[2020] JMCA App 46

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 101/2018

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MR JUSTICE F WILLIAMS JA

IN THE MATTER of the Trustee Act, Section 41.

AND

IN THE MATTER of the Pensions (Superannuation Funds and Retirement Schemes) Act.

AND

IN THE MATTER of a consolidating trust deed between Glencore Alumina Jamaica Limited and Manchester Pension Trust Fund Limited dated March 10, 2005.

BETWEEN	**UC RUSAL ALUMINA JAMAICA LIMITED**	**1st APPLICANT**
AND	**TIMOTHY O'DRISCOLL**	**2nd APPLICANT**
AND	**ANDREY SHMALENKO**	**3rd APPLICANT**
AND	**IGOR DOROFEEV**	**4th APPLICANT**
AND	**THE MANCHESTER PENSION TRUST FUND LIMITED**	**5th APPLICANT**
AND	**WYNETTE MILLER**	**1st RESPONDENT**

AND	**WINSTON CAMERON**	**2nd RESPONDENT**
AND	**MARCIA TAI CHUN**	**3rd RESPONDENT**
AND	**RADLEY RITCH**	**4th RESPONDENT**
AND	**KINGSLEY JARRETT**	**5th RESPONDENT**
AND	**HOPETON McCATTY**	**6th RESPONDENT**
AND	**THE FINANCIAL SERVICES COMMISSION**	**7th RESPONDENT**

Stephen M Shelton QC, Christopher Kelman and Miss Stephanie Ewbank instructed by Myers, Fletcher & Gordon for the applicants

B St Michael Hylton QC, Kevin Powell and Sundiata Gibbs instructed by Hylton Powell for the 1st – 6th respondents

Mrs Nicole Foster-Pusey QC and Miss Christine McNeil instructed by the Director of State Proceedings for the 7th respondent

4, 25 June 2018 and 6 November 2020

MORRISON P

Introduction

[1] This is an application for leave to appeal against a judgment given by Sykes CJ ('the Chief Justice') on 27 April 2018[1] ('the 27 April 2018 judgment'). The applicants also applied for a stay of execution of the 27 April 2018 judgment pending the hearing of the appeal.

[1] **Wynette Miller et al v UC Rusal Alumina Jamaica Limited et al (No 2)** [2018] JMSC Civ 70

[2] The 1st applicant ('UC Rusal') is the sponsor of the Pension Plan for Employees of UC Rusal Alumina Jamaica Limited (formerly Glencore Alumina Jamaica Limited) ('the pension plan'/'the fund').

[3] The 2nd – 4th applicants ('the sponsor trustees') and the 1st – 6th respondents ('the non-sponsor trustees') are the trustees of the pension plan. The 5th applicant is the original trustee of the plan under the consolidating trust deed dated 10 March 2005 between itself and Glencore Alumina Jamaica Limited.

[4] By virtue of the Pensions (Superannuation Funds and Retirement Schemes) Act[2], the 7th respondent ('the FSC') is the supervisor of the operation of approved superannuation funds.

[5] The services of all permanent employees of UC Rusal were terminated on 31 March 2010, and the pension plan was discontinued on that same date, leaving a substantial surplus available for distribution.

[6] Disputes arose between the sponsor trustees and the non-sponsor trustees about, among other things, the distribution of the surplus. These disputes led to litigation which went all the way to the Privy Council.

[7] In a judgment delivered on 26 November 2014[3] ('the Board's judgment'), the Board ordered that the issues regarding the distribution of the surplus should be remitted

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[2] Section 3(2)(a)

[3] **UC Rusal Alumina Jamaica Limited and others v Wynette Miller and others** [2014] UKPC 39

to the Supreme Court for consideration. Among the matters specifically remitted for the consideration of the trustees with the guidance of the actuaries was "the likely impact of future inflation"[4]. The Board also indicated that, if the trustees were unable to agree on the distribution of the surplus after receiving advice from the fund actuary, they should seek directions from the court.

[8] In a judgment given on 29 February 2016[5] ('the 29 February 2016 judgment'), Sykes J (as he then was) directed that the question whether there should be an uplift in pension benefits to account for the impact of inflation was one that should be considered by the trustees.

[9] However, the trustees were unable to agree on the extent to which pension benefits should be uplifted to account for inflation. Accordingly, by a notice of application for court orders filed on 23 June 2016 ('the first application'), the non-sponsor trustees sought directions from the court "as to the extent to which the trustees of the [pension plan] should recommend an uplift in pension benefits to account for future inflation".

[10] By an order made with the consent of all the trustees on 18 September 2017 ('the consent order'), Sykes J ordered, among other things, that:

> "1. Pension benefits under the UC Rusal Pensions Plan shall be subject to an uplift to account for an inflation rate of 3.85%.
>
> 2. The UC Rusal Pensions Plan fund actuary shall prepare and submit a scheme of distribution of surplus to the Trustees of

[4] Per Lord Mance, at para. 58 (iii)
[5] **Wynette Miller et al v UC Rusal Alumina Jamaica Limited et al** [2016] JMSC Civ 26, para. [51]

> the UC Rusal Pensions Plan and the said trustees shall forward the scheme of distribution to the Financial Services Commission which shall then act in accordance with the provisions of section 32 of the Pensions (Superannuation Funds and Retirement Schemes) Act on or before **November 26, 2017** …" (Emphasis as in the original)

[11] Pursuant to the consent order, Duggan Consulting Ltd ('DCL'), the fund actuary, prepared a scheme of distribution of the surplus and submitted it to the FSC for approval. It is common ground that, in the scheme of distribution, DCL used the rate of 3.85% per annum to account for inflation from 31 March 2017, which was the last anniversary of the discontinuation of the pension plan. For inflation in the previous period, that is, between 31 March 2010 and 31 March 2017, DCL applied a rate equating to 70% of the actual inflation rate for the period.

[12] This gave rise to further controversy between the sponsor trustees and the non-sponsor trustees, in which the former contended that the agreed rate of 3.85% per annum should be applied from the date of discontinuation. In light of this controversy, the FSC asked for clarification of the date from which the rate of 3.85% per annum should be applied. Accordingly, by an application dated 24 January 2018 ('the second application'), the non-sponsor trustees sought directions from the court as to the meaning of the consent order, in particular, the date from which the 3.85% uplift should be applied.

[13] In the 27 April 2018 judgment, the Chief Justice ordered, among other things, that "[t]he 3.85% uplift for future inflation does not go back to March 31, 2010 but begins at

March 31, 2017". The Chief Justice also ordered that the costs of the application should be borne by the fund.

[14] Leave to appeal having been refused by the Chief Justice, the sponsor trustees applied to this court for leave[6].

[15] The single issue which arose on the application for leave to appeal was whether the applicants had an appeal with a real chance of success from the Chief Justice's decision. In submitting that they did, the applicants contended that, properly construed, the consent order required that the 3.85% per annum uplift for future inflation should take effect from 31 March 2010, the date on which the pension plan was discontinued.

[16] We heard the leave application on 4 June 2018, when we reserved judgment to 25 June 2018. On the latter date, we dismissed the application for leave to appeal and ordered that the costs of the application should be borne by the pension plan. Accordingly, the application for a stay of execution fell away.

[17] The court at that time promised reasons for its decision to make these orders. On behalf of the court, I apologise profusely for the fact that these reasons are only now being provided.

[6] Notice of application for court orders filed on 9 May 2018

The evidence in support of the first application

[18] In so far as is now relevant, the evidence produced in support of the first application[7] may be summarised as follows.

[19] In a letter to the sponsor trustees dated 14 March 2016, the non-sponsor trustees proposed a 7% per annum uplift for inflation.

[20] In their response dated 5 April 2016, the sponsor trustees stated that 7% per annum was too high, given that (i) there was a significantly lower inflation outturn in the previous couple years; (ii) the long-term inflation rate in use by companies for projecting pension liability was then 5.5% per annum; (iii) pension increases of 50%-75% of the long-term inflation rate were more common than the full inflation rate (that is, 2.75% to 4.125% instead of 5.5%); and (iv) a payment out of the surplus "was already granted to secure pension increases of approximately $3.5% [sic] per annum which would therefore mean that the accepted inflation rate will have already been addressed".

[21] The sponsor trustees nevertheless offered this counter-proposal:

> "Notwithstanding the above, we … are prepared to recommend that a further allocation of the surplus amounting to $480 million should be granted for further pension increases. This would constitute a 7% increase in the pension to all active Members, Pensioners and Deferred Pensioners as at the Discontinuance Date of 31 March 2010.
>
> Please further note that this is a one off payment which should be able to secure approximately two (2) years inflation to all participants and will not provide for ongoing annual increases.

[7] 2nd affidavit of Sundiata Gibbs, sworn to on 23 June 2016; further affidavit of Constance Hall, sworn to on 30 September 2016; affidavit of Leonid Stavitskiy (managing director of UC Rusal), sworn to on 18 October 2016; and affidavit of Astor Duggan, sworn to on 21 November 2016.

> Furthermore, this recommendation is subject to the agreement in writing of the Employer."

[22] The next step was that, by letter dated 1 June 2016, based on the advice received from DCL, the non-sponsor trustees proposed an increase in benefits "in line with a 5.5% inflation rate".

[23] The sponsor trustees again disagreed; and, in a letter to the non-sponsor trustees dated 16 June 2016, they suggested that "an appropriate rate in all the circumstances is 4.125% per annum inclusive of all increases previously granted". The sponsor trustees explained the basis of this position as follows:

> "Our advice from the Sponsor's Actuary, Eckler is that future pension increases of 5.5% per annum are likely to exhaust the Surplus and in our view the recommended percentage for future pension increases (inclusive of the increases already provided) should be no more than 4.125% per annum. Based on the calculations which were done in 2011, the rate of pension increases secured with the Surplus that was already allocated to Participants, amounted to 3.5% per annum. Therefore the additional increase would be 0.625% per annum; for a total increase of 4.125% per annum. This would represent 75% of the assumed long-term inflation rate of 5.5% per annum; that is, 75% of the pension increase rate proposed by [the non-sponsor trustees' actuaries, DCL]. We are therefore prepared to recommend the aforesaid additional increase of 0.625% per annum. This recommendation is subject to the agreement in writing of the Employer."

[24] In an affidavit sworn to on 30 September 2016, Mrs Constance Hall, a consulting actuary and a principal of UC Rusal's actuaries, Eckler, Consultants and Actuaries ('Eckler'), signalled a shift in the sponsor trustees' position as regards the uplift required to provide for long-term inflation. Having stated that she understood and agreed with

"the basis for the assumed long-term inflation of 5.5% per annum", Mrs Hall added her own recommendation[8]:

> "However, I recommend pension increases at the rate of 3.85% per annum (70% of the assumed long-term inflation). The pension increases would be inclusive of those already secured in the 2012/2013 Plan Year and would be effective from the Discontinuance Date."

[25] As Mrs Hall explained in her affidavit[9], a substantial premise of Eckler's approach was the need to ensure an equitable allocation of the surplus as between the sponsor and the members. Increases in pensions at the level contended for by the non-sponsor trustees would defeat that aim by, in effect, exhausting the surplus, while total pension increases of 3.85% per annum from the Discontinuance Date would secure a 50%/50% sharing of the surplus.

[26] This revised position was confirmed by Mr Leonid Stavitskiy, the managing director of UC Rusal, in an affidavit sworn to on 18 October 2016. At the conclusion of that affidavit[10], having reviewed the position, Mr Stavitskiy stated that UC Rusal "will give its consent to an increase in benefits at the rate of 3.85% per annum (70% of the assumed long-term inflation)".

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[8] At para. 8
[9] See in particular paras 43-46 and 50-52
[10] Para. 4

[27] And finally, in an affidavit sworn to on 21 November 2016, Mr Astor Duggan, a consulting actuary and the managing director of DCL, questioned the validity of Eckler's approach[11]:

> "… I do not agree that the starting point should be a decision to distribute the surplus on a 50/50 basis between the Participants and the Sponsor. The provisions of the [trust deed and rules] should be followed to determine the distribution of the surplus. The rate of inflation should first be agreed and then the calculations carried out rather than dividing the surplus 50/50 and then determining the balance …"

[28] By letter dated 14 September 2017, a few days before the second application came on for hearing, Messrs Hylton Powell, attorneys-at-law for the non-sponsor trustees, wrote to Messrs Myers, Fletcher & Gordon, attorneys-at-law for the sponsor trustees, in the following terms:

> "We have not yet received a report from the fund actuary and it is not likely that we will receive it before the court hearing scheduled for September 18, 2017.
>
> We understand that more beneficiaries have died and the remaining beneficiaries (as well as our clients) have become increasingly concerned with the length of time this litigation has taken to conclude.
>
> **In the circumstances, the Non-Sponsor Trustees are willing to agree to an uplift in pension benefits to account for future inflation at a rate of 3.85%. This is consistent with the position of the Sponsor Trustees**.
>
> We will therefore indicate this to the court on September 18, 2017 and ask it to make an order to that effect." (Emphasis mine)

[11] Para. 21

[29] It is against this background that, particularly having regard to the sentence highlighted in the extract from Messrs Hylton Powell's letter set out in the foregoing paragraph, Sykes J entered the consent order on 18 September 2017.

The second application

[30] In the notice of application for directions as to the meaning of paragraph 1 of the consent order, the non-sponsor trustees referred to the scheme of distribution which DCL had prepared and the ensuing disagreement between the parties as to whether it was in keeping with the terms of the consent order. As the affidavit of Mr Sundiata Gibbs filed in support of the second application indicated[12], at the heart of the disagreement was the question whether the agreed rate of 3.85% per annum was intended to apply with effect from 31 March 2010 or 31 March 2017.

[31] As I have indicated, the approach of DCL in preparing the scheme of distribution was to (i) increase pensions between 31 March 2010 and 31 March 2017 by 70% of the known inflation rate over the period as measured by the Consumer Price Index; and (ii) apply the rate of 3.85% per annum agreed in the consent order in the period after 31 March 2017[13]. The 70% of the known inflation rate for the first period was derived from the assumed 5.5% long term inflation rate previously agreed between DCL and Eckler. In a subsequent letter sent to the non-sponsor trustees[14], DCL explained that "[t]he rate

[12] 3rd affidavit of Sundiata Gibbs sworn to on 25 January 2018
[13] See para. 4.5a of DCL's report on the scheme of distribution of surplus as at 31 August 2017, dated November 2017. The report was exhibited to the affidavit of Sundiata Gibbs sworn to on 25 January 2018.
[14] See DCL's letter to the non-sponsor trustees dated 15 December 2017, para. 12

of 3.85% per annum is logically the rate to be used in the future since 5.5% per annum is a future rate … The inflation rate in the future is not known hence the need for agreement on a particular rate but the rate for the past is known and 70% of inflation is what [Eckler] considers to be reasonable".

[32] On the other hand, Eckler maintained that in accordance with the terms of the consent order, the rate of 3.85% per annum should have been used for the entire period starting 31 March 2010[15]. But, significantly, Eckler accepted that the interim allocations of the surplus which it had previously estimated would have been sufficient to secure pension increases of around 3.5% per annum "were never priced nor purchased. Rather … the allocations were used for other purposes"[16].

The 27 April 2018 judgment

[33] After recording the submissions made by Mr Stephen Shelton QC on behalf of the sponsor trustees, in which the court was invited to have regard to the intention of the parties as reflected in the background to the consent order, the Chief Justice set out what he took to be the correct approach to the interpretation of the order[17]:

> "… The court is being asked to interpret the court order. It is a document like any other document in the very general sense that it is subject to the objective interpretation theory of document interpretation. The court is not trying to find out what the individual intention of the parties were [sic] at the time the order was agreed but rather what the order means to a reasonable person having been placed in the circumstances in which the parties were and armed with the knowledge of the surrounding circumstances. The parties may

[15] See Eckler's letter to the sponsor trustees dated 7 December 2017, para. 5.1
[16] Ibid, para. 5.11
[17] [2018] JMSC Civ 70, at para. [8]

> agree all sorts of things but at the end of the day, unless there is an application to set aside the court order for some reason, the court need not concern itself with what the parties discussed leading up to the consent order. This is not an action for rectification."

[34] Having noted the well-known principle that "an order made by consent … stands unless and until it is discharged by mutual agreement or is set aside by another order of the Court"[18], the Chief Justice recorded the submission of Mr Michael Hylton QC for the non-sponsor trustees that "what we are doing is construing a court order having regard to the context in which it was made"[19]. Agreeing with this submission, the Chief Justice referred to the decision of the Privy Council on appeal from a decision of this court in **Sans Souci Ltd v VRL Services Ltd**[20], in which Lord Sumption said this:

> "**[13]** … the construction of a judicial order, like that of any other legal instrument, is a single coherent process. It depends on what the language of the order would convey, in the circumstances in which the court made it, so far as these circumstances were before the court and patent to the parties. The reasons for making the order which are given by the court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order. In particular, the interpretation of an order may be critically affected by knowing what the court considered to be the issue which its order was supposed to resolve.
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> **[14]** It is generally unhelpful to look for an 'ambiguity', if by that is meant an expression capable of more than one meaning simply as a matter of language. True linguistic ambiguities are comparatively rare. The real issue is whether the meaning of the language is open to question. There are

[18] **Kinch v Walcott and others** [1929] AC 482, 493
[19] Para. [11]
[20] [2012] UKPC 6, paras. [13] – [15]

> many reasons why it may be open to question, which are not limited to cases of ambiguity.
>
> **[15]** As with any judicial order which seeks to encapsulate in the terse language of a forensic draftsman the outcome of what may be a complex discussion, the meaning of the order of the Court of Appeal in this case is open to question if one does not know the background ..."

[35] To similar effect, the Chief Justice also referred to the decision of the Court of Appeal of England and Wales in **Pan Petroleum Aje Ltd v Yinka Folawiyo Petroleum Co Ltd and others**[21], in which Flaux LJ referred to "a consistent line of authority that Court Orders are to be construed objectively and in the context in which they are made, including the reasons given by the Court for making the Order at the time that it was made".

[36] And finally on this note, the Chief Justice mentioned **JSC BTA Bank v Ablyazov (No 5)**[22], a decision of the United Kingdom Supreme Court. In that case, in reference to the interpretation of a freezing order, Lord Clarke said that –

> "… like any document, a freezing order must be construed in its context. That includes its historical context."

[37] On the basis of these authorities, the Chief Justice stated that[23]:

> "… it matters not how the court order came to be. Once the court order is made and it falls to be interpreted then the principles outlined above apply."

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[21] [2017] EWCA Civ 1525, para. 42
[22] [2015] UKSC 64, at para. 21
[23] [2018] JMSC Civ 70, at para. [14]

[38] The Chief Justice accordingly concluded as follows[24]:

> "[15] The context was that an application was made by the claimant asking for directions on the issue of future inflation. The parties were negotiating. The [sponsor trustees] took the position in the negotiations that the date for the uplift for inflation was to be calculated from March 31, 2010. The [sponsor trustees] also say that the sponsor trustees offered, subject to agreement from the sponsor, a further allocation of $480m as a one-off payment. This it is said would amount to a 7% increase for all active members of the pension scheme using the discontinuance date of March 31, 2010. In addition, it was said that the sponsor trustees recommended a pension increase in order to account for future inflation of 5.5% per annum. The final strand in the argument was that the previously paid increase in 2012/2013 to members out of the surplus already accounted for a de facto increase of 3.5% per annum from the discontinuance date and as such any further increase would be only 0.35% per annum.
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> [16] The application before the court when the order was made expressly referred to future inflation. Most reasonable persons unless told specifically that the future began in the past as in March 31, 2010 would not think that the future included the past. It was up to the parties to define what they meant. Freedom of contract means the parties can agree to say a cat is dog [sic] and a dog is an elephant provided there is no rule of law that prohibits such an agreement. Had the parties intended that future started from 2010 it was up to them to say so. The fact that they did not would indicate to a reasonable person placed in the circumstances as the parties were would not think that paragraph 1 rested on the underlying proposition that the future began on March 31, 2010.
>
> [17] If there was any doubt about what has just been stated that doubt is removed when it is noted that the letter of the [non-sponsor trustees'] attorneys at law making the apparent concession was careful to avoid any reference to March 31, 2010. There is no evidence that the [sponsor trustees] challenged the [non-sponsor trustees] or raised with them after the letter was received the now-vexed question of the date that the future began, namely March 31, 2010. What was

[24] At paras. [15]-[18]

> agreed then was future uplifts at 3.85% and not future uplifts at 3.85% on the premise that the future began in the past specifically March 31, 2010. In the normal course of things, the future is not understood to have begun in the past. There is nothing in the context of the order to cause the court to think that such an unnatural meaning was intended. Had the parties intended such an unnatural meaning then prudence suggests that they ought to have spelt that out. The more unnatural a meaning of a word in a particular context the less likely that that was the meaning intended.
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> [18] A hard result for one side is never a sufficient or even a good reason to begin to think that that harsh result makes the interpretation arrived at incorrect."

The proposed grounds of appeal

[39] In his affidavit sworn to in support of the sponsor trustees application for leave to appeal[25], Mr Stavitskiy put forward a total of 10 proposed grounds of appeal. They were as follows:

> "i) The learned Chief Justice failed to appreciate the nature of the order as one by Consent and to properly construe it as such in accordance with the well-known principles of construction specifically governing such orders.
>
> ii) In construing the said Consent Order the learned Chief Justice paid too much regard to cases like **San Souci Ltd. v VRL Services Ltd** and **Pan Petroleum Aje Ltd. Yinka Folawiyo Petroleum Co Ltd** which were not concerned with the construction of Consent Orders and conversely too little regard to cases like **Kinch v Walcott**; **Siebe Gorman and Co Ltd v Pneupac Ltd**; **Leeman Vincent v Fitzroy Bailey**; **Frank Phipps and Pearl Phipps v Harold Morrison**, which were.

[25] Sworn to on 9 May 2018

iii) In approaching the task of interpretation of the Consent order which the learned Chief Justice recognized he was undertaking, His Lordship failed to give any, or any sufficient weight, to the letter of the Claimant's Attorneys-at-Law dated September 14, 2017 particularly, the full legal terms and effect of its acknowledgement that what was agreed in terms of uplift in pension benefits for future inflation at a rate of 3.85% was 'consistent with the position of the Sponsor Trustees'.

iv) While correctly maintaining that in construing court orders one has to do so in view of the surrounding circumstances and that background is important, nevertheless, in construing this consent order, the Learned Chief Justice failed to give any weight to the circumstances and background in which the consent was obtained, particularly the unchallenged evidence that the Appellants maintain and had always maintained that the date from which the uplift for inflation of 3.85% per annum is to be calculated is the Discontinuance Date of March 31, 2010 (i.e. the date the UC Rusal Pension Plan was wound up) and that these increases would be inclusive of those already secured from the interim distribution in 2012 which was effective from the Discontinuance Date.

v) The learned Chief Justice fell into error in placing too much weight to the wording of the Respondents' application which used the words 'future inflation' and conversely too little weight on the affidavit evidence of the Appellants, namely the Affidavits of Leonid Stavitskiy sworn on October 18, 2016 and February 7, 2018 and Constance Hall sworn on October 13, 2016 which were more probative on the surrounding circumstances and historical context of the Consent Order than the word 'future' in the Application.

vi) Having found, as a matter of interpretation, that in the normal course of things the future is not understood to have begun in the past and that there was nothing in the context of the order to cause the court to think that such an unnatural meaning was intended, the learned Chief Justice concluded that the future did not begin on March 31, 2010. Nevertheless, the learned Chief

Justice inconsistently proceeded to find in favour of the Claimants that the future actually began in the past, to wit, March 31, 2017.

vii) The learned Chief Justice fell into error in refusing to consider the absurd effect of construing the order as taking effect from March 31, 2017 and ignoring the cumulative effect of such an interpretation which would be that the members would be entitled to an inflationary increase of 3.85% per annum as of March 2017 plus 3.5% per annum already secured from the interim distribution in 2012. Consequently, the members would be receiving a total of 7.35% inflationary increase which is substantially ahead of the long-term projected inflation rate of 5.5%.

viii) The learned Chief Justice failed to give any consideration to the fact that the Claimants' and Members of the Pension Plan had already received an interim distribution which secured a long term inflationary increase from the date of Discontinuance of the fund amounting to 3.5% per annum and consequently, would be getting a total of 7.35% inflationary increase which is substantially ahead of the long-term projected inflation rate of 5.5%.

ix) The learned Chief Justice failed to give consideration to the earlier Privy Council judgment which ruled that an increase for inflation could only be made under Rule 5.7 of the Rules under the Deed which requires the consent of the Sponsor. The Sponsor having stated the basis on which it will consent must have been a critical background factor for consideration by the learned Chief Justice in particular in terms of the statement by the Claimant's Attorneys-at-Law 'this is consistent with the Sponsor Trustees' position'.

x) Alternatively, the learned Chief Justice erred in ruling that the inflationary increase of 3.85% per annum was to be effective from March 31, 2017 without also ruling that this increase is inclusive of the increase of 3.5% per annum which was already secured from the interim distribution of the surplus in 2012."

The submissions

[40] Mr Shelton submitted that the applicants have an appeal with a real chance of success, as the Chief Justice's judgment "was plainly wrong and against the weight of the evidence and well-settled authorities"[26]. I hope that I do no disservice to Mr Shelton's detailed submissions by summarising them in this way. Firstly, the Chief Justice erred in treating the consent order as "a document like any other document"; accordingly, he failed to have regard to the established principles of construction of consent orders, which required the court to adopt a more commercial approach; thus, the Chief Justice ought to have given more weight to the nature of the bargain which the consent order recorded, rather than take a literal approach to its construction. Secondly, the interpretation contended for by the non-sponsor trustees, which the Chief Justice accepted, ignored the fact that an interim distribution had already secured a 3.5% inflation uplift to the members: adding a further 3.85% uplift on top of that would therefore result in double compensation. And thirdly, the non-sponsor trustees' attorneys-at-law's letter of 14 September 2017, properly construed, amounted to an explicit agreement to the sponsor trustees' position that the 3.85% uplift should apply from 31 March 2010 onwards.

[41] On the first point, Mr Shelton sought to distinguish the authorities to which the Chief Justice had referred. He pointed out that those cases were concerned with the principles of construction which applied to court orders generally, rather than to the more specific principles applicable to the construction of consent orders. Those principles, Mr Shelton submitted, may be found in, among other cases, the decision of the House of

[26] Applicants' written submissions dated 17 May 2018, para. 26

Lords in **Sirius International Insurance Company (Publ) v FAI General Insurance Ltd and others**[27] ('**Sirius**'), in which the court was concerned with the interpretation of a Tomlin order. Mr Shelton laid particular emphasis on the following passage from the judgment of Lord Steyn:[28]

> "18. The settlement contained in the Tomlin order must be construed as a commercial instrument. The aim of the inquiry is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. The inquiry is objective: the question is what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of specific language. The answer to that question is to be gathered from the text under consideration and its relevant contextual scene.
>
> 19. There has been a shift from literal methods of interpretation towards a more commercial approach. In *Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios* [1984] 3 All ER 229 at 233, [1985] AC 191 at 201, Lord Diplock, in an opinion concurred in by his fellow Law Lords, observed:
>
> > '… if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.'
>
> In *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 3 All ER 352 at 372, [1997] AC 749 at 771, I explained the rationale of this approach as follows:
>
> > 'In determining the meaning of the language of a commercial contract ... the law ... generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give

[27] [2004] UKHL 54
[28] At paras. 18-19

> effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language.'
>
> The tendency should therefore generally speaking be against literalism …"

[42] However, it is fair to say that, on his feet before us, Mr Shelton modified his stance somewhat. In so doing, he no doubt had regard, quite properly in my view, to the similarity between (i) Lord Steyn's statement of the law; (ii) some of the dicta in the cases to which the Chief Justice referred (for instance, Flaux LJ's statement that "Court Orders are to be construed objectively and in the context in which they are made"[29]); and (iii) the passage from the Chief Justice's judgment which I have set out at paragraph [33] above. At the end of the day, therefore, Mr Shelton's final submission was that, although the Chief Justice may have had in mind the relevant principles of construction, he failed to apply them correctly to the facts of this case.

[43] Mr Hylton submitted that the Chief Justice applied the accepted principles of construction of documents, which apply equally to consent orders, and he came to the right decision on the facts. By the time the matter came on for hearing before the Chief Justice, the only issue was what allowance to make for the likely impact of future inflation. Both sides agreed that the projected rate of long-term inflation was 5.5% per annum. So the remaining point of dispute between them was whether to allow for the full 5.5%, or

[29] [2017] EWCA Civ 1525, para. 42

a percentage thereof. Accordingly, the dispute, and the agreement to which the consent order sought to give effect, clearly related to the future.

[44] Although the consent order must be construed in the context which prevailed at the time it was made, Mr Hylton also took us, without objection from Mr Shelton, to the scheme of distribution which DCL prepared to give effect to the consent order. His main objective in doing this was to demonstrate that the spectre of double compensation which Eckler had raised had not, in the result, materialised. What the scheme of distribution showed was that, in arriving at the gross amount of the final surplus for the purposes of distribution, DCL brought the interim surplus, accumulated with interest at the rate earned by the fund over the relevant period, back into account. As Mr Duggan explained[30], the result of this approach was to ensure that "the Employer [UC Rusal] participates in the 'total surplus'".

Discussion and conclusions

[45] I bear in mind at the outset, as I must, that this is an application for permission to appeal. In this regard, Mr Shelton very helpfully referred us to the accepted criteria for the grant of permission[31].

[46] The starting point is rule 1.89 of the Court of Appeal Rules ('CAR'), which states the general rule:

[30] See DCL's letter to the non-sponsor trustees dated 15 December 2017, para. 11
[31] Applicants' written submissions dated 17 May 2018, paras 22-26

> "The general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success."

[47] In determining what might amount to "a real chance of success", this court has consistently applied the test formulated by Lord Woolf MR in **Swain v Hillman and another**[32], albeit in the analogous context of an application for summary judgment, where the applicable rule speaks to a claim or defence that has "no real prospect" of success[33]. As Lord Woolf MR explained in that case[34], "[t]he word 'real' distinguishes fanciful prospects of success".

[48] On this application, therefore, the court must consider whether the applicants have shown that the proposed appeal has a realistic as opposed to a fanciful chance of success.

[49] The second application was, as the Chief Justice pertinently observed, an application for directions as to the proper construction of the consent order, not an action for rectification[35]. The question for the court was therefore not whether the agreement which the parties had reached was, in error, wrongly expressed in the consent order. Rather, as Lord Steyn explained in **Sirius**[36], the task of the court was, taking into account the text of the consent order and the relevant context, to discover what "a reasonable

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[32] [2001] 1 All ER 91
[33] This is also the language used in rule 15.2 of the Civil Procedure Rules 2002
[34] At page 92
[35] For the criteria for the grant of an order for rectification, see Hanbury and Martin, Modern Equity, 20th edn, pages 846-848
[36] At para. 18 – see para. [41] above

person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of specific language".

[50] I therefore accept that, as Mr Shelton urged us to do, the Chief Justice was obliged to have regard to the wider context. In that regard, as has been seen, the question of the likely impact of future inflation had been a live one between the parties for some time. So much so that, in delivering the Board's judgment in late 2014, Lord Mance had expressed the view[37] that "there could well be a powerful case for a conclusion that the trustees should make further provision for inflation out of the surplus".

[51] It is clear from the exchanges between the parties, which I have summarised at paragraphs [19]-[28] above, that their principal concern was what allowance to make for future inflation. This was why the issue of the projected rate of long-term inflation was important. After a consensus appeared to emerge around an assumed 5.5% per annum rate of long-term inflation, Eckler proposed pension increases at the rate of 3.85% per annum (or 70% of the assumed long-term inflation rate). However, it reiterated the position that the pension increases "would be inclusive of those already secured in the 2012/2013 Plan Year and would be effective from the Discontinuance Date".

[52] In his affidavit sworn to on 18 October 2016, Mr Stavitskiy stated that UC Rusal would "give its consent to an increase in benefits at the rate of 3.85% per annum (70% of the assumed rate of inflation)[38]".

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[37] At para. 45
[38] Para. 4

[53] As the Chief Justice pointed out, the first application expressly sought directions as to the extent of the uplift which the trustees should recommend "to account for future inflation". That was the single question in relation to which directions were sought from the court. So the indication by the non-sponsor trustees that they were "willing to agree to an uplift in pension benefits to account for future inflation at a rate of 3.85%" can only be regarded as a response to this question. The further statement that this was "consistent with the position of the Sponsor Trustees" was entirely accurate, given the sponsor trustees' acceptance of 5.5% per annum as the assumed projected long-term inflation rate, and their repeated indication that they would agree to an uplift of 70% of that figure.

[54] Against this background, it seems to me that the reasonable person, armed with the same information as the parties had in this case, would inevitably have understood the statement in the consent order, that the pension benefits under the pension plan "shall be subject to an uplift to account for an inflation rate of 3.85%", as relating to the future. To put it another way, taken in its context, the consent order was plainly intended to operate prospectively. And, as the Chief Justice observed[39], "[h]ad the parties intended that [the] future started from 2010 it was up to them to say so".

[55] I therefore think that the conclusion which the Chief Justice reached was the only one suggested by the language of the consent order. But further, taking into account the background to the consent order and the context in which it was made, the Chief Justice's

[39] At para. [16]

judgment also gave effect to what, on the face of it, was the bargain which the parties had struck. To this extent, it was therefore the only commercially sensible result.

[56] This conclusion suffices to dispose of the application for leave to appeal, on the ground that the applicants have failed to show that they have an appeal with a real chance of success.

[57] But I cannot leave the application without commenting on what the applicants described in their grounds of appeal[40] as the –

> "… absurd effect of construing the order as taking effect from March 31, 2017 and ignoring the cumulative effect of such an interpretation which would be that the members would be entitled to an inflationary increase of 3.85% per annum as of March 2017 plus 3.5% per annum already secured from the interim distribution in 2012. Consequently, the members would be receiving a total of 7.35% inflationary increase which is substantially ahead of the long-term projected inflation rate of 5.5%."

[58] As it turned out, this complaint was wholly undermined by Eckler's late concession that the 3.5% per annum increase referred to in the ground as having been secured from the interim distribution had, in fact, never materialised[41].

[40] Ground of appeal vii). Albeit slightly differently worded, the same point was made in grounds viii) and ix) – see para. [39] above
[41] See para. [32] above

Disposal

[59] These are my reasons for concurring in the decision announced in this matter on 25 June 2018. I would only add that, in relation to the costs of the application, neither side suggested a departure from the Chief Justice's approach in the court below, which was that the costs should be borne by the fund.

McDONALD-BISHOP JA

[60] I have had the privilege of reading in draft the reasons for judgment of the learned President. His reasoning and conclusions reflect my own reasons for concurring in the decision of the court and there is nothing that I could usefully add.

F WILLIAMS JA

[61] I too have read, in draft, the reasons for judgment of the learned President. I agree with his reasoning and conclusion and it was for these reasons that I concurred in the making of the orders reflected at paragraph [16].