Neutral Citation Number: [2018] EWCA Civ 2694

Case Nos: A3/2018/0353 and A3/2018/0389

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(CHANCERY DIVISION)
The Hon. Mr Justice Zacaroli
[2018] EWHC 69 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/12/2018

Before:

LORD JUSTICE PATTEN
LORD JUSTICE DAVID RICHARDS
and
LADY JUSTICE ASPLIN

- -

Between:

British Telecommunications PLC	**Appellant**
- and -	
(1) BT Pension Scheme Trustees Limited	**Respondents**
(2) Linda Bruce-Watt (Representative Beneficiary)	

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Andrew Spink QC, Dinah Rose QC and **Farhaz Khan** (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Appellant in Appeal A3/2018/0353 and the Second Respondent in the Cross-Appeal A3/2018/0389**
Lord Pannick QC, Michael Furness QC and **James McCreath** (instructed by **Stephenson Harwood LLP**) for the **Second Respondent in Appeal A3/2018/0353 and the Appellant in the Cross Appeal A3/2018/0389**
Brian Green QC (instructed by Slaughter and May) for the First Respondent to both Appeals

Hearing dates: 9, 10 and 11 October 2018

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Approved Judgment

Lady Justice Asplin:

1. These appeals arise out of the order of Zacaroli J sitting in the Business and Property Courts of England and Wales (Chancery Division) of the High Court. The citation for his judgment is [2018] EWHC 69 (Ch). The appeals are concerned with the proper construction of certain provisions of the BT Pension Scheme, (the "Scheme") their meaning and effect. They relate to the appropriate cost of living index to be used for the purposes of calculating increases in pensions in payment.

2. British Telecommunications plc ("BT") is the Principal Employer of the Scheme which was established in 1983. In 1986 BT established the British Telecommunications plc New Pension Scheme which was merged with the Scheme in 1994 and now forms Section C of the Scheme. Section C alone has over 80,000 members of which around 24,000 are current pensioners. All sections of the Scheme are funded from a single pool of assets. For the purposes of the litigation BT was appointed to represent the interests of all members of the Scheme and those claiming through, or in respect of them, in whose interests it is to argue that pension increases for Section C members should not continue to be linked to the Retail Prices Index ("RPI").

3. In essence, BT contends that it has the power (whether in consultation with the Trustees of the Scheme or otherwise) to determine whether RPI has become inappropriate for the purposes of calculating increases to pensions in payment for Section C members and that RPI is inappropriate. It is common ground that once it is decided that RPI has become inappropriate, it is for BT, in consultation with the Trustees, to decide what other measure of the cost of living should be used. A change in the index used will not only affect the level of pensions in payment for Section C members but will also affect the level of funding of the Scheme as a whole.

4. BT Pension Trustees Limited, the First Respondent, is the present trustee of the Scheme (the "Trustees"). They were represented before us by Mr Brian Green QC. Mr Green made submissions in relation to the proper construction of the rules of the Scheme. The primary position of the Trustees, however, was that they sought to assist the Court and to ensure that a practical and workable outcome for the Scheme is arrived at. Mr Green's submissions in relation to the construction of the rules took those instructed on behalf of BT by surprise and as a result, we allowed BT to make written submissions in response after the close of the hearing.

5. Ms Linda Bruce-Watt, the Second Respondent, is a beneficiary of the Scheme and was appointed to represent all Section C members in whose interests it is to argue that pension increases for Section C members should continue to be linked to RPI. Put simply and in very brief summary, she seeks to support the Judge's decision that the question of whether RPI has become inappropriate must be determined objectively and is not for BT to decide. She goes on to contend, amongst other things, that it is not open to the appropriate decision-maker to rely upon matters or events which occurred before 5 April 2016 when determining whether RPI has become inappropriate.

6. The Grounds of Appeal and Cross Appeal and the matters raised in the Respondent's Notices are lengthy and complex. They are more easily understood and digested in an incremental and thematic way in the light of the relevant Scheme provisions and issues

as they arise. I propose to introduce them as and when they become relevant. The same is true in relation to the Judge's findings.

Essential Materials and Applicable Principles

Materials

7. The central issues turn on the construction of the relevant Rules of the Scheme and the way in which they interleave with each other. There are five sets of Scheme Rules which are relevant. They are dated 1 January 1993 (the "1993 Rules"), 1 May 2002 (the "2002 Rules"), 1 June 2004, 20 March 2009 and 5 April 2016 (the "2016 Rules") respectively. For the most part, the issues on these appeals arise from just two rules: rule 10.2 of the 2016 Rules and rule 25 of Appendix E of the 1993 Rules.

8. Rule 25 of Appendix E of the 1993 Rules where relevant states:

> "(1) 5% increase to excess over guaranteed minimum pension:
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> (a) On 1 April 1993 (or such other date as the Trustees may, with the agreement of the Principal Company, decide) and in each year thereafter the annual amount of pension … shall be increased by the lesser of 5% and the percentage ratio (calculated to the nearest one place of decimals) by which the index figure of the General Index for the month of January (or such other month as the Trustees may, with the agreement of the Principal Company decide) in the year in which the increase takes effect exceeds the index figure for the same month in the immediately preceding year.
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> . . .
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> (3) Changes to the General Index
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> If the General Index ceases to be published, or is so amended as to invalidate it in the view of the Principal Company as a continuous basis for purposes of calculating increases, the Principal Company shall substitute such other index or appropriate basis of comparison as it shall in consultation with the Trustees decide.
>
> (4) Meaning of "General Index"
>
> The "General Index" means the General Index of Retail Prices for all Items in the Digest of Statistics published by the Central Statistical Office."

9. The 1993 Consolidating Deed and Rules which included the 1993 Rules was amended by a deed of 1 May 2002 and was expressly stated to have been "restate[d] as amended by replacing it with the provisions of these [the 2002] Rules and special editions of

these Rules executed on the same day with effect from the date of these Rules." Increases in pensions in payment were dealt with in Rule 10.2 of the 2002 Rules and the wording has remained materially identical in all the further iterations of the Rules. In *BT Pension Scheme Trustees Ltd v British Telecommunications plc & Anr* [2010] PLR 487 at [19] Mann J recorded the unchallenged evidence of the then chairman of the Trustees, Mr Roderick Kent, that the purpose of the "Rules revision [in 2002] was consolidation and turning the words into plain English."

10. The most recent iteration is contained in Rule 10.2 of the 2016 Rules which provides as follows:

> "On each 1 April or such other date as the Trustees with the agreement of the Principal Company decide each pension in payment, except for any GMP which is payable and any pension attributable to additional voluntary contributions, will be increased by the increase in the cost of living during the 12 months up to and including the previous January (or such other month as the Trustees with the agreement of the Principal Company decide) subject to a maximum increase in each year of 5%. The pension may be increased by a higher percentage in respect of that period if the Trustees and the Principal Company agree. The cost of living will be measured by the Government's published General (All Items) Index of Retail Prices or if this ceases to be published or becomes inappropriate, such other measure as the Principal Company, in consultation with the Trustees, decides."

Applicable Principles

11. A number of the grounds of appeal are concerned with the proper construction of various provisions of the Scheme documentation. What are the appropriate principles to apply when conducting such an exercise? We were referred to the well-known passage in the judgment of Arden LJ as she then was in *British Airways Pension Trustee Ltd v British Airways plc* [2002] PLR 247, [2002] EWCA Civ 672 at [26] – [32] and to the passage in the judgment of Lewison LJ in *Barnardo's & Ors v Buckinghamshire & Ors* [2016] EWCA Civ 1064, [2017] Pens LR 2 at [8] – [11] where he considered the appropriate approach for the court to adopt post *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619.

12. Since the hearing in this matter, the judgment of the Supreme Court in the *Barnardo's* case has been handed down, the citation of which is [2018] UKSC 55. Lord Hodge with whom Lady Hale, Lord Wilson, Lord Sumption and Lord Briggs agreed, addressed the issue of the construction of pensions schemes at [13] – [18] of his judgment. He referred first to the guidance on the general approach to the construction of contracts and other instruments provided in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900, *Arnold v Britton* [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] AC 1173. He went on to note that "[I]n deciding which interpretative tools will best assist in ascertaining the meaning of an instrument, and the weight to be given to each of the relevant interpretative tools, the court must have regard to the nature and circumstances

of the particular instrument": see [13]. He, then, turned to pension schemes, in particular, as follows:

> "14. A pension scheme, such as the one in issue on this appeal, has several distinctive characteristics which are relevant to the court's selection of the appropriate interpretative tools. First, it is a formal legal document which has been prepared by skilled and specialist legal draftsmen. Secondly, unlike many commercial contracts, it is not the product of commercial negotiation between parties who may have conflicting interests and who may conclude their agreement under considerable pressure of time, leaving loose ends to be sorted out in future. Thirdly, it is an instrument which is designed to operate in the long term, defining people's rights long after the economic and other circumstances, which existed at the time when it was signed, may have ceased to exist. Fourthly, the scheme confers important rights on parties, the members of the pension scheme, who were not parties to the instrument and who may have joined the scheme many years after it was initiated. Fifthly, members of a pension scheme may not have easy access to expert legal advice or be able readily to ascertain the circumstances which existed when the scheme was established.
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> 15. Judges have recognised that these characteristics make it appropriate for the court to give weight to textual analysis, by concentrating on the words which the draftsman has chosen to use and by attaching less weight to the background factual matrix than might be appropriate in certain commercial contracts: *Spooner v British Telecommunications plc* [2000] Pens LR 65, Jonathan Parker J at paras 75-76; *BESTrustees v Stuart* [2001] Pens LR 283, Neuberger J at para 33; *Safeway Ltd v Newton* [2018] Pens LR 2, Lord Briggs, giving the judgment of the Court of Appeal, at paras 21-23. In *Safeway*, Lord Briggs stated (para 22):
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> > "the Deed exists primarily for the benefit of non-parties, that is the employees upon whom pension rights are conferred whether as members or potential members of the Scheme, and upon members of their families (for example in the event of their death). It is therefore a context which is inherently antipathetic to the recognition, by way of departure from plain language, of some common understanding between the principal employer and the trustee, or common dictionary which they may have employed, or even some widespread practice within the pension industry which might illuminate, or give some strained meaning to, the words used."

I agree with that approach. In this context I do not think that the court is assisted by assertions as to whether or not the pensions industry in 1991 could have foreseen or did foresee the criticisms

> of the suitability of the RPI, which later emerged in the public domain, or then thought that it was or was not likely that the RPI would be superseded.
>
> 16. The emphasis on textual analysis as an interpretative tool does not derogate from the need both to avoid undue technicality and to have regard to the practical consequences of any construction. Such an analysis does not involve literalism but includes a purposive construction when that is appropriate. As Millett J stated in *In re Courage Group's Pension Schemes* [1987] 1 WLR 495, 505 there are no special rules of construction applicable to a pension scheme but "its provisions should wherever possible be construed to give reasonable and practical effect to the scheme". Instead, the focus on textual analysis operates as a constraint on the contribution which background factual circumstances, which existed at the time when the scheme was entered into but which would not readily be accessible to its members as time passed, can make to the construction of the scheme.
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> 17. It is nevertheless relevant to the construction of pension schemes that they are drafted to comply with tax rules so as to preserve the considerable benefits which the United Kingdom's tax regime confers on such schemes. They must be construed "against their fiscal backgrounds": *National Grid Co plc v Mayes* [2001] 1 WLR 864, para 18 per Lord Hoffmann; *British Airways Pension Trustees Ltd v British Airways Plc* [2002] Pens LR 247, Arden LJ at para 30. . . .
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> 18. Finally, a focus on textual analysis in the context of the deed containing the scheme must not prevent the court from being alive to the possibility that the draftsman has made a mistake in the use of language or grammar which can be corrected by construction, as occurred in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, where the court can clearly identify both the mistake and the nature of the correction."

In addition, at [28] Lord Hodge reiterated the well-known principle that the Court must construe a pension scheme "without any preconceptions as to whether a construction should favour the sponsoring employer or the members: *British Airways Pension Trustees* (above), Arden LJ at para 31".

Proper Construction of 2016 Rule 10.2 and Application of the "Wednesbury" Test

13. With those principles in mind, I turn to one of the central issues of this appeal being the proper construction of Rule 10.2 of the 2016 Rules. The Judge found that both limbs of the "gateway" in Rule 10.2 ((i) RPI has ceased to be published and (ii) RPI becomes inappropriate) are questions of objective fact and that the question of whether RPI has become inappropriate is a binary one for the Court to answer: see [17], [39] and [90] of the judgment. At [17] the Judge addressed the express words of Rule 10.2 and, in particular, the use of the phrase "becomes inappropriate" without express reference to

a decision-maker which he contrasted with the final words of the provision which confer power on BT in consultation with the Trustees to decide on an alternative measure if RPI has become inappropriate. He also noted that it was common ground that the first limb of the "gateway", (RPI has ceased to be published) raises an issue of objective fact.

14. The Judge addressed the submission that "becomes inappropriate" is an inherently broad concept which involves a value judgment in relation to which reasonable people can differ and that such decisions are typically left to the trustee or the principal employer of a scheme, in part because the potential for having to refer disputes to the Court is reduced if the hurdle for challenge is one of rationality. He concluded as follows:

> "19. . . . These are powerful points, but in my judgment the furthest they lead is to the conclusion that it might, or even would, be *better* if the 2016 Rule had conferred a power on BT (whether alone or jointly with the Trustee). The fact that an alternative solution may have been a better one falls far short of establishing that the parties to the Rules intended that solution. The breadth of the concept (becomes inappropriate) does not mean that it is impossible, or even unsuitable, for it to be determined by the court in case of disagreement. The court is well used to reaching a decision on matters that involve value judgments in a number of different areas."

15. At [21] the Judge noted the fact that there are numerous other powers of determination conferred on BT or on BT and the Trustees jointly in other parts of the 2016 Rule and concluded that the inclusion of those express provisions tended to suggest that where such a power had been intended it had been expressly included and that by implication where the power was not conferred by the express language used, it was intended that the question should be an objective one. He decided that the point had particular force in relation to the final sentence of Rule 10.2 since it was common ground that as a matter of language the words conferring a power on BT to decide (in consultation with the Trustees) relate solely to the second limb of the sentence, in other words, the choice of measure once the gateway has been satisfied or successfully navigated.

16. The Judge rejected Mr Spink QC's submission on behalf of BT that Rule 10.2 is all about finding a replacement index where the default index has become inappropriate and since the second half of the exercise involves a determination by BT so should the first, on the basis that although it might have been better to do so, "there is no inconsistency between BT having a choice as to what measure to turn to but only if, as a matter of objective fact, RPI had either ceased to exist or become inappropriate". See [22].

17. Further, the Judge was not assisted by the terms of Rule 25 of the 1993 Rules. At [24] he concluded that: ". . . to the extent it is permissible to look to the 1993 Rule, the fact that it expressly conferred a power on BT to make a decision in relation to the gateway for departing from RPI as the measure of indexation tends to suggest that the absence of an equivalent express power in the 2016 Rule indicated a deliberate change in approach." Lastly, the Judge considered what Mr Spink had described as the

unsatisfactory consequences and, in particular, the delay in the implementation of any change in index which would flow if "becomes inappropriate" is a matter of objective fact for the Court to decide. He concluded at [25]:

> ". . . In my judgment, these potential consequences do not outweigh the construction reached on the basis of the ordinary meaning of the language. In reality, whether the determination is an objective or a subjective one, nothing will happen unless and until BT makes a decision. The essential difference between the two alternatives, therefore, lies in the circumstances in which that decision can be challenged. If the determination is an objective one, then the decision can be challenged if the court itself concludes, on the balance of probabilities, that RPI has become inappropriate. If the determination is a subjective one, then BT remains throughout the decision-maker, and its decision can only be challenged if the court concludes that BT's decision failed the test of rationality and good faith. The potential for delay exists in either case."

18. BT contends that having taken proper account of the relevant factors, the Judge ought to have found that on the proper construction of Rule 10.2 of the 2016 Rules, the question of whether RPI has become inappropriate is for BT to assess in consultation with the Trustees. It is submitted that the exercise of the power is subject to the "Imperial" duty of good faith and that there is no single right answer but that the question of whether RPI has become inappropriate is a matter of evaluation, in relation to which there is a range of reasonable opinions. Accordingly, it is said that BT's assessment can be challenged only on the grounds that it was "*Wednesbury*" unreasonable and that the conclusion holds good whether the question of whether RPI has become inappropriate is treated as a subjective matter of opinion for BT or as an objective question of fact, because the pre-condition itself is so imprecise and evaluative.

Conclusion:

19. I approach the construction of Rule 10.2 with all of Lord Hodge's guidance in the *Barnardo's* case in mind and give due weight to textual analysis by concentrating on the words that the draftsman chose to use. The first sentence of Rule 10.2 contains the mechanism by which pensions in payment are to be increased and contains express provision for the Trustees with the agreement of BT to decide upon a different date from 1 April from which annual increases are to take effect and to substitute a different month other than January for the start of the 12-month period over which the increase in the cost of living is to be measured, subject to a cap of 5%. The second sentence also states in express terms, that pensions may be increased by a higher percentage if the Trustees and BT agree. The manner in which the cost of living is to be measured is then addressed in the final sentence which I will set out again for convenience. It is as follows:

> "The cost of living will be measured by the Government's published General (All Items) Index of Retail Prices or if this ceases to be published or becomes inappropriate, such other measure as the Principal Company, in consultation with the Trustees, decides."

20. The clause as a whole allows for the increase in pensions in payment by the increase in the cost of living in the previous 12 months, subject to a 5% cap which is itself subject to the ability of BT and the Trustees to agree a higher rate of increase. It seems clear, therefore, that its purpose is to protect pensions in payment from inflation, subject to the cap and the potential for a more generous uplift. The rule provides that the cost of living is to be measured by RPI unless either of the eventualities set out in the last sentence occurs, in which case RPI will be replaced by another "measure". It goes without saying that that substituted "measure" would have to be suitable for the purposes of Rule 10.2 as a whole, namely, the increase of pensions in payment for Section C members of the Scheme.

21. It seems to me that as a matter of textual analysis of Rule 10.2 and the third sentence in particular, the existence of either of the circumstances in the first part of the third sentence of Rule 10.2 is a condition precedent to the replacement of RPI. There is no express reference to BT, or the Trustees for that matter, in the first part of the sentence, in relation to what have been termed the "gateways" or the "triggers" for substitution. As the Judge noted, this is to be contrasted both with the express references to BT and the Trustees in the earlier sentences of the Rule and in the final part of the third sentence. It seems to me that the Judge was right to note that the draftsman made express reference to the person or body intended to make a decision where necessary, and to infer from the lack of such a reference in the first part of the third sentence that, on the face of the language, the determination of whether RPI was no longer published or had become inappropriate was not for BT to determine, with or without consulting the Trustees.

22. It also seems to me that, as the Judge found, the lack of such an express reference to BT in the first part of the third sentence cannot be made good by seeking to read the whole of the sentence together, as Miss Rose QC on behalf of BT suggested. She submitted that the task of determining what "other measure" should replace RPI is inextricably linked with and very similar to the decision as to whether RPI has "become[s] inappropriate" and that BT's duty to decide on a substitute (in consultation with the Trustees) is naturally triggered by its judgment that RPI has become inappropriate. She submitted, therefore, that there is but a single process and that one cannot decide the first question, namely, whether RPI has become inappropriate, without also determining the second. Lord Pannick QC, on behalf of Ms Bruce-Watt, accepted quite rightly that the existence of an alternative appropriate measure of the cost of living for the purposes of the Rule is a relevant factor when determining whether RPI has become inappropriate. However, I agree with him that the point is neutral and takes the matter no further forward. The existence of such a substitute is relevant to the determination of the preceding issue whether or not it is for BT to decide the question. It does not lead inevitably to the conclusion that it is for BT to determine whether the gateway requirement is satisfied.

23. In any event, as I have already mentioned, it seems to me that that is not a natural and ordinary meaning of the words which the parties used. The need to replace RPI as the index to be used to measure the cost of living for the purposes of the increase of pensions in payment arises either if RPI ceases to be published or if it "becomes inappropriate". As a matter of ordinary language, read in the context of the rule as a whole and taking into account its purpose, it seems to me that the gateways are expressed as conditions precedent to the exercise of the obligation to select a substitute

"measure". Although the majority of the submissions made to us were on the basis that the last sentence of Rule 10.2 contains a power to determine whether RPI has become inappropriate and that the task is to determine the person or body in whom the power is vested, it seems to me that the natural meaning of the words does not lead to such a conclusion at all. The language used is not in terms of a power. It is in terms of conditions precedent or gateways to the substitution of a new measure.

24. Both gateways are states of affairs. The first is obviously readily ascertainable and to use the Judge's terminology, is an objective fact. The existence or fulfilment of the second, however, is more difficult to determine. Miss Rose submits that it is a matter of evaluative judgment which is susceptible to a range of reasonable opinions which it is appropriate for BT to decide, and can only be challenged on "*Wednesbury*" grounds if BT's opinion is outside the reasonable range. Although I agree that the existence of the state of affairs in relation to the second gateway must inevitably be determined as a result of an evaluative process, it seems to me that in the end, RPI is either appropriate or it has become inappropriate. As the Judge stated, the question is binary.

25. Furthermore, the Judge was right to record at [16] of his judgment that in practice, in default of agreement by BT and the Trustees as to whether the second and alternative condition or gateway has been satisfied, the matter would fall to be decided by the Court which, as the Judge noted at [19] of his judgment, is well able to reach a decision by means of an evaluative process. This is not the same as construing the provision to mean that BT, BT and the Trustees or the Court has a "power" to decide the question of whether RPI has become inappropriate. It is merely the practical outworking and consequence of the provision itself, given its natural and ordinary meaning. The use of the term "agreement" is misleading, perhaps. If it is clear that RPI has become inappropriate, BT and the Trustees will not dispute the point. If a dispute arises, the issue will be decided by the Court.

26. This is relevant to Miss Rose's submission that given the evaluative nature of the decision-making process and the requirement that BT choose a substitute measure for the cost of living, having consulted the Trustees, the practical effects of a construction which do not place the decision-making power in the hands of BT would cause difficulties and delay and that such consequences militate against the construction being correct in the first place. In this regard, I agree with Lord Pannick that the perceived practical difficulties are a neutral factor or to put it as the Judge did at [25], the potential for delay exists whether the determination to be made is objective or subjective. It is true that whether the condition precedent is satisfied is highly fact sensitive. That is in the nature of the condition itself. Equally, it is true that if BT and the Trustees do not both consider that it is established that RPI has become inappropriate and, accordingly, that the condition precedent to choosing another measure has been satisfied, as I have already mentioned, it would be necessary to seek the directions and determination of the issue by the Court. Such a step would not cause any difficulty or uncertainty in relation to the choice of another "measure" because the obligation to do so cannot arise until it is clear that the condition precedent has been satisfied and BT will either be aware of the reasons for RPI having become inappropriate, because they are patently obvious and a matter of agreement between it and the Trustees, or the Court will have made its reasoning clear.

27. It is equally true that even if BT and the Trustees were *ad idem*, the Trustees might seek the directions of the Court, nevertheless, in an abundance of caution. Furthermore, it

would be open to any member of the Scheme and, in particular, a Section C Member, to challenge BT and the Trustees' conclusion that the condition had been satisfied. That would be the case even if BT were entitled to decide the issue as a matter of its own opinion (with or without consulting the Trustees). Although the basis for such a challenge would be different and, in practice, BT's decision might be more difficult to overturn, it would remain subject to potential challenge nevertheless. It seems to me therefore, that the practical difficulties do not take the matter any further.

28. The argument that a term should be implied into Rule 10.2 was not pursued before us. However, Miss Rose introduced a new argument which was not addressed to the Judge. She sought to draw, by analogy, on public law principles and submitted that the circumstances arising under Rule 10.2 are analogous to those in *R (A) v Croydon London Borough Council (Secretary of State for the Home Department and another intervening) R (M) v Lambeth London Borough Council (Secretary of State for the Home Department and another intervening)* [2009] 1 WLR 2557 [2009] UKSC 8. She says that where the trigger for a duty or obligation is a matter of evaluation, it is a matter for the decision-maker rather than the Court.

29. The cases were concerned with whether on a proper construction of section 20(1) Children Act 1989 it was for the Court or the local authority to determine whether a person is a "child" in the light of the local authority's obligation to provide accommodation for "any child in need within their area who appears to them to require accommodation . . ." as a result of specific circumstances set out in the sub-section. As a matter of statutory construction, Baroness Hale, with whom Lords Neuberger, Scott and Walker agreed, decided that although the Court was capable of determining whether any individual is or was a "child", whether that person was a "child in need" for the purposes of section 20(1) was for the local authority to determine. Baroness Hale dealt with the matter in the following way:

> "24. . . . We are deciding where Parliament intended that the lines be drawn under the Children Act 1989. The task in all these cases is to decide what Parliament intended. In the *Shah* case, it was common ground between the parties on all sides that it was for the local education authority to decide the facts. No one mounted an argument such as has been mounted in this case. We do not need to decide how it would have fared in 1983, any more than we need to speculate upon how it might be decided now. In the *Puhlhofer* case [1986] AC 484 the statutory duty to provide accommodation for the homeless was clearly expressed in terms that the local authority was satisfied that the criteria existed, as indeed is its successor today. Lord Brightman emphasised, at p 518, that the 1977 Act 'abounds with the formula when, or if the housing authority are satisfied as to this, or that, or have reason to believe this, or that' in support of his conclusion that 'Parliament intended the local authority to be the judge of fact'.
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> …
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> 26. . . .The 1989 Act draws a clear and sensible distinction between different kinds of question. The question whether a child is 'in need' requires a number of different value judgments. What

> would be a reasonable standard of health or development for this particular child? How likely is he to achieve it? What services might bring that standard up to a reasonable level? What amounts to a significant impairment of health or development? How likely is that? What services might avoid it? Questions like this are sometimes decided by the courts in the course of care or other proceedings under the Act. Courts are quite used to deciding them upon the evidence for the purpose of deciding what order, if any, to make. But where the issue is not, what order should the court make, but what service should the local authority provide, it is entirely reasonable to assume that Parliament intended such evaluative questions to be determined by the public authority, subject to the control of the courts on the ordinary principles of judicial review. Within the limits of fair process and '*Wednesbury* reasonableness' there are no clear cut right or wrong answers.
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> 27. But the question whether a person is a 'child' is a different kind of question. There is a right or a wrong answer. It may be difficult to determine what that answer is. The decision-makers may have to do their best on the basis of less than perfect or conclusive evidence. But that is true of many questions of fact which regularly come before the courts. That does not prevent them from being questions for the courts rather than for other kinds of decision-makers.
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> 28. The arguments advanced by Mr Béar might have to provide an answer in cases where Parliament has not made its intentions plain. But in this case it appears to me that Parliament has done just that. In section 20(1) a clear distinction is drawn between the question whether there is a 'child in need within their area' and the question whether it appears to the local authority that the child requires accommodation for one of the listed reasons. In section 17(10) a clear distinction is drawn between whether the person is a 'child' and whether that child is to be 'taken to be' in need within the meaning of the Act. 'Taken to be' imports an element of judgment, even an element of deeming in the case of a disabled child, which Parliament may well have intended to be left to the local authority rather than the courts."

30. I gain very little assistance from the *Croydon* and *Lambeth* cases. As Lord Pannick pointed out, the Supreme Court was concerned with a question of statutory interpretation of a particular provision. Baroness Hale's conclusion was not that evaluative judgments are not for the Court to make. She was seeking to determine what Parliament had intended by the statutory provisions in question. Further, it seems to me that there is no general analogy to be drawn. The natural and ordinary meaning of the words in the second gateway in the first part of the final sentence of Rule 10.2 do not create a dichotomy between a matter of objective fact and a matter of judgment, both of which must be determined. They create a single gateway which must be satisfied in order to trigger the substitution obligation. There is no competition as to which of BT

and the Court should make the decision as to whether the gateway condition has been satisfied. It requires the exercise of an evaluative judgment in order to determine whether it has been fulfilled. It is only if BT and the Trustees do not consider the position to be clear that, as a last resort, it is for the Court to determine whether the condition has been satisfied.

31. Lastly, Rule 25 of the 1993 Rules is prayed in aid. It is said that there is no warrant for the Judge's conclusion at [24] of his judgment that there was a deliberate change of approach in 2002. On the contrary, Miss Rose submits that Rule 10.2 should be construed as having the same effect as its forebear in Rule 25 of the 1993 Rules.

32. Before considering the terms of the 1993 Rule, it is important to bear in mind that both Robert Walker J (as he then was) in *National Grid Co plc v Laws & Ors* [1997] PLR 157 at [73] and more recently, Lewison LJ in the *Barnardo's* case, made clear that pension scheme archaeology is unlikely to be of much assistance. This is as a result of the fourth distinctive characteristic to which Lord Hodge referred at [14] of his judgment in the *Barnardo's* case, namely that members of a scheme are not parties to the instrument which confers significant rights upon them and may have joined the scheme many years after it was initiated. In such circumstances, background facts have a very limited role to play in the task of interpretation.

33. In any event, I agree with the Judge that to the extent that anything can be gleaned from Rule 25 of the 1993 Rules, it militates against BT's construction. It seems to me quite clear that there was a substantial change in the wording of the rule in 2002 when Rule 10.2 was first introduced. In Rule 25 the conditions precedent to a substitution of RPI are either that the index has ceased to be published or that it is "so amended as to invalidate it in the view of the Principal Company as a continuous basis for purposes of calculating increases . . ." Not only is the second condition precedent expressed in subjective form being dependent upon the "view" of BT alone, the view is as to whether the index is "so amended as to invalidate it . . . as a continuous basis for the purposes of calculating increases . . . ". As the Judge noted at [24] of his judgment, the differences in the language used in the 1993 and the 2016 Rules reveal a change. The change is as to the entirety of the test. In the 1993 Rules, it was for BT to form its own view of the relevant matters. The wording of Rule 10.2 is significantly different. I do not understand the Judge's reference to a "deliberate change in approach" to have any more significance than that. There is no evidence as to the reasons behind the change in the wording of the provision and in any event subjective intention would not be relevant.

34. Further, the wording of Rule 25 itself is of no real assistance to Ms Rose. Rule 25 provides for the decision to be made by BT alone. However, if Rule 10.2 is to be construed in the way Miss Rose submitted in oral submissions that it ought to be, the decision would not be that of BT alone (as in Rule 25) but that of BT in consultation with the Trustees.

35. The evidence recorded by Mann J in *BT Pension Scheme Trustees Ltd v British Telecommunications plc & Anr* (supra) does not assist Miss Rose either. The 2002 Rules in which Rule 10.2 first appeared may well have been intended as a plain English "re-write" as Mann J recorded and may well have been so. To the extent that the evidence is a record of subjective intention, it is inadmissible as an aid to construction. To the extent that it can be characterised as a circumstance known to or assumed by the parties at the time the rule was drafted, it should be given little weight. As Lord Hodge

explained at [16] of his judgment in the *Barnardo's* case "the focus on textual analysis operates as a constraint on the contribution which background factual circumstances, which existed at the time when the scheme was entered into but which would not readily be accessible to its members as time passed, can make to the construction of the scheme." In any event, in the light of the substantive differences between Rule 25 and Rule 10.2, such a statement takes the matter no further. Although it appears that the general intention was to use plain English in the 2016 version of the Rules, Rule 10.2 contains substantive changes which cannot be explained merely by clarity of expression.

36. The same is true of the "comfort letters" to which we were referred. BT submit that the Judge was wrong not to give them more weight. As the Judge recorded at [23] of his judgment, the letters, dated 9 January 2000 and 18 February 2002 respectively, were written by BT to the then secretary of the Trustees. They included the statement that: "I confirm that in the event of any unforeseen problems, e.g., ambiguities arising in the interpretation of the re-written BTPS Rules, reference will be made to the pre-existing Trust Deed and Rules with a view to resolving such problems." It seems to me that they are a good example of the kind of common understanding between principal employer and trustee to which Lord Briggs referred in the Court of Appeal in the *Safeway* case and to which Lord Hodge referred in *Barnardo's* at [15] and accordingly, should not cause one to depart from the ordinary and natural meaning of the plain language used. In any event, it seems to me that the statement is of no assistance to BT in circumstances such as these, where Rule 10.2 has a significantly different structure and content from its predecessor.

37. It seems to me, therefore, that the Judge was right about the proper construction of Rule 10.2. Whether RPI has become inappropriate is an objective state of affairs which, if it exists, triggers the obligation to choose another measure of the cost of living. Whether the state of affairs exists is inevitably fact sensitive and a matter of evaluative judgment and if there is any dispute, will have to be determined by the Court.

Is the "Clock Re-set" in 2016?

38. Mr Furness QC, on behalf of Ms Bruce-Watt, submits that the execution of the Deed of Amendment dated 5 April 2016 (the "Deed of Amendment") by which the 2016 Rules were brought into effect had the effect of "re-setting the clock" for the purposes of the appropriateness of RPI and that the Judge was wrong to construe the Deed of Amendment solely as an amending deed as he did at [35] of his judgment. Mr Furness says that by executing that deed, BT and the Trustees were agreeing that RPI was appropriate as at that date because Rule 10.2 was contained in the new 2016 Rules and is forward-looking. Accordingly, the reasonable reader would conclude that RPI was agreed to have been appropriate as at the date of the Deed of Amendment itself. I have turned to this issue now because if, in fact, the clock is re-set as at 5 April 2016, there is no need to consider the significance of at least some of the various events relied upon by BT to show that RPI has "become inappropriate" which were dealt with at length by the expert witnesses and the Judge and were also the subject of lengthy submissions before us.

39. The following provisions of the Deed of Amendment are relevant:

"3. The Scheme is governed by Rules dated 20 March 2009 as amended from time to time.

. . .

5. The power to amend the Rules is contained in Rule 37 (Changing the Rules) of the main edition of the Rules which states that except as prohibited by the Pensions Act 1995 and subject to the British Telecommunications Act 1981, the Principal Company and the Trustees may together by deed change the provisions of any or all of the Rules from time to time in force (and may do so retrospectively) subject to certain exceptions. This Power is a reiteration of the power of amendment contained in the Trust Deed and Rules dated 2 March 1983 which established the Scheme and is capable of amending any provision of the Scheme effective on or after that date. All the amendments included in this deed are permitted under this amendment power.

6. In exercise of [the Scheme's] amendment power, the Principal Company and the Trustees amend the current Rules as set out in the Operative part below.

. . .

Operative part

. . .

11. The Special Edition of the Section C Rules dated 20 March 2009, as amended, are replaced with the rules set out in Schedule C and, without prejudice to the generality of the foregoing, are amended so that:-

11.1 the words or other text that are shown as crossed out in Schedule C are omitted; and

11.2 the words or other text that are shown as underlined in Schedule C are inserted.

. . .

12. Except as set out in: …

. . .

the amendments in Schedule A, B and C take effect on and from 6 April 2016.

. . .

> 17. Clean copies of the amended Section A Rules, Section B Rules and Section C Rules are respectively appended to this deed at Schedules D, E and F.
>
> . . .
>
> Schedule F
>
> Section C Rules (Clean)
>
> . . .
>
> Main Edition of the Rules including provisions applicable to Section C Members . . .
>
> . . ."

40. The Judge's conclusion was as follows:

> "34. In my judgment, BT's interpretation is to be preferred. It is clear, in particular from the terms of clause 6, that the operative part of the deed was concerned with *amending* the 2009 Rules. This is reinforced by rule 12.2 which causes the *amendments* in the Schedules to take effect from 6 April 2016. There is no equivalent provision which causes those parts of the 2009 Rules which have not been amended to come into effect on any particular date. Nor is there anything purporting to restate the prior rules.
>
> 35. . . . I consider that the reasonable recipient of the amending deed would assume that the drafter's intention was limited to *amending* the existing Rules and, in particular, that the drafter did *not* intend to alter in any way those provisions of the existing Rules, including Rule 10.2, that had not been identified in Schedule C as being amended.
>
> 36. The second Defendant's argument, however, would mean that the drafter *had* made a substantive alteration to the terms of Rule 10.2: whereas, on 4 April 2016 it had meant "becomes inappropriate [after the date the relevant prior rules came into force]", on 5 April 2016 it now meant "becomes inappropriate [after 5 April 2016]". . . I consider that the reasonable recipient of the document would consider that the "replacement" of the prior rules by the 2016 Rules was intended to be no more than a convenient way of setting out the now amended rules (in contrast to the more cumbersome mechanic of setting out either the amendments to be made, or the amended provisions, but no more, in a schedule)."

41. Mr Furness, for Ms Bruce-Watt, places reliance on the use of the words "are replaced with the rules set out in Schedule C" in clause 11. He submits that "replaced" means what it says. The new rules replaced the old and the inclusion of Rule 10.2 containing the phrase "becomes inappropriate", which is a forward-looking provision, amounts to an affirmation that RPI was not "inappropriate" as at the date of the Deed of Amendment, being 5 April 2016. Mr Furness submits that Rule 10.2 is a temporal provision and accordingly, it is not necessary to amend it in order to change its effect. It is necessary only to execute a new deed. He says that such a construction is supported by the use of the phrase "without prejudice to the generality of the foregoing, are amended . . ." which also appears in clause 11. He submits that if one reads clause 11 as a whole, specific amendments are made to the Rules without prejudice to the generality of that wholesale replacement. While he acknowledges that only the amendments are stated to take effect from 6 April 2016 (see clause 12) he submits that the replacement of the remainder of the rules – i.e. all of the un-amended rules - takes effect from the date of the deed itself, 5 April 2016.

42. In support of his construction, Mr Furness points out that it would have been possible to amend the Rules in order to change the applicable index altogether but that the parties to the Deed of Amendment did not do so. Furthermore, he says that the Judge's answer to what was Issue 8, which is not appealed, reinforces the conclusion that the 2016 Rules re-set the clock for the purposes of when RPI can become inappropriate. Issue 8 was concerned with which rule in relation to increases in pensions in payment applied to pre-2002 leavers. Having considered various transitional provisions, the Judge held that it was the 2016 Rule rather than its predecessor, Rule 25 of the 1993 Rules. See the judgment at [80] – [85].

Conclusion:

43. I agree with Mr Spink on behalf of BT that the Judge was correct in his conclusions on this matter. It seems to me that the reasonable reader of the Deed of Amendment (which is how it is described on its title page) knowing all of the relevant background, and having considered the provisions which I have set out, including in particular, clauses 6, 11 and 12, and the schedules containing the amended versions of the Rules in tracked change form and the clean copies in schedules D, E and F, (the Section C Rules appearing in Schedule F) would conclude that the intention was to amend the Rules as from 6 April 2016 in the manner set out as a result of the tracked changes. If clause 11 is read in the context of clauses 6 and 12 and the Deed of Amendment as a whole, "replace" in clause 11 should, as the Judge put it, be interpreted as no more than a convenient way of setting out the rules in their new and partially amended form.

44. I come to this conclusion despite the fact that it renders the phrase "without prejudice to the generality of the foregoing" in clause 11 redundant. It seems to me that such a consequence is outweighed by the context to which I have referred and in particular, by the fact that clause 12 provides for the amendments to take effect from 6 April 2016. In contrast there is no express reference to the date from which what might be termed "re-affirmed rules" are to take effect. As a matter of practicality, that would be the date of the Deed of Amendment itself, being 5 April 2016. I agree with Mr Spink that this is a strong indicator that the Deed of Amendment was not intended both as a deed of amendment and as a deed of re-affirmation of rules which had not been changed. Furthermore, as the Judge points out at [36] of his judgment, Mr Furness' argument requires one to read the final sentence of Rule 10.2 as if it had been amended to include

the phrase "becomes inappropriate after 5 April 2016. . ." These are all indicators in favour of the Judge's construction, with which I agree.

Meaning of "becomes inappropriate". Did the Judge err in holding that matters can be taken into account if they occurred before 1 May 2002 as long as they were unknown to BT and the Trustees at that date?

45. BT contends that the Judge erred in law in holding at [30] of his judgment that matters may be taken into account when determining whether RPI "becomes inappropriate" whether or not they occurred before 1 May 2002 when Rule 10.2 was first introduced, as long as they were unknown to BT and the Trustees as at that date. The Judge considered what he viewed as the "logically prior point namely whether the 2016 Rule precludes a switch being made from RPI if it had already become inappropriate as at 1 May 2002, upon the adoption of the 2002 Rules, when the language which became the 2002 Rule was first incorporated . . .". Before turning to [30] of the judgment, it is important to note that it was accepted that it was possible that RPI could become inappropriate as a result of a combination of events over time, some of which occurred before 2016, as long as an event occurred after that date which was the "tipping point". One might term this the "snowball effect".

46. The relevant part of [30] is as follows:

> "30. . .
>
> (4) Even if construing the rule as being forward-looking had the potential for damaging the interests of members, I do not agree that this would provide a sufficient basis for construing it otherwise. Mr Spink relied in this respect on the possibility that events had occurred which, unbeknown to BT or the Trustee caused RPI to have already become inappropriate at the time that the 2002 Rule came into effect. In my judgment, if that had occurred (and no-one suggests it in fact did occur) then it would not preclude a switch from RPI being made. That is because a reasonable recipient of the Rules would make the assumption that neither BT nor the Trustee was aware, at the time the Rules came into effect, that RPI had already become inappropriate. Absent that assumption, the rule could not have achieved its purpose, of ensuring that members' pensions were increased by reference to an appropriate index. Accordingly, "becomes" inappropriate is to be construed as encompassing matters, whether or not they occurred before 1 May 2002, provided they were unknown to BT and the Trustee as at that date."

47. During oral submissions before us, Mr Spink accepted that the use of the phrase "becomes inappropriate" in Rule 10.2 in May 2002 was forward looking. Further, BT is not, in fact, relying on events which occurred before May 2002 in order to support its contention that RPI has become inappropriate, nor is it suggesting that RPI was inappropriate as at 1 May 2002. Furthermore, it is accepted on Ms Bruce-Watt's behalf that the Judge's reliance upon the actual knowledge of BT and the Trustees of matters

which occurred before 1 May 2002 is misplaced. It seems therefore, that there is very little left in this ground of appeal.

Conclusion:

48. For the avoidance of doubt, it seems to me quite clear from the natural and ordinary meaning of the language used in Rule 10.2 in May 2002, that "becomes inappropriate" is forward-looking from that date. There is no need to consider the subjective intention of the parties and, in any event, it would be impermissible to do so. As it was put in the written submissions on behalf of Ms Bruce-Watt, the meaning of a document does not depend on whether the parties consciously determined that the words they used should have one meaning rather than another. Their knowledge of events is only relevant to the extent that such events form part of the background factual matrix. Furthermore, it is irrelevant whether the tacit assumption underlying the use of "becomes inappropriate" (that RPI was appropriate at the time) was entirely unconscious or not. It is also irrelevant whether the parties considered that they had no choice other than to adopt RPI in 2002 as a result of section 51 Pensions Act 1995, as BT submits. It is equally irrelevant whether RPI was inappropriate as at that date. It is a matter of objective interpretation of the words chosen by the parties and used in their context. I agree with BT, therefore, that the actual knowledge of the parties as to events before May 2002 is irrelevant and that the Judge's reasoning at [30(4)] was wrong.

Was the Judge wrong to conclude that none of the "clothing change", the "freeze" or "de-designation" when viewed in isolation or cumulatively have caused RPI to become inappropriate?

"becomes inappropriate"

49. The effect of the "clothing change", the "freeze" and "de-designation" upon RPI (each of which are described below) and whether in isolation or together, they rendered it inappropriate, took up a large part of the time on the appeal and are dealt with at length and in detail in the judgment. Before turning to those matters the Judge considered the meaning of "becomes inappropriate" for the purposes of Rule 10.2 at [86] – [98] of his judgment. I will set out his findings here, both as to the meaning of "becomes inappropriate" and as to the usefulness of the expert evidence in order to place the Judge's conclusions and the submissions made to us in relation to each of the events relied upon in context.

50. The Judge concluded that "it is not enough that it would be better to use another index, or that another index has become more appropriate, or that RPI is merely undesirable", that the "hurdle is therefore a high one", that the "concept of appropriateness does not exist in a vacuum, but relates to some other thing or purpose" which in this case was the purposes for which Rule 10.2 exists being the calculation of increases in pensions in payment "so as to reflect increases in the cost of living of pensioners receiving benefits under the Scheme". See [86], [87] and [88].

51. As I have already mentioned, he also decided that the question of whether RPI had become inappropriate was for the Court, and went on to conclude that the fact that a respectable body of opinion believes it to be appropriate to use the index was a factor to be weighed in the balance but was not determinative and to record that it was common ground that "becomes" inappropriate denotes a change in appropriateness:

[90] and [92] of the judgment. He also accepted that: "[I]t may be sufficient, to demonstrate that RPI had "become" inappropriate, that there had been a wholesale loss of confidence in it as an accurate measure of inflation and its widespread discontinuance" but concluded that the point was likely to be theoretical, "since it is unlikely that there would be such consequences without RPI also being de-designated as a National Statistic, which the second Defendant accepts is the sort of indirect change which could cause the gateway to be passed through." See [96] of the judgment.

The experts and the nature of their evidence

52. The Judge heard evidence from two eminent experts in the fields of economics and statistics in relation to the appropriateness of RPI. Each had produced a lengthy report and both had agreed a joint statement. He also heard both experts cross-examined. Mr Paul Johnson, who was called on behalf of BT, is director of the Institute for Fiscal Studies and was formerly director and chief micro-economist at HM Treasury and deputy head of the Government Economic Service. In May 2013, he was asked by the chairman of the United Kingdom Statistics Authority ("UKSA") to carry out a review of the UK price indices. He published a far-reaching report in January 2015. Mr Simon Briscoe who was called on behalf of Ms Bruce-Watt, sits on the Council of the Royal Statistical Society ("RSS"), has worked in the civil service and investment banking, was statistics editor of the Financial Times over a three-decade career as a statistician and economist, and has written several books on economic statistics.

53. The Judge recorded that the experts had provided him with "a wide-ranging review of the history, and respective merits, of RPI and its main rival, the consumer prices index ("CPI")" which subject to important qualifications, he found of considerable assistance in two respects:

> "102. First, in providing a comprehensive picture of how price indices are compiled, the various purposes for which they are produced, and of the advantages and disadvantages of RPI in that context. An understanding of these issues is critical, since the ultimate question to be decided is whether – having regard to the purpose for which reference to an inflation index is necessary under the 2016 Rule and the package of merits/disadvantages of RPI – RPI has become inappropriate for that purpose.
>
> 103. Second, in identifying the materials relied on by either side as relevant to the ultimate issue, including materials emanating from statutory bodies such as the UKSA and the Office of National Statistics ("ONS") and papers from other respected commentators in the field.
>
> 104. In both respects, there was much common ground between the experts, particularly relating to the history of RPI and CPI, and the differences between them."

He also noted, however, that much of the expert evidence was focussed on the question of the appropriateness of RPI generally rather than whether it had become inappropriate for the purposes of Rule 10.2.

The Judge's Treatment of the "clothing change", the "freeze" and "de-designation"

54. The Judge's unchallenged explanation of what has been referred to as the "clothing change" is at [117] of his judgment:

> *"The clothing change – 2010*
>
> 117. In 2010, as part of the numerous routine changes made to both CPI and RPI from year to year, the ONS implemented what were intended to be improvements in the collection and use of clothing prices. As explained by Mr Johnson (and agreed by Mr Briscoe), in collecting and comparing prices, a definition is needed for what counts as the same good one month to the next. If a price collector cannot find the same item in a shop this month as they found last month, then a new item is selected and the new index starts. Because of frequent changes in styles and fashions a large fraction of clothing items were classed as not comparable between one month and the next. The change implemented in 2010 consisted of guidance so as to allow more direct month-to-month comparisons to be made. In other words more items of clothing were henceforth to be considered comparable to one another."

He went on to describe its effect at [118]:

> ". . . Between 2001 and 2009 clothing and footwear prices in the CPI fell by 5.3% on average, and by 2.5% on average in the RPI. In 2011 they rose by 2.3% in the CPI and by 11.5% in the RPI. More importantly, for present purposes, the clothing change resulted in an increase in the formula effect of between 0.4% and 0.5%. Since 2010 the formula effect has resulted in RPI being on average between 0.9% and 1% higher than CPI."

The Judge then set out the evidence in relation to RPI in chronological order, from [128] - [190] of his judgment. At [144] he referred to the report published by UKSA under the provisions of the Statistics and Registration Service Act 2007 containing the UKSA assessment of compliance with the Code of Practice for Official Statistics which, amongst other things, covered RPI. He noted the Office of National Statistics' recommendation to "effectively freeze" the formula used in RPI at [146] and recorded at [147] that:

> "As a consequence of failing to meet the requirements of the code, paragraph 1.2.3 of the document stated that the UKSA "has cancelled the designation of RPI, including the sub-indices and variants listed in section 1.1.2, as National Statistics".

55. Having set out the remainder of the evidence relied upon at [148] – [190], the Judge addressed the clothing change, the freeze and the de-designation of RPI, amongst other things, in isolation before addressing the question of whether by reference to all of the matters cumulatively, RPI had become inappropriate within the meaning of Rule 10.2 of the 2016 Rules.

56. He addressed the clothing change first, in isolation at [193]. As Mr Spink criticises the Judge's reasoning, I will set out the paragraph in full:

> "The clothing change undoubtedly had a significant impact on the formula effect, and is an important factor to take into account when considering the cumulative effect of the seven matters relied on by BT. In itself, however, I do not regard it as having caused RPI to become inappropriate, for two main reasons. The first relates to the broader points I make below in connection with the cumulative effect of the matters relied on, namely that the formula effect, and the 'upward bias' had been known factors in RPI in 2002. RPI was not inappropriate for the purposes of the 2016 Rule before the clothing change, and the only impact of the clothing change was to increase, in percentage terms, the formula effect. This is an instance where, in my judgment, it is relevant to consider the impact on the protection for pensioners if RPI was replaced by any other index. In particular, given that any other index would remove not only that part of the upward bias introduced by the clothing change, but the whole of the upward bias (already running at an average of 0.5%) which had always been present, that would deprive the pensioners of an important element of protection which opting for the index with in-built upward bias gave them. The second reason is that RPI remained a National Statistic, and continued to have widespread support (as shown by the responses to the consultation in 2012) for some time after 2010."

The Judge considered the "freeze" of RPI in isolation at [194] – [198] as follows:

> *"The 'freeze' of RPI*
>
> 194. The initial 'freeze' in RPI occurred with the announcement of the National Statistician in January 2013. It was far from a complete freeze, however, since it envisaged that changes would continue to be made to RPI relating "…to issues such as the annual update of the basket and weights, improvements to data validation and quality assurance etc." What was not to change was "the basic formulation of the RPI", which was accepted as currently defined. This meant, in particular, that the RPI would continue to be based, to the same extent as it currently was, on the Carli formula.
>
> 195. The 'freeze' was reiterated in the statement from Mr Pullinger, the National Statistician, in March 2016. This confirmed that routine changes would continue to be made, including so as to update the basket and weights, computer systems upgrades and improvements to data validation and quality assurance methods. These were described as examples of changes that would continue to be made as "required to continue production of a consistent, fit for purpose RPI". Whereas in 2013

it had been stated that there would be no change to the basic formulation of RPI, it was now stated that "methodological changes" to RPI would be made if those changes were necessary in order to make improvements to CPI and CPIH.

196. In my judgment, the imposition of the freeze in 2013 did not cause RPI to become inappropriate for the purposes of calculating pension increases under the Scheme. As was made clear in the March 2016 announcement, the freeze did not prevent RPI from remaining "fit for purpose". That announcement also recognised that RPI continued to be widely used for legacy purposes. The legacy uses of RPI included its widespread use in private pension schemes – as the responses to the UKSA's 2012 consultation made clear (in particular, those from the RSS and the Pensions Management Institute). These legacy purposes were those for which RPI's fitness was to be maintained. As Mr Johnson accepts, the imposition of the freeze has not so far caused any change. His concerns as to possible future uncertainty are met, in my judgment, by the fact that the UKSA is committed to ensuring that RPI remains fit for purpose, as well as by the fact that, if by reason of its inability to change, RPI in the future becomes inappropriate, then any decision made now does not inhibit a different conclusion being reached then.

197. The UKSA's and ONS's reasons for the imposition of the freeze do not detract from this conclusion. The ONS's paper of January 2013 notes – as the negative qualities of RPI – that it is its use of Carli which is the primary source of the formula effect, and that Carli does not meet current international standards. These were matters that were known to be attributes of RPI in 2002, and thus not matters which can be said to have caused RPI to *become* inappropriate since 2002. In any event, the essential conclusion of the ONS was to reject the proposals for change, in large part because "…Carli's properties are well understood and there is significant value to users in continuity of the RPI's long time series." This was expanded upon (at p.11 of the ONS paper), as follows: "…the respondents' views, that the properties of the Carli are known and have been used in the construction of the RPI since its creation are also pertinent, especially in the context of the Code of Practice for Official Statistics." At paragraph 28, the "weight of users' requirements and the desire for continuity" were cited as reasons militating against change. While the ONS (1) stated that it would not advocate the use of Carli in the construction of a price increase index if it were starting from scratch, (2) recognised there were counterbalancing arguments for change, and (3) noted that "[t]he RPI's continued use should be reassessed by users, and other indices that are closer to international best standards should be considered as alternatives", I do not consider that the views of the ONS, derived from the paper as a whole, constituted a

> conclusion that it was inappropriate for RPI to continue to be used in the legacy contexts where it was already in use.
>
> 198. The reiteration of the 'freeze' in 2016 cannot – if the original imposition had not rendered RPI inappropriate as from 2013 – render it inappropriate from 2016. There was no substantive worsening of the 'freeze'. If anything, there was a minor relaxation to the extent that it made clear that methodological changes would continue to be made, if necessary so as to improve CPI/CPIH."

57. He went on to conclude at [202] that de-designation of RPI as a National Statistic, taken alone, was insufficient to cause RPI to become inappropriate for the purposes calculating pension increases under the Scheme despite the fact that "such a decision by the UK authority charged with oversight of statistics is a very important factor in considering the appropriateness, generally speaking, of RPI as a measure of inflation." He gained textual support for his conclusion from the first gateway in the third sentence of Rule 10.2, being cessation of the publication of RPI altogether and concluded that whilst de-designation "may well be a factor when considering whether [RPI] has become inappropriate", it was "not in itself determinative of that question". He also concluded that its continued publication by the UKSA and "its maintenance for the express purpose of ensuring it remains "fit for purpose" preclude the conclusion that it has become – by reason of its de-designation as a National Statistic alone – inappropriate (i.e. *unfit* for purpose) for the legacy purposes for which it is being maintained".

58. The Judge went on to consider the cumulative effect of the matters relied upon at [203] – [219] and held:

> "219. Having regard to the totality of the matters relied on by BT and the second Defendant [Ms Bruce-Watt] as demonstrating, respectively, the disadvantages and merits of RPI, notwithstanding the powerful statements from the UKSA, ONS and others to the effect that RPI is flawed and that it ought not to be used as a measure of inflation, I have reached the conclusion for the above reasons that RPI has not at this time "become inappropriate" for the purposes of uprating pensions, within the meaning of that phrase in the 2016 Rule so as to meet the gateway threshold."

The Court's Approach

59. BT's criticisms of the Judge's approach are numerous. However, before turning to the details, it is important to be clear about the role of the Court in relation to this ground of the appeal. We were not asked to conduct a re-hearing and it would not have been appropriate to do so. It is for us to conduct a review and to determine whether the Judge

was wrong about whether RPI had become inappropriate as a result of the "clothing change", the "freeze" or the "de-designation" taken in isolation or together, for the reasons set out in the grounds of appeal. The Judge came to an evaluative judgment having considered the plethora of written evidence before him, including detailed expert evidence and having heard the experts explain their evidence in cross-examination. As Sales LJ explained in *Smech Properties Limited v Runnymede Borough Council, Crest Nicholson Operations Limited, CGNU Life Assurance Limited* [2016] EWCA Civ 42 at 27, (a case concerned with the exercise of judicial discretion) in such circumstances:

> "…the task for this court in looking to see whether the judge was 'wrong' so that the appeal should be allowed is to ask whether the judge had legitimate and proper grounds for reaching the decision [s]he did, rather than simply for this court to approach the matter completely afresh and make up its own mind without regard to what the judge decided."

Sales LJ went on, where relevant, as follows:

> "29…Where an appeal is to proceed, like this one, by way of a review of the judgment below rather than a re-hearing, it will often be appropriate for this court to give weight to the assessment of the facts made by the judge below, even where that assessment has been made on the basis of written evidence which is also available to this court. The weight to be given to the judge's own assessment will vary depending on the circumstances of each particular case, the nature of the finding or factual assessment which has been made and the nature and range of evidential materials bearing upon it. Often a judge will make a factual assessment by taking into account expressly or implicitly a range of written evidence and making an overall evaluation of what it shows. Even if this court might disagree if it approached the matter afresh for itself on a re-hearing, it does not follow that the judge lacked legitimate and proper grounds for making her own assessment and hence it does not follow that it can be said that her decision was 'wrong'."

60. Similar statements of principle can be found in the speech of Lord Hoffman in *Biogen Inc v Medeva plc* [1997] 38 BMLR 149 (at page 165) and in the often-quoted judgment of Clarke LJ in *Assicurazioni Generali SpA v Arab Insurance Group* [2003] 1 WLR 577 at [16] where he said:

> "Some conclusions of fact are, however, not conclusions of primary fact of the kind to which I have just referred. They involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and, in my opinion, appellate courts should approach them in a similar way."

61. This passage was approved by Lord Mance in *Datec Electronic Holdings Ltd v United Parcels Service Ltd* [2007] 1 WLR 1325 at [46] as the correct test for the Court of Appeal to apply when faced with appeals against evaluative judgments. It is appropriate therefore, to give proper weight to the Judge's assessment of the evidential materials in this case including the explanations provided by the experts and having done so to determine whether he had legitimate and proper grounds for reaching the decision he did rather than approaching the matter entirely afresh.

Structure of the Criticisms

62. BT submits that the Judge was wrong to conclude at [193], [196-7] and [202] that none of the clothing change, the freeze or the de-designation of RPI as a National Statistic when viewed in isolation has caused RPI to become inappropriate or alternatively that the Judge erred in concluding that the cumulative effect of the matters relied upon had not caused it to become inappropriate having regard in particular to ten matters set out at sub-grounds 3(a) – (j). The matters referred to in the first three sub-grounds are described as "three fundamentally flawed premises" upon which the Judge's decision was based. The remaining sub-grounds at (d) – (j) are described as reasons why the Judge's decision was contrary to the evidence. In addition, Mr Spink developed a number of other alleged flaws in the Judge's reasoning. They were reliance upon the principle of "pensioner protection" and the alleged failure to take account of the 0.5% increase in RPI as a result of the clothing change. I will consider each of the individual matters set out in sub-grounds 3(a) – (j) first and then turn to the treatment of each of the clothing change, the freeze and de-designation and the overarching complaints made about the Judge's approach and reasoning in relation to those matters.

Sub-grounds 3(a), (b) and (c) – Knowledge of BT, Trustees and Draftsman and the Statutory Underpin

63. First, BT submits that the Judge's decision was based upon three fundamentally flawed premises. They are: (a) the Judge's assumptions or findings as to the knowledge of BT and the Trustees in 2002; (b) his assumptions or findings as to the knowledge of the draftsman of the 2002 Rules; and (c) his assumption that the draftsman had a free hand to select an index, ignoring the effect of section 51 Pensions Act 1995. In its written submissions, in relation to (a) and (b), BT contends that the Judge was wrong to find that BT and the Trustees knew or ought to have known of the fact and extent of the formula effect when adopting the 2002 Rules and that he was equally wrong to find that the draftsman of the 2002 Rules opted for RPI in the knowledge that CPI produced a lower rate of inflation. It is said that there was no evidence as to the knowledge of BT and the Trustees or the draftsman at the time.

64. The first two criticisms arise from paragraphs [207] and [208] of the judgment in which the Judge addresses the presence of flaws in RPI in 2002 when Rule 10.2 was first adopted. These paragraphs flow from the Judge's formulation of the question for him to determine, which he explored at [205] and which he had foreshadowed at [87]. He concluded that he had to decide whether RPI was "inappropriate specifically for the purpose of uprating pensions within the meaning of the 2016 Rule" rather than whether it was inappropriate generally. The flaws which the Judge addressed were specifically the fact that: RPI uses the Carli formula (a mathematical formulation) which does not comply with internationally recognised standards; and that it contains an upward bias, as a result of using the Carli formula, compared with CPI or other indices which use

the Jevons formula. At [206] the Judge points out that these flaws underlie each of the matters relied upon by BT before him, including the "freeze" and de-designation. He went on as follows:

> "207. These are flaws which pre-date the first introduction of the relevant wording, in the 2002 Rules. As noted above, in the HM Treasury document published in December 2003, the formula effect was identified as having contributed approximately 0.5% to the gap between CPI and RPIX since 1997. Similarly, David Fenwick's 1999 paper for the ONS referred to the formula effect as a known quantity, commented on the fact that a formula based on a geometric mean would always produce a lower number than that based on an arithmetic mean, noted that the formula effect was particularly pronounced for clothing, and noted that the introduction of broader item descriptions in 1996 contributed to the formula effect. Mr Johnson, in cross-examination, acknowledged that the criticisms which he makes of RPI, including that it 'overstated' inflation by a percentage point a year could have been made equally in 2002, albeit that the extent of the 'overstatement' was increased as a result of the clothing changes in 2010. He also acknowledged that the fact that RPI failed the axiomatic test had been known for a long time, and certainly in 2002 (Q: If you were doing the research from scratch in 2002, let us say, you, like Professor Diewert, would have identified these axioms and would have noted that going back for a long time before then academic statisticians had identified the problem with the arithmetic mean and the failure of the time reversibility: it was well-known? A: Yes, that has been known for a long period.")
>
> 208. Two consequences follow, in my judgment, from this. First, the starting point for considering whether RPI has become inappropriate within the meaning of the 2016 Rule is that RPI must be taken to have been appropriate, for the purposes of calculating increases in pensions payable under the Scheme, notwithstanding the fact that RPI is based on a formula that failed parts of the axiomatic tests and that it produced a headline number for inflation that was 0.5% higher than CPI. Second, the drafter of the 2016 Rule has opted, in the knowledge that CPI produced a lower rate of inflation, to identify as the default index for increasing pension payments, an index which (by reason of the formula on which it is based) produced a higher rate of inflation than an index based on a different formula, in particular CPI. Members therefore had the protection of an index known to have built into it the same upward bias which is the main focus of the current objection to RPI."

65. Sub-ground 3(a) can be dealt with very shortly. First, the Judge based his conclusions upon the premise that Rule 10.2 as adopted in 2002 was forward looking and should be treated as reflecting the fact that the parties had agreed to use RPI and that as a result,

the objective meaning of the words used, in their proper context, can be taken to mean that RPI was accepted as being appropriate at that stage. He came to that conclusion on the basis of the factual background which he set out at [207]. That included widespread knowledge of and criticism of the formula effect and knowledge of the fact that it led to an overstatement of inflation of approximately 0.5%. The first finding at [208] therefore, that RPI must be taken to have been appropriate as at 2002, is not framed in terms of the subjective knowledge of the parties to the 2002 Deed and there was no need for any evidence on that point. In fact, such evidence would have been inadmissible. It was based quite properly upon the relevant factual matrix.

66. The Judge's second point at [208] which is the subject of sub-ground 3(b) is of the same nature and is susceptible to the same answer. The Judge was merely pointing out that any competent draftsman should be taken to be aware of the factual background outlined in [207] when choosing RPI and if construed objectively against its factual matrix, it must be assumed that the draftsman and therefore, the parties to the deed, chose RPI and forward-looking wording with the objective intention that RPI should be considered appropriate as at the date of the deed. In this regard it is to be noted that BT does not rely upon any facts or matters which arose before 2009 and that it was accepted in oral submissions that Rule 10.2 as adopted in 2002 is to be construed as forward looking.

67. The specific matter relied upon at sub-ground (c) is that the Judge disregarded the statutory underpin in 2002 based on RPI. This is a reference to the effect of section 51 Pensions Act 1995. It appears that this is relied upon to show that there was no conscious determination to use RPI as the appropriate index in 2002, or at least that the draftsman did not have a free hand. It seems to me that this too, can be dealt with shortly. As I have already mentioned, the Judge was seeking to interpret the meaning of Rule 10.2 when it was first adopted in 2002, objectively. In doing so, he had no need to consider the actual, subjective intention of the parties and did not do so. Whether the parties actively chose RPI, felt they had no choice or did not address their minds to the issue is irrelevant. Furthermore, the relevant issue with which the Judge was concerned was not whether BT had no choice but to adopt RPI as the primary measure, but the nature and stringency of the "becomes inappropriate" gateway.

68. In any event, as Mr Furness explained the section did not require RPI to be used for all statutory pension increases. Section 51 applies only to pensions accrued on or after 6 April 1997 and requires them to be increased by the "appropriate percentage", specified by the Secretary of State each year, subject to a cap of 5% for benefits accrued between 6 April 1997 and 5 April 2005 and 2.5% for benefits accrued on or after 6 April 2005. As a matter of practice, the Secretary of State has adopted the percentage increases in RPI. It was open to a scheme to avoid the obligation if its rules provided for at least RPI increases up to the relevant caps for pensions earned on or after 6 April 1997.

Sub-ground 3(d) – Continued Use of RPI by Others

69. The remaining matters at sub-grounds 3(d) – (j) go to the general submission that the Judge's decision was contrary to the evidence. I will consider them each in turn. Sub-ground 3(d) can be addressed shortly. It is contended that the Judge placed undue reliance upon the apparent continued use of RPI by others, without consideration of or evidence as to whether such users had any choice in using RPI. In this regard, I agree with the written submissions on behalf of Ms Bruce-Watt. Such consideration would

have been irrelevant. At [196] the Judge noted that it was the ONS' own view that the freeze did not prevent RPI being kept fit for purpose and one of those purposes was for use in relation to private pension schemes. It seems to me therefore, that it is irrelevant whether there was choice in the matter.

Sub-ground 3(e) - Weight to be Given to the Views of the Office of National Statistics

70. This ground is that the Judge failed to have proper regard to the status, role and statutory responsibilities of the ONS and the UKSA and, accordingly, to their views and recommendations as to the appropriateness of RPI and the expert evidence of Mr Johnson in this regard. In fact, in submissions, Mr Spink put this matter somewhat higher. He submitted that in view of its status as the guardian of quality in relation to statistics, the views of the ONS together with those of UKSA should have been treated as being decisive. The ONS no longer considers that RPI is an appropriate measure of inflation. As I understand it, the matter was not put before the Judge in this way and does not feature in the amended grounds of appeal or the skeleton arguments for this appeal in that form.

71. In order to make good his point, Mr Spink took us to the Statistics and Registration Service Act 2007 under which the Statistics Board (the UKSA) was established with "the objective of promoting and safeguarding the production and publication of official statistics that serve the public good" and the obligation upon the Board to prepare, adopt and publish a Code of Practice for Statistics is created: sections 7(1) and 10(1). He also drew our attention to sections 12 and 14 of the 2007 Act under which the Board must assess whether the Code of Practice has been complied with and if it has, must designate statistics as "National Statistics" or otherwise decline to designate them as such and must do so in relation to statistics already designated as "National Statistics." Section 21 provides that the Board must compile, maintain and publish the RPI and goes on to provide that before making any change to the coverage or the basic calculation of RPI, it must consult the Bank of England as to whether the changes would affect the interests of the holders of relevant index-linked gilt-edged securities and if the Bank considers it would, may not make the change without the consent of the Chancellor of the Exchequer: see section 21(2) and (3) of the 2007 Act.

72. Mr Spink explained that UKSA oversees the ONS. Further, sections 30 and 31 of the 2007 Act provide that the National Statistician is to be the chief executive of the Board and its principal adviser on, amongst other things, the quality of official statistics and that the Board must have regard to the National Statistician's advice in relation to such matters.

73. In the light of this background, Mr Spink drew our attention to: the view of the ONS, stated in its Assessment Report of December 2010, as to the compliance of the consumer prices indices produced by the ONS with the Code of Practice for Official Statistics, that "it is not always clear whether the methods that have been developed in the past to produce the Retail Prices Index (RPI) remain the most appropriate methods today"; the decision to "de-designate RPI as a National Statistic, based upon the conclusions in the UKSA Assessment Report of March 2013, that the methods used to produce RPI are not consistent with internationally recognised best practices and the decision to freeze the methods used to produce RPI and contemplate only "routine" changes"; the statement in the same report that it had been noted that "the statistical properties of the Carli meant it was unsuitable (for use in an "elementary index")" (Carli

being the arithmetical formula used to produce the statistics); and the further statement in the same report that the decision effectively to freeze the formula used and contemplate only routine changes was inconsistent with the requirements of the Code of Practice.

74. Mr Spink also drew attention to an ONS news release of 10 January 2013, entitled "National Statistician announces outcome of consultation on RPI" which had recorded that the National Statistician had concluded that the formula used to produce the RPI (the Carli formula) did not meet international standards and recommended the publication of a new index, had noted that the Carli formula was the "primary source of the formula effect difference between the RPI and the CPI" and that a new "RPI-based index" would be published from March 2013 using the Jevons geometric formulation. It was also noted that there was "significant value to users in maintaining the continuity of . . . RPI's long time series without major change, so that it may continue to be used for long-term indexation and for index-linked gilts and bonds . . ." Lastly, it was stated that although the arithmetic formulation would not be used if the ONS were constructing a new price index, the National Statistician recommended that the formulae used in RPI remain unchanged.

75. Although the evidence, including the statements upon which Mr Spink relies, is addressed in detail in the judgment at [128] – [189], he submits that the Judge did not address the significance and importance of these statements, emanating as they did from the statutory, independent body charged with maintaining the quality of the very statistics in question, the National Statistician and the ONS. He says that he should have decided that the "tipping point" in relation to whether RPI had become inappropriate had been reached as a result of the statements and actions of the UKSA, ONS and National Statistician in 2013 or at the very latest in March 2016 when the then National Statistician, John Pullinger, wrote to the Chair of UKSA. The terms of the letter are addressed in some detail at [170] – [174] of the judgment. The particular passage to which our attention was drawn is as follows:

> ". . .
>
> Third, users have sought clarification on the future of the retail prices Index (RPI). Put simply, I believe that the RPI is not a good measure of inflation and does not realistically have the potential to become one. I strongly discourage the use of RPI as a measure of inflation as there are far superior alternatives. Nonetheless, RPI is still used for a number of legacy purposes and its production is mandated by legislation. My intention is that from the start of 2017, ONS would publish the minimum of RPI-related data necessary to ensure the critical and essential needs of existing users are met. . . .
>
> The RPI would continue to be maintained through routine changes. This covers all changes required to continue production of a consistent, fit for purpose RPI (for example the annual update of the basket and weights, computer systems upgrades and improvements to data validation and quality assurance methods). With due consideration to the requirements of the Statistics and Registration Services Act 2007, ONS would only consider

> making methodological changes to the RPI if to not do so would inhibit the improvement of CPIH and the Consumer Prices Index."

Conclusion:

76. It seems to me that the Judge was fully entitled to give the weight to the views of the ONS and UKSA which he did, having considered the evidence and the views of the experts. It was a matter for him, and other than the issues in relation to pensioner protection and the 0.5% increase in RPI as a result of the clothing change, to which I refer below, BT did not point to any alleged error of principle in the Judge's approach. The matters referred to in sub-ground 3(e) as drafted, along with 3(d) and (f) – (j), to which I shall refer below, all amount to challenges to the weight which the Judge gave to various pieces of evidence. In this case it is appropriate to give due weight to the Judge's assessment of the facts, including the explanations provided by the experts, even though, for the most part, it was based on written evidence which was also available to this Court. As I have already mentioned, the way in which Mr Spink put the ONS issue before us is new and as a result was not addressed by the Judge at all. In any event, it seems to me that an appeal on such a ground would be bound to fail. Neither the ONS nor UKSA were asked to determine whether RPI had become inappropriate (for whatever purpose) since 2002 nor were they asked to determine whether it is inappropriate specifically as a result of the matters relied upon by BT. Accordingly, even if he had been asked to do so, the Judge would not have been wrong not to treat the ONS' views or those of the UKSA as decisive of the issue before him.

Sub-grounds 3(f), (i) and (j)

77. The matters set out in sub-grounds (f), (i) and (j) can be taken together. They are concerned essentially with the Judge's evaluation of the evidence. They are: (f) excessive reliance on views and conclusions expressed in various individual papers or consultation response submissions; (i) undue weight given to the evidence of Mr Briscoe; and (j) that the Judge's decision produced a result which was contrary to the overwhelming effect of the evidence. These were not addressed directly in oral submissions. However, Mr Spink drew our attention to a large number of matters which are relevant to the sub-grounds in general terms.

78. He highlighted the review of UK price indices conducted by Mr Johnson (the expert on behalf of BT) on behalf of UKSA, described in the judgment at [149] – [154], in which Mr Johnson called on the UKSA to monitor use of consumer prices statistics and speak out against inappropriate use, particularly of RPI. Mr Spink also noted the UKSA's 2015 consultation described in the judgment at [157] – [166] and, in particular, the response to the consultation of the Royal Statistical Society (the "RSS") which the Judge describes in some detail at [159] – [161] of his judgment. He drew particular attention to the RSS view that RPI should not be frozen and should be improved and updated.

79. In its skeleton argument on Ms Bruce-Watt's cross-appeal, in relation to matters which post-date the execution of the Deed of Amendment in 2016, BT also relies upon: a DWP Notice dated April 2016 which is referred to at [175] of the judgment and concluded that "the current position . . . makes an ongoing use of RPI in our publication untenable"; the decision of OFWAT in May 2016 to move from RPI to CPI or CPIH

with effect from 2019 in relation to revenue indexation and in phases from 2020 to 2025 for capital value indexation, referred to at [176] of the judgment; a letter from the National Statistician, John Pullinger to the Chair of the RPI CPI User Group, dated 9 December 2016, and described at [182] of the judgment, in which CPI was considered and so far as RPI was concerned the letter stated that it would be "impractical to cease its publication" and that it would therefore continue "for these legacy purposes"; and the statement of the ONS Director General made in August 2017 and referred to at [185] of the judgment, which was posted on the ONS website commenting that CPIH was now its "lead measure of inflation" and which continued: "We will continue to produce RPI for legacy uses. However, the RPI is a flawed measure of inflation with serious shortcomings and we do not recommend its use."

80. Mr Spink also referred us to a letter from Sir David Norgrove, the Chair of the UKSA to a Mr Chris Giles dated 15 September 2017, which the Judge described at [187] of the Judgment, in which Sir David observes amongst other things that: "[T]he Authority has been clear publicly for some years that the RPI is a poor measure of inflation"; and ". . . RPI is not an appropriate method for calculating inflation.

81. Mr Spink also relied upon a letter written by Hetan Shah, the Executive Director of the RSS to the Chancellor of the Exchequer which is dated 15 November 2017 and was produced at the hearing, shortly before Mr Briscoe, (the expert on behalf of Ms Bruce-Watt) was cross examined. It was dealt with in the judgment in the following way:

> "189. On 15 November 2017, the Executive Director of the RSS wrote to the Chancellor of the Exchequer expressing the RSS members' increasing concern at the continuing use of two different inflation indices for what is essentially the same purpose i.e. compensation for changing prices. The letter complained in particular that all too often government formulae which affected people's incomes (such as pensions and benefit increases) used CPI, which normally provided a lower estimate of inflation, whereas many key formulae which affected people's outgoings (such as student loan repayments and rail fares) were related to RPI, which generally gives a higher estimate. This was described as not only unfair but unjustifiable. In particular it was said that it was indefensible that millions of people's outgoings are still being linked to RPI nearly 5 years after its technical shortcomings led to it losing National Statistics status. Particularly as it seemed unlikely RPI would ever regain that status after the ONS had made it clear it had no intention of "in effect, repairing this index". The last paragraph read as follows: "accordingly we urge you to announce, in your budget, a timetable for ending long-standing but increasingly untenable uses of the retail prices index so that, in future, people's incomings and outgoings are both increased in ways which – unlike RPI – command widespread confidence and are, statistically, fit for purpose."
>
> 190. I record that the second Defendant objected to the late introduction of this document into evidence, the timing of which precluded Mr Briscoe from undertaking any research into the view of the RSS, and in particular whether the RSS had changed the views it had previously expressed in September 2015 when responding to the UKSA's

> consultation paper dated June 2015. In my judgment, and paying due regard to the Second Defendant's and Mr Briscoe's lack of opportunity to carry out investigations into the RSS's current views, this letter does not demonstrate that the RSS has changed its views as to the appropriateness of RPI, per se, as expressed in September 2015. I note, in particular, that the thrust of this document is an objection to the mis-match between RPI being used for the purposes of increasing millions of people's outgoings, but CPI was used for the purposes of increasing their income. Beyond this, I consider that the letter demonstrates no more than an acceptance by the RSS that its recommendations made in responding to the UKSA's 2015 consultation (including its recommendation that RPI ought not to be frozen) had not been taken on board."

Lastly, Mr Spink sought to rely upon an ONS article entitled "Shortcomings of the Retail Prices Index as a measure of inflation" which was released on 8 March 2018 and accordingly, post-dates the hearing and judgment in this matter.

Applications to Admit Fresh Evidence

82. The late production of the "Hetan Shah" letter coupled with BT's reliance upon it to show that the RSS had changed its mind on RPI, despite the Judge's conclusions at [190] of the judgment, and BT's desire to rely upon the ONS article which post-dates the hearing and the judgment, have led to applications to admit fresh evidence pursuant to CPR 52.21(2)(b) both on behalf of BT and Ms Bruce-Watt. It is appropriate to consider them now before turning to the issue of whether the Judge was entitled to come to the view he did on the evidence or whether his decision was contrary to the overwhelming effect of that evidence.

Ms Bruce-Watt's Application

83. For the sake of convenience, I will consider the application made on behalf of Ms Bruce-Watt first. Permission is sought to admit the written evidence of the RSS to the House of Lords Economic Affairs Committee as part of that committee's ongoing inquiry into RPI. The evidence was published on the House of Lords website on 5 September 2018 and the RSS published a link on its website to its evidence. Ms Bruce-Watt seeks to rely upon the evidence to support the Judge's refusal at [190] of the judgment, to draw the inference from the Hetan Shah letter that the views of the RSS had changed from those set out in the 2012 and 2015 consultation responses, which were summarised in [136] and [159] – [166] of the judgment.

Parliamentary Privilege

84. Before turning to the matters relevant to the exercise of the discretion to admit fresh evidence itself, it is necessary to consider whether the evidence upon which Ms Bruce-Watt seeks to rely is the subject of Parliamentary privilege. Those instructed on behalf of Ms Bruce-Watt gave notice of the application to the Lord Speaker of the House of Lords and to the Attorney General. In a letter from James Cooper, Counsel to the Chairman of Committees, of 5 October 2018, Mr Cooper points out that it is for the Court to decide whether use of the evidence would infringe Article 9 of the Bill of Rights 1689 (cp *R v Chaytor* [2011] 1 AC 684). Article 9 provides: "That the Freedome

of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament."

85. Mr Cooper also pointed out that whether the RSS evidence is consistent with the views it expressed in the 2012 and 2015 consultations would require an assessment to be made and inferences to be drawn which "has the potential to lead to conflicting views" which the Court would have to determine. He stated at paragraph 9 of his letter that:

> "We agree that parliamentary privilege generally will not apply to statements made outside of Parliament even if those statements simply repeat what has been said inside Parliament. But we do not agree with the suggestion in your letter that "parliamentary privilege does not apply to statements made within Parliament and then affirmed outside it". This implies that in such a case parliamentary privilege ceases to apply to the statements made inside Parliament as well as not attaching to the statements made outside if it. In our view, the principle is limited to the effect of parliamentary privilege on statements made outside parliament and does not imply any loss of privilege for the statements made inside Parliament. . ."

He also pointed out quite rightly that whether or not the steps taken by the RSS amount to an affirmation of its statements to Parliament is a question of fact.

86. In a witness statement sworn by Ms Berman on behalf of Ms Bruce-Watt, Ms Berman has explained the steps taken by the RSS outside the Houses of Parliament. She exhibits a print out of the RSS webpage headed "Official and national statistics policy" under which it is stated that "Our policy statements and reports, correspondence and consultation responses relating to official and national statistics are available below". The page is accessible to the public. A large number of weblinks are then listed, the first of which is entitled: "RESPONSE to the inquiry into "The Use of the Retail Prices Index (RPI) currently conducted by the House of Lords Economic Affairs Committee. Issued: 5 September 2018." The link takes one to the evidence given on behalf of the RSS, set out on the Parliamentary website.

87. In this regard, Lord Pannick took us to the *Chaytor* case and in particular, to a passage in the speech of Lord Phillips of Worth Matravers PSC at [45] and [46] concerning affirmation outside the Houses of Parliament of a statement made inside. In fact, it is convenient to view that extract in the context of the passage from [45] – [47] as follows:

> "45. The same point can, however, be made where a Member of Parliament affirms outside the House a statement made in the House. Such an affirmation can found a claim in defamation. This may well involve a challenge to the good faith of the defendant in affirming the statement, which will inferentially challenge his good faith in making the original statement. Lord Bingham of Cornhill dealt with this point when giving the advice of the Judicial Committee of the Privy Council in *Buchanan v Jennings (Attorney General of New Zealand intervening)* [2005] 1 AC 115, para 13:
>
> > 'It is common ground in this appeal that statements made outside Parliament are not protected by absolute privilege even if they simply

> repeat what was said therein. That proposition, established by *R v Abingdon* (1749) 1 Esp 226 and *R v Creevey* (1813) 1 M & S 273 was more recently applied by the High Court of Ontario in *Stopforth v Goyer* (1978) 87 DLR (3d) 373 and the Supreme Court of the United States in *Hutchinson v Proxmire* (1979) 143 US 111, 126 et seq. In such a case there will inevitably be an inquiry at the trial into the honesty of what the defendant had said, and if the defendant's extra-parliamentary statement is found to have been untrue or dishonest the same conclusion would ordinarily, although not always, apply to the parliamentary statement also. But such an inquiry and such a conclusion are not precluded by article 9, because the plaintiff is founding his claim on the extra-parliamentary publication and not the parliamentary publication.'
>
> 46. Lord Bingham went on to hold that it made no difference that, in that case, the repetition of what had been said in Parliament was merely by reference. At para 17 Lord Bingham tested this conclusion for compliance with the principle underlying the absolute privilege accorded to parliamentary statements, namely the right of Members of Parliament to speak their minds in parliament without any risk of incurring liability as a result. He concluded that liability for repeating outside Parliament what had been said within did not conflict with this principle.
>
> 47. The jurisprudence to which I have referred is sparse and does not bear directly on the facts of these appeals. It supports the proposition, however, that the principal matter to which article 9 is directed is freedom of speech and debate in the Houses of Parliament and in parliamentary committees. This is where the core or essential business of Parliament takes place. In considering whether actions outside the Houses and committees fall within parliamentary proceedings because of their connection to them, it is necessary to consider the nature of that connection and whether, if such actions do not enjoy privilege, this is likely to impact adversely on the core or essential business of Parliament."

88. He also drew attention to a passage in the judgment of Stanley Burnton J in *Office of Government Commerce v Information Commissioner (Attorney General intervening)* [2010] QB 98 at [49]: ". . . There is no reason why the courts should not receive evidence of the proceedings of Parliament when they are simply relevant historical facts or events: no "questioning" arises in such a case . . ."

89. I agree with Lord Pannick that reliance upon the evidence given to the Committee is not contrary to Parliamentary privilege. Reliance upon the statement made by the RSS would not lead to questioning of the evidence before the Committee. It is relied upon purely as a matter of historical fact of the views most recently espoused by the RSS. Furthermore, it seems to me that on the facts, the statements made by the RSS to the Committee were repeated on the RSS website. The weblink was a shorthand way of setting out the entirety of the submissions to the Committee which were published on the RSS webpage as its own views. The link appeared under a number of opening paragraphs which state that they contain "[O]ur policy statements and reports, correspondence and consultation responses relating to official and national statistics . .

." As Lord Bingham is recorded as having pointed out in *Buchanan v Jennings (Attorney General of New Zealand intervening)* [2005] 1 AC 115 at [46] of the *Chaytor* case, it makes no difference whether the repetition of what was said in Parliament is merely by reference. However, it is not necessary for me to decide this issue on this second ground.

Conclusion in Relation to Ms Bruce-Watt's Application

90. I must now turn to whether it is appropriate to exercise the Court's discretion to admit the new evidence in the form of the statement on this appeal. The discretion contained in CPR 52.21(2)(b) must be exercised in accordance with the overriding objective. In determining whether the discretion should be exercised, the criteria in *Ladd v Marshall* [1954] 1 WLR 1489 are no longer the primary rules constitutive of the Court's power, but nevertheless, are highly relevant to the exercise of the discretion: *Terluk v Berezovsky* [2011] EWCA Civ 1534. In this case: the statement could not have been obtained at the time of the hearing because it post-dates it; it seems to me that the statement would have an important influence on the outcome of the question of whether the Judge was right to conclude as he did at [190] of the judgment that despite the Hetan Shah letter, the RSS had not changed its views, something which was important to the outcome of the case; and no question arises about whether the statement is credible. All of the "*Ladd v Marshall*" criteria are satisfied therefore. Furthermore, it seems to me that the admission of the statement is consistent with the overriding objective and overall fairness. The Hetan Shah letter was introduced at the last minute, immediately before the cross examination of the experts and left no time for further investigation. It is only fair that Ms Bruce-Watt should have the opportunity to meet the issue which it raises.

91. Accordingly, it is also relevant on this appeal to have regard to the statement which is in the following form:

> "Royal Statistical Society – written evidence (RPI00001) :
>
> "1. This note provides evidence from the Royal Statistical Society (RSS) to the inquiry into 'The Use of the Retail Prices Index' (RPI) currently being conducted by the House of Lords Economic Affairs Committee.
>
> 2. The RSS is a learned society and professional body for statisticians and data analysts. We have around 9,000 members worldwide – but the majority of our membership is UK-based.
>
> Key points
>
> 3. The RSS welcomes this important and timely inquiry by the Economic Affairs committee. We would particularly like to make the four key points, which follow below:
>
> a. in the RSS's view, no one consumer price index can meet all user needs. In particular, different indices are needed for (i) macroeconomic purposes and (ii) measuring the impact of inflation on households

> b. the Office for National Statistics (ONS) is currently developing the new Household Costs Indices (HCIs). Subject to their satisfactory development, we believe the HCIs could ultimately replace, or become an alternative to, the RPI
>
> c. however, the RPI is likely to remain in widespread use for many decades, due to the extent to which it is embedded in countless contracts. Accordingly, we believe the index should be managed so that it is the best measure possible; changes should not be restricted to routine updating
>
> d. the RSS recently convened and hosted an important and well-attended meeting on 'The Future of the RPI', which involved many distinguished speakers. A wide range of views were expressed but there was broad agreement that the current situation is unsatisfactory, change is needed and clarity about the RPI's future is essential."

It seems to me that the statement is some support for and confirmation of the conclusion which the Judge quite properly reached at [190] of his judgment.

BT's Application

92. BT seeks to rely upon new evidence in the form of an ONS article dated 8 March 2018 entitled "Shortcomings of the Retail Prices Index as a measure of inflation." As I have already mentioned, it post-dates the trial and the judgment. It is described as an event which either on its own or in combination with other events is sufficient to require the Court to find that RPI has now become inappropriate and as a neat summary of the ONS view on RPI.

93. Quite clearly it could not have been produced with due diligence at the trial because it did not exist at that stage. Would it have had an important influence on the outcome of the case? In this regard, I agree with those instructed on behalf of Ms Bruce-Watt that the issue was whether RPI had become inappropriate as at the date of the trial. If the further evidence is to be deployed as an event in itself or in combination with others, it can only be relevant to whether RPI has become inappropriate as at the date of the appeal. In effect, BT would be extending the list of events and matters upon which it seeks to rely to include those which have occurred since the trial in December 2017. The premise assumes that this Court is determining the original issue before the Judge but as at the date of the appeal. That is not the exercise which the Court is undertaking on this appeal. Alternatively, if the evidence is merely a neat summary of the views of the ONS, it seems to me that it cannot be characterised as having an important influence on the case. Clearly, the third "*Ladd v Marshall*" requirement is satisfied.

94. It seems to me that having taken account of the "*Ladd v Marshall*" factors in the light of the overriding objective, it would not be appropriate to exercise the Court's discretion in order to admit this new evidence. Not only is the second "*Ladd v Marshall*" factor not satisfied but also the admission of the evidence would be unfair. It would have the effect of "moving the goal posts". Ms Bruce-Watt might well seek to rely upon further evidence as a result, and the finality of litigation would be undermined. BT's application is dismissed, therefore.

Conclusion in Relation to Sub-grounds (f), (i) and (j)

95. Despite the large number of matters brought to our attention by Mr Spink, chosen from the plethora of evidence drawn to the Judge's attention, in the absence of an error in principle, it seems to me that BT cannot succeed on these sub-grounds. They amount to no more than a difference of opinion about the weight to be given to the evidence. There is no basis for concluding that the Judge did not have legitimate and proper grounds for reaching the decision he did, or to conclude that his conclusions lay outside the bounds within which reasonable disagreement is possible. It is clear from [213] of the judgment that overall, the Judge accepted the evidence of Mr Briscoe in preference to that of Mr Johnson, which he was entitled to do, having heard both of them being cross-examined and having taken account of the evidence as a whole. Mr Briscoe had also endorsed each of the papers to which the Judge refers and considered the responses to the 2012 and the 2015 consultation.

96. The Judge was entitled to take a view of the other materials drawn to his attention, based upon the explanations provided by the experts in relation to them in their reports and in cross-examination, and the submissions made at the time. In oral submissions Mr Spink criticised the Judge specifically for relying upon Dr Altmann's evidence which he summarised at [135] and referred to at [156] and [213] of his judgment on the grounds that she was not qualified and because her paper was based on a discredited theory in relation to consumer substitution behaviour. This criticism of Dr Altmann was not raised at trial and Mr Briscoe, who relied upon her paper, was not cross-examined about why he was relying upon a paper based upon an allegedly discredited theory and written by a person who was allegedly not an expert in the field. It seems to me that in the circumstances, it is much too late to seek to raise these matters now.

97. Further, when considering the large amount of evidence drawn to our attention on this appeal and the evidence as a whole, it is important to bear in mind, as the Judge did, that the views of the ONS, the UKSA and the RSS, the correspondence and papers to which we have been referred and which the Judge considered, were just that. They were views about RPI and what ought to be done in order to create a more accurate measure of inflation. It seems to me that the Judge was entitled to approach them as he did. He found they were not directed at whether RPI had become inappropriate for the purposes of Rule 10.2, which was the issue with which he was concerned and therefore, they were not decisive.

Sub-paragraphs 3(g) and (h)

98. The matters at sub-grounds 3(g) and (h) are slightly different. Sub-ground 3(g) is concerned with the Judge's alleged misconception as to the views of the ONS/UKSA as to the "fitness for purpose" of RPI for calculating pension increases. It is said that the Judge misunderstood the following lines from the National Statistician's March 2016 statement:

> "The RPI would continue to be maintained through routine changes. This covers all changes required to continue production of a consistent, fit for purpose RPI."

The Judge considered this statement in the context of the "freeze" at [196] of his judgment and it seems to me quite clear that he was under no misapprehension. He

expressly stated that it was for legacy purposes that RPI's fitness for purposes was to be maintained. He did not suggest that the statement was an overall endorsement of RPI's appropriateness. In the circumstances, it seems to me that this ground is entirely misconceived.

99. Sub-ground 3(h) is concerned with the Judge's alleged misconception as to the assistance that could properly be provided to the Court by the expert evidence. At [124] the Judge stated:

> "In the end, I find that little assistance is to be gained from the respective experts' views on the ultimate question for two reasons. First, because their views on the "appropriateness" or otherwise of RPI, generally or in respect of uprating pensions generally, is of only limited relevance to the question of its appropriateness specifically for the purpose of calculating pensions increases under the Scheme. Second, because the question whether RPI has "become" inappropriate – again with specific reference to the meaning of that phrase in the 2016 Rule – is not one in respect of which either expert can claim any particular expertise."

100. It seems to me that there is nothing of any substance in this criticism. The Judge was right to take account of the evidence as a whole and come to his own evaluative judgment as to whether RPI had become inappropriate for the purposes of Rule 10.2. The question was ultimately for him. The question was not whether RPI was generally suitable for use in relation to the increase of pensions but was specific to the purposes of Rule 10.2 itself. The Judge relied upon the expert evidence to assist him in the way which he explained at [101] – [103] and ultimately weighed the evidence in a way which was consonant with Mr Briscoe's expert evidence.

Did the Judge Err in Principle?

"Pensioner Protection"

101. Did the Judge misdirect himself in a way which tainted his reasoning and his treatment of the evidence in relation to the appropriateness of RPI? Mr Spink says that the Judge erred in approaching the matter through the spectrum of "pensioner protection" and as a result came to an erroneous conclusion. As I have already mentioned, the issue is foreshadowed at [87] and is addressed at [205] and at [209] and [211] – [213] of the judgment:

> "205. The question I have to determine, however, is not whether RPI is inappropriate, generally speaking, as a measure of inflation, but whether it is inappropriate specifically for the purpose of uprating pensions within the meaning of the 2016 Rule. Similar to the analysis undertaken by the ONS when determining to retain the Carli formula in RPI in January 2013, while it may well be true that it would be inappropriate to use RPI if starting from scratch, for example in a pension scheme created today, it does not necessarily follow that RPI has "become inappropriate" for the purposes of uprating pensions in the Scheme. In this context, I consider that two factors (developed in the following paragraphs) are particularly important: first, the flaws which underlie all of the matters relied on by BT were present, and known to be

present, in RPI in 2002, albeit that the formula effect has worsened, and the perception of those flaws has hardened, in the intervening years; and second, the purpose of the 2016 Rule is to provide protection for pensioners against increases in the real cost of living to which they are likely to be subjected.

. . . .

209. While I acknowledge (as noted above) the limitations in an appeal in the abstract to the purpose of an uprating provision being to protect pensioners nevertheless in considering the concept of "appropriateness" within the rule it is in my judgment legitimate to have regard to that purpose. In particular, it would be an important factor *against* concluding that RPI has become inappropriate if jettisoning RPI would introduce a material risk that increases in pensions would not keep rate with increases in the cost of living likely to be experienced by the relevant pensioners. This is particularly so taking into account that the pension is likely to constitute the principal, if not the sole, source of income for the relevant pensioners.

210. On the basis of the evidence I have summarised above, I consider that there are reasonable grounds to conclude that jettisoning RPI would lead to such a material risk for the pensioners under the Scheme.

211. First, as is common ground, inflation is a latent variable, and any index can do no more than provide an estimate of the increase in cost of living as experienced by any given household, or even type of household. Thus, it is impossible to say that RPI is wrong and CPI is right, or even that RPI is *more* wrong (or right) than CPI, as an estimate of the likely increase in cost of living for pensioners under the Scheme.

212. Mr Johnson, while accepting that this is so, says nevertheless that "if you know there is a problem in the construction of an index in the way that the Carli creates biases, then whilst you might not know the right answer, you do know that you are trying to get there in the wrong way." This is, however, not a complete answer to the latent variable point, since it is common ground that there is no established correlation between the fact that Carli fails certain of the axioms, and the extent of the formula effect.

213. Second, there is convincing evidence (see, for example, the papers cited above from Dr Altmann, the Rowntree Foundation, Donald Hirsch and the RSS) to support Mr Briscoe's conclusion that there are certain respects in which CPI might be said to *under*estimate inflation (albeit probably to a lesser extent) as well as respects in which RPI might be said to *over*estimate it, and that in some instances pensioners are likely to be particularly affected. While the most significant cause of the difference between RPI and CPI is the formula effect, there are other material causes, including property costs, which accounted on average

> for 0.5% of the increase. Although another factor – termed "weights" in the Office of Budgetary Responsibility's revised assumptions for the long-run wedge between CPI and RPI – accounts for a negative difference of -0.4%, that does not detract from the point that there are reasons why RPI is greater than CPI which are not in themselves sufficient to render RPI inappropriate (and in any event have not caused RPI to *become* inappropriate since 2002). As I have noted in connection with the clothing change, a consequence of replacing RPI by an index based on Jevons would wholly remove the upward bias, a substantial part of which was inherent in RPI on its adoption as the default index in 2002."

102. In this regard, I agree with Mr Furness on behalf of Ms Bruce-Watt. It seems to me that when read as a whole, the Judge's conclusions were not tainted, as Mr Spink would have it, by his conclusions in relation to "pensioner protection". The Judge was right to approach the concept of "appropriateness" from the context in which it arises, rather than in the abstract. It is necessary to determine whether RPI has become inappropriate as the measure of the cost of living for the purposes of Rule 10.2 which itself provides for the increase in pensions in payment under the Scheme. One must begin, therefore, from the premise that RPI was the chosen index and consider whether that index has become inappropriate for the task for which it is employed under the rule. I do not read the Judge's conclusions at [205] and [209] – [213] of his judgment and [209] and [210] in particular, as recording anything more than the need to consider "appropriateness" in context. It is an out-working of his conclusion in relation to the meaning of "becomes inappropriate" at [87]. He was not treating pensioners as a special class. He was merely weighing the totality of the evidence in the light of the fact that inflation is a latent variable, RPI was the chosen index and the task for which the index is required. His approach was in accordance with the purpose of Rule 10.2 and, accordingly, does not vitiate his weighing of the evidence.

Comparison of RPI with CPI

103. It is also submitted that the Judge was wrong to compare RPI with CPI at [211] - [213] when seeking to determine whether RPI had become inappropriate. This was not a ground of appeal. However, it seems to me that it, too is a short point. The existence and nature of an alternative index is relevant to the question of whether RPI is inappropriate. If there were no other index at all, or only one which was inappropriate for the task, it would have a direct bearing on the appropriateness or otherwise of RPI. The Judge's approach reveals no error.

Formula Effect, the Clothing Change and the 0.5%

104. Mr Spink also drew attention to the fact that, as the Judge recorded at [111] of his judgment, the experts were "agreed that as a consequence of using Carli, RPI has an "upward bias" such that it is consistently higher than CPI . . .", a consequence which was referred to as "the formula effect." As I have already mentioned, the Judge recorded that the formula effect contributed approximately 0.5% to the gap between RPI and CPI from 1997 to 2010 and that the improvement in the collection of clothing prices in 2010 had a dramatic effect: see [116] - [119] of the judgment. In particular, the Judge set out the changes caused by the clothing change at [118] to which I referred at [54] above. He went on to deal with the clothing change in more detail at [193].

105. Mr Spink submitted that the Judge's reasoning was flawed because it is underpinned by his principle of "pensioner protection" which I have already considered. He also submitted that the Judge failed to take account of the doubling of the formula effect as a result of the clothing change both in itself and as an indicator of the "inappropriateness" of RPI as a cost of living indicator. Mr Spink says that it was quite obvious that inflation cannot have gone up by 0.5%. Lastly, given that de-designation took place in 2013, only after a long process of review and consultation which had begun in 2010/2011, Mr Spink says that there is nothing in the Judge's temporal point at [193].

106. Mr Furness submits that the point taken in relation to what is said to be the Judge's error in failing to take account of the 0.5% increase caused by the clothing change is entirely new and he objects to it being taken now. He points out that the Judge noted at [118] that the clothing change had an upward effect both on RPI and CPI. He also points out that the point was not put to either of the experts and that all that can be said is that the true measure of inflation is unknown and that RPI produces a higher percentage than CPI.

107. In my judgment, the Judge was entitled to come to the view he did on the evidence before him. He concluded that the clothing change merely magnified the effect of the Carli formula which was already well known (and was known before 2002) and did not, in itself cause RPI to become inappropriate. It is not for us to re-assess and re-evaluate the evidence. Furthermore, it is too late to raise new points which were not before the Judge and were not addressed by the experts in their lengthy reports, joint statement and cross examination.

"The Freeze" and De-designation

108. Mr Spink submits that as a result of the freeze, RPI lost its fundamental quality which a statistic has to have if it is to live up to the Code of Practice, namely the quality of continuous improvement. Accordingly, he says that this was not merely a change of opinion, but a fundamental difference in RPI itself. Furthermore, he says that the freeze locked in the flaws in RPI which render it a poor measure of inflation. Accordingly, Mr Spink submits that the Judge erred at [196] of his judgment in basing his reasoning on Mr Pullinger's announcement in March 2016 that the freeze did not prevent RPI from being fit for purpose. He says it is clear that the ONS had in mind fitness for purposes for the legacy user, in the sense of those tied to the use of RPI in the long term, including the index-linked gilt market, and that it is a misunderstanding of the evidence to conclude that it was fit for purpose for pension schemes generally.

109. As Mr Furness pointed out, the experts agreed in their joint statement that it is not possible to identify any changes to RPI as a result of the "freeze" or de- designation and that it is not possible to identify any changes which would have been made had those decisions not been made. In such circumstances, it seems to me that it is impossible to argue that the Judge was not entitled to come to the conclusion he did on the evidence whether as to the effect of the freeze or de-designation upon the appropriateness of RPI for the purposes of Rule 10.2, whether taken alone or cumulatively.

110. For all the reasons set out above, I consider that the Judge was entitled to come to the decision he did on the evidence. I do not consider that he erred in his approach or in

principle. He was entitled to conclude that RPI had not become inappropriate as a result of the clothing change, the freeze or de-designation, taken separately or together and his reasoning was not subject to an error in principle.

Proper construction of Rule 25 of the 1993 Rules

111. Grounds 4-6 of BT's Appeal are concerned with Rule 25 of the 1993 Rules. In the light of our conclusions in relation to the construction of rule 10.2 and whether the Judge's decision in relation to whether RPI has become inappropriate can be successfully challenged, it seems likely that any issues arising in relation to the 1993 Rules will be academic. Nevertheless, for the sake of completeness and in case any issues remain, I will address the grounds here.

112. How should Rule 25 of the 1993 Rules be construed? What is the meaning of "...so amended as to invalidate it . . . as a continuous basis for calculation of pension increases . . .?" The Judge dealt with the matter at [222] – [226] of his judgment. It is said that the Judge's interpretation of the gateway test in the 1993 Rule was wrong in numerous respects. First, he was wrong in finding at [223] that "amendment" is different from "change" and that "amendment" should be construed to connote an alteration to the formula or method of calculation of RPI. Secondly, he was wrong at [225] and [226] to decide that ". . .as to invalidate it as a continuous basis for calculating pension increases" has a "significantly narrowing effect on the gateway" and that sub-rule (3) of the 1993 Rule was concerned with discontinuity between consecutive years rather than whether RPI remained valid for use on a continuous basis, in the sense of a consistent and reliable basis over time.

113. BT submits that the same broad range of facts and matters can be taken into account by the decision-maker in determining whether the gateway has been passed through, whether under the 1993 or the 2016 Rule. It is said that the decision-maker is not confined to considering merely amendments to the compilation of RPI, but can decide if RPI can now be said to be invalid as a continuous basis for the purposes of calculating increases, whether as a result of (1) operational changes, (2) direct effects of those changes, such as de-designation, or (3) other consequences flowing from those changes and their direct effects.

114. In this regard, Miss Rose, on behalf of BT, submitted that although the wording of rule 25 of the 1993 Rules is more technical, it is not significantly different from the 2002 wording and she relied upon the "comfort letters" for support for the proposition that the effect of rule 25 and rule 10.2 was not intended to be different. I have already expressed a view about the limited effect of the "comfort letters". In any event, there can be no question of reading back from the wording of Rule 10.2 of the 2016 Rules to Rule 25, in order to seek to broaden the meaning of its express wording which is what Miss Rose's submission would entail. Neither the "comfort letters" nor the terms of Rule 10.2 itself can be an aid to construction of the earlier provision.

115. I consider that the Judge was right to come to the conclusions he did. First, it seems to me that the ordinary and natural meaning of the word ". . . amended …" when read in the context of the rule as a whole, having taken account of its purpose, requires an amendment to RPI itself, being a direct change to its compilation or the way in which it is calculated. De-designation, freezing in the sense of restricting the range of changes to be made in the future, or changes in perception as to suitability, would be insufficient.

Secondly, any amendment must have occurred since the 1993 Rules were made. I understand that to be common ground. Thirdly, as the Judge points out, the amendment in question must be one which "invalidates it [RPI]. . . as a continuous basis for the purposes of calculating increases. . .". I agree with the submission on behalf of Ms Bruce-Watt and with the Judge in this regard. The ordinary and natural meaning of the words is that the amendment to RPI must be one which has the effect of preventing a year on year comparison for the purposes of calculating increases. It is to enable a comparison of like with like rather than of apples with pears, as the Judge put it. As the Judge points out, that construction is supported by the wording in the remainder of the rule which provides that if the gateway is passed, the alternative method chosen for calculating increases must be either another index or an "alternative basis of comparison."

116. The Judge went on to consider the application of the gateway in Rule 25 of the 1993 Rule at [231] – [234] of his judgment. Having delineated the exercise he was being required to undertake, the Judge stated at [232] that in view of his conclusion as to the meaning of "amendment" only one matter qualified and that was what has been referred to as the "clothing change". He went on at [233] to state that in the light of his decision about the meaning of "so as to invalidate . . ." the clothing change "could only fall within the definition of the 1993 Rules if it invalidated the continuity of RPI, so as to prevent a like-for-like comparison between the current and prior year." He went on as follows:

> "233. . . In my judgment, given the routine nature of the clothing change, and the fact that its impact was limited to contributing to a widening of the already existing formula effect, it does not qualify as such an amendment. More importantly, I do not consider that a rational decision-maker in the position of BT could determine otherwise, because to do so would constitute a mis-interpretation of the rule.
>
> 234. Finally, the widening of the formula effect occurred in 2010. Even if that had the effect of precluding a valid comparison as between 2009 and 2010, then for the reasons given in paragraph 228 above, the formula effect has remained constant ever since so that the clothing change, in 2010, cannot have constituted an amendment that rendered RPI invalid for the purposes of comparison as between any of the consecutive years since 2011."

117. First, Mr Spink submits that the "freeze" was an "amendment" for the purposes of Rule 25 of the 1993 Rule because as a result, RPI lost an inherent characteristic, namely, benefitting from continuous improvement. As a result, he says that the inherent operation and suitability of RPI changed. He submits that accordingly, the Judge ought to have held that the "freeze" amounted to an amendment for the purposes of Rule 25.

118. Furthermore, Mr Spink submits that the Judge was wrong to decide that the clothing change, whilst being an "amendment" did not satisfy the remainder of the gateway requirements. In his written submissions, Mr Spink states that the Judge was wrong to hold that the impact of the clothing change was limited to a widening of the existing formula effect. He says that it led to the freeze, the de-designation of RPI as a National Statistic and the subsequent events relied upon by BT under Issue 3. Further, even if one ignores the wider implications of the clothing change, Mr Spink submits that it was

illogical to find that the doubling of the formula effect caused by the clothing change did not, of itself, meet the gateway test.

119. In relation to the "freeze" I agree with Mr Furness. The short answer is that the experts agreed that the freeze had made no difference to RPI to date. They agreed in their Joint Statement that: it is not possible to identify any changes to RPI made as a result of the decision to "freeze", nor as a result of de-designation, and that it is not possible to identify any changes that would have been made to RPI had the decision to freeze not been taken. Furthermore, it was the unchallenged evidence at trial that notwithstanding the freeze, RPI had continued to be updated and improved in light of changes in spending habits and improvements in data sources. As a result, it seems to me that it is impossible to argue the Judge was wrong to come to the conclusion that neither the freeze or de-designation amounted to an amendment to RPI itself which fell within the parameters of Rule 25(3) of the 1993 Rules.

120. What about the clothing change? It is accepted that that was an amendment for the purposes of Rule 25(3). Did the Judge err in concluding as he did at [233] and [234] that no reasonable decision-maker would conclude that the clothing change was such as to invalidate RPI as a continuous basis for the purposes of calculating increases? In my judgment, he did not. As the written submissions on behalf of Ms Bruce-Watt point out: RPI continued to be used for a multitude of purposes after 2010 including by government, pension schemes, investors and private enterprises and there is no suggestion that a valid comparison could not be made; and perhaps more importantly, Mr Johnson, the expert on behalf of BT, does not suggest in his reports that the clothing change created a discontinuity in the compilation of RPI such that it cannot be used as a continuous basis of comparison. At paragraph 4 of his first report he set out a number of matters which in his opinion are necessary in order that a measure of inflation be considered "continuous". This included: "keep[ing] up to date. . .. being a continuous measure absolutely does not mean that nothing changes. At least the basket of goods and the weight applied need to keep pace with actual consumer behaviours", and "achieve an appropriate balance between continuous improvement and ensuring continuity of measuring the same thing. In general, when better data becomes available or it becomes evident that a different measure of prices is a better reflection of actual prices then continuity is best served by change. . ."

Must the "powers" in Rule 10.2 and Rule 25(3) respectively be Exercised Within a Reasonable Time?

121. In the light of my conclusions, it is not necessary to consider Grounds 2 and 3 of Ms Bruce-Watt's Cross Appeal. Ground 2 proceeded on the false premise that the second gateway as to whether RPI had become inappropriate for the purposes of Rule 10.2 of the 2016 Rules was framed as a power and that that power could be exercised by BT with or without consulting the Trustees. In summary, it was concerned with whether the Judge had erred in holding that a failure to exercise that purported power within a reasonable time of the occurrence or event sufficient to permit the decision-maker properly to make the determination, did not cause the power to lapse. It was contended that the Court should have held that a reasonable time had elapsed since each of the events or matters relied upon by BT and accordingly, it was no longer open to it to decide that RPI has become inappropriate relying upon those matters. Ground 3 was to the same effect as Ground 2 but related to BT's power under Rule 25(3) of the 1993 Rules.

122. It has been unnecessary to consider the arguments put forward by analogy with the treatment of powers in family trusts in relation to either of these grounds and I should not be taken to have affirmed any of the analyses put forward.

123. For all of the reasons set out above, I would dismiss the appeal.

Lord Justice David Richards:

124. I agree that this appeal should be dismissed for the reasons given by Asplin LJ in her judgment.

125. As my Lady records, the application by the respondent to adduce in evidence the text of the evidence given by the Royal Statistical Society (the RSS) to the House of Lords Economic Affairs Committee raised the issue whether the receipt of that evidence would contravene article 9 of the Bill of Rights, thereby breaching Parliamentary privilege. I agree with Asplin LJ that no breach was involved, because its purpose was simply to show the views expressed by the RSS in that evidence, not to place any weight on the evidence and thereby open it to any questioning in breach of article 9.

126. Asplin LJ goes on to express the view, without resting her decision on this ground, that the weblink on the RSS website to its evidence to the Committee constituted a repetition of the evidence outside Parliament, so that privilege did not attach to it. If correct, this would go beyond those cases in which a repetition of or reference to statements in Parliament has previously been found: see the comprehensive review of those cases by Lord Bingham in *Buchanan v Jennings (Attorney General of New Zealand intervening)* [2004] UKPC 36; [2005] 1 AC 115 (in which it was held that, where an MP had said outside Parliament that he did not resile from a statement he had made in Parliament, he had adopted and confirmed the statement such that he could be liable in defamation). It may be noted that in this case the weblink was to Parliament's own website.

127. I prefer to express no view on this point but to leave it to a case where it is necessary to the Court's decision.

Lord Justice Patten:

128. I agree that the appeal should be dismissed for the reasons given by Asplin LJ. Like David Richards LJ, I prefer to treat the RSS evidence as not covered by Parliamentary privilege on the simple ground that its only purpose was to confirm what the views of the RSS are and I express no opinion about the issue of repetition.