Rule 5.7 remained capable of being operated after 31 March 2010, despite the trustees' formation of an intention to wind up the plan and the steps being put in motion to give effect to that intention.*

**[32]** The inevitable result of the Board's reasoning is that since Rule 5.7 continues to operate even after the decision to wind up the fund and since under that rule it was quite permissible to augment benefits on the basis of inflation or otherwise (and it appears that that had in fact been done on a previous occasion(s) before the impasse developed between UC Rusal and the original trustees) then it followed that whether before or after the decision to wind, the trustees may consider and may actually decide to increase benefits on the basis of inflation. This applied to the surplus as well.

**[33]** The Board did say that any decision by the trustees to provide additional benefits other than the strict entitlements under the fund would need to be either at the request of UC Rusal or with their approval.

**[34]** The Board wished to make it plain that UC Rusal's power refusal to agree any uplift recommended by trustees is not unlimited. To frame it differently, UC Rusal's power to refuse to agree with the trustees' recommendation can be challenged on a number of bases. This court recognises that while the Board did not frame its language in the form of a challenge to the power, however the logic of the Board's position must be that if it can be shown that UC Rusal's refusal to agree was not made in good faith or was irrational or arbitrary then it is open to challenge.

**[35]** While the Board was not prepared to indicate the extent of the limitation on UC Rusal's veto power and while UC Rusal was free to pursue its own interest, it not being a fiduciary in relation to the fund, the Board identified at least two

constraints on any veto power held by UC Rusal. At paragraph 51 Lord Mance stated:

> *First, it is common ground that Rusal would have to act bona fide. Second, that does not merely mean that it must act honestly; it must avoid irrational or arbitrary behaviour and must not exercise its power to give or refuse consent for extraneous reasons.*

**[36]** After referring to a number of cases, Lord Mance stated at paragraph 55:

> *All these cases indicate that an employer's power to refuse consent to the trustee's exercise of a discretion is qualified by a test or by reference to factors explained in various ways. The Board has no difficulty in accepting irrationality, perversity or arbitrariness as qualifications. They also correspond with limits accepted in other, contractual contexts: see eg Gan Insurance Co Ltd v The Tai Ping Insurance Co Ltd (No 3) [2002] EWCA Civ 248; [2002] Lloyd's Rep IR 612 . The more recent cases view the concept of continuing trust and confidence as background underlying recognition of duties along these lines, rather than the ultimate test. An underlying concept of trust and confidence is clearly capable of assisting the case for regarding legitimate expectations as potentially relevant.*

**[37]** The court now comes to an interesting phrase, 'legitimate expectation', a concept more frequently encountered in public law. This court understands his Lordship to be saying that having regard to the fact that in the past augmentation(s) occurred based on inflation it would not be unreasonable for the employees to have that expectation now. It is also quite legitimate for the employees to expect the trustees, and if necessary the FSC, to take account of this legitimate expectation. No one is saying that the expectation must be met but it surely must be considered.

**[38]** The court notes that at paragraph 46 Lord Mance indicated that the reason for the build up of the surplus is relevant. This court understands his Lordship to be saying that particular significant weight must be given to the fact, if that is the case, that the surplus was build up solely, substantially or mainly from employees' contributions. The court also recognises that notwithstanding this indication from Lord Mance it may be difficult or impossible to establish the

precise reason for the surplus (**Mettoy Pensions Trustees Ltd v Evans** [1990] 1 WLR 1587, 1619).

**[39]** It must also be bourne in mind that even if the surplus built up could not have been from the employees' contribution alone it does not follow that the employees should not benefit from any surplus after all liabilities have been met. The following passage from **Thrells Ltd v Lomas** [1993] 1 WLR 456 by Sir Donald Nicholls VC at pages 468 – 469 has some important observations:

> *So far as now can be judged, and that is quite a severe limitation in this case, the members' contributions alone would not have sufficed to buy all the benefits which have now been provided for the existing and prospective pensioners under the rules. I am unable, however, to proceed from there to a conclusion that all the surplus should be regarded as an unintended surplus arising from the company's contributions in which the members can have no reasonable expectation to share. It is necessary to disentangle several points. First, to the extent that an employer is under an obligation to make contributions, it is fair for some purposes to regard those as part of the employees' overall remuneration package, just as much as contributions made by the employees from their salaries and wages. Second, it is true that in a balance of costs scheme the employer's obligation is to provide the necessary balance of contributions and no more. It may be that if actuaries were gifted with perfect foresight of the outcome of future uncertainties such as the rate of return on investment contributions, the rates at which salaries are assumed to rise, the dates on which and the circumstances in which employees will leave, and the cost of buying annuities at retirement, unintended surpluses would not usually arise from employer's contributions. It is necessary to have this in mind when exercising a discretion such as that conferred by rule 15(i) (f). But, thirdly, it is necessary also to have in mind that this scheme itself provided for the trustee to have power to increase benefits. That power ranks ahead of the provision that any remaining balance of the scheme funds should be paid to the company.* ***When a scheme so provides, members have a reasonable expectation that if the scheme funds permit, namely, if there is a surplus after providing for the estimated liabilities, or in a winding up, for the actual liabilities, the trustee will exercise that power to the extent that is fair and equitable in all the circumstances, having particular regard to the purpose for which the power was conferred. The power is an integral part of the scheme. It assumes the existence of a surplus. A trustee should not decline to exercise the power solely on the***

> ***ground that the employer was under no legal obligation to provide the surplus.*** (emphasis added)

**[40]** It is the view of this court, that the part of this dictum in bold is of general application. It is not restricted to the specific wording of the plan in that case. This court understands the learned Vice Chancellor to be saying that if there is a power to augment benefits and there is a surplus, the employees have a legitimate expectation that trustees will exercise that power having regard to what is fair and equitable. Of course this general dictum has to be read in light of the 2004 Act, the relevant subsidiary legislation and the applicable rules of the pension fund in this case. However, the foundation on which this principle rests is that it must not be forgotten that a pension fund is never established for the benefit of the company. It is for the benefit of the employee. As Patten J pointed out in **MNOPF Trustees Limited v. F T Everard & Sons Limited, Pandoro Limited, Everard (Guernsey) Limited** [2005] Pen LR 225 at paragraph 40:

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

**[41]** This was said in the context of establishing principles that are to be taken into account when interpreting pension scheme provision.

**[42]** A pension fund is never intended to be a compulsory savings scheme for the employer who may draw down on it as and when he, she or it feels like. It is not unknown for pension schemes to be used as means of attracting persons to a company. The company may use its pension fund to say to a prospective recruit that its pension plan is more attractive and its rival(s).

**[43]** A word now for the trustees. At paragraph 46 Lord Mance stated the following:

> *Trustees must exercise their discretion as fiduciaries for the purposes of and in accordance with the terms of the governing trust.*

**[44]** At paragraph 2 his Lordship cited clause 2 which establishes the purpose of the trust:

> *The main purpose of the Plan administered and funded in accordance with this Deed is the provision of retirement benefits upon retirement at a specified age for the members and/or to provide pensions to their surviving spouses or dependents. The portions of the Plan referring to Life Assurance are provided through a Group Life Insurance Policy or Policies. The administration and management of the Plan shall be vested in the Trustee and the Fund shall be vested in the Trustees and shall be held by them upon irrevocable trust for application in accordance with the Trust Deed and the Rules.*

**[45]** The court wishes to remind all the trustees, the original ones and the court-added ones of the following dictum of Millett LJ in **Bristol and West Building Society v Mothew** [1998] Ch 1, 18:

> *A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. ... As Dr. Finn pointed out in his classic work Fiduciary Obligations (1977), p. 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary.*

**[46]** In other words, it does not matter how any of the present trustees became a trustee. Once they are trustees their duty is to administer the pension fund in accordance with the general law applicable and the rules of the pension fund. They are not there to represent the interests of their appointers. The beneficiaries of this scheme have the right to expect that the trustees will act in their best interest.

**The court's conclusion**

**[47]** From all that has been said it is plain that Board made no binding decision regarding the uplift for inflation. What the Board did was to say that it was quite legitimate for the trustees to take it into account. The Board so held on two bases: (a) the actual wording of the relevant rule did not preclude that possibility and (b) it had actually been done on previous occasions. This court may add a

third, derived from the body of case law, particularly those cases out of England and Wales over the last 15 years, namely, where the rules so provide, that additional benefits may be considered if there is a surplus. The trustees can legitimately consider whether it is fair and equitable to augment the benefits.

**[48]** The defendants' opposition to paragraph (b) of the declaration seems to be predicated on the idea that the FSC **must** make such an amendment 'if it believes that insufficient provisions have been made for inflationary conditions.' The wording does not say this or even imply it on a proper reading but that does not mean that the words may not give rise to some difficulty. It is simply saying that the FSC has the power to amend the scheme if it has formed the view that insufficient provision has been made for inflationary conditions.

**[49]** However this is not the case. Indeed, the defendants and the FSC, by their submissions, have conceded that the FSC indeed has the power to amend the scheme for distribution put forward by the trustees. What the claimants are asking for is that specific consideration be given to any increase due to inflation. They do not wish it to be said that the FSC cannot amend the scheme to make such an allowance if on a consideration of all the relevant factors such an increase was possible. They also wish to make sure that the FSC not only considers whether such a provision is made but that it is sufficient. Thus the proposed directions are aimed at two things: (a) consideration must be given to an uplift for inflation and (b) if the decision is made to give an uplift for inflation then, it must be sufficient.

**[50]** Thus paragraph (b) of the claimants' proposed directions has a multi-step process. First the FSC reviews the proposal and specifically looks for, among other things, whether the trustees gave thought to whether any uplift should be made for inflation. Second, if they did what decision did they make? If, the trustees decided against an uplift for inflation, was that decision properly made having regard to all the circumstances, and in the event that the FSC decided that the decision was not properly made, then the FSC may amend the scheme

to make such a provision and not only make such a provision but make sufficient provision. On the other hand, if the trustees decided to make a provision for inflation then it is open to the FSC to determine whether the provision was sufficient and if it is not then to amend the scheme accordingly. In all this it must not be forgotten that it may be quite in order for both the trustees and the FSC to decide against an uplift for inflation.

**[51]** It is this court's view that since the issue of whether an uplift should be made for inflation came up before the Board and the matter was returned to the Supreme Court for directions and there was no evidence before the Board or this court to suggest that, as a matter of calculation, such an uplift was impossible or undesirable then such a possibility must be among the things considered by the trustees. This court directs specifically that whether there should be an uplift for inflation must be considered by the trustees. This they take into account along with other relevant considerations.

**[52]** Under section 32 of the Act the trustees are to come up with a scheme for the distribution of the surplus. In coming up with the scheme the trustees must take account of the purpose of the fund, the considerations highlighted by the Board, the relevant statutes, the relevant subsidiary legislation and the pension fund rules.

**[53]** The scheme is then sent to the FSC for approval and the FSC may amend the scheme after consultation with the trustees. The next stage is that the FSC returns the scheme to the trustees 'who shall distribute the surplus in accordance with the scheme of distribution as approved' (section 32 (4)).

**[54]** This court agrees with the claimants that in making its decision under section 32 the FSC must consider the question of an uplift for inflation in the manner indicated at paragraphs 49 and 50 of these reasons for judgment.

**[55]** This court is insisting that consideration be given to an uplift for inflation because Lord Mance observed at paragraph 45:

> *…at least on the basis of the facts and arguments presented so far, there could well be a powerful case for a conclusion that the trustees should make further provision for inflation out of the surplus*

**[56]** Nobody has suggested that there has been any change in circumstances between the Board's advice and this hearing that would make a case for further uplift because of inflation is untenable.

**[57]** In this matter, this court will insist that the trustees and the FSC document their reasons for decisions.

**Disposition**

**[58]** The court agrees with the directions proposed by the claimants but also agrees that the words after 'Plan' in paragraph (b) should be deleted. The directions given by this court and by the Board are sufficient to ensure that all relevant matters are considered. The guidance given by this court on the question of determining whether any provision for an uplift for inflation should be made must be borne in mind by the trustees and the FSC. Costs of this application to be bourne by the fund.