Neutral Citation Number: [2017] EWHC 1191 (Ch)

Case No: HC2012000035

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

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

Date: 19/05/2017

Before :

MR JUSTICE MORGAN

- -

Between :

Claimant

BRITISH AIRWAYS PLC

- and -

Defendant

AIRWAYS PENSION SCHEME TRUSTEE LIMITED

- -
- -

Michael Tennet QC, Sebastian Allen and Michael Ashdown (instructed by **Linklaters LLP**) for the **Claimant**
Keith Rowley QC, Jonathan Hilliard QC and Henry Day (instructed by **Eversheds LLP**) for the **Defendant**

Hearing dates: 26-28 and 31 October, 1-4, 7-11, 14-18, 21-25, 28-30 November, and 5-9 December 2016 and written submissions thereafter

- -

Approved Judgment

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

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MR JUSTICE MORGAN

MR JUSTICE MORGAN:

The case in outline

1. The Airways Pension Scheme ("the APS") is a balance of cost, final salary, defined benefit, occupational pension scheme. It was originally established in 1948 and it was closed to new members from 31 March 1984. The APS is a mature scheme. As at 31 March 2012, it had 29,766 members, of whom 3% were active members, 7% deferred members and 90% pensioners. As at 31 March 2015, it had 27,268 members, of whom 2% were active members, 5% deferred members and 92% pensioners (the figures have been rounded off).

2. In general terms, the APS is a generous scheme. Rule 15 provided that the annual rate of pensions under the scheme would be adjusted upwards in accordance with annual Pension Increase Review Orders ("PIROs") made by the Treasury. For many years prior to 2010, PIROs had provided for an increase equivalent to the uplift in the Retail Price Index ("RPI"). The rules of the Scheme did not provide for any cap on the amount of the uplift in pensions which was therefore the full amount of the uplift provided by a PIRO. The absence of a cap was a particular advantage to the members of the scheme. Accordingly, the pensions payable under the APS had been described as "index-linked" or "inflation-proofed".

3. The reason that the APS provided for up-rating in accordance with PIROs was that the scheme originally related to employment in the public sector. By 1987, the sole sponsoring employer under the APS was British Airways plc ("BA") and it was privatised in 1987. However, rule 15 was not changed at that time so that it continued to provide for uprating pensions in accordance with PIROs.

4. On 22 June 2010, the Chancellor of the Exchequer announced that, in the future, public sector pensions would be uprated by reference to the Consumer Price Index ("CPI") rather than RPI. On 8 July 2010, the Department for Work and Penions announced that it would in future use CPI rather than RPI for Revaluation Orders under the Pension Schemes Act 1993 and indexation under the Pensions Act 1995, in relation to private sector schemes. The first PIRO after the Chancellor's announcement, taking effect from 11 April 2011, used CPI accordingly. Because rule 15 provided for uprating by reference to PIROs, these announcements affected the APS, even though it was at that time a scheme relating to employment in the private sector.

5. In and since 2010, the general expectation has been that the rate of increase in accordance with CPI will be lower than the rate of increase in accordance with RPI.

6. Many members and pensioners of the APS were concerned at the move from RPI to CPI. The trustees of the scheme considered what, if anything, they should do in response to this change. Some of the trustees wished to amend rule 15 so that it would provide for uprating in accordance with RPI. This was called "hardwiring RPI" into the rules.

7. On 3 February 2011, the trustees voted unanimously to amend rule 15 to introduce a discretionary power which would allow the trustees from time to time to uprate pensions by an amount in addition to the uprating directed by the PIRO.

8. On 25 March 2011, the trustees executed a supplemental deed which formally amended rule 15 to introduce the discretionary power referred to above. On the same date, the trustees voted on whether to exercise that power for the year from April 2011 but there was not a sufficient number of votes in favour of an exercise of the power.

9. BA initially appeared to accept that the amendment of rule 15 was valid but in August 2013 they contended that the decision taken by the trustees on 3 February 2011 and the supplemental deed of 25 March 2011 were of no effect. That issue now needs to be decided in these proceedings.

10. On 29 February 2012, the trustees again voted on whether to exercise the discretionary power, purportedly conferred by the amended rule 15, for the year from April 2012. On this occasion also, there were not sufficient votes in favour of the exercise of the power.

11. On 28 February 2013, the trustees unanimously agreed to grant a discretionary increase of 50% of the gap between RPI and CPI for 2013, namely an increase of 0.2%, but they also agreed that this decision remained open to later review.

12. On 26 June 2013, the trustees confirmed the decision taken on 28 February 2013 to grant a discretionary increase of 0.2%. There is an issue as to whether the trustees made an effective decision that such increase would take effect from 1 September 2013.

13. On 19 November 2013, the trustees by a majority voted to grant a discretionary increase of 0.2% with effect from 1 December 2013.

14. In these proceedings, issued on 6 December 2013, BA contends that (even if rule 15 had been validly amended in 2011) the decisions taken by the trustees on 28 February 2013, 26 June 2013 and 19 November 2013 were of no effect so that the uprating of pensions pursuant to rule 15, as amended, has been in accordance with the relevant PIRO and does not include a 0.2% discretionary increase above the rate fixed by the PIRO for 2013. Conversely, the trustees contend that they have made an effective decision to grant a discretionary increase of 0.2% above the rate directed by the PIRO for 2013, with effect from 1 September 2013, alternatively from 1 December 2013.

The origin of the APS

15. The British Overseas Airways Corporation was established by the British Overseas Airways Act 1939. The British European Airways Corporation and the British South American Airways Corporation were established by the Civil Aviation Act 1946. In the 1946 Act, these three corporations were referred to as “the three corporations”. The three corporations were in public ownership and the 1946 Act conferred on the Minister of Civil Aviation a wide range of powers in relation to them.

16. Section 19 of the 1946 Act was headed “Terms and conditions of employment of staff, etc” and made some general provisions as to consultation in relation to machinery for the determination of terms and conditions of employment of persons by the three corporations.

17. Section 20 of the 1946 Act required the Minister by regulations to provide for the establishment or maintenance of one or more pension schemes for the purpose of providing pensions and other similar benefits in respect of the service of specified classes of employees of the three corporations and, in particular, to provide for securing benefits in the case of injury or death.

18. On 8 October 1948, the three corporations, described as "the Corporations", a number of named persons described as "the Management Trustees" and the Airways Corporations Joint Pension Fund Trustees Ltd described as "the Custodian Trustees" executed a trust deed setting out the trusts and rules which were to govern the pension scheme for the three corporations, subject to confirmation by Regulations to be made by the Minister under section 20 of the 1946 Act.

19. On 25 October 1948, the Minister made the Airways Corporations (General Staff Pensions) Regulations 1948 which confirmed the establishment and maintenance of a pension scheme in accordance with the trust deed, which was set out in a Schedule to the Regulations. Reg. 7 of the 1948 Regulations provided that no amendment of, or addition to, the trust deed should have effect unless confirmed by Regulations made under section 20 of the 1946 Act.

20. Over the years, there were changes in relation to the constitution of the original three corporations and there were a number of statutory provisions relating thereto, to which it is not necessary to refer.

21. The 1948 trust deed was amended on various occasions between 1948 and 1971.

22. The 1948 Regulations were amended on a large number of occasions. By 1971, the reference in reg. 7 of the 1948 Regulations to section 20 of the 1946 Act had become a reference to section 24 of the Air Corporations Act 1967. In 1971, the Secretary of State in exercise of his powers under section 24 of the Air Corporations Act 1967 made the Air Corporations (General Staff, Pilots and Officers Pensions) (Amendment) (No 2) Regulations 1971. Reg. 3(1) of the 1971 Regulations provided that reg. 7 of the 1948 Regulations (which required any amendment of, or addition to, the trust deed to be confirmed by regulations made under section 24 of the 1967 Act) should cease to have effect. Accordingly, but subject to the provisions of reg. 3(2), the trust deed as amended could be further amended or added to without such amendment or addition being confirmed by regulations made under the said section 24. Reg. 3(2) of the 1971 Regulations provided for a minor qualification on the operation of reg. 3(1), to which it is unnecessary to refer.

23. The trust deed was further amended between 1971 and 1973. On 16 July 1973, the scheme which was by then known as "the Airways Pension Scheme" was further amended, in particular, by the introduction of Part VI of the rules of the scheme. The Part VI rules are of particular relevance in the present case. The trust deed was further amended between 1973 and 1 April 2008, at which point there was prepared a consolidated trust deed which contained the provisions of the original trust deed as amended up to that date and a document which recorded the rules relating to Part VI, also as amended up to that date. The parties' submissions proceeded on the basis that there were no changes to the consolidated trust deed and rules between 1 April 2008 and 25 March 2011 that were relevant to the issues in this case.

The original 1948 trust deed and rules

24. It is relevant to refer to some of the provisions of the original 1948 trust deed and rules. In particular, it is relevant to refer to clauses 2, 3, 4, 8, 11, 12, 13, 18, 19 and 21 of the 1948 trust deed. Clause 2 had the marginal note "Main Object", but the marginal note was, pursuant to clause 20, "for convenience of reference only". Clause 2 provided:

> "THE main object of the Scheme is to provide pension benefits on retirement and a subsidiary object is to provide benefits in cases of injury or death for the staff of the Corporations in accordance with the Rules. The Scheme is not in any sense a benevolent scheme and no benevolent or compassionate payments can be made therefrom".

25. Clause 3 of the 1948 trust deed provided that the three corporations would pay to the Management Trustees the contributions due from the three corporations in accordance with the rules. Clause 4 provided that the Management Trustees should manage and administer the scheme. Clause 8 provided that the Management Trustees had power to appoint and to remove the scheme actuary.

26. Clause 11 of the 1948 trust deed provided:

> "The duties of the Actuary shall be:
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> (a) At or as soon as practicable after the date of the coming into force of the Scheme and thereafter at the end of such periods not exceeding five years as the Management Trustees shall from time to time determine the condition of the Fund shall be submitted to the Actuary who shall consider the same and shall make an actuarial valuation of the assets and liabilities of the Fund and shall report on the financial position thereof to the Management Trustees who shall forthwith transmit a copy thereof to each of the Corporations together with any recommendations they may wish to make in regard thereto
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> (b) In conjunction with each valuation made in accordance with sub-clause (a) of this clause the Actuary shall make a separate actuarial valuation of the assets and liabilities of the Fund attributable to each of the Corporations and if the Actuary certifies that a deficiency or disposable surplus as the case may be is attributable to a Corporation he shall certify the amount thereof and the Management Trustees shall within three months after receiving such certificate make a scheme for making good the deficiency or as the case may require disposing of the disposable surplus Provided that any such scheme shall be subject to the agreement of the Corporation to which it applies or in default of such agreement shall be submitted to the Minister for approval and shall come into force subject to such amendments (if any) as the Minister may direct

> (c) If the Actuary certifies that there is a deficiency attributable to a Corporation the scheme referred to in paragraph (b) above shall provide that that Corporation shall contribute to the Fund in addition to any existing deficiency contribution payable under this clause and to the contributions prescribed by the Rules an equal annual deficiency contribution calculated to make good the deficiency over a period not exceeding forty years from the date of the valuation Provided that a Corporation may at any time or times pay to the Fund such moneys as the Corporation shall think fit in or towards satisfaction of any deficiency contributions which it would otherwise have been liable to provide on any subsequent date or dates
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> (d) If the Actuary certifies that there is a disposable surplus attributable to a Corporation the scheme referred to in paragraph (b) above shall provide that:
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> (i) The amount or outstanding term of any existing annual deficiency contribution shall be reduced to such extent as the disposable surplus will permit
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> (ii) If after having extinguished as aforesaid all outstanding annual deficiency contributions of a Corporation a balance of disposable surplus still remains the contributions of the Corporation shall be reduced to an extent required to dispose of such balance by annual amounts over such a period not exceeding Thirty years from the date of the valuation as the Actuary shall advise
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> (e) Where on such valuation the Actuary certifies that in order to maintain an equality of value in relation to persons becoming members subsequent to three months from the date of the Report on the valuation between the amounts to be contributed by and in respect of such persons and the amounts of benefits to which such persons will become entitled it is expedient to increase or decrease contributions payable to the Fund provision may be made by the scheme referred to in paragraph (b) above for such increase or decrease as the case may require
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> (f) The Actuaries shall also make and give such other reports and certificates and give such advice and information relating to the Fund as the Management Trustees or any of the Corporations may deem to be necessary or expedient."

27. Clause 12 of the 1948 trust deed provided for the appointment of the Management Trustees. There were to be 12 Management Trustees. Each of the three corporations was to appoint 2 trustees and the Members were to appoint 6 Management Trustees. By clause 13, the Management Trustees had power to determine whether or not a person was entitled to any pension benefit or allowance in accordance with the trust deed and rules.

28. Clause 18 of the 1948 trust deed provided for the possibility of amendment of, or addition to, the trust deed and rules and was in these terms:

> "SUBJECT to the provisions of the Civil Aviation Act 1946 and Regulations made by the Minister under Section 20 thereof the provisions of the Trust Deed may be amended or added to in any way by means of a supplemental deed executed by such two Management Trustees as may be appointed by the Management Trustees to execute the same Furthermore subject to the said provisions of the Civil Aviation Act 1946 and any such Regulations the Rules may be amended or added to in any way and in particular by the addition of rules relating to specific occupational categories of staff No such amendment or addition to the provisions of the Trust Deed or to the Rules shall take effect unless the same has been approved by a resolution of the Management Trustees in favour of which at least two thirds of the Management Trustees for the time being shall have voted Provided that no amendment or addition shall be made which
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> (i)would have the effect of changing the purposes of the Scheme or
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> (ii) would result in the return to the Corporations of their contributions or any part thereof or
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> (iii) would operate in any way to diminish or prejudicially affect the present or future rights of any then existing member or pensioner or
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> (iv) would be contrary to the principle embodied in Clause 12 of these presents that the Management Trustees shall consist of an equal number of representatives of the employers and the members respectively."

29. Clause 19 of the 1948 trust deed was a reservation by the three corporations of the right, subject to the approval of the Minister, to give not less than 6 months' notice to the Management Trustees to terminate their contributions to the scheme in whole or in part, whereupon there was to be due from the three corporations such outstanding sums as might be needed to restore the solvency of the scheme having regard to the rights accrued at the date of termination of contributions.

30. Clause 21 of the 1948 trust deed provided that nothing in the trust deed or rules should be construed as limiting the functions of the National Joint Council for Civil Air Transport in the negotiations of the wages and conditions of employment of persons employed by the Corporations.

31. Schedule 1 to the 1948 trust deed contained the rules of the scheme. It is relevant to refer to rules 9, 10, 11, 14 and 28. Rule 9 provided that members would become entitled to pension benefits in accordance with the First Table to the rules. The First Table provided for 45 separate categories by reference to the amount of the pay due to the employee. The First Table then identified the amount of the employee's contributions for each category

and the amount of the annual pension for each year of service in a relevant category. Taking category 45, the category with the highest rate of pay (£5,000 and over per annum), as an example, the annual pension for each year in that category was £98.

32. Rule 10 of the 1948 rules provided for death benefits. Rule 11 of those rules provided for accident benefits. Rule 14 of those rules provided for ill-health pensions. Rule 28 of those rules provided that the rules might be amended or added to in accordance with the provisions of the 1948 trust deed.

33. As can be seen from these references to the trust deed and rules, the Minister played a role in the original version of the scheme. It was for the Minister to confirm by regulation any alterations made to the trust deed or rules pursuant to the amendment power contained in clause 18 of the trust deed, to adjudicate under clause 11 in relation to schemes for making good a deficiency or disposing of a surplus and to consent to any notice to wind up the scheme under clause 19.

34. The 1948 trust deed and rules made no provision for pension increases. I was told that during the period governed by the original trust deed and rules, pension increases were sometimes granted on an *ex gratia* basis although I was not told who precisely was involved in deciding those matters.

The consolidated trust deed and rules

35. The consolidated trust deed and rules set out the relevant provisions as amended from time to time up to 1 April 2008. This version of the trust deed and rules remained current until the further amendment which was made on 25 March 2011, the validity of which is disputed in these proceedings.

36. The relevant provisions of the consolidated trust deed are clauses 2, 3, 4, 11, 12, 13, 18, 19, 21, 23 and 24. The original terms of the 1948 trust deed had been amended to reflect the fact that the original Corporations were replaced as the sponsoring employer by a single company, BA, referred to in the consolidated trust deed as "the Employer". The various provisions of the 1948 trust deed were amended so as to refer to the Employer rather than the Corporations. References in the 1948 trust deed to the Minister were removed between 1984 and 1986. Apart from these changes and consequential amendments, there were no amendments of substance to clauses 2, 3, 4, 11, 13 and 21. Clause 12, dealing with the appointment of Management Trustees, referred to 6 trustees being appointed by the Employer and 6 trustees being appointed by the members and pensioners of the scheme.

37. Clause 18 in the 1948 trust deed was amended only so as to reflect the change from the reference to the Corporations to a reference to the Employer, and to remove the reference to the Minister, but in view of the importance of clause 18 in this case, I will set it out as it appears in the consolidated trust deed, as follows:

> "The provisions of the Trust Deed may be amended or added to in any way by means of a supplemental deed executed by such two Management Trustees as may be appointed by the Management Trustees to execute the same. Furthermore the Rules may be amended or added to in any way and in particular by the addition of rules relating to specific occupational categories of staff. No such amendment or addition to the

> provisions of the Trust Deed or to the Rules shall take effect unless the same has been approved by a resolution of the Management Trustees in favour of which at least two thirds of the Management Trustees for the time being shall have voted PROVIDED THAT no amendment or addition shall be made which -
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> (i)would have the effect of changing the purposes of the Scheme or
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> (ii) would result in the return to an Employer of their contributions or any part thereof or
>
> (iii) would operate in any way to diminish or prejudicially affect the present or future rights of any then existing member or pensioner or
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> (iv) would be contrary to the principle embodied in Clause 12 of these presents that the Management Trustees shall consist of an equal number of representatives of the employers and the members respectively."

38. The scheme had been closed to new members with effect from 31 March 1984 and that was stated in clause 23 of the consolidated trust deed.

39. Clause 24 of the consolidated trust deed had been introduced in 1990 as an amendment to the 1948 trust deed and provided:

> "Discretionary benefits
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> (a) Subject to the payment to the Fund by the Employer of such sum or sums, if any, as may be advised by the Actuary to be necessary, the Employer may by notice in writing to the Management Trustees specify that there shall be provided under the Scheme:
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> (i) increased or additional benefits to or in respect of any Member, Pensioner or category of Member or Pensioner; and
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> (ii) benefits on different terms and conditions from usual for or in respect of any Member, Pensioner or category of Member or Pensioner
>
> and the Management Trustees shall thereupon provide the same accordingly.
>
> (b) Subject to the payment to the Fund by the Employer of such sum or sums, as may be advised by the Actuary as the costs of the benefits, the Employer may, with the consent of the Management Trustees, specify that there shall be provided under the Scheme benefits in respect of any employee, or former employee, of the Employer, or category thereof (other

> than Members or Pensioners), and the Management Trustees shall thereupon provide the same accordingly. The Employer shall make the payment to the Fund, as set out above, within four weeks of the commencement of the payment of benefits."

40. The rules of the scheme which are relevant for the purposes of this dispute are those contained in Part VI of the rules, as amended prior to 1 April 2008. Those rules were not changed prior to 25 March 2011, the date of the purported amendment to the rules which is in dispute in this case.

41. The relevant rules in Part VI of the rules are rules 8, 9, 10, 11, 12, 13A, 15, 19, 30 and 34.

42. Rule 8 provided for the payment of what was described as a "Normal pension" and specified the rate of accrual adopted for the calculation of such pension. Rule 9 provided for a Dependant's pension. Rule 10 provided for an Adult survivor's pension. Rule 11 provided for a Dependent Child's allowance. Rule 12 provided for an Ill-health pension. Rule 13 provided for a Deferred pension.

43. Rule 13A applied in certain specified circumstances. In those circumstances, rule 13A permitted the Employer, in its absolute discretion, to give notice in writing to the secretary to the scheme (before 26 March 1986) to request the Management Trustees to pay a specified augmentation element to certain pensioners. Under Rule 13A(d), in such a case the Employer was obliged to pay to the Management Trustees by way of a contribution to the scheme a sum which was the actuarial equivalent of the augmentation element of such a pension. The way in which rule 13A fitted in with rule 34 and clause 24 of the Trust Deed is referred to below.

44. Rule 15 is at the centre of the dispute in this case and it provided:

> "The annual rate of all pensions and allowances payable or prospectively payable under Rules 8, 9, 10, 11, 12, 13 and 34 hereof shall be adjusted as if the rates of increase as specified in the Annual Review Orders issued in accordance with section 59 of the Social Security Pensions Act 1975 were applicable thereto PROVIDED ALWAYS that if the said Act is repealed and not replaced or should it become necessary to review the basis of such annual adjustments steps shall be taken to ensure that the annual adjustments of pensions and allowances continue to be made based upon an appropriate national index or indices reflecting fluctuations in the cost of living PROVIDED FURTHER that without prejudice to compliance with the requirements of section 51 of the Pension Act 1995, any adjustment under the provisions of this Rule shall not apply –
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> (A) during the period of postponement, to pensions postponed under the provisions of Rules 8(a) or 13(c);
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> (B) in respect of the period from the date of cessation of contributions until the date of commencement of payment, to pensions deferred under the provisions of Rules 5(e), 20(e) or (subject to Rule 34(d)) 20(l);

> (C) when the relevant pension or allowance is in payment, to any actuarial increase under Rule 5(e)(iii); nor shall such adjustment apply (subject to section 51 aforesaid) to any crystallisation uplift as described in Rule 5(e)(iv) (or to any part of a pension or allowance attributable to any such actuarial increase or crystallisation uplift), where in any such case an election to this effect has been duly made in accordance with the provisions of paragraph (iv) or (v) of Rule 5(e) as applicable."

45. Rule 19 provided for payment of a Death Benefit.

46. Rule 30 provided that the rules might be amended or added to in accordance with the provisions of the trust deed.

47. Rule 34 permitted the Employer by notice in writing to the Management Trustees (before 15 November 1989) to specify that a member or pensioner, or category of member or pensioner, should be provided with increased or additional benefits, or benefits on different terms and the Management Trustees were required to provide the same accordingly but subject to the payment to the scheme by the Employer of such sums or sums if any as might be advised by the Actuary to be necessary.

48. It can be seen that at various times, rules 13A and 34 and clause 24 of the trust deed provided for the augmentation of benefits under the scheme. These provisions applied at different times. Rule 13A was introduced in 1983. In 1986, it was replaced by rule 34. Rule 34 required a notice to be served by the Employer prior to 15 November 1989. Clause 24 was introduced into the trust deed by an amendment made in 1990.

49. It was agreed that the way in which the various provisions of the scheme work in practice is as follows:

(1) the Normal Retirement Age ("NRA") is 55 for pilots and cabin crew and 60 for general staff;

(2) the accrual rate is $1/52^{nd}$ for pilots and cabin crew and $1/56^{th}$ for general staff;

(3) final salary is calculated as the average of the best two years of pensionable pay in the last five years before retirement;

(4) pension increases in payment in excess of any guaranteed minimum payment are in accordance with the Government's Pensions Increase (Review) Orders, with no cap;

(5) Members' contributions are currently 8.5% of pay for pilots and cabin crew, and 7.25% of pay for general staff;

(6) BA's contributions in respect of future accrual since 1 July 2013 are 34.7% of pay for all categories of staff;

(7) pensionable pay was frozen from 2010 to 2014; since 2014, Members wishing to unfreeze their pensionable pay have been required to accept a salary reduction of 4.5%.

50. It can be seen that the benefits structure under the original 1948 trust deed and rules has been significantly altered over time. In 1948, the scheme was what was described as a building blocks scheme whereas at present it is essentially a final salary defined benefits scheme. I was told that since 1990, BA has made various improvements to members' benefits under Clause 24, which have been funded either out of surplus, or by specific additional contributions made by BA to fund the cost of those improvements, as calculated by the Scheme Actuary. The last such improvement to members' benefits was made for the period 1 April 2009 to 30 June 2009. It appeared to be agreed by the parties at the trial that the other changes which have been effected to the benefits structure have been brought about by amendments made pursuant to the power to amend in clause 18 of the trust deed.

The litigation in Stevens v Bell

51. This scheme has been the subject of an earlier dispute which was considered first by Lloyd J and then by the Court of Appeal. Their judgments are reported as Stevens v Bell at [2001] PLR 99 and [2002] PLR 247 respectively. Those judgments were primarily concerned with the operation of clause 11 of the trust deed at a time when the scheme was in surplus. In 2000, the scheme had a surplus of £820 million, out of assets with a market value of £6.7 billion.

52. In his judgment, Lloyd J commented on the reference to Main Object in clause 2 of the trust deed ([11], [45] and [52] of his judgment) and considered the power to amend conferred by clause 18 of the trust deed ([15], [20], [43], [44], [45], [53] and [69] of his judgment). Lloyd J held, in his answer to the sixth question which he was asked to consider, that the power conferred by clause 11(b) of the trust deed was restricted by the Main Object provision in clause 2. He noted that the power conferred by clause 18 of the trust deed to amend the trust deed and rules did not require the consent of the employer but that the four provisos to clause 18 and the requirement of a super majority represented "a different kind of balance" from a requirement for the employer's consent: see [45] of his judgment. The judge considered in detail the relationship between clauses 11 and 18 but not all of his reasoning was approved by the Court of Appeal. The judge also drew attention to various respects in which the scheme was very favourable to members and pensioners and he commented that, under the original version of the trust deed, the Minister of Civil Aviation represented the Government which was, in effect, the paymaster of the industry: see [22] of his judgment.

53. In Stevens v Bell, the Court of Appeal (Auld, Waller and Arden LJJ) disagreed with some of the conclusions of Lloyd J and agreed with others. For present purposes, it is not necessary to describe the detail of all of the conclusions reached by the Court of Appeal. The leading judgment in the Court of Appeal was given by Arden LJ, with whom the other members of the court agreed. At [8] of her judgment, she commented that the scheme was closed to new members in 1984 because the terms of the scheme were considered to be unsuitable at the time of the privatisation of BA, which took place in 1987, and that the potential liabilities of the employer under the scheme were considered to be too great for private investors. At [26] to [32] of her judgment, she identified six considerations which are to be taken into account by a court asked to interpret the provisions of a pension scheme. Those paragraphs have subsequently been frequently cited and are now well known; I will refer to them again later in this judgment. At [140], Arden LJ commented on the nature of an actuarial surplus

describing the position in that respect as "changeable". Arden LJ considered in detail the relationship between clauses 11 and 18. She held that clause 11(b) created a power to make a scheme so that it was not necessary to look elsewhere in the trust deed for a provision conferring a power to make a scheme. If, however, the particular scheme involved an amendment to the trust deed or rules, then the trustees had to use clause 18 for that purpose. Arden LJ agreed with Lloyd J that a scheme under clause 11(b) could provide for an increase in pension benefits and the provision of new benefits: see the answers to questions 8(1)(b) and (c) in that case. A scheme could not provide for the making of a payment to the employer because that would involve an amendment to the scheme and such an amendment was precluded by proviso (ii) to clause 18.

The management and administration of the APS

54. I will now describe the administrative arrangements in relation to the APS at the time of the various decisions which are in issue in this case. It will also be relevant in this section of the judgment to refer to the existence of a further pension scheme called the New Airways Pension Scheme ("NAPS"). I will describe the position in relation to the NAPS in greater detail later in this judgment.

55. Twelve Management Trustees (referred to simply as "the Trustees") were appointed to "manage and administer" the APS. Six of the Trustees were appointed by BA and were referred to in the APS trust deed as "Employers' Representatives", and six were elected by APS members and were referred to as "Members' Representatives". The equal weighting between the two groups of trustees was entrenched by the proviso in clause 18(iv) of the APS trust deed stating that this requirement for equal weighting could not be amended pursuant to the general power to amend the trust deed.

56. The "Members' Representatives" were elected by two separate constituencies of active and pensioner members. Ordinarily, five Trustees were elected by pensioners and must themselves be pensioners, and one was elected by active members and must be an active member. Where no nominations were received for an active member vacancy the vacancy was opened to pensioner members. Deferred members were not entitled to vote.

57. In these proceedings, the two types of trustee have been referred to as ENTs (Employer Nominated Trustees) and MNTs (Member Nominated Trustees) respectively. The Chair of the trustees was appointed by BA, and at all relevant times was Mr Paul Spencer.

58. When these proceedings were issued on 6 December 2013, BA named as Defendants the 12 trustees who were the then current trustees. In July 2016, Airways Pension Scheme Trustee Ltd was incorporated and this corporate trustee has now replaced the 12 individual trustees and has been substituted as the Defendant in these proceedings.

59. The administration of the APS, subject to the direction of the trustees, was in the charge of the Scheme Secretary and her staff. The Scheme Secretary and other staff were appointed by the trustees. At all relevant times the Scheme Secretary was Ms Teresa Suriyae.

60. The assets of the APS were vested in a Custodian Trustee which acted in accordance with the decisions and directions of the trustees. The Custodian Trustee was British Airways Pension Trustees Ltd ("BAPTL"), formerly known as Airways Corporations Joint Pension Fund Trustees Ltd. The directors of BAPTL were the trustees of the APS and the NAPS, and the Scheme Secretary was the Company Secretary.

61. BAPTL had two wholly owned subsidiaries, British Airways Pension Services Ltd ("BAPSL") and British Airways Pension Investment Management Ltd ("BAPIML").

    (1) BAPSL carried out the administration of the APS. Some of the trustees were directors of BAPSL.

    (2) BAPIML carried out day-to-day investment management within the parameters established by the trustees, and under the direction of its chief executive.

62. The trustees typically met quarterly as the "Main Board", although in the period which is relevant for the present proceedings, they met more frequently. These meetings were generally attended by all trustees, the Scheme Secretary and members of her staff, the Scheme Actuary and the trustees' other professional advisers as required, and the Trustees of the NAPS.

63. The trustees had established three standing committees to give detailed consideration to particular matters before the Main Board took a final decision. These were:

    (1) Operations Committee: responsible for payments of scheme benefits, considering legislative and benefits changes to the scheme, overseeing the implementation of the communication programme and monitoring management and controls;

    (2) Governance & Audit Committee: responsible for reviewing the performance of the scheme's advisors, ensuring compliance with regulatory requirements, risk management and audit;

    (3) Investment Committee: responsible for investment matters, including investment initiatives, strategic asset allocation decisions, reviewing the performance benchmarks, and monitoring of the Statement of Investment Principles.

The APS trustees

64. In this case, it will be necessary to examine the decisions made by the APS trustees on various occasions. The dates of the most relevant decisions are:

    (1) 3 February 2011;

    (2) 25 March 2011;

    (3) 28 February 2013;

    (4) 26 June 2013; and

(5) 19 November 2013.

65. As at 3 February and 25 March 2011, the Trustees were:

(1) Mr Paul Spencer (ENT) (Chair)

(2) Ms Joanna Boswell (ENT)

(3) Mr Alan Buchanan (ENT)

(4) Mr Charlie Maunder (ENT)

(5) Mr Steve Gunning (ENT)

(6) Mr Kieran Graham (ENT)

(7) Capt Clifford Pocock (MNT)

(8) Capt Mike Post (MNT)

(9) Mr Thomas Mitchell (MNT)

(10) Mrs Sandra Sellers (MNT)

(11) Mr Graham Tomlin (MNT)

(12) Mr Stuart Scott (MNT)

66. As at 28 February and 26 June 2013, the Trustees were:

(1) Mr Paul Spencer (ENT) (Chair)

(2) Ms Joanna Boswell (ENT)

(3) Mr Alan Buchanan (ENT)

(4) Mr Charlie Maunder (ENT)

(5) Mr Philip Osmond (ENT)

(6) Mr Peter Simpson (ENT)

(Mr Osmond and Mr Simpson had replaced Mr Gunning and Mr Graham in the period since 25 March 2011)

(7) Capt Clifford Pocock (MNT)

(8) Mr Thomas Mitchell (MNT)

(9) Mrs Sandra Sellers (MNT)

(10) Mr Graham Tomlin (MNT)

(11) Mr Stuart Scott (MNT)

(12) Mr Paul Douglas (MNT)

(Mr Douglas had replaced Capt Post)

67. As at 19 November 2013, the Trustees were:

(1) Mr Paul Spencer (ENT) (Chair)

(2) Ms Joanna Boswell (ENT)

(3) Mr Alan Buchanan (ENT)

(4) Mr Charlie Maunder (ENT)

(5) Mr Philip Osmond (ENT)

(6) Mr Peter Simpson (ENT)

(7) Capt Clifford Pocock (MNT)

(8) Mr Thomas Mitchell (MNT)

(9) Mrs Sandra Sellers (MNT)

(10) Mr Graham Tomlin (MNT)

(11) Mr Paul Douglas (MNT)

(12) Mr Stephen Mallett (MNT)

(Mr Mallett was elected in place of Mr Scott with effect from 1 October 2013)

The NAPS

68. The NAPS was created by a trust deed dated 16 March 1984 and came into operation on 1 April 1984. From that date, new employees of BA joined the NAPS rather than the APS. In addition, 17,007 members of the APS transferred from the APS to the NAPS. The NAPS provided lower benefits at a lower member contribution rate.

69. In March 2003, the NAPS was closed to new members and, since then, new BA employees have not had the option of joining a final salary scheme, but have instead been entitled to join a defined contribution occupational pension scheme, the BA Retirement Plan ("BARP").

70. The NAPS was structured in the same way as the APS, with six ENTs and six MNTs. The supporting structure of the NAPS was essentially the same as the structure of the APS. The Scheme Secretary and her staff, and BAPTL, BAPSL and BAPIML, all work for the NAPS as well as for the APS. Unlike in the APS, the NAPS MNTs were further divided into occupational constituencies. Five NAPS MNTs were elected by active members, with one each from: (i) pilots; (ii) cabin crew; (iii) ground services; (iv) engineering and other groups; and (v) administration and management. The remaining NAPS MNT was elected by pensioners and must be a pensioner member. The NAPS had also established the same standing committees as APS.

71. Although not obliged to do so, it had been the practice of BA to appoint the same individuals as ENTs for both the APS and the NAPS. At the times of the decisions in issue in this case, the APS and the NAPS have consequently had the same six ENTS, including the Chair, but each scheme had six MNTs unique to that scheme.

72. As at 31 March 2012, the NAPS had 67,599 members, of whom 34% were active members, 33% deferred members and 33% pensioners.

73. As at 31 March 2015, the NAPS had 67,040 members, of whom 31% were active members, 33% deferred members and 36% pensioners.

74. In relation to the NAPS:

(1) Substantial benefit reductions were effected in 2007 and again in 2010.

(2) Before 1 April 2007, the NRA was 55 for pilots and cabin crew and 60 for general staff. Since 1 April 2007, the NRA has been 65, 60 or 55 depending on the contribution rate members choose to pay for all staff.

(3) The accrual rate:

(1) Before 1 April 2007 was 1/52nd for pilots and cabin crew and 1/56th for general staff, with member contributions of 5.25% (for general staff) and 6.5% (for pilots and cabin crew);

(2) Between 1 April 2007 and 30 September 2010 was 1/60th, 1/56th or 1/52nd depending on member contributions;

(3) From 1 October 2010 to 30 September 2011 was 1/75th, with a member contribution rate of between 3.75% and 16%, 1/67th if members paid contributions of 6 – 18.25%, or 1/60th if members chose to pay a higher level of contributions between 8.25% and 20%;

(4) Since 1 October 2011 has been 1/60th (with member contributions between 9.75% and 22%), 1/67th (with member contributions between 7.5% and 19.75%) or 1/75th (with member contributions between 5.25% and 17.5%) for all staff.

(4) Final salary is calculated as the average of the best two years of pensionable pay in the last five years before retirement, and a deduction is made of 1.5 times the Lower Earnings Limit i.e. £8,736 in 2016/17 (subject to a cap for certain members) to pensionable pay.

(5) Pension increases in payment are in accordance with the Government's Pensions Increase (Review) Orders, but capped at 5% each year.

(6) BA's contributions in respect of future accrual are between 13.2% and 18.2% of pay depending on occupational category and member's choice of benefit structure plus fixed lump sum contributions in respect of future accrual. The cost of accrual at the 2012 valuation was 23 – 31.8%.

The funding of the APS

75. Both the APS and the NAPS are balance of cost defined benefit schemes under which employees make specified contributions, entitling them to pension and other benefits at given rates, and BA as sponsoring employer is obliged to make the contributions which are necessary to make up the difference in the cost of providing these benefits over and above the employees' contributions.

76. Clause 11 of the trust deed for the APS provided for the scheme actuary to carry out periodic valuations of the assets and liabilities of the scheme. As at the 1989 valuation pursuant to clause 11, the APS had a very substantial surplus. This was applied by the trustees in granting BA a contribution holiday which lasted until 2003, when BA resumed making contributions for future accrual. There was also a valuation for 2003.

77. Part 3 of the Pensions Act 2004 (sections 221 to 233) has the heading "Scheme Funding". These provisions apply to the APS by reason of section 221. Section 222 defines "the statutory funding objective" as a requirement that a scheme must have sufficient and appropriate assets to cover its technical provisions. A scheme's "technical provisions" means the amount required, on an actuarial calculation, to make provision for the scheme's liabilities: section 222(2). By section 222(3), assets and liabilities are to be considered in accordance with prescribed methods and assumptions. The Occupational Pension Schemes (Scheme Funding) Regulations 2005 supplement section 222 and other provisions in Part 3 of the Pensions Act 2004.

78. Under section 223, the trustees of the APS must prepare and keep under review a written statement of funding principles in accordance with the detailed provisions of that section. Under section 224, the trustees of the APS must obtain certain actuarial valuations which value the scheme's assets and calculate its technical provisions.

79. Under section 226, if (following an actuarial valuation) it appears to the trustees that the statutory funding objective is not met on the effective date of the valuation, the trustees must prepare a recovery plan or review a pre-existing recovery plan. A recovery plan must set out the steps to be taken to meet the statutory funding objective.

80. Under section 227, the trustees must prepare and keep under review a schedule of contributions payable on behalf of the employer and the active members of the scheme. The schedule of contributions must be certified by the scheme actuary.

81. Under section 229, the trustees must obtain the agreement of the employer as to: (i) the methods and assumptions used in calculating the technical provisions of the scheme; (ii) any matter to be included in the statement of funding principles; (iii) the provisions of a recovery plan; and (iv) any matter to be included in the schedule of contributions. Under section 230, the trustees must generally obtain the advice of the scheme actuary as to these matters.

82. By section 231, the Pensions Regulator ("tPR") has various powers to act where the trustees have failed to comply with their various obligations under Part 3 of the Pensions Act 2004. In such circumstances, the powers of tPR include a power to give directions as to the manner in which the scheme's technical provisions are to be calculated and as to the period within which, and the manner in which, any failure to meet the statutory funding objective is to be remedied. Further, tPR may impose a schedule of contributions.

83. The provisions of Part 3 of the Pensions Act 2004 are supplemented by the Occupational Pension Schemes (Scheme Funding) Regulations 2005. Reg. 5 deals with the calculation of a scheme's technical provisions. Reg. 5(4) requires the assumptions used in the technical provisions to be prudent in various respects. Reg. 6 deals with the statement of funding principles. Reg. 6(1)(d) provides that such a statement must include a statement as to:

> "whether there are discretionary powers to provide or increase benefits for, or in respect of, all or any of the members and, if there are such powers, the extent to which they are taken into account in the funding of the scheme;"

84. The provisions of Part 3 of the Pensions Act 2004 and the 2005 Regulations are the subject of a detailed Code of Practice, "Funding Defined Benefits", issued by tPR. I was shown the version of the Code dated July 2014. Paragraph 136 of the Code included the following statement:

> "The trustees should apply the following principles when preparing or revising the schedule of contributions:
>
> …
>
> - It should not refer to the contributions covering individual augmentations or general benefit improvements, unless these were planned and due to be paid when the schedule of contributions was certified."

85. Any assessment of the funding requirements of a pension scheme involves an estimate of what the trustees of the scheme will need at the date of assessment to meet, over time, the obligations to pay to members in the future the pension benefits they are entitled to under the scheme. An estimate of this sum necessarily needs to make a number of assumptions as to matters, such as future investment returns, wage or salary growth and longevity.

86. An assessment of the funding position of a scheme on a technical provisions basis is different from an assessment on a best estimate basis or on an insolvency basis.

87. An assessment on a best estimate basis involves making a best estimate of what sum is needed at the date of assessment to meet the liabilities under the scheme. The concept of a "best estimate" involves there being an equal chance that actual experience will be better or worse than the assumption. An assessment on a technical provisions basis involves more prudent or more conservative assumptions than those made on a best estimate basis in that they have a higher than 50% chance of turning out to be achieved or bettered.

88. An assessment on an insolvency basis involves assessing the funds which would be necessary in the event of the employer's insolvency or (a similar scenario) if the trustees wished to purchase annuities from an insurance company to meet the obligations under the scheme. In the latter scenario, the funds necessary are what the insurance company would charge the trustees for such annuities and this sum would

be likely to be assessed by reference to the return on very low risk investments, such as gilts, plus a margin of profit for the insurance company.

89. The statutory provisions as to scheme funding were complied with for the years 2006, 2009 and 2012. The pension increase assumptions in the valuations for 2006 and 2009 were by reference to RPI. The pension increase assumption in the valuation for 2012 will be described later. The deficit on a technical provisions basis appeared in 2009, and BA started making deficit repair contributions.

The funding position of the APS and the NAPS

90. The tables below set out the APS and NAPS funding position at each of the triennial valuations at 31 March 2006, 2009, and 2012. The figures are in £ millions.

The APS funding position

	31 March 2006	**31 March 2009**	**31 March 2012**
Technical Provisions	6,616	6,955	7,995
Assets	6,638	5,925	7,315
Surplus/(Deficit) (Technical Provisions basis)	22	(1,030)	(680)
Surplus/(Deficit) (Solvency basis)	(1,052)	(1,651)	(1,538)
Discount rate per annum	Gilts + 0.5%	Gilts + 0.5%	Gilts + 0.4%

The NAPS funding position

	31 March 2006	**31 March 2009**	**31 March 2012**
Technical Provisions	7,941	8,778	12,275
Assets	5,846	6,096	9,615
Surplus/(Deficit) (Technical Provisions basis)	(2,095)	(2,682)	(2,660)

Surplus/(Deficit) (Solvency basis)	(5,416)	(7,173)	(9,125)
Discount rate per annum	RPI + 2.4%	RPI + 2.5%	RPI + 1.05%
Equivalent discount rate per annum in relation to gilt yields	Gilts + 1.1%	Gilts + 1.5%	Gilts + 1.15%

The 2010 funding agreements

91. As part of the 2009 triennial valuation process (the chief outcomes of which are shown in the tables above):

(1) BA agreed to pay to the APS deficit repair contributions of £76 million per annum from 1 July 2010 to 31 March 2011, then £55 million per annum from 1 April 2011 to 31 March 2023;

(2) BA agreed to pay to the NAPS deficit repair contributions of £11,506,250 per month from April 2009 to June 2010, £13,481,250 in July 2010, £12,000,000 per month from August 2010 to March 2011, and monthly payments thereafter totalling £164 million in 2012, rising each year to £383 million in 2026.

(3) BA agreed to pay the Pension Protection Levies directly for both the APS and the NAPS.

92. BA also entered into funding agreements dated 30 June 2010 with the trustees of both the APS and the NAPS, which included agreeing:

(1) to continue to provide an insolvency guarantee of £230 million for the APS;

(2) to maintain a liquidity position aggregating at least £1.8 billion to strengthen its covenant for both the APS and the NAPS;

(3) to operate a "cash sweep" by which (i) any Free Cash (as defined in the 2010 Funding Agreements) in excess of £1.8 billion up to £150 million and (ii) 50% of any Free Cash thereafter, was to be paid to the trustees of the APS and the NAPS in such proportions as were agreed by them;

(4) to a mechanism of restoring BA's liquidity position in the event that it dropped below £1.7 billion on any consolidated yearly or half-yearly financial statement;

(5) to substantial information sharing with the trustees of the APS and the NAPS;

(6) not to declare any dividends until the completion of the next triennial valuation for the Schemes;

(7) a Share Security Arrangement involving a share pledge of up to £250 million over certain shares held by British Airways Holding BV in respect of what was, at that time, the proposed merger with Iberia: see clause 9.9 of the APS 2010 funding agreement and clause 4.9 of the NAPS 2010 funding agreement.

93. The Share Security Arrangement was structured so that:

(1) If the pledge had not been exercised or released by 1 January 2019, the trustees of both the APS and the NAPS could require by notice to BA that the APS and the NAPS receive an aggregate special contribution on that date of a cash amount equal to £250 million;

(2) The payment of the £250 million was, therefore, contingent on the share pledge not having been exercised or released by 1 January 2019 and on the trustees of both the APS and the NAPS (defined together as the "Joint Trustees" in the 2010 Funding Agreements) giving notice in writing of BA's requirement to make the payment;

(3) Any special contribution that became payable (on receipt of a notice from the joint trustees) to the APS and the NAPS was to be divided as follows:

(1) the contribution was to be made available in the first instance to the APS unless;

(2) if at the likely date of receipt of such a special contribution, the APS was or would become on receipt of such payment Fully Funded on a Gilts Basis (as defined in the 2010 Funding Agreements) then any amount in excess of fully funded was to be passed to the NAPS;

(3) provided that if the NAPS was or would become on receipt of any such payment Fully Funded on a Gilts Basis, then any amount in excess of fully funded would not be payable.

94. Between July 2010 and June 2013, BA paid pursuant to the 2010 funding agreements:

(1) £235.9 million to the APS, being £180.7 million in deficit-reduction contributions and £55.2 million from the "cash sweep" arrangements; and

(2) £663.8 million to the NAPS, being £498.2 million in deficit-reduction contributions and £165.6 million from the "cash sweep" arrangements.

The 2013 funding agreements

95. As part of the 2012 triennial valuation process (the chief outcomes of which are shown in the tables above):

(1) BA agreed to continue to pay to the APS deficit repair contributions of £55 million per annum to 2023;

(2) BA agreed to pay to the NAPS deficit repair contributions of £177 million in 2013, rising each year to £383 million in 2026;

(3) BA agreed to pay the Pension Protection Levies directly for both the APS and the NAPS.

96. The trustees of the APS and the NAPS sought further protections from BA, in addition to those provided by the 2010 funding agreements. Consequently, BA entered into funding agreements dated 28 June 2013 with the trustees of both the APS and the NAPS.

97. The 2013 funding agreements made largely the same provision as the 2010 funding agreements, with the addition of:

    (1) enhanced liquidity protection by raising the requisite Liquidity Position (as defined in the 2013 funding agreements) of BA from £1.8 billion to £2 billion;

    (2) a protection that prevented BA from declaring any dividends except from Free Cash (as defined in the 2013 Funding Agreements) above either the £1.6 billion or £2 billion threshold (as applicable) and unless a sum equal to the cash used to pay the dividend was paid to the schemes;

    (3) enhanced information sharing provisions.

RPI and CPI

98. RPI is the UK's longest-running prices index, dating back to 1956, and it was the UK's headline rate of inflation for many decades. A variant of RPI, RPIX (which excludes mortgage costs) was used as the Government's explicit inflation target between 1992 and 2003. RPI is calculated on a monthly basis and reflects the change in price of a selection of goods and services designed to be representative of the expenditure of UK households, with the basket of goods reviewed on an annual basis.

99. CPI was first published in 1997 and is the current headline rate of inflation in the UK. It has been used as the inflation target set by the Government for the Bank of England since 2003. It was introduced because of an EU requirement to calculate a "Harmonised Index of Consumer Prices", which defines many elements of the methodology that must be used, and RPI did not meet these criteria.

100. RPI is expected to produce a higher measure of inflation over the long term, although its annual rate can be lower than CPI in any given month. There are three main differences between the measures, namely the "formula effect", the allowance for housing costs and the different population base.

101. The Office for Budget Responsibility (OBR) published "Working paper No. 2 – The long-run difference between RPI and CPI inflation" in November 2011, which estimated a range of 1.3% to 1.5% p.a. for the long-term gap between the two measures. Of this, the formula effect was estimated to be in the range of 0.8% to 1.0% p.a. and was therefore expected to be by far the most important factor. An updated forecast was released in March 2015 in the OBR's paper "Economic and fiscal outlook", which reduced the long-term expected gap to 1.0% per annum, but the formula effect was still expected to make up 0.9% p.a. of the difference.

102. The main reason for the formula effect is RPI's use of an arithmetic mean (the Carli formula) which CPI does not use. The ONS has concluded that RPI is not consistent with international best practice due to its use of the Carli formula. RPI lost its status as a National Statistic in March 2013 in part due to its use of the Carli formula.

103. The second most significant factor in the difference between RPI and CPI is that RPI includes owner-occupied housing costs (e.g. mortgage interest payments), whereas CPI does not (estimated to contribute 0.5% to the gap between RPI and CPI in the OBR's November 2011 paper). Based on the English Housing Survey Headline Report 2014-15, 28% of people aged between 55 and 65 own a property that is

mortgaged and this proportion drops to 5% for people over the age of 65. (The comparator figures for younger members are 34% for ages 25 to 34, 53% for ages 35 to 44 and 50% for ages 45 to 54). Therefore, mortgage interest payments are less relevant for most pensioners when compared with the general population.

104. Thirdly, RPI excludes some members of the population that CPI includes, in particular, the top 4% of households by income, pensioner households who derive more than 75% of their income from state benefits and certain institutional households. The OBR did not expect this to be a particularly significant contributor to the long-term differential.

The operation of rule 15, before amendment

105. Rule 15 of the APS provided that the annual rate of pensions under the APS was to be adjusted in accordance with Annual Review Orders issued in accordance with section 59 of the Social Security Pensions Act 1975. I will summarise the legislative background to this provision.

106. Public service pensions may be increased in accordance with rules established under the Pensions (Increase) Act 1971. That Act creates a link between public service pensions and certain state benefits. The effect is that when benefits are increased to take account of the rise in prices the same rate is used to increase public service pensions. The first step is for the Secretary of State for Work and Pensions to review the general level of prices under section 150(1) of the Social Security Administration Act 1992 and, following such review, he may make an order under that section up-rating certain social security benefits by a specified percentage. Where such an up-rating order is made, section 59(1) of the Social Security Pensions Act 1975 requires the Treasury to make an order applying the same percentage to what are described as official state pensions as defined in the Pensions (Increase) Act 1971.

107. On 22 June 2010, the Chancellor of the Exchequer announced in the Government's Emergency Budget Statement that public sector pensions and certain other state benefits would be increased by reference to CPI rather than RPI under Pensions Increase (Review) Orders from April 2011. The matter was described as follows in a judgment of the Court of Appeal in a subsequent judicial review challenge to later steps which gave effect to this announcement, R (FDA) v Work and Pensions Secretary [2013] 1 WLR 444:

> "26 In his budget statement of 22 June 2010, the Chancellor announced that CPI would be used as the basis for the annual indexation of benefits, tax credits and public service pensions from April 2011, in these terms:
>
> "So from next year, with the exception of the state pension and pension credit, we will switch to a system where we up-rate benefits, tax credits, and public service pensions in line with consumer prices rather than retail prices. [CPI] not only reflects everyday prices better, but it is of course now the inflation measure targeted by the Bank of England. This will save over £6 billion a year by the end of the Parliament. I believe that this is a fairer approach than a benefits freeze."

> 27 "Budget 2010", a document printed by order of the House of Commons on 22 June 2010, stated at para 1.106 that "the Government will use the CPI for the price indexation of benefits and tax credits from April 2011". The document then described CPI as "a more appropriate measure of benefit and pension recipients' inflation experiences than RPI", on the ground that CPI "excludes the majority of housing costs faced by homeowners ..., and differences in calculation mean it may be considered a better representation of the way in which consumers change their consumption patterns in response to price changes."
>
> It then stated that "This change will also apply to public service
>
> pensions ... " ”

108. On 8 July 2010, the Minister of State for Pensions announced that the Government intended to use CPI instead of RPI for determining the percentage increase in the general level of prices when preparing the annual Revaluation Order required under paragraph 2(1) of schedule 3 to the Pension Schemes Act 1993 in relation to pension increases under private sector defined benefit pension schemes. This change in practice was reflected in the first such order made on 30 November 2010, taking effect on 1 January 2011.

109. The Pensions Increase (Review) Order 2011 up-rated the relevant pensions by 3.1%. This increase was based on CPI rather than RPI and took effect from 11 April 2011.

The challenged decisions

110. I will now summarise the decisions which are the subject of a challenge by BA and I will refer to other decisions that are not challenged by it.

111. On 3 February 2011, the trustees of the APS resolved, as recorded in the minutes of their meeting on that day:

> “The Main Board then unanimously (12 votes cast in favour) agreed, subject to consultation with the Company, to insert a power in the Rules to permit discretionary pension increases on top of those granted by the Annual Review Orders, on a two-thirds majority basis, and that the use of the power would be reviewed on at least an annual basis and take account of relevant professional advice.”

112. The decision taken on 3 February 2011 was confirmed by a further decision taken by the trustees on 1 March 2011. On that occasion, there were 10 trustees present and one absent trustee had appointed an alternate. The decision to confirm the decision taken on 3 February 2011 was supported by 10 votes with one trustee abstaining.

113. On 25 March 2011, the trustees approved a draft supplemental deed which had been prepared to amend rule 15 by introducing a power for the trustees to grant a

discretionary increase in pensions. The trustees' decision was recorded in the minutes of their meeting, as follows:

> "The Main Board noted that the Operations Committee had reviewed the draft Supplemental Deed required to introduce the discretionary pension increase rule amendment and recommended that it be approved by the Main Board. The Main Board approved the Supplemental Deed and appointed Mr Scott and Captain Maunder to sign it on behalf of the Trustees."

114. On 25 March 2011, the Supplemental Deed was executed in accordance with the draft approved by the trustees. Rule 15 was thereby amended, with effect from 31 March 2011, to include the following wording:

> "PROVIDED FURTHER THAT the Management Trustees may at their discretion, and shall in any event at least once in any one year period, review the annual rate of pension payable or prospectively payable under Rules 8, 9, 10, 11, 12, 13 and 34 and shall have the power, following such a review, by resolution to apply discretionary increases in addition to those set out in this Rule, subject to taking such professional advice as appropriate. This discretion cannot be exercised unless at least two thirds of the Management Trustees for the time being vote in favour of the resolution."

115. BA contends that the Supplemental Deed, and the trustees' decisions which related to it, were of no effect. (I was told that by a deed of amendment dated 23 August 2012, it was provided that the amendment to rule 15 in Part VI should also apply to those increases in Parts I to V that were normally subject to increases in accordance with the Pensions Increase (Review) Orders, but no separate point was raised in relation to the 2012 deed.)

116. Also on 25 March 2011, the trustees voted on whether to exercise the discretionary power with effect from April 2011. Six trustees, the MNTs, voted in favour of such an exercise and six trustees, the ENTs, voted against such an exercise. As the exercise of the discretionary power required two-thirds of the trustees, i.e. eight trustees, to exercise the power, the discretionary power was not exercised at that point.

117. On 29 February 2012, there was a secret ballot of the trustees in relation to a proposal to exercise the discretionary power to award an increase of 0.2% with effect from April 2012. The minutes recorded that insufficient votes were cast in favour of the proposal for a discretionary increase to be awarded. The actual vote was 7 in favour and 5 against.

118. On 28 February 2013, the trustees agreed in principle to exercise the discretionary power to award an increase of 0.2%. Their decision was recorded in the minutes of their meeting as follows:

> "After discussion the Trustees present, being ten of the twelve currently in office, agreed unanimously that a discretionary increase of 50% (subject to decisions on treatment of specific groups of members) of the difference between RPI and CPI as

> at 30 September 2012 (RPI being 2.6% and CPI 2.2%) would be appropriate. The additional increase of 0.2% would be paid after completion of the valuation, with the amount of the increase to be reviewed before the increase was finalised but with at least two thirds of the Trustees then in office being required to vote in favour of any change to the amount to be paid. It was further agreed that:
>
> • no announcement of the decision to award a discretionary increase would be made until the valuation had been finalised
>
> • in the event that the valuation is not finalised by the end of June, the Trustees would consider whether to proceed with a discretionary increase without the valuation being finalised with at least two thirds of the Trustees then in office being required to vote in favour for an increase to be paid in those circumstances
>
> • the payment date to be finalised once the valuation had been finalised taking into account that BA Pensions would require a minimum of six weeks to implement the increase".

119. On 26 June 2013, the trustees agreed that "the amount of the discretionary increase should remain at 0.2%". There is an issue, which I will later resolve, as to whether the trustees agreed upon an effective date for this increase.

120. On 19 November 2013, the trustees voted to exercise the discretionary power to grant an increase of 0.2% with effect from 1 December 2013. The Minutes of that meeting recorded the following:

> "The Trustees agreed to vote on the exercise of the discretionary increase power under Rule 15 having noted the professional advice contained within the meeting papers and provided at the meeting and taken due consideration of the representations made by BA, tPR and the NAPS Trustees. Mr Spencer reminded the Trustees that a two-thirds majority was required to exercise the discretionary increase power.
>
> The Trustees' votes were as follows:
>
> - Trustees were asked to vote on whether a discretionary increase should be granted this year and there were 9 votes FOR and 3 votes AGAINST. The vote was carried.
>
> - Trustees were asked to vote for granting at least a 0.10% increase and there were 9 votes FOR and 3 votes AGAINST. The vote was carried.
>
> - Trustees were asked to vote for granting at least a 0.20% increase and there were 7 votes FOR and 5 votes

> AGAINST. The vote was not carried by the requisite majority.
>
> - Trustees were asked to vote for granting a 0.15% increase and there were 8 votes FOR and 4 votes AGAINST. The vote was carried.
>
> There followed a discussion around whether the 0.15% should be rounded to be consistent with the single decimal place used in the Orders. Mr Pardoe indicated that, in his view, this would remain a reasonable approach.
>
> …
>
> Mr Spencer noted there was an estimated £3m cost difference over the lifetime of the scheme between granting a 0.15% or a 0.20% increase.
>
> At the conclusion of the discussion it was agreed to hold a further vote on whether to grant a 0.20% discretionary increase. There were 8 votes FOR and 4 votes AGAINST and the vote was carried.
>
> …
>
> Following a discussion, it was agreed that the award would be granted effective from 1 December 2013, but implementation would be delayed if BA committed to initiate Court proceedings. Payment would then be implemented retrospectively from 1 December 2013 if the decision is upheld."

121. BA challenges the decisions of 28 February 2013, 26 June 2013 and 19 November 2013 and, in particular, the last two of those decisions.

BA's pleaded case

122. On 6 December 2013, BA issued its claim form in these proceedings. The Defendants were the then current trustees who were the same persons who had made the challenged decision on 19 November 2013. The proceedings were later amended to change the names of the Defendants to a later group of twelve trustees who were the current trustees at the date of the amendment. Later still, the twelve trustees were replaced by a corporate body, Airways Pension Scheme Trustee Limited and, in the course of the trial, I permitted a further amendment to substitute this corporate body as Defendant.

123. By its Claim Form, BA sought the following relief:

> (1) a declaration that the introduction of the discretionary power to grant the Pension Increases contained in rule 15 of the APS rules was invalid on the basis that it was outside the scope of the amendment power contained in Clause 18 of

the APS trust deed and/or involved the exercise of that amendment power for an improper purpose;

(2) a declaration as to whether, as a matter of fact, a decision was taken by the Defendants to grant Pension Increases in respect of the members of APS in or around February 2013 or alternatively at a meeting on 26 June 2013 (together the "Earlier Decisions") and, if so, what was decided;

(3) a declaration that the Earlier Decisions and/or the decision taken on 19 November 2013 to grant the Pension Increases are invalid on the basis that:

(a) the exercise of the alleged power to grant the Pension Increases under rule 15 of the APS rules was for an improper purpose;

(b) in taking the decision or decisions to grant the Pension Increases the Defendants took into account irrelevant factors and/or failed to take into account factors that were relevant to that decision or those decisions;

(c) the exercise of the alleged power to grant the Pension Increases under rule 15 of the APS rules did not involve the Defendants exercising their discretion properly or at all; and/or

(d) the decision or decisions to grant the Pension Increases was, in all the circumstances, including the substantial deficit of APS, a perverse and irrational one;

(4) consequential or further directions as to the appropriate administration of the APS as a result of the conclusions of the court in respect of the matters set out above.

124. It can be seen that the Claim Form put forward two grounds of challenge to the exercise of the power to amend conferred by clause 18 of the trust deed. The two grounds were: (i) the amendment made to rule 15 was outside the scope of the power to amend; and/or (ii) the amendment made to rule 15 was an abuse of that power. The Claim Form challenged the decisions taken by the trustees in February and June 2013 on the ground that they were not, on the facts, decisions to exercise the discretionary power purportedly conferred by the amended rule 15. In addition, the Claim Form put forward four grounds of challenge to the decisions in 2013 to award a discretionary increase. The four grounds were: (i) abuse of the power conferred by the amended rule 15; (ii) breach of the duty to have regard to all relevant and no irrelevant factors; (iii) the trustees' actions did not involve them in a genuine exercise of discretion; and/or (iv) the decisions were perverse and irrational.

125. Before the trial, BA had served a lengthy Amended Points of Claim running to 104 pages. That pleading is not altogether easy to summarise. It begins by stating, unconventionally, that the background facts are set out in a witness statement; this was the witness statement of Mr Swift of BA, extending to 67 pages. The Amended Points of Claim continue with a long section setting out in narrative form many events between 2010 and 2013. This is followed by a statement of BA's grounds of challenge to what are described as "Four Decisions". The Four Decisions are, first, the decision to amend rule 15 followed by the three decisions in February, June and

November 2013 to award a discretionary increase of 0.2%. It is not always clear in what follows in the pleading whether a particular ground of challenge is being put forward in relation to all of the Four Decisions or only the three decisions in 2013. On a fair reading of the Amended Points of Claim, it seems to me that the following grounds of challenge are put forward.

126. As to the decision to exercise the clause 18 power by amending rule 15, it is clearly contended that that decision was an abuse of the clause 18 power. Although this is not altogether clear, Mr Rowley QC for the trustees accepted that the decision to amend rule 15 was also challenged on the ground that the decision had been "predetermined", which seems to be an allegation that the trustees did not genuinely consider how to exercise the clause 18 power of amendment.

127. As to the decisions in 2013 to award a 0.2% increase, they are challenged on the grounds: (i) abuse of the power conferred by the amended rule 15; (ii) breach of the duty to have regard to all relevant and no irrelevant factors; (iii) the trustees' actions did not involve them in a genuine exercise of discretion; and/or (iv) the decisions were perverse and irrational.

BA's application for permission to amend

128. At the trial, both sides opened their cases in detail and I heard from a series of witnesses. I then heard closing submissions in the order: closing submissions for BA, closing submissions for the trustees and a reply from BA. In the course of BA's reply, in the light of certain submissions made by Mr Rowley QC on behalf of the trustees, Mr Tennet QC on behalf of BA applied for permission to re-amend the Points of Claim. The draft re-amendments fell into five categories, as follows: (i) a contention that the exercise of the clause 18 power to amend was for an additional improper purpose, namely, to advance the best financial interests of members; (ii) a contention that the exercise of the clause 18 power to amend was ultra vires as it was for a purpose not permitted by clause 2 of the trust deed; (iii) a contention that the exercise of the clause 18 power to amend was ultra vires as it was contrary to proviso (i) of clause 18; (iv) a contention that the exercise of the discretionary power purportedly conferred by rule 15 was ultra vires as it was for a purpose not permitted by clause 2 of the trust deed; and (v) a contention that the exercise of the clause 18 power to amend was a breach of the duty to have regard to all relevant and no irrelevant factors.

129. In support of BA's application for permission to amend, Mr Tennet took me through the Amended Points of Claim and the draft re-amendments. Mr Rowley opposed BA's application. He referred to the relevant principles as to the grant of permission to amend as summarised in notes 17.3.5 to 17.3.8 of the 2016 White Book. I also considered the judgments of the Court of Appeal in Swain-Mason v Mills & Reeve LLP (Practice Note) [2011] 1 WLR 2735 and of Carr J in Quah Su-Ling v Goldman Sachs International [2015] EWHC 759 (Comm). In the latter case, the judge summarised a number of authorities (including Mitchell v News Group Newspapers [2014] 1 WLR 795) in these terms, at [38]:

> "38 Drawing these authorities together, the relevant principles can be stated simply as follows:

a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;

b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;

c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;

d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;

e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;

f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;

g) a much stricter view is taken nowadays of non-compliance with the CPR and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so."

130. At the hearing, I announced my decision that I would not grant permission to BA to amend its Points of Claim to put forward the contentions referred to at (i) and (v) in paragraph 128 above. I stated that I would give my reasons for that decision in this judgment. My reasons are:

(1) These draft amendments involved new contentions which had not been put forward earlier, alternatively, had not been clearly put forward earlier;

(2) These draft amendments involved matters of alleged fact as to the subjective purpose for which the power to amend was exercised and as to the decision-making process in relation to the exercise of the power to amend;

(3) Although some of the matters of fact which would be relevant for the purpose of the new contentions had already been pleaded, it was not obvious that all of the matters of fact which would be relevant for that purpose had already been pleaded;

(4) The trustees were entitled to proceed on the basis, when they considered what evidence to call, and in particular, which trustees to call, that the contentions which are now the subject of the draft amendments would not need to be examined;

(5) It would be unfair to the trustees for the court to permit these draft amendments and to make findings in relation to them when all of the facts which might be relevant to the new contentions had not necessarily been the subject of investigation at the trial;

(6) Based on the above considerations, the case for refusing permission to amend in relation to (v) was clear;

(7) Based on the above considerations, the case for refusing permission to amend in relation to (i) was less clear but was still strong enough to justify a refusal of permission;

(8) The application to amend was made very late;

(9) BA had not provided any explanation for the lateness of the application for permission to amend apart from the bad reason that it had not originally thought of putting its case in accordance with the new contentions but now wished to do so.

131. As regards the new contentions in (ii), (iii) and (iv), I indicated at the trial a provisional view that I should grant BA permission to make these amendments. However, Mr Rowley submitted, in reliance on what was said by Carr J in Quah Su-Ling at [38](f), that it was not open to me to grant such permission in a case, like the present, where BA had not provided a good explanation for the delay in seeking to amend its claim in these respects. I wished to consider that submission overnight. Having done so, I informed the parties of my decision to permit these amendments and stated that I would give my reasons in this judgment.

132. The amendments in (ii), (iii) and (iv) raise arguable points. They relate to the purposes of the APS and refer to two express terms of the APS, namely, clause 2 and proviso (i) to clause 18. Those provisions were referred to in argument and in discussion at various stages of the trial. Throughout this claim, BA has asserted that the exercise of the clause 18 power and the discretionary increase power pursuant to the purported amendment of rule 15 were for an improper purpose. In order for me to consider that submission as to improper purpose, it is inescapable that I will have to consider the express terms of the APS. The arguments as to the scope of these two powers overlap significantly with BA's contentions as to the purpose of these two powers. It would be wholly artificial for me to consider the express terms of clause 2 and proviso (i) to clause 18 in order to address the argument as to improper purpose without also considering the scope of the clause 18 power and the scope of the power conferred by the amended rule 15. The points which are intended to be raised pursuant to the amendments in (ii), (iii) and (iv) are matters of legal analysis which it is appropriate for the court to consider. These new contentions do not raise matters of fact in addition to those which it is appropriate to consider when addressing the contentions already pleaded. I put the matter that way because the existing contentions, even without the draft amendments, gave rise to a request by the trustees to be allowed to carry out some research, and possibly put forward further evidence, as to the purposes of the APS. The research was intended to relate to the statement in clause 2 of the APS that the scheme was "not in any sense a benevolent scheme" and the reason why clause 2 was included in the trust deed. That research is potentially relevant to the new contentions but I consider that it would also be potentially relevant even if I refused permission to amend to put forward these new contentions.

133. I do not accept Mr Rowley's submission that I am disabled from granting permission to make these particular draft amendments because BA did not provide a good explanation for the delay. I do not consider that the relevant legal principles make the provision of a good explanation an absolute pre-condition to the court's exercise of its discretion to grant permission to amend. The presence or absence of a good explanation will normally be a factor which is to be taken into account and the absence of a good explanation for a late application will often be a very weighty factor against the grant of permission. However, the absence of a good explanation for a late application does not amount to a complete barrier to the grant of permission to amend in a case where the court is persuaded that it is otherwise fair and just to permit the amendment.

134. In Quah Su-Ling, the judge referred to Mitchell v News Group Newspapers and that citation was the obvious source of the statement she made at [38](g). However, it is also relevant to refer to the decision of the Court of Appeal in Chartwell Estate Agents Ltd v Fergies Properties SA [2014] 3 Costs LR 588, which was approved in Denton v T H White Ltd [2014] 1 WLR 3926. It is clear from Chartwell that, even where the default is non-trivial and there is no good reason for the default, the court retains a real discretion to relieve from a sanction. This also appears from the more recent decision on the subject of relief from sanctions, British Gas Trading Ltd v Oak Cash & Carry Ltd (Practice Note) [2016] 1 WLR 4530 at [30].

135. Standing back, I consider that it is appropriate to permit the draft amendments in (ii), (iii) and (iv) and that it is not unfair to the trustees to grant such permission.

The issues

136. For the purpose of deciding on the outcome of this litigation, I do not need to resolve every difference between the parties which was investigated at the trial. Some of the matters investigated in detail at the trial were not pursued in closing submissions and other issues do not arise in view of the conclusions which I have reached. I find that the issues which I do need to resolve are the following:

(1) What was the scope of the power to amend conferred by clause 18 of the trust deed?

(2) Was the amendment to rule 15 beyond the scope of the power to amend?

(3) What was the purpose of the power to amend conferred by clause 18 of the trust deed?

(4) Was the amendment to rule 15 made for an impermissible purpose?

(5) Were there flaws in the process leading to the decision to amend rule 15?

(6) What was the scope of the power conferred by the amended rule 15?

(7) What was the purpose of the power conferred by the amended rule 15?

(8) Did the trustees of the APS determine an effective date in respect of the decision made on 26 June 2013 to award a discretionary increase of 0.2% and, if not, what is the consequence?

(9) Was the decision on 19 November 2013 beyond the scope of the power conferred by the amended rule 15?

(10) Was the decision on 19 November 2013 made for a purpose not permitted by the power conferred by the amended rule 15?

(11) Did some of the trustees fail, on 19 November 2013, to give any active or genuine consideration to the exercise of the power conferred by the amended rule 15?

(12) Had some of the trustees fettered their discretion in relation to the power conferred by the amended rule 15 so that there was no proper exercise of that discretion on 19 November 2013?

(13) Did the trustees, on 19 November 2013, fail to have regard to all relevant and no irrelevant considerations so that their decision was flawed?

(14) As a result of the answers to the above questions, did the trustees make an effective decision on 19 November 2013 to award a discretionary increase of 0.2% with effect from 1 December 2013?

The evidence as to fact

137. I was provided with voluminous documents (mostly electronically) in this case. Both sides opened their cases on the facts at length. I heard from two witnesses on behalf of BA and I heard from the trustees' various professional advisers and from some, but

not all, of the relevant trustees. In particular, not all of the MNTs, whose decision-making and states of mind were criticised, were called to give evidence.

138. The decision-making process in this case appeared from the documents to be very elaborate. There were many, many meetings of the trustee board and of various committees and working parties over the period from June 2010 to November 2013. The trustees' secretariat and professional advisers prepared voluminous reports and provided a considerable quantity of information for many of these meetings. Many of the relevant meetings lasted for some hours each and most of the relevant meetings were minuted.

139. In another case where there is a challenge to decision-making by trustees, it might be appropriate for the court simply to have regard to the information which was provided to the trustees and any record of the reasons for their decision. It might be appropriate in such a case to supplement the documentary material with oral evidence from the trustees as to their state of mind and their reasoning. The difficulty about confining myself to that material in this case is that BA's case is that the trustees who decided in 2011 to amend rule 15, and who went on in 2013 to decide to award a discretionary increase of 0.2%, did not genuinely consider the exercise of their discretionary power to amend the rules or their discretionary power to award an increase (pursuant to rule 15 as amended) because they had from the outset in 2010 pre-determined the result of all such decision-making. BA's case was that this pre-determination was revealed if one examined statements made by the MNTs, in particular, all the way through from 2010 to November 2013. In order to consider BA's case on pre-determination, I will have to consider the evidence as to such statements by the MNTs although it may not be necessary for me to set out the terms of all of the statements relied upon by BA; it may be possible to express myself more succinctly as to what the statements, taken together, amount to.

140. I heard submissions as to the approach I should adopt in relation to the fact that I did not receive evidence from every trustee who voted in favour of a decision which is now the subject of a challenge. In particular, in relation to the final decision made on 19 November 2013, the eight trustees who voted in favour of a discretionary increase of 0.2% were the six MNTs (Captain Pocock, Mr Mitchell, Mrs Sellers, Mr Tomlin, Mr Douglas and Mr Mallett) and two ENTs (Mr Spencer and Mr Buchanan) but I did not hear evidence from Captain Pocock, Mr Mitchell, Mrs Sellers or Mr Tomlin. Captain Pocock died on 27 December 2014, after the commencement of proceedings but long before the trial. It was submitted that I should draw adverse inferences when making findings of fact, in particular, in relation to the state of mind of these trustees (other than Captain Pocock) who were not called by the Defendant to give evidence if there was no good reason for them not being called to give evidence. In discussing this submission as to the drawing of adverse inferences, I will concentrate on the absent witnesses in relation to the decision made on 19 November 2013.

141. The consideration which a court should give to the fact that a potentially relevant witness has not been called is well established. I can take the principles from the judgment of Brooke LJ in Wisniewski v Central Manchester Health Authority [1998] PIQR P324 at P340 where, having reviewed the authorities, he said:

> "From this line of authority I derive the following principles in the context of the present case:

> (1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

142. This statement of principle is in accordance with the earlier decisions of the House of Lords in R v IRC ex p. T C Coombs & Co [1991] 2 AC 283 and Murray v DPP [1994] 1 WLR 1 and the comments of Lord Sumption in the Supreme Court in Prest v Prest [2013] 2 AC 415 at [44].

143. These principles mean that before I draw an inference and made a finding of fact adverse to a witness who was not called, I need to ask myself:

(1) is there some evidence, however weak, to support the suggested inference or finding on the matter in issue?

(2) has the Defendant given a reason for the witness's absence from the hearing?

(3) if a reason for the absence is given but it is not wholly satisfactory, is that reason "some credible explanation" so that the potentially detrimental effect of the absence of the witness is reduced or nullified?

(4) am I willing to draw an adverse inference in relation to the absent witness?

(5) what inference should I draw?

144. At this point, I will make some comments on the question whether I was given a good reason, or even a credible explanation, as to why the Defendant did not tender evidence from Captain Pocock, Mr Mitchell, Mrs Sellers and Mr Tomlin. There is no dispute in relation to Captain Pocock. He died on 27 December 2014 and, although he was named as a defendant when these proceedings were issued on 6 December 2013, it was not suggested that the trustees were at fault in not obtaining a witness statement from him before his death. As regards Mr Mitchell, Mrs Sellers and Mr Tomlin, in relation in particular to the decision on 19 November 2013, the trustees submitted:

(1) a sense of proportion was required; it would have been disproportionate to have called all the trustees who were parties to the 2011 and 2013 decisions as well as the professional advisers;

(2) the court has the voluminous contemporaneous documents to rely upon;

(3) in relation to the 2013 decisions, BA's primary case was about the actuarial advice;

(4) the witnesses called in relation to the 2013 decision have provided the court with a full picture;

(5) in 2013, Captain Pocock and Mr Douglas were the leaders of the MNT side of the trustees; as Captain Pocock had died in 2014, the trustees called Mr Douglas; whether Mr Douglas was guilty of predetermination is a strong indicator of the position of the other MNTs;

(6) a number of the witnesses had little independent recall of questions of detail apart from what is set out in the documents;

(7) there was little if anything calling for an explanation as all the trustees shared an aspiration to return to RPI and the professional advice was supportive of an increase of the sort that the trustees decided to grant.

145. I will not comment on all of these submissions at this stage as a comment at this stage might lead me into matters of fact with which I have not yet dealt. However, I will comment that I was not impressed with the suggested reasons or explanations for the trustees' decision not to call Mr Tomlin, Mrs Sellers and Mr Mitchell who were parties to the decision made on 19 November 2013. It was plain from BA's pleaded case that BA was challenging the approach taken by these three trustees to their decisions, including the decision on 19 November 2013. I can see that the trustees should adopt a proportionate approach to the preparation of evidence and I can also see that BA's challenges, which were presented on a very wide front, might have made it difficult for the trustees to adopt a proportionate response. Nonetheless, I would have expected those three trustees to be called and to be available for cross-examination as to their state of mind and the reasons for their decisions.

146. Conversely, even if I eventually conclude that I have not been given a good reason or a credible explanation for the trustees not calling these three witnesses, it does not follow that I will automatically draw the inference that whatever is pleaded against those three trustees must be correct. In deciding what inferences to draw, I need to take into account not only the fact that these three trustees were not called, when they could have been, but also other matters such as what I consider to be the most probable finding to make on the basis of all the evidence which I have received.

147. I will now set out my findings of fact. I will confine myself to matters which I consider to be relevant to the issues which I will need to address. I will not record all of the rival submissions as to what those findings should be but when I make my findings I will seek to make a finding which identifies the way in which I have dealt with a matter which was contentious in that respect.

From June 2010 to March 2011

148. Until 2010, increases under the PIROs, and hence under the APS, were invariably by reference to the RPI, and the APS was funded on this basis. The Emergency Budget Statement on 22 June 2010, in relation to the change from RPI to CPI, came out of the blue. Neither BA nor the trustees, nor indeed the members or pensioners, had expected it. In and after June 2010, the general expectation was that the rate of increase pursuant to CPI would be appreciably lower than the rate of increase under RPI.

149. On 30 June 2010, 7 days after the Emergency Budget, the trustees and BA signed off the funding documents relating to the triennial valuation of the APS as at 31 March 2009, which under the Pensions Act 2004 had to be completed within 15 months of the effective date. In relation to these documents:

(1) pension increases were assumed to be RPI (that being the basis of the PIRO at the time) and so the funding of the APS was calculated on this basis;

(2) during the negotiating process, BA had told the trustees on 2 November 2009 that it had commissioned specialist covenant advice from Goldman Sachs, who had concluded that "*BA's long term covenant is strong*", and BA had said that the technical provisions should be based on that covenant;

(3) the trustees' own covenant advice at this time was that the understandable short term liquidity issues that BA had faced in the early part of 2009 following the global financial crisis were being dealt with;

(4) the estimate of the funding position on a technical provisions basis had dropped from 100.3% as at 31 March 2006 to 85.2% as at 31 March 2009;

(5) a recovery plan providing for the deficit to be redressed by periodic contributions over the period to 31 March 2023, with 50% of the contributions to be made by 30 September 2016, was signed off by BA and the trustees on 30 June 2010, the trustees having first taken advice from the scheme actuary, Mr Pardoe of Towers Watson.

150. In a report prepared on 9 August 2010, Towers Watson advised the trustees that a change from RPI to CPI would have a significant effect on any assessment of the funding position of APS as at 31 March 2010. On a technical provisions basis, the reduction in the cost of providing benefits would be some £360 million so that the funding level would rise from 92% to 97%. On a gilts basis, the reduction in the cost of providing benefits would be £398 million so that the funding level would rise from 86% to 91%.

151. On 10 August 2010, Mr Arter (who was then the Head of Pensions at Eversheds LLP, the solicitors to the trustees) prepared a detailed report in advance of a meeting of the Operations Committee of the trustees, advising as to the various consequences of the proposed change from RPI to CPI. That report contained the following executive summary:

> "1. Executive summary

1.1 The Government has announced that CPI will replace RPI as the measure for increasing pensions in payment and deferred pensions. This will apply to both public and private sector pensions.

1.2 Increases under APS and NAPS are directly linked to the pensions increase order for public sector pensions. The Government intends to issue the 2011 order on the CPI basis. The CPI measure will therefore automatically apply to the APS and NAPS increase rules.

1.3 A change from RPI to CPI is likely to improve the funding of APS and NAPS. As a result, the security of members' benefits will also be improved. However, the change to CPI may also have an adverse effect on members' benefits in the longer term.

1.4 The Trustees of APS have two powers under their rules to retain RPI. These are the clause 18 amendment power (a unilateral Trustee power) and the rule 15 proviso which enables the Trustees to review the increases if necessary and to adopt another appropriate index. The Trustees of NAPS do not have such powers.

1.5 It is appropriate for the APS Trustees to consider whether or not they should exercise their powers to retain RPI. However, in so doing, they should take into account factors which are relevant both in relation to the scheme and the employer before arriving at a decision. These factors are set out in detail in 5.6 of this note.

1.6 In relation to APS, our recommendation is that the Trustees take no action at the present time. This is because, in our view, the significant improvement in the funding level will strengthen the security of members' benefits and security is a key consideration for the Trustees given the BA covenant. The Trustees should, however, review the position at each triennial valuation. If there is a significant improvement in the funding levels and security of members' benefits, they can reconsider reverting to RPI at that stage.

1.7 In relation to NAPS, given the size of the scheme deficit our recommendation is that the Trustees take no further action. The only way to retain RPI would be to obtain BA's consent to amend the rules; this is unlikely to be given.

1.8 It is possible that certain APS and NAPS pensioners might have received in the past non-standard letters stating that their pensions will increase in line with changes within the RPI. Whether this would constitute a benefit promise which the Trustees would be obliged to provide will depend on the

> precise wording of the letter. Only in the unlikely event where promises have been made in relation to future increases, would such increases need to be honoured.
>
> 1.9 The review of APS and NAPS actuarial factors should be based on CPI as the Government has stated the 2011 pension increase order for public sector pensions will be based on CPI. The factors could be revisited if the position changes."

152. In paragraph 5.3 of his report, Mr Arter advised that the trustees had power under clause 18 of the trust deed to amend the rules to provide for increases in accordance with RPI. However, he went on to advise that in view of the proviso to clause 18, which referred to an amendment not prejudicially affecting the rights of members, he recommended that any amendment should include what he called "a CPI underpin" to provide for the possibility that in a particular year an increase by reference to CPI pursuant to a PIRO would be greater than an increase by reference to RPI. The CPI underpin would result in the increase being whichever was the higher of RPI or CPI in any particular year. Mr Arter also referred to section 67 of the Pensions Act 1995 in this respect.

153. In paragraph 5.6 of his report, Mr Arter discussed the factors relevant to a consideration as to whether the trustees should use their powers to provide for pension increases in accordance with RPI. He advised:

> "5.6 **Factors relevant to the APS Trustees in considering whether RPI should be retained:** The APS Trustees have the ability to retain RPI under both the amendment power and the clause 15 proviso, without having to obtain consent from BA. However, in deciding how to exercise their powers the Trustees should carefully consider the factors which are relevant to the issue before arriving at a decision. These factors include issues relevant to the scheme and the employer. The following factors are the main ones which we consider to be relevant:
>
> 5.6.1 The Trustees have a number of duties under both trust law and legislation. The Trustees' general trust law duties are fiduciary in nature which means that their duties should be carried out in the best financial interests of the members. A key element of their overriding fiduciary duty is to look after the security of members' benefits. Taking into account the potential long term adverse effect which the change from RPI to CPI could have on members' benefits, it is prudent for the Trustees to consider the position of the scheme and to consider the powers which they have under the APS rules. The Trustees should not disregard any powers which they have.
>
> 5.6.2 The change from RPI to CPI will have implications in a number of areas, in particular the APS funding position and investment strategy. Towers Watson's note covers some of these implications. Trustee perspective, ensuring the security of members' benefits is a paramount consideration. Any potential

to improve the APS funding level will be important in strengthening the security of members' benefits. The move from RPI to CPI is, therefore, a potential opportunity for APS liabilities to be reduced. The funding improvements set out in 5.1 above show a significant improvement which in turn equates to stronger security for members' benefits.

5.6.3 Although the Trustees' primary duty is to the membership, it is well established in case law that the position of the sponsoring employer can be a relevant factor. In the case of APS, we consider BA's position to be important for a number of reasons. The Government is making the change for both public and private sector pensions on the basis that CPI is a more appropriate index and there are cost savings afforded to private sector employers. BA will wish to benefit from this change. The change will apply automatically to APS. If the Trustees were to seek to retain RPI this action could be viewed by BA as a benefit improvement in circumstances where the Government is making the change, in part, to help schemes and employers. The Trustees should also take into account the on-going issues relating to BA’s covenant. For example, is it proper for the Trustees to retain RPI in circumstances where funding and member security could be improved potentially to the extent that there could, in the future, be less reliance on the BA covenant?

5.6.4 Whilst there are schemes which will have difficulty moving to CPI because their rules expressly refer to RPI, there will still be many pension schemes which will move to CPI as the increase measure.

5.6.5 The change from RPI to CPI has been welcomed not only by employers but also by the key industry bodies representing pension funds and employers. Joanne Segars, NAPF Chief Executive, has stated:

'By applying the same index measure to private sector pensions, trustees and fund managers now have more flexibility. This gives final salary pensions some breathing space, and it will make it a little easier for firms to keep schemes open.'

The CBI supports the changes and is urging the Government to introduce overriding legislation so all employers can benefit from the change.

5.6.6 BA will, no doubt, be considering the cost savings for both APS and NAPS. Given the significant savings for the scheme, we cannot see why BA would agree to retain RPI.”

154. The Operations Committee of the trustees met on 16 August 2010. In addition to the members of that committee, which included two MNTs, a further three MNTs attended the meeting, as they were entitled to do. Mr Arter presented his report of 10 August 2010. The minutes of the meeting record that he advised the trustees to adopt the CPI measure for pension increases and to review their position periodically since it was important that "their power under the Rules" which seemingly included the clause 18 power to amend the rules, was exercised in an appropriate manner to avoid a potential challenge from BA. The members of the committee agreed that a principled approach should be adopted to avoid a potential challenge from BA. Mr Arter was asked to provide further advice on the potential risks of maintaining RPI increases at that stage or waiting until a meeting for the main board of the trustees in September 2010. At this meeting, Mr Arter also raised the possibility of an amendment to the rules to introduce a rule permitting the trustees to award a discretionary increase in pensions. He advised that the trustees would need to give detailed consideration to BA's position in relation to such an amendment. One possibility was to provide for an increase at the discretion of the trustees and/or BA. The committee agreed to defer the question to the meeting of the main board in September 2010 and to invite Mr Williams, BA's CEO, to attend that meeting to update the trustees on BA's position in relation to a number of matters including CPI.

155. On 13 September 2010, Mr French, BA's treasurer and pensions risk manager, attended a meeting of the Investment Committee of the trustees and at this meeting the committee reviewed a report on the discussions of the Operations Committee on 16 August 2010.

156. On 17 September 2010, Mr Arter prepared a report for the trustees' meeting due to take place in September 2010. The main points made by Mr Arter were:

(1) The trustees had the option of providing that pension increases should be by reference to RPI in which case it was likely that a CPI underpin would be needed;

(2) The trustees also had the option of providing for an annual discretionary review of the amount of any increase; in such a case, the review would be conducted by the trustees alone but the trustees should consult BA as to how they might decide to act; the exercise of any such discretion would require the trustees to take account of all relevant circumstances;

(3) It would be better to make any change in the rules by use of the clause 18 amendment power, rather than purporting to bring the case within the existing rule 15;

(4) The primary responsibility of the trustees was to protect accrued rights;

(5) The trustees had a responsibility to ensure that any change in relation to prospective benefits was reasonable and administratively workable;

(6) The main factors to be taken into account included:

a) the funding position of the APS and the NAPS and the security of accrued benefits;

b) a CPI underpin would increase the assessment of liabilities as compared with RPI increases alone;

c) a risk of disapproval from tPR if the trustees reinstated RPI as the basis for increases;

d) BA was very likely to disapprove of a reinstatement of RPI as the basis for increases;

e) an amendment to include a discretionary review would mitigate the negative aspects of a reinstatement of RPI and would give the trustees opportunities to improve benefits as funding permitted from time to time.

(7) Mr Arter concluded that the trustees had a reasonable prospect of successfully defending any challenges from BA, members or tPR to a decision to reinstate RPI but he favoured an amendment which provided for a discretionary review which he regarded as a balanced, flexible response to an unusual Government action, where the response could take account of funding, covenant and regulatory pressures whilst retaining the opportunity to preserve the value of benefits to members.

157. The trustees met on 29 September 2010. Mr Williams and Mr French of BA attended the first part of the meeting, which was concerned with the position of BA in relation to a number of topics. Mr Williams stated that he had been surprised by the Government announcement in relation to CPI. He said that he assumed that the trustees would take advice on what course of action to take in response. If pension increases were changed from RPI to CPI that would have a significant effect on the funding position of the APS and the NAPS. Mr Williams recognised that members of both schemes were concerned in relation to the change to CPI but there would need to be "a string of good luck" to pay the promised benefits and the trustees would need to consider the risks associated with changing the rules to retain RPI as the basis for increases. He did not suggest that the trustees did not have the power to amend the rules in this way.

158. At the meeting of the trustees on 29 September 2010, Mr Arter presented the advice contained in his reports of 10 August 2010 and 17 September 2010. Captain Post then tabled a paper which argued that CPI was not an appropriate national index for the purposes of rule 15 so that it was necessary for the trustees to review the basis for pension increases under rule 15. Mr Arter stated that the information in the tabled paper required further consideration and advice. Someone at this meeting pointed out that the use of CPI instead of RPI would shorten the requisite journey plan to reach full funding and that would lead to the earlier loss of certain of the funding benefits under the 2010 funding agreement.

159. The Operations Committee met on 14 October 2010. In addition to two MNT members of the committee, the meeting was attended by two other MNTs, Captain Pocock and Captain Post. The committee discussed the suggestion made by Captain Post at the trustees' meeting on 29 September 2010 that CPI was not an appropriate national index for the purposes of rule 15. Mr Arter gave his advice in relation to that suggestion. He advised that it was not open to the trustees to reinstate RPI by relying

on the provisions of the unamended rule 15. He advised that it would be more appropriate for the trustees to amend the rules to provide a power to award a discretionary increase in benefits. At this meeting, some or possibly all of the MNTs put the case that Mr Arter's advice on rule 15 was not correct. It was decided that BA should be asked for their response to a possible amendment to the rules to reinstate RPI.

160. On 20 October 2010, Ms Suriyae emailed Mr French seeking BA's views in relation to a possible amendment to the rules to reinstate RPI. The email stated that the trustees were conscious that they should consider BA's position in relation to a possible amendment to the rules.

161. On 9 November 2010, Mr French replied to the email of 20 October 2010. He commented on the application of the unamended rule 15 and he stated that a reinstatement of RPI with a CPI underpin would be a benefit improvement. He also suggested that there should not be any enhancement of benefits at a time when the scheme was in deficit and that BA wanted to see a reduction in the risks to the funding of both the APS and the NAPS when that would be possible.

162. On 19 November 2010, Ms Suriyae replied to Mr French's letter of 9 November 2010 and stated that BA's views that there should not be a benefit improvement at a time when the scheme was in deficit would be of some assistance to the committee in their ongoing discussions.

163. On 26 November 2010, Mr French replied to Ms Suriyae's letter of 19 November 2010. He stated that BA's position was that it would not seek a reduction in its deficit contributions which had been agreed in the 2010 funding agreement. He stated that in view of the deficit in the funding of the scheme it would not be appropriate to reinstate RPI, particularly with a CPI underpin. In view of the deficit, he stated that any improvement in funding levels attributable to the change from RPI to CPI should be used to reduce the risk of underfunding and improve the certainty of members receiving the benefits provided under the rules. He added:

> "We are sympathetic to the concept of having the ability for some future discretionary benefit increase, provided the funding levels and risk within the scheme are at a level that make this appropriate. In most circumstances this would only be where the fund is in surplus and the level of risk reduced."

Mr French then referred to the possibility of a legal challenge from BA if the trustees amended the rules to reinstate RPI, with or without a CPI underpin, on the ground that the trustees would not be acting sufficiently prudently.

164. On 9 December 2010, the Operations Committee was not able to agree on a recommendation to be made to the meeting of the trustee board due to take place in December 2010. Mr Arter advised the committee that BA might challenge a decision by the trustees to amend the rules of the APS to increase benefits while the scheme was in deficit.

165. In mid-December 2010, Captain Pocock prepared a paper setting out his views in relation to certain issues concerning the move from RPI to CPI. He consulted Mrs Sellers and Captain Post in relation to the preparation of this paper. On 13 December 2010, he emailed them saying that all of the MNTs are "onside" and that it was necessary to persuade the ENTs. What Captain Pocock meant was that he considered that all of the MNTs of the APS wanted to reinstate RPI as the basis for pension increases.

166. On 15 December 2010, Captain Pocock sent his paper to the APS trustees and to Mr Arter and Mr Pardoe. The paper made a number of points but concluded by stating his views:

(1) that RPI should be reinstated as the basis for pension increases;

(2) that this could be achieved pursuant to the unamended rule 15;

(3) that a CPI underpin was not necessary; and

(4) that discretionary pension increases were not a viable option.

In his paper, Captain Pocock stated that the trustees should act in the collective interests of the members of the scheme and that the change to CPI disadvantaged the members with respect to external groups. This reference to external groups included BA shareholders, BA employees and the members of the NAPS. Mr Arter and Mr Maunder agreed in the course of their evidence that this was not a reasonable point of view. Both Mr Pardoe and Mr Arter commented by email, circulated to the trustees, on Captain Pocock's paper.

167. On 20 December 2010, Mr Spencer and Captain Pocock met a team from the staff of tPR who had been briefed on the trustees' discussions in relation to RPI and CPI. Mr Spencer referred to the power to amend the rules of the APS and stated that the trustees were cognisant of the need to use this power prudently. The tPR team stated that they had been taken by surprise by the Government's announcement, that the trustees were in a difficult position but that they needed to consider the members of the APS.

168. On 22 December 2010, the trustee board met. Mr Arter made a detailed presentation repeating the advice which he had earlier given. He referred to the deficit in respect of the APS and stated that he did not recommend an amendment to reinstate RPI but he suggested that the trustees consider amending the rules to provide a power to award discretionary increases. Mr Pardoe also made a detailed presentation. He referred to a suggestion that the change from RPI to CPI implied a transfer of value from members of APS to BA's shareholders. He stated that whilst it was clear that value had been removed from the benefits under the scheme it was less clear to whom the benefits had been transferred and he added that it was not the case that BA's contributions would be reduced, at least in the short term.

169. The minutes of the meeting on 22 December 2010 recorded a discussion by the trustees of both the APS and the NAPS in relation to the change from RPI to CPI and a number of views were expressed on a range of topics. Mr Spencer is recorded as summarising the discussion by stating that a number of trustees had strong views as to

what should be done but he stated that the clear legal advice was that the trustees had limited room for manoeuvre. He also stated that other trustees had expressed the view that the legal advice meant that they could not support the reinstatement of RPI. Mr Arter and Mr Pardoe, in particular, gave evidence about the discussion at this meeting and on the basis of their evidence I find that the general view of the MNTs of the APS was that they preferred to reinstate RPI rather than to amend the rules to introduce a discretionary power to award increases. The meeting concluded that there should be consultation with BA on the possible reinstatement of RPI and that there should be a further meeting of trustees when BA's views were known.

170. On 7 January 2011, Mr Williams and Mr French (both of BA) met Mr Spencer, Captain Pocock, Mr Bretherton and Mr Pardoe to discuss the change from RPI to CPI. In an email after the meeting, Mr French summarised a number of points which had been discussed at the meeting. He stated that it was recognised that it would be difficult to change back from CPI to RPI while the APS was in deficit. He expressed sympathy for members where benefits in accordance with CPI, instead of RPI, did not accord with their expectations. Mr French then suggested that there might be circumstances in which it would be appropriate to change benefits and he identified some possible parameters to be used for that purpose.

171. On 9 January 2011, Captain Pocock and Mr Spencer exchanged emails. Captain Pocock expressed the view that up to that time all of the MNTs of the APS were committed to the reinstatement of RPI. However, his own views were that there might be scope to move from that position by agreement with BA and, in particular, to move to phased increases above CPI and towards the level of RPI. Captain Pocock wished to amend the rules to include a power to award discretionary increases and Mr Spencer stated that he would support that change.

172. On 28 January 2011, Captain Pocock emailed Mr Arter with a list of quotations from various reports and documents, some of which had been issued to the APS members over the years and which contained statements which touched upon the terms of the APS providing for the basis for pension increases. Captain Pocock asked Mr Arter if these quoted passages were sufficient evidence that the members of the APS had been promised that pension increases would be in accordance with RPI and whether the quoted passages would leave the trustees open to a legal challenge from members if the trustees paid pension increases from April 2011 in accordance with CPI. Captain Pocock plainly hoped that these documents or similar documents would produce the result that members of the APS were legally entitled to pension increases in accordance with RPI. Following Captain Pocock's email, Mr Tomlin and Captain Post supported Captain Pocock's desire to find documents which would tend to show that members of the APS had such an entitlement.

173. On 1 February 2011, Mr French wrote to Mr Spencer referring to the earlier meeting between them (and others) on 7 January 2011. Mr French expressed sympathy for the position of the members of the APS and a desire to mitigate the detrimental effect for them of the change from RPI to CPI. Mr French referred to a possible subsidiary funding target for the scheme which would be to reach 100% funding on an all gilts basis but based on RPI; this was said to recognise an aspiration to achieve pension increases based on RPI.

174. On 3 February 2011, nine of the twelve trustees of the APS met to discuss their response to the situation produced by the proposed change in the PIRO from RPI to CPI. Three of the trustees who were unable to be present appointed alternates. There was a full discussion of the options available to the trustees. The minutes of the meeting recorded the following:

(1) Mr Spencer referred to the letter dated 1 February 2011 from Mr French of BA and stated that the issues raised in the letter would continue to be discussed with BA;

(2) Mr Arter advised on the options of amending the rules unilaterally to grant RPI increases or of introducing a discretionary power to award increases above CPI; the third option was to accept CPI as the basis for pension increases;

(3) Mr Arter advised the trustees that a key element of their fiduciary duties was to look after the security of benefits and other relevant considerations including the funding position, the investment strategy and BA's covenant;

(4) The trustees considered whether to amend the rules to provide for pension increases in accordance with RPI; in that context, Mr Arter advised that such a change would require a CPI underpin; Mr Pardoe advised that a CPI underpin would increase liabilities by between £150 million and £200 million;

(5) Mr Pardoe advised that the funding and covenant position meant that he could not recommend an amendment to provide for pension increases in accordance with RPI;

(6) Mr Pardoe said that although the funding agreement of June 2010 assumed pension increases in accordance with RPI, the change in PIROs to CPI meant that an amendment to the rules to reinstate RPI would be a benefit improvement at a time when the scheme was still in a material deficit and the investment and mortality risks were substantial;

(7) Captain Post (supported by Mr Tomlin) proposed that whatever decision was taken by the trustees, it "should be taken before a judge for approval"; this proposal was passed by ten votes to nil;

(8) There was a discussion about the need for a CPI underpin and the desirability of taking counsel's opinion on that point leading to a possible application to the court; it was recommended that a decision on reinstating RPI should be made after such an opinion were obtained;

(9) In relation to the option of introducing a discretionary power to award pension increases, the minutes recorded:

> "Mr Arter said he recommended the Trustees introduce a discretionary pension increase power which provided the flexibility to assess the relevant factors at the time and come to a decision as to whether to award pension increases in excess of CPI in a particular year. Mr Pardoe said this was a more suitable approach as it meant discretionary increases would be

> awarded on the basis of factors such as Scheme funding levels and BA's covenant. He said that he would not expect to recommend a discretionary increase for April 2011 because the Scheme was in the early stages of its recovery plan and BA's covenant was heavily relied upon for deficit payments. He also pointed out that the current volatility of the Fund, where values had recently fallen by £200m only to quickly recover by £150m, reinforced his view that an increase in excess of that required by the Rules (expected to be CPI) this year was not appropriate this year.
>
> ln response to a question, Mr Arter said that he could not pre-judge the circumstances in which he would advise it appropriate to grant discretionary pensions increases in excess of CPI or look back at previous decisions taken by the Main Boards as it would be important to view the wider situation at the time a decision was being made."

(10) The minutes then recorded a number of decisions made by the trustees;

(11) The first decision stated that it was intended that the opinion of leading counsel should be sought in relation to the options for the trustees, including the option of amending the rules to reinstate RPI, with or without an underpin, and it was agreed that an application to the court would be made, or possibly further considered, in the light of this opinion;

(12) The trustees voted by six votes to six to amend the rules to provide for a power, exercisable by a simple majority, to award discretionary pension increases; as that proposal did not secure the necessary two-thirds majority required by clause 18, it was not carried;

(13) The trustees voted unanimously to amend the rules to provide for a power, exercisable by a two-thirds majority, to award discretionary pension increases where the use of the power would be reviewed on at least an annual basis and would take account of relevant professional advice; this decision was not subject to obtaining advice from counsel;

(14) There was a lengthy discussion as to whether communications to the members of the APS over the years might have conferred upon a member an entitlement to pension increases in accordance with RPI, whether by way of a contractual right or pursuant to an estoppel; Mr Arter advised that he had reviewed a wide range of scheme documents to assess this question and on the basis of that review, he considered that it was unlikely that the general membership had acquired such an entitlement although it was possible that individual members or classes of members might have done so;

(15) The trustees decided that counsel's opinion should be sought as to the possibility that members had acquired an entitlement to RPI increases; they further decided that they should apply, together with the NAPS trustees, for a determination by the court of this question and counsel would be approached as a first step in the process;

(16) The trustees decided to continue to consult with BA on matters relating to RPI and CPI and the introduction of a discretionary power would be considered further by the trustees at their meeting in March 2011.

175. The scheme actuary had prepared a detailed presentation for the meeting on 3 February 2011 and he took the trustees through that material at the meeting. The presentation considered in detail the various options for the trustees as regards the reinstatement of RPI and the introduction of a discretionary pension increase power. The presentation also explained the funding position of the scheme on various bases and the impact of a pensions increase at a rate above CPI. In view of what happened later in 2013, as regards the advice given by Mr Pardoe and the decisions taken by the trustees, it is interesting to note that in the advice Mr Pardoe gave on 3 February 2011, he did refer to the possibility of comparing the amount of the deficit, after allowing for discretionary increases, with the value of future contributions under the recovery plan although Mr Pardoe commented that such an approach would be "more difficult to justify".

176. On 4 February 2011, Captain Pocock, Mr Tomlin and Mr Scott exchanged emails commenting on the trustees' meeting and decisions on 3 February 2011. The tenor of the remarks was that they recognised that the MNTs were not going to achieve a decision to reinstate RPI because of lack of support from the ENTs. The emails seemed to contemplate that the decision to refer the matter to the court was very beneficial to the MNTs.

177. Also on 4 February 2011, Mr Spencer and Mr Maunder exchanged emails which referred to the MNTs having strong, and emotional, views in favour of RPI increases.

178. On 4 and 5 February 2011, there were further emails involving Mr Spencer, Captain Post and Mrs Sellers as to whether it would be a good use of time to carry out further research into previous communications with members which might have led to members having an entitlement to RPI increases. Captain Post and Mrs Sellers were firmly of the view that this work should be done.

179. On 15 February 2011, Mr Spencer wrote to Mr French reporting on the decisions taken by the trustees on 3 February 2011. On 24 February 2011, Mr French responded in detail. He stated that it would not be appropriate for the APS trustees to introduce a discretionary power to award increases in view of the current funding deficit. He also requested the trustees not to introduce such a power at a time when existing benefits could not be secured and in a way which would lead to members of the NAPS being concerned about a disparity in treatment between the two schemes. Mr French also stated that BA's results which were due to be published on 25 February 2011 would show a reduction in pension liabilities for the APS and the NAPS of some £770 million as a result of the change from RPI to CPI.

180. The trustees met again on 1 March 2011. Ten trustees were present and one absent trustee had appointed an alternate. The trustees considered the letter dated 24 February 2011 from BA and voted on whether to proceed with the amendment to the rules to introduce a discretionary increase power. There were ten votes in favour with one abstention. The Operations Committee was asked to review the wording of the proposed amendment.

181. The trustees met again on 25 March 2011. Eleven trustees were present; Captain Pocock was absent and had appointed an alternate. The trustees noted that the Operations Committee had reviewed a draft of a Supplemental Deed to amend the rules and had recommended that the draft be approved by the trustee board. The trustees then approved the draft Deed and appointed two trustees to execute it, which they duly did. The amendment made by the Deed added a final paragraph to rule 15 in the following terms:

> "PROVIDED FURTHER THAT the Management Trustees may at their discretion, and shall in any event at least once in any one year period, review the annual rate of pension payable or prospectively payable under Rules 8, 9, 10, 11, 12, 13 and 34 and shall have the power, following such a review, by resolution to apply discretionary increases in addition to those set out in this Rule, subject to taking such professional advice as appropriate. This discretion cannot be exercised unless at least two thirds of the Management Trustees for the time being vote in favour of the resolution."

182. One of the purposes of the meeting on 25 March 2011 was for the trustees to consider whether to exercise their new discretionary power to award pension increases with effect from April 2011. To assist the trustees, Mr Pardoe had prepared a detailed presentation.

183. Mr Pardoe presented his advice at the meeting on 25 March 2011 and there was a detailed discussion. The minutes of the meeting of 25 March 2011 recorded:

(1) Mr Pardoe reviewed the current funding position of the scheme on a technical provisions and gilts basis, allowing for RPI or CPI increases; he noted that this showed a deficit of varying amount and that on a gilts basis with a prudent view of CPI increases, the value of the deficit was very similar to the value of future contributions under the Recovery Plan;

(2) Mr Pardoe explained some of the risks associated with the current investment strategy;

(3) In response to a question about why the current recovery plan could not support RPI increases given that RPI had been assumed when the recovery plan was agreed, Mr Pardoe stated that although the 2009 valuation was prudent it was not as prudent as would have been desirable if BA had agreed to a higher level, and although the deficit contributions were acceptable, they were not as large as would have been desirable if higher contributions had been affordable;

(4) Mr Pardoe ended his presentation by saying that given the current funding position of the scheme it was not easy to justify the payment of a discretionary increase in April 2011; he added that from a financial and actuarial perspective it was also very early in the recovery plan to make a discretionary increase; the amounts involved were large relative to the recovery plan, and the scheme

remained exposed to fluctuations in funding level and deficit as a result of changing market conditions; in relation to the volatility of the funding position, Mr Pardoe noted that in August 2010 the deficit had worsened by almost £200m over the course of the month and then improved by some £110m over the period from 30 November 2010 to 28 February 2011;

(5) Mr Arter stated that the trustees should be aware of the strength of BA's covenant and Mr Russell of PwC was asked to summarise the position in that respect;

(6) Mr Russell advised that BA's covenant had neither strengthened nor weakened materially since the 2009 valuation;

(7) Mr Arter advised the trustees that in deciding whether to award a discretionary increase it was most important that each trustee removed any sentiment from their consideration and that they exercised their votes in the long term interest of all of the beneficiaries and that they should take account of the advice of the actuary and the advice in relation to the covenant;

(8) Captain Post called for a vote on whether to award a discretionary increase of 1.5% above CPI; 1.5% was the gap between CPI and RPI in September 2010; instead of the vote called for by Captain Post, the trustees agreed to vote as to whether any discretionary increase should be made;

(9) The trustees then voted on whether to award a discretionary increase from April 2011; the six MNTs voted for, and the six ENTs voted against, a discretionary increase with the result that no discretionary increase was awarded;

(10) The trustees decided that they should respond to BA's letter of 24 February 2011 giving the trustees' reasons for their decision to amend the rules by introducing a discretionary increase power and their decision not to award such an increase from April 2011.

184. The evidence at the trial was that the discussion at the meeting on 25 March 2011 about whether to award a discretionary increase was highly contentious. Mr Spencer said that matters "grew quite heated". Mr Arter said that "feelings were running high". This fact does not emerge very clearly from the minutes of the meeting but there were one or two matters recorded in the minutes which support the evidence to this effect. For example, Mrs Sellers stated during Mr Pardoe's presentation that she believed that his presentation was biased and that it should have been worded in more neutral terms. Also, Mr Arter plainly felt it necessary to say to the trustees that they should remove sentiment from their consideration. Further, Mr Spencer is recorded as saying that he recognised that the decisions in relation to RPI/CPI were very difficult for the MNTs and that all of the trustees had enormous sympathy for the members of the scheme but he added that it would be very difficult to go against the advice given by the trustees' legal and actuarial advisers. The contentious nature of the meeting is also consistent with the decision by Captain Post to resign as a trustee, a matter to which I refer below.

185. At the meeting on 25 March 2011, as described above, the trustees voted to use the clause 18 power of amendment to amend rule 15 to introduce a discretionary increase power. This amendment had been recommended by Mr Arter. When the ENTs voted for this amendment, they were not making any decision as to how that power might be exercised in the future. Insofar as they had any view as to the likelihood of that power being exercised in the future, I find that they thought that the power might be exercised if they had professional advice and, in particular, advice as to the funding position of the scheme, which supported the award of some discretionary increase.

186. At the end of the long meeting on 25 March 2011, Captain Post produced a letter of resignation which he had plainly prepared in advance. The letter stated that he resigned as a trustee because the board had not acted in the best financial interests of the beneficiaries of the scheme. Mr Spencer expressed disappointment at Captain Post's resignation and said that he would try to persuade him to remain.

187. The six MNTs who participated in the decisions made on 3 February 2011, 1 and 25 March 2011 were Mr Mitchell, Captain Pocock, Captain Post, Mr Scott, Mr Tomlin and Mrs Sellers. None of these MNTs gave evidence. However, I heard evidence from Mr Spencer and Mr Arter, in particular, as to their understanding of the attitudes of the MNTs in the period from June 2010 to March 2011.

188. Mr Spencer stated that, certainly at the outset, all the MNTs strongly felt that the right thing to do was to reinstate RPI as the basis for pension increases. Later in his evidence he confirmed that up to March 2011, the MNTs wanted to reinstate RPI as the basis for pension increases. He added that Captain Pocock modified his views in the period up to March 2011 as did Mr Scott and Mr Mitchell. Later in his evidence, Mr Spencer said that Captain Post listened to the arguments being put. Moreover, he thought that not all of the MNTs were inflexible. He said: "they were making decisions based on what they were hearing and coming to conclusions".

189. Mr Arter's evidence on this subject was similar to that of Mr Spencer. However, when discussing the attitude of the MNTs a little later (in October 2011) he said that he could not put himself into the heads of the MNTs although he thought that Mrs Sellers and Mr Tomlin were possibly the most committed to reinstating RPI as the basis for pension increases.

190. Mr Tennet objected to evidence being given by witnesses, such as Mr Spencer and Mr Arter, as to the state of mind of the MNTs who had not given evidence. Whether that objection is well founded or not and whether that objection was consistent with some of the questions which Mr Tennet put to Mr Spencer and Mr Arter about the attitude and behaviour of various MNTs, I need not consider. I find that I am able to make all relevant findings without regard to what one witness has said as to his own assessment of the way that another person was thinking. I am able to make my findings based on the documents which included statements made by an MNT which show that MNT's state of mind and also having regard to the inherent probabilities of the matter.

191. Each of these MNTs had made statements outside the meetings of the trustee board or other committees, which statements are now relied upon by BA. I will refer to the principal matters on which BA relies.

192. In relation to Mr Mitchell, I was referred to his emails of 18 November 2010, 3 December 2010, 20 January 2011, 13 March 2011, 15 March 2011 and the minutes of a later meeting on 11 July 2012. These statements disclose that up to March 2011, Mr Mitchell thought that the members of the APS had a moral right to increases based on RPI and that CPI was not an appropriate index. However, I note that in an email of 18 March 2011, Mr Mitchell stated that he was in favour of a discretionary increase of only 0.3% whereas the gap between CPI and RPI at that stage was 1.5%.

193. In relation to Captain Pocock, I was referred to a number of emails from him and a number of statements he made after March 2011. I consider that the best reflection of his state of mind in the period up to March 2011 is in the statement he made when he resigned as a trustee on 14 April 2011. In that statement, he said the following:

(1) Members had a reasonable expectation that pensioners would receive RPI increases and the trustees had an obligation to fulfil those expectations if it were legally possible to do so;

(2) The trustees should use their power to amend the rules to reinstate RPI as the basis for pension increases;

(3) RPI increases were affordable (he referred to the use of RPI in the 2010 recovery plan);

(4) APS was a well-funded scheme; he referred to it being funded to 92% on an ongoing basis and to the further commitments given by BA;

(5) APS had substantial RPI-linked assets, including a buy-in contract insuring 20% of the liabilities of the scheme providing an RPI-linked income stream;

(6) BA was liable to fund the deficit in the scheme;

(7) The retention of RPI as the basis for pension increases would be in the best financial interests of members.

194. In relation to Captain Post, his position is disclosed by his email dated 24 February 2011 where he said that half of the APS trustee board (plainly, the six MNTs) wanted to retain RPI as the basis for pension increases. On 25 March 2011, at the meeting of the trustees, Captain Post proposed a discretionary increase of 1.5% above CPI and he resigned as a trustee at the end of the meeting because the trustees had not acted in the best financial interests of the beneficiaries. He did not stand for re-election as a trustee but he was later very active in a campaign to restore RPI as the basis for pension increases.

195. In relation to Mr Scott, there were not many statements by him prior to March 2011, or at all. On 23 January 2011, he emailed all of the other MNTs in response to an email from Mr Tomlin and he said that all of the MNTs seemed to be of the same opinion. The opinion he was referring to was in favour of reinstating RPI as the basis for pension increases.

196. In relation to Mr Tomlin, his state of mind in February and March 2011 is shown by his letter dated 15 April 2011 resigning as a trustee. That letter stated that he

considered that it was the duty of the trustees to reinstate RPI as the basis for pension increases. His letter shows that he was indignant at the trustees' decision not to do so.

197. In relation to Mrs Sellers, her email of 29 December 2010 makes it clear that she felt that the trustees had a duty to reinstate RPI as the basis for pension increases. However, I note that, in an email of 18 March 2011, she stated that she was in favour of a discretionary increase for pensioners generally of only 0.5%.

198. Mrs Sellers stated at the trustees' meeting on 25 March 2011 that Mr Pardoe's presentation was biased. Her views in that respect appear to have been set out in her email of 26 March 2011 to Mr Spencer where she referred to Towers Watson having a "house view" in favour of replacing RPI with CPI. Subsequently, Mr Spencer had a meeting, or possibly two meetings, with Mrs Sellers to express his view that some of the things she was saying were incorrect and were not helpful to the proper functioning of the trustee board. Mr Spencer considered that after this meeting, or meetings, Mrs Sellers was more circumspect in what she said.

199. Based on the above evidence, I make the following findings as to the wishes of the MNTs in the period up to the end of March 2011. In general terms, all of the MNTs wished to see the reinstatement of RPI as the basis for pension increases. This view was strongly expressed at trustee meetings and elsewhere. However, the possible reinstatement of RPI was never put to the vote and so the question whether the MNTs would actually have voted to restore RPI was never answered. It is far from clear that they would have voted to restore RPI if there had to be a CPI underpin. Further, all the trustees decided on 3 February 2011 to take counsel's opinion as to their options. They had not obtained counsel's opinion by 25 March 2011. The trustees (including the MNTs) could not have committed themselves to any particular position in relation to RPI whilst they were waiting to obtain counsel's opinion. What they did instead, leaving matters open, was to vote to amend the rules to confer on themselves a discretionary increase power.

200. The MNTs appreciated that they would not secure a two-thirds majority for the reinstatement of RPI. They voted for an amendment to the rules to confer on the trustees a discretionary increase power. They regarded this power as less good than the reinstatement of RPI but nonetheless a power worth having. They understood that the availability of the discretionary increase power did not mean that it would be exercised in any particular way in the future. They understood that there needed to be a two-thirds majority in favour of any such exercise. They understood that the power referred to the trustees taking professional advice before exercising the power.

201. Based on his proposal at the meeting on 25 March 2011, I infer that Captain Post would have voted for a discretionary increase of 1.5%, being the gap between CPI and RPI. At that meeting, all of the MNTs voted in favour of a discretionary increase but there was no statement at the meeting as to the amount of increase which they would support. They would not necessarily all have agreed with Captain Post's proposal of 1.5%. After all, on 18 March 2011, Mr Mitchell and Mrs Sellers independently favoured discretionary increases of only 0.3% and 0.5% respectively.

202. The six MNTs did not seek to conceal or misdescribe their views when participating in trustee meetings. Further, the MNTs wanted to take legal advice, no doubt hoping that the legal advice would support their approach. Similarly, the MNTs wanted some

question or other to be referred to the court for decision, again no doubt hoping that the court would provide support for their approach.

203. At the risk of some element of duplication, I will need to refer again, later in this judgment, to some of these statements by the MNTs in 2010 and 2011 when I consider BA's case that the MNTs did not genuinely and actively consider the matters which they ought to have considered on 19 November 2013.

From March 2011 to July 2012

204. On 1 April 2011, in response to an e-mail from Mr Scott, Mr Pardoe emailed Mr Spencer stating that he thought there were arguments for supporting a small increase, such as one of 0.3%, although the possibility had not been raised at the meeting. Mr Pardoe also suggested that he discuss with Mr Spencer and Mr Arter a set of guiding principles as to the exercise of the discretionary increase power.

205. On 5 April 2011, Mr Spencer discussed the position in relation to possible discretionary pension increases with Mr Arter and Mr Pardoe. Mr Pardoe said the following (which he recorded in a file note):

(1) "in forming my advice so far I had taken it as a given that the Trustees could exercise their discretionary power if in deficit (but obviously not necessarily that they should) and that I was pretty confident that some other schemes had provided discretionary increases in the past when in deficit, having taken appropriate account of circumstances" (underlining in original);

(2) "I suggested that it may not be that long before it would be reasonable to provide at least a partial discretionary increase for some of the reasons set out in my email exchanges"; and

(3) "it would be sensible to aim to develop an overall framework for deciding when discretionary increases might be appropriate, and that this would help take some of the emotion and heat out of the annual debate, as well as helping in the funding negotiations with BA as the SFP [statement of funding principles] for the 2012 valuation will explicitly need to cover allowance for discretionary benefits".

206. Mr Spencer also considered it desirable to develop a framework which could be used to inform future discussion as to the exercise of the discretionary increase power. On 5 April 2011, he emailed Mr Scott, one of the MNTs, and said that: "it would be better to try and find acceptable ground rules that all the Trustees could work to". On 15 April 2011, he emailed another MNT, Mr Mitchell, and said that: "I hope to set up a sub group to start work with a remit from the board to work through the details of a journey plan that looks at how we go forward to secure existing benefits and move to full funding and payment on an RPI basis".

207. On 8 April 2011, Mr Spencer, Captain Pocock as a representative of the trustees of the APS, a representative of the trustees of the NAPS, Mr Arter and others from Eversheds attended two consultations with leading and junior counsel, Mr Christopher Nugee QC and Mr Jonathan Hilliard. Counsel had earlier been provided with two sets of instructions, one on behalf of the trustees of both the APS and the NAPS and one

on behalf of the trustees of the APS alone. In the instructions which related to both schemes, counsel were asked whether the members of the schemes could establish an entitlement to a particular level of pension increase as a result of communications made to the membership over the years. In respect of that question, counsel were provided with eighteen files, containing around 1400 documents, which contained communications of various kinds which might be thought to be relevant.

208. The second set of instructions related to the APS alone. Counsel were told that the trustees wished to obtain directions from the court as to their powers or duties to amend the rules of the scheme to establish RPI as the relevant index for pension increases and whether they would be able to do so without a CPI underpin. The instructions referred to clause 18 of the trust deed and to rule 15. Part 9 of the instructions was a long list of factors which were suggested to be relevant when the trustees considered an amendment to the rules. These factors included a reference to the trustees owing a duty to act in the best financial interests of the beneficiaries and to the views of BA. Part 10 of the instructions referred to BA's position in some detail. Part 11 of the instructions summarised the advice of the scheme actuary. Counsel were then asked a number of specific questions including a question as to the factors which would be relevant to the exercise of a power to reinstate RPI as the basis for pension increases and whether such a decision could be successfully challenged. Conversely, counsel were asked whether a decision not to reinstate RPI could be successfully challenged. A further question was whether, in the event of a reinstatement of RPI, there needed to be a CPI underpin.

209. On 8 April 2011, the first consultation concerned the instructions relating to both schemes. It began at 10 a.m. and was attended by those interested in both schemes. The second consultation concerned the instructions relating to the APS alone. It began at 12.30 p.m. and was attended only by those interested in the APS. Counsel later settled detailed notes of both these sessions.

210. In the first consultation, Mr Nugee said that it would not be surprising if members receiving the various communications had developed an expectation that their pensions would be increased in line with RPI. He pointed out that the trustees of both schemes had also developed this expectation as this was an accurate reflection of what had been the actual position for the past 37 years. This common expectation made it understandable as to why there had been unease amongst the membership and trustee boards as a consequence of the recent Government announcements about CPI replacing RPI as the relevant index, and the impact this will have on the schemes. However, Mr Nugee advised that the question was not what members expected but what was their legal entitlement. He then considered whether members would have a legal entitlement to RPI whether in contract or by reason of an estoppel by convention or by representation. He thought that it was very unlikely that a group of members could successfully argue that they had a contractual right to pension increases by reference to RPI. He thought the court would be very reluctant to find an estoppel by convention giving members an entitlement to RPI increases. As to estoppel by representation, he said that it would be almost impossible for there to be a successful class action based on an alleged estoppel by representation. He was asked whether the trustees should seek guidance from the court and he advised that there was not sufficient doubt on the issues as to contract and estoppel by convention to warrant applying to the court for guidance. As to a possible claim based upon an estoppel by

representation, any such claim would turn on its own facts and it was not appropriate to seek general guidance as to whether groups of members could establish such a claim.

211. The second consultation concerned only the APS and involved a consideration of rule 15 and clause 18. As to rule 15, Mr Nugee advised that the question was whether CPI was recognised as an appropriate national index. If it was an appropriate national index, then the trustees could not alter the index under rule 15 but could consider amending the rules using the power in clause 18. If CPI was not an appropriate national index, Mr Nugee thought that the trustees would still need to use the clause 18 power to amend rule 15, rather than relying on the provisions of rule 15 itself. The note of the consultation then recorded:

> "Leading Counsel also noted that the discretionary power that had already been inserted into the Rules is a good way of addressing the issue. This gave the Trustees the ability to award an additional increase to pensions, but did not write that extra commitment into the Rules. He considered this to have been a sensible way to have moved forward."

212. Mr Nugee then considered the factors which should be considered by the trustees if they were considering amending the rules to reinstate RPI as the basis for pension increases. Subject to one matter, he generally agreed with the factors which had been identified in his instructions. However, those factors had referred to the trustees owing a duty to act in the best financial interests of the beneficiaries. Mr Nugee explained that that proposition was taken from a case concerning the investment powers of trustees. With the power to amend conferred by clause 18, one had to examine the purpose for which that power had been conferred. In this case, the power to amend was not for the purpose of giving members the best possible benefits so that the trustees should not exercise this power just to benefit members. The note of the consultation then recorded:

> "However, Leading Counsel considered it was a legitimate consideration for the Trustees to take into account that members had an expectation, that had been shared by the Trustees and the company, that pension increases would be in line with RPI."

213. Mr Nugee was then asked about possible challenges to a decision by the trustees to reinstate RPI as the basis for pension increases, alternatively, a decision not to do so. As to the former, the note of the consultation records:

> "If the Scheme were well funded with a strong employer covenant then Leading Counsel would not have an issue with the Trustees making an amendment to establish RPI into the Rules. In those circumstances, the Trustees could take into consideration the reasonable expectations of members, and that the change to CPI would cause a reduction in members' pensions. However, Leading Counsel stated that the situation was very different where the Scheme was in a significant deficit position with a weak employer covenant. In such a

> circumstance, Leading Counsel considered it would be a very difficult decision for the Trustees to establish RPI into the Rules.
>
> …
>
> Leading Counsel noted that the move from RPI to CPI as the relevant index will mean that members are likely to receive less money in their retirement. The fact that there is a deficit position does not completely rule out using the amendment power in order to try to deal with this. However, as funding improves Leading Counsel thought that there was a lot to be said for de-risking the Scheme rather than incurring added liabilities, in circumstances where there was no entitlement to increases based on RPI.
>
> When considering the discretionary power Leading Counsel thought it would be sensible to see RPI increases as an aspiration. However there were no black and white rules as to when the discretionary power can be used in a deficit position.
>
> A move to RPI would be intended to satisfy the members' reasonable expectations. If the Scheme were better funded with a stronger employer covenant, this would be entirely proper. However the less well funded the Scheme is, the more difficult the decision becomes.
>
> Leading Counsel opined that the only core legal principle was that the Trustees must take into account relevant factors and ignore irrelevant factors. The Court would only interfere if the Trustees had failed to take account of a relevant factor or taken into account an irrelevant factor or if the decision were perverse or irrational. A successful challenge on this basis would be very unlikely."

214. Mr Nugee then considered the possibility of a challenge by a member to any decision they might make and advised that the question for the trustees should be "what the right thing was" rather than how immune they would be from criticism.

215. Mr Nugee was also asked about the need for a CPI underpin if the trustees amended the rules to reinstate RPI as the basis for pension increases. Overall, Mr Nugee considered that the position was not clear in this respect. He was subsequently asked to consider the point further and he included an addendum to the note of consultation in which he set out arguments as to why an underpin was not necessary but he thought that it would not be safe for the trustees to rely on this view and, if it became relevant, the trustees should seek a direction from the court.

216. Finally, Mr Nugee gave advice on the different circumstances in which the trustees might seek guidance from the court.

217. The PIRO which took effect from 11 April 2011 provided for an increase of 3.1% by reference to the CPI in September 2010.

218. On 14 April 2011, Captain Pocock resigned as a trustee of the APS. I have referred earlier to the resignation statement which he made. On 15 April 2011, Mr Tomlin resigned as a trustee of the APS. Again, I have referred earlier to the resignation statement which he made. Both Captain Pocock and Mr Tomlin subsequently stood for re-election as MNTs and were re-elected on 28 July 2011.

219. On 3 May 2011, Mr Spencer met Mr Swift and Mr French of BA. Mr Spencer stated that he was very happy to keep up a dialogue with BA. Mr Spencer followed up the meeting with a letter to Mr French making a number of suggestions including a desire for the trustees to develop a common understanding as to circumstances in which the trustees might decide to reinstate RPI as the basis for pension increases. Under cover of this letter, BA was provided with a copy of the Deed dated 25 March 2011 which amended rule 15.

220. On 20 May 2011, the trustees met and discussed the notes of the consultations with Mr Nugee and Mr Hilliard.

221. Prior to 24 June 2011, the trustees formed a sub-group consisting of Mr Spencer, Mr Scott (an APS MNT), Mr Bretherton (a NAPS MNT) and Ms Boswell and Mr Maunder (the latter two being ENTS for the APS and the NAPS). This was called the Discretionary Increase Sub-committee ("DISC") and its objective was to identify principles to which both schemes could adhere in relation to paying discretionary pension increases. A joint approach was intended as that was thought to be likely to improve the negotiating position of both sets of trustees with BA.

222. The DISC met on 24 June 2011. The scheme actuaries for the APS and the NAPS (Mr Pardoe and Mr Wintle respectively, both of Towers Watson) had prepared a discussion paper to guide the DISC. The paper was considered in detail by the DISC at this meeting. It was agreed that the DISC would meet again and that Mr Spencer should have a meeting with BA. Towers Watson were asked to do further work on the principles to be applied having regard to a number of specified factors.

223. The trustees of the APS met again on 29 June 2011. Mr Swift and Mr French of BA attended the first part of the meeting and gave a detailed report on the financial and trading position of BA. The trustees received a report on the DISC meeting on 24 June 2011 and considered the future funding negotiations with BA.

224. On 11 July 2011, there was a meeting of members and pensioners of the APS at Ascot racecourse. The meeting had been called by members and pensioners under the rules of the APS. The meeting was divided into two sessions, one in the morning and one in the afternoon. Several hundred members and pensioners attended both sessions. Seven of the nine currently serving trustees of the APS attended the morning session and eight of those nine attended the afternoon session. The number of serving trustees had been reduced from twelve to nine by reason of the three resignations in March and April 2011. Mr Arter and Mr Pardoe were also in attendance. The discussions at both sessions were recorded and have been transcribed. Mr Spencer, Mr Pardoe and Mr Arter spoke at both sessions and explained their perception of the position in relation to the change from RPI to CPI and the approach which had been and would be taken

by the trustees. Many of those present expressed their hostility to the explanations given by Mr Spencer, Mr Pardoe and Mr Arter.

225. In the course of both sessions on 11 July 2011, Captain Pocock spoke at some length on the question as to whether RPI based increases were affordable by the APS. His view was that RPI increases were affordable and benefits were secure. He urged the meeting not to think that the trustees could award CPI increases at the beginning and RPI increases later. He said that would not happen because, if the trustees awarded only CPI increases at the beginning, then BA would not fund RPI increases later.

226. Captain Post also spoke during both sessions of the Ascot meeting. He said that the trustees had failed in their duties by not reinstating RPI as the basis for pension increases. Mr Tomlin also spoke during both sessions. He said that the APS was well funded and had the resources to pay RPI based increases.

227. The members and the pensioners at both sessions of the Ascot meeting on 11 July 2011 voted unanimously to pass the following resolution proposed by Captain Post:

> "This meeting demands that the APS trustees retain a funding target sufficient to pay RPI pension increases. Further, it demands that the APS trustees restore RPI pension increases back-dated to April 2011, thus meeting members' expectations and also, that a version of this resolution be put to all APS beneficiaries by postal ballot within 35 days, the wording of such resolution to be devised by Cliff Pocock, Graham Tomlin and Mike Post."

228. Around this time Captain Pocock, Mr Tomlin and Mr Douglas were candidates for election as MNTs of the APS. Captain Pocock's election statement referred to the APS as a well-funded secure scheme. He expressed the view that the trustees should act to restore RPI increases with immediate effect. If elected, he would continue to fight for the restoration of RPI increases.

229. Mr Tomlin's election statement stated that he had resigned as a trustee in disgust over the refusal of the trustees to continue to pay increases in accordance with RPI. He said that, if elected, he would do everything that he could to ensure that RPI increases were always paid. He wanted the issue as to RPI or CPI to be decided by the court.

230. Mr Douglas' election statement described the APS as one of the UK's largest and best funded final salary pension schemes. He stated that the law required all trustees always to act in the best financial interests of beneficiaries. He expressed concern that the trustees had failed to secure a way of ensuring that pension increases continued to follow RPI. He added that putting this right was in the best financial interests of the beneficiaries and must remain a priority for the trustees. He said that he had worked closely with Captain Post and Captain Pocock preparing a campaign to challenge the use of CPI. Mr Douglas was cross-examined about this statement. He said that his reference to the APS being one of the UK's best funded schemes was based on the information available to him at that time and before he was elected a trustee. He had been a trustee of the APS prior to 2007 and had been involved in the 2006 valuation. He had based his statements about the best financial interests of beneficiaries on tPR website.

231. On 28 July 2011, the results of the election for the three vacant positions as MNTs were announced. Captain Pocock and Mr Tomlin were re-elected as trustees. Mr Douglas was elected as a new trustee to fill the third vacancy.

232. On 16 August 2011, Mr Pardoe had lunch with Captain Pocock and Mr Douglas to discuss the position in relation to the trustees of the APS and recent events. It was agreed that there was a need to build bridges within the trustee board.

233. The DISC met again in the afternoon of 16 August 2011. The scheme actuaries for the APS and the NAPS had prepared a further paper (dated 12 August 2011) for discussion at this meeting. Mr Pardoe also presented further material at the meeting. This material identified the different positions that a notional trustee might take in relation to matters such as the expectations of members, the funding position of the scheme, an assessment of affordability and of risk. Mr Spencer reported to the committee that he had met Mr Swift of BA and told him that the objective of the trustees of the APS was to restore RPI increases when it was prudent to do so. The committee agreed to hold a further meeting and Towers Watson were asked to prepare a further paper.

234. At the meeting of the DISC on 16 August 2011, the committee agreed that the ultimate goal was for APS to be fully funded on a gilts basis allowing for RPI increases after the payment of the £250 million contingent contribution in January 2019, at which point the Scheme would have been de-risked as far as practicable. It was also agreed that discretionary increases would be considered annually prior to April and there would be a two-stage test each year. The two-stages were described as "the closed fund test" and the "projected gilts funding level test".

235. In relation to the closed fund test, the DISC agreed that further work should be undertaken as to the assessment of the deficit on a low risk closed fund basis. The deficit would be assessed on the basis of gilts with a prudent allowance for CPI. This deficit would then be compared to the value of the £230 million letter of credit (the subject of the 2010 funding agreement, carried over from the 2006 funding agreement), and a proportion of the current recovery plan contributions, and if these items were expected to cover the closed fund deficit (having adjusted for the cost of any proposed discretionary increase), then a discretionary increase could be paid. It was also agreed that the proportion of the recovery plan contributions that should be included would be discussed with PwC, in the light of their views on the BA covenant. The appropriateness of allowing for the contingent payment of £250 million would also be discussed with PwC, this having been suggested by Mr Scott.

236. In relation to the projected gilts funding level test, it was agreed that further work should be done on a projection of the funding level of the APS to confirm the likelihood of meeting the ultimate goal which was for the APS to be fully funded on a gilts basis allowing for RPI increases after the payment of the contingent payment of £250 million in January 2019. This would allow for the expected level of discretionary pension increases and for further de-risking of the assets.

237. On 16 August 2011, the DISC also agreed that if the tests were passed and discretionary pension increases started to be paid, they would be based on x% of the difference between RPI and CPI, where x% represented the proportion of the assets that have been de-risked. For this purpose, consideration could be given to both

"complete" de-risking and also, to the extent that the assets were invested in gilts and swaps which matched the projected benefit payments, any longevity swaps etc.

238. On 18 August 2011, Captain Bretherton, a NAPS trustee and a member of the DISC raised an issue which was to assume greater significance later. He questioned whether it was right to assume that all of the sum of £250 million security potentially payable by BA in 2019 would be receivable by the APS alone instead of there being a possibility that some part of that sum could be available for the NAPS. Mr Bretherton saw difficulties arising out of this point for the 2012 valuation which might divide the two trustee boards.

239. The DISC met again on 21 September 2011. Towers Watson had prepared a further paper for discussion at this meeting. In relation to the closed fund test, on the assumption that CPI was 0.75% below RPI, the deficit was only £12 million (without any discretionary increase) so that the closed fund test was only just failed. Mr Pardoe took the committee through the Towers Watson paper in detail. At the meeting, Captain Bretherton questioned whether all of the £250 million contingent payment due in January 2019 should be considered to be available for the benefit of the APS. He made a number of further points which, if accepted by the APS trustees, would have reduced the prospects of an award of a discretionary increase. The members of the committee identified a number of principles to be applied and Towers Watson were asked to produce a summary paper reflecting those principles.

240. The proposed two-stage test was considered by the trustee board at their meeting on 19 October 2011. Towers Watson had prepared a paper (dated 10 October 2011) on that subject for discussion at this meeting. There was a lengthy discussion of the subject at the meeting. There was a debate as to whether the contingent payment of £250 million should be included in the calculations for the closed fund test. Mr Spencer summarised the discussion by saying that the trustees were broadly comfortable with the principles which had been identified but they wished to ensure that the tests were not overly conservative.

241. On 31 October 2011, Mr Spencer wrote to Mr Swift with a detailed summary of the trustees' deliberations on the proposed two-stage test. Mr Spencer met Mr French and Mr Swift on 4 November 2011. Mr French and Mr Swift raised various questions as to the appropriateness of including the guarantee of £230 million in the closed fund test and of including the contingent payment of £250 million in the gilts funding level test. Mr Spencer reported on this meeting to the trustees. He stated that he had agreed with BA to start discussions on the 2012 valuation in relation to the schemes.

242. The DISC met again on 15 November 2011. Towers Watson had prepared a further paper for discussion at this meeting. In that paper, Towers Watson considered in detail different ways of making an allowance for the contingent payment of £250 million in the closed fund test. At the meeting, Mr Spencer reported on his meeting with BA on 4 November 2011 and the Towers Watson paper was considered in detail. It was agreed that the conclusions reached by the committee should be reflected in Towers Watson's paper to be submitted to the trustee board.

243. The trustee board met on 21 December 2011. Ten of the trustees (including the six MNTs) were present. The meeting was attended by Mr Swift and Mr French who reported on BA's financial position. The trustees received a report on the meetings of

the DISC. Towers Watson had prepared a detailed paper (dated 12 December 2011) in relation to the proposed two-stage test. There are two matters of background to be noted at this stage. First, the difference between CPI and RPI was only 0.4%; RPI was 5.6% and CPI was 5.2%. Secondly, gilt yields had fallen in the fourth quarter of 2011.

244. At the meeting on 21 December 2011 there was a full discussion of the two-stage test. After discussion, it was agreed that the framework required further discussion and that it was not likely to be ready for some time. At this point, it seemed likely that because of the recent fall in gilt yields, in particular, the proposed two-stage test would not justify awarding a discretionary increase. Further, the trustees were nearing the point of having negotiations with BA as to the 2012 valuation and a new funding agreement. The trustees wanted to include in those negotiations a provision for future discretionary increases and that object would not be advanced if the trustees had adopted a two-stage test which would not support the award of a discretionary increase. However, these were not the only reasons why some at least of the trustees were opposed to a commitment to the two-stage test. A question was raised as to whether the trustees could still reach the conclusion that a discretionary increase was appropriate. Mr Pardoe expressed the view that the trustees could award a discretionary increase even while the scheme was in deficit and BA could only interfere with that decision if it were irrational. Later in the meeting, it was agreed, in view of the forthcoming negotiations with BA in relation to the 2012 valuation, to set up a Valuation Steering Group ("VSG") of the APS and the NAPS and that the VSG should take on the role previously performed by the DISC.

245. The VSG met for the first time on 25 January 2012. The APS trustees who were members of the VSG were Mr Spencer, Captain Pocock, Mr Douglas, Ms Boswell and Mr Maunder. Mr Pardoe presented a detailed report to the VSG. The report considered the previously formulated two-stage test and showed that both the closed fund test and the projected gilts funding level test were not met. A major reason for this result was the significant downward shift in gilt yields which had increased liabilities more than assets. Mr Pardoe also explained that the gap between CPI and RPI in September 2011 had been 0.4% and the cost of awarding a discretionary increase of 0.4% would be £25 million. Mr Pardoe commented that the factors which might be relevant to a decision to award a discretionary increase could include the impact on members, the relatively small cost of granting an increase and the implications for the 2012 valuation negotiations with BA. This last consideration was referred to at the meeting as a tactical consideration. Mr Pardoe further explained that if a discretionary increase of 0.4% were to be awarded, the current recovery plan could support the resulting deficit. The VSG agreed to make no formal recommendation to the trustee boards of the APS and the NAPS.

246. In an email dated 7 February 2012 to Ms Suriyae, Mr Spencer indicated that he would like to see an award of a discretionary increase to assist with the negotiations on the 2012 valuation. He said in his evidence that he wanted to get the principle of discretionary increases established.

247. The APS trustees met on 9 February 2012. Nine of the trustees were present including five MNTs. Mrs Sellers was absent and had appointed an alternate. The trustees considered in detail a report from Mr Pardoe and there was a lengthy discussion. Mr Spencer summed up the position by stating that the trustees' views on the award of a

discretionary increase were finely balanced and the decision was deferred to a further meeting due on 29 February 2012.

248. On 16 February 2012, Mr Spencer wrote to Mr Swift referring to a meeting of the VSG with BA on 20 February 2012 and inviting BA to express its views in advance of that meeting. At the meeting on 20 February 2012, the trustees on the VSG and BA set out their positions. BA stated that it was firmly against the award of a discretionary increase.

249. On 27 February 2012, Mr Swift wrote to Mr Spencer stating that BA was strongly opposed to an award of a discretionary increase and giving its reasons.

250. The trustees met again on 29 February 2012. Eleven of the trustees were present. Mr Douglas was absent and had appointed an alternate. The trustees discussed in detail whether to award a discretionary increase with effect from April 2012. The history of the matter was reviewed. BA's views were considered. Reference was made to the two-stage test and the fact that it had not been passed. Reference was also made to the fact that the decision fell to be made during a period of very unusual market conditions which resulted in what were said to be abnormally low gilt yields. Mr Spencer said that the award of a discretionary increase would be helpful in the 2012 valuation negotiations. The trustees decided that they would vote on a possible increase by secret ballot. The proposal which was put to the vote was to award a discretionary increase of 0.2%. The result of the secret ballot was that insufficient votes were cast in favour of this proposal. It is now known that the vote was 7 to 5 in favour of awarding a discretionary increase of 0.2%. It seems likely that the 7 votes came from the 6 MNTs and Mr Spencer. As a two-thirds majority was not achieved, there was no award of a discretionary increase from April 2012.

251. On 20 March 2012, the Court of Appeal dismissed a challenge, brought by a number of trade unions and other bodies representing public employees, by way of judicial review of the decision of the Secretary of State for Work and Pensions, in line with the Budget Announcement of 22 June 2010 that with effect from April 2011 public sector pensions would be increased by reference to CPI rather than RPI: see R (FDA) v Work and Pensions Secretary [2013] 1 WLR 444.

252. 31 March 2012 was the valuation date for the 2012 valuation under Part 3 of the Pensions Act 2004.

253. On 2 April 2012, Mr Spencer wrote to BA referring to the decision of the trustees on 29 February 2012 not to award a discretionary increase with effect from April 2012. Mr Spencer also commented on BA's letters of 23 and 27 February 2012 to Mr Spencer.

254. In around July 2012, Mr Spencer formed a working party consisting of himself, Mr Maunder (an APS ENT) and Captain Pocock (an APS MNT) which was to be advised by Mr Pardoe. The working party did not include any trustees of the NAPS. By this stage, it was clear that BA would not agree to a discretionary increase for the NAPS and accordingly there was no prospect of such an increase for the NAPS. The possibility of a discretionary increase was only potentially relevant to the APS and so the working party consisted of trustees of the APS alone. In later documents this working party is referred to as the Discretionary Increases Sub-committee ("DISC")

and I will so refer to it but it should be noted that this working party was different from the earlier version of the DISC. Mr Spencer's intention was to endeavour to make progress in formulating a framework to be used to assist the APS trustees to make their decisions as to possible discretionary increases under the amended rule 15. On 6 July 2012, Mr Pardoe emailed the members of the DISC and stated:

> "My understanding is that the Trustees have a common aspiration to follow some form of journey plan intended to get them to a position of full funding on a low risk basis allowing for eventual payment of full RPI increases and with the assets eventually invested with a high degree of hedging. There are various key parameters that are required to more closely define the possible journey plan to this end objective …".

Mr Pardoe then set out the detail of the parameters to which he had referred.

255. On 9 July 2012, there was a meeting of the DISC, attended by Mr Pardoe. After some discussion, there was a tentative agreement that in place of a two-stage closed fund test and projected gilts funding level test, there might be merit in considering what level of discretionary increase could be supported by the outstanding value of recovery plan payments.

256. On 11 July 2012, the APS trustees considered whether CPI was "an appropriate national index … reflecting fluctuations in the cost of living" for the purposes of rule 15. They concluded, on the basis of the information provided, that CPI was an appropriate national index for this purpose. They restated that they remained fully supportive of the objective of returning to RPI increases. The trustees then agreed that instead of seeking to amend rule 15 to remove the reference to PIROs or in some other way, they should focus on putting in place a framework setting out the circumstances in which the trustees would exercise the power to award discretionary increases pursuant to the previously amended rule15.

From July 2012 to February 2013

257. On 17 August 2012, the DISC met again with Mr Pardoe to discuss a 19-page discussion paper which he had prepared. This paper identified a possible "affordable discretionary increase test" and a large number of relevant considerations as to the application of such a test. Such a test would enable one to identify a pension increase assumption whereby the value of the liabilities was equal to the value of the assets plus the value of recovery plan contributions to 2023 so that the derived pension increase assumption could be expressed as a proportion of the gap between RPI and CPI. After discussion, the outcome of the meeting was that Mr Pardoe was asked to revise his paper to deal with a number of matters that had been identified.

258. On 18 September 2012, the DISC met again and their conclusions were reported to a meeting of the trustees later in the day. At that stage, the members of the DISC had agreed on five principles to be applied when considering a discretionary increase and they had failed to agree on a potential sixth principle. The trustees agreed that a paper on this subject should be prepared for consideration at a Main Board meeting on 17 October 2012.

259. On 28 September 2012, there was a second meeting of members and pensioners of the APS at Ascot racecourse. Several hundred members and pensioners attended the meeting. Ten of the trustees (including the chairman, Mr Spencer) attended the meeting. Mr Arter and Mr Pardoe were also in attendance. The discussion at the meeting was recorded and has been transcribed. Mr Spencer addressed the meeting as did Captain Post. These speeches were followed by a question and answer session.

260. At the conclusion of the meeting, the following three questions, provided by Captain Post, were put to those present at the meeting:

(1) Do you agree that the APS trustees should restore RPI pension increases back-dated to April 2011, thus meeting members' expectations?

(2) Do you agree that the APS trustees should retain a funding target sufficient to pay RPI pension increases?

(3) Do you agree that, because of serious conflict of interest issues, APS trustees appointed by British Airways should not be NAPS beneficiaries?

All three questions were answered in the affirmative by an overwhelming majority of those voting.

261. In September 2012, the difference between RPI (at 2.6%) and CPI (at 2.2%) was 0.4%.

262. On 17 October 2012, the Valuation Steering Group met representatives of BA to discuss the 2012 valuation. BA expressed the wish to be free to pay dividends to shareholders. The discussion at this meeting was reported to a meeting of the trustee board later in the day. The trustees also discussed a paper from Mr Pardoe which sought to identify broad principles for use in a discretionary increase framework. The trustees agreed that this paper formed an appropriate basis for further discussions.

263. On 12 December 2012, in the morning, there was a joint meeting of the trustee boards of the APS and the NAPS. The Valuation Steering Group reported on the state of the negotiations with BA as to the 2012 valuation and this was followed by a long discussion by the trustees. In the afternoon of that day, Mr Pardoe presented to the trustees of the APS a 31-page discussion paper in relation to a possible affordable discretionary increase test. The trustees considered whether BA should be invited to comment on the proposed framework. Mr Spencer advised that the trustees should listen to any suggestions made by BA but that the trustees were not obliged to adopt any suggestions from BA. The trustees decided that Mr Pardoe should prepare a shortened version of the framework which should then be provided to BA for its comments. Thereafter, Mr Pardoe did prepare a shortened version of the discussion paper and this was sent to BA on 4 January 2013.

264. On 10 January 2013, the Office for National Statistics announced that RPI would continue to be published in its current form.

265. On 14 January 2013, BA responded with its preliminary comments on Mr Pardoe’s paper. BA stated that, having regard to the current position as to the funding of the

scheme and the future risks involved, it was strongly opposed to the granting of discretionary increases.

266. Mr Spencer met representatives of BA on 16 January and again on 21 January 2013. Mr Spencer and BA then had a meeting with tPR on 23 January 2013. At the meeting with tPR, BA explained that it wished to be in a position to pay a dividend to its parent company, IAG.

267. The Valuation Steering Group met representatives of BA on 28 January 2013 when there was discussion about the payment of a dividend by BA and about discretionary increases. Mr Swift of BA asked "whether outperformance sufficient to pay a dividend could be linked to a start to move towards RPI increases". This possible link between a possible dividend and a possible discretionary increase did not appear to depend on the funding levels of the scheme. There was no agreement at this meeting (or at any time) to a formal link between the paying of dividends and the awarding of discretionary increases.

268. The Valuation Steering Group again met representatives of BA on 7 February 2013. There was detailed discussion about the provisions for a cash sweep in favour of the APS and also in relation to the dividend policy of BA. Mr Swift of BA stated that discretionary increases were a highly sensitive matter for BA but that it was conceivable that there could be a linkage between the payment of dividends and the award of discretionary increases.

269. On 18 February 2013, BA wrote to Mr Spencer in relation to the 2012 valuations for the APS and the NAPS. On the subject of pension increases, the letter stated:

> "We are fully aware of the sensitivities with respect to RPI/CPI and we understand the trustees' stated intention to be able to transition from paying pension increases as set down in the APS rules based on the Pensions Increase Review (Orders), which are now based on CPI, towards pension increases based on RPI, at the appropriate time. We recognise the trustees granted themselves a discretionary power to do this following the Government's decision to base Pension Increase Review (Orders) on CPI and have said to members they will review pension increases annually. We believe such discretionary increases should be viewed very prudently, and any evaluation needs to be based on all the relevant factors, not least the size of the deficit and residual risks, which are currently still significant. The Company has consistently stated that in the current circumstances, the Company is strongly opposed to any discretionary increases, and that position remains unchanged.
>
> That said, we do recognise that the terms of the APS trust deed are unusual in that they do not provide for the employer to be a party to any decision to grant discretions. With this in mind we believe it is appropriate to build some additional prudence into the APS assumption, which we suggest setting at 20 basis points. We also understand that the Company paying a dividend could well be viewed as a key point for the trustees to start on

> their intended journey towards RPI and, assuming the other relevant factors were supportive of such a move, we would be sympathetic to a framework that had this as an important trigger point."

270. The reference in the passage quoted above to 20 basis points led to BA making a proposal that the assumption for the APS 2012 valuation should be that pension increases for the APS should increase at the rate of RPI – 0.55% whereas the assumption to be made for the NAPS would be of pension increases of RPI – 0.75% (with 0.75% being the predicted gap between RPI and CPI). The letter also referred to the contingent payment of £250 million in 2019 and stated that if this payment were made to the APS in 2019, that might increase the likelihood or size of any discretionary payment with respect to pension increases at that time.

271. On 18 February 2013, there was a telephone conversation between Mr Spencer and Mr Swift. Both Mr Spencer and Mr Swift gave evidence about this conversation but their recollections differed in relation to matters of detail. Mr Swift did not make a note of the conversation. Mr Spencer sent an email to Captain Pocock at 6.38 p.m. on 18 February 2013 to give Captain Pocock an account of the conversation. To the extent that it is relevant, I accept Mr Spencer's account of the conversation. In particular, I find that Mr Swift expressed the view that if the trustees were going to make a decision, before the conclusion of the valuation negotiations, to award a discretionary increase for 2013, BA would prefer that the trustees announced such a decision after the conclusion of the valuation rather than before.

272. The Valuation Steering Group met BA on 25 February 2013 when BA's letter of 18 February 2013 was considered and the points raised in it were further discussed.

273. On 28 February 2013, the trustees of the APS met in two sessions. The morning session was a joint meeting with the trustees of the NAPS and the afternoon session was a meeting of the trustees of the APS alone. Ten of the APS trustees attended both sessions. The two absent trustees (one of whom was Mrs Sellers, an MNT) had appointed alternates. The morning session discussed a report from the VSG in relation to the 2012 valuations for the two schemes. The discussion on this topic referred to the fact that BA was not prepared to agree an increase in its contributions compared with the 2010 funding agreement and the trustees were not prepared to agree a reduction in those contributions. It was thought that both objectives could be achieved. Mr Pardoe explained the assumptions used in the negotiations. He stated that the key assumption was the rate at which pensions would increase. In this respect, BA was prepared to agree some allowance for discretionary increases and it had proposed a rate of RPI – 0.55% for the APS (with a different rate for the NAPS of RPI – 0.75%). He told the trustees that there had been investment outperformance since the valuation date of 31 March 2012 and he would be comfortable if the trustees agreed a package which took some account of investment outperformance. Mr Spencer said that the trustees' aspiration to return to paying pension increases in line with RPI had been a consistent theme throughout the VSG discussions and he referred to BA's sensitivity to the amount of the deficits in the two schemes.

274. During the morning session on 28 February 2013, the trustees received a detailed report from PwC on BA's covenant. The trustees then considered the draft discretionary increase framework. This had been presented to BA and it was said that

it had initially met with "violent opposition". It was then reported that once the trustees had persuaded BA to work with them on the question of cash sweeps and the payment of dividends by BA, BA had agreed in principle that a discretionary increase could be supported but no firm agreement on this subject was reached.

275. The afternoon session of the trustees' meeting on 28 February 2013 considered whether to award a discretionary increase from April 2013. The trustees considered a summary of the DISC discussions since the last trustee board meeting on 12 December 2012 and a paper from Towers Watson setting out the considerations which the trustees could take into account for the purposes of their decision. Mr Pardoe then invited the trustees to decide whether to adopt the discretionary increase framework and, if they did adopt it, they could then consider whether to award a discretionary increase for that year. Mr Pardoe stated that the underlying principle of the affordable margin test was that discretionary increases were derived from the level of pension increase that could be supported from the current assets and the 2009 valuation recovery plan contributions (including the contingent payment of £250m in January 2019), if the agreed assumptions were borne out in practice. The proportion of the assumed RPI/CPI gap that could be supported was the "affordable margin". The "affordable margin test" taken together with the set of broad principles that the trustees had previously discussed constituted the discretionary increase framework which would, if adopted, be used when considering whether to pay a discretionary pension increase. Mr Maunder, a member of the DISC confirmed that that committee recommended the trustees to adopt the discretionary increase framework. I will refer to the affordable margin test as "the AMT".

276. The trustees then reviewed the broad principles set out in the discretionary increase framework and agreed that the first principle was of overriding importance with no one of the remaining six being more important than the others. They wished to amend the second principle and with that amendment they adopted the seven principles in these terms:

> "**1) Benefit security for the guaranteed benefits remains the primary objective**
>
> The Trustees' primary responsibility is to deliver the benefits set out in the Rules, which (for most members on the non-GMP element) guarantee pension increases linked to Pensions Increase (Review) Orders.
>
> **2) An important secondary objective is to achieve the Trustees' objective of returning to paying increases in line with RPI as soon as it is appropriate to do so**
>
> The Trustees wish to provide increases that reflect the RPI as soon as it is appropriate to do so, subject to recognising the primary objective in principle 1.
>
> **3) Discretionary increases should be considered in conjunction with de-risking**

The ultimate aim for both Schemes is to provide benefits with a high degree of certainty, with the main investment and demographic risks hedged as far as practicable, thereby reducing to a minimum the ultimate future reliance on the sponsor covenant. Both Schemes are some way off this position, with NAPS being further away than APS, reflecting its lower maturity and lower funding level.

As part of the journey plan aiming for this preferred ultimate position, a balance will be needed between how asset outperformance and other funding level improvements are "spent" on discretionary increases and de-risking. The appropriate balance will need careful consideration, and might change over time depending upon changing views of the sponsor covenant and the level of the de-risking that has already been achieved or is considered appropriate (for example, if risks are high then de-risking might be given a relatively higher priority than discretionary increases, compared to the position where most risks are hedged).

4) The level of discretionary increase should be supportable in the long-term

A possible approach would derive an annual discretionary increase that can be supported both in the current year and in all future years, so that the value of the liabilities allowing for this level of discretionary increase is equal to the value of the Scheme assets and the future recovery plan payments (see principle 5). In effect, the level of discretionary increase (up to the RPI) would be the balancing item that ensured that the expected value of the liabilities exactly equalled the expected value of the assets and future recovery plan payments. Therefore, if the assumptions are borne out precisely, the same level of discretionary increase could be granted in all future years.

5) Allowance should be made for agreed recovery plan payments

When considering the affordability of providing a discretionary increase, allowance should be made for any currently agreed recovery plan payments, providing that the Trustees remain confident that BA is likely to remain a going concern over the time of the recovery plan.

This approach will provide alignment with funding negotiations and the resulting recovery plans when considering whether a Scheme can afford to provide discretionary increases.

6) The assessment of the discretionary increase should be carried out prudently

> A prudent approach should be used in the calculation of the possible discretionary increase, to reduce the risk that unsustainable increases are given in the early years which then need to be reduced or ceased altogether, or which call into question the security of member's benefits.
>
> Consideration would be needed as to how the technical provisions will change over time towards the subsidiary funding objective, and the implications for the timing of discretionary increases and their sustainability, as well as for overall benefit security.
>
> **7) The final decision each year needs to draw upon any other relevant issues**
>
> Although it would be intended that a detailed framework built upon the principles above will provide good guidance as to the appropriate level of increase in a year, it will be important that the Trustees retain an overall perspective when making a final decision. For example, this would allow the proposed calculated increase to be considered alongside other issues including:
>
> - whether views on the strength of BA's covenant have changed materially
> - what imminent or future de-risking plans exist and their likely impact
> - the current benefit security and solvency position
> - consistency with any previous discretionary increases
> - any change in view or uncertainty associated with the key assumptions (discount rate, CPI, RPI and mortality)."

277. Having adopted the amended discretionary increase framework (which from now on I will refer to as "the DIF"), the trustees considered the question of timing in relation to any discretionary increase. Mr Spencer said that the trustees needed to consider whether to take into account BA's position that any increase should not be awarded until the valuation was agreed. It was then decided that the trustees should not announce any decision to award a discretionary increase until the valuation was agreed as such an announcement would adversely affect their position in the negotiations.

278. The trustees then proceeded to discuss the amount of any discretionary increase. Mr Pardoe made a detailed presentation in accordance with a 29-page paper which had been circulated in advance of the meeting. He concluded his presentation by saying that while the decision on what increase could be made was one for the trustees, he would be able to support any increase in the range 25% to 100% of the difference

between RPI and CPI on this occasion. Pressed to set out his personal view he said that his preference would be for an increase of 50% of the difference between RPI and CPI. He said that this would provide for some additional prudence which would be consistent with a move towards the subsidiary funding objective which he said was relevant given that a discretionary increase would add to the scheme's liabilities. He also said that the data suggested an increase of this level could be sustained beyond 2019.

279. The minutes of the afternoon meeting on 28 February 2013 recorded the trustees' decisions as follows:

> "After discussion the Trustees present, being ten of the twelve currently in office, agreed unanimously that a discretionary increase of 50% (subject to decisions on treatment of specific groups of members) of the difference between RPI and CPI as at 30 September 2012 (RPI being 2.6% and CPI 2.2%) would be appropriate. The additional increase of 0.2% would be paid after completion of the valuation, with the amount of the increase to be reviewed before the increase was finalised but with at least two thirds of the Trustees then in office being required to vote in favour of any change to the amount to be paid.
>
> It was further agreed that:
>
> • no announcement of the decision to award a discretionary increase would be made until the valuation had been finalised
>
> • in the event that the valuation is not finalised by the end of June, the Trustees would consider whether to proceed with a discretionary increase without the valuation being finalised with at least two thirds of the Trustees then in office being required to vote in favour for an increase to be paid in those circumstances
>
> • the payment date to be finalised once the valuation had been finalised taking into account that BA Pensions would require a minimum of six weeks to implement the increase."

280. The trustees did not tell BA of the decision taken at this meeting. However, BA had been told in advance of the meeting of 28 February 2013 that a meeting of the trustees of the APS was to be held in late February 2013 to discuss discretionary increases in advance of the usual April pension increase. I find that BA had been given ample opportunity to make its comments in advance of this meeting. As to the decision not to tell BA of what had been decided at the meeting, it is relevant that the trustees' decision was not considered by them to be a final decision. Further, the decision to make no announcement as to the outcome of the meeting was in accordance with the views expressed by Mr Swift in his conversation with Mr Spencer on 18 February 2013.

From February 2013 to November 2013

281. On 1 March 2013, Mr Tomlin emailed Mrs Sellers, who had not been at the meeting on 28 February 2013. He summarised what had occurred and in relation to the agreement in favour of an increase of 0.2% he stated that "some ground was given as we were originally seeking 0.25". It is likely that other MNTs shared Mr Tomlin's aspiration for an increase of 0.25%.

282. Mr Spencer e-mailed the trustees of the APS on 4 March 2013, a few days after the meeting, saying that he thought that there had been a "constructive atmosphere" at the meeting and that "people listened, rationalised and worked with each other to get decisions".

283. By 10 April 2013, BA had become aware that in order for it to be liable to pay the £250 million payment which was contingently due in 2019, BA had to receive a notice of request for such payment whereby the notice was given by both the APS trustees and the NAPS trustees. BA began to recognise that the requirement, that the NAPS trustees must join in the notice of request, could potentially be relevant to the negotiations on the 2012 valuation and to the discussion as to possible discretionary increases in respect of the APS.

284. On 22 April 2013, the trustees of the APS wrote to members stating that the increase in pensions, with effect from April 2013, would be in accordance with the PIRO, which provided for CPI at 2.2%, but that the amount of the increase would be reviewed following the completion of the 2012 valuation. An increase in accordance with RPI would have been 2.6%.

285. On 5 June 2013, there was a meeting with tPR to discuss the negotiations on the 2012 valuations. Mr Spencer and Mr Pardoe attended the meeting. Mr Pardoe presented slides which referred to the APS trustees having an aspiration to return to awarding RPI increases. He did not refer to the decision which had been taken by the APS trustees on 28 February 2013.

286. By 11 June 2013, the trustees of the APS and the trustees of the NAPS and BA had agreed heads of terms for the 2012 valuations of the APS and the NAPS. These heads of terms were in accordance with the terms of the funding agreements which were later entered into and which I will describe below.

287. On 25 June 2013, Mr Spencer and Mr Douglas attended a meeting with tPR. Mr Swift of BA also attended that meeting. Mr Spencer informed Mr Swift immediately prior to the meeting that the intention of the trustees was to grant a discretionary increase for 2013 of 50% of the difference between RPI and CPI. Mr Spencer did not say that the trustees had already made a provisional decision to that effect on 28 February 2013 nor that the trustees were meeting again on 26 June 2013. At the meeting with tPR, the possibility of discretionary increases for the APS was the main topic for discussion. TPR was concerned as to the effect of discretionary increases on BA and any consequential effect on the ability of BA to fund the NAPS. There was a discussion as to the extent to which the trustees of the APS should take account of the possible effect for the NAPS of a decision to award discretionary increases for the APS. Mr Spencer and Mr Douglas explained the position taken by the trustees of the APS in that respect. There was also discussion as to the cost to the APS of discretionary increases. Mr Spencer and Mr Douglas stated that the cost of awarding an increase of 0.2% for one year would be £12 million. TPR referred to a possible

cost of hundreds of millions of pounds but that was on the basis that a discretionary increase was awarded every year. There was a reference to the contingent payment of £250 million in 2019 and Mr Spencer recognised that a notice requiring BA to make this payment had to be given by both the trustees of the NAPS and the trustees of the APS. Mr Spencer agreed to provide tPR with details of the DIF and the explanation of the process which would be followed when deciding on whether to award a discretionary increase.

288. Between March 2013 and June 2013, the details of the proposed funding documents as at 31 March 2012 were finalised by agreement between BA and the trustees of the APS and the NAPS. For the APS, the deficit contributions remained the same as under the 31 March 2009 funding documents, i.e. £55 million per year, and the technical provisions funding position had improved from 85.2% at 31 March 2009 to 91.5% at 31 March 2012. The proposed statement of funding principles provided that a linear transition from CPI to RPI increases from 2013-2023 should be assumed for funding purposes, that an express allowance would be made for discretionary increases within the technical provisions, and that the trustees would consider at least annually whether a discretionary increase should be awarded.

289. On 26 June 2013, the trustees of the APS met in two sessions. The morning session was a joint meeting with the trustees of the NAPS and the afternoon session was a meeting of the trustees of the APS alone. Ten of the APS trustees attended both sessions. The two absent trustees (one of whom was Mr Tomlin, an MNT) had appointed alternates. During the morning session, the trustees of both schemes considered the draft valuation and funding agreements. After a discussion, the trustees agreed to approve the draft valuation and funding agreements.

290. The main business for the afternoon session of the meeting on 26 June 2013 was the question of a possible award of a discretionary increase. Mr Spencer reminded the trustees of the decision taken on 28 February 2013 and stated that at least two-thirds of the trustees currently in office would be required to vote in favour of any change from 0.2% as a discretionary increase. Mr Pardoe presented a 13-page paper which he had prepared which referred back to his earlier paper of 28 February 2013 which had been considered by the trustees at their meeting on 28 February 2013. Mr Pardoe stated that there were no strong arguments arising from the Towers Watson review of market conditions that would lead him to recommend any change to the amount of increase previously agreed by the trustees. The trustees then agreed that the amount of the discretionary increase should remain at 0.2%.

291. Having confirmed their earlier decision (of 28 February 2013) to award a discretionary increase of 0.2%, the trustees considered the question of the timing of the payment of such an increase. The minutes of the afternoon meeting on 26 June 2013 recorded the following:

> "**Timing Of Payment of Discretionary Increase**
>
> Mr Spencer noted that the earliest that BA Pensions could implement the increase would be for the September 2013 payroll. He said that before the timing was finalised it was important that the Company was briefed on how the Trustees had reached their decision. He said that this was consistent with

> what the Trustees were expecting of the Company where it was making decisions which might affect the Covenant. He said that it was also important to brief tPR on the decision process.
>
> In response to a question from Mr Scott, Mr Spencer said that he did not foresee either of these consultations taking more than a few weeks.
>
> The Main Board agreed that consultation with the Company and tPR should be undertaken before enacting the decision and noted that this process was not expected to delay payment in September 2013."

292. Following the trustees' discussion as to the timing of the payment of the discretionary increase, the trustees discussed the question of what should be communicated to members about a discretionary increase. Ms Suriyae stated that she expected that communications about the valuation would go out to members by the end of July 2013 and information on the discretionary increase could be included in those communications.

293. On 28 June 2013, the triennial valuation for 2012 was formally agreed. The trustees of the APS and BA entered into a funding agreement dated 28 June 2013 where the technical provisions made an allowance for discretionary increases in pensions. In accordance with the agreements reached, Towers Watson prepared its report on the valuation for the purposes of clause 11 of the trust deed of the APS and under Part 3 of the Pensions Act 2004. The report described the position in relation to pensions increases as follows:

> "The main pension increase assumption at 31 March 2012 is derived from RPI and CPI, adjusted for the timing of actual pension increases and the pension increase awarded in April 2013 of 2.2%. To allow for possible discretionary increases, pension increases are assumed to transition linearly from CPI in April 2013 to RPI from April 2023 onwards. The Trustees will consider at least annually whether a discretionary increase may be awarded, and the size (if any) could be higher or lower than the allowance in the technical provisions."

294. On 9 July 2013, Mr Spencer wrote to Mr Swift of BA enclosing a draft of a report which the trustees intended to send to tPR as requested by it at the meeting on 25 June 2013. The letter to Mr Swift stated that the trustees had decided to proceed with the payment of an additional increase of 0.2% "with effect from 1 September 2013". The draft report to tPR took the form of an explanatory letter followed by a detailed report. That report described the approach taken by the trustees in relation to the contingent payment of £250 million in 2019. The report attached a paper prepared by Mr Pardoe which described the AMT and its application. Finally, the letter to Mr Swift included a draft of the communication which the trustees intended to make to the members of the APS. The draft communication referred to pensioners receiving an additional increase in pensions "with effect from 1 September 2013".

295. On 15 July 2013, Mr Swift of BA replied to Mr Spencer. Mr Swift stated that BA was strongly opposed to the discretionary increase referred to in Mr Spencer's letter. Mr Swift stated that BA would need to consider taking legal action should the trustees wish to pursue any discretionary increase at that stage. He also reminded Mr Spencer that there had to be a joint notice from both the trustees of the NAPS and the trustees of the APS to require the making of the contingent payment of £250 million in 2019.

296. On 16 July 2013, Mr Spencer wrote to tPR sending it a report on the subject of discretionary increases in accordance with the draft of that report which had been provided to Mr Swift under cover of the letter of 9 July 2013. The letter of 16 July 2013 stated that the trustees had decided to award a discretionary increase of 0.2% "with effect from September".

297. On 17 July 2013, Mr Spencer replied to Mr Swift's letter of 15 July 2013. Mr Spencer responded in detail to the matters raised by Mr Swift and stated:

> "We will give further consideration to any additional representations you would wish to make to the APS Trustees, alongside any views conveyed by the Regulator and a meeting will be convened for this purpose as required. We will keep you informed of progress and in the meantime, we await your direction as to the documentation you would like to send to the Regulator as BA's response to our most recent exchange of correspondence on this matter."

298. Mr Swift wrote to tPR on 19 July 2013. This letter was copied to Mr Spencer and was circulated to the trustees of the APS. In the days following 19 July 2013, various trustees of the APS sent emails to the other trustees referring to Mr Swift's attempt to delay the implementation of the increase and recommending that the trustees proceed to implement their decision made in June 2013 and to send out communications of the members to that effect.

299. On 26 July 2013, Mr Swift wrote to Mr Spencer urging the trustees of the APS not to communicate an intended discretionary increase to the members until BA had formally responded to the trustees' proposal of an increase and until the trustees had considered that response.

300. On 26 July 2013, Mr Swift wrote to the trustees of the NAPS reminding them that a notice requiring payment of the £250 million contingent sum in 2019 was required to be given by both the trustees of the NAPS and the trustees of the APS and making a number of comments and suggestions as to the attitude which the trustees of the NAPS might adopt in relation to that matter. On the same day, Mr Bretherton, a NAPS MNT, wrote to Mr Spencer expressing his opposition to any of the £250 million contingent payment being used to fund discretionary increases for the APS. Other NAPS trustees then wrote to support the stance taken by Mr Bretherton.

301. On 2 August 2013, BA wrote to Mr Spencer enclosing a detailed report which contended that the trustees' decision to award a discretionary increase was invalid. BA's letter of 2 August 2013 asked the APS trustees to confirm that they would not inform members that pensions would be increased in accordance with the decision made in June 2013 and that the trustees would give BA 21 days' notice of any

intention to send any such communication to members. The report stated that BA reserved the right to bring court proceedings against the trustees if they proceeded to implement the decision to increase pensions and such proceedings might include a claim for interim relief.

302. On 7 August 2013, the APS trustees met to discuss the position being taken by BA in relation to discretionary increases. The trustees considered in detail the effect of tPR becoming involved in the decision to award a discretionary increase on the date of implementation of the decision taken in June 2013. It was resolved that the trustees would make a final decision on implementation at a meeting to be held on 2 October 2013 and that the discretionary increase should be deferred with a view to a final decision being taken at that meeting. It was further resolved that if a decision was not possible on 2 October 2013, then a final decision would be made, in any event, by mid-November 2013 for implementation by the end of the calendar year.

303. On 21 August 2013, Mr Spencer had a meeting with Mr Swift to discuss the position. On 23 August 2013, Mr Spencer wrote to Mr Swift to deal with a number of points that had been discussed. The letter explained that a decision by the trustees to pay an increase in any one year, expressed as a percentage of the gap between RPI and CPI, did not guarantee that such a percentage increase would be awarded in any future year. As to the implementation of the decision to award a discretionary increase, Mr Spencer wrote:

> "As I confirmed at the meeting, given the concerns expressed in your letter, and in the interests of seeking to maintain a good relationship with you, the final decision has been postponed until our next board meeting scheduled for 2 October. The time between 9 July (when we notified you formally of the proposed 0.2% increase) and 2 October, when we intend to make our final decision, will give sufficient time for all relevant parties to feel there has been proper (and lengthy) consultation."

304. At the end of August or early September 2013, the trustees of the APS wrote to members reporting on the outcome of the 2012 valuation. On the subject of discretionary increases, the letter stated:

> "A substantial amount of preparatory work had been undertaken prior to the finalisation of the valuation with the intention that we would be able to confirm our position on the move from CPI to RPI increases, including a decision for 2013, at the same time as reporting to you on the valuation outcomes. However we have been held up because BA has raised further concerns, with us and the Pensions Regulator, that we must first discuss with them."

305. On 12 September 2013, tPR wrote to both Mr Swift and Mr Spencer stating that it wished to review the proposal of the APS trustees to award a discretionary increase. TPR stated that it was conscious of the APS trustees' desire to make progress but it considered that the issue needed to be properly considered by tPR.

306. On 24 September 2013, the APS trustees discussed the points arising in relation to the £250 million contingent payment and the desirability of reaching an agreement on that subject with the NAPS trustees. Mr Spencer commented that the position in relation to this payment had been a key factor in the earlier decisions and if there were a review of those decisions at a time when the facts had changed in relation to that payment then the outcome might be different.

307. Between the end of September 2013 and 19 November 2013, correspondence between Mr Spencer and BA continued as did the involvement of tPR. Further, there was correspondence between Linklaters on behalf of BA and Eversheds on behalf of the trustees. It is not necessary to refer to all of that correspondence. Also, in that period, there were negotiations between some of the MNTs of the APS and some of the MNTs of the NAPS as to the rival positions of the two sets of trustees in relation to the £250 million contingent payment in 2019. Those negotiations were constructive and the degree of progress which was made in those negotiations was later reported to the trustees of the APS on 19 November 2013.

308. With effect from 1 October 2013, Mr Mallett became an MNT of the APS following his election on 12 September 2013. He replaced Mr Scott. In his election statement in July 2013, he had stated that under the rules of the APS introduced in 1973, RPI had been the intended mechanism for pension increases. He also stated that he had been working with and supporting the Association of British Airways Pensioners ("ABAP") and Captain Post in the campaign to restore RPI increases to APS pensions.

309. On 1 October 2013, Mr Swift of BA wrote to Mr Spencer a lengthy letter making a number of points and making it clear that BA was opposed to the trustees awarding a discretionary increase.

310. On 2 October 2013, the trustees established the procedure to be followed "for re-running the 2013 Discretionary Increase review". The procedure involved: (1) reports from Mr Pardoe and PwC (on the BA covenant); (2) the matter being considered by the DISC who would recommend what was to be done; (3) that recommendation being passed to BA; and (4) the Main Board meeting on 19 November 2013 to consider whether to adopt any recommendation made by the committee.

311. On 4 October 2013, Mr Spencer wrote to Mr Swift stating that the trustees intended to consider anew the question of awarding a discretionary increase so as to take the decision afresh.

312. On 15 October 2013, tPR wrote to Mr Spencer stating that it would be in the interests of both the APS and the NAPS for the trustees' covenant adviser (PwC) to carry out a further analysis of the BA covenant in order to assess the impact on the covenant if discretionary increases were to continue at the same level (as in 2013) or above for future years. On 16 October 2013, PwC advised against carrying out this further analysis. Their reasons were that the further analysis would not be material and that there was insufficient time to do so.

313. On 18 October 2013, Linklaters wrote to Eversheds raising a number of arguments against any award of a discretionary increase.

314. The DISC met on 21 October 2013 with Mr Russell of PwC, Mr Pardoe and his colleague Bridget Hall, three Eversheds pension partners (Mr Arter, Mr Orton and Ms Swift) and representatives of the Secretariat in attendance. The meeting lasted 4 ½ hours. I will summarise some of the matters which were considered.

(1) Mr Spencer told the meeting that its purpose was to consider whether the DISC would recommend to the trustee board that a discretionary increase be awarded for 2013 and, if so, the increase figure or the range for any increase. He noted that the trustee board would not be constrained by the recommendation of the DISC and would be free to depart from it.

(2) The DISC discussed the many and various points made by BA and tPR in the recent correspondence.

(3) Mr Russell of PwC confirmed that the £12m cost of a 0.2% increase would not be material in the context of the covenant, that such an increase was affordable, and that there had not been any material change to the covenant since the conclusion of the 2012 valuation exercise in June 2013. He also advised, and the DISC agreed, that it was not necessary to undertake a full review of the cost of returning to RPI increases when what was being considered was the award of an increase for 2013.

(4) The DISC noted that the interests of BA were a relevant factor.

(5) The DISC considered a 69-page draft paper, dated 18 October 2013, prepared by Mr Pardoe and presented orally by him at the meeting. Mr Pardoe's draft paper had been peer-reviewed by another senior Towers Watson actuary with no link to the scheme. Mr Pardoe stated at the meeting that he was comfortable with the trustees awarding an increase in the range 0.07-0.4%.

(6) Mr Pardoe also explained in an email sent with his draft report that he had made some informal enquiries and could confirm that there were a number of schemes where discretionary increases were still being paid at that time even where there was a deficit. He explained that in most of those cases the power to determine discretionary increases lay with the sponsoring employer rather than a power in the control of trustees alone.

(7) Following discussion at the meeting on 21 October 2013, Mr Spencer, Captain Pocock and Mr Maunder agreed to recommend to the main board that the trustees consider awarding an increase in the range 0.15%-0.30%.

(8) After subsequent e-mail discussion between Captain Pocock and Mr Maunder on 21 October 2013, Captain Pocock suggested that the recommendation be amended to the range of 0.17%-0.30%, explaining that 0.17% was halfway between 0.10% (the increase that the AMT suggested was affordable on the gilts basis if one excluded the £250m contingent payment) and 0.24% (the increase suggested by the AMT if one took into account the full amount of the £250 million), effectively treating £125m of the £250m as recoverable. Mr Maunder was happy with this, although felt that the final decision to be taken at the full trustee meeting should be to one decimal place rather than two. Mr

Spencer was also agreeable to this course and this was the range subsequently communicated to BA and the trustees.

315. On 25 October 2013, Eversheds on behalf of the trustees replied to Linklaters' letter of 18 October 2013 and communicated the outcome of the meeting of the DISC on 21 October 2013. On the same day, Mr Spencer wrote to the trustees of the APS advising them of the outcome of the meeting of the DISC and included reports from Towers Watson and PwC.

316. On 25 October 2013, Mr Spencer wrote to tPR explaining why the trustees of the APS considered that it was unnecessary for them to request PwC to carry out further analysis in relation to the BA covenant.

317. On 1 November and 7 November 2013, there was further correspondence between Linklaters and Eversheds. On 12 November 2013, tPR wrote to Mr Spencer as chairman of the trustees of both the APS and the NAPS; tPR continued to express its concern at the possibility that the trustees of the APS might decide to award a discretionary increase; it stated that BA and the trustees of the NAPS had or should have had legitimate concerns in that respect.

318. On 15 November 2013, Mr Swift of BA wrote to the trustees of the APS. His letter referred to tPR's letter of 12 November 2013 and enclosed a 14-page paper which was highly critical of the trustees both as to the past and as to a possible decision to award a discretionary increase. The letter contained a number of comments by BA, including the following:

(1) Members of the APS were not entitled to discretionary increases;

(2) BA had never agreed to discretionary increases;

(3) BA did not wish to expose itself, the APS or the NAPS to the extra risk that would be created by RPI-linked increases; such risks were significant and volatile;

(4) The trustees were acting inconsistently in considering an award of a discretionary increase when they had previously regarded the BA covenant as weak and, on that basis, had previously insisted on additional protections and security.

The trustees' meeting on 19 November 2013

319. On 19 November 2013, the trustees met to consider the question of a possible discretionary increase. The meeting started at 2 p.m. and ended at 7.15 p.m. The minutes of the meeting are twenty pages long. All twelve trustees were present save that Captain Pocock left the meeting at a late stage. Most of the meeting was taken up with presentations, discussion and decision-making in relation to a possible discretionary increase. Mr Spencer began the consideration in relation to a discretionary increase by saying, as recorded in the minutes:

> "Mr Spencer confirmed that the Trustees were to consider afresh whether to grant a discretionary pensions increase in

> accordance with Rule 15. In undertaking this review, the Trustees noted that earlier decisions and views must be set aside and a new decision taken based on the advice both circulated as part of this new process and provided at the meeting.
>
> It was noted that the option of a secret ballot had been made to the Trustees but that the offer had been declined."

320. Mr Spencer then invited Mr Douglas to report to the trustees on the discussions of the MNTs' sub-committee (comprising MNTs from the APS and the NAPS) in relation to the allocation of the contingent payment of £250 million in January 2019 and cash sweeps. On behalf of the NAPS, an offer had been made which stated that cash sweeps should not be further considered because of their uncertainty and, as to the £250 million payment, the NAPS should receive no less than £125 million and the APS should receive no more than £125 million. Mr Douglas stated that it was not clear that the NAPS' proposal was in the best interests of the APS and there was no urgency to reach a settlement with the NAPS in relation to this issue. The trustees noted that the cash sweep had been excluded from the DIF on the grounds of prudence. Mr Maunder told the trustees that the DISC had considered it reasonable to value the contingent payment at £125 million and Mr Spencer supported this approach.

321. Mr Pardoe then made his presentation to the trustees. In advance of the meeting, the trustees had been provided with three papers from Mr Pardoe. The first was headed "Considerations around a discretionary pension increase in 2013" and was dated 25 October 2013; this paper was 70 pages long. The second was headed "Follow up questions to the considerations around a discretionary pension increase in 2013" and was dated 14 November 2013; this paper was 9 pages long. The third paper was headed "Journey plan considerations" and was dated November 2013; this paper was 10 pages long. These papers are immensely detailed and contain many facts and figures.

322. It is not easy to summarise the information contained in the 70 pages of the first paper which was full of graphs and figures and explanatory text. The executive summary of this paper was itself five pages long. For present purposes, I will simply refer to the headings of the executive summary and one or two bullet points contained in it. The summary described:

(1) The background to the questions arising; the paper stated that the analysis in the paper contained sufficient actuarial information for the trustees to make an informed decision about whether to grant a discretionary increase in 2013 and, if so, at what level;

(2) The current funding position of the APS; the paper stated that the funding position of the APS had improved since 31 March 2012 and at 30 September 2013, the scheme was fully funded on a gilts plus 0.42% pa basis with CPI increases;

(3) The AMT; the paper recorded Mr Pardoe's own opinion that the DIF balanced the principles and different objectives to enable the trustees to proceed in a reasonable and prudent manner;

(4) The results of applying the AMT; the paper stated that the outcome of the AMT showed a range of possible discretionary increases in 2013 between 0.07% and 0.40%;

(5) The durability of the results of the AMT;

(6) Sensitivities and other considerations; the paper recorded Mr Pardoe's own opinion that it would be reasonable and prudent for the trustees to award a discretionary pension increase in 2013 and that the AMT suggested an increase in the range of 0.07% to 0.40%.

323. The second paper was prepared by Mr Pardoe to provide answers to two questions raised by one of the trustees which requested: (1) a reconciliation of the funding levels on a gilts basis to the gilts plus margins for risk basis, based on market conditions as at 30 September 2013; and (2) an update of the stochastic projections of the funding level of the Scheme in two particular pages of the first paper, based on market conditions as at 30 September 2013. The graphs shown in Mr Pardoe's report had been based on 31 March 2013 market conditions.

324. The third paper was prepared by Mr Pardoe and a colleague at Towers Watson. The paper was intended to inform a discussion as to the appropriate principles that should underpin the scheme's journey plan and the related de-risking framework and, in particular, whether these should be linked to the DIF. The paper stated that these decisions required consideration of a number of inter-related points: (1) the funding objective; (2) the investment strategy; (3) pension increases; and (4) contributions. The paper illustrated how the current journey plan treated these issues and suggested possible alternative approaches for the new journey plan.

325. In his presentation to the trustees, Mr Pardoe went through the papers which had been provided to the trustees. The minutes show that this process was very thorough and detailed. The minutes record the presentation by reference to a number of headings. These headings included various questions and answers which were given and they also refer to a presentation by Mr Russell of PwC as to BA's covenant. The matters considered by the trustees in this part of the meeting were as follows:

(1) The extent to which the scheme was in deficit; Mr Pardoe explained that there had been a rise in gilt yields and he said:

> "the Scheme was in deficit on several measures but indicated it was currently very close to being fully funded on a technical provisions basis if future increases were only assumed to be CPI. He noted that the award of a DI being considered had a cost of up to £24m, which was small relative to the overall liabilities."

(2) The security of members' benefits including the schemes' current investment and de-risking strategies; Mr Pardoe summarised the DIF and there was a

detailed presentation which referred to a number of the pages of his paper dated 25 October 2013; a number of trustees asked Mr Pardoe questions on the detail of that paper;

(3) The strength of the employer covenant and the viability of its business; Mr Russell of PwC advised the trustees on this matter; he said that the recovery plan, agreed by both schemes in June 2013, included in the technical provisions for APS an allowance for future discretionary increases which assumed a linear transition from CPI in April 2013 to RPI from April 2023 onwards; as to the continued reasonableness of the recovery plan since its agreement, Mr Russell said the analysis showed it remained reasonable for the trustees to expect that the contribution commitments under the plan would be met; Mr Green of PwC advised the trustees that it was reasonable to expect that BA would be able to pay the sum of £250 million potentially due in 2019; Mr Russell stated that the cost of a discretionary increase of 0.4% (£24 million) was immaterial to an assessment of the BA covenant;

(4) The views and interests of the employer; Mr Spencer advised the trustees, as recorded in the minutes:

> "The Trustees considered the views and interests of the employer and there followed a discussion in which Mr Spencer said that BA's position on DI did not appear to have been consistent over the past two years. He said that although initially against the Trustees' decision to include a discretionary interest power in Rule 15, BA took no action and then agreed to enter valuation discussions on the basis that the assumptions included an allowance for discretionary increases in order to secure the ability to pay dividends.
>
> It was noted that as at 31 March 2013 there was a reserve in the technical provisions of £481m for discretionary increases based on the assumptions agreed with BA and documented in the Statement of Funding Principles. It was agreed that in the event that the Trustees' aspiration of returning to payment of increases in line with RPI was fully achieved then this would have a significant cost, although the allowance for DI in the technical provisions included increases in line with RPI from 2023, and so the technical provisions covered most of the cost of full RPI in the long term. A discretionary increase in 2013 was assessed to have a capital cost of £6m for each 0.1% of increase, with a maximum capital cost over the lifetime of the Scheme of £24m; which was relatively small compared to the DI allowance in the technical provisions. Mr Spencer suggested that alongside considering the % gap between RPI and CPI in any given year the Trustees should take into account the actual monetary amount associated with an increase in any given year."

(5) The purpose for which the amendment power existed; privilege has been claimed for the note of the discussion under this heading; that claim has not been challenged by BA;

(6) The likely costs of an increase awarded in 2013; the minutes recorded:

> "The Trustees had previously agreed that the upper limit of any DI in 2013 would be 0.4%, representing the difference between RPI and CPI in September 2012. As part of his updated advice, Mr Pardoe confirmed that the likely cost of increasing pensions would be £6m for each 0.1% granted, generating likely costs in the range £0 - £24m. The Trustees noted Mr Pardoe's advice that the expected cost of a DI this year was not material in terms of the Scheme's overall funding position, particularly given the allowance for discretionary increases included within the technical provisions.
>
> …
>
> In terms of the likely impact of any DI on BA's covenant, it was noted that Mr Russell's advice was that a total cost of £24m was immaterial to BA."

(7) The extent to which reliance could, and should, be made on the contingent payment of £250 million in 2019; it was noted that the assumed value placed on this point would impact on the level of discretionary increase that might be deemed affordable;

(8) The fact that granting an increase to pensioners' benefits would be advantaging one class of members over another, and what the reasons were for doing so;

(9) The views of and the general relationship with tPR; the trustees considered the letter from tPR to Mr Spencer of 12 November 2013; it was noted that several points in that letter were incorrect or not properly founded; the trustees considered, in particular, the following points made by tPR:

a) The primary responsibility was to protect the benefits promised under the rules;

b) Granting an increase would set a precedent; the discussion indicated that the trustees took the view that a decision to award a discretionary increase in 2013 did not set a precedent for future years and the reference to sustainability in the DIF did not suggest otherwise;

c) The delay to de-risking;

d) Inter-creditor issues between the APS and the NAPS;

e) Governance;

f) Additional considerations;

(10) The views of the NAPS given that there was still a desire to work together with that scheme in future negotiations with BA and the implications of any increase on the covenant support for the NAPS;

(11) The professional advice received from Towers Watson and PwC; the minutes recorded that the trustees agreed that "in considering afresh the decision whether to grant a discretionary increase", they had given due attention to the professional advice concerning the actuarial, financial and legal aspects contained in the meeting papers and provided at the meeting; the heading to this subject had some wording redacted and the trustees claimed privilege for the redacted wording; this claim was not challenged by BA.

326. The trustees then considered the correspondence from BA. The minutes recorded the discussion under the following headings:

(1) A scheme in deficit can never pay discretionary increases;

(2) Conflict between primary and secondary objectives;

(3) The process is not a good one;

(4) Adoption of the discretionary increase power;

(5) Actuarial factors;

(6) Start of inexorable process.

At the end of the discussion on these points, Mr Pardoe confirmed that other than the increased uncertainty regarding the availability of the payment of £250 million in 2019 which might result in the trustees changing their view of the appropriate weight to put on the availability of this payment, the correspondence from BA and tPR in November 2013 did not, in his opinion, necessitate changes to his report to the trustees.

327. The trustees then heard the views of Mr Pocock and Mr Maunder as members of the DISC. The minutes recorded:

> "Mr Spencer reminded the Trustees that the Discretionary Increase Sub-Committee (DISC) had been authorised to recommend, based on professional advice and in accordance with the approved framework, a suitable range for the discretionary increase decision. This recommendation was not binding on the Main Board. The difference between RPI and CPI measures at September 2012 was 0.40%, which set the upper limit for any award.
>
> At its meeting on 21 October 2013 the DISC recommended that a discretionary increase in the range of 0.17% - 0.30% be considered by the Trustees.
>
> Mr Spencer asked Mr Maunder and Mr Pocock if they wished to adjust the range for discretionary increases having received

> and been able to consider updated advice since the DISC's earlier recommendation. Mr Pocock confirmed his view that the DISC's recommendation of 0.17% - 0.30% remained appropriate. Mr Maunder said that he considered there was now less certainty regarding whether the CPT would be paid in 2019 and, if so, the proportion the Scheme might receive and, as a result, his position was that the appropriate range for consideration be adjusted to 0.10% - 0.30%.
>
> Mr Spencer confirmed that, should the Trustees agree it was appropriate to grant a DI having considered the professional advice and correspondence from BA and tPR, then an increase within the range 0.10% - 0.30% should be considered as recommended by the DISC."

328. The trustees then discussed the question whether to award a discretionary increase for 2013. The minutes recorded:

> "In response to a question from Mr Spencer, the Trustees confirmed that their ambition to return to RPI increases remained. Mr Maunder stressed the importance of affordability in defining the timeframe in which this could be pursued. Mr Spencer then asked the Trustees to consider the DISC's recommendation and whether it was appropriate to grant a discretionary increase this year.
>
> Mr Simpson said it was his view that a high degree of prudence should be adopted when considering the affordability of a DI and preferred the Gilts measure to the Technical Provisions measure. It was also important to consider downside scenarios and he noted that the projections using the subsidiary funding objective (SFO), using Gilts plus loadings for risk and expenses (on slide 14 of Mr Pardoe's 25 October 2013 presentation) would not support an increase. He noted that the SFO assumptions were judged by Mr Pardoe as representing a package of very prudent measures which were therefore at the pessimistic end of a range of assumptions that may reasonably be used for the DI discussion. Mr Pardoe said each Trustee would have their own view on prudence which was why projections on several bases had been carried out. Mr Pardoe noted that the SFO took a gilts basis and then added further prudence to four key assumptions (RPI/CPI gap, allowance for inflation floor, future long-term rate of future mortality improvement, and expenses). In each case Mr Pardoe felt that the additional margin resulted in a very prudent approach, and taken as a package, in his opinion, they could currently be regarded as lying right at the pessimistic end of the range of bases that might reasonably be used for the purpose of making decisions about discretionary increases. Mr Pardoe noted that the current Artemis upsize transaction provided useful information about the cost of transferring the liability to a third

> party, and for RPI benefits this was equivalent to the gilts approach with no additional margins.
>
> Mr Simpson also raised the possibility that an external shock could have a significant effect on the affordability of DIs because airlines tended to be hit harder during economic downturns and it was his view that the stress tests had insufficient allowances for this. Mr Pardoe said that several scenarios had been included in the stress testing and that these presented a robust basis on which the Trustees could assess the impact to member security of any DI. One of the tests included 1 in 200 investment shocks that also involved covenant deterioration and the reduction of future contributions (slides 48-49), which indicated that the affordability of DIs would rapidly fall away but that by 2023 the Scheme would be close to fully funded on a CPI basis. Mr Tomlin said it was relevant to note that during the PwC covenant advice the Trustees had heard that BA had demonstrated a greater degree of resilience to market shocks than other airlines. Mr Russell referred the Trustees to his advice letter of 25 October 2013 which confirmed that the updated 5 year forecasts showed BA above the Amber Zone, a measurement of the cash buffer BA might be expected to need to withstand external shocks, throughout the period to FY 16, with the exception of FY 13 in a downside scenario."

329. At this point in the discussion, Captain Pocock left the meeting having appointed Mr Douglas as his alternate for the remainder of the meeting.

330. The minutes recorded the further discussion after Captain Pocock's departure:

> "Providing further details on the affordability of a DI, Mr Pardoe referred the Trustees to slides 12 and 13 of his 25 October 2013 presentation and said that the Scheme's funding position had improved over the 6 months to 30 September 2013, noting that the Scheme was also close to a de-risking trigger. He continued that the affordable margins test included a significant margin of prudence in requiring the assets and Recovery Plan contributions to be sufficient to sustain any DI decision in the long term, while not committing the Trustees to paying that increase in the future.
>
> Mr Douglas said the affordable margin tests indicated that a DI could be supported. He said the figures indicated that a greater increase could be afforded and recalled that, apart from Mr Russell's advice that there had been no improvement to the covenant, other indicators such as BA's performance and its successes with bmi and American Airlines pointed towards an improved picture. However, despite this Mr Douglas believed it was important the Trustees maintained a responsible and

> prudent approach to exercising its DI power and confirmed his support for a 0.20% increase.
>
> Mr Pardoe noted that as RPI and CPI measures were set to one decimal place the Trustees may wish to consider rounding any awards on a consistent basis.
>
> Mr Maunder said the Trustees' framework for DIs was mechanistic and it was his view that decisions should therefore be on the Gilts basis. He said the uncertainty over the £250m had impacted his views on the appropriate range of any increase. He believed BA would take determined steps to reduce by as much as possible any amount APS received and, given the current relationship between the Schemes, an agreement to split the CPT could not be relied upon. Ms Boswell agreed with Mr Maunder's assessment of the chances of a legal challenge and confirmed she did not think it was appropriate to place a £125m value on the CPT.
>
> Mr Maunder confirmed that on the basis outlined above he supported a 0.10% discretionary increase.
>
> Mr Mallett said he considered it reasonable to place a £125m on the CPT and confirmed his view that a 0.20% increase was affordable and pragmatic in light of the advice and representations made. Ms Boswell suggested that due to the possible legal action following any decision to grant an increase it was important that the Trustees were able to demonstrate that a sound decision-making process had been followed and said that reliance should not be placed on receiving £125m in 2019. There was support for placing a £125m value on the CPT from several other Trustees and Mr Spencer said he found it difficult to foresee circumstances where the NAPS Trustees would not accept £125m if at a later date the APS Trustees were to offer this.
>
> In relation to the Cash Sweep, Mrs Sellers indicated that moving to an equal distribution between the Schemes could provide additional resources to fund an increase however it was noted that there was uncertainty regarding the level of any payments under the Cash Sweep, which included the possibility of no payments."

331. The trustees then agreed to vote on the exercise of the discretionary power under rule 15. The minutes recorded that this agreement was reached:

> "having noted the professional advice contained within the meeting papers and provided at the meeting and taken due consideration of the representations made by BA, tPR and the NAPS Trustees. Mr Spencer reminded the Trustees that a two-

> thirds majority was required to exercise the discretionary increase power."

332. The minutes recorded the following in relation to the voting process:

> "The Trustees' votes were as follows:
>
> • Trustees were asked to vote on whether a discretionary increase should be granted this year and there were 9 votes FOR and 3 votes AGAINST. The vote was carried.
>
> • Trustees were asked to vote for granting at least a 0.10% increase and there were 9 votes FOR and 3 votes AGAINST. The vote was carried.
>
> • Trustees were asked to vote for granting at least a 0.20% increase and there were 7 votes FOR and 5 votes AGAINST. The vote was not carried by the requisite majority.
>
> • Trustees were asked to vote for granting a 0.15% increase and there were 8 votes FOR and 4 votes AGAINST. The vote was carried.
>
> There followed a discussion around whether the 0.15% should be rounded to be consistent with the single decimal place used in the Orders. Mr Pardoe indicated that, in his view, this would remain a reasonable approach.
>
> …
>
> Mr Spencer noted there was an estimated £3m cost difference over the lifetime of the scheme between granting a 0.15% or a 0.20% increase.
>
> At the conclusion of the discussion it was agreed to hold a further vote on whether to grant a 0.20% discretionary increase. There were 8 votes FOR and 4 votes AGAINST and the vote was carried."

333. Mr Spencer gave evidence as to the way in which the individual trustees voted. The nine votes were the six MNTs, Mr Spencer, Mr Maunder and Mr Buchanan. The eight votes were the six MNTs, Mr Spencer and Mr Buchanan. The seven votes were the six MNTs and Mr Spencer.

334. Mr Spencer also gave evidence to explain the circumstances in which a majority of the trustees voted for a discretionary increase of 0.2%. He said that there was a discussion as to the position that had been reached as a result of the trustees voting for an increase of 0.15% but not voting for an increase of 0.2%. The trustees discussed the fact that they had decided on 26 June 2013 to award an increase of 0.2%. Those facts might result in them having to incur very large sums in legal fees going to court to determine which of the two increases took effect. This would involve delay and would be disproportionate in terms of the sums involved. Mr Spencer expressed these

views to the trustees. It was also noted that increases under PIROs were by reference to a single decimal place only. Mr Pardoe advised that it would be reasonable to round the increase of 0.15% up to 0.2%. The consideration of this point took about twenty minutes. The trustees then voted on this proposal which was carried by eight votes to four.

335. The trustees then considered the implementation of their decision. It was agreed that the discretionary increase should take effect from 1 December 2013 and that the members should be told this in mid-December 2013. In view of earlier statements made to BA and tPR, Mr Spencer stated that letters would be sent to them giving them notice of the decision. It was then agreed that implementation would be delayed if BA brought court proceedings to challenge the decision and payment would be implemented retrospectively if the decision was upheld.

336. The trustees then decided not to have a full discussion at that meeting on the paper prepared by Mr Pardoe and his colleague, as to a de-risking journey plan, as it was considered that there was then insufficient time for that discussion.

337. I heard oral evidence from five of the trustees who attended the meeting on 19 November 2013. These trustees were Mr Spencer, Mr Maunder, Mr Buchanan, Mr Douglas and Mr Mallett. Four of these five (that is, not including Mr Maunder) voted in favour of a discretionary increase of 0.2%. I also heard oral evidence about the meeting on 19 November 2013 from Mr Pardoe, Mr Barker (of Eversheds) and Mr Russell (of PwC). There was no oral evidence about the meeting on 19 November 2013 from the other trustees who voted in favour of a discretionary increase of 0.2%, namely, Mr Mitchell, Captain Pocock (who died before the trial), Mr Tomlin or Mrs Sellers.

338. Mr Spencer's evidence as to the meeting on 19 November 2013 was in accordance with the minutes of that meeting, as supplemented in the ways I have already referred to above. He also stated that all of the trustees appeared to give full, active and genuine consideration to the exercise of their discretion.

339. Mr Maunder gave evidence as to the events on 19 November 2013 in accordance with the minutes of the meeting. He also commented on the attitude of the trustees at that stage as compared with their attitude at earlier times. He explained that after the Government's announcements in June and July 2010, the issue of the change to CPI had caused major tension and division within the trustee board. The trustees' decision in early 2011 to amend rule 15 had a major impact in that, thereafter, the trustees focussed on carrying out an annual review pursuant to the amended rule 15 and with professional advice. Before his resignation on 25 March 2011, Captain Post had adopted a confrontational attitude but after his resignation he was no longer a trustee. Although the MNTs continued to favour a return to RPI as soon as possible, and although there remained significant differences between the trustees, the trustees were able to work constructively to agree unanimously on a framework for considering discretionary increases. Mr Maunder said that by November 2013, the trustees had experience of lengthy discussions on the possibility of discretionary increases. The DIF had been approved. The gap between RPI and CPI was only 0.4%. The cost of an increase of 0.2% was only £12 million. He also thought that BA had moved its position from 2010 to November 2013. By the latter date, BA appeared to have recognised that as part of a journey plan, the trustees had the power to grant

discretionary increases above CPI. Mr Maunder did not feel that he was subject to any inappropriate pressure from MNTs nor from the professional advisers. When re-examined, Mr Maunder described Mrs Sellers' participation in the many meetings of the trustees over the years. He said that she had firm views but became less strident between 2011 and 2013. Her contributions in 2013 were quite different from those of 2011. She became more accommodating to some of the aims and objectives of BA.

340. Mr Buchanan gave evidence in relation to the meeting on 19 November 2013 which accorded with the minutes. He commented that the trustees as a body had behaved in a thorough, measured and careful way. He mentioned Mr Douglas and Mr Mallett, in particular. He referred to Mr Douglas emphasising the need to maintain a responsible and prudent approach and he had not urged any increase above 0.2%. Mr Mallett was only prepared to put a value of £125 million on the contingent payment in January 2019 and had not supported an increase above 0.2%.

341. Mr Buchanan explained why, on the final vote, he supported an increase of 0.2%. I will consider that evidence in detail later in this judgment when I consider one of the challenges (which I call "the ninth challenge") to the decision made on 19 November 2013.

342. Mr Douglas gave evidence as to the events on 19 November 2013 in accordance with the minutes. BA alleges that Mr Douglas did not actively and genuinely engage with the need to consider the relevant considerations at the meeting on 19 November 2013. I need to consider that allegation in detail and I will do so later in this judgment. At that stage, I will consider Mr Douglas' evidence as to the meeting on 19 November 2013 together with other matters which are relevant to BA's allegation against him.

343. Mr Mallett gave evidence as to the events of 19 November 2013 in accordance with the minutes of the meeting. As in the case of Mr Douglas, BA alleges that Mr Mallett did not actively and genuinely engage with the need to consider the relevant considerations at the meeting on 19 November 2013. I need to consider that allegation in detail and I will do so later in this judgment. At that stage, I will consider Mr Mallett's evidence as to the meeting on 19 November 2013 together with other matters which are relevant to BA's allegation against him.

344. Mr Pardoe described the meeting on 19 November 2013 in accordance with the minutes.

345. Mr Barker was a solicitor at Eversheds. He had replaced Mr Arter as Head of the Pensions Group at Eversheds on 1 May 2013. Mr Barker had not been at the trustees' meetings on 28 February 2013 or 26 June 2013, whereas Mr Arter had been. Mr Barker attended the trustees' meeting on 19 November 2013 and Mr Arter did not. Mr Barker stated that he had reviewed the minutes of this meeting and that they were accurate.

346. Mr Russell gave evidence as to the involvement of himself and his colleague, Mr Green of PwC, at the meeting on 19 November 2013.

347. On 20 November 2013, Mr Spencer wrote to Mr Swift to inform him of the decision taken by the trustees of the APS at the meeting on 19 November 2013.

348. On 6 December 2013, BA issued the claim form in the present proceedings challenging various decisions taken by the trustees including the decision taken on 19 November 2013.

The basic legal principles and terminology

349. It can be seen from my earlier discussion of BA's pleaded case that it is, first of all, necessary to consider the scope of the powers which were exercised, or purportedly exercised, in this case. There were two such powers, the power to amend conferred by clause 18 of the trust deed and the power to award discretionary increases pursuant to the purported amendment of rule 15. Secondly, it is necessary to consider the purposes for which these two powers were conferred in order to address the argument that the exercise of those powers was an abuse of the relevant power. Thirdly, it is necessary to examine certain aspects of the decision-making processes which led to the decisions which are now challenged.

350. It will be helpful if I define the terms which I will use in this judgment. When I refer to "the scope of the power", I intend to refer to the scope of the power as defined by any express or implied limitations as to what can be achieved by an exercise of the power or as to the circumstances in which the power may be exercised. In Pitt v Holt [2013] 2 AC 108 at [60], Lord Walker of Gestingthorpe referred to a purported exercise of a power which went beyond the scope of the power by using the traditional term of "excessive execution".

351. A case of excessive execution is to be distinguished from two other classes of case. The first of these is a case where the exercise of the power is ostensibly within the scope of the power but where the power is being exercised for an improper purpose: see Pitt v Holt per Lord Walker at [61]. Such cases were traditionally referred to as cases of "fraud on the power". I will refer to this class of case as cases of "abuse of power". The permitted purpose or purposes of a particular power may be expressly stated or may be implied. However, a limitation on the permitted purpose or purposes of a power does not necessarily depend on any express limitation or any implication of a restriction into the instrument which conferred the power. The proper purpose rule is a principle by which equity controls the exercise of a fiduciary's powers in respects which are not necessarily determined by the terms of the instrument alone. As was stated by Lord Sumption in Eclairs Group Ltd v JKX Oil and Gas plc [2016] 1 BCLC 1 at [30]:

> "Ascertaining the purpose of a power where the instrument is silent depends on an inference from the mischief of the provision conferring it, which is itself deduced from its express terms, from an analysis of their effect, and from the court's understanding of the business context."

352. Cases of excessive execution, i.e. a purported exercise of the power beyond the scope of the power, and cases of abuse of power, are also to be distinguished from cases where a trustee has failed in his duty to give proper consideration to all relevant matters, and to no irrelevant matter, when making a decision which is within the scope of the relevant power. Lord Walker in Pitt v Holt at [60] referred to those cases as cases of "inadequate deliberation". It has also been common to say that such cases involve an application of the so-called rule in Hastings-Bass. As Lord Walker pointed

out in Pitt v Holt at [1], the label "the rule in Hastings-Bass" is a misnomer although he considered that it was still appropriate to continue to use it. However, as the further reasoning in Pitt v Holt makes clear, the power of the court to set aside a decision by a trustee, by reason of inadequacies in the decision-making process, only arises if the inadequacies are sufficient to amount to a breach of duty by the trustee. In this judgment, I will refer to this third class of case as one involving a breach of duty by a trustee in relation to the decision-making process. Later in this judgment, when I am considering the challenges which have been made to the decision of 19 November 2013, I will consider more fully the legal principles which apply to this third class of case, involving a breach of duty by a trustee.

The scope of the power to amend: introduction

353. Clause 18 of the trust deed provides that the provisions of the trust deed may be amended or added to "in any way". It further provides that the rules may also be amended or added to "in any way". These provisions are subject to the four provisos to clause 18. Proviso (i) provides that no amendment or addition can be made which "would have the effect of changing the purposes of the Scheme". Clause 2 of the trust deed has the marginal note "Main Object" and identifies a main object and a subsidiary object of the APS. The main object is to provide pension benefits on retirement; this statement of the main object is probably governed by the words at the end of the first sentence of clause 2, namely, "in accordance with the Rules". The subsidiary object is to provide benefits in cases of injury or death for the staff of the Employer in accordance with the rules. Clause 2 also states that the APS "is not in any sense a benevolent scheme and no benevolent or compassionate payments can be made" from the APS.

354. Clause 18 further provides that no such amendment or additions to the provisions of the trust deed or rules can take effect unless the same has been approved by two thirds of the Management Trustees for the time being. The trust deed provided for there to be 12 Management Trustees, 6 MNTs and 6 ENTs. Accordingly, where there are 12 Management Trustees, as was the case at all times material to this dispute, there must be 8 votes in favour of the amendment or addition.

355. The power conferred by clause 18 was, at all times material to this dispute, a unilateral power available to be exercised by the trustees. At no point during the life of the APS was there a requirement for the consent of the sponsoring employer to the exercise of this power. When the APS was established in 1948, an amendment or addition within clause 18 had to be confirmed by regulations made by the Minister but that requirement was later removed. As stated by Lloyd J in Stevens v Bell, the Minister was originally the paymaster of the industry but when the requirement of his confirmation was removed, no new provision (such as the consent of the sponsoring employer) was put in its place. It has (I think correctly) not been suggested that it would be possible to imply into clause 18 a general requirement that an amendment or addition within clause 18 required the consent of the sponsoring employer.

356. Rule 30 of the rules of the APS provided that the rules could be amended or added to in accordance with the provisions of the trust deed but this does not add anything to clause 18 of the trust deed.

357. The submissions in relation to the scope of the power to amend were lengthy and very wide-ranging. As will be seen, I have come to the conclusion that the matter can be analysed in fairly straightforward terms and that many of the submissions were too wide and general to be of any real assistance in resolving the dispute. However, out of deference to the sustained submissions of counsel, I will now attempt to summarise the primary submissions which were made.

The scope of the power to amend: submissions for BA at the trial

358. Mr Tennet submitted that the amendment to rule 15, which was purportedly made on 25 March 2011, infringed proviso (i) to clause 18 which prohibited an amendment which had the effect of changing the purposes of the scheme. The main object of the scheme was expressed in clause 2 of the trust deed. Clause 2 provided that the scheme was "not in any sense a benevolent scheme" and "no benevolent or compassionate payments can be made therefrom". The amendment to rule 15, if it were valid, would permit the trustees to exercise a discretion to award pension increases out of a sense of generosity or sympathy with pensioners who were disappointed by the Government's change from RPI to CPI and such pension increases would be benevolent or compassionate payments. As a result, the amendment to rule 15 was contrary to clause 2 of the trust deed and was invalid.

359. The words "benevolent" and "compassionate" are not terms of art but should be given their ordinary meaning in the present context. The Oxford English Dictionary states that "benevolent" means "desirous of the good of others, of a kindly disposition, charitable, generous" and "well-wishing, well-disposed" to another. "Benevolence" is wider than "charitable": see Morice v Bishop of Durham (1805) 32 ER 656 and Commissioners for Special Purposes of Income Tax v Pemsel [1891] AC 531. "Compassionate" means "granted out of compassion, without legal or other obligation".

360. In addition to these submissions as to the express terms of clause 2 of the trust deed, Mr Tennet had an altogether broader point as to the purposes of the APS. Mr Tennet's submissions as to the purposes of the APS would apply to any typical defined benefit occupational pension scheme. Many of his submissions about the purposes of the APS were presented in connection with his later argument that the decision to amend rule 15 was an abuse of power but it seems appropriate to consider those submissions, first of all, in relation to the logically prior point that the amendment to rule 15 infringed proviso (i) to clause 18, which also refers to the purposes of the scheme. I stress that what follows in this section of the judgment is my summary, in my own words, of Mr Tennet's submissions rather than my conclusions.

361. The fundamental characteristic of a defined benefit occupational pension scheme was that it existed to provide deferred pay from an employer to an employee. As the name suggested, it offered a defined package of benefits, the content of which had been carefully constructed by the employer in accordance with what it considered it could afford in accordance with its business objectives and remuneration strategy and, in a business like BA, as typically negotiated with trade unions. This did not mean that the package could not be changed but it did mean that whatever the administrative machinery for changing the trust deed and rules, it was for the employer not the trustees to determine any changes to that pay package in accordance with what the employer could afford. He said that the scheme was plainly not intended to be a

structure (as these trustees had now sought to make it) whereby the benefits would be whatever the trustees decided from time to time they would be. This analysis of a defined benefit occupational pension scheme reflected the commercial rationale for which such a scheme is established by an employer.

362. In the context of a private trust, the purpose of a trust or the purpose of a trustee power is to be ascertained by investigating the purposes of the settlor of the trust. In the context of an occupational pension scheme, the purpose of the scheme or the purpose of a trustee power is to be ascertained by investigating the purposes of the employer who established the scheme.

363. In determining the purposes of the APS, the court should have regard to the following matters:

(1) the terms and effect of the trust deed and rules;

(2) the relevant historical context to those provisions;

(3) statements in case law, text books and academic papers reflecting the general understanding of why occupational defined benefit pension schemes exist and what wider business function they serve;

(4) the statutory framework which regulates pension schemes, which reflects their purposes;

(5) the practical consequences which would follow were the trustees to have a power to improve benefits, how this would conflict with the trustees' other responsibilities under the APS, and the sponsoring employer's responsibilities.

364. As to the terms and effect of the trust deed, Mr Tennet referred to the definitions of "Member" and "Scheme" in clause 1 which reflected the employment relationship between BA and its employees and the fact that the benefits under the scheme were defined not discretionary. It was implicit in the reference to "benefits" in clause 2 that the benefits were set by BA. The scheme was not "in any sense" a benevolent scheme. By clause 3, BA covenanted to pay for the benefits that it had promised its work force. This provided a very important reason why it was for BA to determine the level of benefits it considered affordable in the context of its business objectives. Mr Tennet asked: what reasonable employer would sign up for a commitment to fund benefits decided by a third party whose decisions would ultimately be bounded only by considerations of rationality? Clause 4 gave the trustees power to "manage and administer" the scheme; this power was very different from a power to design the benefits of the scheme. The scheme contained a large number of detailed provisions conferring powers on the trustees but there was no hint of a power to design the benefits structure as distinct from delivering defined benefits.

365. Continuing his analysis of the terms of the trust deed, Mr Tennet referred to clause 11 which was a detailed provision dealing with a surplus or a deficit under the scheme. Clause 11 pre-dated the funding regime under Part 3 of the Pensions Act 2004. The balance of clause 11 would be completely distorted if the trustees could just rewrite the benefits payable under the scheme. If the trustees had a general power to increase benefits under clause 18, then they could increase the funding burden on BA and

could prevent the scheme ever reaching a surplus so that BA could not benefit from the operation of clause 11.

366. As to clause 18 itself, proviso (iii) preventing the trustees reducing benefits and proviso (i) could be seen as a counterpoint to that, preventing increases in benefits which were in conflict with BA's remuneration strategy. Further, once a benefit was increased, proviso (iii) prevented the trustees cancelling that increase at a future point because that would involve a reduction in benefits.

367. Although there was a power under clause 19(a) to give six months' notice to terminate contributions, the trustees could increase benefits under clause 18 during the period of that notice and the service of such a notice would oblige BA to restore the solvency of the scheme by reference to rights accrued at the date of termination. Further, clause 19(d) was an express provision which conferred a highly specific power on the trustees to increase benefits, from any surplus, without the consent of BA. The existence of this highly specific power suggested that clause 18 was not intended to give the trustees a general power to increase benefits.

368. Clause 21 provided that the trust deed and rules do not limit the functions of the National Joint Council for Civil Air Transport in the negotiations of wages and conditions of employment for employees of an employer. It would be extraordinary if, after careful negotiation and settlement in respect of wages and conditions, the trustees could rewrite the deal by increasing benefits under clause 18.

369. Clause 24 was a specific clause providing for the possibility of discretionary benefits. However, clause 24 operated at the will of BA and required BA to provide any necessary additional funding.

370. As to the terms and effect of the rules, it was clear that the rules laid down a carefully defined scheme as to benefits. Under rule 5, there was a definition of the contributions to be made by a Member for the defined benefit package promised by the employer. Rule 15 contained a specific and very restricted power to change the rate of inflation in respect of benefits. This power was designed to maintain and deliver the existing level of benefits. Rule 34 mirrored the power vested in BA pursuant to clause 24 of the trust deed.

371. As to clause 18 itself, this was a general power of amendment. If there really had been an intention to give the trustees a discretion to award benefit increases at the expense of the employer, such a power should have been explicitly conferred and its terms clearly spelt out. The fact that an amendment under clause 18 had to be by a super-majority which necessarily involved the votes of the ENTs was not an adequate protection for BA. None of the trustees was a delegate for either the members or BA and, in any case, it was not for the ENTs (or the other trustees) to set BA's remuneration strategy.

372. In relation to the history of the APS, Mr Tennet referred to the original requirement in clause 18 that a proposed amendment be confirmed by the Minister. In practical terms, the Minister would be unlikely to approve a proposed increase in benefits contrary to the wishes of the employer. Even after the requirement of confirmation by the Minister was removed in 1971, the Minister initially retained the power to make new regulations providing for the operation of the APS. These powers were removed

when BA was being prepared for privatisation. Before these powers were removed the purposes of the scheme would have prevented the trustees increasing benefits against the wishes of the employer. The removal of these powers cannot have been intended to change the purposes of the scheme. In particular, a power for the trustees to increase benefits against the wishes of BA would have been wholly unsuitable for a private sector pension scheme.

373. As to statements in text books and academic papers reflecting the general understanding of why defined benefit occupational pension schemes exist and what wider business function they serve, Mr Tennet relied, first, upon Pollard on The Law of Pension Trusts (1st ed. 2013) at para. 9.40 which stated:

> "The purpose of a defined benefit occupational pension scheme is to provide the stated and accrued relevant benefits to (and in respect of) the members at a cost acceptable to the employer."

However, I note that at para. 9.41(b), the text book continued with this passage:

> "Any augmentations or benefit increases may well impose extra costs on the employers. In practice, most schemes require the consent of the employer for such discretionary benefits (save perhaps on a scheme winding-up), so the employer can look after its own interests when deciding whether or not to give consent. But some schemes do not include this (or give an unfettered power to the trustees – eg to fix the reduction applicable on early retirement). This cost principle should apply here."

The text book added that some might want to add at the end of the test:

> "balancing the interests of the employers and the members."

374. Mr Tennet also referred to a lecture given by Sir Christopher Nugee, speaking extra-judicially, printed at (2015) 29 TLI 59, in which he referred to an earlier talk by Mr Edward Nugee QC in 1998, printed at (1998) 12 TLI 216, where he had commented that employers were under no obligation (in 1998) to provide pensions, that the establishment of a pension scheme was therefore a voluntary act by an employer, that the trustees' objective is to achieve the purposes of the scheme, which meant the purposes of the employer who established the scheme, and those purposes were the provision to the members of the benefits promised by the scheme.

375. Mr Tennet cited a number of cases on the subject of the purpose of a defined benefit occupational pension scheme. In Edge v Pensions Ombudsman [2000] Ch 602, Chadwick LJ said at 623A-B in relation to such a scheme:

> "… the purpose of the scheme is to provide the retirement and other benefits to which the members, pensioners and dependants are entitled under the rules. The scheme is a "defined benefits" scheme: the benefits are fixed by the rules. The scheme is not set up as a unit trust, under which the

> members would be entitled to a proportionate share in the fund."

At 623D-F, Chadwick LJ added:

> "… the task of the trustees is to maintain a balance between assets and liabilities valued on that actuarial basis; so that, so far as the future can be foreseen, they will be in a position to provide pensions and other benefits in accordance with the rules throughout the life of the scheme. That task is to be performed by setting appropriate levels for employers' and members' contributions. If that task could be performed with perfect foresight there would be no surpluses and no deficits. But, because the task has to be performed in the real world, surpluses and deficits are bound to arise from time to time and prudent trustees will aim to ensure that the likelihood of surplus outweighs the risk of deficit. Nevertheless, it is no part of the trustees' function, in a fund of this nature, to set levels for contributions which will generate surpluses beyond those properly required as a reserve against contingencies."

Mr Tennet emphasised the last sentence of this passage but I have quoted more extensively to provide the context for that sentence. He submitted that, on the facts of the present case, the trustees had impermissibly sought to create a surplus over the promised benefits in order, unilaterally, to augment the promised benefits.

376. Mr Tennet then cited Stevens v Bell per Arden LJ at [27] and Sterling Insurance Trustees Ltd v Sterling Insurance Group Ltd [2015] EWHC 2665 (Ch) at [26] for the uncontentious proposition that pensions are a form of deferred pay earned by service. This is a point that is often relied upon for the protection of the interests of members in that a pension scheme should be administered to reflect the fact that members are not mere volunteers under a trust. Mr Tennet submitted that the other side of that coin is that the benefits which constitute deferred pay are part of a remuneration structure set by the sponsoring employer, who decides what it will pay its employees, both during their employment, and by way of "deferred pay" in retirement.

377. Mr Tennet added to these citations a reference to a comment by Lewison LJ in Barnardo's v Buckinghamshire [2016] EWCA Civ 1064 which was a case where an employer wished the trustees to substitute CPI for RPI as the index used for up-rating pensions. The Court of Appeal held by a majority that the trustees did not have the power to do so. In relation to a particular submission as to the possible powers of the trustees in a case where up-rating using CPI might produce a higher pension than up-rating using RPI, Lewison LJ said at [35]:

> "The implications of that submission, if correct, would be that the trustees had power to impose greater financial obligations on the sponsoring employer without obtaining the employer's consent. That is, in my judgment, an unlikely conclusion."

378. Mr Tennet also addressed a number of authorities which were relied upon by the trustees in this context. He submitted that these authorities were either cases of

trustees using a unilateral power to amend the rules to increase an employer's liability to contribute to the scheme or they were cases where the scheme was in surplus. He said that the cases involving the employer's contributions were all cases where the power to amend was being used to advance the purposes of the scheme. As to the cases involving surpluses, he said they were of no assistance as to the powers of the trustees in relation to a scheme in deficit. I will consider those authorities separately later in this judgment.

379. The statutory funding regime under Part 3 of the Pensions Act 2004 was enacted long after the APS was established but it was submitted that that framework reflects the usual purposes of an occupational pension scheme. The statutory obligation on an employer is to fund the liability for accrued benefits but not for discretionary benefits which have not yet been granted. The technical provisions for which provision must be made are to provide for the scheme's "liabilities": see Pensions Act 2004, section 222(2) and reg. 3(2) of the Occupational Pension Schemes (Scheme Funding) Regulations 2005. Reg. 6(1)(d) of these Regulations which refers to discretionary powers to increase benefits does not impose a statutory obligation to fund such benefits.

380. As to the practical consequences which would follow were the trustees to have a discretionary power to improve benefits, it was difficult to see where to draw the line between what the trustees could and could not do. The power would not be limited to up-rating under rule 15 to reflect inflation. Mr Tennet referred to possible discretionary increases of different kinds which, he said, had been contemplated at one time or another. He asked: what was to stop the trustees changing the rate of accrual defined in the rules or even the retirement age? An interpretation of clause 18 which allowed the trustees to determine benefits which the employer had to fund against the wishes of the employer was untenable.

381. Mr Tennet submitted that the facts of this case were a good illustration of the impracticality and the unsuitability of the trustees having a power to award discretionary increases. The existence of the alleged power had a corrosive effect on the trustees' approach to their role and their responsibilities. It took them far away from their proper role of delivering defined benefits as deferred pay which had been promised by the employer. The trustees decided to award a discretionary increase by using funds which had been committed by BA for the purpose of funding on a prudent basis the defined benefits and not the discretionary increases. Mr Tennet summarised matters as follows:

> "The absurdity is that BA is now left in a position where it cannot feel free to pay to the Scheme everything it can reasonably afford in order to secure the benefits it has promised to members in case this is used against it to provide benefit improvements that it does not want to see granted. This also puts BA in an impossible position moving forward when it should – in common purpose with the Trustees – be trying to ensure that the promised benefits are funded as quickly as it can reasonably afford."

382. Having made these submissions as to the purpose of the APS, Mr Tennet addressed the wording in proviso (i) to clause 18 which referred to an amendment having "the

effect of changing" the purposes of the scheme. He submitted that the amendment in this case conferring a power on the trustees to award discretionary increases in benefits should not be regarded as, permissibly, merely "adding to" the purposes of the scheme but as having the effect of "changing" those purposes. Mr Tennet submitted that the amendment to the rules, although it appeared in rule 15, was not confined to up-rating benefits for the future to reflect current inflation but would allow the trustees to grant a large catch-up and retrospective increase to reflect past inflation, to change accrual rates or simply to increase pensions in any way they thought desirable. Such an amendment had the effect of significantly changing the purposes of the APS.

383. Thus far, many of these submissions were directed to the impermissibility of the trustees having a discretionary power to increase benefits. However, Mr Tennet was at pains to stress that it had never been his case that it was never permissible for the trustees to use the clause 18 power to amend to increase benefits. He was scornful of the suggestion that his arguments went that far. He accepted that there could be cases where the trustees had the power to amend the scheme to increase the benefits payable. The most obvious example of such a case was where the employer wished the trustees to do so. Because the purposes of the scheme included giving effect to the employer's wishes as to the remuneration package for Members, the scheme could be amended when the employer wanted to change the benefits package. In such a case, clause 18 was available to be used to amend the trust deed or the rules to allow the benefits under the scheme to be increased. Indeed, that had happened in the past when the employers and the trustees had executed Deeds of Amendment which had made significant changes to the benefits originally provided under this scheme. A scheme which could not be amended in those circumstances would be very inflexible and an inability to amend the scheme in that way would frustrate the purposes of an occupational pension scheme. Another example of the trustees having a power to amend the scheme to increase benefits was the power conferred by the proviso to the original rule 15 which referred to specific cases where it was necessary for the trustees to review the up-rating of benefits. A further example would be where it was desirable to deal with a trapped surplus where, by definition, there were sufficient assets to cover existing benefits.

The scope of the power to amend: submissions for the trustees at the trial

384. Mr Rowley submitted that the position, as regards the scope of the clause 18 power to amend the rules, was entirely straightforward and that the amendment of rule 15 on 25 March 2011 was clearly within the scope of that power. Clause 18 permitted the rules to be amended "in any way" and the obvious width of that phrase covered the way in which rule 15 was amended.

385. The amendment of rule 15 was not contrary to proviso (i) to clause 18 because the amendment did not change the purposes of the APS. He submitted that the purpose of a pension scheme was to be considered at a high level of generality; he referred to Re Courage Group's Pension Schemes [1987] 1 WLR 495 at 505 and Pilots National Pension Fund Trust Company Ltd v Taylor [2010] PLR 261 at [215]. It was said that, both before and after the amendment, the APS was a scheme which had the main object and the subsidiary object referred to in clause 2 of the trust deed. In particular, the APS remained a scheme with the main object of providing pension benefits on retirement in accordance with the rules (as amended). The benefit structure of the

APS was set out in the rules and clause 18 expressly permitted the rules to be amended or added to "in any way". A change in the benefits payable under the rules of the APS did not "change the purposes" of the APS.

386. Mr Rowley submitted that there were checks and balances, in the interests of the sponsoring employer, on the unilateral power to amend vested in the trustees. The first check or balance came from the need for a two-thirds majority of the trustees coupled with the constitution of the trustee board with 6 ENTs, a requirement entrenched by proviso (iv) to clause 18. Secondly, when exercising their unilateral power to amend the trustees had to take account of the interests of, and the wishes of, the employer. Thirdly, until the law changed in 1990 (by reason of the Social Security Act 1990 inserting section 58B into the Social Security Pensions Act 1975), an employer could terminate his contributions by giving 6 months' notice under clause 19(a) of the trust deed without incurring any exit liabilities.

387. Mr Rowley submitted that the court should not approach the present issue as to the construction of clause 18 with any predisposition as to the philosophy behind the clause; he referred to the comment by Arden LJ in Stevens v Bell at [31], which has been applied in later pensions cases. He said that the court should not reach a construction which would unduly fetter a power to amend the provisions of the scheme because a general power to amend was necessary to deal with the many changes which would occur over the long life of a pension scheme: see Re Courage Group's Pension Schemes at 505G. In particular, experience showed that pension schemes needed to be amended from time to time to react to changes in legislation (including taxation) and case law, to changes affecting the employer and to changes in economic and social conditions.

388. Mr Rowley said that BA's arguments as to the purpose of the APS involved drawing distinctions between various kinds of amendments; there was to be a distinction between an amendment increasing benefits and one decreasing benefits, a further distinction between amendments which BA wished to see and those it did not want and a yet further distinction between a time when the scheme was in surplus and a time when the scheme was in deficit. These suggested distinctions were imprecise, would cause difficulties in practice and showed how far one was moving away from a process of construing the trust deed and rules. These distinctions might be relevant to the trustees when considering whether they should exercise the power to amend in particular circumstances but they were not limitations on the scope of the power.

389. Mr Rowley further submitted that the reference in clause 18 to amending the rules expressly included the addition of rules relating to specific categories of staff and that was a particular example of a case where the trustees could change the benefit structure for such staff. He pointed to proviso (iii) which showed that in a case where that specific proviso did not apply, clause 18 allowed changes to benefits.

390. Insofar as it was necessary to consider the second sentence of clause 2 of the trust deed, the amendment of rule 15 to provide a discretionary power to increase benefits did not make the APS in any sense a benevolent scheme. Clause 2 was referred to by Lloyd J and by the Court of Appeal in Stevens v Bell, where it was held that the trustees could use a surplus to enhance the benefits payable under the scheme. Further, the benefits payable under the scheme had been considerably enhanced by amendments over the years so that they had been significantly increased above the

level specified in the First Table to the original 1948 trust deed. The amended rule 15 which conferred a power to award discretionary pension increases did not infringe clause 2, but was itself subject to clause 2, and could not be used by the trustees to make a benevolent or compassionate payment. An award of a pension increase across the board to all pensioners, irrespective of their personal circumstances, could not be described as a benevolent or compassionate payment. This case could be contrasted with the case of an individual, or a group of individuals, who had been assessed as suffering hardship which merited a benevolent or compassionate payment.

391. As to Mr Tennet's analysis of other provisions of the trust deed and rules, there was nothing in any other provision which detracted from the general power to amend the trust deed and rules and, in particular, the benefits provided by the rules. The trustees' interpretation of clause 18 was entirely compatible with all the other provisions of the trust deed and rules.

The authorities relied upon by the trustees

392. Mr Rowley cited a number of authorities as illustrations of cases where it was within the scope of a trustees' unilateral power of amendment for trustees to increase benefits under a pension scheme or to increase the burden on a sponsoring employer. In date order, the cases cited were: Aitken v Christy Hunt plc [1991] PLR 1; Packwood v British Airways Pension Scheme [1995] PLR 189; Stevens v Bell [2001] PLR 99 and [2002] PLR 247; Law Debenture Trust Corp plc v Lonrho Africa Trade & Finance Ltd [2003] PLR 13; Merchant Navy Officers Pension Fund Trustees Limited v FT Everard & Sons Ltd [2005] PLR 225; IMG Pension Plan HR Trustees Ltd v German [2010] PLR 23; Pilots National Pension Fund Trust Company Ltd v Taylor [2010] PLR 261; Merchant Navy Officers Pension Fund Trustees Ltd v Watkins [2013] EWHC 4741 (Ch); Merchant Navy Ratings Pension Fund Trustees Ltd v Stena Line Limited [2015] EWHC 448. In turn, Mr Tennet made detailed submissions on these cases. Rather than recording the submissions made by each side, I will make my own observations on these cases.

393. In Aitken v Christy Hunt plc, Ferris J considered whether a trustee's unilateral power of amendment could be used to alter scheme benefits, in particular to increase them without the consent of the employer. The particular way the trustee chose to do this was to delete the requirement for company consent in an augmentation power (such augmentation power having been previously introduced by the trustee in exercise of its unilateral power of amendment). The court took into account the fact that the employer could terminate its contribution liability as a check and balance upon the trustee. The court declined to imply a term into the unilateral power of amendment so as to require the trustee to obtain the consent of the employer to an amendment. The dispute in that case arose in the context of a dispute between the employer and the trustee as to the distribution of a surplus but the court discussed the operation of the power to amend in general terms.

394. Packwood v British Airways Pension Scheme was a decision of the Pensions Ombudsman in relation to the APS itself, at a time when the scheme was in surplus. A pensioner complained about the conduct of the trustees and the employer. There were also complaints in relation to the NAPS, but they are not material for present purposes. In relation to the APS, one of the complaints was that the trustees had at the request of the employer introduced a package of benefit improvements which were

confined to active members of the APS. The Pensions Ombudsman considered the scope of the clause 18 power to amend. He held that clause 18 gave the trustees power to award benefit increases without the employer's consent. He made further general comments (at [17]) as to the nature of the power to amend. He held that the trustees were at fault for not considering the exercise of their unilateral power to amend in order to increase benefits for members including pensioners.

395. I have already referred to Stevens v Bell.

396. In Law Debenture Trust Corp plc v Lonrho Africa Trade & Finance Ltd, the scheme was in surplus. Rule 11.6 allowed the trustee, in its absolute discretion, to augment benefits. The employer argued by reference to other provisions in the rules that its consent was needed to the exercise of this power. This argument was rejected. The judge (Patten J) made some general comments, at [31], on the duty of a trustee exercising that unilateral power to take into account the position of the employer in a case where there was no surplus.

397. In Merchant Navy Officers Pension Fund Trustees Limited v FT Everard & Sons Ltd, the trustees had a unilateral power of amendment. It was not in dispute that this power allowed the trustees to impose on the relevant employers obligations which they had not previously been subject to under the scheme.

398. IMG Pension Plan HR Trustees Ltd v German was cited only as an example of a scheme which had a unilateral trustee power of amendment.

399. In Pilots National Pension Fund Trust Company Ltd v Taylor, the power to amend was originally subject to an express requirement for the consent of the National Negotiating Forum but that requirement was later removed so that the power was a unilateral trustee power. Mr Rowley said that that process was similar to what happened in relation to the APS with the removal, from clause 18 of the APS, of the earlier requirement for confirmation by the Minister in relation to a proposed amendment. The issue in Pilots was whether the trustee could use the power of amendment to impose on various entities a liability, or an increased liability, to contribute to the scheme. It was held that the power could be used by the trustee in this way.

400. Merchant Navy Officers Pension Fund Trustees Ltd v Watkins is of no real relevance in the present context. It was an unopposed application to rectify the rules of a pension scheme. As it happened the trust deed in that case contained a unilateral trustee power to amend the provisions of the scheme.

401. Finally, Merchant Navy Ratings Pension Fund Trustees Ltd v Stena Line Limited, the 2015 decision of Asplin J, was cited because the relevant rule in that case, rule 30, was in very similar terms to clause 18 of the APS and it was held that the rule allowed the trustee to impose obligations as to contributions on relevant employers.

The scope of the power to amend: further material and submissions

402. As explained earlier, clause 2 of the trust deed states that the APS is not in any sense a benevolent scheme and no benevolent or compassionate payments could be made out of the scheme. At the hearing, I asked whether this was a conventional provision in

pension trust instruments and whether there was a well understood reason for its inclusion. I was told that it was not a conventional provision and there was considerable but inconclusive speculation as to why these references to benevolence and compassion had been included in the 1948 trust deed. At the end of the hearing, the trustees, in particular, expressed a wish to investigate whether there were any materials which might throw light on these questions and which might be admissible as an aid to the interpretation of clause 2. I permitted the parties to adduce any material of this kind which they were able to find and to make submissions in relation to it. Following the hearing, I was provided with a number of documents by the trustees and I received written submissions on that material from both parties.

403. I can summarise the material provided to me in this respect in the following way. The material established:

(1) very similar words to those used in clause 2 were used, in particular, in two earlier related pension schemes, namely, the 1936 Imperial Airways Pension Scheme and the 1942 British Overseas Airways Corporation Pension Fund;

(2) by way of contrast, wording of this kind was not used in the 1939 British Airways Ltd Superannuation Scheme (the employer in that case was a different company from BA);

(3) before the 1936 Imperial Airways Pension Scheme, the employer in that case had made ex gratia payments in some circumstances and the 1936 scheme replaced any prior arrangements which led to such ex gratia payments;

(4) there were examples of benevolent funds in existence (but not in this industry) long before 1936;

(5) the British Airways Welfare & Benevolent Fund was only established in 1981.

404. I am grateful to the parties for the considerable work which they must have done to search for potentially relevant materials which might have thrown light on the interpretation of clause 2 of the trust deed. However, I consider that the material which has been found does not take the matter any further forward. Nothing in this material helps to interpret the references to benevolence and compassion in the context of the trust deed as a whole.

405. Both sides submitted that the parties who established the APS would have been concerned to ensure that the scheme would receive Revenue approval. I am sure that is right but that fact does not throw any real light on the meaning of clause 2. Mr Tennet submitted that the employer would have been concerned to ensure that its contributions to the APS would have been regarded by the Revenue as payments wholly and exclusively for the purposes of its business. Again, I am sure that that is correct but that does not help very much to interpret clause 2. In particular, I do not think it would be right to substitute for the words actually used in clause 2 a different provision which refers to BA's contributions being wholly and exclusively for the purposes of its business.

406. The upshot of the parties' researches therefore is that I am left to interpret clause 2, and the references to benevolence and compassion, having regard to their ordinary meaning and reading them in the context of the trust deed as a whole.

The scope of the power to amend: discussion and conclusions

407. The arguments in this case, as to the scope (and the purpose) of the power to amend, include submissions as to the correct interpretation of the trust deed and rules. In particular, I have to construe clauses 2 and 18 of the trust deed. I will therefore begin this discussion by referring to the principles to be applied for the purpose of construing the provisions of the APS.

408. There was no dispute as to the principles to be applied in this context. The position was described by Lewison LJ in Barnardo's v Buckinghamshire [2016] EWCA Civ 1064 at [8]-[10] in these terms:

> "There is no significant dispute about the applicable principles of interpretation. The rules of a pension scheme are, in principle, to be interpreted in the same way as any other written instrument. As the Supreme Court said in Arnold v Britton [2015] UKSC 36, [2015] AC 1619 at [15] the court must focus on the meaning of the relevant words in their documentary, factual and commercial context. "That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the [instrument], (iii) the overall purpose of the clause and the [instrument], (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."
>
> 9. Reliance on background and commercial common sense must not be allowed to undervalue the importance of the words of the instrument. In addition commercial common sense cannot be invoked retrospectively.
>
> 10. There are, however, at least three points of special relevance to the interpretation of pension schemes. First, all or almost all pension schemes are intended to be tax efficient and to comply with Inland Revenue requirements. So Inland Revenue requirements are relevant to their interpretation. Second, pension schemes should be interpreted to have reasonable and practical effect. Third, since the rules of a pension scheme affect all those who join it (in some cases many years after its inception) other background facts have a very limited role to play."

409. As it happens, one of the leading cases on the proper approach to construing the provisions of a pension scheme is Stevens v Bell [2002] PLR 247 which concerned the APS itself. I can summarise some of the guidance given by Arden LJ in that case at [26] to [34] as follows:

(1) members of a scheme are not volunteers; the benefits they receive under the scheme are part of the remuneration for their services; the relationship of members to the employer is to be seen as running in parallel with their employment relationship;

(2) a pension scheme should be construed so as to give a reasonable and practical effect to the scheme bearing in mind that the scheme has to be operated against a constantly changing commercial background;

(3) as a corollary of (2), it was important to avoid unduly fettering a power to amend the provisions of the scheme as it was important for parties to be able to make those changes which might be required by the exigencies of commercial life;

(4) technicality in the consequences of a possible interpretation was to be avoided;

(5) the meaning of a clause in the scheme must be ascertained by examining the instrument as it stood when the clause was first introduced;

(6) in the case of an amending provision, the provision is to be construed against the background circumstances at the date when it was adopted;

(7) the relevant background circumstances include the practice and requirements of the Inland Revenue;

(8) the function of the court is to construe the instrument without any predisposition as to the correct philosophical approach;

(9) a pension scheme should be interpreted as a whole.

410. Further, as regards authority, I am assisted by the comment in Pilots National Pension Fund Trust Company Ltd v Taylor, referred to above, that the purpose of a pension scheme is normally to be considered at a high level of generality.

411. There are clear limitations on the power to amend conferred by clause 18. The scope of the power is expressly limited by the four provisos to clause 18. The proviso which matters for present purposes is proviso (i) which provides that no amendment may be made which has the effect of changing the purposes of the scheme. This proviso therefore brings in the description of the object of the scheme contained in clause 2 which provides, positively, that the main object of the scheme is to provide pension benefits on retirement and, negatively, that the scheme is not a benevolent scheme and no benevolent or compassionate payments may be made therefrom.

412. Accordingly, the relevant limitations on the scope of the power to amend are that the power may not be used:

(1) to permit the trustees to make benevolent or compassionate payments; nor

(2) otherwise in a way which has the effect of changing the purposes of the scheme.

413. In the present case, the trustees purported to amend the rules to introduce a discretionary increase power exercisable by the trustees. The discretionary increase power did not expressly permit the trustees to make benevolent or compassionate payments. Accordingly, the discretionary increase power is subject to clause 2 of the trust deed so that the power to award discretionary increases cannot be exercised to make benevolent or compassionate payments. Of course, if it were inevitable that any discretionary increase which might be awarded under the discretionary increase power would be a benevolent or compassionate payment then it might be said that the amendment was not within the scope of the power to amend. Alternatively, it might be said that the amendment was ineffective because every possible attempt to exercise the discretionary increase power would involve an attempt to make a benevolent or compassionate payment which was not permitted by clause 2 of the trust deed. However, it cannot be said in this case that the exercise of the discretionary increase power introduced by the trustees by the amendment of rule 15 would always and inevitably involve a benevolent or compassionate payment. It follows that because the discretionary increase power is itself subject to clause 2, the amendment was not outside the scope of the power to amend in that respect. In due course, it will be necessary to ask a different question and that is whether a particular purported exercise of the discretionary increase power would involve the making of a benevolent or compassionate payment.

414. The next question is whether the introduction of the discretionary increase power had the effect of changing the purposes of the scheme. This question can be answered in a similar way to the answer given in the last paragraph. The discretionary increase power did not expressly state the purposes for which the power could be exercised. Accordingly, the discretionary increase power is subject to clause 2 of the trust deed so that the power to award discretionary increases cannot be exercised otherwise than for the purposes of the scheme. Of course, if it were inevitable that any discretionary increase which might be awarded under the discretionary increase power would be otherwise than for the purposes of the scheme then it might be said that the amendment was not within the scope of the power to amend. Alternatively, it might be said that the amendment was ineffective because every possible attempt to exercise the discretionary increase power would involve an attempt to do something which was not for the purposes of the scheme. However, it cannot be said in this case that the exercise of the discretionary increase power introduced by the trustees by the amendment of rule 15 would always and inevitably involve a payment which is otherwise than for the purposes of the scheme. Indeed, BA does not so submit. It accepts that a discretionary increase which is in accordance with BA's wishes is permissible. BA also accepts that a discretionary increase which draws on a trapped surplus is permissible, even without BA's consent. It follows that because the discretionary increase power is itself subject to clause 2, the amendment was not outside the scope of the power to amend in that respect. In due course, it will be necessary to ask a different question and that is whether a particular purported exercise of the discretionary increase power would be vitiated as being for an impermissible purpose.

415. The above reasoning provides the short answer to BA's case that the amendment made to rule 15 infringed the first proviso to clause 18 of the trust deed. Equally, if the amendment to rule 15 conferred a power which can only be exercised in

accordance with the purposes of the scheme, the amendment should be considered to be within the scope of the power to amend the rules of the scheme.

416. If the above reasoning is correct, then it is not necessary at this stage, when considering the scope of the power to amend, to consider BA's wider submissions as to the purpose of a defined benefit scheme. Instead, those submissions would have to be considered later in this judgment, in particular, in connection with BA's argument that the trustees' purported exercise of the power conferred by the amended rule 15 was outside the scope of that discretionary power or for an impermissible purpose. Nonetheless, I will consider BA's wider submissions at this stage. I do so because BA made its wider submissions in relation to the issue as to the scope of the power to amend and it is helpful to deal with those submissions at this stage. This will enable me to deal more briefly, later in this judgment, with BA's challenge to the trustees' exercise of the discretionary power conferred by the amended rule 15.

417. In order to deal with BA's wider submissions as to the scope of the power to amend the rules, I will begin by referring to some further express terms of the scheme. I note that proviso (iii) to clause 18 precludes an amendment which operates to diminish or prejudicially affect the present or future rights of a member or pensioner. There is no express proviso which operates in the opposite direction to prevent an amendment which operates to enhance the rights of a member or a pensioner. Further, proviso (iv) to clause 18 entrenches the provision dealing with the composition of the management trustees but, in general, the provisions of the scheme are not entrenched so as to be incapable of amendment. Indeed, subject to the provisos, clause 18 states that the trust deed and rules may be amended "in any way".

418. It is also relevant that when clause 18 first appeared in the 1948 trust deed, it was subject to the provisions of the Civil Aviation Act 1946 and Regulations made by the Minister under section 20 of that Act. The effect of the Regulations made under section 20 was that, before an amendment made by the trustees was effective, the Minister had to confirm the same. Clause 18 of the trust deed is no longer subject to that restriction. The trustees can now make an amendment without needing any confirmation from the Minister. At no time has clause 18 required the consent of the sponsoring employer or employers before an amendment was effective. Clause 18 is to be construed today so that it has the same meaning and effect as it originally had in 1948 save that the requirement of the Minister's confirmation has been removed. The relevance of this, as I see it, is that the scope of the power to amend in clause 18 in 2011 was the same as it had always been. The power was never, and was not in 2011, subject to a provision that an amendment under clause 18 required the consent of the employer in any case. So far as the scope of the power is concerned, what the trustees could originally do with the confirmation of the Minister they can now do without any need to obtain confirmation from the Minister.

419. BA's submissions as to the scope of the power to amend were put forward in this case where the relevant amendment purported to confer on the trustees a unilateral power to increase pension benefits. However, the argument as to the scope of the power to amend would apply in the same way if the trustees had purported to amend the scheme in a way which directly provided for an identified increase in benefits.

420. As explained, the power to amend the scheme conferred by clause 18 does not require the consent of BA. It is a unilateral power and not a bilateral power. BA does not

submit that every amendment to the scheme requires its consent. However, it does say that, save in certain cases, an amendment to the scheme which has the effect, directly or indirectly, of increasing benefits does require BA's consent. If BA's consent is not required by clause 18, or any other express provision of the trust deed or rules, where does the requirement of BA's consent come from? BA's answer is that the purposes of the scheme provide for such a requirement.

421. The way in which BA's argument is said to work is as follows. The purpose of the scheme is to deliver the benefits defined by the scheme. The benefits defined by the scheme can change; the benefits are not fixed by reference to the benefits which were defined in 1948. However, the benefits defined by the scheme can only change if that is in accordance with BA's wishes. If BA wishes to increase benefits, BA can ask the trustees to amend the scheme accordingly. If the trustees are prepared to amend the scheme to give effect to BA's wishes, then the amendment will be in accordance with the purposes of the scheme and will be effective. Of course, the scheme has other express provisions which deal with augmentations of benefits requested by BA but BA submits that benefits can be increased pursuant to the power to amend in clause 18 but only in the way described above.

422. The argument for the trustees is that the purpose of the scheme is to deliver the pension benefits as they are defined from time to time. The trustees agree with BA that the benefits may change from time to time. The trustees say that the benefits can change if there is an amendment to that effect pursuant to the general amending power in clause 18. The question then is: whose consent is needed to make an amendment under clause 18? The trustees say that the clear answer is that the clause 18 power is a unilateral power available to be exercised by the trustees alone and without any requirement that BA gives its consent. The trustees submit that BA's position will be a relevant consideration when the trustees exercise their power to amend. BA's position may be a highly relevant consideration but BA does not have a veto. Further, it is not appropriate to use a general concept such as the purposes of a pension scheme to write in a requirement of BA's consent to the unilateral power to amend conferred by clause 18.

423. Having put the parties' arguments into my own words, I conclude that I prefer the argument for the trustees. The position is simple. Clause 18 is a unilateral power to amend. It was not always a unilateral power. Originally, a proposed amendment had to be approved by the Minister. At that time if the trustees proposed to make an amendment and they obtained the approval of the Minister, it could not be said that the purposes of the scheme imposed an additional requirement, namely, the consent of the employers, in a case where the amendment involved an increase in benefits. Now that the requirement for the approval of the Minister has gone, it is still the case that it cannot be said that the consent of the employer is needed to an amendment which involves an increase in benefits. I also agree with the trustees that it is not appropriate to use a general concept such as the purposes of a pension scheme to write in a requirement of BA's consent to the unilateral power to amend conferred by clause 18. I also agree that BA's position is a relevant consideration when the trustees are considering whether to amend the scheme to increase benefits. BA's position may indeed be a highly relevant consideration but it does not have a veto.

424. I referred earlier to BA's submissions that its consent is needed to an amendment to effect an increase in benefits, except in certain cases. BA referred to the case where

the trustees exercise the express power under the original rule 15 to review the basis of annual adjustments. I do not consider that that provision has any real impact on the argument as to the purposes of the scheme. On any view, that provision confers an express power which is effective.

425. BA also submits, or accepts, that the trustees can amend the scheme to increase benefits without BA's consent in another case. That is a case where the scheme is in surplus. Accordingly, BA submits that the purposes of the scheme can be summarised as being:

(1) to deliver the benefits as originally defined;

(2) to deliver any increased benefits in accordance with the wishes of BA; and

(3) to deliver any increased benefits out of a surplus if the trustees so determine.

In this way, BA is seeking to define the purposes of the scheme in terms of specific powers which might exist. Of course, BA's intention in doing so is to read in a restriction, i.e. the need for BA's consent, into clause 18 when the scheme itself does not express such a restriction. BA has had to refer to the case where the scheme is in surplus because it recognises that the courts in Stevens v Bell have held that it is open to the trustees to amend the scheme under clause 18 to pay increased benefits out of a surplus without the consent of BA. It should be noted that the Court of Appeal did not refer to any express power for the trustees to pay increased benefits out of a surplus. The case of a surplus is therefore different from the case of an amendment to give effect to the original rule 15 which did contain an express power to review the annual adjustments. Accordingly, BA has sought to add this further case to its statement of the purposes of the scheme.

426. I consider that the purposes of the scheme are not as described by BA. As regards the suggestion that the purposes of the scheme can be expressed to deal with what is to happen in the case of a surplus, that suggestion addresses a highly specific case which is not appropriate to include in the much more general concept of the purpose of a pension scheme. Further, there would be difficulty if one was to say that the purposes of the APS included the purpose of paying benefits out of a surplus if the trustees so determined. A surplus or a deficit can be an evanescent thing depending on the fluctuations of volatile markets. The existence of a surplus or a deficit can depend upon the basis of the assessment which is used. BA's description of the purposes of the scheme does not give guidance as to how the existence of a surplus or a deficit is to be assessed. Of course, clause 11 does describe how the scheme actuary may determine that question but clause 11 does not contain an express power to pay increased benefits out of a surplus nor does it purport to define the purposes of the scheme. Of course, the existence of a surplus or a deficit will be a highly relevant consideration when the trustees consider whether to amend the scheme to increase benefits but that is different from saying that it is a purpose of the scheme to permit the payment of increased benefits out of a surplus but not out of a deficit (unless BA consents).

427. Even though I am not persuaded to adopt BA's suggested restrictions on the scope of the power to amend conferred by clause 18, it remains the case that there are

important controls on the exercise of the power to amend and, indeed, on the power conferred by the amended rule 15. The controls are that:

(1) the power to amend can only be used for a proper purpose;

(2) when considering whether, and how, to exercise the power to amend, the trustees must have regard to all relevant considerations and to no irrelevant considerations and must not act perversely or irrationally;

(3) the power conferred by the amended rule 15 is subject to clause 2 of the trust deed; however, as I will explain later, it is possible for trustees to determine to increase benefits under the amended rule 15 without producing the result that the scheme is a benevolent scheme or that the payments of the increased benefits are benevolent or compassionate payments;

(4) the power conferred by the amended rule 15 can only be exercised for the purposes of the scheme (which do not themselves prevent it being exercised without BA's consent and when the scheme is in deficit); and

(5) when considering whether, and how, to exercise the power conferred by the amended rule 15, the trustees must have regard to all relevant considerations (including the interests of BA and the funding position of the scheme) and to no irrelevant considerations and must not act perversely or irrationally.

428. Mr Tennet suggested that it was wholly inappropriate for the trustees to have a power to increase benefits against the wishes of BA. Indeed, it may be unusual for trustees to have a unilateral power to amend a scheme so as to increase benefits. However, that position in the case of the APS has come about because of the history of the scheme. Originally, the trustees did not have that unilateral power, as an amendment under clause 18 required the approval of the Minister. However, when the scheme left the public sector and entered the private sector and the requirement for the approval of the Minister was removed, there was no amendment to require the consent of the employer, either to all amendments or to particular classes of amendment. This is not the only term of the scheme which is the product of its history. The reference in rule 15 to pension increases being in accordance with PIROs is explained by the fact that the scheme began life in the public sector and this reference was not altered when the scheme entered the private sector. Just as the members of the APS do not like the continued reference in clause 15 to PIROs, so too BA does not like the fact that the clause 18 power of amendment is a unilateral trustee power.

429. The authorities relied upon by the trustees are of some use in providing a backcloth to the submissions which were made in this case but I do not specifically rely on any particular passage in those authorities in support of my conclusion. Conversely, there is nothing in those authorities which casts any doubt on the above reasoning.

430. For all of the above reasons, I reject BA's submissions that the amendment to rule 15 in this case was beyond the scope of the power to amend conferred by clause 18.

The purpose of the power to amend

431. I have now dealt with the arguments as to the scope of the power to amend conferred by clause 18. Subject to the four provisos to clause 18, that clause is not specific as to the purposes for which the power to amend may be used. However, as with every fiduciary power, the power to amend may only be used for the proper purposes for which it has been conferred. It may be used for the purposes of the scheme; it may not be used for collateral or ulterior purposes.

432. I have already discussed in detail the purposes of the scheme in the present case when considering proviso (i) to clause 18 which prevents the power to amend from being used in a way which has the effect of changing the purposes of the scheme. For the same reasons as I gave when discussing the proviso, it follows that I consider that the amendment made in this case was not made otherwise than for the purposes of the scheme. Further, the power to amend was used in order to amend the rules of the scheme and was not used for some other purpose which was collateral or ulterior.

The alleged pre-determination in relation to the exercise of the power to amend

433. I heard detailed submissions as to alleged pre-determination by the MNTs in this case. Most of those submissions related to alleged pre-determination in relation to the decisions taken by the trustees in 2013 to award a discretionary increase of 0.2%. Later in this judgment, I will discuss in detail the law as to a trustee's duties in relation to the process of decision-making and whether the MNTs were guilty of pre-determination in 2013. It is sufficient for present purposes, when discussing the decision to exercise the power conferred by clause 18 to amend rule 15, to say that a trustee must genuinely consider whether to, and how to, exercise a discretion vested in him.

434. BA submitted that the MNTs did not genuinely consider whether they should exercise the power conferred by clause 18 to amend rule 15 to confer upon themselves a discretionary power to award an increase in pension benefits. BA said that up to February and March 2011, when the trustees decided to amend rule 15 in this way, the MNTs were set upon a course of restoring RPI and they voted to amend rule 15 in order to achieve their pre-determined result of restoring RPI. I have made detailed findings as to what the MNTs wanted to achieve in February and March 2011. The decisions which they made in February and March 2011 did not involve the restoration of RPI. Insofar as the MNTs had the general objective to restore RPI, they did not try to give effect to that objective at that time. Instead, on the advice of Mr Arter, the decision on restoring RPI was deferred. In February and March 2011, the MNTs were waiting to take advice from counsel as to their options. In the meantime, all of the trustees decided that the possibility of an increase above CPI should be considered in the future, at least once in every year, and the future consideration would be subject to taking appropriate professional advice.

435. In so far as the MNTs, and indeed the ENTs, had the aspiration to return to pension increases based on RPI, they did not determine in February and March 2011 that that result would definitely be achieved. The terms of the amendment to rule 15 meant that such a decision would have to be considered later.

436. It is not necessary to consider whether a decision to restore RPI, if it had been made in March 2011, would have been flawed on the grounds that the MNTs were guilty of pre-determination with the result that they did not genuinely consider the matters

which would have been relevant to such a decision. The reason for not considering that question is that the trustees made no decision to restore RPI in 2011.

Conclusion as to the amendment in March 2011

437. I conclude that the trustees' decision in March 2011 to amend rule 15 to include a discretionary power to increase pensions was a valid exercise of the power to amend conferred by clause 18 of the trust deed.

The decision of 28 February 2013

438. It is agreed that the decision taken on 28 February 2013 to award a discretionary increase of 0.2% was not an effective exercise of the power conferred by the amended rule 15 to award a discretionary increase. The reason, or the principal reason, for this agreement was that the decision made on that date was expressed to be subject to later review before the increase was "finalised", which I interpret to mean "effective". In addition to this consideration, the trustees did not specify any date from which the increase was to be effective because, of course, they were not seeking to make an effective decision to award an increase.

439. Because the decision taken on 28 February 2013 was not an effective exercise of the power to award a discretionary increase, it is not necessary to consider whether the decision would have been open to challenge if it had taken the form of an effective decision.

The decision of 26 June 2013

440. The decision taken on 28 February 2013 was reviewed by the trustees on 26 June 2013 when they decided that the amount of the discretionary increase to be awarded should remain at 0.2%. There is an issue as to whether the decision taken on 26 June 2013 was an effective exercise of the power conferred by the amended rule 15. BA says that the decision was not an effective exercise of the power because the trustees did not decide on 26 June 2013, or indeed at any time (leaving aside the fresh decision taken on 19 November 2013), as to the date on which that increase would become effective; BA accepts that there was a subsequent decision, on 19 November 2013, which did specify the date of 1 December 2013 as the effective date for the decision taken on 19 November 2013. The decision of 19 November 2013 is, of course, challenged on separate grounds. The trustees contend that they decided on 26 June 2013 that the increase decided upon on that occasion would take effect on 1 September 2013.

441. I have set out at paragraph 291 above the way in which the minutes of the meeting of 26 June 2013 described how and when the decision taken at the meeting would be implemented. These minutes were approved by the trustees at their meeting on 24 September 2013 and were then signed off as accurate by Mr Spencer. I was also referred to a number of documents which came into existence after the meeting and it was submitted that these documents helped the court to determine what had been agreed at the meeting. In addition, some of those present at the meeting on 26 June 2013 were called to give evidence as to the discussion on this point at that meeting.

442. I will start with the way in which the decision is recorded in the minutes. The minutes refer to the timing of the payment of the increase and the issue of implementation of the increase. It was contemplated that the increase would be paid as part of "the September 2013 payroll" and that there would be "payment in September 2013". The decision to award the increase would obviously have to be effective before the increase could be paid.

443. The minutes do not mention a date in the month of September 2013 but the trustees had before them a report from the Operations Committee which had stated that the earliest date for implementation was 1 September 2013 and had referred to the September payroll. It may therefore be that the trustees had in mind 1 September 2013 as the earliest effective date for the increase. The report from the Operations Committee had also explained that the increase could not be back-dated.

444. It is clear from the minutes that the precise timing of the first payment of the increase was not fixed. The minutes refer to the timing being "finalised" on the basis that the timing was not finalised at the meeting on 26 June 2013. The minutes also make clear that the process of consultation was not expected to delay payment in September 2013 but the fact that this was an expectation shows that the trustees had not committed themselves to the first payment being in September 2013.

445. It would be legally possible to specify a date as the effective date for the increase even where the date for the first payment of the increase had not been settled. So the question is whether the minutes record that the trustees specified an effective date in that way. The minutes do not record any statement as to when the increase would be effective. There is of course the implication that the increase had to be effective before the first payment was made but, as explained, the minutes do not record any commitment as to the date of the first payment.

446. The minutes also refer to the trustees briefing BA and tPR and to the trustees consulting BA and tPR. In some circumstances, the process of briefing and the process of consulting could be different things. The trustees could make an effective decision and then "brief" BA and tPR as to what they had done. However, a process of consultation suggests that the consultation should precede, rather than follow, the making of an effective decision.

447. Standing back at this stage, based on the way the matter was described in the minutes, it would appear that the trustees had not decided on an effective date for the increase of 0.2% although they had the confident expectation that the first payment would be with effect from 1 September 2013 and that carried with it the implication that if that expectation as to payment was realised then the effective date for the increase would be 1 September 2013.

448. The trustees relied on a number of documents which came into existence after the meeting on 26 June 2013 which, they said, threw light on what had been agreed at the meeting. I will refer to these documents and some others which might be material but on which the trustees did not rely.

449. On 8 July 2013, Mr Mitchell who was standing for re-election as a trustee issued an election statement which stated that most of the APS pensioners would receive a 0.2% increase with effect from September 2013.

450. On 9 July 2013, Mr Spencer wrote to Mr Swift of BA enclosing a detailed report intended to be sent to tPR. The letter to Mr Swift stated that the trustees had decided to proceed with the payment of a discretionary increase of 0.2% with effect from 1 September 2013. A number of statements in the intended report to tPR were consistent with the message that the trustees had made a decision to this effect. On 16 July 2013, Mr Spencer wrote to tPR in accordance with the draft which had been sent to Mr Swift.

451. On 15 July 2013, Mr Swift replied to Mr Spencer's letter of 9 July 2013 raising a number of points and on 17 July 2013 Mr Spencer wrote again to Mr Swift responding in detail to the points made by Mr Swift. Mr Spencer's letter stated that the trustees would give further consideration to any additional representations which BA would wish to make to the trustees alongside any views conveyed by tPR and a meeting would be convened for that purpose.

452. On 19 July 2013, Mr Mitchell sent an email to the other APS trustees. His email stated that the trustees had agreed to pay a discretionary increase of 0.2% from 1 September 2013. Mr Mitchell also referred to the communications with BA and tPR about this matter and stated that the existence of these communications was an attempt by BA to delay matters so that Mr Mitchell urged the trustees to go ahead to implement the increase with effect from 1 September 2013.

453. On 20 July 2013, Mr Douglas commented on the stance being taken by Mr Swift. Mr Douglas suggested that the trustees consider any further comments received from BA before the target date for sending out notification to members of the discretionary increase. He also referred to the possibility of some compelling argument being put forward by BA which the trustees had not already considered although he thought that was unlikely.

454. On 25 July 2013, Mr Spencer wrote to Mr Swift in terms which suggested that the trustees were deferring their notification to members of the 0.2% increase whilst the trustees awaited a further communication from BA.

455. On 29 July 2013, tPR wrote to Mr Spencer referring to what the trustees were "planning" to do and their "intended timetable" and asking the trustees to delay communication to the members of the APS as to the granting of discretionary increases until tPR had had time to consider the matter more fully. On the same day, Mr Mitchell sent an email to the APS trustees giving his reaction to tPR's request. Mr Mitchell stated that the trustees had made a decision to pay an increase of 0.2% from 1 September 2013. Mr Mitchell seemed to contemplate the possibility that a two-thirds majority of the trustees could reverse that decision but, unless they did so, the decision should be implemented.

456. On 7 August 2013, the trustees of the APS met to consider the responses of BA and tPR "to the consultation regarding the Discretionary Increase"; this is how the matter was described in the minutes of that meeting. The trustees considered the responses of BA and tPR in considerable detail and they also considered whether to go ahead with an increase with effect from 1 September 2013 or to continue to engage with BA and tPR. Different views were expressed on that subject. There was also discussion about backdating any increase; this seems to have contemplated a future decision to award an increase coupled with a decision that the effective date of the increase should be

backdated to, possibly, 1 September 2013. Eventually, the trustees resolved that they would make a final decision on implementation at a meeting to be held on 2 October 2013 and that the discretionary increase should be deferred with a view to a final decision being taken at that meeting. It was further resolved that if a decision was not possible on 2 October 2013, then a final decision would be made, in any event, by mid-November 2013 for implementation by the end of the calendar year.

457. The events between 7 August 2013 and the meeting on 19 November 2013 have been set out above. I have also already referred to the discussion which took place on 19 November 2013 as to the position in relation to the decision which had been taken at the meeting on 26 June 2013. On 19 November 2013, Mr Spencer referred to the possibility that the trustees might have to go to court to determine whether the trustees had on 26 June 2013 decided on an increase of 0.2% whereas the initial vote at the meeting on 19 November 2013 was for an increase of 0.15%. The trustees then voted, by 8 votes to 4, to round up the increase of 0.15% to an increase of 0.2%. The trustees then awarded an increase of 0.2% with effect from 1 December 2013. It does not appear that they discussed a possible difficulty because the effective date of 1 December 2013 was different from whatever might have been the effective date for the decision on 26 June 2013.

458. I heard oral evidence from some of the persons present at the meeting on 26 June 2013, namely, Mr Spencer, Mr Maunder, Mr Buchanan, Mr Douglas and Mr Arter. The recollection of these five witnesses differed as to what had been decided at the meeting.

459. Mr Spencer's evidence is wholly in line with my provisional interpretation of the minutes of the meeting. Mr Spencer confirmed that it was intended on 26 June 2013 that there would be a genuine consultation with BA although, in the case of tPR, the communication would be more in the nature of telling tPR what was proposed rather than consulting tPR on what should be done.

460. Mr Maunder described the position in different ways. He considered that Mr Spencer did envisage a genuine consultation with BA although Mr Maunder himself would have been content simply to brief BA as to what the trustees were doing. If the consultation, envisaged by Mr Spencer, had provided further relevant material then Mr Maunder agreed that the trustees would have to take that into account. However, he had been confident on 26 June 2013 that such a consultation was unlikely to affect the trustees' approach to the matter. Taken as a whole, I do not think that Mr Maunder's evidence is out of line with my provisional interpretation of the minutes of the meeting.

461. Mr Buchanan's evidence supports a finding that the trustees intended to have a genuine consultation with BA and the process of consultation could affect the ultimate decision to be taken by the trustees, although he thought that was unlikely.

462. Mr Douglas described the position in different ways but his preferred description was that the trustees had decided on 1 September 2013 as the effective date for an increase but that the process of engagement with BA and tPR might lead to the trustees postponing the time for the first payment of the increase. He thought that the minutes lacked clarity.

463. Mr Arter's recollection of the meeting was that the trustees had decided to award an increase with effect from 1 September 2013 and that the "consultation" with BA and tPR was for the purpose of giving them information about what had been decided. He considered that the minutes were somewhat confusing as to what had been determined but nonetheless the minutes were a fair summary of what was actually said.

464. Having considered the minutes of the meeting, the documents which came in to existence after the meeting and the oral evidence, I will now state my conclusions. I consider that I have to determine how the decision of the trustees was expressed at the meeting on 26 June 2013. Plainly, I must give considerable attention to the minutes. The minutes were more or less contemporaneous with what was said and were intended to record the expressions used in the decision made by the trustees. The expressions used in the minutes are not crystal clear and are open to interpretation although, as I have indicated, it is not too difficult to arrive at the objective meaning of the words recorded as having been used.

465. Because the words used in the minutes are open to interpretation it is possible that the different trustees subjectively approached the matter in a way which was somewhat different from the objective meaning of the words used. It is even possible that the minutes did not represent in some way or other what an individual trustee thought. However what matters is what was said and what was objectively assented to by the trustees.

466. In the case of some witnesses, the oral evidence is not entirely in accordance with the words used in the minutes. It may be that the words used in the minutes differ from what was actually said but it is also possible that the words used and accurately recorded in the minutes did not accord with what was in the mind of an individual trustee. Further, it is possible that the oral evidence given at this trial is not a perfect recall of a discussion which took place some years earlier. If I have to choose between the minutes and the oral evidence of some witnesses as to what was actually said at the meeting, the minutes should be regarded as many times more reliable than the recollection of the witnesses.

467. As regards the documents which have been relied upon, these send mixed messages to some extent. The first letters from Mr Spencer to BA and tPR could be said to be more in the nature of a briefing in relation to what the trustees had done rather than a consultation as to what the trustees proposed to do. However, shortly after those letters the communications with BA, in particular, take the form of a genuine consultation which would suggest that the trustees had kept open the possibility that the consultation might affect the ultimate decision which they had to make. If so, that would suggest that the trustees did not consider that they had irrevocably committed themselves to an increase which would take effect on 1 September 2013 whether they wanted it or not. In fact the difference in tone in Mr Spencer's letters, changing from a briefing to a consultation, is foreshadowed in the words of the minutes themselves and may show some subjective ambiguity as to how the trustees had expressed their decision at the meeting itself.

468. I therefore decide that the most reliable account of how the trustees expressed their decision is to be found in the minutes. I also decide that my provisional interpretation of those minutes, set out earlier in this judgment, is indeed the correct interpretation of what the trustees decided. Accordingly, I find that the trustees had not decided on 26

June 2013 on an effective date for the increase of 0.2%. Although they had a confident expectation that the first payment would be with effect from 1 September 2013 and that carried with it the implication that, if that expectation as to payment was realised, then the effective date for the increase would be 1 September 2013, that did not amount to the making of an irrevocable decision that the increase would have effect on 1 September 2013.

469. In the alternative, the trustees argued that even if they did not on 26 June 2013 specify an effective date for the proposed increase, the effect would be that the increase would take effect "within a reasonable period and no later than 31.12.13, the end of the calendar year in which the review was undertaken". I am not able to accept that argument. In order for a decision to award an increase to be effective the trustees must identify an effective date or, at the least, a formula by which an effective date will emerge on the happening of specified events. In this case, the trustees did neither. The suggestion that the effective date would be determined by the effluxion of a reasonable period of time is not something which the trustees expressed or even intended and such an approach is too uncertain in its operation to give rise to an effective date and hence an effective decision to award an increase.

470. The result is that the decision taken by the trustees on 26 June 2013 was not an effective exercise of the power to award a discretionary increase pursuant to the amended rule 15.

The decision of 19 November 2013

471. BA's submissions in relation to the trustees' decision on 19 November 2013 to award a discretionary increase of 0.2% with effect from 1 December 2013 require me to consider:

(1) the scope of the power conferred by the amended rule 15;

(2) the purpose of that power; and

(3) the challenges to the decision-making process which led to the decision on 19 November 2013.

The scope of the discretionary increase power

472. The amended rule 15 confers on the trustees a discretionary power to review the annual rate of pension payable. The amended rule 15 states that the exercise of this power is subject to the trustees taking such professional advice as is appropriate. The trustees did take professional advice from appropriate advisers, in particular, from the scheme actuary, the covenant adviser and from lawyers. The amended rule 15 does not itself specify the scope of the discretionary power or the purposes for which it has been conferred. However, I have already held that the discretionary power is subject to clause 2 of the trust deed and any other provisions of the scheme which serve to define the purposes of the scheme.

473. Clause 2 of the trust deed states that the scheme is not in any sense a benevolent scheme and no benevolent or compassionate payments may be made from it. The existence of the discretionary power conferred by the amended rule 15 does not make

the scheme a benevolent scheme; it remains a defined benefit occupational pension scheme. The discretionary power conferred by the amended rule 15 may not be used by the trustees to make benevolent or compassionate payments.

474. I have already set out the parties' submissions as to the meaning of clause 2 when it refers to benevolent and compassionate payments but I will summarise them at this point. Mr Tennet submits that the decision made by the trustees to award a discretionary increase in pensions of 0.2% was due to their desire to act generously or out of sympathy with pensioners who were disappointed by the Government's change from RPI to CPI and, as such, the discretionary increase was a benevolent or compassionate payment. He cited a dictionary definition of "benevolent" as meaning "desirous of the good of others, of a kindly disposition, charitable, generous" and "well-wishing, well-disposed" to another. He submitted that "benevolent" is wider than "charitable" and that "compassionate" means "granted out of compassion, without legal or other obligation".

475. Mr Rowley submitted that an award of a pension increase across the board to all pensioners, irrespective of their personal circumstances, could not be described as a benevolent or compassionate payment. This case could be contrasted with the case of an individual, or a group of individuals, who had been assessed as suffering hardship which merited a benevolent or compassionate payment.

476. It is easy to hold that the award of a 0.2% discretionary increase did not involve a compassionate payment. The trustees were not moved by compassion in making their decision. The increase was to be available to all pensioners whatever their personal circumstances, whether or not they were suffering hardship and whether or not their circumstances deserved compassion.

477. It is more difficult to decide whether the award involved a benevolent payment. That question has to be answered in the context of this scheme rather than by applying a dictionary definition. One of the difficulties in reaching the decision is the uncertainty as to why clause 2 was expressed as it was. Prima facie, the draftsman of the scheme would have had a clear object in mind when he included clause 2 in a prominent place in the trust deed of the scheme. However, the researches conducted by the parties have not come up with any real explanation of the draftsman's thinking on this point. In some circumstances, I could see that the deliberate conferring of a benefit on someone who was not entitled to that benefit might be said to be an act of benevolence. However, other provisions of the scheme can be operated in a way which results in a benefit being conferred on a person who has no pre-existing entitlement to it. The scheme permits the employer to augment benefits in certain circumstances. Further, the provisions of clause 11 in relation to the disposal of a surplus were interpreted in Stevens v Bell to permit a scheme under which a surplus could be made available to provide benefit improvements: see the answers to questions 8(i)(b) and (c) in that case. The Court of Appeal held that a scheme under clause 11 could not provide for a payment (by way of a return of contributions) to be made to the employer. The court's reasoning was that such provision would require an amendment of the scheme and an amendment of that kind was not possible by reason of proviso (ii) to clause 18. It can be said that the operation of express provisions of the scheme which provide for augmented benefits are an express qualification on the prohibition in clause 2 on benevolent payments. However, the decision in Stevens v Bell as to a scheme which provided for increased benefits out of a surplus did not turn

on the express terms of clause 11. Further, Mr Tennet accepted that it would be open to the trustees to augment benefits by an amendment under clause 18 if the employer wished them to.

478. I will not attempt a comprehensive definition of "benevolent payments" for the purposes of this scheme. However, the above arguments taken together powerfully suggest that the prohibition in clause 2 of the trust deed on the making of benevolent payments was not intended to prevent the trustees conferring on themselves, and then exercising, a power to make discretionary payments which would be available to all of the pensioners irrespective of their personal circumstances. I therefore conclude that the decision of 19 November 2013 to award a discretionary increase was not contrary to clause 2 of the trust deed.

479. As discussed earlier, Mr Tennet submitted that the scope of the power to amend was such that the power could only be used to increase benefits: (1) to give effect to the wishes of BA; or (2) when the scheme was in surplus. I have discussed those submissions when considering whether the amendment to rule 15 was outside the scope of the power to amend conferred by clause 18. I now need to consider the question as to whether there are the same, or similar, restrictions on the power conferred by the amended rule 15. Adapting Mr Tennet's earlier submissions as to clause 18, the argument would seem to be that the discretionary power to increase benefits could only be exercised: (1) to give effect to the wishes of BA; or (2) when the scheme was in surplus. For the reasons given earlier, I consider that these matters do not go to the scope of the power under the amended rule 15. Instead, I need to consider different questions as to whether the award of a discretionary increase was not for a permissible purpose or whether there was a flaw in the decision-making process.

The purpose of the discretionary increase power

480. The power conferred by the amended rule 15 was to enable the trustees to consider conferring a discretionary benefit increase on pensioners. The power could only be exercised for the purposes of the scheme and not for a collateral or ulterior purpose. In view of my earlier conclusions as to the purposes of the scheme, I do not accept BA's submissions that an exercise of the power to award a discretionary benefit was outside the purposes of the scheme when it was not in accordance with BA's wishes and did not involve a payment out of a trapped surplus. Accordingly, I conclude that the decision taken on 19 November 2013 was for the purpose of conferring a discretionary benefit on pensioners for the purposes of the scheme and not for a collateral or ulterior purpose. As before, I accept that the existence of a deficit and the wishes of BA are relevant, even highly relevant considerations, for the trustees to take into account but the existence of a deficit and the absence of BA's consent do not mean that the exercise of the power must be for an impermissible purpose.

481. Accordingly, I turn to consider the next group of issues which relate to the decision-making process as to the exercise of the power conferred by the amended rule 15.

The decision-making in relation to the discretionary increase power: the law

482. Rule 15, as amended, conferred upon the trustees a power to award discretionary increases. On 19 November 2013, the trustees resolved to exercise that power by

awarding a discretionary increase of 0.2% with effect from 1 December 2013. BA contends that the making of that decision involved a breach of duty by the trustees and accordingly the decision was voidable and the court should now set it aside.

483. It is now established that a decision by trustees to exercise a fiduciary power is not voidable unless it was made in breach of their duty as trustees. The position was described in Pitt v Holt at [73] as follows (referring to the so-called rule in Re Hastings-Bass):

> "… for the rule to apply the inadequate deliberation on the part of the trustees must be sufficiently serious as to amount to a breach of fiduciary duty. Breach of duty is essential (in the full sense of that word) because it is only a breach of duty on the part of the trustees that entitles the court to intervene (apart from the special case of powers of maintenance of minor beneficiaries, where the court was in the past more interventionist: see para 64 above). It is not enough to show that the trustees' deliberations have fallen short of the highest possible standards, or that the court would, on a surrender of discretion by the trustees, have acted in a different way. Apart from exceptional circumstances (such as an impasse reached by honest and reasonable trustees) only breach of fiduciary duty justifies judicial intervention."

484. It is therefore necessary to identify the relevant duties of the trustees in this case. For this purpose, it is useful to refer to a number of statements in the decided cases as to the nature and extent of these duties and the power of the court to intervene. In In re Beloved Wilkes's Charity (1851) 3 Mac & G 440 at 448, Lord Truro LC said:

> "… it is to the discretion of the trustees that the execution of the trust is confided, that discretion being exercised with an entire absence of indirect motive, with honesty of intention, and with a fair consideration of the subject. The duty of supervision on the part of this court will thus be confined to the question of the honesty, integrity, and fairness with which the deliberation has been conducted, and will not be extended to the accuracy of the conclusion arrived at, except in particular cases."

485. In Dundee General Hospitals Board of Management v Walker [1952] SC (HL) 78, Lord Reid said at page 92 that, even where trustees are expressed to have an absolute discretion:

> "If it can be shown that the trustees considered the wrong question, or that, although they purported to consider the right question, they did not really apply their minds to it or perversely shut their eyes to the facts, or that they did not act honestly or in good faith, then there was no true decision and the court will intervene …"

486. In In re Pilkington's Will Trusts [1964] AC 612, Viscount Radcliffe said at 641:

> "… there does remain at all times a residual power in the court to restrain or correct any purported exercise that can be shown to be merely wanton or capricious and not to be attributable to a genuine discretion."

487. In Scott v National Trust [1998] 2 All ER 705, Robert Walker J said at 717f – 718d:

> "I have heard a lot of submissions about the duties of trustees in making decisions in exercise of their fiduciary functions. Certain points are clear beyond argument. Trustees must act in good faith, responsibly and reasonably. They must inform themselves, before making a decision, of matters which are relevant to the decision. These matters may not be limited to simple matters of fact but will, on occasion (indeed, quite often) include taking advice from appropriate experts, whether the experts are lawyers, accountants, actuaries, surveyors, scientists or whomsoever. It is however for advisers to advise and for trustees to decide: trustees may not (except in so far as they are authorised to do so) delegate the exercise of their discretions, even to experts. This sometimes creates real difficulties, especially when lay trustees have to digest and assess expert advice on a highly technical matter (to take merely one instance, the disposal of actuarial surplus in a superannuation fund).
>
> …
>
> In an imperfect world trustees (like other decision-makers) do often make decisions which are based on less than complete information and less than full analysis and discussion, and there is real difficulty in formulating the test for determining when a decision is so flawed as to be invalid.
>
> …
>
> [After referring to the test as to what the trustees would or might have decided consistently with the performance of their duty, the judge added:]
>
> To impose too stringent a test may impose intolerable burdens on trustees who often undertake heavy responsibilities for no financial reward; it may also lead to damaging uncertainty as to what has and has not been validly decided."

488. In Edge v Pensions Ombudsman [2000] Ch 602 at 627D-E, Chadwick LJ said:

> "The essential requirement is that the trustees address themselves to the question what is fair and equitable in all the circumstances. The weight to be given to one factor as against another is for them.

> Properly understood, the so-called duty to act impartially—on which the ombudsman placed such reliance—is no more than the ordinary duty which the law imposes on a person who is entrusted with the exercise of a discretionary power: that he exercises the power for the purpose for which it is given, giving proper consideration to the matters which are relevant and excluding from consideration matters which are irrelevant."

489. It is also relevant in this context to consider the role played by professional advice which is given to trustees. In Pitt v Holt, Lord Walker said at [80]-[81]:

> "80 … Trustees may be liable, even if they have obtained apparently competent professional advice, if they act outside the scope of their powers (excessive execution), or contrary to the general law (for example, in the Australian case, the law regulating entitlement on intestacy). That can be seen as a form of strict liability in that it is imposed regardless of personal fault. Trustees may also be in breach of duty in failing to give proper consideration to the exercise of their discretionary powers, and a failure to take professional advice may amount to, or contribute to, a flawed decision-making process. But it would be contrary to principle and authority to impose a form of strict liability on trustees who conscientiously obtain and follow, in making a decision which is within the scope of their powers, apparently competent professional advice which turns out to be wrong.
>
> 81 Such a result cannot be achieved by the route of attributing any fault on the part of professional advisers to the trustees as their supposed principals. Solicitors can and do act as agents in some clearly defined functions, usually of a ministerial nature, such as the receipt and transmission of clients' funds, and the giving and taking of undertakings on behalf of clients. But they do not and may not act as agents in the exercise of fiduciary discretions. As I said in the *Scott* case [1998] 2 All ER 705, 717: "It is however for advisers to advise and for trustees to decide: trustees may not (except in so far as they are authorised to do so) delegate the exercise of their discretions, even to experts." "

Lord Walker added at [88]:

> "Finally, on this part of the case, there is the submission that the trustees' duty to take account of relevant considerations is to be interpreted as a duty to act on advice only if it is correct—in effect, a duty to come to the right conclusion in every case. I have left this submission until the end because it is to my mind truly a last-ditch argument. It involves taking the principle of strict liability for ultra vires acts (paras 81–84 above) out of context and applying it in a different area, so as to require trustees to show infallibility of judgment. Such a requirement is

> quite unrealistic. It would tip the balance much too far in making beneficiaries a special favoured class, at the expense of both legal certainty and fairness. It is contrary to the well-known saying of Lord Truro LC in In re Beloved Wilkes's Charity (1851) 3 Mac & G 440, 448*:*
>
> "that in such cases as I have mentioned it is to the discretion of the trustees that the execution of the trust is confided, that discretion being exercised with an entire absence of indirect motive, with honesty of intention, and with a fair consideration of the subject. The duty of supervision on the part of this court will thus be confined to the question of the honesty, integrity, and fairness with which the deliberation has been conducted, and will not be extended to the accuracy of the conclusion arrived at, except in particular cases."
>
> The trustees' duty does not extend to being right ("the accuracy of the conclusion arrived at") on every occasion."

490. On the subject of the wide range of matters which might be potentially relevant to the exercise of the power conferred by the amended rule 15 in this case it was agreed that the interests and wishes of the sponsoring employer, BA, were relevant considerations. I was referred to the detailed discussion of that subject in Merchant Navy Ratings Pensions Fund Trustees Ltd v Stena Line Ltd [2015] PLR 239 but as the matter was agreed, I need not quote extensively from the judgment of Asplin J in that case. I will however refer to what the judge said about a submission in that case that the trustees' duty was to act in the best interests of the beneficiaries i.e. the members of the scheme. On that subject, she said at [228]:

> "… the 'best interests of the beneficiaries' should not be viewed as a paramount stand-alone duty. In my judgment, it should not be treated as if it were separate from the proper purposes principle. In fact, it seems to me that the way in which the matter was put by Lord Nicholls extra judicially sums up the status of the best interests principle and the way it fits in to the duties of a trustee. It is necessary first to decide what is the purpose of the trust and what benefits were intended to be received by the beneficiaries before being in a position to decide whether a proposed course is for the benefit of the beneficiaries or in their best interests. As a result, I agree with his conclusion that '.. to define the trustee's obligation in terms of acting in the best interests of the beneficiaries is to do nothing more than formulate in different words a trustee's obligation to promote the purpose for which the trust was created.' "

491. Mr Tennet put at the forefront of his challenge to the trustees' decision-making the contention that they had "pre-determined" the result they wanted to arrive at. He contended that, as a result, they had not truly considered whether to exercise, and how to exercise, the discretion which they had under the amended rule 15. He submitted

that the result was their apparent decision, or decisions, to award an uplift of 0.2% above CPI were voidable.

492. It is clear that trustees must genuinely consider whether to, and how to, exercise a discretion vested in them. In the cases cited above, there are references to trustees acting "with a fair consideration of the subject", "not really applying their minds to it", "address[ing] themselves to the question" and "giv[ing] proper consideration to the exercise of their discretionary powers". It is less easy to find illustrations in the decided cases of circumstances where trustees have been held to have failed in their duty in this respect even though they have appeared to have gone through a decision-making process in relation to an issue.

493. As it happens, there is an illustration in a reported case of some of the features which BA alleges existed in the present case. The illustration comes from Bromley LBC v Greater London Council [1983] 1 AC 768. In that case, a local authority owed a fiduciary duty as to how it spent monies which were to be provided by ratepayers. Some of the members of the local authority had been elected on a manifesto which stated that, if elected, those members would act in a particular way as regards reducing fares on public transport. Those members were elected and then acted in accordance with the statements in the manifesto. The members in question did not give evidence as to their reasoning when they made their decision. The relevance of these matters was considered in detail in the judgments of the Court of Appeal and the House of Lords in that case. It was held that the members in question had not given genuine consideration to the issue before them which involved balancing the conflicting interests of the ratepayers (who would be required to pay) and of the travelling public (who would enjoy the benefit). The principles which were applied in that case appear to be much the same as the principles to be derived from the cases cited above in relation to the requirement that trustees give genuine consideration to the exercise of a discretionary power. However, the case can only be an illustration of how such principles might apply and the facts of that case are not the same as the facts of the present case. In addition, I must heed the comments of Lloyd and Mummery LJJ in Pitt v Holt [2012] Ch 132 at [77] and [235] respectively where they emphatically cautioned against drawing an analogy between the relevant principles of trust law and public law principles in relation to judicial review. In the Supreme Court in Pitt v Holt, Lord Walker did not dissent from these comments: see [2013] 2 AC 108 at [11].

BA's challenges to the decision-making process which led to the decision of 19 November 2013

494. BA challenged the decision-making process which led to the decision of 19 November 2013 on a number of grounds. BA contended:

(1) some of the trustees did not give proper consideration to the matters which were relevant to their decision because they had from mid-2010 onwards pre-determined that they would vote for pension increases based on RPI or (if they were unable to achieve a two-thirds majority for such increases) for the largest increase for which they could achieve a two-thirds majority; BA referred to this as "pre-determination" on the part of certain trustees;

(2) the trustees failed to take all relevant considerations into account;

(3) the trustees took into account some irrelevant considerations.

BA had originally contended that the trustees' decision of 19 November 2013 was irrational and perverse but that contention was not pursued in its closing submissions.

495. The allegation that certain trustees had impermissibly pre-determined the outcome long before 19 November 2013 was the primary and the over-arching submission made by BA. Accordingly, it is necessary for me to consider that contention first before I go on to consider the contentions put forward as to relevant and irrelevant considerations.

The alleged pre-determination

496. The pleaded case:

> "**259** It is BA's case, based on the facts and matters set out above, that all the MNTs were, at all material times, operating on the basis of a predetermination to secure RPI increases for APS members as soon as possible, alternatively (to the extent that the objections of other Trustees precluded this) to secure above-CPI increases as close to RPI as they could persuade or pressure their fellow Trustees to go along with. This predetermination derived from the strongly held preconceived views of the MNTs as leaders or strong supporters of the anti-CPI campaign.
>
> **260** In consequence, in voting for such increases:
>
> **260.1** the MNTs did not give any active or genuine consideration to the exercise of the discretionary power under Rule 15; and
>
> **260.2** the MNTs effectively fettered their own discretion under Rule 15 because they had adopted an inflexible policy or viewpoint that discretionary increases should be awarded.
>
> There was, as a result, no actual or proper exercise of discretion by those Trustees."

497. Mr Tennet confirmed in the course of his reply at the end of the trial that BA's case remained as pleaded in paragraphs 259 and 260 of the Re-Amended Particulars of Claim. The pleaded allegation relates only to the MNTs. Accordingly, in relation to the three ENTs who voted for a discretionary increase on 19 November 2013, namely, Mr Spencer, Mr Maunder and Mr Buchanan, it is not alleged that they failed to give genuine consideration to the exercise of their discretion, or that they fettered their discretion, in relation to the power conferred by the amended rule 15.

498. In relation to the six MNTs who voted for a discretionary increase on 19 November 2013, namely Mr Douglas, Mr Mallett, Captain Pocock, Mr Tomlin, Mrs Sellers and Mr Mitchell, it is alleged that they failed in the respects alleged in paragraphs 259 and

260 of the pleading. Accordingly, in relation to each of these six MNTs, I need to make findings as to whether:

(1) that MNT failed, on 19 November 2013, to give any active or genuine consideration to the exercise of the discretionary power under the amended rule 15; and/or

(2) that MNT effectively fettered his or her discretion under the amended rule 15 because he or she had adopted an inflexible policy or viewpoint that discretionary increases should be awarded.

Mr Douglas and Mr Mallett gave evidence at the trial; the other four MNTs did not. It will be remembered that Captain Pocock had died before the trial.

- *Mr Douglas*

499. Mr Douglas had been elected as an MNT in July 2011. He had released an election statement when standing for election. In that statement, he described the APS as one of the UK's largest and best funded final salary pension schemes. He said when cross-examined that this statement was made before he became a trustee and was his understanding at that time; Mr Douglas had been an ENT in relation to the APS and the NAPS from September 2004 to September 2007. His election statement referred to trustees being required by law to act in the best financial interests of beneficiaries. It stated that the trustee board had failed to secure a way of ensuring that pension increases followed RPI; putting this right was in the best financial interests of the beneficiaries and must remain a priority for the trustees. When cross-examined, Mr Douglas agreed that he thought the change from RPI to CPI was "a swindle", a phrase he had used in other documents.

500. From the time of his election as an MNT until 19 November 2013, Mr Douglas was a very active trustee. He and Captain Pocock were the two most influential of the MNTs in the period up to 19 November 2013. Mr Douglas gave detailed evidence as to the various meetings of the trustees of the APS in that period. Mr Douglas was a member of the VSG which first met on 25 January 2012. Mr Douglas did not attend the trustee meeting on 29 February 2012 but he appointed Captain Pocock as his alternate who voted for a discretionary increase of 0.2%.

501. At the trustee meeting on 11 July 2012, Mr Douglas accepted that CPI was an appropriate index for the purposes of the original rule 15 although he felt it was very harsh on the APS pensioners to use CPI as the measure for pension increases. Also at that meeting, Mr Douglas was of the view that rule 15 should not be further amended to hardwire RPI but that the trustees should develop a framework which set out the circumstances in which the power to award discretionary increases might be used. At that time, Mr Douglas was of the view that a discretionary increase could only be paid when the funding level (taking into account future contributions) was at a high enough level to allow for it. He gave evidence that he would only agree to a discretionary increase where that was consistent with the covenant, legal and actuarial advice received by the trustees.

502. At the trustee meeting on 28 February 2013, Mr Douglas supported the adoption of the DIF and voted for a discretionary increase of 0.2%. He gave evidence that he was

in favour of this increase because he was of the opinion that a discretionary increase was appropriate and affordable. Mr Douglas attended the meeting with tPR on 25 June 2013. At the trustee meeting on 26 June 2013, Mr Douglas remained of the view that it was appropriate to award a 0.2% discretionary increase.

503. At the meeting on 19 November 2013, Mr Douglas voted in favour of an increase of at least 0.1% and an increase of at least 0.2% and ultimately in favour of an increase of 0.2%. He gave evidence that he was disappointed, as were the other MNTs, with the actions of a number of the ENTs at the meeting. He, and the other MNTs, felt that much of the relevant information that had emerged since the February and June 2013 decisions had been positive, investment conditions had improved, the fund was in better shape and BA's own results were improving. Mr Douglas thought that on 19 November 2013, all the variable factors that should influence a trustee decision were as good, or better, than they had been in February 2013.

504. Mr Douglas described the debate at the meeting on 19 November 2013 as being very professional and measured. He gave evidence that the meeting had been one of the most difficult that the trustee board had had. He said that Mr Spencer had worked hard all afternoon to help the trustees concentrate on the relevant issues and he had been very deliberate in the way he ensured, first, that each of the advisors made their contribution and then the trustees were each given an opportunity to enter the debate before moving towards making a decision. Mr Douglas gave evidence that he considered that Mr Spencer had been working extremely hard to achieve as close to a consensus behind an eventual decision as was going to be possible, whatever that eventual decision might be.

505. Mr Douglas gave detailed evidence as to his reasons for the conclusions he reached at the meeting on 19 November 2013. I will summarise that evidence as follows:

(1) there had been throughout an unequivocal expectation among the members of the APS that future pension increases would be based on RPI; secure protection against inflation would have been one of the reasons that approximately 50% of eligible APS members did not transfer to the NAPS in 1984 and until 2010 there had been nothing to change this view;

(2) the decision to award a discretionary increase was based on an understanding that it would only be paid from funds that BA had already pledged; as at November 2013, BA had signed up to the 2013 funding agreement so it could be presumed that BA was content that the contributions were affordable; PwC expressly advised the trustees that it was reasonable to expect that those contributions would be made; further, PwC advised that even if the discretionary increase cost an extra £24 million, this would still be immaterial to BA's covenant; further still, PwC had previously advised the trustees that the Iberia merger, the British Midland acquisition, the agreement with American Airlines and the funding arrangements for the new fleet were all positive developments for its business; as far as the February 2013 decision was concerned, PwC had advised that the covenant was not significantly different to where it had been at the time of the 2010 funding agreement, and in fact there had been positive developments in BA's business; Mr Douglas considered that it was clear from this that BA was as able to pay the recovery plan contributions as it had been in 2010;

(3) the DIF and the actuarial advice were comprehensive and addressed all the points raised by tPR; Mr Douglas considered that the DIF was a sensible way to consider the award of a discretionary increase especially as this would require annual review, thus allowing the trustees to respond to down-side events and exposure to risk as well as funding or covenant improvements;

(4) the trustees had adequately considered BA's interests;

(5) the APS trustees had to have regard to the NAPS as a large creditor of BA but Mr Douglas considered that the NAPS had its own funding agreement in place for the interests of the NAPS members; and

(6) he considered that he could reasonably assume a value of at least £125 million from the total £250 million contingent payment as a source of funding.

506. At the meeting on 19 November 2013, Mr Douglas considered that he was faced with a decision between awarding a 0.17% increase on a gilts flat basis or a 0.345% increase on a technical provisions basis. He believed that there was good justification for adopting the technical provisions approach but in the interests of preserving a consensus amongst the trustees he recognised an argument could be made for giving higher priority to de-risking and less weight to discretionary increases. This moved his decision to 0.2%. Generally, it was his desire to pay discretionary increases where possible to bring annual increases up to the level of RPI, subject to the same being affordable by the APS. He believed that there was a genuine and justified level of expectation from the membership, as demonstrated by (amongst other things) the strength of feeling expressed at the two meetings held at Ascot in 2011 and 2012, and that the trustees should try to meet that expectation if they were able to do so. Therefore, if the advisers were able to recommend that it would be a proper exercise of the trustees' discretion to pay an increase, the covenant was sufficiently strong and the APS was sufficiently funded, he thought that a discretionary increase should be paid, if not necessarily the full amount of the difference between CPI and RPI.

507. BA submitted that there were a large number of considerations to be taken into account when addressing the submission that Mr Douglas (and indeed all of the MNTs) had not given genuine consideration to the exercise of the discretion under the amended rule 15 and had fettered the exercise of their discretion. Some of these considerations related to a time before Mr Douglas became a trustee and do not directly apply to him, although BA would say that Mr Douglas shared the views of the other MNTs in some or all of these respects. Accordingly, I will refer to the matters put forward by BA even though some of them related to a time before Mr Douglas was a trustee. In particular, BA submitted:

(1) the MNTs campaigned for the restoration of RPI even at a time when this involved them challenging the decisions of the trustee board;

(2) the MNTs communicated with ABAP in relation to its campaign to restore RPI;

(3) from April 2011, before he became a trustee, Mr Douglas supported the campaign to restore RPI; he was also in contact with ABAP as late as 23 November 2012;

(4) Mr Douglas' election statement supported the restoration of RPI;

(5) Mr Douglas stated on a number of occasions that he wanted to see a restoration of RPI;

(6) the MNTs had very strong views on the restoration of RPI;

(7) the MNTs' views were emotional, not rational;

(8) the MNTs' views were inconsistent with legal advice;

(9) the MNTs' views were inconsistent with actuarial advice;

(10) the MNTs wrongly believed that the members had been misled in relation to the future use of RPI;

(11) the MNTs wrongly believed that RPI was affordable because the 2009 valuation assumed RPI increases;

(12) the MNTs wrongly believed that CPI was not an appropriate index;

(13) the MNTs wrongly believed that a change from CPI to RPI would not be a benefit improvement;

(14) the MNTs wrongly believed that it would be improper to benefit BA or its shareholders;

(15) the MNTs sought to put pressure on advisers when they did not get the advice they wanted;

(16) the MNTs were determined, if they could not restore RPI, to get as much out of the ENTs as they could; this related first to the amendment to rule 15 and then the vote for an increase of 0.2%;

(17) the MNTs always voted consistently for the highest possible increase that the ENTs were prepared to support;

(18) the MNTs accused the ENTs of being conflicted;

(19) the MNTs were not concerned with the interests or wishes of BA;

(20) the MNTs coordinated their activities as an informal sub-group of trustees.

508. Mr Douglas was cross-examined in detail as to his thoughts and actions from around April 2011 to November 2013. The cross-examination took matters in chronological order and Mr Douglas was asked very little about the meeting and the decision on 19 November 2013. As regards that meeting, the questions put to him related to the change from an increase of 0.15% to an increase of 0.20%, the significance of the decisions made in February and June 2013, the way that Mr Spencer conducted the meeting and Mr Maunder's position at the meeting.

509. On the issue as to predetermination which is now being examined, I find that Mr Douglas did not fail, on 19 November 2013, to give active and genuine consideration to the exercise of the discretionary power under rule 15. I also find that he did not fetter his discretion under rule 15 and he did not adopt an inflexible policy or viewpoint that discretionary increases should be awarded.

510. What emerges from Mr Douglas' evidence is that matters were not static between the Budget announcement in June 2010 and the decision on 19 November 2013. The documents show that, initially, the MNTs saw matters in stark terms. The Budget announcement came as a shock, in particular, to the APS pensioners. The APS pensioners had, up to that point, expected that pension increases would continue to be based on RPI. The MNTs (not including Mr Douglas at this stage) had the immediate reaction that they should use whatever powers they had to restore RPI. The MNTs were sympathetic to the position of the pensioners and were not sympathetic to the position of BA. The MNTs were persuaded by their advisers not to hardwire RPI in the Spring of 2011. Instead they chose to introduce a discretionary power to increase pensions.

511. At the time of his first involvement in April 2011, Mr Douglas took up a similar position to that of the MNTs in favour of attempting to restore RPI. After he became an MNT, Mr Douglas genuinely engaged with the various processes on which the trustees as a whole were engaged. The trustees saw the sense of having a framework which would guide them as to how they used their discretionary power in future years. The MNTs did not want a framework which was overly conservative. By the time of the trustee meeting of 11 July 2012, the MNTs had moved from their initial reaction to the Budget announcement to making the decision that CPI was an appropriate index for the purposes of the original rule 15. At the same meeting, Mr Douglas did not wish to amend rule 15 to hardwire RPI. From that point, it cannot be said that Mr Douglas was determined to hardwire RPI as he then chose not to do so. The development of the DIF and the AMT was a genuine attempt to arrive at a workable framework which would allow the trustees to take into account the relevant factors which should guide their decision under the amended rule 15. By the middle of 2012, the trustee board had once again started to function coherently although there remained differences of views between the ENTs and the MNTs. The trustee board was able to act unanimously on 11 July 2012 and again on 28 February 2013 when it adopted the DIF and made a conditional decision in favour of a discretionary increase of 0.2%. In the course of 2013, an enormous amount of work was done to provide the trustees with a considerable amount of actuarial, legal and covenant advice. I am satisfied that Mr Douglas fully engaged with that advice with a view to informing himself of the matters relevant to the decisions which he made in February and June 2013 and on 19 November 2013. Mr Douglas was an impressive witness and I accept his evidence. In particular, I accept Mr Douglas' evidence, as recorded above, as to his reasons for his decision on 19 November 2013.

- *Mr Mallett*

512. Mr Mallett became a member of the APS in 1978 when he joined BA. He accrued benefits from 1978 to 2000 and has been a pensioner member of the APS since 2001. He was elected an MNT on 12 September 2013 and took up office as a trustee on 1 October 2013. He was elected in place of Mr Scott. Mr Mallett has other relevant experience as a trustee of a pension scheme in that he had been, since 1 November

2009, the independent chairman of the board of trustees of three pension schemes sponsored by Cobham plc.

513. There are many documents which show the points of view expressed by Mr Mallett following his becoming aware of the Budget announcement made in June 2010. Mr Mallett seems to have become aware of the position in relation to the APS in early 2011 when he received a members' communication explaining the effect of the Budget announcement. From then until he stood for election as an MNT, Mr Mallett's position was that of a pensioner member of the APS who was severely disappointed by the Budget announcement and the trustees' failure, as he saw it, to take action to restore RPI in the case of the APS. The documents from this period show that Mr Mallett was very persistent and, indeed, repetitive in relation to the complaints he was making to Mr Spencer as chairman of the trustees. He did not change his views in the light of explanations given to him by Mr Spencer. It is fair to say that as an aggrieved pensioner member, Mr Mallett saw the position in very simplistic, black and white terms to the effect that the trustees ought to restore RPI.

514. Mr Mallett gave evidence that he was "shocked" and "deeply concerned" when he learned that increases under the APS would in future be based on CPI and not RPI. He took a "dim view" of what Mr Spencer as chairman of the trustees was doing, or not doing, to reverse the change to CPI. He thought that the trustees had a moral obligation to pay increases in accordance with RPI. Mr Mallett was critical of Mr Spencer's statements at the first Ascot meeting on 11 July 2011. He considered that Mr Spencer was being bureaucratic and evasive. Mr Mallett decided to become involved with the campaign to restore RPI and he met Captain Post, Captain Pocock, Mr Tomlin and Mr Douglas at Mr Douglas' flat. In 2011, Mr Mallett issued a complaint through the APS internal dispute resolution procedure; Mr Mallett's complaint was one of very many similar complaints which were orchestrated by Captain Post. In due course, those complaints were taken to the Pensions Ombudsman. Captain Post's own complaint was treated as the lead case and was not upheld by the Ombudsman. As a result, Mr Mallett's complaint was closed. In 2012, Mr Mallett was of the view that RPI was the appropriate index to use for the APS. Mr Mallett attended the second Ascot meeting, on 28 September 2012. In 2013, Captain Post suggested to Mr Mallett that he should stand as an MNT. Mr Mallett then joined ABAP as he thought that was appropriate if he were to stand as an MNT. ABAP endorsed him as a candidate. In his election statement, Mr Mallett stated that he supported Captain Post's campaign to restore RPI.

515. Mr Mallett attended the meeting of trustees on 2 October 2013. At around that time, Mr Mallett very conscientiously arranged a number of meetings with the advisers to the APS, with some of his fellow trustees and the secretariat so that he could inform himself of relevant matters concerning the APS.

516. Mr Mallett gave evidence about the meeting on 19 November 2013 which I can summarise as follows:

(1) as a relatively new trustee of the scheme, he was interested in the decisions the trustees had reached previously but he did not think that these decisions were relevant to the decision that had to be made on 19 November 2013;

(2) Mr Spencer made it clear to everyone present at the meeting that the decision had to be taken afresh;

(3) Mr Mallett considered that all of the trustees, including himself, had received more than sufficient advice and information to reach a properly informed decision;

(4) he considered that, in order to make any decision, the trustees needed to understand fully the legal, covenant and actuarial advice that they were given; he was confident that, when the decision on the increase was made, he did understand the advice and he believed that his fellow trustees did so as well;

(5) the views of BA and the NAPS were clearly set out at the meeting;

(6) Mr Mallett expressed the opinion at the meeting that it would be reasonable to place a value of £125m on the contingent payment;

(7) he expressed the opinion that an increase of 0.2% would be affordable and pragmatic in light of all the advice given and representations made;

(8) Mr Mallett had had no intention in advance of the meeting to push for any increase at any particular level;

(9) his ultimate decision was based on the advice that the trustees received and the arguments that were aired at the meeting;

(10) he considered that the quality of the discussion was very high.

517. Mr Mallett was cross-examined in detail as to the many documents which showed his dissatisfaction with the trustees prior to his becoming a trustee on 1 October 2013. In his answers, Mr Mallett distinguished his position as an aggrieved pensioner from his position as a trustee. Mr Mallett was also cross-examined about his actions and thoughts as a trustee although the period between his becoming a trustee on 1 October 2013 and the meeting on 19 November 2013 was a short one. He was asked comparatively little about that meeting and the decision on 19 November 2013 or about the evidence he had given in chief on that subject.

518. There was undoubtedly a very marked difference between the statements which Mr Mallett had made when he was an aggrieved pensioner complaining to Mr Spencer as chairman of the trustees and the evidence which Mr Mallett gave as to how he approached his duties as a trustee on and after 1 October 2013. He was asked about that difference at the end of his evidence. He explained that his mindset necessarily changed when he took on the responsibilities of a trustee. He said that when he attended the meeting on 19 November 2013, he did not have any settled intention as to how he would vote and what outcome he wanted. He wanted to hear the advice given at the meeting and to hear from his fellow trustees. Before the meeting, he did not have a figure in his mind as the likely figure to be adopted at the meeting. He said that he asked a number of questions at the meeting as he needed to clarify matters.

519. Because of the very marked difference between Mr Mallett's statements as an aggrieved pensioner and his evidence as to what he did on and after 1 October 2013

and because of the very short time which Mr Mallett had in which to change his attitude from that of an aggrieved pensioner to that of an open-minded trustee, I have considered Mr Mallett's evidence with some care. I am sure that when Mr Mallett gave his evidence to me that he genuinely believed it to be true. Nonetheless, I have to consider whether an objective assessment of the situation should accord with his own belief as to the situation. Having reflected on this matter and having re-read the documents relating to his position as an aggrieved pensioner and the transcript of his evidence, I do accept his evidence that he genuinely did seek to engage with the advice which was given to the trustees and that he in fact did base his decision on that advice and his own assessment which required evaluation of matters such as benefit security, prudence and risk. I am quite satisfied that it would have been possible for Mr Mallett to have done so and I accept his evidence that he did so.

520. Accordingly, on the issue as to predetermination which is now being examined, I find that Mr Mallett did not fail, on 19 November 2013, to give active and genuine consideration to the exercise of the discretionary power under the amended rule 15. I also find that he did not fetter his discretion under the amended rule 15 and he did not adopt an inflexible policy or viewpoint that discretionary increases should be awarded.

- *Captain Pocock*

521. I have already referred to the statement which Captain Pocock made when he resigned as a trustee on 14 April 2011. In that statement, he referred to the reasonable expectations of members that pensioners would receive RPI increases and that the trustees had an obligation to fulfil those expectations if it were legally possible to do so. He expressed the view that the trustees should use their power to amend the rules to reinstate RPI as the basis for pension increases. He also stated that the restoration of RPI was in the best financial interests of members, that the APS was a well-funded scheme and that RPI increases were affordable.

522. In a series of blogs published by Captain Pocock in 2011, he repeated some or all of the views set out in his resignation statement. He also published blogs explaining his view that CPI was not an appropriate index for pension increases and that the change from RPI to CPI had resulted in a transfer of benefits from pensioners to the shareholders of sponsoring employers.

523. Following his resignation, Captain Pocock stood for re-election as an MNT. In his election statement of 27 May 2011, he said:

> "On 14th April, I resigned from the APS Board as a public statement of my opposition to the Board's decision not to pay RPI pension increases in 2011. My view was (and still is) that Scheme communications over many years have created a strong expectation that RPI increases would always be paid. APS is a well-funded, secure scheme backed by an employer who in June 2010 agreed a valuation and funding plan based on RPI. There are also substantial contingent assets in place should BA be unable to meet that commitment. The Trustee Board could and should act now to restore RPI pension increases with immediate effect."

524. Captain Pocock spoke at the first Ascot meeting on 11 July 2011. He expressed the views that RPI increases were affordable and that benefits under the APS were secure. He urged the meeting not to think that the trustees could award CPI increases at the beginning and RPI increases later. He said that would not happen because, if the trustees awarded only CPI increases at the beginning, then BA would not fund RPI increases later.

525. Captain Pocock was re-elected as an MNT on 28 July 2011. On 16 August 2011, at a lunch with Mr Pardoe and Mr Douglas it was agreed that there was a need to build bridges within the trustee board.

526. Captain Pocock became a member of the VSG which held its first meeting on 25 January 2012. At the trustee meeting on 29 February 2012, Captain Pocock voted for a discretionary increase of 0.2%.

527. In July 2012, Captain Pocock became a member of a working party formed by Mr Spencer (called the DISC) comprising some of the trustees of the APS. The intention of the working party was to formulate a framework which could be used to assist the APS trustees to make future decisions as to discretionary increases. The DISC met on 9 July 2012.

528. On 11 July 2012, Captain Pocock was present when the trustee board decided that CPI was an appropriate national index for the purposes of the original rule 15. At that meeting, the trustee board also decided not to hardwire RPI into the rules but to focus on putting in place a framework to guide the trustees when making future decisions as to discretionary increases. At that meeting, Captain Pocock referred to an "objective" of returning to RPI increases rather than the trustees having an obligation to restore RPI.

529. Between July 2012 and February 2013, Captain Pocock served on the DISC and formulated the draft DIF. At the meeting of trustees on 28 February 2013, Captain Pocock voted to adopt the DIF and voted, subject to conditions, for a discretionary increase of 0.2%. At the meeting of trustees on 26 June 2013, Captain Pocock voted to confirm this decision.

530. Captain Pocock continued to be a member of the DISC from February 2013 to November 2013. The DISC met on 21 October 2013 and agreed to recommend to the trustee board an increase in the range of 0.15% to 0.30%. After that meeting, Captain Pocock recommended a revision so that the range became 0.17% to 0.30%.

531. At the meeting of trustees on 19 November 2013, Mr Spencer invited Captain Pocock to express his view as a member of the DISC and he stated that his recommendation of the range for a possible increase remained 0.17% to 0.30%. Captain Pocock left that meeting before the final votes were taken and he appointed Mr Douglas as his alternate.

532. The precise arrangements made between Mr Douglas and Captain Pocock as to how Mr Douglas would cast his vote as an alternate for Captain Pocock were not explored. If the decision as to how to vote as an alternate was a decision to be made by Mr Douglas then, for the purposes of the submission as to pre-determination, it would seem that I should consider Mr Douglas's state of mind rather than Captain Pocock's.

Alternatively, if Mr Douglas had been instructed by Captain Pocock as to how he wanted Mr Douglas to vote and Mr Douglas acted in accordance with that instruction, then the relevant state of mind would be Captain Pocock's. I have already made my decision as to how Mr Douglas approached matters on 19 November 2013 and I have held that he gave active and genuine consideration to the decision which then fell to be made. I will continue to consider Captain Pocock's state of mind at that stage on the assumption that that is relevant to this question.

533. It is apparent from the documents that Captain Pocock was a conspicuously able and thoughtful man. It is also apparent from the documents that Captain Pocock was highly influential in relation to the thinking of the MNTs and possibly even some of the ENTs of the APS. It was not suggested that I should draw any adverse inferences from the fact that Captain Pocock was not asked to prepare a witness statement before he died in December 2014.

534. In 2011, Captain Pocock expressed the view that the trustees were under an obligation to restore RPI. However, over time, those views were modified so that he thought that the trustees should have an aspiration or an objective to award increases by reference to RPI. Indeed, all of the trustees of the APS, MNTs and ENTs alike, subscribed to that aspiration. Captain Pocock recognised that it was necessary for the trustee board to work together if it was to pursue that aspiration. He served on the DISC from July 2012 onwards. In July 2012, he did not push for a decision that CPI was not an appropriate national index. On the same occasion, he did not push for a decision to hardwire RPI. The approach which was then agreed upon, and which was carried forward by the DISC of which he was a member, was to develop a framework which could be adopted by the trustees and then applied by them. The draft framework which was evolved by the DISC (i.e. the DIF) was adopted by the trustees in February 2013 and, applying the DIF, the trustees voted for a 0.2% increase in February and June 2013. Following June 2013, I consider that Captain Pocock realised that it was necessary to think the matter through again and this he did at the meeting on 19 November 2013. The matter had to be considered afresh at that meeting because of the change of circumstances in relation to the £250 million contingent payment and because the trustees had received extensive representations from BA and tPR. I am quite sure that Captain Pocock appreciated the necessity of a fresh decision and genuinely engaged with the debate for that purpose.

535. Accordingly, on the issue as to predetermination which is now being examined, I find that Captain Pocock did not fail, on 19 November 2013, to give active and genuine consideration to the exercise of the discretionary power under rule 15. I also find that he did not fetter his discretion under rule 15 and he did not adopt an inflexible policy or viewpoint that discretionary increases should be awarded.

- *Mr Tomlin*

536. Mr Tomlin became a trustee of the APS on 1 October 2007 although he remained on the committee of ABAP after he became a trustee. On 15 April 2011, Mr Tomlin resigned as a trustee and explained his reasons in a letter of the same date. In that letter, he stated:

> "I believe that it is the duty of the Trustees to serve the interest of the beneficiaries of the APS and ensure that RPI increases are paid this year and into the future."

537. Mr Tomlin stood for re-election as an MNT. In an election statement issued on 25 May 2011 he said:

> "As a Member Nominated Trustee I will … [d]o everything that I can to ensure that RPI increases are always paid."

This election statement also said that the effect of the change from RPI to CPI was to "transfer benefits amounting to £770 Million from APS Pensioners to BA Shareholders". The election statement was generally expressed in strong language showing a high degree of commitment to the case for restoring RPI.

538. Mr Tomlin spoke at the morning and the afternoon sessions of the first Ascot meeting on 11 July 2011. He expressed the views that:

(1) the APS had the resources to pay RPI increases;

(2) the trustees would have paid RPI increases if the Government had not intervened;

(3) it was "a big issue" that not all of the trustees of the APS were members of the APS; this was a reference to the position of the ENTs;

(4) by paying CPI, £270 million of pension benefit was transferred to BA and IAG shareholders;

(5) the trustee board had not accepted that the expectation of members was a sufficiently powerful argument in favour of restoring RPI; the view of the trustee board was "rubbish";

(6) the restoration of RPI increases was not a benefit improvement; it was giving to pensioners what they had before;

(7) there was a question as to where the previous surplus of the APS had gone;

(8) the conflicts of interest on the trustee board were "toxic";

(9) the APS needed an independent chair not one paid for by BA.

539. Mr Tomlin was re-elected as a trustee on 28 July 2011. At the meeting of trustees on 29 February 2012, Mr Tomlin said that there was a sense of injustice felt by members that the Government had changed pension increases from RPI to CPI. At that meeting, he voted in favour of a discretionary increase of 0.2%.

540. On 12 June 2012, Mr Tomlin was involved in an email exchange with Mr Douglas and Captain Pocock. The matter being discussed arose out of the claims made under the internal dispute resolution procedure ("the IDRPs") being pursued by various members of the APS. The emails involved criticisms of the role played by Mr Pardoe and Mr Arter. In particular, Mr Tomlin stated views which were hostile to Mr Arter.

541. On 11 July 2012, Mr Tomlin was present when the trustee board decided that CPI was an appropriate national index for the purposes of the original rule 15. At that meeting, Mr Tomlin said that he remained of the view that members should receive RPI increases as this was "their absolute expectation". Also at that meeting, the trustee board decided not to hardwire RPI into the rules but to focus on putting in place a framework to guide the trustees when making future decisions as to discretionary increases. At that meeting, the trustees referred to an "objective" of returning to RPI increases rather than the trustees having an obligation to restore RPI.

542. On 28 February 2013, Mr Tomlin voted to adopt the DIF and supported the conditional decision in favour of a 0.2% discretionary increase. After that decision, on 1 March 2013, Mr Tomlin emailed Mrs Sellers who had not been present at the meeting. In his email, he reported on some of the events at the meeting and told her that the board had agreed on a discretionary increase of 0.2%. He added:

> "Some ground was given as we were originally seeking 0.25 but the principle was more important than the number I think. It is absolutely vital that this is not leaked as it will substantially devalue our bargaining position so please do not reveal this to any one."

543. Mr Tomlin did not attend the meeting of trustees on 26 June 2013 but appointed Captain Pocock as his alternate. On 19 November 2013, Mr Tomlin voted in favour of an increase of not less than 0.1% and not less than 0.2% and ultimately in favour of an increase of 0.2%.

544. Mr Tomlin did not give evidence at the trial. As I have earlier explained, I do not consider that I was given any persuasive reason for him not being called to give evidence. As to Mr Tomlin's state of mind, I have a large number of documents from which I might be able to draw inferences as to Mr Tomlin's state of mind at various stages but I do not have Mr Tomlin's own evidence as to his state of mind on 19 November 2013. If a contemporaneous document shows clearly the state of Mr Tomlin's mind on a certain matter, then I am able to make a finding in accordance with that document. It is open to me to draw an adverse inference from the fact that Mr Tomlin did not give evidence but I am not obliged to draw any particular adverse inference. I consider that I should arrive at the most probable inference as to his approach on 19 November 2013 and I should not draw an inference that is improbable or that I cannot safely draw.

545. It is clear that, in 2011, Mr Tomlin regarded matters in simple black and white terms. I have already made findings based on the documents as to how the MNTs saw matters in 2010 and 2011. I have referred to the shock of the Budget announcement, the expectations of members of the APS and the sympathy of the MNTs being with the members rather than BA. Nonetheless, the MNTs were persuaded by their advisers not to hardwire RPI in the Spring of 2011. Instead they chose to introduce a discretionary power to increase pensions.

546. A great deal happened between 2010 and 19 November 2013 as regards the approach of the MNTs to the question of pension increases. I have already made some findings on these matters but I will repeat some of those findings to the extent that they apply to Mr Tomlin. The trustees (including Mr Tomlin) saw the sense of having a

framework which would guide them as to how they used their discretionary power in future years. The MNTs (including Mr Tomlin) did not want a framework which was overly conservative. By the time of the trustee meeting of 11 July 2012, the MNTs (including Mr Tomlin) had moved from their initial reaction to the Budget announcement to making the decision that CPI was an appropriate index for the purposes of the original rule 15. At the same meeting, Mr Tomlin did not wish to amend rule 15 to hardwire RPI. From that point, it cannot be said that Mr Tomlin was determined to hardwire RPI. The development of the DIF and the AMT was a genuine attempt to arrive at a workable framework which would allow the trustees to take into account the relevant factors which should guide their decision under the amended rule 15. By the middle of 2012, the trustee board had once again started to function coherently although there remained differences of views between the ENTs and the MNTs. The trustee board was able to act unanimously on 11 July 2012 and again on 28 February 2013 when it adopted the DIF and made a conditional decision in favour of a discretionary increase of 0.2%. In the course of 2013, an enormous amount of work was done to provide the trustees with a considerable amount of actuarial, legal and covenant advice. I am satisfied that Mr Tomlin engaged with that advice with a view to informing himself of the matters relevant to the decisions which he made in February and June 2013 and on 19 November 2013.

547. I consider that the email of 1 March 2013 is revealing as to Mr Tomlin's state of mind. This was a private email from Mr Tomlin to Mrs Sellers. It discloses that when Mr Tomlin voted for an increase of 0.2% on 28 February 2013, his preference would have been for an increase of 0.25% but he was prepared to agree an increase of 0.2% in order to produce a decision in favour of some level of discretionary increase, rather than none. This email shows that Mr Tomlin was not determined at that time to hardwire RPI or to vote for an increase in accordance with RPI. At that time, Mr Tomlin was participating in a board decision which had adopted the DIF and was seeking to apply the DIF to the circumstances of the case. It was a matter for individual trustees to decide on their own views as to benefit security, prudence and risk when applying the guidance in DIF in the light of the actuarial, legal and covenant advice given to the trustees. By February 2013, and thereafter, I consider that the correct inference to draw in the case of Mr Tomlin was that he was actively and genuinely engaging with the DIF and with the advice given to the trustees in order to reach his own view as to the amount of any discretionary increase.

548. Accordingly, on the issue as to predetermination which is now being examined, I find that Mr Tomlin did not fail, on 19 November 2013, to give active and genuine consideration to the exercise of the discretionary power under rule 15. I also find that he did not fetter his discretion under rule 15 and he did not adopt an inflexible policy or viewpoint that discretionary increases should be awarded.

- *Mrs Sellers*

549. Mrs Sellers became a trustee of the APS on 1 November 2010, after the Budget announcement of June 2010. She had been a founding member and past chairman of ABAP and she remained on the committee of ABAP notwithstanding her appointment as a trustee of the APS. She worked with ABAP to promote the restoration of RPI. It looks as if she was not wholly candid with her fellow trustees as to extent of her involvement with ABAP.

550. On 17 November 2010, Mrs Sellers wrote to the secretariat expressing the view that the use of RPI was not a benefit improvement but was a continuation of the previous practice in order to prevent the unintended consequences of wording drafted at a time when BA was a nationalised industry. On 29 December 2010, Mrs Sellers wrote to ABAP making it clear that she thought that it was appropriate to restore RPI increases.

551. On 18 March 2011, Mrs Sellers emailed the other MNTs suggesting that the trustees be asked to vote on different levels of discretionary increase, depending upon the circumstances and proposing an increase of 0.5% across the board and increases of 1.5% in two special cases.

552. At the meeting of trustees on 25 March 2011, Mrs Sellers stated that she thought that Mr Pardoe's presentation was "biased" and that it should have been worded in more neutral terms. At that meeting, she voted in favour of awarding a discretionary increase. On 26 March 2011, Mrs Sellers emailed Mr Spencer and criticised Mr Pardoe and his firm for adhering to a "house view" in favour of CPI.

553. On 28 March 2011, Mr Spencer replied in detail to Mrs Sellers' email making a large number of points about conflict of interest, her criticisms of Mr Pardoe and his firm and confidentiality. He said that as Mrs Sellers had been a trustee for a short period, it concerned him that she appeared to bring preconceived views to the discussions. Mr Spencer gave evidence that he thought that some of the views expressed by Mrs Sellers were unfair and unreasonable. He was concerned as to the views she had expressed. He arranged a one-to-one meeting with her to emphasise to her that he thought that what she had been saying was incorrect and was undermining the proper functioning of the board. Mr Spencer described this meeting as "a tough meeting" and he thought that it did help and that after this meeting Mrs Sellers was more careful about what she said. It is not clear when Mr Spencer had his meeting with Mrs Sellers. I note that on 13 May 2011, Mrs Sellers was continuing to refer to Mr Pardoe being biased when discussing the minutes of the meeting of 25 March 2011. Mr Spencer thought that he might have had two meetings with Mrs Sellers but he was not sure about that.

554. On 14 October 2011, Mrs Sellers commented in an email that she thought the then proposed two stage test was "too constraining".

555. At the meeting of trustees on 29 February 2012, Mr Sellers expressed the view that the trustees should seek the decision of the court as to whether the trustees had the power to remove the wording of rule 15 which referred to PIROs. She acknowledged that there was not a majority of trustees in favour of RPI but she suggested that the reference to PIROs needed to be removed to prevent the scheme being subject to the vagaries of Government. Later at that meeting she stated that the Bank of England's view was that RPI understated the effect of inflation and this view made it more important that pensions were increased by RPI.

556. At the trustee meeting on 11 July 2012, Mrs Sellers was a party to the board decision that CPI was an appropriate national index for the purposes of the original rule and also a party to the decision not to hardwire RPI into the rules.

557. Mrs Sellers did not attend the meeting of trustees on 28 February 2013 and appointed Mr Tomlin as her alternate.

558. At the meeting of trustees on 26 June 2013, Mrs Sellers voted to confirm the decision of the trustees of 28 February 2013.

559. On 12 August 2013, Mrs Sellers emailed Mr Scott stating that the aspiration of the trustees was to return to RPI "when the funding will allow it".

560. At the meeting of the trustees on 19 November 2013, Mrs Sellers is recorded as noting that there was uncertainty regarding the level of any payments under the cash sweep. She voted in favour of an increase of at least 0.1% and of at least 0.2% and ultimately voted for an increase of 0.2%.

561. My assessment of the evidence in relation to Mrs Sellers follows essentially the same course as the assessment I set out in detail in relation to Mr Tomlin. I conclude that on the balance of probabilities, at the meeting on 19 November 2013, Mrs Sellers was actively and genuinely engaging with the DIF and with the advice given to the trustees in order to reach her own view as to the amount of any discretionary increase.

562. Accordingly, on the issue as to predetermination which is now being examined, I find that Mrs Sellers did not fail, on 19 November 2013, to give active and genuine consideration to the exercise of the discretionary power under rule 15. I also find that she did not fetter her discretion under rule 15 and she did not adopt an inflexible policy or viewpoint that discretionary increases should be awarded.

- *Mr Mitchell*

563. Mr Mitchell was the longest serving MNT, having been appointed on 13 January 1998. A survey of the documents shows that he was much less vocal than the other MNTs. In 2010 and 2011, he appears to have joined with the other MNTs in their desire to hardwire RPI into the rules of the APS. I was specifically referred by BA to a number of documents which referred to certain views held by Mr Mitchell. What is striking is that there were not many such documents and all of the statements relied upon by BA related to the period 2010 – 2011.

564. On 18 November 2010, Mr Mitchell sent an email to the other trustees of the APS stating that as BA had agreed a recovery plan based on RPI pension increases, BA should "morally" honour that recovery plan. On 20 January 2011, when asked to give feedback to the secretariat, Mr Mitchell expressed the view that the trustees of the APS were subject to a four pronged attack in relation to the issue as to RPI/CPI; the four prongs were the secretariat, Mr Pardoe, Mr Arter and Mr Spencer. On 13 March 2011, Mr Mitchell suggested taking counsel's opinion on whether employer nominated trustees had a conflict of interest on the subject of RPI/CPI; he attached an article in which the Occupational Pensions Alliance referred to pensioners having a moral right to RPI. On 15 March 2011, he again referred to the desirability of taking counsel's advice on the question of conflict of interest on the part of employer nominated trustees.

565. On 18 March 2011, Mr Mitchell emailed the other MNTs stating that the trustees needed to listen to the Towers Watson presentation, debate whether or not any

discretionary increase could be granted and if so, how much and to whom. His view was he could not justify awarding the full 1.5% CPI/RPI difference given the current funding position of the APS, where the current assets were not sufficient to meet the technical provisions based on CPI increases. He added that, as around 20% of the pensioner liabilities had been 'bought in' on an RPI basis, he would be in favour of granting a 0.3% discretionary increase (20% of the 1.5% CPI/RPI difference) to all APS pensioners from April 2011.

566. At the meeting of trustees on 25 March 2011, Mr Mitchell voted in favour of awarding a discretionary increase. At the meeting of trustees on 29 February 2012, Mr Mitchell stated that the trustees had agreed that their long term objective was the restoration of RPI. He was critical of BA wishing to have a journey plan based on CPI. Mr Mitchell also referred to possible guidance from tPR on the subject of valuations during extreme investment conditions. At that meeting, Mr Mitchell voted in favour of a discretionary increase of 0.2%.

567. On 30 November 2011, Mr Mitchell emailed his fellow trustees stating that the security of the existing benefits was critical.

568. At the meeting of trustees on 11 July 2012, Mr Mitchell agreed with a view expressed by Mr Tomlin that members should receive RPI as that was "their absolute expectation". At that meeting, the trustee board agreed that CPI was an appropriate national index for the purposes of the original rule 15. The trustee board also agreed not to amend the rules further to hardwire RPI but instead to develop a framework which would offer guidance as to the exercise of the discretionary power under the previously amended rule 15.

569. On 28 February 2013, the trustee board adopted the DIF and Mr Mitchell voted for a discretionary increase of 0.2%. On 26 June 2013, Mr Mitchell voted to confirm the decision taken on 28 February 2013.

570. In August 2013, Mr Mitchell stood for re-election as an MNT and was re-elected. In his election statement, he stated that the trustees were committed to restoring pensions increases based on RPI "when it is prudent to do so".

571. At the meeting of trustees on 19 November 2013, Mr Mitchell voted in favour of a discretionary increase of at least 0.1% and of at least 0.2% and ultimately voted in favour of an increase of 0.2%.

572. In the case of Mr Mitchell, I do not regard the comments which he made in 2010 or 2011 as providing any support for the contention that he failed to engage actively and genuinely with the decision-making required on 19 November 2013. There is no other reason to think that he failed in the way alleged. Even if he had been a strong supporter of the restoration of RPI in 2011, matters had changed by the time of the decision on 19 November 2013. I have already made detailed findings as to the changes which took place in the thinking and the approach of the MNTs between 2011 and 2013. In July 2012, the MNTs (including Mr Mitchell) had decided not to hardwire RPI and had instead decided to evolve a framework to guide them as to how to exercise the discretion under the amended rule 15. Between July 2012 and November 2013, the trustees had developed and adopted a framework and obtained a large amount of advice which was relevant to the use of that framework.

573. Accordingly, on the issue as to predetermination which is now being examined, I find that Mr Mitchell did not fail, on 19 November 2013, to give active and genuine consideration to the exercise of the discretionary power under rule 15. I also find that he did not fetter his discretion under rule 15 and he did not adopt an inflexible policy or viewpoint that discretionary increases should be awarded.

- *General remarks*

574. I have considered the position of the six MNTs separately in relation to the allegation of pre-determination and I have found that none of them failed in the respects alleged. In addition, for the sake of completeness, I will address the more general criticisms which BA made of the MNTs.

575. Some of the general criticisms made by BA refer to the MNTs campaigning for the restoration of RPI and being disloyal to the trustee board. I accept that some of the MNTs were very vocal and stepped outside their proper role as trustees in the earlier parts of the period from June 2010 to November 2013. I also agree with the comment that in the earlier parts of that period, some of the MNTs were very exercised on the subject of RPI/CPI and had very strong views. They did not welcome professional advice which conflicted with those views. Some of the MNTs in the initial stages challenged the advice they were receiving. Whether their challenges to professional advice were appropriate or not, it is quite clear that the attitudes of the MNTs and the operation of the trustee board changed significantly between March 2011 and November 2013.

576. March 2011 was a low point as regards the functioning of the trustee board with the three trustee resignations in March and April 2011, followed by a divisive election campaign and the members' meeting at Ascot on 11 July 2011. However, I find that Mr Spencer used considerable skill and leadership to rebuild cohesion on the trustee board. A clear sign of the difference in the approach of the trustees was the outcome of the trustee meeting on 11 July 2012, when the trustees decided that CPI was an appropriate national index for the purposes of the original rule 15 and also decided not to hardwire RPI into the rules. At that meeting, they decided instead to develop a framework to guide the trustees when deciding how to exercise their power under the amended rule 15. After July 2012, the trustees did develop a framework and sought professional advice as to the inputs into the framework. The development of the framework and the seeking of that advice were genuine attempts to engage with the matters which were relevant to the decision which the trustees had to arrive at. A further sign of the cohesion of the trustee board was the fact that on 28 February 2013, the trustees unanimously voted to award a discretionary increase of 0.2%. In these circumstances, there is no real case for supposing that the MNTs were simply going through the motions after 11 July 2012 and pretending to engage with the framework and the professional advice whilst all the time shutting their eyes to that framework and that advice and mechanically giving effect to a pre-conceived view that they would vote for the highest discretionary increase they could get, irrespective of the framework and the advice.

577. The MNTs voted for a discretionary increase of 0.2% on 19 November 2013. They did not vote for a higher increase and they did not vote to restore RPI. It is a matter of speculation what the MNTs would have decided if the outcome had turned on their views alone and there were no need to obtain the votes of eight trustees in favour of

any particular outcome. Some of the MNTs might have supported an increase above 0.2%. The MNTs realised that for there to be a discretionary increase, they needed to persuade some of the ENTs to support a discretionary increase. That realisation and a preparedness to compromise, rather than to push for a level of increase which would not attract the support of ENTs, was simple realism and does not involve any distortion of proper trustee decision-making. The fact that the MNTs saw things much the same way and the fact that they sometimes communicated with each other and not with the ENTs equally does not affect the validity of their decision.

578. These conclusions, rejecting BA's allegation of pre-determination by the MNTs, do not deal with BA's further criticisms of the decision-making process which led to the decision on 19 November 2013. I will next deal with BA's further criticisms which were that the trustees failed to take account of all relevant considerations and took into account irrelevant considerations.

Relevant and irrelevant considerations

579. Mr Tennet submitted that there were nine respects in which the trustees failed to take account of all relevant and no irrelevant considerations in reaching their decision of 19 November 2013. BA contended that:

(1) the trustees wrongly considered that they were under a duty to spend the recovery plan and the £250m contingent payment on discretionary increases in order to ensure that those sums would "come to" the APS rather than BA or the NAPS;

(2) the trustees consequently developed a framework that was premised on trying to spend the recovery plan and the £250m contingent payment; this resulted in the trustees asking themselves the wrong question: rather than asking whether a discretionary increase was appropriate, they were only ever asking how to find a way to justify granting a discretionary increase; this was because a framework that did not justify a discretionary increase would not have been effective in demonstrating that there was a funding need for the full recovery plan and the £250m contingent payment;

(3) the trustees continued to proceed on the basis of a misunderstanding that BA was legally obliged to pay and to continue to pay the full amount of the recovery plan (including an allowance for discretionary increases (subject only to severe financial difficulties)) and ignored the risk of tPR using its powers to impose a different plan;

(4) the trustees wrongly regarded it as relevant that the trustees had negotiated from BA an agreement that the APS technical provisions could include an assumption for discretionary increases, in circumstances in which:

a) BA had made it perfectly clear that it was not thereby agreeing to any sums actually being spent on discretionary increases; and

b) it is to be inferred that BA would not have agreed to the inclusion of that assumption had BA been aware that the trustees would rely on it as a justification for paying a discretionary increase with immediate effect

(that being the reason why the February 2013 decision was kept secret from BA);

(5) the trustees failed to take account of BA's wishes and interests, including eliding negotiating and consulting, failing to consider what BA wanted and what would be fair to BA, and not taking account of the position of the NAPS and its members (representing a sizeable part of BA's workforce), notwithstanding this was a matter which legitimately affected BA's wishes and interests;

(6) the trustees failed to take account of the potential cost of the proposed increase, including the cost of the plan to grant increases year on year and failed to appreciate the cost of doing a deal with the NAPS on the £250m contingent payment;

(7) the trustees wrongly based their decision on the AMT alone, in the erroneous belief that the range of "possible" discretionary increases produced by the AMT reconciled the other important principles set out in the DIF;

(8) the trustees improperly took into account their own view of the strength of BA's covenant, which did not accord with the advice they had received from PwC;

(9) the trustees improperly took into account an incorrect belief that a valid increase had been granted in June, and the need for consistency with that decision.

I will refer to these challenges as "the first challenge", "the second challenge" etc and I will deal with them in turn.

The first challenge

580. BA submits that the trustees wrongly considered that they were under a duty to spend the recovery plan and the £250m contingent payment on discretionary increases in order to ensure that those sums would "come to" the APS rather than BA or the NAPS.

581. I have referred earlier in this judgment to the terms of the 2012 valuation and the 2013 funding agreement for the APS, whereby BA agreed on a recovery plan to 2023, agreed to make a contingent payment of £250 million in 2019 and whereby the technical provisions allowed for possible discretionary increases in the period 2013 to 2023 with increases based on RPI thereafter. The agreement for the contingent payment of £250 million had initially been entered into (in the 2010 funding agreement) as a quid pro quo for the APS trustees accepting a lower rate of contribution (£55 million instead of £60 million). When the trustees considered, on 19 November 2013, whether to exercise their power to award a discretionary increase they obviously had to take account of the funding arrangements for the scheme and they did so. In particular, they considered the funding commitments which had been made by BA. They considered how to react to the point made by BA and by some of the NAPS trustees that the APS trustees were not entitled unilaterally to call for payment of the £250 million as a notice calling for such payment had to be given by

the trustees of the APS and of the NAPS. The APS trustees were aware of the negotiations which had taken place between some MNTs of the APS and some MNTs of the NAPS on that point and that the DISC advised that the APS trustees should value the contingent payment in 2019 in the amount of £125 million and that the position was uncertain. The overall assessment made by the APS trustees on 19 November 2013 related to what sums were available to be spent by them on discretionary increases, having regard to BA's funding commitments. They did not act in the belief that they had a duty to spend all of that funding commitment. They did consider that a decision needed to be made as to whether it was appropriate to do so.

582. The suggestion that some of the APS trustees considered that they had a duty to spend the recovery plan and the £250 million contingent payment on discretionary increases seems to be based on certain answers which Mr Maunder, in particular, gave when cross-examined about his attitude, as a trustee of the APS, to the £250 million contingent payment. Mr Maunder regarded the £250 million contingent payment as an asset of the APS. As a trustee of the APS he correctly recognised that it was his duty to preserve and to get in its assets. Mr Douglas and Mr Spencer gave evidence to the like effect. I do not see that this correct understanding of their duties as trustees of APS meant that they also considered that they had a duty to spend BA's funding commitments on discretionary increases so that they did not need to consider whether it was appropriate to award a discretionary increase. The issue for all the APS trustees remained whether in all the circumstances, including BA's funding commitments, it was appropriate for the trustees to award a discretionary increase. I do not accept this challenge to the decision made on 19 November 2013.

The second challenge

583. BA submits that the trustees consequently developed a framework that was premised on trying to spend the recovery plan and the £250m contingent payment. This resulted in the trustees asking themselves the wrong question: rather than asking whether a discretionary increase was appropriate, they were only ever asking how to find a way to justify granting a discretionary increase. This was because a framework that did not justify a discretionary increase would not have been effective in demonstrating that there was a funding need for the full recovery plan and the £250m contingent payment.

584. I do not accept this challenge to the decision made on 19 November 2013. I consider that what the trustees were deciding on that occasion was whether it was appropriate to award a discretionary increase in all the circumstances of the case. There were many circumstances which were relevant. One circumstance was that all of the trustees from early 2011 had held the aspiration that it would be appropriate to return to RPI, if and when it was judged to be appropriate to do so, and, in the meantime, to award lower discretionary increases, if and when it was appropriate to do so. The trustees also directed themselves before November 2013 that they would be assisted in determining whether a discretionary increase was appropriate by having a carefully considered framework to guide their decision-making. I have set out the full terms of the DIF earlier in this judgment. I consider that the DIF and the AMT were a framework, or consisted of guidance, which it was permissible for the trustees to adopt and to apply. In particular, the trustees were entitled to adopt a framework and guidance which was consistent with their continuing aspiration in relation to RPI

increases. The framework and the guidance properly took account of BA's funding commitments. I have already described BA's funding commitments based on the 2012 valuation and the 2013 funding agreement. Those were the relevant funding commitments as at 19 November 2013 and the trustees acted properly in taking them into account.

585. By November 2013, I do not consider that it was relevant to inquire into why BA had been persuaded to enter into those funding commitments. BA has argued that the trustees persuaded BA to enter into those commitments by seeking to show to BA that there was a real possibility that the trustees would award discretionary increases in the future and, possibly inconsistently, BA has also argued that it was misled into thinking that the trustees would not award a discretionary increase in the short term following the 2013 funding agreement. As to that, it is right that the trustees wished to show to BA that it was desirable that the funding arrangements should make provision for discretionary increases. I do not think that BA was misled about the imminence of a decision by the trustees as to an award of a discretionary increase. In particular, Mr Spencer told Mr Swift on 25 June 2013 that such a decision was imminent. But in any event, the point remains that by November 2013, BA had entered into those funding commitments and the trustees properly took them into account.

586. Under this head of challenge, BA repeated some of the arguments which it put forward under the first head of challenge but I have already rejected those arguments. BA also referred to evidence given by Mr Spencer in relation to the period when the trustees of the APS were negotiating with BA over the 2012 valuation and a funding agreement. Mr Spencer saw that a framework which identified a real possibility of a discretionary increase would help with those negotiations. He also thought that an actual award of a discretionary increase would help with those negotiations and, in particular, it would support the argument that BA should continue to commit to pay a contingent payment of £250 million in 2019. A possible corollary of that consideration is that when, in November 2013, the trustees were considering whether to award a discretionary increase they might have been aware that such an award in 2013 would help them to show to BA that the £250 million contingent payment should be made to the APS rather than to the NAPS in 2019. However, the decision which the trustees were asked to make in November 2013 was whether an award of a discretionary increase was appropriate and they considered that it was appropriate. It is a distortion of their reasoning to say that they were influenced in their decision to award an increase by the consideration that if they did award an increase that would improve their chances of obtaining the £250 million contingent payment in 2019 and if they declined to award an increase that would impair those chances. In any case, the precise state of affairs in relation to the £250 million had changed significantly between what Mr Spencer had thought at the time of the negotiations and November 2013. By November 2013, BA and some of the NAPS trustees had raised an issue about the APS trustees' ability to call for payment of the £250 million and, after intervening negotiations, the APS trustees were given specific advice that they should not proceed on the basis that all of the £250 million would be made available to them in 2019 and that the position was uncertain.

The third challenge

587. BA submits that the trustees continued to proceed on the basis of a misunderstanding that BA was legally obliged to pay and to continue to pay the full amount of the

recovery plan (including an allowance for discretionary increases (subject only to severe financial difficulties)) and ignored the risk of tPR using its powers to impose a different plan.

588. This head of challenge is in two parts. The first part of the challenge asserts that the trustees misunderstood the legal position as to future contributions from BA. As expressed, this part of the challenge does not assert that the trustees made an inappropriate assessment of the factual probabilities as regards future contributions from BA.

589. In fact, the legal position as regards triennial valuations, agreement between BA and the trustees on a recovery plan and a schedule of contributions and the powers of tPR was quite clear. The legal position is dealt with in Part 3 of the Pensions Act 2004, to which I referred above. I do not consider that BA has demonstrated that the trustees were not aware of the legal position. In fact, it is inherently likely that the trustees were aware of the legal position. The trustees as a body had been involved in the negotiation of three valuations and funding agreements under the Pensions Act 2004. The most recent valuation and funding agreement had received considerable attention from the trustees until the end of June 2013. Of course, not all of the 12 trustees in post at November 2013 had been involved in all three valuations. Further, Mr Mallett became a trustee after the conclusion of the negotiations with BA in relation to the 2012 valuation and the 2013 funding agreement. However, since 2009, Mr Mallett had been the independent chairman of the board of trustees of three pension schemes sponsored by Cobham plc.

590. In addition to the inherent likelihood referred to in the last paragraph, there is also the fact that the trustees on 19 November 2013 considered a letter dated 12 November 2013 from tPR which contained the statement:

> "We do not accept that the split of available sponsor funding agreed after the 2009 valuation should be regarded as set in stone — the scheme funding regime under Part 3 of the Pensions Act 2004 is intended to be applied flexibly and to respond to changing circumstances and the trustees are under a duty to review, and if necessary revise, any recovery plan following a subsequent valuation."

This statement informed the trustees just before they made their decision on 19 November 2013 that BA's funding commitments as set out in the 2013 funding agreement might be revised by a valuation and funding agreement in or after 2015.

591. The 2013 funding agreement contained express provisions dealing with the duration of BA's legal commitments under it. Clause 24.4 referred to that matter in the context of the next funding agreement to be entered into in due course. The clause referred to the parties negotiating a further agreement in good faith. Clause 24.4.2 provided that the trustees would not (in the context of such negotiations) unreasonably withhold their consent to the release or relaxation of the obligations of BA under the 2013 funding agreement, to the extent reasonably appropriate, if there had been intervening changes in the funding position of the APS and the NAPS, the covenant of BA, BA's liquidity position and/or any other material relevant factor which (taken in the round) materially improved the position of the APS and the NAPS both as to funding and the

BA covenant. The result was that there was a legal possibility that the 2015 valuation and funding agreement would not repeat all of the terms of the 2013 funding agreement as to the commitment of BA.

592. When the trustees considered matters on 19 November 2013, they had to make assessments or assumptions as to the future. The 2013 funding agreement was legally capable of being replaced by a different funding agreement in or after 2015. However, the 2013 funding agreement contained express provisions dealing with the position after 2015 and, indeed, up until 2023. Further, the 2013 funding agreement expressly referred to the possibility that there could be discretionary increases after 2013. I consider that the trustees were entitled to form an assessment of the probabilities as to funding from BA after 2015 even though, legally, that subject would be dealt with by a further funding agreement and not by the 2013 funding agreement. I consider that the trustees were entitled to form the assessment which they did form as to funding from BA after 2015 and, in particular, that the funding after 2015 would be in accordance with the funding commitments in the 2013 funding agreement. I also consider that that assumption was a permissible assumption in the context of a decision being made in 2013 as regards the increase to take effect in 2013 and without any commitment from the trustees as to whether there would be a discretionary increase in any later year. That meant that when BA and the trustees negotiated the 2015 funding agreement, they would know that the benefits under the APS to which, as at 2015, the pensioners were entitled included the 2013 discretionary increase. I also consider that the trustees could legitimately reflect in their assessment the fact that the cost of the 2013 discretionary increase was £12 million whereas the 2012 valuation had a reserve of £424 million for discretionary increases.

593. The second part of this head of challenge is the submission that the trustees ignored the risk of tPR using its powers to impose a different funding plan in relation to the 2012 valuation. I do not accept that challenge. Mr Spencer had been in regular contact with tPR prior to 19 November 2013. TPR wrote to Mr Spencer on 12 November 2013 with the obvious intention that the concerns of tPR would be available to be considered by the trustees when they came to make their decision as to a discretionary increase. TPR chose to put into the letter all of the matters which he wished the trustees to take into account. The trustees did consider tPR's letter. I consider that it cannot be said that there was some aspect of tPR's involvement or views which the trustees failed to take into account.

594. Under this head of challenge, BA also put forward submissions which related to BA's covenant and the possibility that future contributions from BA might be affected by future financial difficulties. Submissions as to the strength of BA's covenant are dealt with below in relation to the eighth head of challenge to the decision of 19 November 2013. At this point, it is sufficient to say that the trustees did consider the strength of BA's covenant and the degree of risk that BA might default in relation to its funding commitments.

The fourth challenge

595. BA submits the trustees wrongly regarded it as relevant that the trustees had negotiated from BA an agreement that the APS technical provisions could include an assumption for discretionary increases, in circumstances in which:

(1) BA had made it perfectly clear that it was not thereby agreeing to any sums actually being spent on discretionary increases; and

(2) it is to be inferred that BA would not have agreed to the inclusion of that assumption had BA been aware that the trustees would rely on it as a justification for paying discretionary increases with immediate effect (that being the reason why the February 2013 decision was kept secret from BA).

596. I have referred above to the fact that the technical provisions in the 2012 valuation made an allowance for discretionary increases in pensions. Clause 24.3.3 of the 2013 funding agreement provided:

> "For the avoidance of doubt, BA and the Management Trustees acknowledge that the pension increase assumption adopted for the valuation of the Scheme as at 31 March 2012 is for the purposes of valuation only. It does not represent any agreement or commitment by either of BA or the Management Trustees to any future specific discretionary increases; and is without prejudice to the rights of the Management Trustees to decide to grant (or not to grant) discretionary pension increases at any time as they see fit and to BA's rights to respond or take action in relation to any such decision as it sees fit."

597. On 19 November 2013, the trustees were well aware of the assumption in the 2012 technical provisions and they were also well aware of clause 24.3.3 of the 2013 funding agreement. Further, by 19 November 2013, they were also aware that BA was objecting strongly to an award of a discretionary increase. There was an issue as to whether BA had adopted a consistent position in its dealings with the trustees at all earlier times. At the meeting on 19 November 2013, Mr Spencer told the trustees that BA's position on discretionary increases had not been consistent over the preceding two years. I consider that Mr Spencer's statement was correct. After August 2013, BA appeared to have become much more opposed to the possibility of a discretionary increase than it had been before. In any event, even if Mr Spencer had misunderstood BA's position, his interpretation of its attitude was an entirely permissible one.

598. As regards BA's challenge under this head, the technical provisions and their reference to a discretionary increase were not irrelevant. They were obviously relevant. In so far as BA wish to submit that the trustees went wrong in that they considered that the technical provisions gave them a green light to award a discretionary increase or in some way overrode BA's clear objections to a discretionary increase (which they were obliged to take into account) there is no basis for saying that the trustees considered that either of these was the position.

599. As to BA's suggestion that it would not have agreed the assumption in the technical provisions if it had appreciated that it would be relied upon by the trustees as a justification for an immediate award of a discretionary increase, I cannot see how that is relevant to the decision made on 19 November 2013. That decision had to take into account the technical provisions and it properly did so. In any event, I do not think that BA was misled by the trustees.

The fifth challenge

600. BA submitted that the trustees failed to take account of BA's wishes and interests, including eliding negotiating and consulting, failing to consider what BA wanted and what would be fair to BA, and not taking account of the position of the NAPS and its members (representing a sizeable part of BA's workforce), notwithstanding this was a matter which legitimately affected BA's wishes and interests.

601. BA submits that the trustees failed to take account of BA's wishes and interests. BA accepts that the trustees were fully aware of BA's wishes and interests. There had been extensive consultation and dialogue between BA and Mr Spencer in particular. Further, BA had written to Mr Spencer on a number of occasions with the intent that its letters would be available to and be considered by the trustees. This correspondence culminated in a letter dated 15 November 2013 addressed to the trustees; that letter enclosed a 13-page paper which was expressed in hard hitting terms leaving no possible doubt as to BA's position. The minutes of the meeting of 19 November 2013 recorded that the position of BA was considered in two separate phases of the meeting. The first phase is minuted under the heading "the views and interests of the employer". Part of the minutes in this respect are redacted on the grounds of privilege and the claim to privilege was not disputed. The second phase is minuted under the heading "BA letter". This part of the minutes is a substantial section and large parts of it are redacted for privilege and the claim to privilege was not disputed. It is not sustainable to say that the trustees failed to take account of BA's wishes and interests. They plainly considered BA's wishes and interests but they did not agree with the view expressed by BA that there should be no award whatever of a discretionary increase. What the trustees failed to do was to give BA a veto in relation to the decision to be made by the trustees but the trustees were not obliged to give BA a veto. BA also contends that the trustees did not engage with BA's wishes and interests in a genuine and receptive way. I do not accept that assertion. The trustees' consideration of BA's comments was genuine. It was only not "receptive" in that it did not accept the conclusion contended for by BA but the trustees were not bound to adopt that conclusion.

602. BA then contends that even if the trustees considered all of the points made by BA, they did not consider BA's wishes and interests. I do not accept that contention. I do not see how the trustees could consider all of the reasons put forward by BA to explain its wishes and interests without considering what were BA's wishes and interests. It is true that the trustees did not give effect to BA's wishes but that was not required as part of a duty to take those wishes into account.

603. BA explained its position as regards discretionary increases at an early stage in the relevant history when the trustees were in negotiation with BA in respect of the 2012 valuation and the 2013 funding agreement. During that period, the trustees and BA were negotiating parties and the trustees conducted themselves accordingly. I do not find that the trustees behaved inappropriately as negotiating parties at that time but even if they had done the negotiations had ended with the agreement of the valuation and the entry into the funding agreement. After that time, it was the duty of the trustees to exercise their powers as trustees and to have regard to all relevant considerations. The trustees took account of BA's wishes and interests as a relevant consideration and nothing which happened during the earlier negotiations justifies a contrary conclusion.

604. BA also submits that the trustees were at fault in that they did not consider the position of the NAPS and its members. It is true that BA had to consider both the APS and the NAPS as it had obligations in relation to both schemes. Further, tPR was concerned about both schemes and, in particular, the NAPS. However, the position of the APS trustees was different from the position of BA and tPR in relation to the NAPS. The future for the NAPS and the security of benefits for the members of the NAPS and considerations of prudence and risk for the NAPS were not of direct concern to the APS trustees. Of course, the position of the NAPS was of indirect concern to the APS trustees and they fully understood that this was the position. The first indirect way in which the APS trustees were obliged to have regard to the NAPS was to reflect the fact that the NAPS was a very substantial creditor of BA and/or could make very substantial financial calls on BA. If that position affected BA's covenant then that would be a relevant matter for the APS. Further, amongst BA's wishes which were potentially relevant were BA's wishes in relation to the NAPS. However, whilst BA's wishes in relation to the NAPS were a relevant consideration, the APS trustees were not obliged to give effect to those wishes. Further, the APS trustees did not owe duties to the members and pensioners of the NAPS. The APS trustees were not obliged to make a decision which would be less favourable to the members and pensioners of the APS on the ground that such a decision would be more favourable to the members and pensioners of the NAPS. I consider that the APS trustees did not fail to have regard to relevant considerations in these respects even though, in the result, they did not give effect to BA's wishes in relation to the NAPS.

605. Finally, under this head, I will consider BA's submission that the trustees failed to consider what would be fair to BA. I accept that the trustees had to take account of the interests of BA and of the members and pensioners of the APS. Insofar as those interests conflicted, the trustees had to try to hold the balance between them in a fair way. However, BA's case is that there was only one fair outcome and that was that there should not be an award of a discretionary increase. BA does not say that there was any other way of achieving fairness, for example, by awarding an increase of 0.10% rather than 0.20%. Put that way, BA's case is effectively that its wishes must prevail and the trustees were disabled from making any other decision. I do not think that that is the legal position. The true position is that the trustees were obliged to consider the wishes and interests of BA but if there were a conflict between those wishes and interests and some other objective which was appropriate in the circumstances, the trustees were entitled to advance that other objective if they saw fit.

The sixth challenge

606. BA submitted that the trustees failed to take account of the potential cost of the proposed increase, including the cost of the plan to grant increases year on year and failed to appreciate the cost of doing a deal with the NAPS on the £250 million contingent payment. BA developed this submission by saying, correctly, that on 19 November 2013, the trustees approached the cost of a discretionary increase as not exceeding £24 million, this being the capital cost of a one-off 0.4% increase for 2013, the upper end of the range which Mr Pardoe said could be supported, and ultimately as costing £12 million for a one-off 0.2% increase. BA then submitted that the trustees, in focusing on the one-off capital cost, failed to take into account three relevant matters:

(1) they did not intend to make a one-off increase, and so should have had regard to the potential cost of year on year increases;

(2) they had not obtained covenant advice in relation to increases beyond the single year, despite tPR having expressly requested it;

(3) they failed to take into account the likely cost of doing a deal with the NAPS trustees to secure the £250 million contingent payment for the APS.

607. As to the first of the three points in paragraph 606 above, it is correct that the trustees' aspiration was to award discretionary increases on more than one occasion and the trustees who supported a discretionary increase on 19 November 2013 would probably have been disappointed it if later turned out that the increase for 2013 was a one-off. Indeed, the DIF and the AMT had been developed so that it could be considered each year. For that reason, the DIF used language which referred to discretionary increases being awarded on more than one occasion and the trustees were directed by the DIF to consider the long-term sustainability of any award of an increase. Conversely, the DIF recognised that on each occasion on which the trustees considered whether to award a discretionary increase the decision had to be made afresh and any award was for one year only.

608. The trustees obviously had to consider the cost of the decision they were asked to make on 19 November 2013. The decision they made on that occasion was to award a discretionary increase of 0.2%. The cost of that award was £12 million. On that occasion, the trustees did not award a further increase for 2014 or for 2015 or for any later year. Any possible award for 2014 or 2015 or any later year would have to be considered separately at a later time or times. Accordingly, I consider that the trustees were right to assess the cost of the decision they were making as a cost of £12 million.

609. BA submits that the trustees ought to have computed the cost of awarding a discretionary increase of one half of the gap between RPI and CPI for every future year and if they had done so they would have arrived at a cost of £384 million. BA then submits that before the trustees made their decision on 19 November 2013, they ought to have considered the affordability of a cost of that magnitude. I do not agree. The trustees decided on 19 November 2013 to spend £12 million. They did not decide to spend more than £12 million. They did not decide to spend £384 million. They would have misled themselves if they had decided not to make an award of a discretionary increase in 2013 in the belief that their decision would cost £384 million.

610. The second of the three points referred to in paragraph 606 above relates to the absence of advice on the strength of BA's covenant for the purpose of the trustees deciding to spend several hundred million pounds on discretionary increases. BA points out that tPR asked the trustees to obtain this advice. The trustees did not ignore this request. They considered the request and decided that it was not appropriate to carry out a further assessment of BA's covenant on a different basis from that previously carried out. The trustees and their covenant adviser, Mr Russell of PwC, had a number of reasons for this view. They thought that a further covenant review was not necessary in the light of the previous reviews which had been carried out in connection with the 2012 valuation, where the technical provisions contained assumptions as to the award of discretionary increases, and in view of the fact that the

decision to be made in November 2013 related to an award of an increase for one year only. Further, the review requested by tPR would have cost between £1.5 million and £2 million which was a lot to spend if it were not necessary to do so. In addition, a review would have taken a considerable time and if the outcome of the review were relevant to the trustees' deliberations, then the trustees would have to await that outcome. In view of the trustees' assessment that such a review would not be relevant to their deliberations, the trustees decided that it was not appropriate to carry out, and wait for, an unnecessary review. I consider that the trustees were entitled to take this view.

611. The third of the three points referred to in paragraph 606 above is that the trustees failed to take into account the likely cost of doing a deal with the NAPS trustees to secure the contingent payment of £250 million to the APS. In relation to this point, it is necessary to consider what the trustees did take into account as regards the £250 million contingent payment when they made their decision on 19 November 2013.

612. The trustees considered the question of the £250 million payment in some detail. On 2 October 2013, it had been agreed that the MNTs from both the APS and the NAPS would negotiate terms in that respect under a mandate which permitted the proportions of the cash sweep payments to be adjusted. Prior to 19 November 2013, the respective MNTs had met and had discussed dividing the £250 million rather than revising the terms of the cash sweep agreement. This was because the position in relation to the cash sweep was recognised as being uncertain. The suggestion had been made that the £250 million would be split equally between the two schemes. The trustees were told that no deal had been done between the MNTs of the two schemes and there was no urgency about doing such a deal. There was also a reference to a possibility that the split in the cash sweep should be changed from a 77.5/22.5 NAPS/APS split to a 90/10 NAPS/APS split. Mr Russell told the trustees that the two schemes might receive anything between £400 million and nil by way of a cash sweep over three years. The amount of any cash sweep had been excluded from the DIF/AMT on the grounds of prudence. The DISC valued the contingent payment at £125 million. The trustees concluded that the position in relation to the £250 million was uncertain.

613. When the trustees made their decision on 19 November 2013, they knew that the position in relation to the £250 million and future cash sweeps was uncertain. Indeed, the position in relation to cash sweeps was uncertain for reasons unconnected with the absence of agreement between the two sets of trustees; the position was uncertain because of a perceived aversion by BA to cash sweeps. The trustees could have taken the view that they should wait until there was certainty as to a deal between the two sets of trustees or they could make their decision reflecting the extent of the uncertainty at that point. They were entitled to take the latter view and they did so.

614. In any event, I do not consider that later events (which of course were unknown on 19 November 2013) have falsified any of the trustees' thinking on 19 November 2013. The later events included a detailed agreement between the two schemes on 21 July 2014 and the amount of cash sweeps actually paid. BA has done a detailed calculation which draws on the actual amount of the cash sweeps in 2014, 2015 and the first half of 2016 and the calculation shows that the APS received £72 million less than if the split of the cash sweep had remained at 77.5/22.5 NAPS/APS. However, the other matter which was agreed between the two schemes was that the trustees of the two

schemes agreed that they would jointly serve notice calling for the £250 million payment and that when the APS actuary calculated whether the APS was fully funded on a gilts basis the NAPS trustees would not claim that such a calculation was invalid on the ground that it made allowance for discretionary increases. Accordingly, if one were to take into account later events, I do not consider that they demonstrate a position which was worse for the APS than that considered on 19 November 2013.

615. For the sake of completeness, I record that I accept BA's submission that the difficulty as it existed in November 2013 between the two schemes as to the £250 million payment was caused by the possibility that the APS trustees might award a discretionary increase. However, in view of my earlier findings, this acceptance does not alter my conclusion.

The seventh challenge

616. BA submitted that the trustees wrongly based their decision on the AMT alone, in the erroneous belief that the range of "possible" discretionary increases produced by the AMT "reconciled" the other important principles set out in the DIF.

617. I do not consider that the trustees misunderstood the way in which the DIF and the AMT could assist them to form a judgment as to what was appropriate. I have already set out the terms of the DIF. Mr Pardoe explained in his evidence the respective roles of the DIF and the AMT. He and some of the trustees were asked whether they thought that the AMT "reconciled" the principles. The suggestion seemed to be that if they thought that the AMT "reconciled" the principles then the trustees would have thought that their task was simply to pick any number they chose within the range of numbers thrown up by the AMT. Mr Pardoe explained in his evidence that the AMT did not "reconcile" the principles, or at least not all of the principles, in the DIF in the way apparently suggested in cross-examination. It remained for the trustees to form a judgment as to what was appropriate and, as a part of that judgment, they had to consider benefit security, prudence and risk. The suggestion that the AMT "reconciled" the principles in the DIF was also put to Mr Mallett, Mr Spencer, Mr Maunder and Mr Buchanan. I do not consider that any of them accepted that their task was simply to pick a number within the range thrown up by the AMT. It remained essential for them to decide on their attitude to the appropriateness of discretionary increases, affordability, benefit security, prudence and risk and they did so.

The eighth challenge

618. BA submitted that the trustees improperly took into account their own view of the strength of BA's covenant, which did not accord with the advice they had received from PwC.

619. I do not accept this challenge to the trustees' decision. The trustees had very detailed covenant advice from Mr Russell of PwC. Mr Russell was a very respected adviser and the trustees accepted his advice. Mr Russell advised that the cost of the decision to award a discretionary increase of 0.2% was immaterial to an assessment of BA's covenant. The trustees accepted that advice. Mr Russell explained that his opinion involved a long-term view of the covenant and was not overly influenced by recent events which might show a more positive assessment of the covenant.

620. BA submits that Mr Spencer and Mr Maunder thought that they "knew better" than Mr Russell. I do not think that they did think that. They accepted what Mr Russell said about the long-term view of the covenant. They were also aware of the more positive recent developments. That knowledge allowed them to see that Mr Russell's advice was deliberately conservative, something which Mr Russell himself explained.

621. I consider that all of the trustees relied upon Mr Russell's advice and did not reject it. I also consider that Mr Spencer's and Mr Maunder's thoughts about the more positive recent developments did not affect the decision which they made, which was fully supported by Mr Russell's advice. In any event, even if Mr Spencer and Mr Maunder were influenced by their assessment of more positive recent developments, they were entitled to be influenced in that way.

The ninth challenge

622. BA submitted that the trustees improperly took into account an incorrect belief that a valid increase had been granted in June, and the need for consistency with that decision.

623. BA seems to be making two points under this head, a wider point and a narrower point. The wider point is that all of the decisions made on 19 November 2013 (including the decisions in favour of an increase of at least 0.10% or of 0.15%) were improperly influenced by a desire to adhere to the decision previously arrived at on 26 June 2013. The narrower point is that the ultimate decision to award an increase of 0.20% was improperly influenced by a desire to adhere to the earlier decision. My conclusions are that the decisions as to at least 0.10% and 0.15% were not influenced by the earlier decision and that the decision to award an increase of 0.20% was not improperly influenced by the earlier decision.

624. As to the wider point, the trustees were aware that a lot had happened between 26 June 2013 and 19 November 2013. There had been detailed consultation of BA and tPR. The position in relation to the £250 million contingent payment was known to be different as between the two dates. Mr Spencer stressed to the trustees at the outset of the meeting on 19 November 2013 that the whole purpose of the decision-making on that occasion involved setting aside earlier decisions and views and looking at the matter afresh in the circumstances which then existed and in the light of the material then presented to them. I consider that all of the trustees genuinely attempted to comply with Mr Spencer's direction to them and that, until they reached their ultimate decision as to an increase of 0.20%, they succeeded in doing so.

625. The position is different in relation to the ultimate decision as to an increase of 0.20%. Prior to that decision, the trustees had decided by a majority of 7 to 5 in favour of an increase of at least 0.20%. I find that the seven trustees who voted in favour of at least 0.20% reached their decision, irrespective of the earlier decision on 26 June 2013, in the same way as they reached their decision as to an increase of at least 0.10%. Accordingly, as regards those seven trustees, they were not influenced by the earlier decision at that stage. However, after the trustees had decided by a majority of 8 to 4 to award an increase of 0.15%, the possibility of a 0.20% increase was put to the trustees again. On this occasion, there was a majority of 8 to 4 in its favour. The eight votes were from the same seven trustees who supported 0.20% earlier, plus Mr Buchanan. At this stage two additional considerations had been identified. The first

was the suggested desirability of rounding the figure of 0.15% to 0.20%. I consider that it is likely some of the eight trustees who supported the ultimate decision took this consideration into account to some, possibly limited, extent. Of course, in relation to the seven who had already voted for at least 0.20%, this consideration did not change their view. As regards the other trustee making up the group of eight trustees, Mr Buchanan, I accept his evidence that he had no particular view on that point, if separately considered. The second additional consideration was that an award of 0.15% was different from the figure of 0.20% which had been supported by the trustees on 26 June 2013. I find that all eight of the trustees who supported the ultimate decision took account of this second consideration, although in the case of the seven who had already supported an award of at least 0.20% it did not change their view. The only trustee who changed his view as a result of this second consideration was Mr Buchanan.

626. Mr Buchanan gave evidence as to his thinking as to the relevance of this second consideration. He said that Mr Spencer had raised with the trustees that their decision to award an increase of 0.15% was different from what had been decided on 26 June 2013, namely, an increase of 0.2%. It was obvious that only one of those decisions could be an effective decision. Even if that were not obvious, I consider that a trustee was entitled to proceed on that basis. If the trustees had made a binding decision in favour of 0.2% on 26 June 2013, then that decision would prevail. If the trustees had not made a binding decision in favour of 0.2% on 26 June 2013, then their decision in favour of 0.15% would prevail. This meant that there might be an issue as to whether the trustees had made a binding decision in favour of 0.2% on 26 June 2013. I find that up until this point on 19 November 2013, the trustees had engaged in their deliberations and decision-making on the basis that they had to approach the matter afresh and without regard to the decision made on 26 June 2013. However, Mr Spencer's comments meant that they now had to grapple with the possible effectiveness of the decision on 26 June 2013. On 19 November 2013, there was justifiable uncertainty as to the effectiveness of the decision on 26 June 2013. In this judgment, I have held that the decision on 26 June 2013 was not effective but that was not known on 19 November 2013.

627. The consequence of there being justifiable doubt about the effectiveness of the decision of 26 June 2013 was that the trustees would have been justified in taking legal advice as to what they should do. There were three solicitors from Eversheds in attendance at the meeting. The minutes of the meeting have a section which has been redacted on the grounds of privilege. That claim to privilege has not been challenged. At the trial, there was no attempt to investigate the legal advice which was given to the trustees. Mr Buchanan gave evidence that the trustees were told that they faced the need to go to court for directions as to whether the decision on 26 June 2013 was effective. That need would involve legal costs and the trustees were told that the costs would be considerable. I think that was a reasonable assessment of the situation. The trustees were told that the difference between an increase of 0.15% and an increase of 0.2% was a cost of £3 million. Mr Buchanan considered that in this context it was legitimate to reflect the fact that the DISC had been willing to recommend an increase of 0.17% and that the differential between 0.17% and 0.2% would cost £1.8 million. Taking these matters into account, Mr Buchanan voted in favour of an increase of 0.2% which would avoid an application to the court. It was not suggested to Mr

Buchanan that it was unreasonable to award an additional increase costing £1.8 million or £3 million to avoid the legal costs of court proceedings.

628. I recognise that the decision made on 19 November 2013 did not wholly remove the possibility of an argument that that decision was inconsistent with the decision made on 26 June 2013. The decision made on 19 November 2013 was to be effective from 1 December 2013 whereas there was a possibility of an argument that any decision on 26 June 2013, if effective, would have been effective from 1 September 2013. The trustees do not seem to have reflected on that possibility and they gave no weight to that consideration. However, BA did not submit that their decision was flawed on that account. The trustees may have thought that there was no need to have a court decision on the effective date of the increase if the only relevant difference was a difference as to the effective date as between 1 September 2013 and 1 December 2013. As it has happened, no member or pensioner has raised this point in the years since November 2013.

629. I consider that Mr Buchanan was entitled to be influenced in his ultimate decision by the considerations he has explained. As I have already found, I do not think that these considerations changed the conclusion of the other seven trustees who made up the relevant majority of eight in favour of an increase of 0.2% but in so far as they were a further supporting reason, I hold that they were a permissible reason for their decision.

Perversity

630. BA's pleaded case included a contention that the trustees' decision of 19 November 2013 was irrational and perverse. In its opening, BA continued to assert that this decision was irrational and perverse. The opening did not entirely accord with the earlier pleading. In its opening, BA alleged that the trustees' decision was inconsistent with the approach which the trustees had taken at an earlier point in time in relation to other matters which required an assessment of benefit security, prudence and risk. It was submitted that inconsistency was a hallmark of irrationality. Some of the time of the trial was taken up by BA's pursuit of this allegation. In its closing submissions, BA did not put forward an allegation of irrationality and perversity.

Concluding remarks

631. I have now considered all of BA's challenges to the trustees' decision to amend rule 15 and to their decision on 19 November 2013 to award a discretionary increase of 0.2% with effect from 1 December 2013. On examining each of these challenges, I am satisfied that the challenges must fail.

632. The above conclusions mean that a number of points which were considered at the trial do not arise. I do not need to consider separately whether:

(1) any criticisms of the trustees' decision making were sufficiently serious to establish that the trustees had committed a breach of duty;

(2) any fault on the part of the trustees would result in a decision they made being void or voidable;

(3) any flaw in their approach should be excused on the ground that they were relying on professional advice;

(4) the outcome of any decision-making would have been the same absent the alleged flaw.

633. BA's challenges in this case were very wide ranging. The result was a lengthy and expensive trial, preceded no doubt by lengthy and expensive preparation. BA's allegations of perversity and irrationality, based on allegations of inconsistency in decision making, meant that the trial involved an investigation of other decisions made by the trustees which also involved assessments of benefit security, prudence and risk. That lengthened the trial but yet, in closing submissions, these allegations were not pursued. Further, the allegations of irrationality meant that there was a danger throughout the trial of the court being asked to consider the merits of the actual decisions made. In my judgment, I have expressed no view on the merits of the decisions made. In accordance with clear authority, the merits of the decisions in this case are for the trustees and not for the court.

634. Another matter which lengthened the trial was the attack made by BA on Mr Pardoe. It was suggested that he had behaved inappropriately in a number of respects. BA wished to, and as the result of an interlocutory ruling in this case was permitted to, call expert evidence to assist it to try to advance those suggestions. In closing submissions, very little if anything remained of those suggestions. In view of the suggestions which were made, I wish to record my assessment of Mr Pardoe which I was able to form having heard him cross-examined for four days. I found Mr Pardoe to be an actuary of outstanding ability who behaved entirely appropriately at every stage during a long and difficult process of deliberation by the trustees in this case.

Summary of my conclusions

635. In view of the length of this judgment, I will set out a summary of my conclusions. They are:

(1) the amendment to rule 15 did not infringe proviso (i) to clause 18; the amended rule 15 is itself subject to proviso (i) to clause 18; the scope of the power under the amended rule 15 is restricted so that the trustees may not make benevolent or compassionate payments and may not make payments which are not for the purposes of the scheme;

(2) the amendment to rule 15 was not beyond the scope of the power to amend conferred by clause 18;

(3) the amendment to rule 15 was not an abuse of the power to amend conferred by clause 18;

(4) the trustees (including the MNTs) actively and genuinely engaged with the decision-making process which led to the decision to amend rule 15;

(5) the amendment made to rule 15 was valid and effective;

(6) the decision on 26 June 2013 to award a discretionary increase of 0.2% was not an effective exercise of the power conferred by the amended rule 15 because the trustees did not determine any effective date for the increase;

(7) the decision of 19 November 2013 to award a discretionary increase of 0.2% with effect from 1 December 2013 did not involve the making of a benevolent or compassionate payment;

(8) the decision of 19 November 2013 did not change the purposes of the scheme; the purposes of the scheme included the delivery of the benefits defined from time to time by the scheme; the trustees had the unilateral power under clause 18 and the amended rule 15 to define the benefits of the scheme;

(9) the decision of 19 November 2013 was not beyond the scope of the power conferred by the amended rule 15;

(10) the decision of 19 November 2013 was not an abuse of the power conferred by the amended rule 15;

(11) in relation to the decision of 19 November 2013, the trustees (including the MNTs) actively and genuinely engaged with the process of deciding on whether to award a discretionary increase;

(12) in relation to the decision of 19 November 2013, the trustees had regard to all relevant considerations and to no irrelevant considerations;

(13) the decision of 19 November 2013 was a valid and effective decision to award a discretionary increase of 0.2% with effect from 1 December 2013.

636. The result of these conclusions is that BA is entitled to a declaration that the trustees of the APS did not, on 26 June 2013, make an effective decision to award a discretionary increase but, otherwise, BA's claims will be dismissed.