Neutral Citation Number: [2016]EWHC 1530 (Ch)

Case No: HC-2015-002634

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27.6.16

Before :

TIMOTHY FANCOURT QC
(sitting as a Deputy Judge of the High Court)

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Between :

(1) IAN SHANNAN **(2) ERIC ROGER HALL** **(3) WILLIAM KIM QUILLIN**	**Claimants**
- and -	
(1) VIAVI SOLUTIONS UK LIMITED **(2) MALCOLM FROUDE** **(3) BOND PEARCE (a firm)** **(4) BOND PEARCE LLP** **(5) AON CONSULTING LIMITED**	**Defendants**

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James McCreath (instructed by **TLT Solicitors LLP**) for the **Claimants**
Jonathan Evans QC and Bobby Friedman (instructed by **Shoosmiths LLP**) for the **First Defendant**
Nicolas Stallworthy QC and Simon Oakes (instructed by **Stephenson Harwood LLP**) for the **Second Defendant**
The Third, Fourth and Fifth Defendants were not represented

Hearing dates: 13, 16, 17 May 2016

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Approved Judgment

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

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Mr Fancourt QC :

Introduction

1. This action is brought by the trustees of the Wandel & Goltermann Retirement Benefits Scheme ("the Scheme") to determine issues relating to the validity of various deeds, by which amendments were purportedly made to the definitive deed and rules of the Scheme, and connected matters.

2. The First Defendant is the company that was in fact acting as principal employer for the purposes of the Scheme between 1983 and 1997, and again in 2003. The Scheme closed to further accrual later in 2003. One of the issues that I have to decide is whether it remained the principal employer between 1997 and 2003. It was previously known by various names, including Wandel & Goltermann Limited. I shall refer to it in this judgment as "Viavi" although its current name was only acquired as recently as 5 October 2015.

3. The Second Defendant ("Mr Froude") is a member of the Scheme and was formerly a trustee. The Third Defendants were the legal advisors to the scheme, and the Fourth Defendant is the successor to the business previously carried on by the Third Defendants. The Fifth Defendant is and has since about 1997 been the provider of administrative and actuarial services to the Scheme. The Third, Fourth and Fifth Defendants were joined in these proceedings for the purpose of their being bound by the decisions that I make. My findings and decisions are likely to be of significance for other pending proceedings against them. None of them were represented at the trial before me.

4. By the time that the claim form was issued, it had become clear that the main issues to be determined were the following:

   i) Whether or not a deed made on 7 November 1995 ("the 1995 Deed"), which substituted new scheme rules under the definitive deed and rules, was validly executed by the principal employer, as was required under the previous rules in order to modify them. The 1995 Deed was executed by Viavi and the then trustees, but there was doubt at a later time as to whether by 1995 the principal employer under the scheme had changed from Viavi to Wandel & Goltermann Management Limited ("Management"), which had been incorporated in July 1994 and acquired by the Wandel & Goltermann group in September 1994.

   ii) Second, whether or not a deed dated 15 September 1999 ("the 1999 Deed"), which purported further to amend the rules of the Scheme, was validly executed by the principal employer, as it was required to be under the previous rules. The 1999 Deed was executed by Management and the then trustees, but there is doubt as to whether Management was the principal employer at that time.

   iii) Third, if the 1999 Deed was invalid, whether or not a deed dated 13 March 2002 ("the Deed of Novation") executed by Viavi, Management and the then trustees had the effect of making Management the principal employer with retrospective effect, so that the amendments specified in the 1999 Deed became effective, or only with effect from the date of the Deed of Novation.

In addition to these main issues, there are a number of other issues, some of which arise in any event and some of which depend on my decisions on the main issues. The parties have helpfully agreed a schedule of issues. I annex that schedule to this judgment, in the form in which it was before me (as amended) at the trial, and to which I will refer in the course of this judgment. In the event, some of the issues were agreed by the time of the trial, and with others Mr Froude was able to offer concessions in the light of the documentary evidence now available.

5. Viavi argued that the 1995 Deed was valid, the 1999 Deed invalid and that the Deed of Novation did not have retroactive effect. It was represented by Mr Jonathan Evans Q.C. and Mr Bobby Friedman of Counsel. Mr Froude argued that the 1995 Deed was invalid, the 1999 Deed valid and that the Deed of Novation (if needed) had retroactive effect. His arguments were presented by Mr Nicolas Stallworthy Q.C. and Mr Simon Oakes of Counsel. The trustees, represented by Mr James McCreath of Counsel, took a neutral position on all the issues that I have to determine. They did not address any arguments of substance on any of them, but were able to assist me by clarifying a number of factual details.

6. It was proposed, in view of the nature of the issues and the participation of Viavi and Mr Froude in the proceedings, that I make representation orders pursuant to CPR Part 19 rule 7, under which Viavi is appointed to represent all those employers, members and other beneficiaries of the Scheme whose interests on the issues coincide with the position taken by Viavi, and Mr Froude is appointed to represent all those employers, members and other beneficiaries of the Scheme whose interests coincide with the position taken by him. Having seen the considerable work done and care taken by the lawyers acting for Viavi and Mr Froude, and having heard the detailed arguments addressed to me on all issues (save where issues were properly conceded), I consider it appropriate to make such orders and I will do so.

7. The principal factual issues in this case relate to what happened in 1994-1995, between the time when Management became a company in the Wandel & Goltermann group and the execution of the 1995 Deed, and between 1998 and 2000, leading up to the date of execution of the 1999 Deed. In particular, the question is whether at either of those times Management was validly appointed principal employer under the rules of the Scheme that then applied. The validity of the 1995 Deed, executed by Viavi but not by Management, and the 1999 Deed, executed by Management but not by Viavi, depend on the answer to that question.

8. The evidence before me was in the form of two witness statements from Mr Ian Shannan, one of the trustees, one witness statement from Mr Michael Taylor, the legal director of Viavi, and documents that each party had chosen to disclose and rely on, many of which were the fruits of investigation and requests made by one party to another. There was no order as such for standard or any other disclosure. I was told that certain documents had been made available by the Third, Fourth and Fifth Defendants that were relevant to the issues in this case, but that this did not amount to full disclosure of their files relating to the Scheme. I find it a little surprising that no application for disclosure was made. The matters in issue date back 20 years or more, and it was therefore unsurprising that there were gaps in the documentary records of Viavi and Management. In particular, there were only very few board minutes and resolutions relating to the years in question. Disclosure might have filled some of these gaps. The trustees had a full set of minutes of their meetings, but unfortunately

no trustee from the period 1994 to 2000 was able to give first hand evidence of what happened in relation to the principal employer of the Scheme in those years.

Issues 1 and 2: was the 1995 Deed validly executed?

9. The evidence – such as is now available – of what happened between 1994 and 2000 is of particular significance in relation to the question of whether the 1999 Deed was validly executed, which it could only have been if Management was at the time of its execution the principal employer. Before turning to the known facts and the terms of the relevant instruments, it is convenient to address first Issues 1 and 2 on the Schedule of Issues, namely:

   i) what was the identity of the principal employer on the date of execution of the 1995 Deed;

   ii) in the light of the answer to issue 1, was the 1995 Deed validly executed?

10. Doubt had previously been cast on whether Viavi was the principal employer on the date of the 1995 Deed because later documents, and indeed the 1999 Deed itself, stated or implied that Management had become the principal employer with effect from 30 September 1994. If those statements were correct, then it follows that the 1995 Deed, which was executed by Viavi but not by Management, could not have had effect to change the previous rules of the Scheme, since under the previous rules any such change required a deed executed by the principal employer. By the time of the trial, however, the documents that were available showed conclusively that although Management had become the holding company of Viavi on 30 September 1994, having been incorporated on 27 July 1994 and acquired "off the shelf", it was not appointed principal employer in place of Viavi (which itself had become principal employer in 1983). Furthermore, Management was not even admitted to the Scheme as an employer until 1996, and a decision was specifically taken in January 1996 not to appoint Management as principal employer. Documents show that Viavi continued to fulfil this role up to at least 4 June 1997, when it appointed two new trustees, if not longer.

11. There is therefore no doubt that Viavi remained principal employer at the time of the 1995 Deed, which accordingly was validly executed and had effect to substitute entirely new rules of the Scheme with effect from 7 November 1995. Mr Stallworthy on behalf of Mr Froude offered to concede that the answers to Issues 1 and 2 were accordingly that Viavi was the principal employer on the date of the 1995 Deed, which was validly executed on 7 November 1995. It seemed to me, in the light of the evidence, that that offer was properly made and that I should accept it. That means that my account of the relevant facts can start with the terms of the 1995 Deed, under and in accordance with which any subsequent change of principal employer or the rules had to be made.

The facts 1995-2003

12. In the 1995 Deed, Viavi is defined as "the Principal Employer which expression shall include any person firm or company limited or otherwise which shall hereafter carry

on substantially the same business as that now carried on by [Viavi]". The Deed then recited the history of the Scheme and that Viavi had been granted a contracting out certificate by the Occupational Pensions Board, and it incorporated the rules appended to the Deed. The Rules state that "Principal Employer" has the same meaning as in the 1995 Deed itself. They provide for members to receive a pension equal to 1/60th of their final salary for each complete year of service; no augmentation of benefits as of right, but with power for the trustees – with the agreement of the principal employer and the member's employer – to grant discretionary increases capped at the higher of RPI increase and 3%.

13. Section 10 of the Rules relates to administration of and amendment to the Scheme, and includes the following rules:

> "10.1 Subject to the prior approval of the Board of Inland Revenue and the consent of the Principal Employer any company or other organisation, which is not a party to this Deed which is or becomes associated with or a subsidiary of the Principal Employer and which desires its Employees to participate in the Scheme shall with the Principal Employer and the Trustees enter into a Supplemental Deed in which it shall covenant to observe the provisions of the Scheme applicable to a Participating Employer.
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> …………..
>
> 10.7 Until such time as the Deed or the Rules has or have been so varied, the Trustees shall have the power to operate the Scheme on the basis which has been announced in writing to those Members affected by such variation.
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> 10.8 (a) The power of appointment and removal of Trustees shall be vested in the Principal Employer and shall be exercisable by Deed. Notice of the intention to remove any Trustee, otherwise than by or with his consent, must be served upon such Trustee four weeks before such removal is to take effect. Such notice may be served by first class post from the Trustee's last known address and shall be deemed to have been served 48 hours after posting.
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> ……..
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> (c) Any Trustee may resign their appointment as the trustee hereof by serving on the Principal Employer one month's notice in writing to that effect …
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> ……..
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> 10.9 The Principal Employer and the Trustees may jointly from time to time without the consent of the Members by Deed alter cancel modify or add to any of the provisions of this Deed and Rules provided that in the case of a corporate body the Rules may be amended, cancelled, modified or added to by memorandum under hand signed in the case of the Principal Employer by a director, duly authorised. Provided that no such alteration cancellation modification or addition shall
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> (i) change the purpose of the Scheme as stated in paragraph (i) of the Preamble to the Interim Trust Deed or lead to the transfer or

payment of any part of the Scheme monies to the Principal Employer (or any associated or subsidiary company),

(ii) be such as would prejudice the Scheme's Approval, or

(iii) be such as would prejudice or impair the benefits accrued in respect of membership up to that time.

10.10 The Trustees may agree with an employer or holding company that it may become the Principal Employer unless this would prejudice Approval. The consent of the existing Principal Employer shall be necessary unless it has been dissolved."

14. In November 1995, Linda Turbin of Godwins Ltd (later identified by her married name of Mrs Bartlett, which I will use), who provided actuarial services to the Scheme, was in correspondence with the then Scheme administrators, Sun Life, about various regulatory matters, including an intended change in the name of the Scheme. There was apparently an appointment of Richard Taylor ("Mr Taylor") as a trustee of the Scheme with effect from 1 November 1995 (though the deed appointing him is no longer available). Mr Taylor had become a director of Viavi the previous month, and at the trustees' meeting on 24 October 1995 it was noted that he was to become a trustee.

15. A note of a telephone conversation on 15 January 1996 records that Mrs Bartlett knew that the trustees wanted to change the Scheme name to "Wandel & Goltermann Management Ltd", but that Management was not to be the principal employer. A memo from Mrs Bartlett to Sun Life the following day instructed the preparation of paperwork to record a name change to "Wandel & Goltermann Retirement Benefit Scheme", with Viavi remaining the principal employer and with Wandel & Goltermann Sales Ltd ("Sales") and Management being participating companies.

16. A memorandum recording the change of name was executed by the trustees and Viavi on 6 March 1996. Although a deed of adherence executed by Management no longer exists, it is clear from other documents in March 1996 that one was then executed. The contracted out status of the re-named Scheme with a new participating employer was then updated with the OPB and the Inland Revenue between April and July 1996.

17. On 25 June 1996 Mr Taylor became the company secretary of Viavi. He also became the company secretary of Management at some time between January 1996 and February 1997, though owing to missing documents it is not now possible to pinpoint the date. Before Mr Taylor, Mr Bourton had been the company secretary of both companies. Mr Bourton had become a trustee in June 1995 and remained a trustee until the end of August 1999.

18. On 1 November 1996, Viavi as principal employer and the trustees signed a memorandum making changes to the Scheme rules. Mr Taylor and Mr Bourton both signed the memorandum as trustees. On 25 November 1996, Mr Taylor on behalf of Viavi wrote to the trustees notifying them of an intention to make different arrangements governing selection of trustees. On 1 May 1997, Mr Taylor on behalf of Viavi signed a return to the Occupational Pensions Board identifying Viavi as the principal employer and Sales and Management as subsidiary employers. On 3 June 1997, Viavi and the trustees executed a deed of appointment of new trustees: Mr

Bourton and Mr Taylor signed on behalf of Viavi and both signed in their trustee capacity too. On the same day, Mr Higgs of Godwins was appointed scheme actuary, and his instructions required him to report to Mr Taylor. Other correspondence in 1997 was conducted between (largely) Mr Taylor on behalf of Viavi, as principal employer, Mr Higgs, Aon (who took over in 1997 from Sun Life as provider of administrative services to the Scheme) and various pension industry bodies, in connection with a re-election by Viavi to contract out, among other matters. An annual return for the Scheme for the year ending 17 February 1998 showing Viavi as principal employer was signed off by Aon on 16 March 1998.

19. On 30 September 1998, the Wandel & Goltermann group merged with an American group called Wavetek. There were corporate name changes in consequence, including in the case of Viavi and Sales, but Management's name alone was unchanged. It appears that as a result of the merger, contact was then made by Mr Taylor (on behalf of Viavi) with Bond Pearce, by letter dated 15 October 1998. This referred to a previous conversation between Mrs Bartlett and Mr Clarkson of Bond Pearce about the trust deed and rules and a new booklet for members. Following agreement on fees, Mr Taylor wrote again on 18 November 1998 (on behalf of Viavi) enclosing the 1995 Deed and Rules and a new draft booklet. That letter stated that Viavi, Sales and Management were participating employers. It did not say that there was to be, or had been, any change in the principal employer. Nothing in the minutes of the trustees' meetings on 3 November 1998 or 10 February 1999 indicated any change either, except that Aon and Mr Higgs were to take over the provision of administrative and actuarial services and that solicitors were advising on the trust deed and booklet.

20. The next event of significance is that on 29 March 1999 Mr Clarkson wrote to Mrs Bartlett at Viavi enclosing a mark up of the scheme booklet and a draft of a new definitive trust deed. A further letter from Mr Clarkson dated 30 April 1999, written to Mrs Bartlett, this time at Management (but at the same address), referred to a meeting with her on 21 April at which the Scheme documents and particulars were discussed. Mr Clarkson stated that he had amended the trust deed to reflect the discussions. A week later, on 6 May, Mrs Bartlett sent Mr Clarkson a fax, thanking him for his recent letter, supplying address details for the trustees and stating (incorrectly) that Management was incorporated on 30 September 1994. Mr Clarkson replied on 10 May, this time writing to Mrs Bartlett at Viavi, stating that he would incorporate the trustee details into the documentation and that he noted the date of incorporation of Management.

21. By letter dated 25 May 1999 to Mr Clarkson, signed by Mr Taylor on behalf of Viavi, and headed "Re: Pension Scheme: Deed & Rules; Handbook for Members", Mr Taylor stated that he had spoken to Mrs Bartlett; that he understood that Mr Clarkson had been advised of the trustee addresses and also the date of incorporation of "the management company"; that Mr Clarkson could now "amend page 1 of your 2nd draft accordingly", and that various amendments including the principal company name on the front cover were agreed. These amendments apparently refer to a draft deed and rules, but the drafts are no longer available. By reply dated 2 June, Mr Clarkson enclosed a further copy of the deed and rules "which have taken into account the comments made in your letter of 25 May as well as those raised by [Mrs Bartlett] earlier".

22. On 16 June 1999, the trustees met (for the first time since February), and their minutes record that Mrs Bartlett advised them that a new booklet was almost finalised and that the new Scheme rules were in a final draft. The minutes then record that "Mr East raised the question of the possible change of Employer name", and that the trustees agreed that Mr Taylor and Mrs Bartlett would progress any action needed. Present at that meeting were Mr Taylor, Mr Bourton, Mr Higgs and Mrs Bartlett, among others. The reference to a change of employer name is ambiguous: it could refer to name changes resulting from the Wavetek merger, or it could refer to a change in the identity of the *principal* employer.

23. A fax from Mrs Bartlett to Mr Clarkson dated 6 July 1999 headed "Deed & Rules" pointed out that there would be changes to the participating employers' names, with Viavi to become known as Wavetek Wandel Goltermann Plymouth Ltd and Sales to become known as Wavetek Wandel Goltermann UK Ltd, with immediate effect, although the administration (including an amending deed) would need attending to in future. Mr Clarkson replied the following day agreeing that if not done in time for changing the definitive deed this could be dealt with later. In fact, the name changes were effected on 26 July 1999, before the 1999 Deed was executed.

24. At about the same time, on 23 July 1999, the trustees signed off their annual report to members for the year ended 5 April 1999. The report identified Management as the principal employer and the Scheme was stated to be for the benefit of employees of Management and to be governed by the 1995 Deed and Rules. In one place it referred to Viavi as the "sponsoring employer". (The 2000 and 2001 annual reports similarly identified Management as the principal employer.)

25. The trustees met again on 15 September 1999. On this occasion Mr Bourton was not present: he had resigned his employment and was to be replaced as trustee. Mrs Bennett, who was an officer of Viavi, was suggested as a possible replacement trustee. She advised the meeting that the new booklet had been finalised and that the revised Scheme Rules were finalised, with only the date of their implementation being outstanding. Mr Higgs was provided with change of name certificates and the meeting noted "there was no change to the name of the Principal Employer". Since the only name that did not change was that of Management, this implies that by 15 September 1999 Management was being identified as principal employer by those officers of Viavi who were present (including Mr Taylor) and by the trustees, though there is no formal record of any change having been agreed. No resolution was made to sign the 1999 Deed.

26. The 1999 Deed bears the date 15 September, but it is common ground that it was not executed on that day. On 16 December 1999, Mr Clarkson wrote to Mrs Bennett enclosing an engrossed deed for execution by the trustees and "the Company"; the deed had been updated to record the resignation of Mr Bourton and the appointment of Mrs Bennett. The trustees met on 12 January 2000: those present included Mr Taylor, Mrs Bennett, Mr Higgs and Mrs Bartlett. All the trustees signed the 1999 Deed on that day, and Mrs Bennett was then to liaise with Bond Pearce about the requirements for signature by "the Company". On 3 February 2000, the directors of Management formally resolved to authorise Mr Taylor "to seal with the company seal and sign on behalf of the company". Mrs Bennett, expressly as HR Advisor on behalf of Viavi, sent a copy of the signed deed and the board resolution to Mr Clarkson, for lodging with the Inland Revenue.

27. After the execution of the 1999 Deed, it was Management, not Viavi, that acted as principal employer, e.g. by executing deeds of appointment of trustees and the later deeds in issue in this case. (At a later date, in 2003, a further deed was executed, by which Viavi was once again appointed principal employer in substitution for Management.)

28. The 1999 Deed is made by Management and the trustees. Management is termed "the Principal Employer". There are 7 recitals, which provide some historical context for the new deed and rules. Recital (C) states that the 1995 Deed contains the current provisions of the Scheme. Recital (D) states that the Principal Employer, with the consent of the trustees, has decided under clause 5 of a Trust Deed dated 25 September 1968 to amend the provisions of the Scheme. That recital is incorrect: the deed dated 25 September 1968 was the first definitive deed and rules of the Scheme, whose provisions were replaced by, first, the deed and rules made in 1975, and secondly the 1995 Deed. Clause 5 of the 1975 rules was a power for the principal company and the trustees jointly to modify the Scheme, but the operative amendment power at the date of the 1999 Deed was rule 10.9 of the 1995 rules (set out above), which conferred a similar power on the principal employer and the trustees.

29. Recital (E) of the 1999 Deed is as follows:

> "Wandel & Goltermann Limited ceased to be Principal Employer on 30 September 1994 when Wandel & Goltermann Management Limited became the Principal Employer."

The recital is demonstrably false, as the parties now agree.

30. The 1999 Deed purports to amend the provisions of the Scheme by deleting the provisions of the 1995 Deed and all preceding deeds entirely and replacing them with the Rules within the 1999 Deed and its schedules ("the 1999 Rules"). The amendment is stated to be made by the Principal Employer with the consent of the trustees. In the definition and interpretation clause in rule 1 of the 1999 Rules, however, it is stated that in the deed, unless the context otherwise requires, Principal Employer means Wandel & Goltermann Limited (which is Viavi) or any person who becomes the Principal Employer under Rule 32.2. The 1999 Rules thus appear to conflict with the 1999 Deed as to the identity of the principal employer.

31. Rule 5 of the 1999 Rules confers on the Principal Employer (alone) power by deed to change any provisions of the 1999 Deed from a date specified, which may be before or after the date of the deed. The power is expressed to be subject to sections 65, 67 and 68 of the Pensions Act 1995. Similarly, the Principal Employer alone is given power by deed to remove and appoint trustees.

32. Rule 32 of the 1999 Rules deals with the case of substitution of Principal Employer as follows:

> "32.1 If a person ("New Principal Employer"):
>
> (a) executes a deed in favour of the Trustees (whose agreement shall not, subject to any operation of Rule 34, be required) under which:

(i) he undertakes the liabilities of the Principal Employer under the Scheme; and

(ii) covenants to observe and perform the provisions of the Scheme applicable to him as an Employer; and

(b) obtains the consent of the person (the "Old Principal Employer") who is the Principal Employer immediately before the operation of Rule 32.2; and

(c) in respect of whom the Revenue approves the operation of Rule 32.2 or the operation of Rule 32.2 will not prejudice Approval

then Rule 32.2 applies.

32.2 If the requirements of Rule 32.1 are met, then with effect from such date as the Old Principal Employer and the New Principal Employer agree:

(a) the Old Principal Employer shall be released from all obligations in relation to the Scheme which apply to it other than as an Employer; and

(b) the Rules and all other provisions of the Scheme shall take effect as if the New Principal Employer had been and is the Principal Employer."

33. Rule 34 is in the following terms:

> "If the Principal Employer ceases to participate in the Scheme in consequence of an Insolvency Event then all the powers of the Principal Employer (including the Old Principal Employer) in relation to the Scheme shall be exercisable by the Trustees in the place of the Principal Employer. In that event Rule 2.4 shall apply to those powers in the place of Rule 2.3."

34. Rule 61 provides for an entitlement to increase in amount of pensions in course of payment. Rule 61.4 specifies the rates of increase:

> "(a) for that part of the pensions which is attributable to Pensionable Service before 6 April 1997 3% per annum compound; and
>
> (b) for that part of the pension which is attributable to Pensionable Service after 5th April 1997 3% per annum compound (or, if greater, the annual rate of increase of the Index, as determined at 1st September in the preceding year up to a maximum of 5%)."

35. On 12 April 2000, at a trustees' meeting, Mr Higgs informed the trustees that that the drafting of rule 61.4 was a mistake. The trustees agreed that the Scheme had not been operated on the basis of the actual drafting of rule 61.4. A version of the 1999 Deed in evidence contains a page of the Rules with a different version of Rule 61.4(a),

which provides that escalation for pre-6 April 1997 service is at the trustees' discretion. The change appears to have been initialled by each of the trustees at a meeting on 16 November 2000. I shall refer to it later as "the informal rule 61.4(a) amendment". At that time, no change was made to rule 61.4(b).

36. At the 12 April meeting, under Any Other Business, the trustees agreed that Mr Higgs would be provided with a copy of the 1994 deed, which changed the Principal Employer, in order for him to progress the contracting out issues with the National Insurance Contributions Office. The trustees present at the meeting included Mr Taylor and Mrs Bennett, and Mrs Bartlett and Mr Higgs were in attendance. It is now common ground that there was no such 1994 deed. On 2 June 2000, Mr Higgs wrote to Mr Taylor informing him that the Inland Revenue were seeking the documents by which the principal employer was changed. He states in the letter that "according to Bond Pearce this change took place in September 1994, and hence the new rules (signed earlier this year) have [Management] as the Principal Employer", and that he had been in contact with Bond Pearce and Mrs Bennett about it but that no one appeared to have any documentation. The letter continues:

> "I note in passing that the previous rules, which were signed in November 1995 had W&G Ltd as the Principal Employer. None of this therefore seems entirely consistent. In order to resolve this unsatisfactory situation, I have taken it that W&G Management did become the principal employer with effect from 30/9/94."

37. On 9 October 2000, Mr Higgs wrote to Mr Taylor again, enclosing two documents. The first was a notice explaining to members that Viavi was surrendering its contracting-out certificate and an election was being made for a new certificate to be issued in the name of the new principal employer, Management. The second was the Contributions Agency form for a change of principal employer, which Mr Higgs explained was needed to issue a new certificate in the name of the "new" principal employer. On receipt of this signed form, a new contracting out certificate was issued on 12 December 2000 in the name of Management, but the Inland Revenue continued to pursue proper evidence of the change of principal employer.

38. This issue was not swiftly resolved. Mrs Mortimer of Aon wrote to the Inland Revenue on 11 January 2001 advising them that the principal employer changed to Management, effective from 30 September 1994, and was recorded in the 1999 Deed. On 9 May 2001, the Inland Revenue was sent a copy of the 1999 Deed. When it sought the document by which the change was made, it was again sent by Aon the 1999 Deed, which Aon said recorded the change, and was told that the change took place before Aon took over as advisors. But the Inland Revenue insisted on 18 October 2001 that they wanted to see the deed that made the change, rather than a deed that advised that there had been a change.

39. In reply, Mrs Mortimer asserted that Management had assumed the responsibilities of principal employer with effect from 30 September 1994, and said that she was checking with the legal advisors to see whether there was a deed that had effected the change. On the same day she advised Mr Higgs that if there was no deed one would be required retrospectively to confirm the change. In November 2001, Mr Taylor

asked Aon to produce a retrospective deed. A first draft appears to have been produced by Aon on 21 November. At their meeting on 12 December 2001, at which Mr Taylor was present, the trustees were informed by Mr Higgs that the principal employer had been changed from Viavi to Management in 1994 but that no deed could be found to reflect the change, and that "in order to pacify the Inland Revenue, Aon were drawing up such a deed". A draft deed of novation was then provided by Mr Higgs to Mr Taylor on 13 December 2001.

40. Meanwhile, the trustees had already made progress with the perceived defects in the drafting of new rule 61.4. At their meeting on 26 September 2001, they noted that they had received advice from Bond Pearce about their power to correct the error in the 1999 Rules and they signed a deed of rectification. In due course this was executed by Management (by the signatures of Messrs Taylor and Froude) and dated 31 December 2001 ("the 2001 Deed of Rectification").

41. The 2001 Deed of Rectification was expressed to be supplemental to the 1999 Deed (which it referred to as "the Rules"), and recital C states:

> "An error was made in the drafting of Rule 61.4(a) and (b) of the Rules at the time the Rules were adopted on 15 September 1999. The error in Rule 61.4(a) was corrected by insertion of the correct page duly initialled by trustees. However, in error the mistake in 61.4(b) was not corrected at the same time."

Recital D stated that the Scheme had not been operated in accordance with the error and that accordingly the trustees and Management wished to rectify the error in rule 61.4(b) with effect from 15 September 1999. Clause 1 purports to be an exercise by Management of the power in rule 5.1 of the 1999 Rules to rectify the error by substituting for rule 61.4(b) with effect from that date a new rule, as follows:

> "for that part of the pension which is attributable to Pensionable Service completed after 5 April 1997 the annual rate of increase in the Index, as determined at 1st September in the preceding year up to a maximum of 5%."

42. By the time of the trustees' meeting on 13 March 2002, it appears that the draft deed of novation intended to pacify the Inland Revenue had been approved and signed ("the 2002 Deed of Novation"). Mrs Bennett passed it to Mr Higgs at the meeting, to forward to the Inland Revenue.

43. The 2002 Deed of Novation was executed by Viavi, as "the Old Employer", Management, as "the New Employer" and the trustees. Recital E states that the Scheme is now governed by the deed and rules dated 15 September 1999, which it calls "the Definitive Deed and Rules", and recital F states that the parties want to confirm the substitution of Management for Viavi as principal employer under the Scheme since 30 September 1994. There then follow these declarations:

> "1. The Old Employer and the New Employer confirm that, since 30 September 1994, the New Employer has assumed the duties and obligations of the principal employer under the Scheme in place of the

Old Employer. In consequence of this and in exercise of the power under rule 32 of the Definitive Deed and Rules, the parties to this Deed confirm that, with effect from 30 September 1994, the New Employer is the principal employer under the Scheme in place of the Old Employer for all the purposes of the Scheme.

2. The parties to this Deed ratify all actions and decisions made by the New Employer as the principal employer under the Scheme between 30 September 1994 and the date of this Deed.

3. The New Employer confirms that it will continue to assume the duties and obligations of the principal employer under the Scheme for as long as it is the principal employer.

4. The Old Employer has continued to participate in the Scheme since 30 September 1994 as an associated employer and it confirms that it has observed and performed the duties and obligations of an associated employer since 30 September 1994 and that it will continue to do so for as long as it participates in the Scheme."

44. On 16 May 2002, Ms Wakely in Aon's legal and documentation practice department returned the executed 2002 Deed of Novation to Mr Higgs. She said that it had been signed twice by the company secretary on behalf of Management and that accordingly the deed was not valid. Notwithstanding, she said that she had submitted the deed as it stood to the Revenue and the Registrar. On 20 May, Mr Higgs returned the deed to Mr Taylor, asking him to arrange for someone else to sign as director or as company secretary and stating "I am informed that that is all that needs to be done." Mr Taylor then sent it to Karl-Heinz Eisemann, a director living in Germany, asking him to sign, complaining about the "bureaucratic" requirement. The deed was returned to Mr Higgs by Mr Taylor on 10 June 2002 with the comment "Deed now signed & sealed by both directors of W+G Management Ltd!!".

45. The original of the executed deed was passed by Mr Higgs to Mr Taylor at the trustees' meeting on 19 June 2002. At that meeting, Mr Higgs identified further errors in the 1999 Deed and it was agreed that a further amendment was required. Aon sent a draft deed to the trustees on 10 July and the deed was executed on 26 July 2002 ("the 2002 Deed of Correction"). This was made between Management (called "the Principal Employer") and the Trustees. The particular changes that this deed purported to make are not relevant to the issues in this case, but it is relevant to note that there was a declaration that the Principal Employer and the Trustees were making the changes to the Definitive Deed and Rules (sc. the 1999 Deed) with effect from 15 September 1999. The 2002 Deed of Correction recited that the 1999 Deed defines the Scheme's provisions, save that certain provisions in it were incorrect.

46. On 10 June 2002, a deed of adherence ("the 2002 Deed of Adherence") was executed by Management as principal employer, by Acterna UK Ltd as an associated employer and by the trustees. Acterna UK Ltd was not at that time the same company as Viavi, though as a result of a later change of names Viavi became known as Acterna UK Ltd in 2003.

47. The further history of the Scheme can be summarised as follows, so far as of any materiality to this case:

    i) Mr Taylor ceased to be a trustee on 2 October 2002, pursuant to a deed executed by Management and the trustees;

    ii) By a deed made on 21 March 2003 ("the 2003 Deed of Novation"), Viavi (then known as Acterna UK Ltd) was substituted as principal employer pursuant to rule 32.2 of the 1999 Rules, purportedly with retroactive effect from 2 January 2003;

    iii) By a further deed made on 27 June 2003, the closure of the Scheme to further accrual was documented.

48. The facts rehearsed above are uncontroversial, or at least they are established by undisputed documentary evidence. I will make such findings of further fact as are necessary to answer the further issues, below.

Issues 3, 4 and 5, relating to the effect of the 1999 Deed

49. The next issues that I have to determine are the date of execution of the 1999 Deed; whether Viavi or Management was the principal employer on that date, and accordingly whether or not the 1999 Deed was validly executed. It is to be borne in mind that the 1999 Deed purports to amend the pre-existing deed and rules – which it is common ground were contained in the 1995 Deed – and to do so had to comply with rule 10.9 of the 1995 Rules, which required execution of a deed of amendment by the principal employer and the trustees. The 1999 Deed was executed by Management and the Trustees, and so could only have legal effect if Management was, by no later than the date of execution, the principal employer under the Scheme.

Date of execution of the 1999 Deed

50. As for the date of execution, in view of the documentary evidence that I have already referred to the parties are agreed that the only possible answer is that the 1999 Deed was executed on or around 3 February 2000, notwithstanding the date that it bears. That was the date on which the board of Management authorised Mr Taylor expressly to sign and seal the deed. The trustees had all signed it previously, in January. It seems inherently likely that Mr Taylor, the company secretary, would have done so straightaway, after the board meeting. The 1999 Deed bears Management's seal and Mr Taylor's signature.

51. It is common ground that rule 10.9 of the 1995 Rules allows an amendment to be made with retrospective effect. Although the 1999 Deed was in fact executed on or about 3 February 2000, rule 3.1 provides that it has effect from 15 September 1999, so the amendments – if valid at all – have effect from 15 September 1999, to the extent that retrospectivity is otherwise permissible having regard to section 67 of the Pensions Act 1995 and fetters to the amendment power.

Interpretation of rule 10.10

52. The 1999 Deed recited that Viavi ceased to be and Management had become principal employer on 30 September 1994, but it is agreed (and evident) that that was untrue. The question that I have to determine is whether or not at any time up to execution of the 1999 Deed Management had been validly appointed principal employer. The case for Mr Froude and those that he represents is that such an appointment was indeed made in accordance with the Rules: by actual agreement reached at some time after Viavi's last act as principal employer in 1997 and before 6 April 1999; alternatively by implication under the terms of the 1999 Deed itself; alternatively as a result of an estoppel arising from the terms of the 1999 Deed. The case for Viavi and those that it represents is that no such appointment was made, or is to be taken as having been made, by any of these means.

53. Under rule 10.10 of the 1995 Rules, such a change appears to require the agreement or consent of three parties: the trustees, Management and Viavi. It is convenient to address at this stage the question of the true scope and meaning of rule 10.10, and in particular the degree of formality – if any – that is required, and whether or not such an appointment can be made with retrospective effect. The case for Mr Froude was that no formality is required and that there is no reason to preclude the ability of the relevant parties to make an appointment with retrospective effect, so long as that does not amount to "re-writing history" in an impermissible way, or otherwise adversely affect rights accrued by the actual date of the appointment. The case for Viavi is the opposite: that the power can only be exercised in writing and that it cannot have retrospective effect.

54. Rule 10.10 is one of a group of rules concerned with modification of the effect of the Scheme and change in the identity of those with responsibility for it. Rule 10.7 allows informal variation by the trustees of the way in which the Scheme operates, subject only to an announcement of the variation to those members affected by it. The informal variation has effect "until such time as the Deed or the Rules has or have been so varied". These words do not relate back to previous provisions of rule 10, as one might have expected: they deal with the costs and expenses of the Scheme and the commutation of small annual pensions. The words more naturally attach to the power in rule 10.9 formally to alter, cancel, modify or add to any of the provisions of the definitive deed and rules. This power is to be exercised by the principal employer and the trustees jointly. Rule 10.8 is a power concerned with the appointment, removal, retirement or death of trustees of the Scheme.

55. Rule 10.10 is concerned with a change of the principal employer. It appears to confer a power on the trustees ("The trustees may ...") to reach agreement with someone who may or may not be a party to the scheme but who is connected with it ("an employer or holding company"), but subject to the consent of the existing principal employer. Mr Froude characterises the power as a bilateral power, vested in the trustees and the new principal employer, but requiring the consent of the existing principal employer to be effective. Viavi characterises the power as requiring a tripartite agreement. In my view, the power is in substance a power for the trustees and the existing principal employer to agree with another company, who may be a participating employer, to take over the role of principal employer. Neither the trustees alone nor the existing principal employer alone can effect the change, which of course cannot be made unless another person with the specified characteristics is willing to take on the role.

The proposed new principal employer may well be a stranger to the Scheme, until appointed, so it is not that company that has the power, despite the way that the rule is written.

56. In marked contrast with the terms of rules 10.8 and 10.9 that immediately precede it (and indeed numerous other rules, to which Mr Stallworthy drew my attention, which stipulate varying degrees of formality for different matters), rule 10.10 notably does not contain any requirement for formality in connection with a change of principal employer. That might, on first consideration, be thought a little surprising for at least these two reasons. First, the identity of the principal employer is clearly a matter of some importance for the operation and regulation of the Scheme (as was subsequently demonstrated by the Inland Revenue's attitude to the assertion that Management had become the principal employer in 1994), and the precise date on which a change takes place might need to be carefully recorded. Secondly, a change in the identity of the principal employer is also a change in the terms of the 1995 Deed, unless the new company is the successor to substantially the same business as was carried on by Viavi at the date of the 1995 Deed. This second reason prompted me to raise in argument the question whether rule 10.10 was not an additional requirement, over and above the requirements of rule 10.9, rather than a free-standing rule governing all requirements for a change of principal employer. It could be construed that way, imposing a requirement for an extra consent from the new principal employer; imposing a condition on its exercise (non-prejudice of Scheme approval by the Inland Revenue), and dispensing with the requirement of agreement by the previous principal employer where it has been dissolved. That, if correct, would have meant that the formality of a deed was still needed, under rule 10.9, for a change of principal employer.

57. My suggested interpretation was not adopted by Mr Evans, on behalf of Viavi, in whose interests it might have been to do so if the point was a good one; and Mr Stallworthy was clear in his submissions that rule 10.10 was to be treated as a free-standing rule governing substitution of a principal employer.

58. Given the considerable experience that they both have in this field, I am persuaded, on balance, to accept that rule 10.10 should be so interpreted, with the consequence that any formality associated with its exercise must effectively be implied into rule 10.10, if it exists. In context (that is to say, by way of comparison and contrast with the other provisions of the 1995 Rules), the language used in rule 10.10 cannot be interpreted as *meaning* that written agreement/consent is required for a valid exercise of the power. Mr Stallworthy did, at a later stage of his submissions, seek to argue that the power of informal variation in rule 10.7 could operate in parallel with rule 10.10, so as to enable the trustees to effect an informal substitution of principal employer pending the agreement contemplated by rule 10.10 being made with retrospective effect. I find it difficult to see how that could be so. Rule 10.7 is concerned with an informal variation of the deed or rules, potentially affecting members of the Scheme. If rule 10.10 is free-standing, as was urged on me, then it is distinct from the power in rule 10.9, under which a formal amendment to the deed and rules can be made. Further, if as Mr Stallworthy submits, rule 10.10 requires no formality for its exercise, it is difficult to see in what circumstances a prior informal exercise of the power by the trustees would be needed.

59. Mr Evans' submissions on the implied requirement of rule 10.10 for some formality were that scheme rules should be interpreted so as to give reasonable and practical effect to a pension scheme; that the position of principal employer is of central importance to the operation of the Scheme; that a change in the principal employer is a significant event, and that it is important to be able to identify with certainty who the principal employer is, at any given time. He pointed out that there had in fact been a deed used to substitute Viavi as the principal employer in 1983, and that the 1995 Rules require a deed, not just writing, to effect other significant changes: for the adherence of a new employer; a change of trustees, and a change in the deed and rules. However, unlike in the case of admission of a new employer to a scheme, there appears to be no requirement in the Practice Notes of the Pension Schemes Office that were in force in November 2005 for a change of principal employer to be made in writing or by deed.

60. Accepting all the points made by Mr Evans, the question is whether or not a requirement for writing in such circumstances should be implied as a term of the 1995 Deed. The 1995 Deed is a carefully drawn professional document, which descends to considerable detail in terms of who is able to exercise particular powers and how they can do so. Within the same group of rules as rule 10.10, there are carefully distinguished requirements in different rules for a deed, a written memorandum, and informal agreement. That seems to me to point firmly away from any conclusion that the draftsman simply overlooked an obvious term. In the light of the decision and reasoning of the Supreme Court in *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2015] UKSC 72; [2015] 3 WLR 1843, the question is not just whether some degree of formality would be reasonable but whether formality is necessary to give business effect to the 1995 Deed in accordance with the parties' expectations of the way in which it would work. Put another way: does the 1995 Deed lack business coherence without the implied term?

61. In my judgment, the answer to the question, whichever way it is put, is that it is not necessary to imply any requirement of formality. Although it might have been sensible to have some documented record, it can hardly be said that the Scheme could not operate without it, though the absence of writing no doubt increases the risk of the kind of issues that I am having to decide in this case. If rule 10.10 is a self-contained rule then it naturally reads as a rule standing apart from the formal requirements of the other modification rules, and a requirement for formality cannot be implied by means of rule 10.7, which does not apply in the case of a change of principal employer. The trustees and Viavi, when executing the 1995 Deed, would no doubt have had in mind that a change in principal employer could not practically happen without the agreement of three parties, and that the trustees' agreement would have been likely to have been recorded in minutes or in separate communications from the individual trustees. They would also have expected that there would be a board resolution from at least one of the employers concerned. The annual return to the Pension Schemes Office would have to identify the principal employer, and a new contracting-out application to the N.I. Contributions Office would in due course be needed, so the matter is hardly likely to be overlooked.

62. The notion that the 1995 Deed could not properly work without there being a written agreement on a change is not one that, in my view, stands up to scrutiny. Best practice is one thing; necessity another. Terms are not lightly to be implied into

complex and carefully-drawn agreements. I note that in *Betafence Ltd v Veys* [2006] PLR 137 neither the Judge nor the parties appeared to consider that a power to *amend* scheme rules that did not specify any formality had to be interpreted as if it did so. The absence of a requirement for writing to change the principal employer is surely less surprising than that case. The exceptional circumstances of this case do not justify the conclusion that in all circumstances written agreement is required.

63. The next question that I have to decide is whether or not the power in rule 10.10 can be exercised with retrospective effect. It was common ground that the power in rule 10.9 could be so exercised, and this makes good sense in view of rule 10.7, though of course it could not be exercised so as to derogate from accrued rights. Mr Froude submits that good administration may necessitate use of powers retrospectively, and that pension scheme rules should not be construed restrictively, so as to fetter the ability to manage the scheme in the interests of its members. This is no doubt so, and has been highlighted in a number of authorities on interpretation of pension scheme rules: see, e.g., *The PNPF Trust Company Ltd v Taylor* [2010] PLR 261, at paras 127-129, where Warren J reviewed earlier authorities. I bear in mind too the requirement to interpret the power in accordance with the proper purposes for which it must have been granted (*Hole v. Garnsey* [1930] A.C. 472).

64. Mr Froude submits that the words "may become" in rule 10.10 are a reference to change of status, rather than an indication of futurity upon exercise of the power. I consider that that is probably right, since the rule requires the consent of the *existing* principal employer (unless dissolved), and so it is the transition from the existing principal employer to the new principal employer that is envisaged. Mr Froude also relies on the fact that when Viavi was appointed in 1983 it was done purportedly with retrospective effect to 1981, as support for his argument that a change can be made retrospectively, and on the rule's reference to the case of the dissolution of the principal employer as being a case where some retrospective effect may be necessary. However, he did not identify what it might be, in such a case, that might need to be done by a principal employer with retrospective effect.

65. Whether or not the power can be exercised retrospectively is a question that depends on the proper scope of the power that is conferred, depending on what the parties to the 1995 Deed must be taken to have envisaged as the circumstances of its exercise. That in turn, in my view, depends on the effect of the exercise of such a power with retrospective effect. Since (apart from the case of dissolution) the consent of the existing principal employer is required, the rule does not contemplate exercise in order to fill a gap with retrospective effect. That means that, immediately prior to the exercise of the power, the principal employer was and had been performing the acts required, and exercising the powers and discretions, of the principal employer under the Scheme. The performance and exercise of such duties and powers would – assuming that the other rules of the Scheme were complied with – have been valid when done. Equally, any acts purportedly done before then by the incoming principal employer would have been invalid when exercised. The appointment of a new principal employer with retrospective effect would therefore be capable of invalidating acts that were valid as done, and validating acts that were invalid when done. In that sense, there is an obvious danger that history would be at risk of being re-written with consequences for the Scheme, if the power were capable of exercise retrospectively.

66. Mr Froude's answer to this is that whenever something is done with retrospective effect history is re-written to some extent, so that is not exceptionable in principle. He also accepts that history could not be re-written in such a way as to take away benefits that had already accrued under the Scheme (which would be a possible consequence of invalidating a rule amendment that, when made by the then principal employer, was validly made), and so any excessive exercise of the power could (he submits) be severed, with the result that the exercise would only be partially retrospectively effective. In this regard, he relied upon a decision of Neuberger J, *Bestrustees v Stuart* [2001] Pens LR 283, though in that case the exercise of the power was severed so that there was no retrospective effect, and the power was only validly exercised to the extent that it regulated future rights.

67. In this context, there is no presumption against a retrospective change in the operation of a pension scheme, unlike the strong presumption against Parliament legislating with retrospective effect. The presumption arises as a question of fairness in the circumstances of the particular case: see *Bank of New Zealand v Board of Management of the Bank of New Zealand Officers' Provident Association* [2003] UKPC 58, per Lord Walker of Gestingthorpe, at para 26. But in the context of a trust deed of this kind, the question is to be resolved as one of the scope of the power conferred, having regard to the likelihood or otherwise of its exercise giving rise to impermissible re-writing of history: *ibid.*, paras 25-27, and *PNPF v Taylor*, above, at paras 138-145. It is clear in this and other authorities that "re-writing history" is used in the sense of doing so impermissibly: see *Dalriada Trustees Ltd. v Faulds* [2012] 2 All ER 734, para 78. What is impermissible is exercising a power so as adversely to affect accrued rights, or to falsify something that was true and/or effective when done, or validate something that when done was a breach of trust.

68. On the other hand, retrospectively validating a power that, as exercised, was invalid for want of formality (ratification), to give effect to expectations created, may be unexceptionable, as long as rights for other scheme members did not accrue as a result of the invalidity of the exercise of the power; and the conferring of additional rights, or voluntary assumption of obligations, with effect or calculated from an earlier time, may be perfectly acceptable (and indeed routine so far as the conferring of additional rights is concerned). What this shows is that the retrospective exercise of a power to change the identity of a principal employer may have a variety of different consequences, some of which are objectionable and others of which are not. But retrospective substitution will always be likely to have the consequence that acts validly done by the outgoing principal employer will – if effect is given to the purported retrospective substitution – become invalid. So, e.g., a trustee removed and another appointed will, retrospectively, become a nullity (unless separately ratified by the new principal employer), with the consequence that acts done by the trustees since the date of the removal and appointment will be invalid too. And a power could never be exercised so as to validate retrospectively a breach of trust.

69. Against that background, I must consider whether substitution of a principal employer with retrospective effect can reasonably be considered to have been within the contemplation of the parties to the 1995 Deed. Given that, as I have held, rule 10.10 requires no formality for its exercise, one might wonder why any retrospective effect would be needed or intended for such a rule, unlike the quite different case of a power to amend scheme rules. The need for the consent of the existing principal employer

will mean that there is no gap that needs to be filled, save in the case of a dissolution; and the agreement to substitute a new company could be swiftly and informally given. As for the case of dissolution, I can see that – in principle – there may be a desire for continuity in the office of principal employer, though I was not told that there was any regulatory requirement to that effect, and it may be that another employer company was obliged to act swiftly upon discovery that the principal employer had been dissolved. Apart from that case, however, and even allowing for a purposive interpretation of the rules in order to give reasonable flexibility in operating the Scheme for the benefit of its members, it is difficult to see why any retrospective effect to the power of substitution would be needed.

70. The main objection to a change of principal employer with retrospective effect is however the likelihood that it will result in an impermissible re-writing of history. Mr Stallworthy referred me to two recent decisions in which the court has upheld the exercise of a power with retrospective effect, even where it appeared to some extent to result in some historical revisions: *Vaitkus v Dresser-Rand UK Ltd* [2014] Pens LR 153 and *Safeway Ltd v Newton* [2016] EWHC 377(Ch). The first seems to me to turn on the particular example of the definitive deed and rules – when executed – dating back to the interim deed. The consequence was that a purported amendment of the definitive deed, announced before the deed had in fact been executed, was effective to amend the (eventually executed) definitive deed from the date of the announcement. I do not find that of assistance on the question of whether the parties can reasonably have contemplated a different power being exercised with retrospective effect.

71. The second case was one where an intended exercise of a power of amendment, expressed to be capable of having retrospective effect to a specified extent, had been announced in 1991 but not effected by deed until 1996. The issue was whether or not, for the purposes of EU law, the announcement had effected a change in the scheme rules. Warren J held that it did not; only the later formal deed did so, albeit with retrospective effect, so that in fact, before 1996, the amendment had not been made. Again, I do not consider that that assists me on the question of how to interpret a power to substitute a principal employer that says nothing about its retrospective effect.

72. Set against those decisions are other decisions, such as *IMG v German* [2010] Pens LR 23 and *Dalriada v Faulds*, above, where an attempt retrospectively to change rules was held to be invalid. In the *IMG* case, the backdating of a deed of amendment, which would have interfered with accrued rights, was held to be beyond the scope of a general power of amendment, both because it infringed the scheme fetter on amendments affecting accrued rights and because it amounted to an attempt to "re-write history", i.e. to change the facts and hence the consequences of what actually happened.

73. In my judgment, a change in principal employer which is intended – as would be the effect in this case – to have retrospective effect to a time (1994-1997) during which the then principal employer (Viavi) was validly acting as such, is beyond the scope of the power in rule 10.10. It cannot reasonably be considered to have been in the contemplation of the parties to the 1995 Deed that the power should be capable of exercise retrospectively so as to falsify steps that had been taken by the then principal employer, with all kinds of potentially damaging consequences for the proper administration of the Scheme. I accept that a degree of backdating of an appointment

may be permissible in circumstances where the principal employer has been dissolved. Rule 10.10 itself refers to such a case, and it *may* reasonably have been considered appropriate to "fill the gap" left by the dissolution, particularly if the other company has been acting as principal employer in place of the dissolved company. But apart from that specific case I can see no good reason why trustees and the company that has had the duty to act as principal employer and has been doing so should be able to agree that it has not been subject to that duty previously and has not so acted.

74. Mr Froude accepts that Management could not in law be substituted retrospectively in such a way as to prejudice any accrued rights, or so as to invalidate steps validly taken by Viavi up to 1997 or thereafter (it appearing however that there is no formal record of Viavi exercising any powers as principal employer thereafter). He therefore submits that it is always possible to sever the excessive and invalid aspects of a retrospective exercise of rule 10.10, leaving the ability to exercise the power with retrospective effect but only as far back as a point in time beyond which the use would contravene these principles. He relies, by analogy, on the decision of Neuberger J in *Bestrustees v Stuart*, above. In that case, a purportedly retrospective exercise of a power to amend scheme rules (which permitted retrospective amendment but not so as to affect accrued rights) was held invalid to the extent that it purported to have retrospective effect, but was valid prospectively, the judge being satisfied that the excessive exercise of the power was severable and that the trustees would have exercised the power prospectively had they been aware that the amendment could have no restrospective effect. Neuberger J referred to and approved passages in *Thomas on Powers* and *Farwell on Powers*, and in particular the following passage in the latter text:

> "Where there is a complete execution of a power and something added which is improper, the execution is good and the excess void. But where there is not a complete execution and where the boundaries between the excess and the execution are not distinguishable, the whole appointment fails."

75. In that case, the amendment rule expressly permitted a retrospective amendment, subject to constraints. The constraints were infringed by the exercise of the power, and the question was whether the exercise of the power was valid prospectively, despite the terms of its purported exercise. In this case, the question is different, namely whether rule 10.10 can be interpreted as conferring a power to substitute with retrospective effect, on the basis that any excessive exercise can be severed. That strikes me as a much more difficult exercise, conceptually, than to sever the retrospective exercise of a power from the prospective exercise, in a case where the retrospective element is wholly excessive. In such a case there is a clear distinction between what is valid – the prospective amendment – and what is invalid. In this case, there would be no such clear distinction, but it is certain that the retrospective substitution of a principal employer would be incapable of altering accrued rights or re-writing history in an impermissible way (though inherently liable to do so).

76. The effect of such a power to appoint with retrospective effect would be that exercise of the power would either be invalid as regards particular events, rights or facts, but

otherwise valid (and so creating islands of reality in a sea of artificiality); or alternatively – which was Mr Froude's position at trial – be valid as from a later date than the date as from which it was expressed to be exercised. As to the first possibility, that is in my view far removed from the case of a complete execution of a power with an excessive element, and exactly what *Farwell* describes in the phrase "where the boundaries between the excess and the execution are not distinguishable". The second possibility similarly has elements of uncertainty, in that there may be doubt as to the latest date on which a power was validly exercised by the existing principal employer or which does not otherwise infringe a fetter on retrospective exercise of a power. Even if that uncertainty could be removed, the effect is likely to be significantly to cut down any purportedly retrospective exercise of the power. That is because the power will only be capable of being valid (because it does not adversely impact on accrued rights or impermissibly re-write history) to the extent that it has no real bearing on past events.

77. Given that the power is capable of informal exercise, without any real delay, it could readily be exercised in accordance with its terms where another person is urgently needed to take over the role of principal employer. The notion that that could be done even less formally than the rule specifies and then later ratified by a backdating of the appointment is not in my view a compelling argument for reading into the rule an ability to exercise it generally with retrospective effect.

Was the power in rule 10.10 validly exercised?

78. Having decided the meaning of the power, I have to decide whether in fact it was exercised so as to appoint Management as principal employer no later than 3 February 2000, when the 1999 Deed was probably executed.

79. Mr Froude's primary case is that, at some time before the 1999 Deed was executed, possibly as early as 6 April 1999, it was so exercised; that is to say that the trustees, Management and Viavi agreed then for Management to take over as principal employer. His secondary case is that, by one means or another, the 1999 Deed itself is to be taken as such an agreement.

80. The significance of the date of 6 April 1999 appears to be that the trustees' annual report to members, for the year ending 5 April 1999, stated that Management was the principal employer. That report was signed off by the trustees on 23 July 1999. The report – or rather that statement, since the report as a whole is equivocal – is some evidence that Management was indeed principal employer, but it clearly cannot be taken in isolation as proof of that fact. The statement may simply be an error (although, if so, it was repeated in the 2000 and 2001 annual reports) or, more likely, a reflection of what the trustees understood was going to happen, with retrospective effect, rather than what had actually happened by 5 April 1999. It is therefore some evidence of what the trustees understood by 23 July 1999.

81. Looking at the evidence as a whole, it seems clear to me that it was well-known in 1999 by those such as Mr Taylor and Mrs Bartlett, who had been closely involved with the Scheme for some time, and by Mr Bourton, that Viavi was in fact the principal employer of the Scheme and that Management was a holding company. The merger with Wavetek and/or the appointment of Bond Pearce as Scheme legal advisors had given rise to a review of the Scheme documentation and probably the

corporate structure too, and it is highly likely that Mr Clarkson's first draft of the new deed and rules named Viavi as principal employer. He had been sent the 1995 Deed by Mr Taylor and was not told then that there had been any change in principal employer.

82. Mr Clarkson then met Mrs Bartlett on 21 April, no doubt to consider the draft booklet and deed that he had produced. As a result of that meeting, various amendments were made to the draft deed. It is a clear inference to be drawn that the position of Management was discussed at that meeting. On 6 May, Mrs Bartlett sent Mr Clarkson (incorrect) details of the date of incorporation of Management. This date does not appear as such in the 1999 Deed or the booklet, but it does appear as the date from which Management supposedly became the principal employer. This in my judgment reveals an understanding, on the part of someone, that because Management was the holding company it should have become the principal employer. Whose understanding this originally was is unclear, but it appears to have been communicated and acted upon. It is clear that Mr Clarkson's later draft deed had Management as a party, as principal employer. That, I find, was endorsed by Mr Taylor, in his letter dated 25 May 1999.

83. In my judgment, it is much more likely than not that the trustees were told about these matters at their meeting on 16 June 1999. Two of the trustees were directors of Viavi and Mrs Bartlett was closely involved in what had been discussed with Bond Pearce. The draft deed would at some stage have needed an explanation of the identity of the principal employer, so there is no reason to think that Mr Taylor and Mr Bourton (assisted by Mrs Bartlett) did not do their duty as trustees by explaining what was intended to happen. I find that Mr Taylor and Mrs Bartlett probably explained to the trustees that it was appropriate that Management should be the principal employer, with retrospective effect from the time that it became the holding company of Viavi. The identification of Management as principal employer in the 1999 trustees' report reflects their understanding and acceptance that this was to be so. But in June it was not necessary for the trustees to take matters further and they did not do so. There appear to have been some details outstanding still, so the deed was not ready for signature.

84. One of these details was the change of name of group companies, consequential on the Wavetek merger, and I consider it likely that the reference in the minutes to Mr East's raising the possible change of employer name was a reference to this, rather than to the change of principal employer, which by then was not a matter of possibility only. This is supported by the fact that Mrs Bartlett's fax to Mr Clarkson dated 6 July 1999 addressed the changes of name. Further, the minutes of the next meeting on 15 September 1999 record that it was noted that there was no change to the name of principal employer, which was therefore necessarily Management; they did not record that there was indeed to be a change to Management.

85. It is possible that the 1999 Deed had been prepared for signature by the trustees at that meeting and that is why it bears the date 15 September 1999 (though it is unusual to date a deed before it has been executed by all parties, and a further engrossment was sent out by Mr Clarkson in December 1999). The minutes record that the retirement of Mr Bourton and appointment of a new trustee had to be documented before the 1999 Deed was signed, and this was not dealt with at the September meeting. The new booklet was approved by the trustees but the 1999 Deed was not signed. For

whatever reason (possibly the timetable for the trustees' regular meetings), the 1999 Deed was not signed by the trustees until January 2000. When it was signed, it contained a recital to the effect that Management became the principal employer on 30 September 1994, in succession to Viavi.

86. In my judgment, there is no sufficient evidence prior to the execution of the 1999 Deed that the trustees, Management and Viavi all agreed to appoint Management as principal employer at any earlier time. It appears that Mrs Bartlett, of Aon, Mr Clarkson of Bond Pearce and Mr Taylor between them were instrumental in raising the issue of Management's status within the Scheme, but I cannot find that the trustees unanimously agreed that Management should become, or be treated as having become, the principal employer before they signed the 1999 Deed. There is nothing in the June or September 1999 minutes to justify a finding that then and there they all agreed to the change.

87. Nor is there sufficient evidence that Management itself agreed before it executed the Deed. Mr Taylor was content that the draft deed should be prepared on the basis that Management should be, or be treated as, the principal employer, and Mr Taylor and/or Mrs Bartlett had probably explained to the trustees at the June 1999 meeting what was intended; but that is not the same as Management, as a company, agreeing (even informally) with the trustees to become the principal employer. Mr Taylor was present at the trustees' meeting in his capacity as a trustee, not as a director of Viavi or Management. There is no record of any agreement being reached in the trustee meeting minutes. Mr Taylor was later formally authorised by the directors of Management to sign and seal the 1999 Deed, and it seems to me unlikely that, before that, Management had informally agreed with the trustees to become the principal employer, even though some of its directors intended that to be so. Further, in his letter to Mr Taylor of 2 June 2000, Mr Higgs, who was present at the trustees' meetings the previous year, told Mr Taylor that Bond Pearce had said that the change in principal employer "took place in September 1994, and hence the new rules (signed earlier this year) have [Management] as the Principal Employer". Mr Higgs would have known if a change in principal employer had been agreed with the trustees the previous year before the 1999 Deed was executed.

88. Viavi's case about these events is that all the relevant parties mistakenly believed that Management *had been* appointed principal employer in 1994 and that there was therefore no intention or agreement in 1999 for it to become principal employer. I reject that argument. Mrs Bartlett had been an administrator of the Scheme since at least 1995; Mr Taylor had been a director of Viavi since November 1995 and in that capacity had been involved in Viavi's performance of its role as principal employer up to and including December 1997. He was a director at the time when it was specifically decided not to make Management the principal employer but for it to execute a deed of adherence as a participating employer, in 1996. He sent the 1995 Deed (showing Viavi as principal employer) to Mr Clarkson in 1998, without any comment or correction in relation to Viavi's position. Further, Mr Bourton, who had been the company secretary of both companies before Mr Taylor, and remained a director of Viavi until September 1999, was a trustee too. In 1999, two other trustees had been trustees since 1992, and another had been a trustee from 1983, apart from a period from February 1994 to June 1997. It is not credible that Mr Taylor, or the

trustees, believed that Management had in fact been appointed principal employer in 1994. They knew that that was not the case.

89. What I find happened in 1999 is that, for whatever reason, Mr Taylor and Miss Bartlett came to understand that Management should have become the principal employer in 1994, when it became the holding company of Viavi, even though Viavi in fact decided in 1996 that Management should not be the principal employer. Accordingly, they decided to treat it – ultimately by means of the 1999 Deed – as if it had become principal employer in 1994 and remained principal employer. They knew that in fact, in 1999, Viavi was the principal employer, but they wanted Management to become the principal employer, if possible (for whatever reason) retrospectively to 1994. What advice they received from Bond Pearce in this regard I am unable to say, and will not speculate about. I find that Mr Taylor and/or Mrs Bartlett shared their understanding of what was to happen with the other trustees at the June 1999 meeting. Accordingly, all relevant parties understood that Management was not already the principal employer but was to become the principal employer, with retrospective effect to 1994.

90. What then is the effect of the 1999 Deed, which as I have found was executed by the trustees on 12 January 2000 and by Management on 3 February 2000?

91. According to its terms, Management, said to have become principal employer on 30 September 1994, agreed in such capacity with the trustees to amend the provisions of the Scheme by substituting a new deed and rules. The power to do so was exercisable jointly by principal employer and trustees, under rule 10.9 of the 1995 Deed; for whatever reason the 1999 Deed is expressed in terms of Management amending the Scheme and the trustees consenting, but in my view nothing much turns on that. Importantly, clause 3 of the 1999 Deed states that the trustees hold the fund (defined in an earlier deed) "on trust to apply it in accordance with the provisions of the Scheme as amended by this deed". That is an express affirmation by the trustees of a scheme with Management as principal employer, Viavi and Sales as additional participating employers and the rules in accordance with the 1999 Deed. As previously noted, the 1999 Rules in fact identify Viavi and its successors under rule 32.2 as the principal employer. Given the background to the 1999 Deed, which I have set out and considered above, it is obvious that, when changing the name of the Principal Employer in the draft deed, the draftsman forgot to do so in the draft rules and no one else picked up the error.

92. The amendments made by the 1999 Deed are only valid if it also made Management principal employer. The relevant question is whether the 1999 Deed itself can be read as the necessary agreement of the trustees, Management and Viavi to Management becoming the principal employer going forwards (though not with retrospective effect), in exercise of the power in rule 10.10 of the 1995 Deed. If it can, then the 1999 Deed validly amended the 1995 Deed; if it cannot, then the 1999 Deed was of no legal effect under rule 10.9 because it was not executed as a deed by the principal employer, Viavi.

93. The first and obvious point to consider is that Viavi was not in fact a party to the 1999 Deed. It must be taken to have known of the intention to execute the 1999 Deed to achieve the desired effect since Mr Taylor and Mr Bourton were both directors of Viavi in 1999 and Viavi had initiated the process of revision. But without Viavi's

actual or deemed consent to a change of principal employer the change would not be effective. Viavi was, however, at all relevant times the wholly-owned subsidiary of Management, so that Management in law could take decisions within the corporate powers of Viavi informally on its behalf, without any need for Viavi to make a board resolution or pass a special resolution in general meeting to that effect: *Re Duomatic* [1969] 2 Ch 365. It seems to me that, if there is agreement by Management to become principal employer, there is necessarily consent by Viavi to its doing so. Under the 1995 rules, Management could not become principal employer without Viavi ceasing to be principal employer; and Management's agreement to its becoming principal employer is also Viavi's agreement.

94. Mr Evans submitted that the *Duomatic* principle could not apply here, where Viavi's interest under the 1995 Deed is different from Management's interest; that is to say, Viavi's position as principal employer is being taken over by Management. Although initially attracted by that submission, I do not agree with it. I accept that Management and Viavi had different interests in principle, but not necessarily conflicting interests. It might very well have been as much in Viavi's interests for it to be substituted as it was in Management's interests to take over. Management could not have decided to become principal employer (if that is what it did) without also deciding that Viavi should cease to be principal employer. And it is inconceivable that, exercising its voting rights as shareholder of Viavi, Management would have voted differently on that question. If on its true interpretation the 1999 Deed appointed Management as principal employer, then by resolving to execute the 1999 Deed, Management effectively gave consent as sole shareholder of Viavi too.

95. It could be said that it is odd for a non-party to a deed to be treated as bound by the exercise of a power that the deed, on its face, does not expressly exercise, and one can see that in other circumstances that might be a persuasive argument. However, if on the true interpretation of the deed in its proper factual context, or by implication, there is in law an exercise of a power, and the non-party is otherwise to be taken as having consented, then the fact that the power is not expressly exercised would not be an obstacle to the non-party being bound. The particular circumstances of the 1999 Deed were that Viavi, through Mr Taylor, was well aware that the view had been taken on its behalf that Management should be the principal employer going forwards, and should have been principal employer from 1994; and Viavi's conduct from 1999 onwards, acquiescing in Management's performance of the principal employer role, evidences its understanding and agreement that Management was to act as principal employer going forwards.

96. In substance, therefore, by means of the 1999 Deed, Viavi knowingly ceded its role as principal employer to Management, with the agreement of the trustees. In my judgment, that means that, as a matter of interpretation of the 1999 Deed against its factual background, the Deed had effect as an exercise of the rule 10.10 power, notwithstanding the infelicities in its wording, and notwithstanding that the power could not in law be exercised with retrospective effect. The particular factual background that is material is that it was common knowledge to the trustees and Management (and to Viavi) that Management was not in 1999 the principal employer; that Viavi was the principal employer; that Management had not acted as principal employer since 1994, but that the view had been formed that as holding company it was to become the principal employer with retrospective effect to 1994. The exercise

by the trustees and Management (with the consent of Viavi) of the power to appoint Management as principal employer was a necessary precursor to the rule changes that the 1999 Deed purported to make. In reality, the parties to the 1999 Deed meant to make Management the principal employer, so far as possible with retrospective effect but certainly for the future. The language of the 1999 Deed is in my view apt to achieve this, and it would be understood as such by a reasonable person with all the background knowledge that the parties had.

97. Mr Froude's case in relation to the 1999 Deed is also advanced on two alternative bases: first, that there is an imputed intention to exercise the power in rule 10.10 to appoint Management, so that the rule changes made by the 1999 Deed would have effect; secondly, that Management, the trustees, Viavi and the beneficiaries of the scheme are estopped by deed from denying that Management had become the principal employer.

98. The first alternative basis depends on the *ratio* of the decision of Scott J in *Davis v Richards and Wallington Industries Ltd* [1990] 1 WLR 1511 at 1530:

> "A disponor (A) purports to make a disposition of property. This disposition cannot be effective unless associated with the exercise of a power vested in A and that A could properly have exercised in order to make the disposition. The disposition makes no mention of the power and does not purport to be an exercise of it. The effect of the principle and the cases to which I have just referred is that A's intention to make the disposition justifies imputing to him an intention to exercise the power, provided always that an intention not to exercise the power cannot be inferred. If the requisite intention can be imputed, the court will treat the disposition as an exercise of the power".

The principle has subsequently been applied to validate the appointment of a trustee, where a change in the trust rules was required before that trustee could be appointed: *LRT Pension Fund Trustee Co Ltd v Hatt* [1993] Pens LR 227. More recently, the principle was approved and followed by Newey J in *Briggs v Gleeds (Head Office)(a firm)* [2015] Ch 212, though he emphasised that it needed to be applied with caution otherwise trustees could be taken to have exercised powers that they did not even consider whether they should properly exercise.

99. There is no evidence here that the trustees and Management did not intend to exercise the power to substitute Management for Viavi. As I have found, it was known by the trustees and the companies that Viavi had in fact been the principal employer up to 1999 and that Management had not been, even if they believed that it should have been. The reason why the view was taken that Management should become principal employer with retrospective effect was, apparently, that Management was the holding company of Viavi from 1994, and not because any acts actually done by Management before 1999 needed to be ratified (there were no such acts on the part of Management). Management remained the holding company of Viavi when the 1999 Deed was executed, so, even if the parties to the deed had known that retrospective effect could not be achieved under rule 10.10, they would still have exercised the

power so that Management could become and amend the 1995 Deed as principal employer.

100. It is of course necessary, for the *Davis* principle to apply, that the person making the disposition has it within his power to exercise the other necessary power. In this case, the trustees and the principal employer jointly had the power to vary the terms of the Scheme (rule 10.9). Under the 1999 Deed, that power was purportedly exercised by the trustees and Management. Did the trustees and Management also have the power to appoint Management principal employer? The answer is that in theory they did not, because the appointment needed to be made with the agreement of the existing principal employer. But in practice they did, because the principal employer was a wholly-owned subsidiary of Management. In my view, it must be sufficient for the application of the *Davis* principle that the disponor was, at the date of the purported disposition, in fact in a position lawfully to exercise the necessary further power, and irrelevant that in other circumstances (e.g. if the existing principal employer were not directly controlled by the new principal employer) the trustees and the new principal employer would not have had that other power.

101. Mr Evans raises a further objection to the application of this principle here, namely that it cannot be used to give the disponor a power that he does not have, but only to validate the exercise of a power that he does have. So, here, the objection is that, but for the exercise of the power in rule 10.10, Management would have had no power at all to amend the rules of the Scheme. I quite see that if the person exercising the power has no powers then it is unlikely that the *Davis* principle can apply to validate the purported exercise. But if, for whatever reason, it does lie within the power of those who have purported to exercise one power to confer that power by first exercising another, then the principle in my judgment is capable of applying. The distinction between invalid exercise and no power is not borne out by the authorities. Whether the invalidity stems from a lack of power (as in the *LRT v Hatt*) case, or from a lack of a necessary consent (as in *Davis*), the principle seems to me to be the same. Indeed, if Mr Evans were right, the decision in *LRT v Hatt* would have been the opposite, for there the company that purported to appoint a single trustee in place of existing trustees had no power to do so unless the scheme rules were first amended to provide the power.

102. Accordingly, I reach the conclusion, if I am wrong on interpretation of the 1999 Deed and that Deed cannot be read as an appointment of Management, that there is nevertheless to be imputed to the trustees and Management the exercise of the power that they had, in fact and in law, to appoint Management in place of Viavi at the same time as (though logically immediately prior to) the amendments made to the Scheme under the 1999 Deed.

103. In view of the conclusions that I have reached, it is not necessary for me to decide whether or not an estoppel by deed would have arisen from the 1999 Deed, precluding anyone with an interest from asserting that Management was not the principal employer at the date of the Deed. I record only that I would have had real doubts whether the beneficiaries of the Scheme could have been treated as privies of the trustees, so as to make any estoppel that might otherwise arise from recital (E) bind the members of the Scheme. Although in some circumstances beneficiaries can be treated as privies of their trustees, e.g. where trustees have been litigating to protect their beneficiaries' rights and an estoppel *per rem judicatam* arises, in other

circumstances there is no privity, because the beneficiaries have rights and interests that do not necessarily coincide with those of the trustees. In the case of a pension scheme, the beneficiaries are not volunteers and do have independent rights, and on occasions pension trustees have to take decisions (having considered all relevant matters) that do not necessarily favour some or even all of the beneficiaries. That would seem to me to preclude a finding that there could be an estoppel by deed, binding all scheme members, if the power to appoint a new principal employer was not validly exercised, or deemed to have been exercised, in accordance with the trust deed.

104. Accordingly, and notwithstanding my doubts about estoppel by deed operating against the Scheme members, the answers that I give to Issues 3, 4 and 5 are that the 1999 Deed was executed on or about 3 February 2000; that on that date the principal employer was Management, and that accordingly the 1999 Deed was validly executed on that date.

Issue 5a: the first purported correction to the 1999 Deed

105. In paragraph 35 above I explained the circumstances in which the informal rule 61.4(a) amendment was made by the trustees initialling an amended page of the 1999 Rules, with rule 61.4(a) in different terms from the originally executed Rules. The question is whether this amendment was valid.

106. It is common ground that it was not validly made. Under the 1999 Rules (which as I have held were validly made and in force from 3 February 2000), any modification thereof was required to be made by deed by the principal employer, namely Management. There is no such deed executed by Management. I am not required to decide whether or not any estoppel in this regard arises out of the circumstances in which the informal rule 61.4(a) amendment was made. This issue has, by agreement, been reserved to be argued, if necessary, in other proceedings.

Issues 6, 7 and 8: the validity and effect of the 2001 Deed of Rectification

107. The circumstances and terms in which the 2001 Deed of Rectification was made are set out at paragraphs 40 and 41 above. The 2001 Deed (as I shall refer to it here for convenience) did not purport to make the amendment to rule 61.4(a) that had already been attempted to be made informally, though that purported correction was recited. It purported to make an amendment to rule 61.4(b), with retrospective effect to 15 September, 1999.

108. I have already decided that Management became the principal employer with effect from 3 February 2000. The remaining questions for determination are the date of execution of the 2001 Deed and whether it was validly executed on that date.

109. The parties are agreed that the best evidence of the date of execution of the 2001 Deed is the date that it bears, 31 December 2001. Although there is evidence that the trustees signed the 2001 Deed at their meeting on 26 September 2001, there is no independent evidence of when it was executed on behalf of Management. Accordingly, it is to be taken as having been executed on 31 December 2001.

110. The amendment that it purports to make to the 1999 Rules, pursuant to rule 5.1, was to substitute a new rule 61.4(b) with retrospective effect to 15 September 1999. Rule 5.1 expressly permits retrospective amendment, but subject to rule 5.2, which preserves any accrued rights. Further, s.67 of the Pensions Act 1995 prevents any power of amendment being exercised that would impact adversely on accrued pension rights. In those circumstances, the amendment to rule 61.4(b) made by the 2001 Deed, which purported to take away a minimum 3% (and maximum 5%) per annum compound escalation of pensions in payment attributable to pensionable service after 5 April 1997 and substitute a capped RPI Index (maximum 5%) escalation, could not have effect from a date prior to 31 December 2001.

111. Accordingly, the 2001 Deed was validly executed on 31 December 2001 and has effect from that date but no retrospective effect. I am not required to decide whether or not any estoppel in this regard arises out of the circumstances in which the 2001 Deed was made, or whether any equity to rectify the 1999 Deed (if any) is capable of adversely affecting accrued rights. These issues have, by agreement, been reserved to be argued, if necessary, in other proceedings.

112. The final question is whether, by reciting the trustees' attempt informally to amend rule 61.4(a) at their meeting on 16 November 2000 (which was in law invalid but which was assumed to be valid), the 2001 Deed, which *was* executed by Management and which amended rule 61.4(b), has effect to make the rule 61.4(a) amendment too, even though the 2001 Deed does not expressly exercise the power of amendment in that regard.

113. That raises a question of law as to the circumstances in which the law will impute the exercise of a power that could have been exercised but that was not in terms exercised. It is therefore closely related to the principle in *Davis v Richards and Wallington Industries Ltd*, referred to above, where the law imputes to a disponor the exercise of a power that he could have exercised and which was *necessary* to establish the validity of the disposition, even if the disponor did not address the issue. In one respect, it could be said that the imputation is rather less of a fiction, in that the parties to the 2001 Deed believed that the power had already been validly exercised, whereas in *Davis* the trustees did not advert to the need to exercise it at all. On the other hand in *Davis* it can be said that the trustees must be taken to have intended to exercise the power, since otherwise the definitive deed and amendment deed were invalid.

114. The only decision that the parties have put before me that is directly in point is a decision of the Bailiff of the Royal Court of Jersey, sitting with Jurats, in *Bas Trust Corporation Ltd and Goyet v. MF* [2012] JRC 081, otherwise known as the *Shinorvic Trust case*. One of the issues in that case was whether a Mrs B was validly added as a beneficiary of the trust in exercise of a power reserved to the settlor to do so by instrument. The settlor purported to do so by deed in 1990, but his signature was not validly witnessed and so it was not an "instrument" as defined in the trust deed. A later 1998 deed, which was validly executed, was expressed to be supplemental to the trust and to the 1990 deed "in terms of which [Mrs B] was added to the class of beneficiaries". The Court held that the formal defect in the 1990 deed was capable of being cured by the principle that equity will aid the defective execution of a power, because Mrs B was within the class of persons in whose favour equity would act. Its decision on the alternative ground that an intention in 1998 to exercise the power to appoint Mrs B could be imputed to the settlor was therefore *obiter* (see para 59 of the

judgment). However, the decision is carefully and closely reasoned, with the benefit of opinions from very experienced English Counsel and submissions from the Jersey advocates.

115. The Royal Court held that, even where the prior exercise of a power was not necessary for the validity of the subsequent transaction (as in the *Davis* case), the recital in a valid instrument of a past ineffective exercise of a power is sufficient to treat the later instrument as a valid exercise of the power, and so the 1998 deed had the effect of appointing Mrs B to the class of beneficiaries. The authority, such as it was, that the Court found persuasive was an Irish decision, *Lees v Lees* (1871) IR 5 Eq 549, in which the Vice-Chancellor held that a statement in a will that a sum of money had been transferred during the testator's lifetime was a valid exercise of a power of appointment by the testator:

> "It is, of course, unnecessary that there should be actual words of appointment in order to bring that about; a statement or expression of intention sufficiently clear is all that is required. The recital in an instrument capable of operating as an execution of a power of a past transaction, which transaction would by itself have been inadequate, has been held sufficient."

116. The decision is referred to in Farwell on Powers at paras 222-223, with apparent approbation, and the principle is expressed in Thomas on Powers at para 5-191 in the following terms:

> "Provided the requisite intention to exercise the power is manifested, the means by which this is achieved does not necessarily matter. Thus powers have been held to have been exercised by the recital in a settlement, by a recital in a petition".

117. From that discussion of the principle, it appears to me that what is required is sufficient evidence of intention on the part of Management to exercise its power to amend rule 61.4(a). Such evidence can be derived from the recital of a previously ineffective exercise of the power, for then the recital acts as an endorsement of what was previously ineffective, such that the intention to exercise is capable of taking effect under the valid deed. Does it then matter that what was previously ineffective was ineffective because the right person did not exercise the power, rather than because there was some defect in execution by the right person, or some other default in performance? In my view it should not matter, since the appointor is treated as exercising the power at the later time, on the basis that there is sufficient evidence of intention to do so.

118. By reciting the earlier correction of rule 61.4(a) and stating that "in error the mistake in 61.4(b) was not corrected at the same time", it is clear that Management's intention is that rule 61.4(a) be amended in terms of the informal amendment, even though that is not done expressly in the terms of the 2001 Deed. This is not, in my judgment, a case such as is referred to in Farwell on Powers at para 222, where a recital states that

someone has an independent entitlement apart from exercise of the power. It is a case where it is recognised that the power of modification has been exercised to correct rule 61.4(a), but the power was in law invalidly exercised because it was not done under the seal of Management. There is no evidence that Management did not intend to exercise the power, and it is clear that it would have done so expressly had it been informed, at the date of the 2001 Deed of Rectification, that the informal amendment to rule 61.4(a) was invalid.

119. Accordingly, in my judgment, the principle recognised and applied in the *Shinorvic Trust case* can and should be applied here, with the result that the 2001 Deed of Rectification is taken to have amended rule 64.1(a), in terms of the amendment initialled by the trustees. However, the amendment cannot have retrospective effect, by reason of the principle previously referred to. The original terms of rule 61.4(a) provides escalation fixed at 3% per annum compound for benefits in payment attributable to service before 6 April 1997, whereas the amended version gives the trustees discretion as to the rate to be applied. The accrued benefits cannot be defeated by retrospective amendment, and so the amendment to rule 61.4(a) takes effect from the same date as the amendment to rule 61.4(b), namely 31 December 2001.

Issues 9 and 10: Did the 2002 Deed of Novation have any retrospective effect, and if so did it invalidate the 1995 Deed?

120. The circumstances in which the 2002 Deed of Novation was made, and its relevant terms, are set out in paragraphs 38, 39 and 42-45 above.

121. As formulated by the parties, issue 9 was whether clause 1 of the 2002 Deed of Novation had the effect of substituting Management as principal employer, and if so was it with effect from 30 September 1994 or some other (and if so what) date, or only prospectively. Since I have held that the 1999 Deed had effect to make Management the principal employer, the question is whether the 2002 Deed of Novation had retrospective effect to make Management the principal employer with effect from an earlier date, and if so what date. This depends on the interpretation of rule 32 of the 1999 Rules.

122. The answer seems to me to be straightforward. In 2002, Management was already the principal employer. The 1999 Rules were the rules of the Scheme. Rule 32.2 would have applied were there to be a change in principal employer from Management to someone else (as in fact happened in 2003). The 2002 Deed of Novation purports to be made by Viavi as "Old Employer", Management as "New Employer" and the trustees. It contains a recital that the parties to the 2002 Deed wish to confirm the substitution of Management in place of Viavi since 30 September 1994. There is then a declaration, in the operative part of the 2002 Deed, "confirming" that Management assumed the duties of principal employer with effect from 30 September 1994 and that, *in exercise of rule 32*, Management is the principal employer in place of Viavi for all purposes. The parties to the 2002 Deed then ratify all actions taken by Management as principal employer since 30 September 1994.

123. The purported exercise of the power in rule 32 of the 1999 Rules to appoint Management principal employer was of no effect. Rule 32 does not empower the principal employer (Management) to agree with someone who was previously the principal employer but is not to become principal employer (Viavi) that it (Management) is to be treated as principal employer from an even earlier date than that on which it was in fact appointed. It empowers someone who is not the principal employer, with the agreement of the person who is the principal employer, to undertake the liabilities of the principal employer as from a date agreed with the person who is the principal employer. If the 1999 Deed had been invalid, the 2002 Deed would have had to be analysed in terms of the power of substitution in the 1995 Rules, which as I have held does not permit a change of principal employer with retrospective effect. But since the 1999 Deed was valid, Management already was the principal employer as from 3 February 2000, and so the rule 32 power to substitute a new principal employer could only have been exercised in favour of someone else, not in favour of Management.

124. Accordingly, in so far as it purports to exercise rule 32 of the 1999 Rules, the 2002 Deed is of no effect. In so far as it purports to ratify the actions of Management before 2002 no ratification was needed, since Management did not act as principal employer before 3 February 2000 and did act after that date as lawfully appointed principal employer. The 2002 Deed therefore did not invalidate the 1995 Deed.

125. In any event, a New Employer could not have been appointed principal employer under rule 32 with retrospective effect so as to invalidate prior transactions or appointments that were validly made by Viavi (such as the 1995 Deed and the appointment of trustees); nor could such retrospective appointment operate to create a fiction that Management was the principal employer when it was not and that Viavi was not when it was (e.g. on any question of regulatory significance for the Scheme); nor could any such appointment have the effect of interfering with accrued rights under the Scheme. All these contraventions would have occurred if the exercise of the rule 32 power had been given the effect that it was intended to have. I am very doubtful whether the purported exercise of the power could have been saved by severance in such circumstances, when it is unclear in what respects retrospective effect could be given to the appointment and unclear from precisely what date. But it is not necessary for me to decide that point.

126. A further issue as to exactly when the 2002 Deed of Novation was executed, which could have been of some significance if I had not held that the 1999 Deed was validly executed, does not now matter. That is because Management was in fact the principal employer with effect from 3 February 2000 and did not only become principal employer under the terms of the 2002 Deed of Novation.

127. Had it been necessary to decide this issue, and in case it later becomes of significance, I would have held that the obvious conclusion to draw from the fact that Aon had a copy of the 2002 Deed sealed by Management and signed by Mr Taylor but not by Mr Eisemann was that the seal of Management was affixed no later than 13 March 2002. It was on that day that the Deed was handed to Mr Higgs at the trustees' meeting, and Mr Higgs then forwarded it to Aon's legal and documentation department, before they returned it to him in May and he returned the Deed to Mr Taylor for the signature of someone else. Accordingly the Deed was validly executed no later than 13 March 2002 by the affixing of Management's seal, regardless of the signatures on it. I

consider that this conclusion is further supported by the fact that, when the board of Management authorised Mr Taylor on 3 February 2000 to execute the 1999 Deed, it did so in terms that he should seal it and sign it, as indeed was done. It is likely that he was similarly authorised in relation to the 2002 Deed and that he both affixed the company seal and signed it. It is, in my judgment, unlikely that the Deed was only sealed shortly before it was sent to Mr Eisemann for his signature. It is likely that it was Ms Wakely or someone else at Aon who made the mistake of thinking that the Deed required two separate signatures as well as the seal of Management, which under s.36A(2) of the Companies Act 1985 it did not.

Issue 11: Did clause 1 of the 2002 Deed of Novation have the effect of rendering the 1999 Deed valid?

128. Since I have held that the 2002 Deed was ineffective and the 1999 Deed was valid, this issue does not arise for determination.

Issue 12: If the 2001 Deed of Rectification was invalid, did clause 1 of the 2002 Deed of Novation have the effect of rendering it valid?

129. Since I have held that the 2001 Deed of Rectification was valid and the 2002 Deed was ineffective, this issue does not arise for determination.

Issue 13: Did clause 2 of the 2002 Deed of Novation have the effect of rendering the 1999 Deed valid?

130. Since I have held that the 1999 Deed was valid and that no ratification by the 2002 Deed of Variation was needed, this issue does not arise for determination.

Issues 13a and 13b: were the 2002 Deed of Correction and the 2002 Deed of Adherence validly executed?

131. Since I have held that Management became principal employer with effect from 3 February 2000, the 2002 Deed of Correction and the 2002 Deed of Adherence were validly executed.

Issue 14: did the 2003 Deed of Novation have the effect of substituting Viavi as principal employer, and if so from what date?

132. This issue arises because the 2003 Deed was executed by Management, Viavi and the trustees on 21 March 2003 but purports to have retrospective effect from 2 January 2003. There is no dispute that the 2003 Deed was validly executed; the only issue is

whether it could and did have retrospective effect. The 2003 Deed states that the following matters occur with effect from 2 January 2003:

i) Viavi becomes principal employer in place of Management;

ii) Viavi undertakes the liabilities of principal employer and covenants to comply with the Scheme obligations as an employer;

iii) Management is released and discharged from liability as principal employer.

133. Rule 32.2 of the 1999 Rules provides that where a deed is executed in appropriate terms:

> "...then with effect from such date as the Old Principal Employer and the New Principal Employer agree:
>
> (a) the Old Principal Employer shall be released from all obligations in relation to the Scheme which apply to it other than as an Employer; and
>
> (b) the Rules and all other provisions of the Scheme shall take effect as if the New Principal Employer had been and is the Principal Employer."

134. The first question is whether, as a matter of interpretation of the Rules, rule 32 permits a substitution to be made with retrospective effect, in the same way that the amendment power can be exercised retrospectively. There is no express limitation in rule 32 on the date that the outgoing and incoming principal employers may agree, and the language of rule 32.2(b) appears to contemplate retroactivity ("...as if the New Principal Employer *had been* and is the Principal Employer"). The definition of Principal Employer in the 1999 Rules expressly includes any person who becomes Principal Employer under rule 32.2, so it is not obvious that rule 32.2(b) is expressed in that way simply to bring the appointee within the definition in the Rules.

135. Unlike the power of substitution in the 1995 Rules, rule 32.2 does require the formality of a deed and possibly Revenue approval (rule 32.1(c)); so it is possible that the preparation of the necessary formalities for a change in principal employer will take time. On the other hand, the rule requires the consent of the existing principal employer in all cases, so it does not purport to deal with a case where the principal employer has otherwise ceased to act or to exist. Rule 34 deals separately with what happens to the powers of the principal employer in case of an Insolvency Event.

136. As in relation to the 1995 Rules, the question to be resolved is one of the scope of the power conferred, having regard to its terms, the purpose of the rule and the likelihood or otherwise of its exercise giving rise to impermissible re-writing of history. Can substitution of a principal employer with retrospective effect reasonably be considered to have been within the contemplation of the parties to the 1999 Deed?

137. In my judgment, the parties cannot reasonably be taken to have intended that a principal employer who has acted as such can be displaced retrospectively so as to create a fiction that that person was not the principal employer, which in turn would invalidate steps lawfully by it. That would have the effect of harming the good administration of the Scheme. Similarly, it cannot reasonably have been intended that, without the agreement of the trustees (which rule 32 does not require), the existing principal employer could be released with retrospective effect from obligations to which in fact it was subject. The release from obligations referred to in the rule must be a release for the future, not an exoneration of liability for matters past. However, there is nothing similarly objectionable about the incoming principal employer assuming liabilities as from an earlier time: that does not permit history to be re-written so as to deny the validity of acts previously done by the principal employer, or so as to create a fiction for all purposes that the new principal employer was in place before in fact it was.

138. It can be argued, as Mr Stallworthy did argue in relation to the 1999 Deed, that there is nothing objectionable either about a retrospective validation of acts done by the new principal employer acting as such before the execution of the formal deed. That is more in the nature of a ratification of acts that, when done, were done with the intention that they be done by the principal employer. The effect would be that the acts of a new principal employer, acting as such before the formality of the deed had been attended to, could be rendered valid.

139. I see the force of that argument, and it may be that rule 32 accommodates some retroactive effect in such circumstances. But it was not argued that the 2003 Deed of Novation was expressed to be retroactive for that reason. The only documentary evidence relating to the date of 2 January 2003 is the minutes of the trustees' meeting on 15 January 2003, when it was noted, under the heading "*Change of Principal Employer*", that with effect from 2 January 2003 there was only one UK company, Viavi - presumably this meant only one UK company that remained an employer for the purposes of the Scheme. The draft deed to effect the change of principal employer was then prepared by 12 February 2003. But there is no suggestion that Viavi did any act as principal employer before 21 March 2003. The 2003 Deed of Novation appears to have been executed in the interests of better administration, and before an annual return that would identify that only Viavi was by then a participating employer.

140. In my judgment, save to the extent indicated above, rule 32 does not permit an existing principal employer to cease to be the principal employer from a date before the execution of the deed by the new principal employer, nor does it permit the creation of a fiction that the new principal employer was in office before the execution of the deed. That does not prevent a new principal employer from voluntarily assuming liabilities from an earlier time, but it does prevent the old principal employer from being released from its liabilities from an earlier time.

141. In my judgment, therefore, notwithstanding its terms, the 2003 Deed of Novation did not have the effect of making Viavi the principal employer (again) before the date of its execution, 21 March 2003. Management remained principal employer and was not released from its liabilities as principal employer until that date.

Issue 15: Did the 2003 Deed of Novation regularise the appointment of the trustees?

142. It is common ground that if any regularising was required the 2003 Deed achieved this. On the basis of my conclusions on the other issues, no regularising was required, unless there was a purported appointment of trustees by Viavi between 2 January 2003 and 21 March 2003, but there is no suggestion that this was the case.

AGREED LIST OF ISSUES

Issue 1: What was the identity of the principal employer on the date of execution of the Supplemental Trust Deed dated 7 November 1995 ("**the 1995 Deed**")?

Issue 2: In the light of the answer to issue 1, was the 1995 Deed validly executed on the date as determined at issue 1?

Issue 3: What was the date of execution of the Trust Deed dated 15 September 1999 ("**the 1999 Deed**")?

Issue 4: What was the identity of the principal employer on the date as determined at issue 3?

Issue 5: In the light of the answers to issues 3 and 4, was the 1999 Deed validly executed on the date as determined at issue 3?

Issue 5(a): Was Rule 61.4(a) of the 1999 Deed validly amended from the terms in which it was originally executed by the initialling of the replacement page or the Deed of Rectification (as defined at issue 6)?

Issue 6: What was the date of execution of the deed of rectification dated 31 December 2001 ("**the Deed of Rectification**")?

Issue 7: What was the identity of the principal employer on the date as determined at issue 6?

Issue 8: In the light of the answers to issues 6 and 7, was the Deed of Rectification validly executed on the date as determined at issue 7?

Issue 9: Did Clause 1 of the deed of novation dated 13 March 2002 ("**the 2002 Deed of Novation**") have the effect of substituting WGML as principal employer and if so was it:

(a) With effect from 30 September 1994; and/or

(b) Prospectively; or

(c) With effect from some other date, and if so what date?

Issue 10: If the answer to issue 2 is that the 1995 Deed was valid, did Clause 1 of the 2002 Deed of Novation have the effect of:

(a) Rendering the 1995 Deed invalid;

(b) If so, from what date;

(c) And if so, on what terms?

Issue 11: If the answer to issue 5 is that the 1999 Deed was invalid, did Clause 1 of the 2002 Deed of Novation have the effect of:

(a) Rendering the 1999 Deed valid;

(b) If so, from what date;

(c) And if so, on what terms?

Issue 12: If the answer to issue 8 is that the Deed of Rectification was invalid, did Clause 1 of the 2002 Deed of Novation have the effect of:

(a) Rendering the Deed of Rectification valid;

(b) If so, from what date;

(c) And if so, on what terms?

Issue 13: If the answer to issue 5 is that the 1999 Deed was invalid, did Clause 2 of the 2002 Deed of Novation have the effect of:

(a) Rendering the 1999 Deed valid;

(b) If so, from what date;

(c) And if so, on what terms?

Issue 13(a): In light of the answer to issues 5,9,10 and 11 was the Deed of Adherence dated 10 June 2002 validly executed?

Issue 13(b): In light of the answer to issues 5 and 9 to 12 was the Deed of Correction dated 26 July 2002 validly executed?

Issue 14: Did the deed of novation dated 21 March 2003 ("**the 2003 Deed of Novation**") have the effect of substituting Viavi as principal employer for WGML? If so, did it do so:

(a) Retrospectively with effect from 2 January 2003; and/or

(b) Prospectively; or

(c) With effect from some other date, and if so what date?

Issue 15: Did the 2003 Deed of Novation regularise the position in respect of the appointment and retirement of the Trustees so that with effect from 21 March 2003 the Trustees of the Scheme were Cheryl Connaughton, Robin Halliday, Jennifer Bennett, Simon Brewer, Gerald Hobbs and Paul Bartlett?