Michaelmas Term
[2014] UKPC 39
Privy Council Appeal No 0086 of 2013

JUDGMENT

UC Rusal Alumina Jamaica Limited and others (Appellants) *v* Wynette Miller and others (Respondents)

From the Court of Appeal of Jamaica

before

Lord Neuberger
Lord Mance
Lord Clarke
Lord Carnwath
Lord Toulson

JUDGMENT DELIVERED BY LORD MANCE

ON

26 November 2014

Heard on 21 July 2014

Appellants
Vincent L Nelson QC
Stephen Shelton QC

(Instructed by Myers, Fletcher and Gordon Solicitors)

Respondents
Michael Hylton QC
Kevin O Powell
Sundiata Gibbs
(Instructed by Charles Russell Speechlys LLP)

LORD MANCE:

Introduction

1. The appeal concerns the allocation of a surplus on the winding up of a plan established to provide pensions and other benefits for employees of certain companies in the Alcan group. The plan is the subject of a consolidating trust deed made on 10 March 2005 between the first appellant, UC Rusal Alumina Jamaica Ltd (under its former name of Glencore Alumina Jamaica Ltd) ("Rusal"), and the fifth appellant, The Manchester Pension Trust Fund Ltd ("Manchester"). By 2010, the trustees had come to consist of the first to sixth respondents, employees of Rusal, although Manchester evidently continued to act for them.

2. On 31 March 2010 Rusal gave to all its employees as well as to the first to sixth respondents as trustees of the plan notice that such employees' employment was terminated with immediate effect. On the same day Manchester on behalf of the first to sixth respondents wrote to all plan participants to advise that the plan was discontinued as from that date and that "the necessary steps will be taken by the Trustees to wind up the Plan". On 1 April 2010 Livingston, Alexander & Levy, attorneys for the first to sixth respondents, wrote to the Financial Services Commission, informing them of the discontinuance of the plan and that "it is the intention of the Trustees to wind it up" and to "make application for your approval for such winding-up" in accordance with section 27(4) of the Pensions (Superannuation Funds and Retirement Schemes) Act 2004" ("the 2004 Act").

3. The background to Rusal's decision was inability to agree with the first to sixth respondents upon the terms of a revised deed to be submitted to the Financial Services Commission for approval under the terms of the 2004 Act, which had come into effect on 1 March 2005. The bone of contention concerned the provisions in the plan regarding the distribution of assets, including any surplus on any winding up of the plan.

4. On 27 May 2010 Rusal passed a board resolution to replace the first to second respondents as trustees with the second to fourth appellants. The first to sixth respondents thereupon commenced the present proceedings, claiming that their purported removal was invalid, and sought injunctive relief. By a

consent order dated 19 August 2010, Cole-Smith J revoked the board resolution and made an order that:

(a) (para 1) the trustees "shall consist" of the first to sixth respondents and the second and fourth appellants together with Mr Ivan Irikov and Mr Ivan Makarenko;

(b) (para 5) the first to sixth respondents "undertake not to take any decision regarding the distribution of or to distribute any surplus declared without the agreement of all the trustees", but, "in the absence of agreement, the parties are at liberty to apply to the court for directions";

(c) (para 6) the first to sixth respondents appoint Mr Astor Duggan of the fund actuary, Duggan Consulting Ltd ("Duggan"), to provide or make available to an actuary nominated by Rusal, Mrs Constance Hall of Eckler, Consultants and Actuaries, "all information, calculations and assumptions which may be used and made in the preparation of the Winding Up report, the scheme of distribution of the surplus and the winding up process generally".

5. Duggan's report dated November 2010 and Eckler's review of it dated 21 December 2010 highlighted differences of approach, to which the Board will have to return. Some of these differences, along with some other issues of law, were the subject of argument before McIntosh J who on 16 January 2012 delivered a one-page judgment. After recording that the court had heard oral submissions which amplified and complemented the written submissions which were "attached herewith for ease of reference", McIntosh J rejected Rusal's submissions as "lucid" but seeming "to be merely the academic treatment of a moot", declared that clause 18.3.5 (a mistake for 18.3.3) of the plan was void, directed that the surplus in the fund be distributed according to Duggan's recommendations and ordered costs against Rusal.

6. Following an appeal, the Court of Appeal, in a full written judgment dated 19 April 2013 given by Morrison JA, upheld the judge's order save as to costs, which it ordered should come out of the fund. The matter now comes before the Board with the leave of the Court of Appeal.

The deed and rules

7. After reciting the history of the plan established under "the Rules ….as lawfully amended from time to time", the 2005 trust deed records its intention to make further amendments and to consolidate such amendments with the previous 1986 deed and rules. Clause 2 of the deed then restates the purpose of the plan in these terms:

> "2. *PURPOSE*
>
> The main purpose of the Plan administered and funded in accordance with this Deed is the provision of retirement benefits upon retirement at a specified age for the members and/or to provide pensions to their surviving spouses or dependents. The portions of the Plan referring to Life Assurance are provided through a Group Life Insurance Policy or Policies. The administration and management of the Plan shall be vested in the Trustee and the Fund shall be vested in the Trustees and shall be held by them upon irrevocable trust for application in accordance with the Trust Deed and the Rules."

8. By clause 8 of the deed, the trustee(s) of the fund covenanted with Rusal

> "8.1.2 **to pay benefits**
>
> to pay or cause to be paid out of the Fund the pensions and other benefits prescribed by the Rules
>
> 8.1.3 **to pay additional benefits**
>
> to pay or cause to be paid such benefits in addition to those specified in the Plan as the Employer may request provided that the Employer agrees in writing by an appropriate officer or other person duly authorised by a Resolution of the Board of Directors of the Employer that the Trustee will be reimbursed therefor …."

9. The 2005 trust deed contained further provisions as follows regarding winding up of the fund:

“**ALTERATION OF THE DEED OR RULES**

19.1. The Trustee and the Employer may at any time amend any of the provisions of this Deed and the Rules by Supplemental Deed PROVIDED THAT no amendment shall be made which:-

19.1.1 varies the main purpose of the plan as administered and funded in accordance with this Deed, namely the provision of pensions for employees upon their retirement and for their surviving spouses and dependants.

19.1.2 reduces the benefit of any pensioner or affects the accrued benefits of any member or alters the rates of their contributions except in either case with the consent of that Member.

19.1.3 authorises the return of any part of the Fund to the Employer or any of the Associated Employers.

19.1.4 extends the operation of the Plan beyond the Trust Period.

…..

PRIORITIES ON DISSOLUTION OF THE FUND

18.1 In the event of the Fund at any time being dissolved as aforesaid the Trustee shall cause to be computed by the Actuary, the assets due in respect of each Member of the Plan as follows:

18.1.1 Assets in the sub-Account for each Member’s Voluntary Additional contributions as provided for in Clause 3 hereof shall be allocated to the Member to whose credit the account stands:

18.1.2 In the computation the remaining assets shall be allocated so far as it has not already been done towards

liabilities for pensions and other benefits in the following order of priority that is to say:-

(i) pensions whether in payment status or deferred to normal retirement date or other benefits under the RILA Plan (more particularly described in the Rules of the Plan);

(ii) employee contributions after the Commencing Date less payment made in respect of the employee other than payments in respect of benefits described in sub-paragraph (i) above all accumulated with interest;

(iii) to the extent not provided in sub-paragraphs (i) or (ii) above towards liabilities for pensions or persons already in receipt or entitled to be in receipt of or entitled to retire and commence receiving pension on the date of dissolution;

(iv) to the extent not provided in sub-paragraphs (i) or (ii) above towards liabilities for pensions payable at normal retirement date as defined in the Rules of the Plan to those whose employment has terminated and are entitled to or if their employment terminated would under the Rules of the Plan be entitled to a deferred pension at normal retirement date as defined in the Plan;

(v) all other benefits provided for under the Plan.

Liabilities for benefits referred to in sub-paragraphs (i), (iv), (v) above shall be increased as recommended by the Actuary to allow for the value of any options which would have been available to the Member.

18.1.3 Such part of the balance of the assets of the Fund not already allocated as above shall be allocated to augment proportionately the liabilities for pensions under (ii) of this clause for each Member subject always to such limitations as are consistent with the approval of the Fund by the Commissioner Taxpayer Audit & Assessment.

PROVIDED that such computations shall not create new liabilities to pensions or any new right in any Member to assets allocated in respect of him.

18.2. the Trustee shall then divide the Members into groups based on employment with the Associated Employer. The Members most recently employed by a particular Associated Employer are allocated to that Associated Employer.

18.3. assets, based on the computations in sub-clause 18.1 above in respect of the group of Members allocated to each Associated Employer shall be either:-

18.3.1 transferred by the Trustee to a scheme adopted by the particular Associated Employer and approved or capable of approval by the Commissioner Taxpayer Audit and Assessment under section 44 of the Income Tax Act, or

18.3.2 be applied by the Trustee to provide the benefits computed in accordance with sub-clauses 18.1.1 and 18.1.2 above to the Members in some other approved way. Any remaining assets shall be returned to the particular Associated Employer or at the request of that Employer shall be used to provide such additional benefits as the Trustee may see fit. Notwithstanding any provision in the Rules, benefits hereunder may, with the consent of the Trustee, to the extent permitted by Jamaican Law, be commuted for cash.

18.3.3 if there are no Associated Employers the balance remaining in the Fund after the payment of all benefits under sub-clauses 18.1.1 and 18.1.2 shall be paid to the Employer."

It is common ground that in clause 18.1.3 the words "under (ii) of this clause" are a slip and should be read as "under 18.1.2 of this clause".

10. The Rules are scheduled to the deed and provide inter alia:

“1.4 **Object of the Plan**

The object of the Plan which is covered by the Deed is to provide pensions, retirement benefits and certain other benefits for those employees of the Employer who participate in the Plan and for their surviving spouses and dependents. The part of the Plan referring to Life Assurance is covered by a Group Life Assurance Policy or Policies.

1.5 **Other Definitions**

In the Trust Deed and the Rules unless the context otherwise requires:

……

1.5.17 “**Income Tax Act**” means the Income Tax Act of Jamaica and any statutory modification or re-enactment thereof for the time being in force. ….

1.5.19 “**Member**” shall mean an Employee who has joined the Plan and who is currently in Pensionable Service…...

1.5.23 “**Pensioner**” means a former Member whose pension under the Plan has come into payment…..

5.7 **General Augmentation of Benefits**

5.7.1 At the request of the Employer (or at the discretion of the Trustee but in that even (sic) subject to the agreement of the Employer) the Trustees may:

(i) increase all or any of the provisions and other benefits payable under the Plan; or

(ii) provide benefits or additional benefits under the Plan for Members, Pensioners, former Members with vested rights or beneficiaries:

subject to the payment to the Plan of such additional contributions (if any) as the Trustee and the Employer (acting on the advice of the Actuary) shall determine to be necessary to ensure that the actuarial solvency of the Plan is not thereby impaired, PROVIDED THAT approval of the Plan under the Income Tax Act would not be prejudiced.

15.3 **Maximum Lump Sum and Retirement Income Payments**

Annual Retirement Income may not exceed 2% of your annual salary at the date of your retirement for each year of service with the Employer up to a maximum of 33 1/3 years."

The issues

11. Before the Board and in post-hearing written submissions invited by the Board, the main focus was on issues of interpretation of the deed and rules, and in particular upon: (i) whether clause 18.1.3 is valid, and, if it is, (ii) what are the "limitations" to which it refers and whether it is relevant in this connection to have regard to the Income Tax Act as in force in 2005 and until 2008 or as amended in 2008, (iii) whether clause 18.1.3 relates to pensioners as well as current employees and (iv) whether there should be any further uplift for inflation out of the surplus.

12. However, Duggan's and Eckler's reports also raise a question about the potential relevance of the terms of the 2004 Act, to which the Board has already referred. As stated in para 3 above, it was intended that the plan should be made subject to a revised deed and then registered as such under that Act as an approved superannuation fund. By reason of Regulation 4(1) of, and the Second Schedule to, The Pensions (Superannuation Funds and Retirement Schemes) (Registration, Licensing and Reporting) Regulations 2006, it would then have had to provide for the trustees to have power to increase pension benefits and for pension increases. These statutory requirements make no express reference to such increases or power being liable to depend on the employer's consent. However, their very generality and the terms of section 44(2)(d) of the Income Tax Act as amended, as well as the employer's legitimate interest in circumstances such as those where any increase would require increased contributions, suggest that it was probably not intended under the 2004 Act and 2006 Regulations to preclude such increases or power being made dependant on the employer's consent. On that basis, rule 5.7 of the present plan rules would, on its face, appear to be in a form which would have been acceptable under the 2004 Act and 2006 Regulations.

13. Be that as it may be, the 2004 Act also regulates in some detail the voluntary winding up of any approved superannuation fund, providing as follows:

> "27 (4) Where trustees intend to voluntarily wind-up an approved superannuation fund or approved retirement scheme, they shall notify the Commission of their intention no later than ninety days before the winding-up and obtain the prior approval of the Commission for such winding-up.
>
> …..
>
> 31. Notwithstanding anything to the contrary in this Act, upon the winding-up of an approved superannuation fund or approved retirement scheme, all assets for the time being of that fund or scheme shall be delivered to the trustee or provisional trustee who shall pay all debts in the following order of priority:
>
> (a) Expenses of the fund or scheme;
>
> (b) Voluntary contributions and transfer values;
>
> (c) Pensions owing to pensioners or their beneficiaries;
>
> (d) Pensions for members eligible for early retirement and their beneficiaries;
>
> (e) Pensions owing to deferred pensioners and their beneficiaries;
>
> (f) Prospective pensions for the remaining active members and their beneficiaries;
>
> (g) Any other liabilities relating to the approved superannuation fund or approved retirement scheme.
>
> 32 (1) If after discharging the liabilities specified in section 31(a) to (f) any surplus exists, the trustees or provisional trustees shall

employ an actuary approved by the Commission to verify the amount of the surplus.

(2) The trustees or provisional trustees shall, on receipt of the verification of the surplus, forward a copy thereof to the Commission together with a scheme of distribution of the surplus for the Commission's approval.

(3) The Commission shall examine the scheme of distribution before giving its approval, so, however, that where the Commission thinks it necessary, it may, after consultation with the trustees or provisional trustees, amend such scheme.

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

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

(a) to the current pensioners and their beneficiaries;

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

(c) subject to subsection (6), to the sponsor.

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

14. Duggan in its report was prepared to assume that the 2004 Act applied to the present winding up. Eckler dealt with the point as follows:

"Additionally, although the Plan has not been approved by the Financial Services Commission (FSC) and it is not clear whether, or to what extent, the provisions of the Pensions (Superannuation Funds and Retirement

> Schemes) Act, 2004 (the Pensions Act) apply to the Plan; we took these provisions into account in conducting our review."

15. The Board will return to the possible significance of the 2004 Act, after addressing the points on which the main submissions focused.

Validity of clause 18.3.3?

16. The first issue is whether clause 18.3.3 of the plan is void. It was common ground before the Board that, if it is void, the effect is that any surplus, arising after applying the earlier provisions of clause 18, would be held on trust for Rusal and the members to the extent that each provided the same. Although the issue whether clause 18.3.3 was void achieved prominence below, counsel limited themselves on it before the Board to making bare references to their written submissions.

17. The Court of Appeal considered that clause 18.3.3 was void for two reasons, one based on the provisions of the prior deeds which the 2005 deed was purporting to consolidate, the other based on inconsistency with clauses 18.3.1 and 19.3. The prior deeds dated from 1974 and 1986. Clause 19(3) of each of these prior deeds simply prohibited any amendment "which authorises the return of any part of the Fund to the Associated Companies". The argument is that the prior deeds contained no equivalent of clause 18.3.3, the introduction of which by the 2005 consolidating deed was accordingly impermissible. The Board is content to proceed on the basis, without deciding, that, if the prior deeds contained no such equivalent, this could represent a valid basis for challenging a clause in the 2005 consolidating deed. But the Court of Appeal was, in the Board's view, in error in concluding that the appearance for the first time in the 2005 deed of clause 18.3.3 had the effect of creating any new rights which did not exist under the earlier deeds.

18. The earlier deeds were made not with Rusal, but with various other Alcan companies described as "the Associated Companies". Clauses 18(A), (B) and (C) of the earlier deeds provided that on any dissolution of the fund "any remaining assets shall be returned to the particular Associated Company or at the request of that Company shall be used to provide such additional benefits as the Trustee may see fit". By a deed of substitution made 3 August 2001 the Associated Companies were redefined as "the old Principal Employer" and it was agreed by clause 1(b) that Rusal as "the new Principal Employer" "will become a party to the Plan in the place and stead of the old Principal Employer as the Associated Companies under The Trust Deed and The Rules". Accordingly, as "the Associated Companies" for the purposes of the prior deeds,

Rusal became entitled to receive "any remaining assets" to be returned under clause 18 of those deeds.

19. Under the 2005 deed, in the case of any members employed with an Associated Employer, any remaining assets not used to provide benefits for such employers, were under clause 18.3.2 to be returned to the particular Associated Employer. But "Associated Employer" excludes "the Principal Employer" under the relevant definition contained in the Rules and expressed also to cover the 2005 deed. Rusal submits that, had there been any Associated Employers, this provision would have been permissible under clause 19.3 of the prior deeds, in which the prohibition only relates to "Associated Companies". But in fact there are no Associated Employers, so that the point is unnecessary to decide and Rusal is the only (and "Principal") employer, as well as being "the Associated Companies". Under clause 18.3.3 any surplus therefore falls to be paid to Rusal, which, since it is also "the Associated Companies" as a result of the deed of substitution, is entitled to receive it under the 2005 deed, just as its predecessors as Associated Companies were under clause 18(A), (B) and (C) of the prior deeds.

20. It is true that clause 19.1.3 of the 2005 deed prohibits any amendment which authorises the return of any part of the fund not only to Associated Employers, but also to "the Employer", which means Rusal. But the 2005 deed itself contains clause 18.3.3, which, being there from the start and not by amendment, cannot be touched by a clause prohibiting amendments. In short, clause 19.1.3 only affects future amendments purporting to allow returns to Rusal in circumstances other than those applying under clause 18.3.3 on a winding up. Similarly, under the prior deeds there is no contradiction between Clause 18, permitting return of any remaining assets to Associated Companies, and clause 19(3), prohibiting any "amendment …. which authorises the return of any part of the Fund to the Associated Companies". Clause 18 is part of the prior deeds, without any amendment, and clause 19(3) refers to any future amendment purporting to allow such returns to Associated Companies in other circumstances.

21. Finally, it was argued for the respondents that, in consequence of clause 17(B) of the prior deeds, clause 18 of those only applied in circumstances where "one or more, but not all of the Associated Companies" was wound up. That is a misreading of the purpose of clause 17(B). Clause 18 of all the deeds governs in the first instance situations in which the whole fund is wound up. Clause 17(B) of the prior deeds deals expressly with situations where the whole fund is not wound up, and it is necessary to wind up the part or parts relating to Associated Companies which are being wound up. It is not intended or apt to limit clause 18 to situations in which only part or parts of the whole fund are being wound

up. There would be a lacuna, if the situation where the whole fund was being wound up was not catered for.

22. It follows that clause 18.3.3 of the 2005 deed reflects provisions that existed in the prior deeds, and no complaint about the 2005 consolidating deed can be based in that respect on clause 19(3) of the prior deeds. As to the further submission that clause 18.3.3 of the 2005 is inconsistent with clause 18.1.3 of the 2005 deed, the Court of Appeal focused on the provision in clause 18.3.3 for payment to Rusal of "any balance remaining in the Fund after the payment of all benefits under sub-clauses 18.1.1 and 18.1.2", making therefore no express reference to sub-clause 18.1.3. From this, the court drew the conclusion that clauses 18.1.3 and 18.3.3 were "irreconcilably in conflict" and that clause 18.3.3 must be disregarded in its entirety. The Board cannot accept that reasoning or result.

23. First, the opening words of clause 18.3 refer to "assets, based on the computations in sub-clause 18.1", which read naturally means all of clauses 18.1.1, 18.1.2 and 18.1.3. When clause 18.3.2 and 18.3.3 (read in the amended form which it is common ground that it must be read) go on to refer to clauses 18.1.1 and 18.1.2, this does not mean that they are suggesting that clause 18.1.3 should be left out of account. Clause 18.1.3 provides for proportionate augmentation of the liabilities under clause 18.1.2. So clauses 18.3.2 and 18.3.3 can readily be understood as referring to any balance remaining after payment of all benefits under clauses 18.1.1 and 18.1.2, proportionately augmented in the latter case. Secondly, this is confirmed by the fact that clauses 18.3.2 and 18.3.3 come after clause 18.1.3. The natural meaning is that the steps under clause 18.1.3 are taken first, and that clause 18.3.3 only attaches to any surplus balance remaining after such steps are taken. The Board therefore concludes that clause 18.3.3 is valid, and that the courts below erred in reaching a contrary conclusion.

Which version the Income Tax Act is relevant?

24. The Board turns to the issues which arise under clause 18.1.3. That clause operates in terms "to augment proportionately the liabilities for pensions under [clause 18.1.2] of this clause for each Member", although any augmentation is to be "subject always to such limitations as are consistent with the approval of the Fund by the Commissioner Taxpayer Audit & Assessment". The question therefore arises: what are the liabilities for pensions under clause 18.1.2 for each Member? That requires consideration of the terms of the plan. Under rule 5.1, Members were on retirement at normal retirement date ("NRD") entitled to an annual pension from the Plan equal to the greater of (i) 1.75% for each year and part year of credited service, subject to a maximum of 60% of average pensionable earnings ("APE") and (ii) 75% of the member's total mandatory

contributions to Rusal's life assurance and pension plan ("LAPP") for employees plus any retirement pension due from predecessor plans operated under the prior deeds. NRD was defined as 65 for all men and for women joining the plan after 31 December 1988, or 60 for women joining before 1 January 1989. APE was defined as the highest average annual pensionable earnings over any 36-month period prior to retirement. Rule 5.1.2 covered eligibility for benefits arising from voluntary additional contributions, Rule 5.2 provided for reduced retirement income on early retirement, and rule 5.3 related to postponement of retirement benefit, with the consent of Rusal, on late retirement.

25. In order to give effect to clause 18.1.3, the Board understands it to be common ground that the right course is to take each member separately, as Duggan did, and to uplift his or her pension entitlement pro rata. The second question then arises: what is meant by the proviso "subject always to such limitations as are consistent with the approval of the Fund by the Commissioner"? It is here that the issue arises because of an amendment made in 2008 to the Income Tax Act. Under the Act before its amendment and under rule 15.3 (set out in para 10 above), the maximum annuity permitted to be awarded was 66 2/3rds of final salary. The amendment raised the statutory maximum to 75%, although no amendment was made to rule 15.3. Approval of the Fund was given by the Commissioner before the amendment. Rusal's case is that the only "limitations … consistent with the approval of the Fund by the Commissioner" are those in force under rule 15.3 and the unamended Act in force when the plan was approved.

26. Section 44(2)(b) of the Income Tax Act provided before amendment that:

> "the Commissioner … shall not …. approve any fund unless it is shown to his satisfaction that:-
>
> (a) …..
>
> (b) the fund has for its sole purpose the provision in any case, of lump sums not exceeding $120,000 or pensions and annuities not exceeding two-thirds of the salary of the employee at the date of his retirement, for all or any of the following persons in the events respectively specified, that is to say for persons employed in the trade or undertaking, either on retirement at a specified age or on becoming incapacitated at some earlier age, ….."

27. Following the Act's amendment in 2008, the relevant part of section 44(2)(b) came to provide that:

> "the Commissioner … shall not …. approve any fund unless it is shown to his satisfaction that -
>
> (a) ….
>
> (b) the fund has, for its principal purpose, the provision of lump sums, pensions and annuities for its members, and in the case of -
>
> (i) …
>
> (ii) pensions and annuities -
>
> (A) an amount not exceeding seventy-five per cent of the remuneration of an employee at the date of his retirement at a specified age after a period of not less than thirty-seven and one-half years of service or on becoming incapacitated at an earlier age; or
>
> (B) a proportionate percentage in respect of a shorter period of service,
>
> for all or any of the following persons in the events respectively specified, that is to say, persons employed in the trade or undertaking, either at a specified age or on becoming incapacitated at some earlier age ….."

28. The plan as operated did not take full advantage of the maximum permitted even by rule 15.3 and the unamended Act. It provided that a member's actual entitlement under the plan in issue on this appeal would not, on one alternative, exceed a pension calculated at the rate of 1.75% of APE per annum of service, subject to a maximum of 60% of APE. It follows that, whichever version of the Income Tax Act is relevant, there is potential scope for a proportionate uplift on winding up under clause 18.1.3. However, the increased limit in the amended Act would allow a larger uplift, which both actuaries appear to have assumed to be appropriate. It is a question of law which version is relevant.

29. Clause 18.1.3 refers to the Commissioner's approval, by implication under the Income Tax Act. In the light of rule 1.5.17 there is no difficulty about understanding that as meaning the Income Tax Act and any statutory modification thereof, and so as embracing any approval under the amended Act. Only one approval by the Commissioner for Income Tax has been identified. It was issued on 8 March 2006 before the amendment of section 44. It was produced by the parties only after the hearing before the Board. It read as follows:

> "The Consolidating Trust Deed and Plan Rules of Glencore Alumina Jamaica Ltd., Pension Plan is now in order.
>
> The Pension Scheme is hereby approved effective August 31, 2004 pursuant to Section 44 of the Income Tax Act.
>
> For the approval to remain in force, you are to supply the Department with the following:
>
> 1. Annual accounts of the Fund along with:
>   (a) A list of contributions by each member together with the salaries on which these contributions are based.
>   (b) Contributions by the employer in respect of the members.
>   (c) Details of any payment or repayment out of the fund to either member or employer.
> 2. Triennial Actuarial Valuation Reports of the Fund
> 3. In the event of the termination of the Scheme:
>   (i) A copy of the resolution by the Trustees for the winding up within 14 days of the date of the Resolution.
>   (ii) Full details of the distribution of the assets of the Fund.
> 4. Any further information that may be required."

30. Prior to production of the approval dated 8 March 2006, the parties' submissions focused on the question whether clause 18.1.3 refers to such limitations as are consistent with the plan as actually approved and the unamended Act in force at the date of such approval, or whether it refers to such limitations as are or would be consistent with approval of the fund by the Commissioner if an amended version of the plan had been presented at any time after the 2008 amendment of the Income Tax Act. The Court of Appeal considered the latter to be correct, on the basis that "clause 18.1.3 refers to the conditions of approval of the pension scheme imposed by the Commissioner, rather than to a limitation imposed by the Rules themselves".

31. In the light of the terms of the actual approval, now produced, the Board sees the issue differently from the way it has previously been presented. The effect of clause 18.1.3 is that the balance of the Fund should go to augment proportionately the liabilities for pensions for each member "subject always to such limitations as are consistent with the approval of the Fund by the Commissioner". Inspection of the actual approval reveals that it was a continuing approval, which was to remain in force from year to year, provided that the numbered conditions one to four were complied with. Annual accounts were prepared and submitted and tax relief received under the Act as amended without any need for further approval. Following production of the actual approval, this is now common ground. It follows that, after the coming into force of the amended Act, the Fund continued to be approved under the approval dated 8 March 2006 from year to year for the purposes of that Act as amended. The only limit on augmentation under clause 18.1.3, once the amended Act came into force in 2008, thus became 75%, the limit under the amended Act.

Scope of clause 18.1.3?

32. During the post-hearing exchanges, a further issue emerged: whether the augmentation provided by clause 18.1.3 in respect of "each member" is for the benefit only of Members in the sense defined by rule 1.5.19, that is employees who had joined the plan and were in pensionable service at the date of dissolution of the Fund. Rusal contends that clause 18.1.3 should be read as having this limited scope. The respondents point to other provisions of clause 18, and submit that, despite the definition in rule 1.5.19, the context requires a wider meaning, embracing also current pensioners, in clause 18 as a whole.

33. The Board considers that the respondents are correct on this point. Clause 18.1 states that the ensuing clauses 18.1.1, 18.1.2 and 18.1.3 deal with "the assets due in respect of each Member of the Plan". Yet sub-paragraph (i) of clause 18.1.2 covers "pensions whether in payment status or deferred to normal retirement date or other benefits under the RILA Plan", and sub-paragraph (iii) covers "(to the extent not provided by sub-paragraph (i)) liabilities for pensions or persons already in receipt". It is clear therefore that the term "Member" in clause 18.1 is being used in a sense wide enough to cover pensioners as well as employees still in pensionable service, and the same must follow when it comes to augmentation under clause 18.1.3. It would also be strange if it were otherwise. The Fund has been built up by pensioners as well as existing employees. On its dissolution one would expect both to be covered by the provisions relating to the distribution of assets, and there is no reason why the same should not apply to any augmentation provision. Both employees still in service and pensioners are therefore covered by clause 18.1, including clause 18.1.3.

Uplift for inflation?

34. The Board comes to the last and, in its view, most difficult issue. That is, whether any further allowance falls to be made for inflation. According to the report by the actuary, Duggan Consulting Ltd, para 1.3:

> "Increases were last granted to pensioners and spouses on 1 January 2008. Regular and supplementary augmentations were calculated by reference to the pensioner's retirement date. The regular augmentation was subject to a maximum of 19.5% of the pension in payment as at 31 December 2007 whilst the supplementary augmentation was subject to a maximum of 10.4%".

35. That there should have been an augmentation for inflation is unsurprising in an environment where inflation has been substantial and in a context where Rusal's business was continuing and it had an active workforce as well as a body of retired pensioners or dependant spouses. The augmentation took place, presumably, under Rule 5.7, set out in paragraph 10 above, although the proviso at the end of Rule 5.7 suggests one potential puzzle which the Board, fortunately, does not have to resolve. The unamended Income Tax Act, in force when the 2005 deed was agreed, made no reference to any possibility at all of augmentation of pensions above the two-thirds of retirement salary limit provided by the unamended section 44(2)(b). Yet it is difficult to think that pensioners receiving a full two-thirds of retirement salary pension were deprived of the inflation augmentation which other pensioners evidently received.

36. The drafters of the 2008 amendments to the Income Tax Act must have been conscious of a problem in this area, because they amended another provision dealing with the terms of funds which the Commissioner might approve, so that section 44(2)(d) has since 2008 read as follows:

> "Provided that the Commissioner may, if he thinks fit, and subject to such conditions, if any, as he thinks proper to attach to the approval, approve a fund, or any part of a fund, as a superannuation fund for the purposes of this Act -
>
> ….

> (iv) Notwithstanding that the fund makes provision for pensions and annuities, the employer may increase the post retirement benefit of a pensioner member; however, the increase shall not exceed the annual changes in the Consumer Price Index."

The sense of this ungrammatical amendment is fairly clear. It provides or possibly confirms that a fund may enable an employer to grant post-retirement pension increases, but limits such increases by reference to a maximum derived from the Consumer Price Index.

37. In support of their case that there should be an inflation uplift, the respondents rely on the amended Income Tax Act. They submit that the augmentation provided by clause 18.1.3 should include an allowance for inflation, up to the maximum limitation set by section 44(2)(d)(iv) as amended, consisting of the annual change in the Consumer Price Index. Both actuaries accepted some inflation uplift as appropriate, probably because they either saw the 2004 Act as directly applicable or were prepared to proceed as if it applied (see para 14 above). But, putting the 2004 Act for the moment on one side, on the assumption that it cannot directly apply since the plan was never actually approved under it, clause 18.1.3 does not on its face help. Clause 18.1.3 provides only for augmentation of "the liabilities for pensions under clause 18.1.2", and clause 18.1.2 refers to "liabilities for pensions" and "all other benefits provided for under the Plan". Nowhere in clause 18.1.2 or elsewhere in the plan is there any *express* liability for an inflation uplift.

38. The way in which the plan covers inflation uplifts is not by creating any outright liability or entitlement, but by Rule 5.7 which contemplates on its face that any such increase or additional benefit will take place only at Rusal's request or at the trustees' discretion with Rusal's approval. At first sight, the parties' respective cases are at this point counter-intuitive. Rusal submits that it is only if it as employer were either to request or to agree to a proposal for an inflation uplift under Rule 5.7 that there could now be any such uplift; and it points to the references in Rule 5.7 to additional contributions and to continuing approval of the plan not being prejudiced as indications that Rule 5.7 only applies before any winding up. In contrast, the respondents submit that Rule 5.7 only applies while the fund is continuing and has nothing to do with the present situation when it is being wound up. However, this is because of their primary submission that clause 18.1.3 gives them by itself an absolute right to augmentation for inflation – a submission that the Board rejects, for reasons given in the preceding paragraphs.

39. The Board is not persuaded that the references in Rule 5.7 to additional contributions and to continuing approval not being prejudiced are reliable

indications that Rule 5.7 cannot apply after the date of "discontinuation" of the plan (31 March 2010) or after it has been decided to wind up the fund. The possibility that additional contributions might be necessary, if any pension increase was to be provided has an obvious potential link with the requirement of employer's consent. But the words "if any" in parenthesis show that increases in other situations were also in mind. A surplus may well have been built up over a period so that an increase would require no further contributions to be made.

40. A stronger argument appears to the Board to be that clause 18.1 introduces a process which was on its face intended to operate inexorably to determine the allocation of, and priorities in respect of, the assets of the fund available at the date of winding up. In short, it involves a contractual crystallisation of rights, which leaves no room for the operation of Rule 5.7 in order to cover, in whole or part, such pension increases.

41. The Board does not however consider that this is the right analysis of the position. It is apparent from the communications identified in para 2 above as well as from para 5 of the court's order dated 19 August 2010 that winding up was seen not as having occurred, but as a continuing or iterative process, during which a plan of distribution would be prepared, which it was, at least originally, contemplated would be submitted to the Financial Services Commission for approval under the 2004 Act and which the actuaries' reports would assist to finalise. Both the actuaries' reports approach the matter on that basis. Duggan's report also expressly refers to "the trustees" (though this may only mean the first to sixth respondents) agreeing that allowances should be made for future inflation (para 6.4).

42. While the process of winding up is under way, the Board sees no real reason why Rule 5.7 should not enable the trustees to take a decision, with the agreement of the employer, to use a surplus in the fund to increase the liabilities or benefits calculated under clauses 18.1.1, 18.1.2 and 18.1.3. The trustees could on any view take such a decision immediately before the plan was "discontinued" and before they decided to wind it up. If the mere discontinuance of the plan by the employer prevented the operation of clause 5.7, an employer could simply forestall an anticipated decision by the trustee by dismissing all his employees forthwith, as happened in this case on 31 March 2010. If Rule 5.7 is, as the Board considers, apt to cover the situation where the fund is in surplus, it would also seem strange if the wording did not cover the possibility that the trustees might with the employer's agreement, or at the employers' request, decide that such surplus should, as part of the winding up scheme, be used to provide additional benefits for former employees and pensioners.

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

44. In Rusal's submission, this conclusion is however of no avail to the first to sixth respondents, since the operation of Rule 5.7 depends upon either a request by Rusal, of which there has been none, or a decision "at the discretion of the Trustee but in that even (sic) subject to the agreement of [Rusal]" which is equally lacking. If, as seems likely, "the Trustees" in para 6.4 of Duggan's report refers only to the first to sixth respondents, then the current trustees, as prescribed and provided by the order dated 19 August 2010, have not it seems (at least yet) exercised any discretion, one way or the other, on this subject. They are or might quite probably be dead-locked, at this moment, on such a point. However, it is, firstly, an aspect on which they might well be assisted by taking further actuarial advice in the light of the Board's advice, and it is, secondly, always open to any trustee to apply to the court for directions as to the exercise of any discretion or power which the trustee has been given (and para 5 of the order dated 19 August 2010 itself on one view also makes express provision to that effect).

45. The Board cannot predict what assistance or proposals the actuaries might provide or make, or what view a court might take of the manner in which the trustees should exercise any such discretion or power. But, for the reasons given in the next paragraphs, the Board considers that, at least on the basis of the facts and arguments presented so far, there could well be a powerful case for a conclusion that the trustees should make further provision for inflation out of the surplus. If it did, the further question would then arise whether Rusal could under Rule 5.7 simply withhold agreement, in order to ensure that it received under Rule 18.1.3 the whole balance not already liable to be distributed under the express provisions of Rule 18.1.1 and Rule 18.1.2. The Board will come back to that question in para 50 et seq below, after saying some more words about the trustees' position.

46. Trustees must exercise their discretion as fiduciaries for the purposes of and in accordance with the terms of the governing trust. Here, the main purpose of the plan was by clause 2 expressly the provision of retirement benefits for retired employees and pensions for their surviving spouses or dependants. Under Rule 10.1 employees made contributions consisting of 5% of their income per annum, while employers were required by Rule 10.5 to contribute the balance necessary to provide the retirement income and other benefits stipulated by the plan. The Board does not have before it information as to why and how the present surplus has built up. But it would clearly be material for trustees to have regard to the

extent to which it has been built up out of employees' contributions or out of the proceeds of their successful investment of such contributions.

47. Another possibly relevant factor is that, at or around the time when the Income Tax Act was amended to provide expressly for the possibility of inflation uplifts, a substantial uplift was resolved upon and granted by the trustees, no doubt with the consent of Rusal, under Rule 5.7. This may well reflect a not unnatural expectation that some account of inflation would and should be taken, even though not such as fully to cater for its effects. Both experts' reports contain passages which contain some support for such a view. The augmentation provided by clause 18.1.3 seems unlikely to come near covering the loss of purchasing power resulting from endemic inflation in the region. That appears to be borne out by the information given to the Board during the hearing, that the major financial issue on this appeal concerns the inflation uplift.

48. The Board considers that a yet further relevant consideration may well be the scheme of the 2004 Act under the terms of which the legislature clearly contemplated that the plan would be approved and operated, although this was not in fact achieved by 31 March 2010, by when five years had passed since the 2004 Act came into force and four years since the Regulations under it were made. (The Board is informed that an application for registration was made on 28 September 2006, within an extended six month period - running from 30 March 2006 when the Regulations were approved - which the Commission allowed under section 57 of the 2004 Act. Approval was sought for the 2005 deed and plan with proposed amendments. But since the terms to be approved evidently continued to be an issue, as mentioned in para 3 above, the plan was never approved under the 2004 Act).

49. The Board has already referred to the scheme of the 2004 Act in para 13 above. This scheme has at least two potentially significant aspects. First, it underlines the understandable importance which the legislature attached to the possibility of pension increases. Second, the Board has not heard argument on the precise effect of section 32 dealing with any surplus, but it appears that it may well, in relation to plans which (unlike the present) were approved under the 2004 Act, give the Commission power to deal with such a surplus by amending any scheme so as to provide for additional benefits for pensioners and beneficiaries, over and above any provided by the original fund terms and in priority to any distribution to the sponsor (employer): see in particular sub-sections (3) to (5). Then it would also appear to follow that any winding up and the distribution of any surplus would ultimately have been subject to scrutiny and a considerable measure of control by the Financial Services Commission. If that is right, then it could prove to be a relevant factor in relation to the way in which the trustees' discretion should be exercised, even in circumstances where (as here: see para 48 above) the plan never in fact came to be approved under the 2004 Act. The Board

repeats that it is doing no more at this stage than identify what appear to it potentially relevant factors. Whether and how far they are actually relevant would have, if necessary, to be determined by the court at first instance after further submissions.

50. Assuming that the trustees, or the court on application, concluded that the trustees' discretion as fiduciaries should be exercised in favour of making further provision under Rule 5.7 for inflation, could Rusal simply refuse to agree to any such provision and thereby ensure that any balance due to it under clause 18.1.3 is maximised? Unlike the trustees, Rusal is not a fiduciary. It can take its own interests into account. But that does not mean that Rusal has or would have an absolutely unfettered power to refuse consent.

51. Again, the Board does not consider that it should at this stage attempt to state definitely the principles by reference to which Rusal's power to refuse consent may be constrained. Both the law and the facts would benefit from further consideration and submissions. But some provisional observations based on the current state of authority may assist. First, it is common ground that Rusal would have to act bona fide. Second, that does not merely mean that it must act honestly; it must avoid irrational or arbitrary behaviour and must not exercise its power to give or refuse consent for extraneous reasons. Thus in *Imperial Group Trust v Imperial Ltd* [1991] 1 WLR 589, employers were not entitled to refuse consent to an increase in pensions in order to force employees to move to another fund, the terms of which gave the employers the right to any surplus. Importantly, this was rationalised on the basis that employers' powers under a pension trust:

> "shall not be exercised so as to destroy or seriously damage the relationship of confidence and trust between the company and its employees and former employees". (P 598E-F)

52. The reference in this passage to "former employees" is also important in the present context, where many of Rusal's former employees had retired before 31 March 2010 and Rusal dismissed the remainder with effect from that date. The existence of a relevant duty to former employees was also accepted by Warren J in his second judgment in *IBM United Kingdom Pensions Trust v IBM United Kingdom Holdings Ltd*: *IBM United Kingdom Holdings Ltd v Dalgleish* [2014] EWHC 980 (Ch) reported at (2014) IDS Pensions LR 335 and referred to by the Board in para 53 below.

53. The applicable principles have been further examined in later cases. In *National Grid Co plc v Mayes* [2001] 1 WLR 864, para 11, Lord Hoffmann approved

Robert Walker J's first instance statement that an employer "was entitled to act in his own interests provided that he had regard to the reasonable expectations of the members". In *Prudential Staff Pensions Ltd v The Prudential Assurance Co Ltd* [2011] EWHC 960 (Ch), where the authorities were examined at length at paras 118 to 153, Newey J said at para 146 that:

> "My own view is that members' interests and expectations may be of relevance when considering whether an employer has acted irrationally or perversely. There could potentially be cases in which, say, a decision to override expectations which an employer had engendered would be irrational or perverse. On the other hand, it is important to remember that powers such as that at issue in the present case are not fiduciary."

54. The area was again reviewed by Warren J briefly in a judgment in *IBM United Kingdom Pensions Trust v IBM United Kingdom Holdings Ltd* [2012] EWHC 3540 (Ch), paras 15 to 19 and comprehensively in his further judgment in the same case *IBM United Kingdom Holdings Ltd v Dalgleish* [2014] EWHC 980 (Ch); (2014) IDS Pensions LR 335, paras 353-478. In the first judgment, Warren J questioned whether the employer could be said objectively to be acting in a way which would destroy or seriously damage the continuing duty of trust and confidence towards its actual and former employees, if the employer was not acting irrationally or perversely. In the second, he reached the same conclusion positively, and emphasised that the test should not be understood or restated as a simply test of fairness, but was a more restrictive and "severe" test, precisely because the employer is not acting as a fiduciary. At the same time, however, Warren J acknowledged the importance that could in his view attach to reasonable expectations, at least in the sense of expectations which give an employee a positive reason to believe that things *will* take a certain course in the future and which are engendered by an employer in respect of matters over which the employer has some control: see eg paras 386(iv), 463-464, 467-471 and 478.

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

56. In the light of the foregoing, the Board has no real doubt that all the factors identified by the Board in paras 46 to 49 above as relevant to the exercise (or non-exercise) by trustees of their fiduciary discretion to propose an inflation uplift would have significant relevance (were the situation to arise) when considering the validity of any refusal by Rusal to agree to a proposal by trustees to grant such an uplift out of a surplus. They would be relevant in this regard even though Rusal is not a fiduciary, and would therefore be entitled to take into account its own legitimate interests. The fact that the exercise by the trustees of their discretion would, in one way or another, have been crystallised and the basis on which it had been decided that such discretion should be exercised would be material background to any consideration of the legitimacy of any refusal of consent by Rusal. The fact that the present appeal concerns the distribution on a winding up of a surplus which has developed within a pension plan may also mark this case out as different from previous cases such as the *IBM* case before Warren J, which concerned a complicated restructuring of pension arrangements in the context of a continuing commercial business. The existence and terms of the 2004 Act are another feature which finds no previous parallel, and could in this context also prove to be highly significant.

57. The Board does not consider that it is possible, at this stage, to be more specific, or to give any indication as to whether or how far Rusal could or could not validly refuse consent to any proposal for an uplift. Before any question could arise of Rusal having to decide whether to give agreement, or the court having to decide whether a refusal by Rusal to give agreement was legitimate, there would have to have been a proposal for an uplift. Such a proposal would have to be the result of a decision by the trustees themselves, or by the court in the exercise of its supervisory jurisdiction over trustees' exercise of their discretion, or it might perhaps result from a combination of further directions by the court and further expert report(s). Any question whether Rusal could legitimately refuse agreement to a proposed uplift would depend upon the nature and terms of the proposal and upon an evaluation of all the relevant interests and expectations in the light of the guidance given by the Board in the preceding paragraphs.

58. The matter should in these circumstances be remitted to the court at first instance for reconsideration (there being no need for it be to be reserved to McIntosh J). Without in any way purporting to bind the court of first instance, the Board envisages that a course of events along the following lines may well be appropriate:

i) a hearing to consider and give directions as to the potential significance of the 2004 Act (see paras 13, 48 and 49).

ii) Unless the trustees then agree on whether and how their discretion should be exercised, instructions to the actuary in the light of the directions given under (i) as well as in the light of the Board's advice generally.

iii) Guidance by the actuaries as to why and how the present surplus has arisen (see paras 46-47 above) and as to the likely impact of future inflation, and as to the nature and implications of any proposals which the trustees might, if they so decided in their discretion, adopt to cater for such inflation, bearing in mind all parties' respective interests.

iv) A decision by the trustees as to whether or not and how to exercise their discretion, or, failing agreement, a further hearing before the court of first instance followed by directions given to the trustees in that regard (paras 44 to 49 above).

v) If and so far as the trustees' discretion is in the event exercised in favour of making an inflation allowance under Rule 5.7, a decision by Rusal as to whether or not to consent thereto (paras 50 to 57 above).

vi) Any further necessary hearing and determination.

Conclusions

59. It follows that the Board will humbly advise Her Majesty that the order made by the judge and upheld in the Court of Appeal must be set aside, that the Court of Appeal's variation of that order to provide for costs below to come out of the fund should stand, and the case must be remitted to the court at first instance to be reconsidered generally there in accordance with this judgment. The parties should have 28 days in which to make submissions in writing on the costs before the Board and the form of the order.