[2013] JMCA Civ 14

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 7/2012

BEFORE: **THE HON MR JUSTICE PANTON P**
THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA

IN THE MATTER of the Trustee Act, Section 41

AND

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

AND

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

BETWEEN	**UC RUSAL ALUMINA JAMAICA LIMITED**	**1ST APPELLANT**
AND	**TIMOTHY O'DRISCOLL**	**2ND APPELLANT**
AND	**ANDREW SHMALENKO**	**3RD APPELLANT**
AND	**IGOR DOROFEEV**	**4TH APPELLANT**
AND	**THE MANCHESTER PENSION TRUST FUND LIMITED**	**5TH APPELLANT**
AND	**WYNETTE MILLER**	**1ST RESPONDENT**

AND	**WINSTON CAMERON**	**2ND RESPONDENT**
AND	**MARCIA TAI CHUN**	**3RD RESPONDENT**
AND	**RADLEY RITCH**	**4TH RESPONDENT**
AND	**KINGSLEY JARRETT**	**5TH RESPONDENT**
AND	**HOPETON McCATTY**	**6TH RESPONDENT**

Vincent Nelson QC, Stephen Shelton and Christopher Kelman instructed by Myers, Fletcher & Gordon for the appellants

B. St Michael Hylton QC and Sundiata Gibbs instructed by Michael Hylton & Associates for the respondents

25, 26 April 2012, 22 March and 19 April 2013

PANTON P

[1] On 22 March 2013, it was announced by the court that this appeal would be dismissed, save as regards the question of costs. The court directed that the costs of all parties, both in this court and in the court below, should be agreed or taxed as between attorney and client and paid out of the pension fund.

Having read in draft the reasons for judgment written by my learned brother Morrison JA, I agree with them and have nothing to add.

MORRISON JA

[2] This appeal concerns the proper interpretation of the rules of the Life Assurance and Pension Plan for Staff Employees of Alcan Jamaica Limited and Associated

Companies in Jamaica ('the pension plan'), which was terminated with effect from 31 March 2010. The context of the dispute between the 1st appellant ('UC Rusal'), which was the employer under the pension plan, and the respondents, who were the trustees of the pension plan as of the termination date, is an actuarial surplus in the fund of the pension plan ('the fund') of $2,628,800,000.00. Before D.O. McIntosh J, the respondents contended for an interpretation of the rules of the pension plan by which approximately 97% of the surplus would be used to augment the benefits of members, while UC Rusal contended for an interpretation by which appproximately 45% of the surplus would be so used and 55% would revert to it. The respective positions on both sides were supported by actuarial recommendations. This is an appeal from the judgment of the learned trial judge, who (in a judgment occupying a single typed page) resolved the dispute in favour of the respondents.

The pension plan

[3] On 31 December 1974, the pension plan was established under a deed of irrevocable trust ('the 1974 Trust Deed') by Alcan Jamaica Limited, Sprostons (Jamaica) Limited and Alcan Products of Jamaica Limited ('the Alcan Associated Companies'), to provide pension benefits for their employees. The 5th appellant was the trustee under the 1974 Trust Deed.

[4] The 1974 Trust Deed was amended by various subsequent supplemental deeds and, by virtue of a trust deed dated 8 October 1986 ('the 1986 Trust Deed'), it was restated and continued, incorporating various amendments.

[5] Between 1986 and 2005, various amendments were made to the 1986 Trust Deed. By Deed of Substitution dated 3 August 2001, between the Alcan Associated Companies (referred to in the deed as "the Old Principal Employer"), the 5th appellant and Glencore Alumina Jamaica Limited ('Glencore') (referred to in the deed as "the New Principal Employer"), Glencore was substituted for, and assumed the rights and obligations of, the Alcan Associated Companies under the pension plan, with effect from 1 September 2001.

[6] On 10 March 2005, Glencore and the 5th appellant entered into a Consolidating Trust Deed ('the 2005 Trust Deed'), which restated and consolidated the 1986 Trust Deed and all subsequent amendments to it. The 2005 Trust Deed was stated as governing all actions of the parties as of 31 August 2004, "and all benefits of employees of the Principal Employer and Associated Employers on or after the Consolidation Date" (clause 1.1). The pension plan is now principally governed by the 2005 Trust Deed. Before going to the detail of the dispute between the parties, it might be helpful to indicate the relevant provisions, comparing them briefly with their predecessor provisions in the 1974 and 1986 Trust Deeds, as well as, so far as applicable, 'The Rules of the Life Assurance and Pension Plan for Employees of Glencore Alumina Jamaica Limited' ('the Rules').

Clause 18 of the 2005 Trust Deed

[7] Clause 18, which deals with 'Priorities on Dissolution of the Fund', falls to be read as a whole and, regrettably, I cannot avoid setting it out in its entirety:

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

18.1.1 Assets in the Sub-Account for each Member's Voluntary Additional Contributions as provided for in Clause 3 hereof shall be allocated to the Member to whose credit the account stands.

18.1.2 In the computation the remaining assets shall be allocated so far as it has not already been done towards liabilities for pensions and other benefits in the following order of priority that is to say:-

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

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

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

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

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

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

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

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

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

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

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

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

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

[8] Under the 1974 Trust Deed, the settlors of the trust, it will be recalled, were Alcan Jamaica Limited, Sprostons (Jamaica) Limited and Alcan Products of Jamaica Limited (together described as 'the Associated Companies'). Clauses 18.1.1, 18.1.2 and 18.1.3 were also part of the 1974 Trust Deed, in virtually identical language, under the rubric 'Priorities on dissolution of the Fund' and grouped together as part of clause 18(A). This was followed by clause 18(B), which required the trustees to divide the members

into groups based on employment with the Associated Companies, and members most recently employed by a particular Associated Company allocated to that Associated Company. There was then clause 18(C), which required the assets, based on the computations in 18(A) in respect of the group of members allocated to each Associated Company, to be either (i) transferred to an approved scheme adopted by the particular Associated Company, or (ii) be applied to provide benefits computed in accordance with clause 18(A) to members in "some other approved way". Thereafter, any remaining assets were to be returned to the particular associated company or, at the request of that company, used to provide such additional benefits as the trustees should see fit. However, there was in terms no equivalent to clause 18.3.3.

[9] Under the 1986 Trust Deed, the settlors were described as Aluminum Company of Canada Limited, Jamtrac Limited (formerly named Sprostons (Jamaica) Limited) and Alcan Products Jamaica Limited (again, together described as 'the Associated Companies'). Clause 18 was in form and substance virtually identical to the equivalent provision in the 1974 Trust Deed and, again, there was no clause 18.3.3.

[10] Clause 19.1 of the 2005 Trust Deed, under the general rubric, 'Alteration of the Deed or Rules', empowers the trustee and the employer to amend any of its provisions or the rules by supplemental deed. However, a proviso in the following terms prohibits the making of any amendment which -

> "19.1.1 varies the main purpose of the plan as administered and funded in accordance with this Deed, namely the provision of pensions for employees upon their

retirement and for their surviving spouses and dependants.

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

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

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

[11] Clause 19.1.3 appeared in virtually identical form in clause 19(3) of the 1974 and 1986 Trust Deeds (save that the earlier deeds refer to 'Associated Companies', rather than to 'Associated Employers').

The Rules

[12] The current rules are contained in the schedule to the 2005 Trust Deed. Rule 1.4 states the object of the pension plan as being "to provide pensions, retirement benefits and certain other benefits for those employees of the Employer who participate in the Plan and for their surviving spouses and dependents".

[13] Rule 1.5 sets out a number of definitions, some of which are relevant for present purposes:

"1.5.1 **"The Actuary"** means a professionally qualified actuary or firm of such actuaries appointed by the Trustee as advisors to the Plan except that in connection with any benefits in respect of which the Trustee has effected annuity policies or contracts pursuant to this Deed with an insurance company it means that the actuary for the time being of that insurance company.

1.5.2 **"Alcan Companies and Alcan Associated Companies"** means Alcan Inc., Alcan Sprostons Limited and Alcan Properties Limited and 'any Alcan Company' means any of the Alcan Companies.

1.5.3 **"Associated Employer"** means an employer (other than the Principal Employer) which participates in the Plan under Clause 4...

1.5.14 **"The Employer"** means the Principal Employer and any Associate Employers and (in relation to an Employee or Member) the Employer by which he is or was last employed.

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

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

1.5.26 **"Principal Employer"** means Glencore Alumina Jamaica Limited and includes any other person which shall as a result of reconstruction, amalgamation, purchase or otherwise be the successor in business of the Principal Employer which shall have assumed the obligations of the Principal Employer under clause 15 of the Trust Deed."

[14] Under the rubric, 'General Augmentation of Benefits', rule 5.7.1 provides as follows:

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

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

or

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

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

[15] And finally, rule 15.3 provides that annual retirement income may not exceed 2% of an employee's annual salary at the date of retirement for each year of service with the employer, up to a maximum of 33 1/3 years.

The dispute

[16] Following upon the execution of the 2005 Trust Deed, the 5th appellant became the administrator and investment manager of the pension plan and individual trustees were appointed. As of 31 March 2010, the respondents were the duly appointed trustees of the pension plan. With effect from 28 June 2007, Glencore changed its name to UC Rusal Alumina Jamaica Limited.

[17] The Pension (Superannuation Funds and Retirement Schemes) Act ('the Pensions Act') came into force on 1 March 2005, by which time the 2005 Trust Deed had already been prepared. In 2009, in order to secure its compliance with the Act and approval from the Financial Services Commission ('the FSC'), the respondents undertook a review of the pension plan, in consultation with their attorneys-at-law. A new consolidating trust deed ('the 2010 Consolidated Trust Deed') was accordingly

prepared, to incorporate the 2005 Trust Deed and any amendments required by the FSC. The final version was in due course approved and executed by the respondents as trustees, and presented to UC Rusal for signature. UC Rusal declined to sign the 2010 Consolidated Trust Deed and, in an affidavit filed on its behalf in the proceedings, gave as one of its reasons the fact that it "was in fact examining whether it was lawfully possible and/or appropriate to increase the share of the surplus which would be returned to it upon the winding-up of the Plan, should that course be finally determined and chosen" (affidavit of Kirill P. Strunnikov, sworn to on 13 July 2010 and filed on 14 July 2010, para. 4). On 1 March 2010, UC Rusal proposed amendments of its own to the document, which would have resulted in the entire surplus in the pension fund being paid to it in the event of a winding up of the fund. UC Rusal's proposed amendments were not accepted by the respondents.

[18] By letter dated 31 March 2010, the respondents were advised that, effective 31 March 2010, all permanent employees of UC Rusal were terminated by reason of redundancy with immediate effect. Further, by a second letter of the same date, all participants in the pension plan were advised of the discontinuation of the pension plan by UC Rusal, also with effect from 31 March 2010, as a result of the redundancy exercise and the cessation of contributions to the pension plan. The participants were also advised of UC Rusal's intention to wind up the pension plan. On the following day, 1 April 2010, the respondents, through their attorneys-at-law, advised the FSC of the discontinuation of the pension plan and sought approval to proceed with the winding up.

[19] On 27 May 2010, UC Rusal, by resolution of its board of directors, purported to remove the 1st and 2nd respondents and to appoint the 2nd, 3rd and 4th appellants as trustees of the pension plan. On 31 May 2010, UC Rusal advised the FSC by letter of that date of these developments.

[20] By fixed date claim form filed on 30 June 2010, the respondents sought (i) declarations that the removal of the 1st and 2nd respondents and the purported appointment of the 2nd, 3rd and 4th appellants as trustees of the pension plan were unlawful and invalid; and (ii) pending determination of the litigation, interim injunctions restraining (a) the 2nd, 3rd and 4th appellants from exercising any powers as trustees of the pension plan; and (b) all or any of the appellants from effecting any amendments to the pension plan to alter the provisions of the pension plan for augmentation of benefits or to authorise the distribution of the assets of the fund to UC Rusal. In an affidavit filed on its behalf on 14 July 2010, UC Rusal undertook (in "a demonstration of good faith") to "abide by any recommendation given by the Actuary of the Pension Plan to the Trustees as to the allocation of the surplus of the plan provided that the Actuary's recommendation conforms with the usual professional standards which are employed in such circumstances" (affidavit of Kirill Strunnikov, para. 17).

A consent order

[21] Interim injunctions having been granted and renewed in the terms sought and affidavits having been filed by both sides, the matter came on for hearing before Cole-

Smith J on 19 August 2010. On that date a consent order was entered, to the following effect:

1. The resolution passed by UC Rusal on 27 May 2010 was revoked and the trustees of the pension plan would consist of the respondents and the 2nd and 3rd appellants.
2. UC Rusal undertook not to take any step to remove the respondents as trustees of the pension plan.
3. UC Rusal undertook not to take any step or steps to amend the 2005 Trust Deed and the rules made thereunder;
4. The respondents undertook not to take any decision regarding the distribution of, or to distribute, any surplus declared in the pension fund without agreement of all trustees, including those appointed by UC Rusal. In the event of disagreement, the parties would be at liberty to apply to the court for directions.
5. The respondents would direct Mr Astor Duggan of Duggan & Associates ('Duggan'), the actuary appointed to compute the allocation of the assets of the pension plan, to make available to Mrs Constance Hall of Eckler Consultants and Actuaries ('Eckler'), an actuary nominated by UC Rusal, "all information, calculations and assumptions which may be used and made in the preparation of the Winding-Up Report,

the scheme of distribution of the surplus and the winding-up process generally".

6. The respondents' costs would be paid out of the pension fund and the sum of $2,000,000.00 would be paid out of the fund towards the appellants' costs.

The actuarial disagreement

[22] On or around 16 November 2010, Duggan submitted its report ('the Duggan report') to the trustees. The report was sent to Eckler, which in turn submitted a review dated 7 January 2011 of the Duggan report ('the Eckler review').

[23] As at 30 September 2010, Duggan calculated that the estimated value of the assets of the pension plan exceeded its liabilities by $2,628,800,000.00. The Duggan report recommended that $2,547,203,770.00 of the surplus should be allocated to the participants in the pension plan and $81,596,284.00 to UC Rusal. The Eckler review, on the other hand (using a slightly lower total surplus of $2,597,000,000.00), recommended that $1,137,000,000.00 should be allocated to the participants and the remaining $1,370,000,000.00 to UC Rusal.

[24] Apart from some differences in approach on issues affecting the computation of the surplus (for example, the ascertainment of market value), described by the appellants as "actuarial disagreements", the real difference between Duggan and Eckler as regards distribution of the surplus was a fundamental one of methodology, with both actuaries claiming support for their respective positions in the body of the rules

themselves. Duggan considered that the surplus should be distributed to participants in accordance with the dissolution provisions contained in clause 18 of the 2005 Trust Deed, which "specifies that the balance of the assets not already allocated should be allocated to augment proportionately the liabilities for pensions subject always to the limits specified under the Income Tax Act" (the Duggan report, para. 6.2). Further, that "allowances should be made for future increases to take account of inflation" (para. 6.4). The amount of the surplus allocated by Duggan to the participants in the pension plan to achieve this object therefore consumed approximately 97% of the surplus, leaving the excess of 3% for allocation to UC Rusal.

[25] Eckler, on the other hand, considered that while rule 18.1.3 of the 2005 Trust Deed permitted the augmentation of pensions up to the statutory maximum, there was no requirement under either the Pensions Act or the Income Tax Act ('the IT Act') for pension increases at the rate of inflation, or for any level of pension increases without the approval of UC Rusal. In accordance with clause 18.3.3 of the 2005 Trust Deed therefore, any amount remaining from the surplus after augmentation up to the statutory maximum pension therefore belonged to UC Rusal and fell to be allocated at its discretion. Taking into account what was described as the common practice that surplus should be shared between members and the employer (Eckler review, para. 2.39(iii)), Eckler therefore recommended an allocation of approximately 45% to members and 55% to UC Rusal. This, it was considered, would be a "not unreasonable" result.

[26] It is hardly surprising that this significant divergence should have led to disagreement between the trustees, the respondents urging acceptance of Duggan's recommendations and the trustees appointed by UC Rusal pursuant to the consent order contending for Eckler's approach. It was therefore necessary to seek the intervention of the court once again.

[27] In addition to the actuaries' reports, affidavit evidence was provided by both Mrs Hall (by way of a first affidavit, sworn to on 14 July 2010, before the consent order was made, and a supplemental affidavit, sworn to on 20 May 2011) and Mr Duggan (by way of a single affidavit, sworn to on 3 June 2011).

[28] In her first affidavit, which was explicitly made on behalf of UC Rusal, Mrs Hall was primarily concerned to suggest that the purported removal by UC Rusal of the 1st and 2nd respondents and their replacement with the 2nd, 3rd and 4th appellants as trustees of the pension plan (see para. [11] above) were actions that it was fully entitled to take by law and also under the 2005 Trust Deed. That issue was in due course overtaken by the consent order, to which reference has already been made (at para. [21] above). However, in that affidavit (at para. 7), Mrs Hall also made an important general point, as follows:

> "In my professional opinion, once a winding-up of a pension plan has been triggered, the matter of the winding-up of the plan and related matters, such as the distribution of the surplus, is [sic] determined by the calculations of the Actuary and the recommendations of the Actuary which are made to the trustees of the plan. Moreover, under the Pensions (Superannuation Funds and Retirement Schemes) Act the distribution of any surplus has to be approved by the

> Financial Services Commission. As a result, it is inconceivable that a Sponsor could control or interfere with the process, other than if the Sponsor were to commit an obvious and easily discernible fraud or breach of law."

[29] In her supplemental affidavit, which was filed in response to the Duggan report, Mrs Hall identified the pension plan as a 'defined benefit' (as opposed to a 'defined contribution') type of plan. Based on her experience as an actuary, Mrs Hall made the comment (at para. 4) that "it is the norm…for the Employer to benefit from [an actuarial surplus]", whether by way of a contribution holiday, and/or a reduced contribution rate, while the pension plan is ongoing, "or Surplus distribution, on discontinuance". Mrs Hall also referred (at para. 11.16) to an email exchange between Eckler and the Taxpayer Audit and Assesment Department ('TAAD') on the import of proviso (iv) to section 44(2) of the IT Act, on the basis of which she concluded that any pension increases "are to be granted solely at the Employer's discretion". It will be necessary to return to the email exchange and Mrs Hall's conclusion in due course.

[30] In his affidavit, Mr Duggan's addressed the various areas of disagreement which had emerged from a comparison of the Duggan report and the Eckler review and also from Mrs Hall's supplemental affidavit. In particular, he disagreed with Mrs Hall's position that pension increases are to be granted solely at the employer's discretion, observing (at para. 27) that, "[t]o the extent that Clause 18.1.3 provides for an initial allocation of all of the surplus to Plan participants (subject only to revenue limits)…, the Employer's consent is not required or relevant". Mr Duggan's affidavit ended with the recommendation that "the Trust Deed and Rules should be followed in distributing the surplus between the Participants and the Employer".

McIntosh J's judgment

[31] In a laconic judgment given on 16 January 2012, McIntosh J determined the matter as follows:

> "[1] This court has heard submissions from two eminent counsels [sic] of the Queen. Those submissions amplify and complement their written submissions which are attached herewith for ease of reference. It is regretted that there would be no meeting of the minds in regard to the disposal of this matter.
>
> [3] [sic] The submissions of the Defendant though lucid seems [sic] to be merely the academic treatment of a moot. This Court will:
>
> 1) Declare that Clause 18.3.5 [sic] of the Pension Plan is void.
>
> 2) Direct that the surplus in the fund be distributed accordingly [sic] to the recommendations of the Fund Actuary [Duggan Consulting Ltd.]
>
> 3) Costs to be the Claimants against the First Defendant. Costs to be taxed if not agreed."

The appeal

[32] By notice of appeal filed on 23 January 2012, UC Rusal appealed on the following grounds:

> "(i) The learned judge held that Clause 18.3.5 of the Consolidated Trust Deed (the "Plan") is void. There is no Clause 18.3.5 in the Plan.
>
> (ii) Insofar as the judge intended to refer to Clause 18.3.3 of the Plan (which is not conceded) he was wrong when he found that Clause 18.3.3 of the Plan was void.

(iii) The judge failed to properly consider Clause 18 of the "Plan" or to consider it at all and to understand that, on a proper construction, there was no conflict between Sub-Clauses 18.1.3 and 18.3.3

(iv) The Judge erred when he failed to understand that the augmentation of pensions provided for in Sub Clause 18.1.3 of the Plan was subject to Rules 5.7; 5.2.1 and 15.3 of the Rules of the Life Assurance and Pension Plan for Employees (hereinafter called the "Rules to the Plan") and the statutory limitations contained in the Income Tax Act and, in particular, Section 44, unless specifically requested or agreed to by the employer.

(v) The judge erred when he ordered that the surplus be distributed according to the recommendations of the Fund Actuary for the following reasons:-

(a) The Fund Actuary in carrying out its computation and proposed allocation applied the law wrongly. The Actuary contends, inter alia, that the Income Tax Act allows for pensions and annuities to be increased after retirement in line with the annual changes in the Consumer Price Index, when in law this can only be done under Section 44 (2) (d) (iv) of the Income Tax Act with the permission of the employer. Alternatively, there is no statutory and/or common law provision permitting such indexing. Further, Clause 5.7 of the Rules to the Plan also provides that general augmentation by the Trustees may only take place at the request or agreement of the employer.

(b) The Fund Actuary, contrary to the terms of the Plan, recommended:-

(i) an allocation of the Surplus should be made to each Member equal to 71.5% of his Liability as at the Discontinuance Date. The Surplus allocated should be used to:

- Increase the pensions of active Members up to the Statutory Maximum and provide future pensions increases of 7% p.a., and

- Provide pension increases at the rate of inflation up to the Discontinuance Date and 7% per annum thereafter for other Members.

If the allocated Surplus exceeds the amount required to secure these benefits, then the excess of the allocated assets over the cost of the benefits (done on an individual basis) should be refunded to the Employer.

On this basis, he recommended that **97%** of the Surplus equal to $2.547 billion (computed as at 2010 September 30) should be used for benefit enhancements for the Members and **3%** refunded to the Employer.

This would result in the Surplus of $2,547 billion not being sufficient to fund the augmentation to the Statutory Maximum Pension and provide future pension increases at the proposed level of 7% per annum for most Members. The cost of these increases exceeds $5,000 million, and Clause 18.1.3 of the Trust Deed specifically states that the allocation of Surplus should not create any additional Liability to the Plan in respect of any Member.

(vi) The learned judge in chambers erred in making the costs order that he did and failed to appreciate and to consider that this was a claim brought by the Respondents for directions for the distribution of the surplus in the Pension Plan on an issue of genuine difficulty in which the assistance of the Court was appropriately sought. In such circumstances the appropriate costs order ought to have been one indemnifying not only the Respondents but the Appellant as well and in those circumstances it is usual that such costs are paid out of the fund."

[33] Based on these grounds, UC Rusal seeks orders that the judgment of McIntosh J be set aside and the matter be remitted to the fund actuary for a calculation and disposal of the surplus, in accordance with the court's interpretation of the relevant provisions of the 2005 Trust Deed and Rules, and the IT Act. Happily, this court is not asked by the parties to delve into the mysteries of actuarial science, or otherwise to attempt to resolve what is an obviously sincere professional disagreement between two of the country's most distinguished practitioners of the discipline.

The argument

[34] Mr Nelson QC for the appellants submitted that the three issues for this court's determination are (i) is clause 18.3.3 void? (ii) what is the proper augmentation of employees' benefits upon a true construction of clause 18.1? and (iii) what sums are to be returned to UC Rusal?

[35] I hope that I do no disservice to Mr Nelson's careful submission in support of UC Rusal's contention on the first issue that clause 18.3.3 is not void, by summarising it in this way:

(i) Both the 1974 and 1986 Trust Deeds permitted the payment of the balance of a surplus in the fund to "the particular Associated Company" on dissolution of the pension plan;

(ii) pursuant to the 2001 Deed of Substitution, the bundle of rights and obligations of each associated company under the 1986 Trust Deed, including an entitlement to a part of the surplus on discontinuance, "coalesced and devolved" upon Glencore, which became not only the "New Principal Employer", but also the "particular Associated Company";

(iii) read in the light of this, clause 19(3), which was intended to meet the mischief of a mulcting of the fund by an employer during the active life of the pension plan, "does not encompass the payment of a part of the surplus to the Associated Company on dissolution of the Fund";

(iv) the right to a share of the surplus which devolved on Glencore by virtue of the Deed of Substitution, now enures to the benefit of UC Rusal;

(v) the effect of clause 18.3.3 is therefore that it is a repetition and consolidation of clause 18(C)(ii) of the 1986 Trust Deed, rather than an amendment.

[36] In the alternative, Mr Nelson submitted, if clause 18.3.3 is void, the sums that should have been distributed pursuant to that clause would be held under a resulting trust and would, prima facie, be distributed equally between UC Rusal and the members, in accordance with the decision of the Privy Council in ***Air Jamaica Ltd and Others v Charlton and Others*** (1999) 54 WIR 359. And, in the further alternative, if clause 18.3.3 is void and there is no resulting trust, the distribution of funds to members envisaged by the clause would breach the provisions of clause 18, in that the maximum pensions then payable to the members would be exceeded.

[37] On the second issue, Mr Nelson submitted that, while the trustees clearly have power to augment members' benefits, this was subject to the provisions of the Trust Deed (in particular, clause 18.1.3), the Rules (rules 5.7.1 and 15.3) and the general law (IT Act, section 44(2)(b)(ii)(A) and the Pensions Act, section 13(2)(o)). The power to augment was therefore limited by the conditions of approval of the pension plan imposed by the Commissioner of Taxpayer Audit and Assessment ('the Commissioner'), the prohibition against creating "new liabilities to pensions or any right to any Member

to assets allocated in respect of him", and the employer's discretion. As regards the issue of good faith, there could be no question of bad faith in UC Rusal seeking to exercise its rights under the deed and the rules of the pension plan, which it was entitled to do in the circumstances.

[38] And finally, on the third issue, Mr Nelson's submission was that if clause 18.3.3 is void, then there would be no basis for payment of any kind to UC Rusal, as Duggan in fact recommended.

[39] For the respondents, Mr Hylton QC for his part also identified three issues, the first two of which coincided with the first two identified by Mr Nelson. Mr Hylton's third issue was whether the judge should have ruled that the appellants' legal costs be paid out of the fund.

[40] On the first issue, Mr Hylton referred to and relied on the submissions which had been made on behalf of the respondents to the judge. He identified a conflict between clauses 18.1.3 and 18.3.3, in that the former required that any part of the surplus not allocated in accordance with clause 18.1.1 and 18.1.2 should be used to "augment proportionately" pensions payable to members (subject to the Commissioner's conditions of approval), while the latter provided that any balance remaining after applying sub-clauses 18.1.1 and 18.1.2 "shall be paid to the employer". A reading of the history of the deeds demonstrates how the conflict emerged over the years and what clause 18.3.3 appears to provide is in breach of clause 19(3), which has appeared consistently in the various deeds since 1974. In accordance with established authority,

the only way of resolving this conflict is to declare clause 18.3.3 void and to leave it out of account entirely in determining how the surplus should be distributed. McIntosh J was therefore correct to have declared the clause void. Particular reference was made in this context to ***Air Jamaica v Charlton*** and ***Stevens and others v Bell and others*** [2002] EWCA Civ 672.

[41] On the second issue, Mr Hylton submitted that there was nothing in clause 18.1.1, the IT Act or rule 5.7 of the Rules to support UC Rusal's contention that the consent of the employer was necessary before benefits provided for under the deed can be augmented. Indeed, the use of the phrase "shall be allocated to augment" in clause 18.1.3 indicates that the use of the surplus to increase benefits is mandatory and not dependent on the exercise of anyone's discretion. But, even if UC Rusal's consent to augmentation is required, it was submitted, the grant or refusal of such consent would have to be made in good faith, in the sense explained by Sir Nicolas Browne-Wilkinson V-C in ***Imperial Group Pension Trust Ltd v Imperial Tobacco*** [1991] 2 All ER 597. In the instant case, in determining whether UC Rusal, in refusing to consent to the augmentation of benefits in line with the Consumer Price Index ('the CPI'), acted in good faith, UC Rusal's conduct in the period immediately before the winding up needs to be considered.

[42] And finally, as regards costs, Mr Hylton submitted that costs orders are always discretionary and, unless shown to be clearly wrong, ought not to be interfered with on appeal. While he accepted that, in pension litigation generally, costs would usually be

ordered to be paid out of the fund, he submitted that, in the instant case, the litigation between the parties was essentially hostile, with the result that costs should, as in ordinary litigation, follow the event (***McDonald & others v Horn & others*** [1995] 1 All ER 961). In any event, rule 64.6(3) of the Civil Procedure Rules 2002 requires the court to take into account the conduct of the parties in considering a costs order and the judge's order ought not to be disturbed.

[43] In a brief reply on costs, Mr Nelson referred to the history of the matter, in particular the consent order, and submitted that, rather than being hostile litigation, this was a case in which the parties have sought the court's help in resolving the disputed questions. In such circumstances, the appropriate order was that the costs of all the parties should be paid out of the fund.

Discussion and analysis

Interpretation of pension plan documents

[44] The resolution of the problems posed by this case turns largely on the true construction of clause 18 of the 2005 Trust Deed, in the light of the deed and the Rules as a whole. In this regard, there is no dispute as to how the court should approach questions of construction of pension fund rules, both parties referring us to the decisions of the Court of Appeal of England and Wales in ***Stevens v Bell*** and of the Privy Council on appeal from this court in ***Scully and Richardson v Coley et al*** [2009] UKPC 29.

[45] In ***Stevens v Bell***, Arden LJ observed (at para. 26) that, with regard to the interpretation provisions of pension schemes, "[t]here are no special rules of construction but pension schemes have certain characteristics which tend to differentiate them from other analogous instruments". The learned judge then went on to state the following series of propositions, collected from the authorities (at paras 27-32):

> "27. First, members of a scheme are not volunteers: the benefits which they receive under the scheme are part of the remuneration for their services and this is so whether the scheme is contributory or non-contributory. This means that they are in a different position in some respects from beneficiaries of a private trust. Moreover, the relationship of members to the employer must be seen as running in parallel with their employment relationship. This factor, too, can in appropriate circumstances have an effect on the interpretation of the scheme.
>
> 28. Second, a pension scheme should be construed so to give reasonable and practical effect to the scheme. The administration of a pension fund is a complex matter and it seems to me that it would be crying for the moon to expect the draftsman to have legislated exhaustively for every eventuality. As Millett J said in *Re Courage Group's Pension Schemes* [1987] 1 WLR 495 at 505:
>
> > '[its] provisions should wherever possible be construed so as to give reasonable and practical effect to the scheme, bearing in mind that it is to be operated against a constantly chamging commercial background. It is important to avoid unduly fettering the power to amend the provisions of the scheme, thereby preventing the parties from making those changes which may be required by the exigences of commercial life.'

> In other words, it is necessary to test competing permissible constructions of a pension scheme against the consequences they produce in practice. Technicality is to be avoided. If the consequences are imppractical or over-restrictive or technical in practice, that is an indication that some other interpetation is the appropriate one…
>
> 29. Third, in pension schemes, difficulties can arise where different provisions have been amended at different points in time. The effect is that the version of the scheme in issue may represent a 'patchwork' of provisions…Pension schemes are foten subject to considerable amendment over time. The general principle os that each new provision should be considered against the circumstances prevailing at the date when it was adopted rather than at the date of the original trust deed…
>
> 30. Fourth, as with any other instrument, a provision of a trust deed must be interpreted in the light of the factual situation at the time it was created…It has been submitted to us that the factual background is only relevant if the document is ambiguous. I do not accept this submission, which is inconsistent with the approach laid down by Lord Hoffmann in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896
>
> 31. Fifth, at the end of the day, however, the function of the court is to construe the document without any predisposition as to the correct philosophical approach…
>
> 32. Sixth, a pension scheme should be interpeted as a whole. The meaning of a particular clause should be considered in conjunction with other relevant clauses. To borrow John Donne's famous phrase, no clause 'is an Island entire of itself'."

[46] And in ***Scully v Coley***, Lord Collins of Mapesbury, after reiterating that "there are no special rules for the construction of pension scheme documents", went on to observe (at para. 30) that the provisions of a pension scheme "should be construed to

give practical effect to the scheme, bearing in mind the practical consequences and the fact that it has to be operated against a changing commercial background".

[47] I accordingly propose to approach the problems of construction posed by the instant case in accordance with the principles to be derived from these authoritative statements of the law.

[48] While I accept that the issues for the court's determination are as identified by counsel in their illuminating submissions, I propose to approach the matter by considering, firstly, the proper approach to augmentation of benefits on dissolution of the fund; secondly, the status of clause 18.3.3 of the 2005 Trust Deed (there is no clause 18.3.5 in the 2005 Trust Deed and it therefore seems clear that the learned judge's reference to a clause bearing that number in the paragraph numbered [3] of his judgment – see para. [31] above - was intended to be a reference to clause 18.3.3.); thirdly, whether any part of the surplus should be returned to UC Rusal; and fourthly, what is the appropriate order for costs.

Augmentation of benefits

[49] It is common ground that this is governed by clause 18.1 of the 2005 Trust Deed. Upon dissolution of the fund, the actuary, acting on the instructions of the trustee, is required to compute the assets due in respect of each member in the manner set out in the clause.

Clause 18.1.1

[50] Clause 18.1.1 is uncontroversial: clause 3 provides for the creation of a sub-account within the fund for any voluntary contributions made by a member, to which interest on those contributions will be credited from time to time, and clause 18.1.1 provides that, upon a dissolution, moneys standing to the credit of each member's sub-account shall be allocated to the particular member.

Clause 18.1.2

[51] Clause 18.1.2 provides that "the remaining assets", that is, the assets remaining after allocation of members' voluntary contributions as set out in sub-clause 18.1.1, are to be allocated towards liabilities to pensions and other benefits in the order set out in sub-clause 18.1.2 (i), (ii), (iii), (iv), and (v). There is again no dispute between the parties that these are all liabilities and benefits already provided for by the pension plan.

Clause 18.1.3

[52] Clause 18.1.3 is at the heart of the disagreement between the actuaries and the dispute between the parties in this case. On the face of it, what it requires is that such part of the balance of the assets of the fund not already allocated as provided for in clause 18.1.1 and 18.1.2 (the surplus) should be allocated to augment proportionately the liabilities for pensions under 18.1.2 (which, the parties agree, should be substituted for '(ii)' in the text of clause 18.1.3), subject to two limitations only. The first is "such limitations as are consistent with the approval of the Fund by [the Commissioner]", and

the second is that "such computations shall not create new liabilities to pensions or any new right in any Member to assets allocated in respect of him". The first of these limitations emphasises that the operation of the dissolution provisions of the 2005 Trust Deed remain subject to the conditions of approval laid down by the Commissioner, while the second underscores the fact that, under clause 18.1.3, the funds used for augmentation of pensions must come from the surplus and not by way of the creation of new liabilities to pensions or other rights. Although it will be necessary to come back to the role of the Commissioner and the provisions of the IT Act in this context, I do not think that anything more need be said about the creation of new liabilities, since, at the end of the day, both parties appeared to be agreed that, as Mr Nelson submitted, the effect of the clear language of the proviso to clause 18.1.3 is that the extent of augmentation cannot exceed the level of funds available from the surplus.

[53] As regards the conditions of approval laid down by the Commissioner, the matter arises in this way. In order for both employers and employed persons to secure the benefit of allowances in respect of contributions to a pension fund for the purposes of calculating liability to income tax, it is necessary for the pension fund to be approved by the Commissioner in accordance with section 44 of the IT Act. Section 44(2)(b) provides that the Commissioner shall not approve any fund unless it is shown to his satisfaction that "...the fund has, for its principal purpose, the provision of lump sums, pensions and annuities for its members"; and in the case of –

> "(ii) pensions and annuities –

(A) an amount not exceeding seventy-five per cent of the remuneration of an employee at the date of his retirement at a specified age after a period of not less than thirty-seven and one-half years of service or on becoming incapacitated at an earlier age; or

(B) a proportionate percentage in respect of a shorter period of service..."

(See also section 13(2)(o) of the Pensions Act, which states as one of the conditions for approval of a fund under that Act that "the maximum annual pension payable shall not exceed the prescribed limit".)

[54] The maximum pension payable under section 44(2)(b)(ii)(A) was increased by way of amendment in 2008, prior to which the maximum payable was two-thirds of the employee's salary at the date of retirement. Rule 15.3, which provides that annual retirement income may not exceed 2% of an employee's annual salary at the date of retirement for each year of service with the employer, up to a maximum of 33 1/3 years, obviously reflects the two-thirds maximum under the section as it existed prior to its amendment in 2008. Mr Nelson submitted that the increased maximum is 'permissive', by which I understood him to mean that it was a matter to be determined by the framers of individual plans. However, since clause 18.1.3 refers to the conditions of approval of the pension scheme imposed by the Commissioner, rather than to a limitation imposed by the Rules themselves, I consider that the current statutory maximum, and not rule 15.3, is the appropriate upper limit in this case.

[55] In the light of these provisions, I would therefore regard the power to augment pensions to the maximum pension payable under section 44(2)(b)(ii)(A) of the IT Act,

that is, 75% of the remuneration of an employee at the date of his retirement at a specified age after a period of not less than 37½ years of service to be clearly sanctioned by clause 18.1.3 (as both Duggan and Eckler acknowledged - see Duggan's report, paras 6.2 and 6.3 and Eckler's report, paras 4.10 and 4.11).

The employer's consent

[56] The further question which arises is whether clause 18.1.3 permits further augmentation without the consent of UC Rusal. In contending that it does not, UC Rusal puts the argument, firstly, on the basis of rule 5.7.1, which, it will be recalled, provides for general augmentation of benefits under the pension scheme by the trustee, at the request of the employer, or at the discretion of the trustee, with the agreement of the employer. By that means, the trustees may (i) increase all or any of the benefits payable under the plan or (ii) provide benefits or additional benefits to members, pensioners, former members with vested rights or beneficiaries.

[57] However and, it seems to me, critically, this power is explicitly subject "to payment to the Plan of such additional contributions (if any) as the Trustee and the Employer (acting on the advice of the Actuary) shall determine to be necessary to ensure that the actuarial solvency of the Plan is not thereby impaired, PROVIDED THAT approval of the Plan under the Income Tax Act would not be prejudiced". In my view, the requirement under this rule for payment of additional contributions, if necessary, to ensure the actuarial solvency of the pension scheme after enhancement of benefits demonstrates clearly, as Mr Hylton submitted, that it relates to augmentation during the

life of the pension plan and not as part of the dissolution process, which is what clause 18.1.3 is concerned with. What clause 18.1.3 mandates is augmentation of the liabilities for pensions under clause 18.1.2 out of "the balance of the assets of the fund not already allocated" and there is absolutely no suggestion in the clause that such augmentation is subject to the consent or discretion of the employer. I therefore do not think that rule 5.7.1 can be of any assistance to UC Rusal in this regard.

[58] UC Rusal puts its argument on the requirement for its consent, secondly, on the basis of section 44 of the IT Act. Proviso (iv) to section 44(2) (which was also introduced by way of amendment in 2008), provides that the Commissioner may approve a fund for the purposes of the Act –

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

[59] The implications of this proviso were explored in the email exchange between Eckler and the TAAD, which was exhibited by Mrs Hall to her supplemental affidavit and to which I have already made brief reference (see para. [29] above). In an email to the TAAD dated 24 March 2011, Eckler sought advice as to whether "the phrase 'the employer may increase the post-retirement benefit of a pensioner member' means that pension increases should be paid by the Employer and not from the Fund". In its email response on the same day, TAAD replied as follows:

> "The [proviso] specifically speaks to the employer increasing the postretirement benefit of a pensioner member. Section 44(1) would be the conduit through which this could be accomplished. This Department should be advised of any such contribution which is not an ordinary annual contribution which is placed in the fund. The amount so placed in the Fund requires TAAD's approval.
>
> Although the Act speaks specifically to the 'Employer', postretirement benefits to pensioner members can also be paid from the fund's surplus.
>
> It is important that Funds incorporate the possibility of such post retirement benefit increases in their respective plan rules."

(Section 44(1) of the IT Act provides that any sum paid by an employer by way of contribution to an approved superannuation fund shall be an allowable deduction in computing profits or gains for income tax assessment purposes.)

[60] Mrs Hall's view was that the TAAD response "resolves the issue…[a]ny pension increases are to be granted solely at the Employer's discretion" (supplemental affidavit, para. 11.16). Despite Mrs Hall's certainty on the point, I must confess that the matter does not appear to me to be as clear-cut as this. I accept that, in respect of a pension scheme which makes no provision in its rules for post-retirement pension increases, the decision to extend such benefits to pensioners will be one for the discretion of the employer, the exercise of which in these circumstances the proviso clearly permits, up to the limit of the annual changes in the CPI. But this can have no possible bearing, in my view, on a case such as the instant case, in which the issue is whether and to what extent a surplus of funds in the pension scheme may be used to provide post-retirement pension increases. Again, the answer must be sought, in my respectful

view, in the language of clause 18.1.3, which calls for "the balance of the assets of the Fund not already allocated" to be used to augment liabilities to pensions in respect of members, subject only, as Mr Duggan puts it in his affidavit, to "revenue limits". That language is, it seems to me, clearly wide enough to cover provision for post-retirement pension benefits of the kind for which the Duggan report sought to make provision in this case, with or without the consent of UC Rusal. (Further, it is not without interest to observe that the TAAD considered that post-retirement benefits to pensioners could be funded from the surplus of the pension scheme.)

[61] It accordingly appears to me, reading clauses 18.1.2 and 18.1.3 together, that the clear intention of the framers of the 2005 Trust Deed was that any surplus in the fund upon termination should so far as possible be allocated for the benefit of members.

[62] From the exchange of affidavits between Mrs Hall and Mr Duggan (see paras [27] – [30] above), there appeared initially to be some common ground between them, in the light of Mrs Hall's statement that, in her professional opinion, "once a winding-up of a pension plan has been triggered, the matter of the winding-up of the plan and related matters, such as the distribution of the surplus, is [sic] determined by the calculations of the Actuary and the recommendations of the Actuary which are made to the trustees of the plan". I understood her to mean by this that, upon a winding-up, the destination of the surplus was purely a matter for calculation by the fund actuary, based on the deed and the rules of the fund in question, a position not, it seems to me,

vastly dissimilar to Mr Duggan's view (expressed in his affidavit of 11 June 2011) that "the Trust Deed and Rules should be followed in distributing the surplus between Participants and the Employer". In the light of this common position (with which I respectfully agree), it strikes me that the further observation made by Mrs Hall, in her supplemental affidavit, that, in a defined benefit scheme, "it is the norm…for the Employer to benefit from [an actuarial surplus]", seeks to impose, impermissibly, a predetermined standard approach to the distribution of the surplus, which in this case finds no justification in the actual provisions of the trust deed and the rules. This was, in my view, the very point made by Arden LJ in ***Stevens v Bell***, when she described the function of the court as being "to construe the document without any predisposition as to the correct philosophical approach" (see para. [45] above).

The obligation of good faith

[63] But further still, the respondents contend, even if UC Rusal's consent was required for the augmentation of benefits beyond the statutory maximum pension, the decision to grant or refuse such consent would have to be made in good faith. In this regard, both parties accept that, as Sir Nicolas Browne-Wilkinson V-C said in ***Imperial Group Pension Trust Ltd and others v Imperial Tobacco Ltd and others*** (at page 606), "pension trust deed and rules themselves are to be taken as being impliedly subject to the limitation that the rights and powers of the company can only be exercised in accordance with the implied obligations of good faith" (see also Halsbury's Laws of England, 4th edn, vol. 44(2) (Reisssue) para. 745 and ***Air Jamaica Ltd v***

Charlton, at page 371). So the only question that arises in this case is whether, on the facts, it can be said that UC Rusal acted in bad faith.

[64] In support of their contention that UC Rusal acted in bad faith in refusing to consent to augmentation of benefits in the manner proposed by the Duggan report, the respondents refer to, among other things, UC Rusal's open admission that one of the reasons for its refusal to sign the 2010 Consolidated Trust Deed was that it was examining the legality of increasing its share of the surplus upon a possible winding-up of the pension plan; its proposal, before terminating all its employees, that clause 18.1.3 be amended to provide that the entire surplus should be returned to it; and, that not having been achieved, its subsequent attempt to replace respondents as trustees. In answer to this, UC Rusal protested that the respondents have failed to identify precisely what is required by the good faith requirement which they propound.

[65] In ***Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd***, Browne-Wilkinson V-C said this (at page 607):

> "It must be open to the company to look after its own interests, financially and otherwise, in the future operation of the scheme in deciding whether or not to give its consent.
>
> However, in my judgment the obligation of good faith does require that the company should exercise its rights (a) with a view to the efficient running of the scheme established by the fund and (b) not for the collateral purpose of forcing the members to give up their accrued rights in the existing fund subject to this scheme..."

[66] The tension is therefore between, on one side, a company acting to protect its own legitimate financial and business interests and, on the other, exercising its rights without any or any sufficient regard for the accrued rights of its employees, to whom the obligation of good faith is owed.

[67] In considering where the instant case falls, it is important to bear in mind, I think, the precise nature of the breach of the obligation of good faith that is alleged on the part of UC Rusal: it is its failure to accede to the augmentation proposals contained in the Duggan report. That report was, it will be recalled, commissioned pursuant to the consent order (para. [21] above), which required that it be made available to Eckler, for its consideration and comment. The scheme of distribution of the surplus to be adopted was plainly among the most important aspects of the entire exercise. In its response to the Duggan report, Eckler raised the issue of the necessity for UC Rusal's consent to further augmentation under clause 18.1.3 and the latter's refusal to consent is presumably to be inferred from the continuation of this litigation without abatement.

[68] While it is true that UC Rusal had undertaken to abide by the recommendation of Duggan, the fund actuary, it did qualify this undertaking by the proviso that the actuary's recommendation should conform "with the usual professional standards which are employed in such circumstances" (para. [20] above). While it is also true that, as the respondents complained, UC Rusal did not suggest that the Duggan report departed in any way from "the usual professional standards", it appears to me that this reservation, though perhaps clumsily expressed, is wide enough to cover a fundamental disagreement between the actuaries, which is certainly what has occurred in this case.

In these circumstances, I find it impossible to say that by maintaining its position, on the face of it on the strength of the actuarial and other professional advice that it has received, that UC Rusal has acted in breach of its obligation of good faith to its employees. I would accordingly decline to take the further step urged by the respondents.

The status of clause 18.3.3

[69] Clause 18.3.3 provides that "[i]f there are no Associated Employers the balance remaining in the Fund after payment of all benefits under clauses 18.1.1 and 18.1.2 shall be paid to the Principal Employer". McIntosh J declared clause 18.3.3 to be void, presumably because he accepted the respondents' case, in the court below and in this court, that it cannot coexist alongside clause 18.1.3, which provides that, after payment of all benefits under clause 18.1.2, the balance remaining in the fund shall be applied in augmenting members' benefits. UC Rusal challenges this finding on appeal, contending that the judge failed to appreciate that, on a proper construction, there is no conflict between the two clauses.

[70] Mr Nelson makes the argument, it will be recalled, that, when the history of the deeds is examined carefully, it will be seen that clause 18.3.3 is, far from being a new provision introduced for the first time in 2005, in fact a repetition of clause 18(C)(ii) of the 1974 and 1986 Trust Deeds. It will also be recalled that, in both the 1974 and the 1986 Trust Deeds, clause 18(C)(ii) permitted the return to "the particular Associated Company" of the remaining assets of the fund attributable to its employees, after allocation of their voluntary contributions and augmentation of their pension benefits in

accordance with the then clause 18(A)(i), (ii) and (iii) (the equivalent of what is now clause 18.1.1, 18.1.2 and 18.1.3). It will also be recalled that, under the 2001 Deed of Substitution, the companies formerly referred to as the Associated Companies are referred to as 'the Old Principal Employer' and Glencore, of which UC Rusal is the successor, became the 'the New Principal Employer', which assumed the Old Principal Employer's rights under the pension plan. Thus, Mr Nelson says, clause 18.3.3 is a repetition and consolidation of clause 18(C)(ii) of the 1986 Trust Deed, and not an amendment of that trust deed to provide for a transfer which was not already provided for by the 1986 Trust Deed. The entitlement that it appears to give UC Rusal is in fact part of "the bundle of rights" to which UC Rusal became entitled as the ultimate successor to the former associated companies.

[71] The problem with this analysis, it seems to me, neat as it is, is that, if it is correct, it renders clause 18.3.3 entirely otiose: if at the date of execution of the 2005 Trust Deed UC Rusal was already vested with the right to the surplus by virtue of the operation of clause 18(C)(ii) in the predecessor deeds, then why was it felt necessary to add clause 18.3.3, if it did not confer any further rights on the employer?

[72] Clauses 18(B) and 18(C) in the 1974 and the 1986 Trust Deeds were clearly designed to deal with the special problems created by the fact that the settlor of the deeds was a group of associated companies, each with its own set of employees. It was therefore necessary, in the event of dissolution of the fund, to make provision for the potentially different needs of each company and their employees. The first step to achieve this was for the trustees to "divide the members into groups based on

employment with the Associated Companies" (clause 18(B)), then either (i) to transfer the assets due in respect of the group of members allocated to each associated company to a scheme adopted by the particular associated company, or (ii) apply the assets to provide pension benefits to members "in some other approved way". It was at this point that clause 18(C)(ii) permitted the return of "[a]ny remaining assets" to the particular Associated Company, "or at the request of that Company [to be] used to provide such additional benefits as the Trustees may see fit".

[73] The 2001 Deed of Substitution documented a fundamental change in the overall arrangements, chief among which was that the Associated Companies as a group of separate entities ('the Old Principal Employer') was merged into and replaced by Glencore ('the New Principal Employer'). As of 1 September 2001, Glencore was substituted for the Associated Companies under the pension plan and thereupon assumed the Associated Companies' rights and obligations under the 1986 Trust Deed and Rules.

[74] The position immediately before the execution of the 2005 Trust Deed on 10 March 2005 was therefore that the settlor was no longer the group of Associated Companies, but a single entity, Glencore, described in the 2005 Trust Deed as 'the Principal Employer'. Beyond a few references in the recitals to the 2005 Trust Deed, as part of the summary of the history of the pension plan arrangements from the 1974 Trust Deed, the only reference to the Associated Companies in the 2005 Trust Deed is in clause 1.2, which provides that "[t]he benefits of any former member who ceased to be an employee before 31 August 2004 ('the consolidation Date') shall be determined

under the predecessor of this Deed as in effect on the date when he ceased to be an employee of the Principal Employer or any of the Alcan Associated Companies..."

[75] In place of the Associated Companies, the 2005 Trust Deed introduced, for the first time, the concept of 'Associated Employers', clause 1.1 stating that, "This Deed governs all benefits of employees of the Principal Employer and Associated Employers on or after the Consolidation Date" [31 August 2004]. Clause 4.2 speaks to the condition of admission of an Associated Employer:

> "It shall be a condition of admission as an Associated Employer that each such company shall in respect of its period of participation in the Plan have entered into a covenant with the Trustee, in the manner and in such form as the Trustee in their [sic] absolute discretion may require to observe and perform such of the provisions of the Plan as may apply to it."

[76] Clauses 18(B) and 18(C) in the predecessor deeds are replaced in the 2005 Trust Deed by clauses 18.2, 18.3.1 and 18.3.2, save that the phrase 'Associated Company' is substituted wherever it previously appeared by the phrase 'Associated Employer'. In particular, clause 18(C)(ii) is replaced by the second sentence of clause 18.3.2 and clause 18.3.3 makes its appearance for the first time.

[77] What this analysis of the history of the relevant provisions suggests, in my view, is that the framers of the 1986 Trust Deed did not intend that the special regime created by clause 18(B) and (C) should be effective to convey a right to the surplus beyond the existence of the associate companies as a distinct grouping. In other words, once the associated companies as such ceased to exist, those clauses ceased to

have any efficacy, hence the need, in the 2005 Trust Deed, to (a) create a new, though substantially identical, regime for associated employers (of which there are none); and (b) make a new and separate provision for the principal employer, by amending the 1986 Trust Deed to add the new clause 18.3.3. It is this clause which purports to entitle "the Employer" (defined by rule 1.5.14 as "the Principal Employer and any Associated Employers"), if there are no associated employers, to the surplus of the fund after the payment of all benefits under clauses 18.1.1 and 18.1.2. It is also this clause upon which UC Rusal principally relies in this litigation. Contrary to Mr Nelson's submission, in my view, it is not a repetition and consolidation of clause 18(C)(ii) of the 1986 Trust Deed (as the second sentence of clause 18.3.2 is), but a new clause specifically added to address the situation of the "Principal Employer", itself a newcomer in the 2005 Trust Deed.

[78] Against this background, it seems to me that clause 18.3.3 is clearly objectionable on two bases. The first is that principally advanced by Mr Hylton: clause 19.3 of the 1974 and the 1986 Trust Deeds prohibited any amendment which would authorise the return of any part of the fund to the employer; clause 18.3.3 , which was not originally to be found in either the 1974 or the 1986 Trust Deeds, but was introduced by way of amendment in the 2005 Trust Deed, is just such a clause; it follows that that amendment flies in the face of the prohibition in clause 19.3 and, in the result, clause 18.3.3 must be, as the learned judge found, void.

[79] The second basis is that clauses 18.1.3 and 18.3.3 are irreconcilably in conflict: the former requires that the balance of the assets of the fund shall be allocated to augment proportionately the liabilities for pensions under 18.1.2, while the latter requires that, if there are no associated employers, the balance remaining in the fund after payment of benefits under 18.1.1 and 18.1.2 shall be paid to the principal employer.

[80] In my view, this conflict must be resolved by reference to the clear terms of the 2005 Trust Deed and the Rules. Clause 2.1 of the 2005 Trust Deed provides as follows:

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

[81] To the same effect, is rule 1.4 of the Rules:

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

[82] Further, clause 6.2 of the 2005 Trust Deed prohibits investment by the trustee of any moneys forming part of the trust fund in any undertaking or property of the employer, save for the purposes set out in clause 6.3 (the provision of residential or

office space for the use of the company or its employees, subject to a maximum of 20% of the aggregate value of all the assets in the fund at the time). This reinforces the intention to preserve the separation of the fund from the business of the employer.

[83] And, in addition to these clauses, there is also clause 19.3, to which I have already made reference, which clearly demonstrates the anxiety of the framers from the outset to protect the fund from the employer. In all of these circumstances, I consider that clause 18.3.3 is fundamentally opposed to the main object of the pension scheme, which is to provide pensions and other retirement benefits to members of the fund upon their retirement. This objective is, in my view, fully reflected in the clear provisions of clause 18.1.3, and McIntosh J was accordingly correct to conclude that the inconsistent clause 18.3.3 cannot stand.

Should any part of the surplus be returned to UC Rusal?

[84] Although there was no clear evidence on this, it appeared – and this was certainly assumed during argument – that the allocation of a small amount from the surplus to UC Rusal was as a result of the operation of what Mr Duggan described as "revenue limits". In other words, having augmented members' benefits to the fullest extent permissible under clause 18.1.3, there was a relatively small balance of approximately 3% of the surplus remaining, which was allocated to UC Rusal. However, Mr Nelson posed this question: if 18.3.3 is void, on what basis did Duggan allocate a percentage of the fund to UC Rusal? It is, I think, a fair question. For, if clause 18.3.3 is void, ought it not to be void for all purposes? And if this is so, it also

gives rise to another question: if the exercise of allocating the surplus to augment pensions and other benefits to the fullest extent, pursuant to clause 18.1.3, nevertheless results in a residual surplus, attributable to revenue or any other actuarial limits, what is to become of that residue?

[85] Mr Nelson submitted that if clause 18.3.3 is held to be void, the sums that would otherwise be distributed pursuant to that clause would be held under a resulting trust and would, prima facie, be distributed to the employer and the members in equal shares. This is what had happened in ***Air Jamaica Ltd v Charlton***, where, it having been found that some of the trusts of the pension plan had failed by reason of the operation of the rule against perpetuities, the Board held that the resultant surplus fell to be distributed between the employer and the members on the basis of a resulting trust. Thus, where, as in that case, contributions were payable by members with matching contributions by the employer, the court considered that the surplus had to be treated "as provided as to one-half by the [employer] and as to one-half by the members" (per Lord Millett, at page 372), and shared between the parties in those proportions. In that case, the Board specifically referred to the impact of IT Act, which places a limit on the amount which can be paid out of the fund to an individual employee, but nevertheless considered that "[t]he resulting trust arises by operation of the general law, *dehors* the pension scheme and the scope of the relevant legislation".

[86] Although there does appear to be a certain logic in this approach, I have come to the conclusion, not without a degree of hesitation on this point, that we ought not to disturb Duggan's allocation of the surplus, primarily on the basis that there is no appeal

from this aspect of McIntosh J's judgment. But further, without any clear evidence to suggest that he acted on an erroneous basis in allocating any part of the surplus to UC Rusal, I would not be inclined to disturb any aspect of the actuary's allocation.

Costs

[87] Rule 64.6(1) of the Civil Procedure Rules 2002 ('the CPR') states the general rule, which is that, if the court decides to make an order about the costs of any proceedings, "it must order the unsuccessful party to pay the costs of the successful party". However, it is well recognised that special principles apply to orders for costs in proceedings concerning the construction of a trust deed or administration of the trust. In ***McDonald v Horn***, which was a pension fund case, Hoffmann LJ (as he then was) adopted and applied the statement of the relevant principles by Kekewich J in ***Re Buckton, Buckton v Buckton*** [1907] 2 Ch 406, 413-415 ("[t]he classic statement"), in which trust litigation was divided into three categories, as follows (at page 970-971):

> "First, proceedings brought by trustees to have the guidance of the court as to the construction of the trust instrument or some question arising in the course of administration. In such cases, the costs of all parties are usually treated as necessarily incurred for the benefit of the estate and ordered to be paid out of the fund. Secondly, there are cases in which the application is made by someone other than the trustees, but raises the same kind of point as in the first class and would have justified an application by the trustees. This second class is treated in the same way as the first. Thirdly, there are cases in which a beneficiary is making a hostile claim against the trustees or another beneficiary. This is treated in the same way as ordinary common law litigation and costs usually follow the event."

[88] However, as Kekewich J also cautioned in ***Re Buckton*** (at pages 413-414) "costs are so largely in the discretion of the judge that it is…well nigh impossible to lay down any general rules which can be depended on to meet the ever varying circumstances of particular cases". To similar effect is rule 64.6(3) of the CPR, which states that in deciding who should be liable to pay the costs of particular proceedings, "the court must have regard to all the circumstances", including "the conduct of the parties both before and during the proceedings" (rule 64.6(4)(a)).

[89] Mr Nelson puts the litigation in the instant case in Kekewich J's first category, contending that this is a case in which it was necessary for the parties to seek the court's guidance on questions of construction of the 2005 Trust Deed and the Rules, while Mr Hylton maintains that the conduct of UC Rusal which necessitated the bringing of proceedings by the respondents was such as to place it in the third category of hostile litigation.

[90] In my view, the instant case falls more readily into the first, rather than the third, category. While the interests of UC Rusal and the respondents were plainly in opposition to each other, the entitlements claimed by each of them were based on the provisions of the 2005 Trust Deed and, in particular, what effect was to be given to clause 18.3.3, in the light of clause 18.1.3. Given the fundamental disagreement between the parties, each of them acting on advice, proceedings seeking the court's directions were, it seems to me, plainly inevitable. The proceedings were in point of fact intitiated by the respondents and, in all the circumstances, I cannot regard it as

unreasonable for UC Rusal to have maintained and advanced in the litigation a construction of the deed and rules which, if correct, would have redounded to its substantial benefit. It was clearly in the interests of all parties and the orderly winding up of the fund that the questions of construction upon which the case turned be resolved as early as possible. I therefore think that, contrary to McIntosh J's view, the appropriate order for costs in this matter is that the costs of both parties should be paid out of the fund on an indemnity basis.

Conclusion

[91] My conclusion is therefore that, save as regards the question of costs, the appeal should be dismissed and the costs of all parties, both here and in the court below, should be agreed or taxed as between attorney and client and paid out of the pension fund. These are my reasons for concurring with the result of the appeal, as set out at paragraph [1] above.

DUKHARAN JA

[92] I too have read the draft reasons for judgment of Morrison JA and agree with his reasoning and conclusion.