[2019] JMSC Civ. 136

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2018HCV04085

BETWEEN	**UC RUSAL ALUMINA JAMAICA LIMITED**	**APPLICANT**
AND	**FINANCIAL SERVICES COMMISSION**	**1ST RESPONDENT**
AND	**MARCIA TAI CHUN**	**2ND RESPONDENT**
AND	**WYNETTE MILLER**	**3RD RESPONDENT**
AND	**WINSTON CAMERON**	**4TH RESPONDENT**
AND	**RADLEY RITCH**	**5TH RESPONDENT**
AND	**KINGSLEY JARRETT**	**6TH RESPONDENT**
AND	**HOPETON MCCATTY**	**7TH RESPONDENT**

IN CHAMBERS

Stephen Shelton QC, Christopher Kelman and Stephanie Ewbank instructed by Myers, Fletcher and Gordon for the applicant.

Patrick Foster QC and Camille Wignall Davis instructed by Nunes Scholefield DeLeon & Co for the 1st respondent.

Michael Hylton QC, Kevin Powell and Sundiata Gibbs instructed by Hylton Powell for the non-Sponsor trustees.

February 5-7 and 27, 2019, March 14, 2019 and **July 5, 2019**

Application for leave to apply for Judicial Review – Court acts as the gate keeper- Role of the Judicial Review Court- Alternative statutory remedy- Appropriateness- Powers of the appeal tribunal- Illegality/ Unlawfulness- Exceptional circumstances- Interim Injunction- Balance of convenience- Irremediable prejudice- What constitutes consultation- Failure to consult- Failure to give reasons- Potential for bias- Failure to pursue alternative statutory remedy- Pension Fund- Trustees discretion- Interpretation of legislative provisions– Irrationality of decision

MCDONALD J.

BACKGROUND TO APPLICATION

[1] The present application has arisen in relation to a Pension Plan governed by a Consolidating Trust Deed (hereinafter referred to as Trust Deed) made on March 10, 2005 between the applicant/ employer/ Sponsor and the Manchester Pension Trust Fund Limited (hereinafter referred to as Manchester PTFL). The Pension Plan operated as a pension scheme whereby pension and other benefits were provided to the applicant's employees. Manchester PTFL appears to have been the trustee of the pension fund at one point but by 2010, the 2nd -7th respondents/ the original trustees (hereinafter referred to as the non-Sponsor trustees) became the trustees of the fund.

[2] The **Pensions (Superannuation Funds and Retirement Schemes) Act**, 2004 (hereinafter referred to as the **Pensions Act**), came into force on March 1, 2005. It appears to this court from the evidence given herein that the Trust Deed was not in compliance with the **Pensions Act** for pension schemes and in about 2008, the Non-Sponsor trustees, the only trustees of the Pension Plan at that time, embarked on a process of reviewing the Trust Deed with the intent of amending it to make it compliant with the provisions of the **Pensions Act**. (**See affidavit of Marcia Tai Chun filed on December 11, 2018, paragraphs 8 and 9**).

[3] The **Pensions Act** required existing pension schemes to conform to the standards of the legislation. Thus, all existing pension funds were to submit their trust deeds

to the 1st respondent but in the instant case no such trust deed was ever submitted as the applicant and the non-Sponsor trustees could not agree on the terms of distribution of assets including any surplus that may arise in the event of a winding up. The lack of agreement meant that they did not meet the six-month deadline set by the **Pensions Act** which required all existing pension funds to submit their trust deed to the 1st respondent for perusal and approval. The consequence was that the pension fund became an unapproved pension fund and has since remained so.

[4] Further, before the review was completed by the non-Sponsor trustees, the applicant 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 via redundancy and the scheme would be discontinued as of the said March 31, 2010. This triggered a winding up of the Pension Plan. Hence, the attorneys representing the non-Sponsor trustees wrote to the 1st respondent 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 its approval of the winding up in accordance with s. 27 (4) of the **Pensions Act.**

[5] The applicant however also sought to remove some of the non-Sponsor trustees but this was challenged via proceedings in the court (hereinafter called the Original Proceedings) by the non-Sponsor trustees/ claimants. As a consequence of the Original Proceedings, the parties consented to an order on August 19, 2010, before her Ladyship Cole-Smith J. The order provided, among other things, that the pension fund was now to be managed by the non-Sponsor trustees, the 2nd and 4th defendants in the Original Proceedings, as well as a Mr Ivan Irikov and a Mr Ivan Makarenko (the Court-added Trustees as per Sykes J (as he then was) at paragraph 7 of his decision in **Wynette Miller & Ors v UC Rusal Alumina Jamaica Ltd. and Ors**, [2016] JMSC Civ 26, delivered on February 29 and hereinafter referred to **as Wynette Miller & Ors v UC Rusal Alumina Jamaica Ltd. and Ors 2016).**

[6] 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. The consent order also indicated that Astor Duggan, an actuary of Duggan Consulting Ltd. (the plan/ fund actuary and hereinafter referred to as Duggan), would provide or make available to Constance Hall, the applicant's nominated actuary of Eckler, Consultants and Actuaries (the Sponsor's actuary and hereinafter referred to as Eckler), '*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'- (***See paragraph 6 of the Consent Order.)**

[7] The actuaries were of different views regarding certain matters and there was disagreement between the trustees as to whether Duggan's report was to be implemented. (**See paragraph 15 of Marcia Tai Chun's affidavit filed on December 11, 2018**). These differences led to an application for directions as to the distribution of the surplus in the Original Proceedings before McIntosh J who directed in January 2012, that the surplus be distributed according to the Duggan's recommendations. The applicant appealed to the Court of Appeal which upheld McIntosh J decision. The applicant proceeded to the Judicial Committee of the Privy Council.

[8] On November 26, 2014, the Privy Council set aside part of the order of the Court of Appeal in **UC Rusal Alumina Jamaica Ltd & Others v Wynette Miller & Others [2014] UKPC 39**. Their Lordship resolved certain issues including that on the winding up of the Pension Plan the trustees could grant an uplift in pension benefits in line with inflation, subject to the consent of the applicant, which is not unlimited and could not be unreasonably withheld. Their Lordships advised that '*the case be remitted to the court at first instances to be reconsidered generally there in accordance with this judgment'* (**See: paragraph 59**).

[9] Further to the decision of the Privy Council, the Non-Sponsor trustees applied to the Supreme court for directions in **Wynette Miller & Ors v UC Rusal Alumina Jamaica Ltd. and Ors**, **2016, supra**. The court there directed that whether there should be an uplift for inflation must be considered by the trustees. Subsequently, an issue arose between the trustees as to the extent of the uplift in pension benefits to account for future inflation that should be given from the surplus of the Pension Plan. On June 23, 2016, the Non-Sponsor trustees applied in the Original Proceedings for directions on the issue.

[10] On September 18, 2017, the court (Sykes J (as he then was) made an order (Uplift Order) with the consent of all the trustees and the applicant which provided that pension benefits under UC Rusal Pension Plan shall be subject to an uplift to account for an inflation rate of 3.85%. The order also directed Duggan to prepare and submit a scheme of distribution of surplus to the trustees and for the trustees to send the scheme of distribution to the 1st respondent for its consideration and decision. This was done.

[11] The evidence reveals that the applicant objected to the scheme of distribution in regards to the manner in which the Duggan applied the uplift to account for future inflation, being of the view that same was inconsistent with the agreed terms under the Uplift Order. The Non-Sponsor trustees thereafter applied in the Original Proceedings for clarification of the Uplift Order. On April 27, 2018, the court ruled in favour of the Uplift Order as being consistent with the scheme of distribution submitted to the 1st respondent by Duggan. (See: the decision of Sykes J (as he then was) in **Wynette Miller & Ors v UC Rusal Alumina Jamaica Ltd. and Ors No. 2** [2018] JMSC Civ. 70, delivered on April 27, 2018 hereinafter referred to as **Wynette Miller & Ors v UC Rusal Alumina Jamaica Ltd. and Ors No. 2**).

[12] The Supreme Court and the Court of Appeal refused the applicant's leave to appeal. Following further written correspondence amongst the 1st respondent, the trustees and the applicant's and plan actuaries, the 1st respondent approved the scheme of distribution by letter dated August 24, 2018.

THE APPLICATION

[13] By a further amended notice of application filed on January 07, 2019 (having previously filed notices of application on October 19, 2018 and December 10, 2018), the applicant applied for leave to apply for certiorari in respect of the decision of the 1st respondent that pursuant to s. 32 of the **Pensions Act,** the proposed scheme of distribution of surplus for the Pension Plan for the employees of the applicant had been approved (hereinafter referred to as 'the Decision').

[14] Additionally, it also seeks, amongst other orders, a stay of the implementation of the Decision pending the outcome of judicial review proceedings or in the alternative, an interim relief in the form of an interim injunction restraining the Non-Sponsor trustees by their servants, agents or otherwise howsoever, from taking any further steps to implement the Decision pending the outcome of the judicial review proceedings. Three affidavits of Leonid Stavitskiy (dated October 19 and November 23, 2018 and January 7, 2019) were filed by the applicant in support of the application.

[15] The 1st respondent and Non-Sponsor trustees have filed affidavits and submissions in opposition to the application for leave and interim relief. The 1st respondent has filed affidavit of Nicolette Jenez, dated January 11, 2019 in response and there is an affidavit of Marcia Tai Chun filed on December 11, 2018 on the behalf of the non-Sponsor trustees.

SUBMISSIONS

[16] The applicant in summary, made the following submissions, that:

(1) The applicant's claim has a realistic prospect of success: -

(i) The threshold which the applicant must satisfy the court is that its claim has "*an arguable ground for judicial review having a realistic prospect of success"*- this test is more flexible in that the more serious the allegation, the higher the strength and quality of the evidence that is required. See

Sharma v Brown-Antoine (2006) 69 WIR 379, p. 387 and **Regina v Industrial Disputes Tribunal (Ex parte J. Wray and Nephew Limited**), (judgment delivered on October 23, 2009, paragraph 57);

(ii) The court's role at this stage is that of a 'gatekeeper' who decides whether an applicant ought to be given "the green light to bring a claim for judicial review"- See **Tyndall & Others v Carey and Others**, Claim No. 2010HCV00474, paragraph4); and

(iii) The applicant is not relying on the quick perusal test as the court is not doing a quick perusal but taking a more detailed look. This court should remind itself that the discretion that it is exercising at this stage is not the same as that which it is called on to exercise when all the evidence is in. The court is not required to go into the level of depth as it would in a trial when all the evidence is presented for its consideration- this underlying position expressed in the dicta from Lord Diplock is still good law. See: **Inland Revenue Commissioners v National Federation of Self Employed and Small Business Limited** [1981] 2 ALL ER 93. However, it must ensure that there are grounds and evidence that establish the real prospect of success. See: **Tyndall & Others v Carey and Others,** supra, paragraph 11**)**.

(2) Judicial review is the more appropriate form of redress as opposed to the statutory tribunal in the circumstances of this case, in that:

(i) The authorities establish that the existence of an alternative statutory remedy is not an automatic bar to the availability of judicial review when the remedy is "*nowhere near so convenient, beneficial and effectual*" as seeking judicial review in court. See: Halsbury's Laws of England (Volume 61A (2018))/ 3, para 58). This case meets this standard;

(ii) Further, this standard has been applied by the Jamaican Court of Appeal in **Chisholm et al v Minister of Environment and Housing et al** (SCCA

No. 123 of 2005). See also: **R v Paddington Valuation Officer, ex parte Peachey Property Corp Ltd** [1965] 2 ALL ER 836 and **R v Chief Constable of Merseyside Police, ex p Calveley** [1986] 1 ALL ER 257;

(iii) This threshold is particularly applicable when the decision is being challenged on the ground of illegality; herein Duggan and the 1st respondent's failure to follow the Privy Council's judgment in **UC Rusal Jamaica Limited et al v Wynette Miller et al**, supra, the orders and judgments of the Supreme Court, the Pension Plan and the Plan Rules in formulating and approving the Scheme of Distribution is illegal and the applicant is entitled to seek judicial review to set aside the Decision;

(iv) Further, the presence of the former appellate judge who adjudicated in a manner adverse to the applicant and now is a member of the appeal tribunal which will be tasked with adjudicating over matters closely connected to the earlier adverse ruling makes the FSC Appeal tribunal (hereinafter referred to as the Appeal tribunal) not the most convenient and is ipso facto an exceptional circumstance which brings this case in the well-established threshold for allowing judicial review notwithstanding the existence of an alternative form of redress;

(v) Additionally, the scope of powers applicable to the Appeal tribunal is not as wide as that of this honourable court since it does not have a power to grant injunctions. In light of the unavailability of this injunctive remedy from the Appeal tribunal, the said Appeal tribunal is "nowhere near so convenient, beneficial and effectual" as applying for judicial review and related injunctive relief from this honourable court;

(vi) Further, since the injunctive relief to stop the non-Sponsor trustees from disturbing the surplus until the 1st respondent's decision is reviewed is an indispensable remedy required to protect the applicant's rights, the absence of this type of remedy from the 1st respondent's statutory appeal

regime is an exceptional circumstance which renders the appeal regime nowhere near so convenient, beneficial and effectual as pursuing judicial review before this Honourable Court;

(vii) Finally, the 1st respondent did not properly consult with the trustees of the Pension Plan regarding the proposed scheme of distribution. Hence, in light of the above and the severity and urgency of this application, the Appeal tribunal is nowhere near as convenient, beneficial and effectual as this court and/or the redress currently being pursued herein; and

(viii) This case by its very nature is to be seen as one that falls outside the remit of the Appeal tribunal.

(3) The applicant's primary ground of challenge to the 1st respondent's decision is that of illegality-

(i) It is well accepted that illegality is a valid ground for judicial review. (See: **CC&C Ltd v Revenue and Customs Commissioners** [2015] 1 WLR 4043 paragraphs 43-44.) Where a decision of an authority is liable to be upset as a matter of law because it is clearly made as a consequence of an error of law or illegality, the courts have granted judicial review and not required alternative remedies to be exhausted. See: Halsbury's Laws of England (Volume 61A (2018))/ 3, para 58 and footnotes 1 and 6);

(ii) Further, where a challenge to a decision is not simply that it is unreasonable but that it is unlawful on some other ground, then such a case falls outside of the statutory regime of the Appeal tribunal and there is nothing objectionable in the court entertaining a claim for judicial review or, where appropriate, granting interim relief in connection with that claim. Such cases are by their nature exceptional;

(iii) In approving Duggan's scheme of distribution as is, without amendment, the 1st respondent exercised its discretion unlawfully/ illegally vis-à-vis

the guidance given in **UC Rusal et al v Wynette Miller et al, supra,** and therefore this case, by its very nature, ought to be considered as one that falls outside the remit of the Appeal tribunal. Hence if it is proven that Duggan in preparing the scheme of distribution and the 1st respondent in approving it are bound by the Privy Council ruling and that they did not abide by the judgment, they would have acted illegally and a ground for judicial review would have been established;

(iv) The 1st respondent failed to abide by the binding guidelines in the judgment of the Privy Council as it ignored entirely the guidance of the of the Privy Council in **UC Rusal Jamaica Limited et al v Wynette Miller et al, supra** and it was at all material times incumbent on the 1st respondent to accept and scrupulously follow the guidance of the Board whose decision binds it. The 1st respondent's approval of the Scheme of Distribution as is, runs directly contrary to the trust deed, the Privy Council judgment and the subsequent Supreme Court judgments;

(v) The applicant acknowledges that the Sponsor's power to refuse consent is not unlimited and that it could be open to challenge if certain factors were found to exist. The 1st respondent incorrectly appears to suggest that it had the power to determine whether the Sponsor's consent was unreasonably withheld as the Privy Council intimated that any challenge to the Sponsor's refusal of consent must be determined by the court. Thus, the 1st respondent unlawfully approved the additional inflation increases in the Duggan's report without first awaiting the court's determination;

(vi) Pursuant to the decision of the Board, given the lack of the Sponsor's consent there would have to be a determination by the court whether the withholding of consent is reasonable or not before the trustees can proceed to distribute the surplus. In order to decide whether to approve the proposed scheme of distribution, the 1st respondent was bound to

consider the Sponsor's lack of consent to the scheme of distribution and its effect on its own jurisdiction to approve the said scheme. The 1st respondent's statement that the applicant has not pointed to anything specific to support its contention that no regard was given to its refusal to consent is wholly inaccurate;

(vii) The 1st respondent is making a misleading submission in suggesting that it has the ultimate power to determine the distribution of the surplus as the Privy Council did not make any decision on the scope of the 1st respondent's power. Notwithstanding the 1st respondent's power to review and amend a scheme of distribution under s. 32 of the **Pensions Act**, the 1st respondent is still bound by the Pension Plan and its rules and the Privy Council's interpretation of the plan and these rules, which is exactly the very basis of the applicant's submission that the 1st respondent's decision is illegal. Nothing in the Supreme Court decision (February 2016) extended the 1st respondent's power beyond this as the court merely stated that the parties are agreed that the **Pensions Act** applies to the unapproved Rusal Pension Plan;

(viii) The Privy Council did not rule that the 1st respondent had the discretion to approve a scheme of distribution, irrespective of the Sponsor's consent but directed that the question of whether there should be uplift for inflation must be considered by the trustees. After the trustees exercise their discretion in this regard, the Sponsor, whose consent would be necessary before these inflationary uplifts could be permitted, is then entitled to decide whether or not to consent thereto, the reasonableness of which could then be challenged in court;

(ix) In light of the aforementioned flaws in the 1st respondent's decision, its decision is so unreasonable that no reasonable body acting reasonably could have made it.-(See **Associate Provincial Picture Houses Limited v Wednesbury Corporation** [1948] 1 KB 223.) Moreover, the

1st respondent failed to consider factors that it ought to have considered, in particular the ruling of the Privy Council and the associated issues raised by the Sponsor Trustees;

(4) Further, on the issue of illegality, the applicant made the following arguments, that:

(i) The non-Sponsor trustees' characterization of a limited scope of illegality is inaccurate. The extract in De Smith's Judicial Review, 6th Edition, at paragraph 5-003 indicates that in construing the content and scope of the power of the decision-maker, it may involve, inter alia, the interpretation of a statute or some other common law power. Further, at paragraph 5-110, included within the scope of illegality are scenarios in which a discretionary power is either influenced by irrelevant considerations or by a failure to take into account relevant considerations, in which case the court will normally hold that the power has not been validly expressed. In **CC&C Ltd**, **supra**, a thorough reading of paragraphs. 43 and 44 indicates that the court did not explore or define or limit the scope of the illegality ground;

(ii) To the extent that the Privy Council ruled on an issue of interpretation of the Trust Deed and Plan Rules (as it did in paragraphs 37 and 38), the 1st respondent was required to abide by that binding interpretation which indicated that inflationary uplifts require the consent of the Employer/ Sponsor (or the outcome of a court challenge to the Sponsor's decision not to consent);

(iii) S. 59 of the **Pensions Act** provides transitional provisions for unapproved plans such as the instant one. The non-Sponsor trustees' contention that paragraph 5 of the 2017 Consent Order, which refers to s. 32 of the **Pensions Act**, somehow precludes the applicability of "mutatis mutandis" in s. 59 of the **Pensions Act** is an inaccurate

interpretation as s. 32 of the **Pensions Act** was specifically mentioned in the Consent Order as it is the primary provision applicable to the distribution of surplus. However, there is no agreement between the parties or judicial decision that the other provisions of the **Pensions Act**, such as s. 59, are inoperable in relation to the subject pension plan;

(iv) The 1st respondent provides an incomplete representation of the Privy Council's assessment of the benefits payable under Clause 18.1.3 by referring to paragraphs of the Privy Council judgment which do not relate the issue in dispute and there are solely related to the statutory maximum rate under the 2008 Income Tax Act. Further, it cannot rely on paragraph 49 of the Privy Council judgment to support its contention that it has wide powers under s. 32 in relation unapproved plans;

(v) The initiating documents (Notice of Application and Affidavit in Support of Sundiata Gibbs filed on June 23, 2016) which led to the 2017 Consent Order properly contextualize the scope of the Consent Order. The said application sought directions as to the extent to which the Trustees should recommend an inflationary uplift and thus, the Consent Order did not only represent an agreement between the Trustees, on the one hand, and the Sponsor, on the other, but it is also the only agreement on inflationary uplift amongst all of the Trustees regarding the extent of inflationary uplift to recommend;

(vi) Since the 2018 Supreme Court judgment ruled that the inflationary uplift only applies from March 31, 2017 onwards, the other inflationary increases applied by Duggan during the periods prior to March 2017, including as far back as 2007, does not even reflect the agreement amongst the Trustees as a group and, as such, could not have properly been considered a recommendation of the Trustees;

(vii) Since Duggan's Scheme of Distribution was not in accordance with the agreed inflationary uplift in the 2017 Consent Order, the scheme is invalid as it neither represents the agreed recommendation amongst the Trustees nor does it represent the agreement between the Trustees and the Sponsor, hence the 1st respondent's approval of this invalid scheme of distribution is illegal;

(viii) The respondent's suggestion that in **Wynette Miller & Ors v UC Rusal Alumina Jamaica Limited & Ors, 2016, supra,** the court has already decided on the scope of the 1st respondent's power to override the provisions of the Trust Deed and Plan Rules is a substantial elevation of the court's decision beyond that which was actually decided for essentially, the following reasons:

a. The issue upon which the court was asked to consider is stated at paragraph 10 of his lordship's above mentioned judgment regarding directions as to the potential significance of the Act in relation to the way in which the trustees' discretion should be exercised. The court's ruling is limited to its decision on the only issue joined between the parties regarding the words "if it believes insufficient provisions have been made for inflationary conditions" from direction (b), which the court decided to remove;

b. The judge expressly stated the scope of his judgment at paragraph 17 and the 1st respondent's categorization of his guidance as "directions" is inaccurate;

c. His guidance was obiter and the question whether the 1st respondent's power under the **Pensions Act** entitles it to ignore the provisions of the trust deed and plan rules and interpretation of the Privy Council has not been answered.

The language he uses in paragraphs 49 & 50 indicates the hypothetical non-binding nature of the guidance that was given by the court in these paragraphs.

d. But even if it (obiter dicta) paras 49 & 50 is binding, it does not indicate that the 1st respondent is not required to abide by the trust deed and Plan Rules; and

e. Further in the absence of a court's decision, the 1st respondent was not entitled to override the applicant's refusal to consent or to determine itself whether the applicant's refusal to consent was made in good faith or was irrational or arbitrary.

(ix) The 1st respondent seeks to equate an incorrect description in a letter from the Sponsor's actuary, Eckler- exhibit LS8, regarding the court's April 2018 judgment as an indication of the Sponsor's consent to the inflationary uplift in the scheme of distribution. However, this is a misguided interpretation of the letter. The letter merely indicates that Eckler incorrectly interpreted the court's April 2018 decision and this cannot in any way change the effect of the court's decision which clearly stated that the agreed uplift must be applied from March 31, 2017 onwards.

(x) Nowhere in the court's April 2018 decision is there any ruling on inflationary uplifts applying prior to March 31, 2017. Also, if there was any misunderstanding on the part of the 1st respondent, the letter from the Sponsor dated August 15, 2018 clearly and unambiguously indicates that the Sponsor does not consent to those additional inflationary uplifts which are outside the scope of the September 2017 Consent Order;

(xi) In the face of Rusal's decision not to consent to these inflationary uplifts, the absence of any statutory power or common law decision allowing the

1st respondent to bypass the requirements of the Trust Deed and Plan Rules and the absence of a decision from a court that Rusal's refusal to consent is invalid, the 1st respondent exceeded its statutory powers and unlawfully approved the scheme of distribution. The applicant has established an arguable ground for judicial review with a realistic prospect of success.

(5) An Interim Injunction ought to be granted pending the determination of the judicial review proceedings:

(i) An interim injunction is the relevant interim remedy in these circumstances in which the 1st respondent has made a decision and the applicant is seeking to prevent the implementation of said decision in the interim. See-**Gorstew Limited and Another v The Contractor-General** [2013] JMSC Civ 10; **American Cyanamid Co v Ethicon Ltd** [1975] AC 396; **National Commercial Bank Jamaica Ltd v Olint Corporation Ltd** [2009] UKPC 16; and **Belize Alliance of Conservation Non-Governmental Organizations v Department of the Environment and Another** [2003] UKPC 63;

(ii) The principles relevant to the exercise by a court of its discretion to grant an interim injunction were adumbrated in **American Cyanamid Co. v Ethicon Ltd,** supra, p. 7. There are serious issues to be tried between the parties, damages would not be an adequate remedy for the applicant and the balance of convenience lies in favour of granting the interim injunction as this is the course that seems likely to cause the least irremediable prejudice;

(iii) If there is a serious issue to be tried and the claimant could be prejudiced by the acts or omissions of the defendants pending trial and the cross-undertaking as to damages would provide the defendants with an adequate remedy if it turns out that the injunction was wrongly granted,

then an injunction should ordinarily be granted. See: **National Commercial Bank Jamaica Ltd v Olint Corporation Ltd, supra**, paragraph 16;

(iv) The court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other **National Commercial Bank Jamaica Ltd,** supra, paragraphs 17&18. Based on the substantive arguments presented in support of the leave threshold, the application meets the "serious issues to be tried" threshold and damages are not an adequate remedy. This court has the power to order an interim injunction and ought to exercise that power in favour of protecting the applicant's rights, which are now at urgent risk of being permanently jeopardized;

(v) The Appeal tribunal established under the **Financial Services Commission Act (**hereinafter referred to as the **FSC Act)** is an inferior tribunal endowed only with such powers as are expressly conferred on it by Parliament and so had Parliament intended to confer on it a power to grant interim injunctive relief, it would have done so expressly in the enacting statute of the tribunal (the applicant cites the **Arbitration Act**, 2017 as an example) and not leave it to be drawn as a matter of implication;

(vi) It is a question of statutory interpretation. See: **Petroleum Company of Trinidad and Tobago Limited v Oilfields Workers' Trade Union** CA No. P320 of 2018. This injunctive power is not bestowed on the Appeal tribunal. The applicant disagrees that the power of the appeal tribunal at part 31(b) to suspend the effect of a notice issued by the 1st respondent amounts to a power to grant an injunction. Further in proceedings before the tribunal, the non-Sponsor trustees would not be parties to those proceedings and so the Appeal tribunal would have no power to make a direction under part 31. No similar wording as s. 20 of the **Arbitration Act** is in the **FSC Act;**

(vii) Further, the 1st respondent lacks jurisdiction to stop the implementation of the scheme of distribution and injunctive relief is crucial to protect the applicant's interest. The non-Sponsor trustees have started taking steps necessary to distribute the surplus in accordance with the 1st respondent's decision. Once the plan is approved by the 1st respondent, the implementation of this decision is with the non-Sponsor trustees- the 1st respondent is functus once it has given its approval. The next step is for the non-Sponsor trustees, a third party and the implementation of the scheme is well advanced and the only thing that can maintain the status quo is by an injunction given by this court upon a grant of leave by this court;

(viii) Though rule 33 of the **Financial Services Commission (Appeal Tribunal) Rules, 2017** (hereinafter referred to as the **tribunal rules**) provide the Appeal tribunal with the power to determine "interim applications", this term is undefined and ought to be interpreted as not including a power to stay a decision of the 1st respondent. Moreover, the statutory framework for the Appeal tribunal does not provide any express power to grant injunctive relief in relation to third parties acting upon a decision of the 1st respondent. The **Pensions Act** confers no further duties or role on the 1st respondent once approval is given and all subsequent steps re distribution are imposed on the trustees of the Pension Plan. A suspension of the effect of the notice issued by the 1st respondent pursuant to the **Pensions Act** would only bind the 1st respondent, not the non-Sponsor trustees who are seeking to implement the 1st respondent's decision herein;

(ix) Conversely, this court has the express power to grant interim injunctions pursuant both to the **Judicature (Supreme Court) Act** (See s. (49h)) and rules 17.1(1) and 56.4(10) of the **Civil Procedure Rules** 2002 (hereinafter referred to as the CPR). Furthermore, as a superior court of

record this court under its inherent jurisdiction can grant an injunction in any matter before it;

(x) Since the 1st respondent's decision has already been made and there are no further steps for it to take, an interim injunctive relief is a critical element of the applicant's case as it is the only remedy against the non-Sponsor trustees who are implementing the decision that will provide effective interim protection of the applicant's rights pending determination of the substantive issues. This course is more beneficial, effectual and convenient instead of seeking what amounts only to a stay of the decision-See: **Minister of Foreign Affairs Trade and Industry v Vehicles and Supplies Ltd and Another** [1991] 4 ALL ER 65 and **Digicel (Jamaica) Limited v The Office of Utilities Regulation** [2012] JMSC Civ 91;

(xi) Therefore, even if this court were to find that the Appeal tribunal has an implied power to stay a decision of the 1st respondent, it is submitted that there is no power, whether express or implied, to grant injunctive relief against the third party (the non-Sponsor trustees) who are in the process of implementing the 1st respondent's decision; and

(xii) A pay out to numerous pensioners means that damages would not be a sufficient remedy. There is ample case management power in this court to reduce the delay of which the non-Sponsor trustees assert to their prejudice. An early date for the hearing of this matter can be set should leave be granted. Comparatively, there can be no such corresponding steps taken to minimize the prejudice the applicant will suffer from an interim distribution of the surplus whilst the application is being determined.

(xiii) The inability of an Appeal tribunal to grant an urgent interim remedy, in this case an injunctive relief against the non-Sponsor trustees,

is another exceptional circumstance which justifies departure from the statutory appeal regime. (See Blackstone's Civil Practice 2019 at p. 1438)

(6) If the applicant were to pursue an appeal to the Appeal tribunal, it may unnecessarily subject itself to undue bias and jeopardize its right to a fair and independent review of the 1st respondent's decision:

(i) This court ought to consider the adverse statements made in **UC Rusal Alumina Jamaica Limited et al v Wynette Miller** et al [2013] JMCA Civ 14 as evidence demonstrating a potential bias on the part of the Honourable President of the COA Seymour Panton (as he then was and hereinafter referred to as Panton P) who presided over the court in that matter;

(ii) The circumstance of **Donald Panton v Minister of Finance and The Attorney General,** [2001] UKPC 33 is clearly distinguishable from the applicant's case as this is a matter involving the same parties and legal issues that were before the Court of Appeal**.** The applicant further relies on the dictum from the **Panton case,** at paragraph 8, "*In principle a prior association or connection with the subject matter of the dispute may be sufficient to disqualify a judge from the determination of it...what is of concern is the appearance of the judicial process. If there is a potential for bias that may be sufficient to disqualify the judge*."

(iii) The respondents fail to appreciate that the governing section is really s. 4 of the 2nd schedule which can only comprise of 3 members and so s.1(2) would not assist in these circumstances. In this case there are 3 members in office. The difficulty lies not only in the numbers of persons in office but the number of members who will be available to hear an appeal in this case if Panton P is disqualified by potential bias and so s. 1(2) is inapplicable. There is presently no provision to remove a member

or so far as hearings are concerned for a reduction in the number of members from the mandatory 3-member panel;

(iv) S. 1(3) of the 2nd Schedule of the **FSC Act** could not have been properly invoked by the applicant as it only allows for the appointment of additional members when there is a deficiency in number. No such deficiency presently exists as s.1(1) of the said schedule provides that the tribunal must have "at least 3 members", and it presently comprises only this minimum number of 3 appointed members to the Appeal tribunal. S. 4(1) of the 2nd schedule (the side note to which reads Hearing Panel) makes it clear that matters must be heard and determined by a panel consisting of 3 members. Thus, all of the presently appointed members would have had to sit on the panel adjudicating the applicant's appeal; and

(v) Further, the non-Sponsor trustees' argument that the Appeal tribunal is a specialist expert panel to deal with actuarial issues is an erroneous description of the Tribunal as presently constituted, as all of the total 3 appointed members are retired Justices of Appeal who are not specialists in resolving actuarial issues. In any event, the applicant's claim herein does not require actuarial expertise.

(vi) The non-Sponsor trustees have inaccurately generalized the opinions stated by the Privy Council in the **Panton case** and **Locabail (UK) Ltd v Bayfield Properties Ltd** [2000] QB 451 case. The Privy Council's reference to 'another case' throughout the examples indicates that it is not referring to a scenario such as the present one in which the same matters of law are in issue amongst the same parties in the context of the same litigation which has been unusually long and complex. The scenario in this case appears to fit more neatly into what was described by the Privy Council at paragraph 8 "*in principle a prior association or connection with the subject matter of the dispute may be sufficient to disqualify a judge from the determination of it*";

(vii) Furthermore, the UK COA in **Locabail** at paragraph 25 emphasized that every application must be decided on the facts and circumstances and nature of the individual case, and that in any case where there is a real ground for doubt, that doubt should be resolved in favour of recusal. It is undeniable that this case has extraordinary facts and circumstances, in that it has been litigated for almost a decade at all levels of the judicial system, it involves very technical and contentious issues of law and fact, and the fact that the subject matter pension fund is of an unusually large scale; and

(viii) **Ervin Moo Young v Debbian Dewar et al** [2017] JMCC Com 12 is a first instance decision of this court while **JSC BTA Bank v Ablyazov and Ors** [2013] 1 WLR 1845 is a UK COA case. Neither decision binds this court and therefore greater reliance ought to be placed on the binding authority of the **Panton case**, which was not considered in either case.

(7) The 1st respondent failed to properly consult: -

(i) In light of the immense difference between the calculations of the Actuaries, it was even more incumbent on the 1st respondent to ensure that it engaged in a fair and just decision-making process. For the 1st respondent to end up approving the scheme without any amendment it is clear evidence that no serious consideration was given to the applicant's complaint;

(ii) The 1st respondent has provided absolutely no indication as to whether or not it took into account the concerns raised by the Sponsor Trustees (based on correspondence from the Sponsor's Actuary). It has not demonstrated that in arriving at its decision it conscientiously (or at all) took the matters raised by Eckler into account and further, it has given no indication how, or even if, it resolved the differences in approach between the Plan Actuary and the Sponsor's Actuary. See-**Northern Jamaica**

Conservation Association et al v The Natural Resources Conservation Authority and NEPA (judgment delivered on May 16, 2006); **Regina v Brent London Borough Council, Ex parte Gunning and Others** 84 L.G.R. 168, 189; and **R (on the application of Moseley (in substitution of Stirling Deceased) v London Borough of Haringey** [2014] UKSC 56.

(iii) The 1st respondent therefore failed to meet the 4th requirement of consultation laid down in **Ex parte Gunning**, supra, and the flaws in the 1st respondent's consultation process were serious enough to deprive the consultation process of efficacy. The failure of the 1st respondent to properly address the views provided to it by way of the consultation process is made the more egregious by the long, contentious history of this dispute and the gravity of the matters raised by the Sponsor;

(iv) There is inadequate evidence to establish that the reopening of the consultation process by the 1st respondent constituted genuine consultation. Even when there is no mandatory statutory duty to consult, if consultation is embarked upon, it must meet the same minimum standards expounded in **Ex parte Gunning**, supra.

(v) See also **Sardar et al v Watford Borough Council** [2006] EWHC 1590 (QB), paragraph 33.- the court must examine the seriousness of the flaws in the consultation process to determine whether they rise to the level of warranting that the decision be quashed**.** See: **Northern Jamaica Conservation Association et al,** supra**.** Fairness in the consultation process may demand that reasons why divergent views were not accepted be provided. See: **R (on the application of Moseley (in substitution of Stirling Deceased),** supra**;**

(vi) Despite the provisions of s. 32(3) of the **Pensions Act**, the 1st respondent did not develop a proactive consultation process. It did not

invite comment from either party, or otherwise solicit their views as for instance, it was only when the 1st respondent received the Sponsor Trustees' letter dated July 26, 2018 that it forwarded promptly a copy to the Chairman of the Board of Trustees inviting response "*so that the 1st respondent is provided with sufficient opportunity to consider the issues.*" At that stage it was incumbent on the 1st respondent to conscientiously address these matters in its decision-making process as it said it would do per its letter dated July 27, 2018;

(vii) Given the large sums of money at stake and the severe level of prejudice to the rights of the applicant, it is even more unreasonable that the 1st respondent did not undertake a sufficiently serious and thorough consultative process. This amounts to a serious flaw in the 1st respondent's consultative process, which warrants that its decision be quashed.

(viii) The 1st respondent failed to give reasons for its decision and the failure of a public authority to give reasons may either be procedurally unfair or may be an indication that the decision of the authority is irrational. See: **Linton Allen v His Excellency the Right Hon. Sir Patrick Allen and the Police Services Commission** [2017] JMSC Civ 24, paragraph 133;

(ix) Even in circumstances when a public authority has absolute discretion, a failure to give reasons may result in the decision being quashed in circumstances where this failure leads to unfairness. See: **Mallak v Minister for Justice, Equality and Law Reform** [2012] IESC 59, paragraphs 74 & 76. The circumstances surrounding the 1st respondent's decision are such as to render its failure to give reasons sufficiently unfair to warrant certiorari, in light of the extent of financial benefits at stake between the two diverging views of the actuaries and the strength of the arguments opposing the scheme of distribution;

(x) Furthermore, in discharging its statutory duty to act fairly to the applicant, the duty included the 1st respondent demonstrating the requisite level of fairness by providing reasons why it rejected the views of the Sponsor Trustees and ignored the issue of the Sponsor's lack of consent to the level of the pension uplift. Insofar as the 1st respondent's letter dated August 24, 2018 does not provide or explain any basis for its approval of the scheme of distribution, a strong inference is raised that the 1st respondent did not in fact conscientiously take these matters into account as is required by the case law and the court is entitled to draw said inference;

(xi) Further, the 1st respondent's failure to give reasons for its decision in circumstances where it received the views of the relevant parties and is bound by the ruling of the Privy Council, renders the 1st respondent's decision irrational and unlawful. Additionally, given the importance and seriousness of the competing rights at stake, it was even more incumbent on the 1st respondent to provide reasons indicating its basis for arriving at a decision to approve the scheme of distribution; and

(xii) In light of the failure to engage in an adequate consultation process and the failure to give reasons for its decision in the circumstances of this case, the 1st respondent's decision was so unreasonable that no reasonable authority acting reasonably could have made it. (See: **Associate Provincial Picture Houses Limited,** supra)

[17] The 1st respondent in opposition to the application made, in summary, the following submissions:

(1) An applicant for leave to apply for judicial review must have a good arguable case with a realistic prospect of success. Further, the discretionary bars in respect of delay and the availability of an alternative remedy have to be considered before deciding whether leave should be granted. There is a

discretionary bar to leave being granted to the applicant herein because an alternative form of redress exists which has not been pursued:

(i) It is settled law that where an alternative form of redress exists, in order to obtain leave, the applicant must demonstrate why judicial review is more appropriate or why the alternative has not been pursued. This is an express requirement under rule 56.3(3)(d) of the CPR. The clear inference from this rule is that a party seeking judicial review should pursue the alternative remedy if more suitable;

(ii) Judicial review is the residual jurisdiction of the court and the party should only be allowed to proceed to judicial review if the alternative remedy is "*nowhere near convenient, beneficial and effectual as Judicial Review*";

(iii) The appellate tribunal is the more appropriate mechanism to deal with the issues surrounding the decision of the 1st respondent to approve the scheme rather than judicial review. Further, where legislation lays down a very detailed and comprehensive system of appeals procedure against administrative decisions the courts should allow that procedure to be utilized to deal with the issues;

(iv) The tribunal has the right to co-opt persons in its opinion who have the requisite expertise in any matter before that panel for the purpose of advising the panel members on issues and it would immerse itself in the issues that have to be resolved. The legislature therefore contemplated the constitution of a tribunal and advisers to deal with the range of complex issues that may arise on an appeal and to effectively and competently address those issues. The appeals procedure is also very detailed and elaborate. It is arranged in such a manner in order to provide all the evidence required by the tribunal and to identify and distill all the issues required to be addressed in order to arrive at a fair and just decision;

(v) The tribunal with its elaborate appeal structure clearly has the power to re-hear the matter and any flaws or errors alleged by the applicant, if accepted by the tribunal, could lead to it substituting its own decision for that of the 1st respondent. The tribunal would substantially be dealing with the matter afresh with additional evidence to consider if it deems appropriate. It is therefore demonstrably clear that an appeal is a more effective way of dealing with the issues raised by the applicant rather than the judicial review process which is by its very nature different from an appeal. The judicial review deals with the process and whether it was fair while the appeal is able to address the merits of the decision, which is exactly what the applicant has raised. The tribunal is therefore better placed to deal with these issues more comprehensively than a judicial review court and can more conveniently, beneficially and effectually resolve the matters in dispute;

(vi) If Judicial review is done, what will happen next- it is sent back to the 1st respondent but if the matter went to the Appeal tribunal the whole range of issues complex or otherwise could be dealt with and resolved conclusively. That is the practical and sensible approach and how the law says it should be, not by judicial review;

(vii) Parties cannot proceed to the court system until the administrative process has run its course, hence, absent exceptional circumstances, those who are dissatisfied with some matter arising in the administrative process must pursue all effective remedies that are available within that process; it is only when the administrative process affords no effective remedy can they proceed to court. See: **Homer Davis v Granger and Kellier** [2016] JMSC Civ 67, paragraph 15 and **Web Communications Ltd v Office of Utilities Regulation** Claim No. M030 of 2002, unreported judgment delivered on December 3, 2003. In the absence of exceptional circumstances, the applicant must first exhaust available procedures for objection or to appeal- See **R (Davies) v Financial Services Authority**

[2004] 1 WLR 193, **R (Willford) v Financial Services Authority** [2013] EWCA Civ 677 and **Watch Tower Bible & Tract Society of Britain & Ors v The Charity Commission** [2016] EWCA Civ 154 at paragraph 19;

(viii) The underlying consideration in determining whether an alternative remedy is conveniently and effectively available to another party was addressed by Straw J (as she then was) in **Malica Reid v The Commissioner of the Independent Commissioner of Investigations et al** Claim No. 2011HCV00981 unreported judgment delivered on March 18, 2011. Her Ladyship relied on **Regina (on an application by JD Wheatherspoon Plc) v Guilford Borough Council** 2006 EWHC 815 (Admin);

(ix) The consideration as to whether the alternative course of redress would be effective, and suitable for the sensible determination of the real issue is not affected by the fact that the time for exploring that alternative recourse may have already expired due to the applicant's own conduct. The fact that the time has passed to pursue the alternative remedy does not entitle the applicant to get leave- See: **The Queen on the Application of Richard Carnell v Regents Park College and the Conference of Colleges Appeal tribunal** [2008] EWHC 739 (Admin). In the instant case, there is an alternative statutory remedy conveniently and effectively available to the applicant which has not been pursued and the applicant has conceded that this alternative remedy exists;

(x) The applicant has failed to establish that it would be entitled to the interim relief in the form of an injunction, and this ought not therefore to affect the court's consideration and determination as to the appropriateness of an appeal to the Appeal tribunal as an alternative remedy to judicial review. Further, the process of an appeal to the Appeal tribunal rather than judicial review would be more appropriate for the examination of the

issues that the 1st respondent considered before it gave its approval of the scheme;

(xi) S.1(3) of the 2nd schedule of the **FSC Act** allows for the Minister to appoint additional members to the Tribunal for a limited period and purpose during any period in which there is a deficiency in number. This provision could have been invoked to address any concerns held by the applicant regarding the former appellate judge and the applicant ought to have pursued this alternative before its current application to the court. If it had done so administrative arrangements could have been made to appoint another person to the panel; and

(xii) The applicant ought not to be granted leave to proceed to judicial review in the circumstances having failed to pursue an alternative form of redress that is conveniently and effectively available to it.

(2) The position that there would be a potential for bias in the COA judge because he has already adjudicated on the issues adverse to the applicant is without merit:

(i) The issues which the COA adjudicated on are not the same issues to be heard by the tribunal although the subject matter may overlap. The tribunal would consider the 1st respondent's decision and the material that it had before it against the background of any grounds of appeal filed;

(ii) If Panton JA recused himself, the minister could appoint a 4th member of the panel, so Panton JA would remain on the panel but would not be hearing the appeal. This is a part of the minister's power to appoint at least 3 members.

(iii) A judge who has heard a matter involving a litigant and has made a finding adverse to that litigant, without more, is not precluded from hearing a subsequent matter involving the same litigant. The test is

whether a fair-minded and informed observer considering the facts would conclude whether there was a real possibility that the judge, in hearing the second matter, would be biased. Judges are expected to be impartial, independent and objective in the carrying out of their judicial functions and barring some other material fact, no informed and fair-minded observer would conclude in these circumstances that there would be a real possibility of bias by Panton JA;

(iv) There is no evidence that the learned judge who is slated to sit on the tribunal expressed himself in the COA judgment in terms that were less than moderate or restrained or that he based his decision other than on the evidence before him. There is no other evidence other than the fact that Panton JA sat on the COA that handed down a previous decision in this matter that can justify a request for the judge to recuse himself. There is no allegation that he is likely to reach his decision by reference to extraneous matters or predilections or prejudices; and

(v) In the circumstances, the tribunal comprising 3 persons including Panton JA can independently and impartially deal with the issues arising on any appeal that may be filed by the applicant. Without more it cannot be contended that one panel member is biased and therefore the tribunal is perfectly capable of adjudicating in the matter. Even if there is merit to the applicant's contention relating to bias, which is disputed, there is scope for the appointment of another panel member and this should not be a difficult exercise for the Minister especially if there are good reasons to do so.

(3) The threshold for the granting of leave that must be met is that there must be an arguable ground with a realistic prospect of success- See **Sharma v Brown- Antoine, supra.**

(i) The applicant's reliance on the decision in **Inland Revenue Commissioners case, supra**, is misplaced as the test applied there was replaced by the test in **R v Legal Aid Board, ex parte Hughes**, (1992) 5 Admin 623, p. 628. In view of **Sharma v Brown- Antoine, supra,** applications for leave are no longer dealt with by applying a "quick perusal" test. The threshold is now higher and this higher standard has been applied in our jurisdiction- See: **IDT ex parte Wray and Nephew** 2009HCV04798, judgment delivered on October 23, 2009. A more diligent analysis of the evidence is required to determine whether there is a more arguable ground with a more realistic chance of success;

(ii) The court has to be satisfied based on the evidence presented in support of the application that there is an arguable case for judicial review with realistic prospects of success before leave to apply for judicial review can be granted. This has to be demonstrated on the evidence presented at the leave stage and the granting of leave cannot be grounded just on the basis that some arguable case with a realistic chance of success may emerge after more evidence is adduced;

(iii) The pertinent question at this stage of seeking leave therefore is whether the evidence presented by the applicant demonstrates an arguable case with a realistic prospect of success. The court has to satisfy itself that the affidavit evidence at this stage demonstrates an arguable case with a realistic prospect of success and the evidence before the court has failed to do so. The court should not speculate as to whether on further consideration at a judicial review hearing an arguable case may emerge.

(4) The applicant has no realistic prospect of challenging the 1st respondent's decision on the ground of failure to consent as the affidavit evidence clearly establishes that there was sufficient consultation having regard to the role of the 1st respondent under s. 32 of the **Pensions Act**.

(i) The decision maker is not bound to take on the position advanced by a party, and the failure to do so does not automatically lead to a conclusion that the concerns raised were not considered.

(ii) Further, a statutory duty to consult "vary greatly depending on the particular provision in question, the particular context, and the purpose for which the consultation is to be carried out...A mechanistic approach to the requirements of consultation should therefore be avoided" (See: **R (on the application of Moseley (in substitution of Stirling Deceased) v London Borough of Haringey), supra,** paragraph 36**.** The consultative process that the applicant expected the 1st respondent to do consistent with the authorities on which they have relied would not have been necessary or even possible. In any event the affidavit of Nicolette Jenez clearly indicates that all the correspondence received and the issues raised in them were duly considered by the 1st respondent in making its decision;

(iii) The consultation process in the context of a public consultation exercise need not be unduly complex or lengthy (See paragraph 41 of **R (on the application of Moseley (in substitution of Stirling Deceased) v London Borough of Haringey), supra;**

(iv) Consultation is not litigation (See: **Northern Jamaica Conservation Association**, paragraph 39, supra) and hence there is no need for an elaborate or unduly lengthy or complex consultation process to be shown;

(v) Further, the question of whether the 1st respondent sufficiently consulted has to be considered in the context of its role under s. 32 of the **Pensions Act.** In the context of the 1st respondent's role as prescribed in the **Pensions Act,** the level of consultation advocated for by the applicant was not required**;**

(vi) The 1st respondent's role was to review the scheme of distribution submitted by Duggan and determine whether or not to approve it, taking account of the directions from the court and the priorities listed in s. 32(5) of the **Pensions Act**. Consultation would only take place if the 1st respondent considered it necessary to amend the scheme of distribution submitted for approval but no decision was made to amend the said scheme of distribution. In any event, the 1st respondent embarked upon extensive and genuine consultation involving all the relevant parties, including the Sponsor;

(vii) The applicant's contention that the 1st respondent did not sufficiently consult is based on the fact that the 1st respondent did not accept the position of its actuary. This does not mean that the position was not considered or that there was no sufficient consultation. In the absence of the applicant identifying a specific flaw in the consultation process, which it has failed to do, there is no realistic prospect of this ground of challenge succeeding; and

(viii) There is clear evidence from the affidavit of Nicolette Jenez that the 1st respondent was diligent in considering all the issues before it and that even after making a decision, re-opened the matter, advised itself and then approved the scheme. This submission is thus without merit and unsupported on the facts.

(5) The applicant has not identified anything specific to support its contention that no regard was given to its refusal to consent:

(i) The applicant's submissions imply that the approval of the scheme in the face of its refusal to consent constitutes a flaw in the respondent's decision to approve the scheme. However, the Privy Council's decision did not bind the respondent to any position taken by the Sponsor and did

not preclude them from approving a scheme of distribution to which the Sponsor had not consented;

(ii) Both the Privy Council and the Supreme Court decisions emphasized that the Sponsor's power to refuse consent was not unlimited. If it could be shown that the Sponsor's refusal to agree was not made in good faith or was irrational or arbitrary then it was open to challenge. The employees' legitimate expectation of a recommendation of an uplift by the trustees on account of similar augmentations that were done in the past was also a relevant consideration;

(iii) It is clear from the Supreme Court judgment that the 1st respondent had a discretion under s. 32 of the **Pensions Act**, irrespective of the Sponsor's consent, to approve a scheme of distribution submitted by Duggan or amend the scheme if it considered that insufficient provision had been made for inflationary conditions. The scheme of distribution as proposed by Duggan sought to make provision for the inflationary conditions and generally sought to distribute the surplus in accordance with trust deed. This is not inconsistent with the directions from the Privy Council or the Supreme Court;

(iv) The applicant has not indicated the existence of any factors which would take the 1st respondent's approval of the scheme outside of the directions of the Privy Council, other than its refusal to consent, and that by itself does not mean that the 1st respondent was not entitled to approve the scheme of distribution as proposed by Duggan or that the said approval was in breach of the directions from the Privy Council. The applicant does not have a realistic prospect of succeeding on this ground.

(6) The applicant has failed to demonstrate on its affidavit evidence anything that was unreasonable in the 1st respondent's consideration of the matter in the Wednesbury sense as the applicant has contended:

(i) The affidavit evidence on which the applicant relies has not met these considerations given by Sykes J (as he then was) in **Northern Jamaica Conservation Association**, paragraph 17, supra. The only basis raised by the applicant for its contention that the 1st respondent's decision was irrational and unreasonable in the **Wednesbury** sense is that the 1st respondent did not agree with their position. A disagreement about the decision is insufficient to bring the matter into the realm of **Wednesbury** unreasonable; and

(ii) The argument that the 1st respondent's approval of the scheme as proposed by Duggan was irrational or unreasonable in the **Wednesbury** sense cannot be maintained and has no realistic prospect of success.

(7) The basis for a court finding that there is a duty to provide reasons for a decision is to ensure that the decision maker acted fairly in arriving at the decision. Obtaining an insight into the basis for the decision, facilitates the assessment of the decision and whether it was fair or not:

(i) It is settled that there is no general duty at common law to provide reasons and the failure to do so will not by itself nor will it in every case render a decision procedurally unfair. The obligation to give a reason may arise in certain circumstances because the recipient of the decision may be prejudiced as a consequence of the failure to do so;

(ii) Herein, the 1st respondent was exercising a statutory power under the **Pensions Act** in reviewing and approving the scheme of distribution proposed by Duggan. There was no requirement under those statutory provisions to provide reasons at the stage of communicating its decision. The 1st respondent's obligation was to communicate its decision to the Trustees. Additionally, there was nothing irrational, or unreasonable in the scheme as proposed by the fund's actuary and it was not in breach of the Privy Council's directions. Therefore, any failure to expressly

indicate why it was accepted would not render the decision or the procedure unfair;

(iii) The applicant herein was fully aware of the material on which the 1st respondent based its decision and the various considerations it took into account in making the decision it did. Indeed, the applicant's contention is that the 1st respondent acted on Duggan's report and did not accept the position of the Sponsor's actuary, thus, the applicant had some obvious insight into the various considerations that informed the 1st respondent's decision. Further, the applicant would have been aware of the other material that the 1st respondent had before it when it was considering the approval of the scheme before making its decision. In those circumstances it could not be reasonably contended that there was an equivalence between **Mallack, supra,** who had no clue as to the information that the minister relied on to make his decision and the consideration that guided the process;

(iv) Furthermore, in arriving at its decision to approve the scheme, the 1st respondent had to be guided by the priorities in s. 32 of the **Pensions Act** thereby giving another insight into the considerations which ought to have influenced the decision that was made. It should also be noted that once an appeal is filed under the relevant legislation, the 1st respondent would be required to provide reasons for its decision and the applicant would have gotten the reasons simply by appealing. Therefore, the applicant would be in an even more advantageous position if it had filed an appeal;

(v) The respondent has also indicated in the affidavit of Nicolette Jenez that it considered all the correspondence submitted as well as the court judgments and found the scheme proposed by Duggan to be reasonable, consistent with actuarial standards and the trust deed and therefore approved it; and

(vi) The applicant should be required to pursue the alternative remedy provided under the statute by appealing and has no realistic prospect of succeeding on this ground and leave should therefore be refused.

(8) The case of **Gorstew Ltd and Ano v The Contractor General** [2013] JMSC Civ 10 is instructive as to the principles relevant to the grant of interim relief in the nature of either a stay or an interim injunction on the grant of leave to apply for judicial review. However, it must be emphasized that this power to grant interim relief only arises on the court's determination that the applicant has grounded its entitlement to leave:

(i) The applicant's affidavit evidence fails to demonstrate any arguable grounds with a realistic prospect of success and is therefore not entitled to leave to apply for judicial review. By extension, the applicant is not entitled to obtain interim relief whether in the nature of stay or an interim injunction;

(ii) In the event the court finds that the applicant is entitled to leave, the principles of **American Cyanamid, supra,** is applicable to the question of whether an interim injunction should be granted;

(iii) The role of the court is to assess whether a just result will be achieved by granting or refusing the injunction with the crucial determination being which course is likely to cause the least irremediable prejudice;

(iv) In resolving the issue, the court must be mindful of the third party rights which stand to be affected by any stay on the implementation of the decision granted;

(v) The Pension Plan was established with the stated objective of providing retirement benefits for the members and/ or surviving spouses or dependents. The extended litigation in the matter since the winding up has prevented this from being realized and the applicant ought not to be

allowed to prolong the delay by further litigation of issues already determined by the courts; and

(vi) The applicant ought not to be permitted to proceed to judicial review and is not entitled to the injunctive relief sought or to be granted leave to apply for judicial review or any other relief as prayed.

(9) The applicant's submission that once illegality arises, the courts have granted judicial review and not required the alternative remedies to be exhausted is an inaccurate representation of the law:

(i) The reliance on **CC&C Limited** case, **supra**, is misplaced as it turned on its particular facts and the express provisions of the legislation in issue and does not establish a general principle. The pronouncements on which the applicant relies was specific to the legislation and facts of the case before it and is not one of general application;

(ii) The contention of illegality herein cannot be sustained but in any event, does not take the matter outside of the statutory regime of an appeal to the tribunal under the **FSC Act** and the FSC Appeal tribunal Rules. The tribunal has a wide jurisdiction to conduct any appeal to it as a rehearing and reconsideration of all the issues including one based on a contention of unlawfulness or illegality. It also has the power to permit people to give evidence. The ground of illegality does not entitle the court herein to grant relief outside of the statutory regime;

(iii) The evidence presented on the affidavits fail to establish any such unlawfulness or illegality in the exercise by the 1st respondent of its discretion;

(iv) The guidance given by the Privy Council was not directed at the 1st respondent, nor was there any conclusion or finding in the Privy Council's decision that would restrict the 1st respondent in the exercise of its

decision. The guidance was directed to the trustees and the Sponsor who in turn were at liberty to return to the Supreme Court for further directions;

(v) Even if the evidence was capable of establishing that the 1st respondent failed to give any or any sufficient regard to the guidance from the Privy Council, which it does not, any such failure would not amount to an illegality and would not render the 1st respondent's approval unlawful as the Privy Council did not bind the 1st respondent to a specific exercise of its powers under the **Pensions Act**. At most the Privy Council directed that the relevance of the 1st respondent's powers to the exercise of the trustees and the Sponsor's respective discretion and rights was a matter for the Supreme Court to determine;

(vi) The 1st time directions were given in relation to the 1st respondent's exercise of its power to approve or amend a proposed scheme of distribution of surplus was in the Supreme Court judgment and there was nothing to indicate that the 1st respondent was bound by the grant or lack of consent on the part of the Sponsor to any increases made. To the contrary the 1st respondent was entitled to act as it considered reasonable and appropriate to ensure that sufficient provision was made for the beneficiaries of the Plan;

(vii) It is incorrect and misleading for the applicant to now contend that there is presently no agreement regarding any inflation uplift prior to March 31, 2017. This is entirely inconsistent with Eckler's letter dated July 16, 2018 which clearly evidences an acceptance on their part that the uplift would be applied at a rate of 70% of past inflation rates at least for the period March 31, 2010 to March 31, 2017;

(viii) The Privy Council's decision did not bind the respondent to any position taken by the Sponsor and did not preclude them from approving a scheme of distribution to which the Sponsor had not consented;

(ix) The specific directions given by the Supreme Court as to the role and power of the 1st respondent and in making it clear that the 1st respondent was to specifically look for whether the trustees gave thought to an uplift for inflation and was entitled to amend the scheme to make such an uplift if none was made or if it considered it insufficient implies that the 1st respondent was entitled to approve or amend the scheme as it deemed appropriate and this was not restricted by whether or not the Sponsor consented. This no doubt means that the 1st respondent was vested with the discretion to approve the scheme as submitted even if there was no consent from the Sponsor if it considered it reasonable and appropriate; and

(x) The scheme of distribution proposed by the fund's actuary sought to make provision for inflationary conditions and generally sought to distribute the surplus in accordance with the trust deed. This is not inconsistent with the directions from the Privy Council or those from the Supreme Court to which the matter was referred. The applicant has not indicated the existence of any factors which would take the respondent's approval of the scheme outside of the directions of the Privy Council, other than its refusal to consent, and that by itself does not mean that the 1st respondent was not entitled to approve the scheme of distribution as proposed by the fund's actuary or that the said approval was in breach of directions from the Privy Council.

[18] In the 1st respondent further submitted, in summary, that:

(1) De Smith's Judicial Review paragraph 5-002, sub paragraph (a) cannot reasonably be applied here as no argument has been made that the 1st respondent stepped outside of its power under the **Pensions Act**; sub paragraph (b) does not arise here; and sub paragraphs (c) & (d) are not applicable. The 1st respondent's decision does not fall into any of the categories and it has not been contended that the decision the 1st respondent

made exceeded the provision of s. 32 and there is no evidence or assertion that the 1st respondent failed to understand or give effect to its power under the said act, particularly s. 32. The only allegation made is that the 1st respondent failed to abide by the Privy Council ruling on the matter and this cannot be a basis to contend that its actions were illegal;

(2) The applicant's reference to the statement in paragraph 5-003 of the extract from De Smith's Judicial Review does not support its contention that the 1st respondent's decision was illegal. The evidence is clear that the 1st respondent acted within its powers under s. 32 of the **Pensions Act** and no issue arises as to whether the 1st respondent acted ultra vires. The paragraph relied on also refers to a common law power residing in the decision maker but the 1st respondent did not have any such power;

(3) The applicant's reliance on paragraph 5-110 of De Smith's Judicial Review extract regarding a discretionary power influenced by irrelevant considerations or by a failure to take into account relevant considerations is misplaced. The text is not purporting to suggest that every such instance will give rise to an illegality. To the contrary, the question is "*whether the validity of the decision is contingent on the* ***strict observance of antecedent requirements*****"** (our emphasis) (see paragraph 5-113). The applicant has not contended that the 1st respondent failed to take account of any antecedent considerations strictly imposed under s. 32 before exercising its powers;

(4) Further, the 1st respondent was not involved in the proceedings before the Privy Council and only became an Interested Party in the proceedings between the Sponsor/ non-Sponsor trustees at the stage when the matter came on for hearing before the Supreme Court in February 2016. The Privy Council nowhere in its opinion purported to bind or fetter the 1st respondent's discretion under the 2004 Act;

(5) The *mutatis mutandis* reference in s. 59(4) of the **Pensions Act** does not alter the 1st respondent's discretion under s. 32 of the **Pensions Act** in relation to the proposed scheme of distribution of the surplus of its Pension Plan as the applicant suggests. S. 59(4) was part of the transitional provisions in operation at the time that the **Pensions Act** initially took effect. Those transitional provisions were not intended to operate indefinitely and were eventually removed from later reprints of the **Pensions Act**. This provision is not included in the current version of the **Pensions Act**. The use of the term "*mutatis mutandis"* in the section does not have the effect contended and it does not allow for amendments that would alter the substance of power granted by the statutory provision;

(6) The mutatis mutandis reference in s. 59(4) in effect would only operate to allow for amendments to ss. 27-32 to reflect them being applicable not just to approved superannuation funds and retirement schemes, but to pre-existing unapproved funds and schemes as well. In any event s. 59(4), based on its express terms, was applicable in instances where conditions imposed by the 1st respondent for approval of superannuation funds or retirement schemes in existence prior to the **Pensions Act** were not satisfied within the time period specified by the 1st respondent and the 1st respondent then exercised its power under s. 59(4) to wind up the fund or scheme. The winding up of the applicant's pension plan did not arise in such circumstances. It was a voluntary winding up and it would not therefore have strictly fallen within s.59(4);

(7) The proposed scheme of distribution was submitted to the 1st respondent pursuant to the Consent Order made in September 2017. The Supreme Court by its judgment of February, 2016 and the Consent Order of September, 2017 addressed the issue of the relevance of the **Pensions Act** and no qualifications on the 1st respondent's powers were imposed;

(8) It is inappropriate for the applicant to disassociate itself from the clear agreement that the winding up of the UC Rusal pension plan is subject to ss. 27-32 of the **Pensions Act**;

(9) Paragraph 8 of the Applicant's Reply should be disregarded as it goes outside the scope of a Reply to authorities. Paragraph 9 is an inaccurate representation of the ratio, terms and effect of the Supreme Court's decision on the matter when it came before it in February, 2016 for directions. The court clearly considered and determined the role and power of the 1st respondent under s. 32 of the **Pensions Act** in relation to the issue of an inflation uplift and its role in ensuring that appropriate provisions are made for an inflation uplift;

(10) The use of the word 'guidance' in paragraph 17 does not take away from the force of the views expressed by Sykes J (as he then was) in respect of the 1st respondent's powers under s. 32 of the **Pensions Act** and his specific pronouncements at paras. 50 & 53-54 as to how the discretion should be exercised;

(11) Sykes J (as he then was) pronouncement in respect of the 1st respondent's role and the scope of its powers under s. 32 was more definitive than that given by the Privy Council in relation to the potentially relevant factors it had cited. The Privy Council gave no direction to the 1st respondent and did not bind it to consideration of any specific matters or to any particular position in exercising its discretion. In any event, the 1st respondent has indicated by the affidavit of Nicolette Jenez that it took account of all the judgments in the course of the proceedings as well as the provisions of the Trust Deed and Rules in making its decision;

(12) The question of whether the Sponsor trustees and non–Sponsor trustees agreed with the inflation uplifts reflected in the scheme of distribution submitted by Duggan is irrelevant. The Consent Order to which the parties agreed before

Sykes J (as he then was) in September 2017 was that Duggan was to prepare and submit a scheme of distribution to the 1st respondent for it to act in accordance with the provisions of s. 32 of the **Pensions Act**. S. 32 is what binds the 1st respondent once the scheme of distribution was submitted to it, whether or not there was agreement between the parties;

(13) Eckler's letter exhibited to Leonid Stavitskiy affidavit sworn on October 17, 2018, speaks for itself and clearly evidences an acceptance at least on the part of the Sponsor trustees that the uplift at the rate of 70% of actual inflation for the period March 2010 to March 31, 2017, was permissible in view of Sykes J April 27, 2018 decision and was not being challenged. This was the point of the submission at paragraph 63 of the 1st respondent's speaking notes, ultimately to make it clear that the applicant was not being forthright in asserting that there was no agreement to any inflation uplift prior to March 2017. Notably the Sponsor did not challenge the uplift for pensioners for the period March 2010 to March 2017 in its letter of August 15, 2018 nor did it contend that those increases were outside of the scope of the Consent Order;

(14) In any event, under s. 32 the 1st respondent was not obliged to consult with the Sponsor in its approval or any amendment to the scheme. Consultation if embarked upon under the section was only required to involve the trustees. It is clear from the Privy Council judgment and that of Sykes J (as he then was) in February 2016 that the 1st respondent in exercise of that power had a wide discretion even to allow for increases outside of the Trust Deed and Rules, and there was nothing in the Privy Council's judgment or any of the previous judgments that purported to bind or restrict the 1st respondent in that regard or subject its powers to the presence or absence of the Sponsor's consent;

(15) There is no general principle that every case in which an injunction is sought, it will be considered an exception to the established rule that the alternative remedy must first be exhausted before resort can be had to judicial review. There is no support for any such general principle in the authorities; and

(16) The application for leave should be dismissed with costs to the respondents. There is no rule or principle that costs cannot be awarded against an unsuccessful applicant on an application for leave and the **Homer Davis v Laurence Granger, supra,** is not authority for any such principle. The general rule under Rule 56.15(4) of the CPR relied on by the applicant relates to an applicant for an administrative order only. There is a clear distinction between an application for an administrative order, and an application for leave to apply for judicial review to which this rule does not apply. Based on rules 56.1(1) and (2) it is the application for judicial review that would be classified or properly be considered as an application for an administrative order, and not the application for leave to apply for judicial review; and

(17) In any event, even if Rule 56.15(4) is found to apply, the applicant for leave acted unreasonably in the pursuit and conduct of its application for leave in pursuing this tenuous application when there is an alternative remedy that is amply appropriate for consideration and determination of any issues joined between the parties; and

(18) There is no indication that the 1st respondent was a party to the proceedings before the Privy Council and no evidence that it disregarded the judgment of the Privy Council and the 1st respondent factored all judgments into consideration when they approved the scheme. The legislature itself in framing s. 32 attached some importance in giving increased benefits to the beneficiaries and gave the 1st respondent broad discretion in this regard. There is nothing to indicate that the 1st respondent was constrained or limited in the exercise of the discretion by the refusal to consent and it was entitled to approve the scheme in the way that it did.

[19] The non-Sponsor trustees, in summary, made the following submissions:

(1) The court should not grant the application for leave because there is an alternative remedy that the applicant has failed to pursue. As a general rule

the court will not grant an applicant permission to apply for judicial review where he has not exhausted alternative remedies available to him. It is only in exceptional circumstances that the court departs from this general rule. (See: Halsbury's Laws of England/Judicial Review (Volume 61A (2018))/3. Barriers to Judicial Review/58. Exhaustion of alternative remedies.);

(2) Both of the reasons posited by the applicant as to why judicial review is a more appropriate way to adjudicate the issues that arise from the 1st respondent's decision are misconceived;

(3) The application misstates the applicable test; for the application to succeed the applicant must meet a much higher standard, that is, satisfy the court that the remedy set out in the statute is "nowhere near so convenient, beneficial and effectual as judicial review. The applicant however cannot meet that very high standard;

(4) The decision in the 2013 appeal cannot constitute potential bias for two reasons:

(i) As a matter of law the facts of this case do not satisfy the test of potential bias. See: The **Panton** case; and

(ii) The COA was considering an entirely different issue:

The 2013 Appeal dealt with an interpretation of the provisions of the 2005 Trustee Deed and the trustees' power to increase pension benefits in line with inflation without the applicant's approval. The applicant's proposed challenge herein relates to a professional disagreement between actuaries about methodology.

Panton JA decision in the 2013 appeal cannot affect the Appeal tribunal's ability to impartially decide an appeal against the 1st respondent's decision.

However even if the applicant had been correct about the potential for bias the appropriate course of action would have been to request that Panton JA not be on the panel considering the appeal. Had the applicant appealed the 1st respondent's approval of the scheme (as the relevant legislation permits), there would have been no guarantee that the chairperson of the Appeal tribunal would have chosen Panton JA to sit on the panel considering the appeal. Furthermore, even if he was chosen, the applicant could request that he recuse himself. This application assumes the inevitability of Panton JA former president being on the panel and that assumption is flawed.

Panton JA's status as a member of the Appeal tribunal does not make the judicial review procedure any more appropriate than the statutory appeal process provided for in the 2004 Act.

(5) The applicant's contention that judicial review proceedings are more appropriate because the Appeal tribunal does not have express power to grant an injunction or a stay is not accurate:

(i) Rule 31(b) of the appeal rules gives the Appeal tribunal the power to suspend the effect of decisions the 1st respondent has made;

(ii) The court should interpret this rule to mean that the Appeal tribunal has the power to postpone (stay) the effect of a decision it has made pending the outcome of an appeal. The court should reject the applicant's argument that the tribunal does not have the power to grant an injunction. This argument is, in effect, the applicant inviting this court to read down the ordinary, wide meaning of the phrase "interim applications" in rule 33 and the applicant has not cited any case where the court did that.

(6) There is nothing unusual about these circumstances-

(i) when a party disagrees with the 1st respondent's decision to approve a scheme of distribution he will usually want injunctive relief pending the hearing of his appeal. If the applicant's interpretation is correct, Parliament's intention in creating the alternative remedy would be frustrated in almost every (or at least many) cases;

(ii) In any event, even if the applicant is right and Parliament did not intend to give the Appeal tribunal the power to grant injunctions, this application must still fail. As a general rule, where there is statutory appeal procedure, a court should not permit an applicant to proceed with judicial review proceedings merely because the statutory tribunal is not empowered to grant the interim relief he desires; See **CC&C Ltd case** and

(iii) There is nothing exceptional about the case herein that would justify the court departing form this general rule.

(7) An appeal before the appeal tribunal is plainly a more appropriate process to address the issues the applicant has raised. This is because it is a specialist tribunal equipped to deal with the technical aspects of this matter. In determining whether to permit an applicant to proceed by way of judicial review rather than an alternative remedy, a court must consider many factors, including whether the matter depends on some technical knowledge which is more readily available before the appellate body. See: **R (on the application of Chris Willford) v Financial Services Authority** [2013[EWCA Civ 677 and **R (on the application of Davies and Ors) v Financial Services Authority** [2003] 4 ALL ER 1196.

(8) The applicant ignores the fact that a retired judge appointed to a tribunal will gain certain expertise as a result of that appointment.

(9) There are many local legislative provisions that indicate an intention for the appeal tribunal to be a specialist tribunal created to easily handle technical

matters such as actuarial disputes. S. 1 of the appeal tribunal's constitution indicates an intention that tribunal members are to be equipped to handle the various technical matters with which the 1st respondent frequently deals.

(10) S. 4(2)&(3) of the appeal tribunal's constitution clearly indicate that actuarial issues which may be difficult for a Judge of the Supreme Court to resolve are better handled by the specialist body that Parliament created to resolve them. More importantly, judicial review proceedings are limited to challenges to process, the appeal tribunal is not. Therefore, if the panel disagrees with the 1st respondent's decision on its merits, then it may reverse it and replace it with its own. The Supreme Court in judicial review proceedings is more limited in the scope of relief it may grant. Hence, the statutory appeal process is a more appropriate remedy for the applicant than the judicial review procedure it has chosen to pursue, and its failure to invoke that remedy is fatal to this application.

(11) The applicant was either ignorant of the appeal process or they wilfully disregarded it.

(12) The applicant's application should fail because it has not made its application promptly:

(i) Even if an application is made within 3 months, a court may still find that an applicant has failed to apply promptly- See De Smith's Judicial Review, para 16-052, p. 842; and this is one of those circumstances;

(ii) The applicant's explanation for not pursuing an appeal does not explain why there were no attempts to take any steps before the statutory deadline to appeal passed. See: **O'reilly Mackman** [1982] 3 ALL ER 1124. The applicant's delay in taking steps to even indicate an intention to challenge the 1st respondent's approval constituted an undue delay when one considers the history of this matter and the statutory deadline

for challenging the decision. More importantly, permitting judicial review now would be detrimental to the good administration of the Pension Plan and would prejudice the beneficiaries under the trust. **See R v Stratford-on-Avon District Council ex parte Jackson** 1 WLR 1319;

(iii) Litigation regarding this matter has persisted for 9 years and if the court permits the applicant to proceed with even further litigation, more beneficiaries will likely die before it is resolved and many of the steps already taken to administer the winding up of this pension scheme would be for naught. This would constitute substantial prejudice to the beneficiaries and a state of affairs that is detrimental to the good administration of the pension plan. The issue is not prejudice to the non-Sponsor trustees but the prejudice would be to the beneficiaries and pensioners; and

(iv) an order in favour of the applicant would also set a precedent that could be detrimental to the good administration of pension plans generally because every employer could say it need an injunction in order to bypass the statutory appeal tribunal. For these reasons, we submit that the applicant's delay is by itself sufficient cause for the court to refuse the application for leave to apply for judicial review.

(13) The application should fail because none of the four (4) grounds relied on by the applicant indicates that it has a good arguable case with a real prospect of success:

(i) The applicant's contention that the 1st respondent's decision was procedurally unfair because of a failure to provide reasons has no real prospect of the applicant succeeding and/ or of the court quashing the 1st respondent's approval of the scheme on this basis. It is accepted that the 1st respondent has a statutory obligation to give reasons for its decision but that obligation is only triggered on the occurrence of a specific event-

that is, the service on the 1st respondent of a notice of appeal by an aggrieved person;

(ii) Rule 21 of the tribunal rules indicates that the applicant was only entitled to reasons for the 1st respondent's decision if it had invoked the appellate procedure provided for by the **FSC Act** (a process it has chosen to spurn). In fact, this is a further reason why the appeal procedure is more appropriate; and

(iii) The applicant has failed to follow that procedure and therefore failed to trigger its entitlement to those reasons. The lack of reasons cannot be said to be procedurally unfair if the person who is demanding those reasons has failed to start the process that would lead to their production.

(14) The 1st respondent filed an affidavit of Nicollete Jenez that sets out in detail the consultations the 1st respondent undertook and the careful consideration it gave to the representations by all the parties. It is clear from this evidence that there is no merit in this ground:

(i) In fact, the applicant's real complaint is not that the 1st respondent did not consider its views, but that the 1st respondent did not agree with them;

(ii) The Privy Council did not say that the applicant has to consent to the scheme of distribution but that it had to consent to the inflation uplift. The applicant did so when it agreed to the Uplift Order. The way in which that uplift would be calculated and applied was then a matter for the Fund Actuary and the 1st respondent. The applicant disputed the effect of its consent and after another contested hearing Sykes J (as he then was) settled that dispute and the COA dismissed the applicant's attempt to appeal the decision. The 1st respondent has acted in accordance with the Privy Council's judgment and has had due regard to the applicant's interests.

(15) On an application for judicial review it is not enough to show that the public body's decision was unreasonable. The applicant must show that it is so unreasonable that no public body that understood its function and powers could have made it. There is no basis for the court to find that in this case. The applicant would have to show that some aspect of the decision is manifestly wrong and it has not done so. The application has not disclosed anything unreasonable about the 1st respondent's decision.

(16) In accordance with the submissions made herein, the court need not consider the application for an injunction and a stay. However, the circumstances of this case provide further reasons why the court should refuse to grant the interim relief sought:

(i) The non-Sponsor trustees agreed to a 3.85% uplift (suggested by the applicant, which was less than the estimated rate of future inflation. They did so in the interest of the pensioners because so many of them had already died without receiving their entitlement and more would likely die while the litigation continued;

(ii) They would also have been concerned about the legal fees that were being paid out of the fund. This includes all the applicant's legal fees, even in relation to applications and appeals where it was unsuccessful; and

(iii) The non-Sponsor trustees' agreement and the resulting Uplift Order should have brought the litigation to an end and resulted in the applicant being entitled to $210.7 million. The applicant wishes to reopen the matter, pursue further litigation with a view to obtaining more from the fund, and prevent the pensioners from receiving the rest of their entitlement while it does so.

(17) In all the circumstances and on the authorities cited, the application for interim relief and for leave to apply for judicial review should be refused with costs awarded to the interested parties against the applicant.

[20] The non-Sponsor trustees further stated in summary, that:

(1) It is incorrect that the applicant's proposed claim involves the same parties and the same legal issues that were before the COA but even if this was so, it does not assist the applicant.

(i) A full reading of the decision indicates that this is no distinguishing factor at all. The court relied on **Locabail** case, supra, in which the English COA gave several examples of cases where the danger of bias might and might not arise. In that decision, the court made it clear that a judge's previous judicial decision is not a good basis to object to his sitting on a panel; and

(ii) The appellants in the **Panton** case tried to distinguish **Locabail** but the Privy Council stated that the essential element of the objection was that the judge had expressed a view on the question in issue in a previous capacity. This the Privy Council said, was not enough to disqualify a judge. Equally the applicant's submission is not enough to support their application.

(2) The applicant's submissions that the appeal tribunal could not make any decision that would bind the non-Sponsor trustees, ignores rule 28 of the tribunal rules which permit the appeal tribunal to "*declare to be a party to any proceedings, a person who satisfies the Appeal tribunal that that person has a substantial interest in the proceedings*". There is no dispute that the non-Sponsor trustees are persons who would have a substantial interest in an appeal against the 1st respondent's decision approving the scheme of distribution.

(3) A deficiency would arise in the event Panton JA was appointed to the panel hearing the appeal and is recused by reason of any objection on the ground of bias. However, the applicant's criticism of the non-Sponsor trustees' submission in relation to the numbers of persons appointed to the appeal tribunal ignores the fact the Minister can appoint additional tribunal members at any time. Three is the minimum number but the Minister can appoint more (especially if he thinks there is a need to do so because of a deficiency). The applicant's submission that the judges on the Appeal tribunal are not actuaries applies to the judges of this court. The difference is that the appeal tribunal can co-opt persons with the necessary expertise. The Sponsor's misunderstanding of Duggan's report also indicates the risks of the court deciding to determine these issues.

(4) The applicant's reliance on **CC&C** case in stating that the principle applies only where an applicant is contending that a decision is unreasonable and not where it is saying that the decision is unlawful reveals a misreading of the authority. The dicta on which the applicant seeks to rely are only relevant to an appeal under the **Finance Act** of the UK. The English COA pointed out at the outset of the decision that the effect of this provision was that an appeal under the section was only exercisable on the ground of unreasonableness. The statutory regime in the instant case is not limited in the same way or at all. A Sponsor aggrieved by a decision of the 1st respondent may appeal it on any grounds and the appeal tribunal may vary cancel or confirm that decision.

(5) The applicant's speaking notes states that illegality is its primary ground of challenge but it does not refer to it in either its application for leave or in the affidavit evidence on which it relies. Illegality in the context of a judicial review refers to the basis on which a decision is challenged as being made outside of the provisions of the statute giving the decision maker the power to make it. The extract from the De Smith's Judicial Review on which the applicant relies confirms that none of the categories of decisions which would constitute an

illegality arises in the present case. The applicant has no realistic (or any) prospect of success on a ground of illegality.

(6) The applicant's contention that the 1st respondent's decision is unlawful as it acted illegally in failing to follow the Privy Council judgment is not supported by the **CC&C** case. In that case the court made it clear that it was not considering circumstances such as the present. The court in **CC& C** case expressed that a court may consider a claim for judicial review where the decision was unlawful, with unlawful meaning an abuse of power or improper or taken in bad faith. The applicant is not arguing that the 1st respondent abused its power or acted in bad faith- these are the type of "unlawful"/illegal decisions for which the court would intervene based on the **CC&C** case.

(7) The applicant's reliance on s. 59 of the Act to contend that the Act must be applied mutatis mutandis to the Plan and therefore the 1st respondent's statutory powers are subject to the Plan and by extension the interpretation of the Plan's provisions by the Privy Council is misconceived. It is not necessary to have recourse to the transitional provision of s. 59 of the Act and Sykes J (as he then was) decision disposes of any suggestion that the 1st respondent acted illegally or that it was bound by the terms of the plan.

(8) Neither in 2016 when the parties consented and the court confirmed the applicability of the Act to the Plan, nor in 2018, when again with the consent of the parties, the court ordered the 1st respondent to act in accordance with its powers under s. 32, did the applicant argue or suggest that the Act should be applied mutatis mutandis.

(9) In any event, even if the court felt it necessary to rely on s. 59 to determine the issues raised in the application, the appearance of the phrase "mutatis mutandis" does not assist the applicant in any way. The case of **Ketz v R** illustrates why and hence the applicant's reliance on **R v Ketz** and s. 59 of the **Pensions Act** does not assist its argument in any way.

(10) S. 32 of the Act sets out the 1st respondent's statutory powers to approve or amend a scheme of distribution. The 1st respondent acted pursuant to its powers in approving the scheme. The applicant did not suggest that the 1st respondent did not have the power to do what it did or acted in excess of its powers. It therefore cannot be said that the applicant has a realistic prospect of successfully arguing that the 1st respondent acted illegally/ unlawfully in the present circumstances.

(11) None of the applicant's new points and authorities (in its Reply to Respondents' Speaking Notes) help it rebut our main submission that none of the categories of decisions which would constitute an illegality arise in this case:

(i) The passage at paragraph 5-003 of De Smith's Judicial Review on which the applicant relies to illustrate how it claims the respondents have mischaracterised the scope of illegality, does not contradict anything in our speaking note. It merely states that when a court is determining whether a decision falls within the previously mentioned categories of illegality, it will engage in an exercise of construing the content and the scope of the instrument conferring the power and that the instrument may be common law;

(ii) In any event, applying the passage to the instant matter does not assist the applicant. The instrument which confers the power exercised by the 1st respondent is the **Pensions Act** and specifically s. 32 in approving the scheme of distribution and no illegality arises from its decision;

(iii) Paragraph 5-002 identified the various categories of illegal decisions and the applicant's own application does not even identify any of these categories as being the basis of their complaint.

(12) Paragraph 5-010 is equally unhelpful to the applicant as it merely describes challenges based on the consideration of irrelevant factors. This is not a

ground identified in the application and certainly not a situation that any of the parties say arise in this case.

(13) The applicant offered no response to the argument that it failed to act promptly and the authorities in support of same because it has no good excuse for its delay and therefore has no answer to the said argument and on this basis alone the application should be refused.

(14) As a matter of law and on the facts of this case, this court should grant the non-Sponsor trustees their costs for three reasons:

(i) First, this court is not bound by the decision in **Homer Davis;**

(ii) Secondly, rule 56.15(5) provides a general rule in relation to applications for "administrative orders". Rules 56.1(1) and (2) provides that applications for administrative orders include application for judicial review. However, the instant application is not an application for judicial review but an application for leave to apply for judicial review. It is clear from the scheme of Part 56 that the framers of the CPR recognized the distinction between the two; and

As a matter of law, rule 56.16(5) does not apply to the instant application and therefore it is rule 64.6 which applies and which provides that the general rule is that in any proceedings the court must order the unsuccessful party to pay costs of the successful party.;

(iii) Third, there is nothing in the facts of this case which demonstrate that the applicant, if unsuccessful, should not pay the costs of the non-Sponsor trustees. In any event, even if this court were to find that rule 56.15(5) applies herein, the applicant's conduct has been so unreasonable that it should be ordered to pay costs. This is evident from the following:

a. The delay in making this application until after the beneficiaries were informed that there was no challenge to the 1st respondent's decision to approve the scheme of distribution;

b. The fact that the pension fund has been caused to incur costs in obtaining quotations for the provision of annuities to the beneficiaries of the pension plan;

c. The prejudice that has been caused to the beneficiaries by the delay in the winding up process occasioned by the application;

d. The multiple amendments to its application and several days of oral arguments advanced by the applicant; and

e. The filing of a Reply in which it tried to reargue many of the submissions it already made on its application.

ISSUES

[21] This matter has been one in which a significant number of contentions have been made by the respective parties and all have been duly noted and considered by this court. I have found however that the following are the primary issues which arise for determination herein:

(1) Whether judicial review was the more appropriate form of redress as opposed to the statutory tribunal in the circumstances of this case?

(2) Whether the applicant has an arguable case with a realistic prospect of success?

(3) Whether the applicant delayed in making its application for judicial review?

(4) Whether costs should be awarded against the applicant?

LAW & ANALYSIS

Issue 1- *Whether judicial review was the more appropriate form of redress as opposed to the statutory tribunal in the circumstances of this case?*

[22] This court in addressing its mind to the issues for determination herein has carefully considered the content of the affidavits filed and the submissions of the parties. I am equally mindful of the authorities on which the parties have relied There are several sub- issues which arise for determination from this primary issue and which must in this court's mind be effectively addressed as part of the determination of whether or not judicial review is the more appropriate form of redress. Before proceeding, it is important to recall that judicial review is concerned with the decision making process. The appeal tribunal is however, in this court's mind, empowered to have a hearing regarding the merits of the decision of the 1st respondent- **See rules regarding the Conduct of Appeal as provided the tribunal rules**.

[23] The applicant has not challenged the availability of an alternative statutory remedy but it has urged on this court its view that in light of the unlawful/ illegal actions of the 1st respondent, the inability of the tribunal to grant an injunction and the potential for bias of one of the members of the appeal tribunal panel, this remedy is nowhere near so convenient, beneficial and effectual as judicial review in court and in such circumstances, it is at liberty to pursue judicial review proceedings. Further, the applicant contends that the 1st respondent has not provided any reasons for its decision.

[24] I come now to consider the applicant's contention of illegality/ unlawfulness, the presence of which, in the applicant's view makes this case one of an exceptional nature. Counsel for the applicant is adamant that the inflationary increases applied by Duggan prior to March, 2017 and as far back as 2007, was not agreed to by all the trustees and/ or the trustees and the Sponsor, the only agreement on inflationary uplift being the 2017 Consent Order, the scope of which was

adjudicated on in the 2018 decision of Sykes J (as he then was). Accordingly, to the extent that the 1st respondent approved Duggan's report with these additional increases (not consented to by the Sponsor) without first awaiting the court's determination of the reasonableness of the Sponsor's refusal to consent, it acted unlawfully/ illegally as it is bound by the decision of the Privy Council, the Pension Plan and its rules.

[25] The applicant in its speaking notes expressed that Duggan failed to abide by the Privy Council decision's and the decision in relation to the Consent Order in that he applied the following additional inflationary uplifts and increases (which were outside of the agreed uplift in the Consent Order):

(a) Increases of the pension at December 31, 2007, or at the date of retirement if later, up to March 31, 2010 at a 70% rate of inflation over that period;

(b) Increases for deferred pensioners in that the deferred pension at exit has been increased at a rate of 70% up to March 31, 2017;

(c) Recalculation of accrued pensions for active members in that deferred pensions at March 31, 2010 have been increased by 70% up to March 31, 2017; and

(d) Surplus allocation in respect of deceased participants.

[26] S. 32 of the **Pensions Act** provides that:

> *(1) If after discharging the liabilities specified in section 31 (a) to (f) any surplus exists, the trustees shall employ an actuary approved by the Commission to verify the amount of the surplus.*
>
> *(2) The trustees or provisional trustees shall, on receipt of the verification of the surplus, forward a copy thereof to the Commission together with a scheme of distribution of the surplus for the Commission's approval.*
>
> *(3) The Commission shall examine the scheme of distribution before giving its approval, so, however, that where the Commission thinks*

it necessary, it may, after consultation with the trustees or provisional trustees, amend such scheme.

(4) The Commission shall after approving the scheme of distribution, with or without amendment, return it to the trustees or provisional trustees who shall distribute the surplus in accordance with the scheme of distribution as approved.

(5) The Commission shall, in approving a scheme of distribution, have regard to the payment of assets in the following order of priority-

(a) to the current pensioners and their beneficiaries;

(b) providing additional benefits for the remaining members and their beneficiaries;

(c) subject to subsection (6), to the Sponsor

(6) Subsection (5) (c) shall not apply to assets of an approved retirement scheme.

[27] The Privy Council in **UC Rusal Alumina Jamaica Ltd & Ors v Wynette Miller & Ors**, supra, observed that one of the potential significant aspects of the scheme of the **Pensions Act** is the possible effect of s. 32 treating with surplus. Lord Mance expressed that:

"...Second, the Board has not heard argument on the precise effect of s. 32 dealing with any surplus, but it appears that it may well, in relation to plans which (unlike the present) were approved under the 2004 Act, give the Commission power to deal with such a surplus by amending any scheme so as to provide for additional benefits for pensioners and beneficiaries, over and above any provided by the original fund terms and in priority to any distribution to the Sponsor (employer): see in particular sub-sections (3) to (5). Then it would also appear to follow that any winding up and the distribution of any surplus would ultimately have been subject to scrutiny and a considerable measure of control by the Financial Services Commission. If that is right, then it could prove to be a relevant factor in relation to the way in which the trustees' discretion should be

> *exercised, even in circumstances where (as here: see para 48 above) the plan never in fact came to be approved under the 2004 Act. The Board repeats that it is doing no more at this stage than identify what appear to it potentially relevant factors. Whether and how far they are actually relevant would have, if necessary, to be determined by the court at first instance after further submissions"-* ***See paragraph 49*** *.*

Their lordship determined, inter alia, that the trustees could grant an increase in pension benefits in line with inflation and this was applicable to the surplus as well. This was subject to the applicant's consent which could not be unreasonably withheld.

[28] Sykes J (as he then was) then came to consider the potential significance of the **Pensions Act** vis-à-vis the way in which the discretion of the trustees should be exercised. The court noted that all the parties had accepted that the **Pensions Act** applied to the plan herein. His Lordship opined that

> *"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. ***Wynette Miller & Ors v UC Rusal Alumina Company Ltd****., 2016, supra, paragraph 50*

[29] Paragraph b of the proposed claimant's direction provided that "*In accordance with section 32 of the Pensions (Superannuation Funds and Retirement Schemes) Act, 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".*** The court agreed with these proposed directions but deleted the words embolden after the word 'Plan' above. The court continued thereafter by stating the following:

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 as 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 s, 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 (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*
>
> *(**Wynette Miller & Ors v UC Rusal Alumina Company Ltd**.,* 2016, supra, paragraphs 51-54)

[30] This was followed by a Consent Order on September 18, 2017, whereby the parties agreed, inter alia that pension benefits should be subject to an uplift to account for an inflation rate of 3.85% and that Duggan was to prepare and submit a scheme of distribution of surplus to the trustees for them to forward same to the 1st respondent. In 2018, Sykes J (as he then was) declared that the 3.85% uplift for future inflation began at March 31, 2017.

[31] The applicant has said that the Privy Council did not make any decision on the scope of the 1st respondent's power and that the guidance given by Sykes J (as he then was) in that regard was obiter. Whilst this court is mindful that the Privy Council did not make any definitive decision on the powers of the 1st respondent, it made very clear observations as to the possible effect of s. 32 of the **Pensions' Act** regarding the matter of surplus; the distribution of which is in contention in the instant case. This is undoubtedly useful dictum which is likely to be quite useful in the interpretation and application of the said section. Certainly for these purposes I find that it has shed some light on the scope and/ or nature of the powers of the 1st respondent.

[32] I do not find that Sykes J (as he then was) pronouncements were obiter. The applicant has said that Sykes J (as he then was) ruling in 2016 was limited to a narrow issue between the parties regarding whether the embolden words from paragraph (b) of the directions should remain. The court removed the words as indicated above. However, it does seem to me that this specific point resulted from the wider question as to the effect of s. 32 of the **Pensions Act**, wherein the scope

of the 1st respondents' power lies; this is what was remitted to the court of first instance for consideration by the Privy Council. **(See: Wynette Miller & Ors v UC Rusal Alumina Company Ltd**., 2016, supra, paragraphs 9, 10 and 12)

[33] His Lordship also expressed that "*the directions given by this court and the Board are sufficient to ensure that all relevant matters are considered*"-paragraph 58. That direction by his lordship in the first instance court was that the 1st respondent had the power to amend the scheme of distribution submitted by the trustees. Accordingly, the pronouncements regarding the 1st respondent's power at paragraphs 49&50 were not made '*by the way'* but were '*part and parcel'* of the ratio decidendi of the case. Nonetheless, even if the comments were obiter, they would prove useful for present purposes. Finally, in my view the wording of s. 32 of the **Pensions Act** is clear and does lead to a conclusion in line with the expressions made by learned brother and the learned judge in the Privy Council.

[34] The plan although unapproved, was agreed by the parties to be subject to the **Pensions Act** and in accordance with the role of the 1st respondent as stated in s. 32 and interpreted by my learned brother Sykes J (as he then was), it cannot be said that, in approving the plan submitted by Duggan, the 1st respondent was not within its powers to do so. Therefore, since the 1st respondent acted within its powers, on what premise could it be argued that in approving the scheme it acted illegally/ unlawfully. The authorities are helpful in this regards.

[35] In the case of **CC&C Ltd**, supra, the court expressed that:

> ***43*** *I do not therefore believe that the court is entitled to intervene to grant interim relief where the registration of a trader in duty-suspended goods is revoked simply on the basis that there is a pending appeal with a realistic chance of success. But it does not follow that there are no circumstances in which the court may grant such relief; and, as noted above, HMRC do not in fact so contend. The correct principle seems to me to be this. If a "relevant decision"*

is challenged only on the basis that it is one to which HMRC could not reasonably have come the case falls squarely within section 16 of the 1994 Act, and the court should not intervene. ***However, where the challenge to the decision is not simply that it is unreasonable but that it is unlawful on some other ground, then the case falls outside the statutory regime and there is nothing objectionable in the court entertaining a claim for judicial review or, where appropriate, granting interim relief in connection with that claim. A precise definition of that additional element may be elusive and is unnecessary for present purposes.*** *The authorities cited in the Harley Development case refer to "abuse of power", "impropriety" and "unfairness". Mr Brennan referred to cases where HMRC had behaved "capriciously" or "outrageously" or in bad faith. Those terms sufficiently indicate the territory that we are in, but I would sound a note of caution about "capricious" and "unfair". A decision is sometimes referred to rhetorically as "capricious" where all that is meant is that it is one which could not reasonably have been reached; but in this context that is not enough, since a challenge on that basis falls within the statutory regime. As for "unfair", I am not convinced that any allegation of procedural unfairness, however closely connected with the substantive unreasonableness alleged, will always be sufficient to justify the intervention of the court: Mr Brennan submitted that cases of unfairness would fall within the statutory regime to the extent that the unfairness impugned the reasonableness of the decision. As I have noted above, the types of unfairness contemplated in the Preston case—which is the source of the use of the term in the Harley Development case—were of a fairly fundamental character. But since procedural unfairness is not relied on in this case I need not consider the point further.*

44 *In short, therefore, I believe that the court may entertain a claim for judicial review of a decision to revoke the registration of a registered excise dealer and shipper, and may make an order for "interim re-registration" pending determination of that claim (subject, no doubt, to such conditions as it thinks fit), in cases where it is arguable that the decision was not simply unreasonable but was unlawful on one of the more fundamental bases identified above. Such cases will, of their nature, be exceptional. That approach may seem unfamiliar in as much as it involves making a distinction which it is not normally necessary to make between "mere" unreasonableness and other grounds of public law challenge of the type identified above: indeed there are plenty of observations in the authorities to the effect that the various ways of formulating such a challenge tend to blur into one another (including, famously, by Lord Greene MR in Wednesbury itself: see Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223, 229). But I see no conceptual difficulty about making such a distinction where the circumstances call for it; and here it arises naturally from the way in which the jurisdiction of the tribunal is defined in section 16 of the 1994 Act.*

45 *Applying that approach, the answer in this case seems to me to be clear. On the limited materials so far available, Judge Keyser QC may have been right to acknowledge that there is an arguable case that HMRC's decision was one to which they could not reasonably have come. But I see no basis whatever for an argument that it amounted to an* ***abuse of power or that it was improper or taken in bad faith****, and Mr Jones did not attempt to demonstrate that it did or was. Indeed, as I have explained, he did not in the end undertake in his oral submissions any particularised attack on the grounds for revocation set out in the annex; but even the points made in his*

skeleton argument go no further than alleging unreasonableness. The withdrawal of the assessment and wrongdoing penalty which were the main feature of HMRC's "third pillar" does not in itself raise an arguable case of abuse—still less if, as Mr Jones himself suggested, it was the result of a subsequent decision of the First-tier Tribunal which undermined the legal basis on which the assessment was raised. As Mr Brennan pointed out, the withdrawal of the assessment did not necessarily mean that the claimant was not still at fault in failing to require its suppliers to correct erroneous movement declarations.

***46** My detailed reasoning does not correspond to that of the judge, or of Dingemans J in the San Marco case, on which he relied to a considerable extent. We have had the benefit of fuller argument and more time for consideration. But his insistence on a "high degree of caution" and on the absence of any evidence of bad faith shows that his judicial instincts led him in the right direction and, as I would hold, to the right decision*

[36] This case looked at a specific power under **s. 16(4) of the Finance Act** whereby the tribunal power came into effect when the commissioners made a decision that they could not have reasonably arrived at. Unlawful in this said case included **abuse of power or that it was improper or taken in bad faith** which the applicant herein has not so claimed. Unfairness may or may not qualify: see paragraph 43 above but in any event the applicant has not so argued. Instead it has said that the approval of the scheme by the 1st respondent was illegal/ unlawful. However, in accordance with the above finding, there is no assertion and/or evidence that the 1st respondent abused its power or its decision was improper or taken in bad faith or even unfair. Indeed, as observed above as far as the decision itself is concerned it falls within its powers so to do.

[37] The observations of their Lordships in **Chisholm, supra,** at paras. 17 & 19 do establish that judicial review may be sought where the alternative statutory remedy is nowhere near so convenient beneficial and effectual. However, it does seem to this court that an applicant must first ground its claim of illegality/ unlawfulness; it must be able to prove the act(s) of illegality/ unlawfulness in order that the argument of '*nowhere near so convenient, beneficial and effectua*l' is merited, the alternative statutory remedy is bypassed and judicial review sought. That has not happened herein.

[38] In the instant case, the state of affairs as they are show that the trustees submitted the scheme to the 1st respondent and the 1st respondent approved it, as it was empowered to do (the question of the Sponsor's consent does not arise for consideration by the 1st respondent). Further, I think it is important to note that from the Privy Council's judgment, it is not the 1st respondent's approval which was subject to the applicant's consent. Hence, I accept the 1st respondent's submission that the 1st respondent's power is not constrained by the presence or lack of consent from the Sponsor. Further, to my mind, implicit in the decisions of the courts (Sykes J (as he then was) and Lord Mance) is that by the time the plan gets to the 1st respondent, issues regarding consent or refusal to consent, would have already been determined.

[39] I further do find that all the applicant's consent is required for is in relation to the inflationary uplift, not how the uplift is calculated and/ or applied. This is really a matter for the Fund actuary on the direction of the trustees and the 1st respondent, considering in particular the intention of the pension fund and its good administration. Accordingly, the trustees must exercise their discretion as fiduciaries, regardless of their appointers. **See: paragraph 46 of Sykes J (as he then was) 2016 decision.**

[40] I accept however that as submitted by the applicant and in accordance with the judgment of the Privy Council, by which the trustees are bound, their decision to make an inflation allowance is subject to the Sponsor's consent. I also accept that

Rusal does not have an unfettered or unrestricted power to refuse to consent. The trustees considered and determined that there was to be an uplift; the Sponsor was unwilling to consent to same. In accordance with the Privy Council's judgment, it was then for the court to determine the legitimacy of the refusal to consent. The applicant is correct in this sense.

[41] In regards to the qualification on the applicant's power to refuse to consent, the Privy Council expressed that, 'the Board has no difficulty in accepting irrationality, perversity or arbitrariness as qualifications.'-paragraph 55. Sykes J (as he then was) made the following observations:

> **[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 built 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...*

[42] The applicant is not at liberty to withhold consent as it is pleased; there must be a sound and legitimate basis for so doing. Further, it must be considered that it may very well be that there was a legitimate expectation to receive certain inflationary increases based on past augmentation as his Lordship highlighted and that would not make it unreasonable for the employee, trustees and 1st respondent to have this expectation and to proceed accordingly.

[43] It remains however that the directives of the Privy Council were to the trustees whose decision it was to grant an uplift. Perhaps, it would have been prudent for the applicant to pursue court proceedings at the point when the trustees submitted the scheme to the 1st respondent, irrespective of its non-consent. The 1st respondent is not required to consult with the Sponsor to ascertain whether it has consented. Its role is engaged on receipt of the scheme and thereafter its concern is whether the trustees gave thought to an uplift and if they did, what decision they made, if any, accordingly and it may amend to make provisions and/ or sufficient provisions based on the specific circumstances.

[44] The 1st respondent does not have a duty to have regard to the Sponsor's refusal to consent. It does seem to me that the acquisition of the applicant's consent was a matter between the applicant and the trustees and not the applicant and the 1st respondent. The 1st respondent becomes involved after the fact, that is post the agreement or lack thereof regarding inflationary uplifts as between the trustees and the applicant. In this court's view, having evaluated the 1st respondent's

decision, I have found that in light of the content and scope of s. 32 of the **Pensions Act,** there is no illegality and/ or unlawfulness in its decision- See: 5-003 of De Smith's Judicial Review.

[45] The court should not be eager to proceed with Judicial Review where there is a statutory scheme (**Web Communications Ltd v Office of Utilities Regulation** Claim No. M030 of 2002, unreported judgment delivered December 3, 2003) bearing in mind the purpose and intent of that legislation and be cautious so as to guard against the risk of undermining the will of parliament. **R (Willford) v Financial Services Authority** [2013] EWCA Civ 677 and **Watch Tower Bible & Tract Society of Britain & Ors v The Charity Commission** [2016] EWCA Civ 154 at paragraph 19.

[46] The question is whether "*the real issue to be determined can sensibly be determined"* by the appeal tribunal which parliament has provided*."* See: **Malica Reid v The Commissioner of the Independent Commissioner of Investigations et al, supra,** paragraph 20. In other words, could the appeal tribunal have determined whether Duggan's report includes inflationary uplifts for a period preceding March 31, 2017 and to which the Sponsor did not agree?

[47] **S. 19** of the **FSC Act** establishes the appeal tribunal and 2nd Schedule provides that:

> *3.1) The Minister shall appoint one of the members of the Tribunal to be the Chairman thereof.*
>
> *(.1) A matter referred to the Tribunal shall be heard and determined by a panel consisting of three members of the Tribunal, one of whom shall be an Attorney-at-law, as assigned by the Chairman of the Tribunal.*
>
> *(2) In assigning members of the Tribunal to a panel, the Chairman shall take into consideration the requirements, if any. for experience*

and expertise to enable the panel to decide the issues raised in any matter before the Tribunal.

(3) The Tribunal may co-opt to a panel such persons as in its opinion have the requisite expertise in any matter before that panel for the purpose of advising the panel on that matter.

[48] The **FSC Act Appeal Tribunal Rules of 2017,** provides that**:**

s.4 – an aggrieved person files a notice of appeal within 30 days of receiving the decision

s.21- after FSC is served with copy of notice of appeal they would provide written reasons for their decision

31b- suspend the effect of any notice issued by the FSC

42- CO-OPT member with expertise on the panel

51- the tribunal decision may confirm, vary, cancel or reverse the decision of the FSC

[49] I am of the view that the real issue could have been sensibly determined by the appeal tribunal. Under the appeal rules, the applicant had 30 days after being notified of the 1st respondent's decision, to appeal. That time has long elapsed. The applicant's concern has been that since there was no consent to any inflationary uplift prior to March 31, 2017, which it is claiming that Duggan's report reflected, the scheme would have been approved without its consent and in breach of the Privy Council judgment and the 1st respondent would have usurped the court's role in this regard. Accordingly, it is seeking to quash the decision of the 1st respondent.

[50] The appeal tribunal is empowered by rule 51 to cancel or reverse the decision of the 1st respondent and based on the applicant's submission, since the process would have bypassed the court's involvement so far as determining whether it was

unreasonably withholding its consent, the most sensible and effective remedy would have been to ask the tribunal to cancel or reverse the 1st respondent's decision. This would then have reinstated the status quo, placing them (the trustee and the applicant) back into the position they were, that is the place at which the trustees would be confronted with the applicant's refusal to consent and would have had to address the issue before proceeding to seek approval for the plan.

[51] Furthermore, 31b of the Appeal Rules empowers the tribunal to suspend the effect of any notice issued by the 1st respondent. The appeal tribunal does not have the power to grant an injunction but its power to suspend the effect of a notice would have prohibited the non-Sponsor trustees from distributing the surplus. The non-Sponsor trustees' authority to distribute comes from the notice and if its effect was suspended, they would not have the authority on which to act. Further, the appeal tribunal could have also declared the non-Sponsor trustees to be a party to the proceedings under rule 28 or it was open to the applicant to pursue an interim application against the non-Sponsor trustees under rule 33, in light of its concern regarding the distribution of the surplus.

[52] The appeal tribunal is also empowered to co-opt members and an expert in this particular area could assist. It does not appear to me that it could be said that the statutory tribunal was nowhere near convenient, beneficial and effectual.

[53] Furthermore, and in any event, even if an interim injunction was the more effectual, convenient and beneficial remedy, the balance of convenience does not lie in favour of granting the injunction. As is well established, in determining whether an injunction is to be granted, the court must consider 1) whether there are serious issues to be tried; 2) that damages are not an adequate remedy; and 3) the balance of convenience generally lies in favour of granting the interim injunction. (See **American Cyanamid, supra**) These principles are well established in this jurisdiction and the applicant has said that its rights will be irremediably prejudiced if the injunction is not granted.

[54] The applicant's submissions regarding irremediable prejudice can be narrowed down to a concern it has that if an injunction is not granted and the surplus is distributed in accordance with Duggan's plan, and it is later successful, it would lose a substantial sum of the money in the surplus. Conversely if the beneficiaries are further denied their benefit, the applicant would be in a position, if it is unsuccessful, to compensate for same by paying damages. This claim of irremediable prejudice has to be considered in the context of the history of the matter and what is at stake.

[55] The court is also mindful of the submission of the non-Sponsor trustees that prejudice has been caused to the beneficiaries by the delay in the winding up process occasioned by the application and that an order in favour of the applicant would also set a precedent that could be detrimental to the good administration of pension plans generally because every employer could say it needs an injunction in order to bypass the statutory appeal tribunal.

[56] This matter has been contested at every level in the courts and the courts have issued numerous directions regarding the pension scheme as well as made findings adverse to the applicant. The applicant and the non-Sponsor trustees has been engaged in court proceedings since 2010. There is a submission from the non-Sponsor trustees that some of the pensioners have died without receiving their entitlements and others are likely to die. I am also mindful that a pension fund is never established for the benefit of a company or to be a compulsory savings scheme for the employer who may draw down on it as and when he or she feels like. (**See paragraphs 40 and 42 of Sykes J (as he then was) 2016 decision**).

[57] Finally, the applicant has raised submissions regarding the potential bias of one member of the appeal tribunal panel as well as the fact that the 1st respondent did not supply reasons for its decision. I will resolve these contentions simply by highlighting the fact that had the applicant pursued its statutory remedy, the 1st respondent would have had to provide the reasons for its decision pursuant to rule 21 and in accordance with the 2nd schedule of the **FSC Act,** the issue of potential

bias could have been effectively remedied in accordance with the provisions contained therein.

[58] In all the circumstances, I have not found the 1st respondent's decision to be so absurd or irrational that no reasonable public body that understood its function could have made that decision. Further, even if I did not find the appeal tribunal to be an effective, convenient and beneficial alternative, I am of the view that the balance of convenience does not lie in favour of granting the injunction.

Issue 2- Whether the applicant has a good arguable case with a realistic prospect of success?

[59] I remind myself that at this stage of the proceedings my role is that of the gate keeper of judicial review. I am not engaged in a full hearing of the matter but there must be available sufficient evidence to demonstrate that the applicant has an arguable case with a realistic prospect of success. Thus, simply to assert that the applicant has acted unlawfully/ illegally (which I have not find as indicated above), irrational or procedurally unfair is insufficient.

[60] Counsel for the applicant and the 1st respondent have formed different views regarding the content and interpretation of the letters from Eckler to the Sponsor trustees and the Sponsor to the 1st respondent dated July 16, 2018 and August 15, 2018, respectively. Although the applicant maintains that the 2018 decision of Sykes J (as he then was) clearly states that the agreed uplift must be applied from March 31, 2017 onwards, the 1st respondent is of the view that the letter of July 16 evidenced an acceptance by the applicant that the uplift would be applied at a rate of 70% of past inflation rates at least for the period March 31, 2010 to March 31, 2017. The applicant strongly denies this and refers to it as a mere incorrect interpretation of the 2018 Order of his Lordship by its actuary.

[61] I do note that in the letter dated August 15, 2018, uplift for pensioners for the period March 2010 to March 2017 is not listed as one of the other increases which the applicant asserts that the fund actuary Duggan, keeps computing. I also note too

that in the 2018 decision of Sykes J (as he then was), the applicant had argued that March 31, 2010 was the starting date for calculating the future uplift for inflation. This argument was however rejected by the court. Therein, counsel for the applicant mentioned that this was always the position of the Sponsors. In any event, the applicant now maintains that it did not agree to inflationary increases prior to March, 2017. I do not propose to make any finding on the question of consent between the applicant and the trustees as that is not before this court.

[62] Additionally, the applicant's claim of mere incorrect interpretation of the 2018 Order of his Lordship by its actuary may or may not be so, as well as the letter of July 16, when combined with the Sponsor's failure to challenge the uplift for pensioners for the period March 2010 to March 2017 in its letter of August 15, 2018 or its failure to indicate that those increases were outside of the scope of the Consent Order, may or may not lead to a reasonable inference that it consented to these inflationary increases. Whichever it is, if leave to seek judicial review is granted, the court would be asked to assess the relevant documentation to determine the accuracy of the increases awarded. This is not the role of a judicial review court and in any event, the award was not made by the 1st respondent, whose decision is being challenged before this court.

[63] In the circumstances, I am not of the view that the applicant has an arguable case with a realistic prospect of success bearing in mind the role of a judicial review court. I am even further certain in my mind that the appeal tribunal was the more appropriate forum.

[64] The applicant has said that the 1st respondent has given no indication as to whether it conscientiously considered the concerns of the Sponsor Trustees based on the correspondence from Eckler. Nicolette Jenez, Deputy Executive Director of the 1st respondent averred that on December 22, 2017, the 1st respondent received from the Chair of the Trustees of the pension plan, Duggan's report. Their approval was eventually given on August 24, 2018.

[65] Miss Jenez has said in her affidavit filed on January 11, 2019, that the process of review of the scheme of distribution of surplus entailed advice from 1st respondent's pension and actuarial divisions on the scheme of distribution as well as the various points and concerns raised by the respective trustees in the correspondence received by the 1st respondent. Equally, the 1st respondent sought legal advice and was aware of the various decisions of the court and court orders.

[66] The timeline of correspondence amongst the parties herein, as stated by Ms. Jenez was to the effect that:

(i) Letter from Marcia Tai Chun dated December 19, 2017, enclosing the following letters:

(ii) Letter from Eckler to the Sponsor Trustees dated December 7, 2017, essentially indicating that the Sponsor would be entitled to a greater share of the surplus;

(iii) Letter from Duggan to the Chair of the Trustees dated December 15, 2017 supporting his report and its submission to the 1st respondent;

(iv) Letter from Eckler to the Sponsor trustees dated December 19, 2017, affirming its position in its earlier letter;

(v) Issue regarding the date from which the 3.85% inflation rate should be applied and as part of the consultation process, the 1st respondent sought clarification and this led the 2018 Supreme Court decision;

(vi) The plan was then approved on July 26, 2018. On this date she said that she was present at the meeting and believed that "*the decision was carefully arrived after consideration of all the advice received on the points raised by the parties up to that pint and the various judgments and orders of the Court.*"

(vii) On July 26, 2018, following the approval, the 1st respondent received another letter from the Sponsor Trustees, enclosing a letter from their Actuary dated July 9, 2018 raising concerns vis-a-vis the now approved pension scheme;

(viii) The 1st respondent re-opened consultation process and on July 27, 2018, referred the correspondence to the non-Sponsor trustees for their consideration and response by August 10, 2018. The 1st respondent was to provide its decision by September 01, 2018 in accordance with the order of the COA;

(ix) The 1st respondent received correspondence from Duggan and the Sponsor on August 9 and 15, respectively;

(x) The 1st respondent wrote to the parties on August 16, 2018 extending time for additional information and submissions to August 17, 2018 at 4 p.m.. She said that this letter was to allow for final opportunity to make any further representations desired and also to ensure that the review process was within the time frame as had been extended by the COA;

(xi) Duggan also wrote to the 1st respondent on August 17, 2018 making reference to the Sponsor's letter dated August 15. Therein, Duggan noted his disagreement with the points made in sections a, b and c of the said letter or that there was any basis for the Sponsor withholding consent.

(xii) The issues raised in the additional correspondence were all considered by the FSC and legal advice sought. There was further consideration and approval.

[67] In **R (on the application of Moseley (in substitution of Stirling Deceased) v London Borough of Haringey,** the court expressed:

> **[36]** *This case is not concerned with a situation of that kind. It is concerned with a statutory duty of consultation. Such duties vary greatly depending on the particular provision in question, the particular context, and the purpose for which the consultation is to be carried out. The duty may, for example, arise before or after a proposal has been decided upon; it may be obligatory or may be at the discretion of the public authority; it may be restricted to particular consultees or may involve the general public; the identity of the consultees may be prescribed or may be left to the discretion of the public authority; the consultation may take the form of seeking views in writing, or holding public meetings; and so on and so forth. The content of a duty to consult can therefore vary greatly from one statutory context to another: "the nature and the object of consultation must be related to the circumstances which call for it" (Port Louis Corporation v Attorney-General of Mauritius* [1965] AC 1111*, 1124, [1965] 3 WLR 67). A mechanistic approach to the requirements of consultation should therefore be avoided.*

[68] In **The Northern Jamaica Conservation Association and Ors v The Natural Resources Conservation Authority and Ano**, Claim No. HCV 3022 of 2005, Sykes J (as he then was) expressed that '*the law now requires that any consultation embarked upon must meet minimum standards...whether the consultation arises under statute or was voluntarily undertaken by the decision maker. He cannot conduct a flawed consultation process and when challenged say "I was under no duty to consult so be off with you!*' A consultation is proper if:-

(i) It is undertaken at a time when proposals are still at a formative stage;

(ii) It must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response;

(iii) Adequate time must be given for this purpose; and

(iv) The product of consultation must be conscientiously taken into account when the ultimate decision is taken**. See para. 38 of judgment.**

[69] At paragraphs 39 and 40, his lordship expressed further that:

> *Lord Woolf explained that consultation is not litigation. Consultation does not require the disclosure of every submission or (absent a statutory mandate) all the advice received. The duty entails letting "those who have a potential interest in the subject matter know in clear term what the proposal is and exactly why it is under consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response". That "obligation, although it may be quite onerous, goes no further than this (see page 259, para. 122) Earlier at page 258, paragraph 108 Lord Woolf accepted the proposition that "adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken"*
>
> *It does not follow from this that flaws in the consultation process will necessarily mean that the decision should be quashed. It would seem to me that it depends upon the seriousness of the flaw and the impact that it had or might have had on the consultation process. Consultation is the means by which the decision maker receives concerns, fears and anxieties from the persons who might or will be affected by his decision. These concerns should be taken into account conscientiously when making his decision. It must be recognised that the consultation process may not go as well as everyone would like so at the end of the day the question may well be a qualitative one, that is to say, the courts will examine what took place and make a judgment on whether the flaws were serious enough to deprive the consultation process of efficacy.*

[70] The 1st respondent does not have a statutory duty to embark on a consultation process. The order from the COA which directed that the 1st respondent communicate its decision by September 1, 2018, provided that the 1st respondent shall make all consultations it considered necessary. S. 32 of the **Pensions Act** provides that the 1st respondent, after examining the pension scheme but before approval, may where it thinks necessary, after consultation with the trustees, amend the scheme. The evidence from Nicollete Jenez makes it clear that the 1st respondent was not minded to amend the scheme and as such, in this court's mind, there was no need to consult the trustees.

[71] In any event, the fact is that the plan was initially approved on July 26, 2018. Prior to this date, the evidence on behalf of the 1st respondent is that it engaged in proper consultation. It is important to note that there is no requirement to consult the Sponsor and consultation may take place by seeking views in writing. Further, such duty varies depending on the provision in question, the context and the purpose of the consultation. It must be borne in mind that consultation in the instant case would have been preceded by several judgments, court orders and directions and years of litigation. Further, the 1st respondent, from Ms. Jenez evidence had previously sought the direction of the court vis-à-vis an issue between the parties and that resulted in Sykes J (as he then was) 2018 decision.

[72] Again from the evidence, it has also been mindful of the decisions of the court and has sought legal advice. In any event, since the1st respondent re-opened the process of consultation, following the letter from the Sponsor trustees dated July 26, 2018, it had to ensure that there was proper consultation. I find that the 1st respondent did engage in proper consultation between July 27, 2018 to August 24, 2018, when it made its decision. The 1st respondent requested additional material and extended the time for a response to August 17, affording the parties almost 3 weeks to provide a response. The applicant and/or the Sponsor trustees were very familiar with the proposed pension plan and the stage at which it was and would have been very able to intelligently respond to the 1st respondent's request.

[73] I do find that based on the particular circumstances and context of this case, the 1st respondent would have conscientiously taken into account the product of the consultation as it made its decision. Nevertheless, even if there were flaws in the process, I do not find that those flaws were so serious such as to deprive the consultation process of efficacy and require that the decision be quashed.

Issue 3-Whether the applicant delayed in making its application for judicial review?

[74] Part 56.6 of the CPR addresses delay in relation to an application for leave to seek judicial review:

> *(1) An application for leave to apply for judicial review must be made promptly and in any event within three months from the date when grounds for the application first arose.*
>
> *(2) However the court may extend the time if good reason for doing*
>
> *so is shown.*
>
> *(3) Where leave is sought to apply for an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date on which grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceedings.*
>
> *(4) Paragraphs (1) to (3) are without prejudice to any time limits*
>
> *imposed by any enactment.*
>
> *(5) When considering whether to refuse leave or to grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to -*
>
> *(a) cause substantial hardship to or substantially prejudice the*
>
> *rights of any person; or*
>
> *(b) be detrimental to good administration.*

[75] Para. 16-052 of De Smith Judicial Review provides that:

> *'the primary requirement is always one of promptness and permission may be refused on the ground of undue delay even if the claim form is filed within three months. The fact that a breach of a*

public law duty is a continuing one does not necessarily make it irrelevant to take into account the date at which the breach began in considering any question of delay.'

[76] In **Dewayne Thomas v Commissioner of Police** [2015] JMSC Civ 26, Shelly Williams J expressed that

[32] In relation to delays the starting point is laid out in the case of ***O'Reilly v Mackman*** *(1983) 2 AC 237 where Lord Diplock said: 'The public interest, in good administration, requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision of the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the persons affected by the decision. " This case also emphasises that even in instances where the delay is less than three months the court may still rule that there was undue delay.*

[33] Rule 56.6 of the CPR lays down the rule that the court is to take into consideration when considering delays in applying for Judicial Review. Rule 56.6 (1) indicates that in "an application for leave to apply for judicial review must be made promptly and in any event within three months from the date when grounds for the application first arose.

[34] This rule highlights that time periods should be strictly adhered to as even if an application is filed within a three month period the application may still be deemed to be delayed. In the case of ***City of Kingston Co-Operative Credit Union Ltd v Registrar of Co-Operative Societies and Friendly Societies and Yvette Reid****, Sykes J after detailing the decisions in a number of cases namely Securities Commission of the Bahamas ex parte Petroleum Products Ltd B.S. 2000 SC 24 (delivered on 4 July 2000) (Suit No. 144 of 1999) went on to analysis how and when time is to be run in applications for Judicial Review.*

[35] The significance of these cases is that in all of them it was held that time starts to run when the decision is made, not when the Defendant would have acquired knowledge of it. In this case the decision of the Commissioner of Police was made on the 4th of March 2010 which is the date of the letter of dismissal.

[77] In **Randean Raymond v The Principal Ruel Reid and Anor** [2015] JMCA Civ 59, the COA expressed that:

> *[37] Additionally, where the question of delay is concerned, there have been cases in which applications were dismissed for reason of delay even where the applications were made within the period limited by the rules for the making of such applications. One such case is that of Andrew Finn-Kelcey v Milton Keynes Council & MK Windfarms Limited [2008] EWCA Civ 1067, in which Lord Justice Keene (with whom the other members of the Court of Appeal agreed), considered the provision – CPR 54.5(1)- in the English rules (which is in pari materia with rule 56.6(1) of the CPR – the Jamaican provision). Keene LJ observed as follows at paragraph 21 of the judgment:*
>
> *"As the wording indicates and as has been emphasised repeatedly in the authorities, the two requirements set out in paragraph (a) and (b) of that rule are separate and independent of each other, and it is not to be assumed that filing within three months necessarily amounts to filing promptly: see R v. Independent Television Commission, ex parte TV Northern Ireland Limited [1996] J.R. 60, [1991] TLR 606 and R v. Cotswold District Council, ex parte Barrington Parish Council [1997] 75 P. and C.R. 515."*
>
> *[38] In the Finn-Kelcey case, the claim was filed four days short of the expiration of the three-month period; but was regarded by the court as not having been filed promptly.*
>
> *[39] The position was similar in the case of R v Independent Television Commission, ex parte TV Northern Ireland [1996] JR 60, where the English Court of Appeal dismissed the appeal of TV Northern Ireland, which had challenged the refusal of Otton J to grant it leave to apply for judicial review. What was being challenged in that case was the decision of the Independent Television Commission (ITC) to grant certain companies regional licences, whilst denying those licences to the appellant. Lord Donaldson MR opined as follows:*
>
> *"It had been stated in the press that all applicants had three months in which to apply for leave to move for judicial review. That was not correct. Applicants in such matters, which could affect good administration, had to act with the utmost promptitude since so many third parties were affected. The present applicants had not done so."*
>
> *[40] That was another case in which the application for leave had been made within the three-month period stipulated in the rules.*

> *[41] Similarly, in R v Cotswold District Council, ex parte Barrington Parish Council [1997] 75 P. and C.R. 515, where a parish council sought leave to apply for judicial review to challenge the grant of planning permission by a local planning authority, an application for extension of time for leave to apply for judicial review was refused. One of the grounds for the refusal was that the court was of the view that the application had not been made promptly, even though it was made within the three-month period, it having been made eight weeks after the grant of the said permission.*
>
> *[42] From a consideration of these cases, I agree with the approach of the court below in placing greatest emphasis in its analysis of the issues in this case on the issue of delay. I find that there is support for this position in Lord Diplock's speech in* ***O'Reilly v Mackman*** *[1983] 2 AC 237, in which judicial review proceedings were described as meant to provide a "very speedy means" of resolving disputes, such as that in the instant case. (It is noteworthy, as well, as pointed out in the said judgment that the period for applying for leave was reduced in England in 1977 in Order 53, from six months to three months.) I find (as submitted by counsel for the respondents) that this ground of the appeal lacks merit.*

[78] The non-Sponsor trustees have said that the applicant has no good excuse for its delay and therefore has no answer to the said argument and on this basis alone the application should be refused. On the other hand, the applicant has said that this court has ample case management powers to reduce the delay of which the non-Sponsor trustees assert to their prejudice and an early date for the hearing of the substantive matter can be set should leave be granted.

[79] The 1st respondent's decision was communicated to the applicant on August 24, 2018. Under the appeal tribunal rules, the applicant had 30 days after being notified of the decision to file a notice of appeal (see rule 4) to challenge the ruling of the 1st respondent, that is by September 23, 2018. Under part 56 of the CPR, the applicant had up to 3 months, that is by November 23, 2018 to seek leave for judicial review; its application was filed on October 19, 2018 and later amended.

[80] The applicant clearly made its application within the time stipulated under the CPR. However, the rule really requires an applicant seeking leave for judicial review to come before the court promptly. The applicant came 7 weeks after the decision

was communicated to it. This was in a context where the matter has a particular history and there is a 30 days' deadline period for the statutory remedy. These are material considerations in determining whether or not the applicant sought leave promptly.

[81] Also material and impacting on the good administration of the pension plan, to which the applicant has raised no challenge, is the 2nd-7th respondents' submission that there was a delay in making the application until after the beneficiaries were informed that there was no challenge to the 1st respondent's decision to approve the scheme of distribution. A reasonable inference to be drawn from this is that the beneficiaries are legitimately expecting and anticipating the receipt of their pension and perhaps would have received same by now but for this application. Further some beneficiaries have died and more could perhaps die, if leave is granted, before the substantive hearing is determined without receiving their pension. Such prejudice cannot effectively be addressed by a timely hearing of the substantive application.

[82] The COA authority above has made reference to instances where the application for leave was brought technically within time but the applicant was found to not have acted promptly. From the above authorities, an applicant is required to act with haste and filing within 3 months is not tantamount to filing with promptitude and may instead be deemed as having delayed. So although the applicant filed the application within the stipulated time, it may have delayed nonetheless. In the circumstances, I do accept the non-Sponsor trustees' submissions that the applicant did not act promptly.

Issue 4 -Whether costs should be awarded against the applicant?

[83] The 1st respondent and the non-Sponsor Trustees have sought an order for costs against the applicant.

[84] **Part 56.15(5)** of the CPR provides that:

> *The general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application.*
>
> ***Part 64.6 (1)** and **(2)** provides that-*
>
> *If the court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.*
>
> *The court may however order a successful party to pay all or part of the costs of an unsuccessful party or may make no order as to costs.*

[85] In **Homer Davis,** Batts J ruled that

In the result and for the reasons stated I dismissed the application. I refused Mr. Knight's application for costs and decided to abide the general rule that costs should not be awarded against an unsuccessful Claimant in Judicial Review proceedings (Rule 56.15(5)). In my view, it was not unreasonable for the Claimant to apply given the authorities cited and the short time available for sober consideration and reflection.- See para. 17

In this case the applicant sought leave to apply for judicial review of a Magisterial decision regarding the recount of ballots.

[86] In **Gorstew Limited v HH Mrs. Lorna Shelly-Williams and Ors** [2016] JMSC Full 8, the full court awarded costs against the applicant. The applicant renewed its application for leave to apply for Judicial Review in relation to a decision made by the 1st respondent on June 3, 2014 upholding a no case submission and dismissing all charges against the 2nd, 3rd and 4th respondents. Application for leave was refused. Thompson-James J in addressing the basis of costs order expressed that:

[37] *The general rule as to costs in Administrative proceedings is provided in Rule 56.15(5), wherein it is stated: "…no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant*

has acted unreasonably in making the application or in the conduct of the application."

[38] The court may however make such orders as to costs as appear to the court to be just, including a wasted costs order [CPR 56.15(4)].

[39] Though it may appear from the wording of those rules that they only apply in circumstances where there has been a substantive hearing, the Full Court in ***Danville Walker v. The Contractor General*** *[2013] JMFC Full 1(A) ruled that costs for the application at the leave stage could be determined within the parameters of part 56.15(4) and (5) [para. 32]. It is to be noted that whilst Sykes J found that the rules did not apply and part 64 alone was to be relied on, the majority of the court, Straw and Campbell JJ, agreed that rules 56.15(4) and (5) are in fact applicable to leave applications/hearings.*

[40] All judges however unanimously agreed that the formulation by Auld J in Mount Cook [2014] 2 Costs LR 211 as to what would amount to exceptional circumstances could be considered as helpful in determining what may be unreasonable conduct of an applicant" [para. 33]. These are: a) The hopelessness of the claim; b) The persistence in it by the claimant after having been alerted to facts and/or of the law demonstrating its hopelessness; c) The extent to which the court considers that the claimant, in the pursuit of his application, has sought to abuse the process of judicial review for collateral ends – a relevant consideration as to costs at the permission stage, as well as when considering discretionary refusal of relief at the stage of substantive hearing, if there is one; and d) Whether, as a result of the deployment of full argument and documentary evidence by both sides at the hearing of a contested application, the unsuccessful claimant has had, in effect, the advantage of an early substantive hearing of the claim.

[41] In ***Danville Walker****, the court consequently decided that costs were to be granted to the respondent on a limited basis, owing to the unreasonable conduct of the applicant, in seeking to renew its application for leave, since the application*

was hopeless and bound to fail, and that the applicant persisted with the renewal in spite of this [para. 29].

[42] Based on the foregoing, and the reasoning set out in ***Danville Walker****, I see no reason to depart from the finding of the majority of the court, and therefore find that the rules in part 56.15 (4)(5) are applicable to the case at bar. I also bear in mind that though the circumstances set out by Auld J in Mount Cook are indeed useful, they are not exhaustive, and what amounts to „unreasonable conduct" still ultimately rests in the court's discretion, once exercised judicially.*

Did the Applicant act unreasonably?

[43] The Applicant renewed its application after having been refused leave by Beswick J on December 10, 2014, following a full ventilation of issues in its initial application.

[44] I agree with Brown Beckford J that the application is vexatious and the applicant's conduct in renewing the application was highly unreasonable, being so against the weight of authority that it was hopeless and bound to fail. The legal hurdles facing the applicant, particularly in respect of the issue of autre fois were insurmountable based on the law in our jurisdiction which is well settled.

[45] Further, there was absolutely no credible evidence before the court of the allegations levied against the Resident Magistrate. Not only was the applicant alerted to this in its initial application by the submissions of the respondents, but Beswick J, in her written decision of April 2015, gave a lengthy detailed discourse on the law surrounding the issues and the reasons for which the application was bound to fail, reasons with which this court agrees.

[46] Despite this the Applicant persisted in renewing the application, bringing the four respondents back before the court to expend time, effort and expense to defend the application for a second time.

In the premises, it is only fair that the applicant pays costs.

[87] Brown-Beckford J on the issue of costs posited at para. 19 that

I find that the application is vexatious for being so against the weight of authority that there could have been no reasonable expectation that it would have succeeded. Pursuant to CPR Rules 56.15 (4) and (5), cost of this application is to the Respondents.

[88] In **Gorstew Limited v HH Mrs. Lorna Shelly-Williams and Ors** [2017] JMCA App 9, the applicant applied for leave to appeal against the decision of the Full Court and the COA granted leave to appeal in respect of the issue of costs only. Morrison P with whom the entire court agreed, expressed that

[49] Finally, I come to the question of the order for costs of the Full Court hearing. It will be recalled that, upon refusing the applicant leave to apply for judicial review, Lawrence-Beswick J had ordered the parties to make written submissions on costs. I think that it is strongly arguable that, as Mr Leys submits, the Full Court ought to have afforded the applicant the same opportunity before making an order for costs against it. As Lord Sumption observed in Sans Souci Limited v VRL Services Limited, a decision of the Privy Council on appeal from this court, "[i]t is the duty of a Court to afford a litigant a reasonable opportunity to be heard on any relevant matter, including costs, on which he wishes to be heard".

[50] I would accordingly propose that the court should: (i) refuse leave to appeal against the Full Court's decision which refused the applicant's application for leave to the apply for judicial review of the challenged decision; (ii) grant leave to appeal against the Full Court's decision which ordered that the applicant should bear the respondents' costs of the renewed application for leave to apply for judicial review; and (iii) order that the applicant should pay 75% of the respondents" costs of this application, such costs to be agreed or taxed.

[51] In order that the appeal on costs can be dealt with as efficiently and cost effectively as possible, I would order that: (i) the applicant is to file and serve its grounds of appeal against the Full Court's award of costs, together with skeleton

arguments in support of the grounds of appeal, within 21 days of the date of this order; (ii) within a further 21 days of the service on them of the applicant's grounds of appeal and skeleton arguments, the respondents are to file and serve skeleton arguments in response to the appeal; and (iii) within 28 days of the filing of the last of the respondents" skeleton arguments, the court will issue its decision on the appeal in writing.

[89] A reading of the Full Court's decision in **Gorstew** makes it clear that the general rule stated in rule 56.15(5) applies to an application for leave hearing and is not restricted to just the hearing of the matter substantively. Thus, on an application for leave the applicant is correct in submitting that the general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application. The Privy Council in **Toussaint v Attorney General of St. Vincent and the Grenadines,** [2007] UKPC 48**,** has interpreted this rule to be a provision that facilitates administrative law applications and not one to deprive a successful litigant of the award of costs.

[90] I am of the view that whilst the decision of my learned brother Batts J is not binding on this court, his decision was made based on the circumstances of the matter before him and as is well established each case turns on its own facts. In light of the provision of the rules and their interpretation by the full court in **Gorstew**, the rule governing the general award of costs stated in rule 64.6 is inapplicable. Hence, the general rule stipulated in rule 56.15(5) applies to applications for leave, the question before this court is whether this court has found the applicant to have acted unreasonably in making this application and or in its conduct of the application? If it has not, then the general rule applies and no order for costs may be made but if it has, then an order for costs may be made against it. The respondents have said that the applicant has acted unreasonably in its pursuit and conduct of the application. I agree.

[91] The application herein is a culmination of extensive litigation between the applicant and the 2nd-7th respondents over several years as is stated in the background to the application herein. The result is that on April 27, 2018, the court (Sykes J (as he then was)) ruled in favour of the Uplift Order as being consistent with the scheme of distribution submitted to the 1st respondent by the Duggan Actuary and the Supreme Court and the COA refused the applicant's leave to appeal.

[92] In October, 2018, after the 30 days' period for an appeal from the 1st respondent's decision provided for in the appeal tribunal rules had elapsed, the applicant sought leave for judicial review essentially on the basis that the 1st respondent acted illegally in not following the Privy Council's decision. It is notable that the concept of illegality/unlawfulness as a premise for the application for leave was mentioned at the 11th hour of the application and the authorities relied on by the applicant did not include circumstances as these, as being tantamount to illegality/ unlawfulness.

[93] The applicant made oral submissions over several days and some of its submissions were repeated in its reply to the 1st respondent and non-Sponsor trustees' response.

[94] In reference to para. 40 of the full court's judgment in **Gorstew**, the court referred to exceptional circumstances that could assist in determining an applicant's unreasonable conduct, one such factor was '*the extent to which the court considers that the claimant, in the pursuit of his application, has sought to abuse the process of judicial review for collateral ends – a relevant consideration as to costs at the permission stage, as well as when considering discretionary refusal of relief at the stage of substantive hearing, if there is one'* as being a relevant factor.

[95] This court is of the view that the applicant ought to have utilized the alternative statutory remedy provided. However, in choosing to apply for judicial review and an injunction against the non-Sponsor trustees to, in a sense, secure its financial interests in the surplus whilst pensioners and their beneficiaries are denied a

legitimate expectation for a further extended period of time, is a very material factor. The prejudice occasioned in these circumstances makes it an exceptional circumstance.

[96] In conclusion, on a totality of all the circumstances herein, particularly the prolonged litigation, the delay in making the application until after the beneficiaries were informed that there was no challenge to the 1st respondent's decision, the prejudice to the beneficiaries, the failure of the applicant to utilize the alternative statutory remedy and the introduction of a new premise for the application for leave at the '*eleventh hour',* this court forms the view that the conduct of the applicant herein has been unreasonable. The costs of the application is therefore awarded to the respondents against the applicant.

CONCLUSION

[97] In furtherance of the above findings, I find that the appeal tribunal is an effectual, convenient and beneficial alternative. Having regard to the circumstances of this case, the decision to approve the pension scheme is not irrational or amounts to unreasonableness that defies comprehension. There is no exceptional circumstance existing to permit the applicant to bypass the specialist tribunal set up by the statute for a particular purpose in favour of judicial review and the 1st respondent has not acted illegally. I am also of the view that the applicant does not have a good arguable case with a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy. In the circumstances, the threshold for leave for judicial review has not been met and leave is denied.

DISPOSITION:

[98] The court makes the following orders:

(i) The application for leave to seek judicial review is refused;

(ii) In accordance with Order no. 1, the application for an interim injunction is also refused; and

(iii) Costs are awarded to the respondents against the applicant to be agreed or taxed.

(iv) Leave to appeal refused.