THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT)

(Exercising its Admiralty Jurisdiction)

Case No: 9085/2008

In the matter between:

MNOPF TRUSTEES LIMITED **PLAINTIFF**

and

SA MARINE CORPORATION (PTY) LTD **DEFENDANT**

Coram: ROGERS J

Heard: **18-21, 26 NOVEMBER 2013**

Delivered: **11 DECEMBER 2013**

JUDGMENT

ROGERS J:

Introduction

[1] The plaintiff is the corporate trustee of the Merchant Navy Officers Pension Fund ('the Fund'), a pension fund established in England by a trust deed executed in 1937. The defendant ('SAMC') is a South African company which in 1950 became an employer as defined in the Fund's trust deed and rules by signing the prescribed form of participation agreement annexed to the 1937 trust deed. SAMC last employed a person qualifying for membership of the Fund in 1997. The Fund's triennial actuarial valuations since 1999 have revealed deficits in the Fund's resources for purposes of meeting its actuarial liabilities to members. In June 2000 the Fund's board amended the Fund's rules to provide explicit machinery for recovering deficits from employers. In the present proceedings the Fund seeks to recover from SAMC the deficit contributions allegedly owing by the latter pursuant to the June 2000 amendment and resolutions taken by the trustee from time to time on the strength of that amendment.

[2] SAMC's defence in essence is that its participation as an employer in the Fund ceased with effect from 6 April 1978. This defence rests on the fact that with effect from that date the Fund's board adopted a substituted deed and rules. SACM contends that in terms of the 1978 deed and rules it was a requirement that an employer wishing to participate in the scheme should sign the form of accession agreement annexed to the 1978 deed and that this requirement applied not only to employers joining the scheme for the first time after 6 April 1978 but also to firms who were participating employers immediately prior to the coming into force of the 1978 deed and rules. SAMC also contends that due to the substitution of the deed and rules in 1992, 1995 and 1999, a fresh accession agreement is needed to be signed upon the coming into force of those substituted deed and rules. It is common cause that the only accession agreement signed by SACM was the one of 1950.

[3] The Fund's claim is a maritime claim as contemplated in s 1(1)(s) of the Admiralty Jurisdiction Regulation Act No 105 of 1983. The claim is not one in respect of which a court of admiralty in the Republic had jurisdiction immediately

before the commencement of Act 105 of 1983. Accordingly, in terms of s 6(1)(b) of the Act the law to be applied is Roman-Dutch law. By virtue of the principles of our private international law, the interpretation of the Fund's trust deed and rules as they have existed from time to time is governed by English law, since that is where the trust deed and rules of the Fund from time to time were executed, where the Fund's principal place of business has at all times been located and where it is administered, and where it receives pension fund contributions and pays out benefits.

[4] The Fund was represented at the hearing by Mr NGD Maritz SC leading Mr R Patrick while SACM was represented by Mr MJ Fitzgerald SC leading Mr AM Smalberger. The only witness who gave oral evidence was Mr Peter McEwen, the chairman of the board of directors of the corporate trustee. By agreement the expert report of Mr Paul Burbridge, an English actuary, was handed in as proof of the truth of its contents. The report dealt with the quantification of the deficit contributions.

The Fund and its governing documents

[5] The Fund was established to provide pensions for officers of the British Merchant Navy. Such officers might be employed by British ship owners or by non-British ship owners. The scheme was an industry-wide one which took into account that officers would typically, over the course of their careers, be employed by several different employers and might have intermittent periods of unemployment. Once an officer became a member, contributions in respect of his benefits would be made by the participating employer by whom he was for the time being employed. Contributions would cease for as long as the officer was unemployed or was employed by a ship owner who was not a participating employer.

[6] Until 1978 the Fund's pension scheme was a so-called money purchase scheme in terms of which the benefits payable to an officer upon retirement were linked to the contributions which had been paid in respect of his membership. Pursuant to the enactment of the Social Security Pensions Act of 1975, the Fund's trust deed and rules were amended with effect from 6 April 1978. The amended scheme comprised a pre-1978 and post-1978 section. The pre-1978 section (which

applied to contributions paid in respect of members prior to 6 April 1978) continued to provide pension benefits in accordance with the historical position. The post-1978 section (which applied to contributions paid in respect of members, including existing members, as from 6 April 1978) provided for pensions on a defined benefit basis linked to average career salary. The post-1978 section of the Fund involved a permissible contracting-out of certain provisions of the 1975 Act, resulting in a reduction in the contributions which officers and employers needed to make in respect of National Insurance in England. It was a requirement of such contracting-out that the pension scheme should make provision for a guaranteed minimum pension, hence the introduction of a defined benefit section in the Fund.

[7] The governing documents of the Fund comprise a trust deed and a set of rules annexed as a schedule to the trust deed. All underlining in the quotations in this judgment have been added by me to highlight wording of possible significance to the arguments.

[8] The 1937 trust deed defined the term 'Employers' as primarily meaning and including:

'(i) all such Owners of British Merchant Ships to which the National Maritime Board Officers Rates of Pay Agreements apply (either as standard rates or as minimum rates) and Wireless Companies employing Radio Officers in such ships except and to the extent that any such owner or company is maintaining and continues to maintain a private scheme as hereinbefore defined, provided that nothing in this clause shall be construed as preventing any such owner or company from extending any private scheme established prior to [1 November 1937] so long as notice of any such extension is given to the Committee before [1 January 1938] and such extension, unless the Committee extend the date in the approved cases, is in full operation by [1 July 1938] and (ii) such other Owners of British Merchant Ships and Employers of British Merchant Officers as the Committee may from time to time determine to bring within the Scheme, and who in either case undertake, by way of the Agreement set forth in the Second Schedule hereto or otherwise to the satisfaction of the Committee, the obligations imposed on employers by the Trust Deed and the Rules and become contributors to the Fund. The expression shall also extend to include such institutions (including the Fund and the Trustees as employers of staff) or undertakings formed for purposes connected with or relating to the British Merchant Navy as the

Committee may from time to time determine to bring within the Scheme and to undertake in manner aforesaid the said obligations and become contributors to the Fund'.

[9] The accession agreement annexed as the second schedule to the 1937 deed was in the form of a document addressed to the Fund's Committee of Management and read thus:

'We, [employer's name and address], having received a copy of the Trust Deed and Rules dated the ____ day of ____ 1937 and constituting and regulating the Merchant Navy Officers Pension Fund HEREBY AGREE to assume and be bound by the obligations undertaken by Employers thereunder or under any subsequent variation that may be duly made therein.'

Provision was made for signature and for the place and date thereof to be inserted.

[10] The expression 'Trustees' in the deed and rules has at all times been a reference to the corporate trustee of the Fund. Originally the administration of the Fund was in the hands of a Committee of Management comprising equal representation from employers and employees (appointed respectively by the employer and employee components of the Navigating and Engineering Officers Panels of the National Maritime Board). In 1986 the administration of the Fund was entrusted directly to the corporate trustee, whose board of directors was to comprise an equal number of employer and employee representatives.

[11] Clause 19 of the 1937 deed provided that the deed and rules could be 'varied or added to in any way' by means of a supplemental deed executed by two members of the Committee as the latter might appoint to execute same. Every such variation first had to be approved by a majority of the full number of employer representatives and by a majority of the full number of employee representatives. The power of variation was subject to certain qualifications prohibiting a change to the main purpose of the Fund or the return of contributions to employers or the prejudicing of annuitants' rights or a derogation from the principle of equal representivity.

[12] On 1 March 1950 SAMC, which was a South African company employing British merchant naval officers, signed an accession agreement in the prescribed form.

[13] Amendments were made to the 1937 deed and rules from time to time. With effect from 5 October 1966 the Committee substituted the 1937 deed as amended by way of a consolidated deed and set of rules. The definition of 'Employers' in the 1966 deed was identical to the definition in the 1937 deed. The 1966 deed also contained an identical power of variation. Because the 1966 deed repeated the definition of 'Employers' in the 1937 deed, the deed applied to those employers who signed the prescribed accession agreement or who otherwise undertook the obligations of employers to the satisfaction of the Committee.

[14] The 1966 deed and rules were substituted with effect from 6 April 1978 by a revised deed and set of rules. As noted, the 1978 deed and rules introduced significant changes to the Fund's benefit structure in relation to contributions made as from 6 April 1978. The preamble to the 1978 deed recorded that it had been adopted in accordance with clause 19 of the trust deed (ie in accordance with the power of alteration in clause 19 of the 1966 deed as it read immediately prior to the adoption of the 1978 deed).

[15] In the 1978 documents the definitions, which formerly had been contained in the trust deed, were located in the rules. The 1978 rules defined the term 'Employers' as primarily meaning and including (my underlining):

'(i) all such Owners and Managers of British Merchant Ships to which the National Maritime Board agreements apply and Wireless Companies employing Radio Offices in such ships except and to the extent that any such owner or company is maintaining and continues to maintain a Private Scheme for officers in its employment; (ii) such other employees of British Merchant Navy Officers and/or former British Merchant Navy Officers as the Committee may in their absolute discretion from time to time determine to bring within the Scheme; (iii) <u>such other employers who were participating in the Scheme on 5th April 1978</u>; and (iv) such institutions (including the Fund and the Trustees as employers of staff) or undertakings formed for purposes connected with or relating to the British Merchant Navy as the Committee may from time to time determine to bring within the Scheme <u>and who in</u>

any such case undertake in manner provided under Clause 2 of the Trust Deed the obligations imposed on Employers by the Trust Deed and the Rules and become contributors to the Fund'.

The definition of 'Employer' in the 1937 and 1966 documents did not contain the third category I have underlined in the above quotation.

[16] Clause 2 of the 1978 deed stipulated as follows:

'Each Employer participating in the Scheme shall undertake by entering into the form of Agreement set forth under the Second Schedule hereto or otherwise to the satisfaction of the Committee of Management of the Fund the obligations imposed upon such Employer by the Rules'.

The form of accession agreement prescribed under the 1978 deed remained substantially as it was under the 1937 deed, save that the blank form referred to a copy of the deed and rules 'dated the ___ day of 197_' and there was added at the end of the undertaking the phrase 'and promptly to pay to the Fund all contributions due under the Rules'.

[17] The deed and rules have been substituted from time to time since 1978 to consolidate intervening amendments and to introduce other alterations. The distinction between the pre-1978 and post-1978 sections of the Fund has remained. Substituted deeds and rules were adopted with effect from 1 December 1992, 27 January 1995 and 6 April 1997 (the last of these substituted deed and rules were adopted on 25 June 1999 with retrospective effect). Each new set of substituted documents was adopted under the power of variation contained in the immediately preceding version of the trust deed.

[18] The 1992 deed replaced the term 'Employer' with 'Participating Employer', and that nomenclature was retained in the 1995 and 1999 documents. The term 'Participating Employer' was defined in the 1992 rules as meaning

'an employer who has completed the Participating Employers form of Agreement contained under the First Appendix of the Trust Deed and has been admitted to the Scheme as (1) and Owner or Manager of British Merchant Ships who adheres to the terms of the National Maritime Board Agreements or (2) such other employers of British Merchant Navy

Officers and/or former British Merchant Navy Officers as the Trustees may in their absolute discretion from time to time determine or (3) an employer of staff engaged in the administration of the Scheme or the National Seat Training Trust or other institution or undertaking formed for purposes connected with all relating to the British Merchant Navy as the Trustees in their absolute discretion may from time to time determine to bring within the Scheme but so as not to prejudice the Approval of the Scheme…'

It will be observed that the 1992 definition did not record the third category contained in the 1978 definition, namely 'such other employers who were participating in the Scheme on 5th April 1978'. Also, the definition no longer referred to the requirement that an accession agreement should be signed and so forth. In the 1992 documents that element was contained only in the trust deed, clause 7.0 whereof provided as follows:

'Each Participating Employer shall undertake by entering into the form of Agreement set forth under the First Appendix or in such other form as shall be determined by the Trustees the obligations imposed upon a Participating Employer by the Rules'.

The form of accession agreement prescribed under the 1992 deed remained substantially as the one prescribed by the 1978 deed, save that the blank form referred to a copy of the deed and rules 'dated the ___ day of 199_'.

[19] The 1995 deed and rules, effective as from 27 January 1995, were identical to the 1992 documents in the respects relevant to this case.

[20] The current version of the Fund's trust deed and rules is the 1999 set of documents as amended from time to time. The definition of 'Participating Employers' in the 1999 rules reflects one potentially significant change. The definition in rule 3 now refers to:

'such companies or firms as may have become Participating Employers in accordance with Clause 6.0, <u>or which have previously become Participating Employers under other documentation which then governed the Scheme</u>.'

Clause 6.0 of the 1999 trust deed reads as follows:

'A company or firm may take part in the Scheme and so become a Participating Employer if:

(i) the Trustees determine that it falls within one of the categories set out in clause 6.1 below

(ii) it agrees to enter into the form of agreement set out in the First Appendix to this Trust Deed, or in such other form as shall be determined by the Trustees

(iii) its participation will not prejudice Approval.'[1]

Clause 6.1 of the 1999 trust deed sets out the different categories of employers substantially as in the definitions of 'Participating Employers' in the 1992 and 1995 rules.

[21] The power of variation which featured in each of the earlier trust deeds is now to be found in clause 30 of the 1999 trust deed.

[22] All versions of the trust deed since 1937 have contained a substantially similar provision dealing with the contingency of a deficit. Clause 29.2 of the 1999 deed provides in that regard as follows:

'If, as a result of the Actuary's report, it shall appear that there is a deficiency or anticipated deficiency in the Scheme's resources, the Trustees shall consider what if any action, having regard to any recommendations made by the Actuary in his report, should be taken either by way of increasing contributions or decreasing benefits to render the Scheme solvent. If necessary, the Trustees shall take such steps as are herein laid down for amendment of the Trust Deed and the Rules, or if the deficiency or anticipated deficiency cannot be made good, for the winding up of the Scheme.'

[23] The Fund's triennial actuarial valuation as at 31 March 1999 reflected a deficit of £55 million in the post-1978 section of the Fund. This was the first occasion on which the post-1978 section was in deficit. Although various actions and adjustments to assumptions reduced the deficit as at 31 March 2000 to £8 million, the board had to give consideration to the way in which deficits, if they continued to arise, would be addressed. By way of a circular to employers dated 17 April 2000 the board solicited views on the matter, sketching certain options. The upshot of this was that on 8 June 2000 the board resolved to amend the rules by replacing the definition of 'Participating Employers' and by inserting a new rule 5.2A.

[1] 'Approval' is defined in the 1999 rules as meaning approval of the scheme as an exempt approved scheme under English tax legislation.

[24] In terms of the new definition of 'Participating Employers', that expression means:

'such companies or firms as may have become Participating Employers in accordance with Clause 6.0, or which have previously become Participating Employers under other documentation which then governed the Scheme. No company or firm shall cease to be a Participating Employer either as a result of ceasing to employ Active Members on or after 8 June 2000 or otherwise as a result of ceasing to employ persons in the categories described in Clause 6.1 of the Trust Deed on or after that date or otherwise (save in accordance with Rule 5.2A).'

[25] Rule 5.2 of the 1999 rules contains provision for participating employers to contribute at a specified rate of aggregate pensionable salaries of the active members in its employment. Similar provisions had been contained in earlier versions of the rules. The new rule 5.2A adopted on 8 June 2000 reads thus:

'Without prejudice to Rule 5.2, each Participating Employer (whether or not employing Active Members and whether or not employing persons in the categories described in Clause 6.1 of the Trust Deed) shall make such further contributions (if any), which may include lump sum contributions, from time to time as may be decided by the Trustees, having regard to the advice of the Actuary, in order to reduce or eliminate any deficiency or anticipated deficiency in the Scheme's resources. Such deficiency shall be calculated for this purpose by reference to the ongoing basis of calculation adopted in the then most recently completed actuarial valuation of the Scheme (that is, the basis which assumes that the Scheme remains in full operation), with such modifications, if any, as the Trustees shall determine having regard to the advice of the Actuary in order to take account of the lapse of time and any events during the intervening period. For the purposes of the calculations in this Rule 5.2A, the Trustees and the Actuary shall take into account, to the extent that they consider it appropriate:

(i) the proportion of the amount of the deficiency or potential deficiency which the Scheme's liabilities attributable to the employment with that Participating Employer bear to the total amount of the Scheme's liabilities attributable to employment with all of the Participating Employers;

(ii) any lump sum or other contributions paid, payable or prospectively payable by any Participating Employer for the purpose of reducing or eliminating a deficiency or potential deficiency, whether under this Rule 5.2A, Section 75 of the Pensions Act 1995 or otherwise; and

(iii) any debt which, in the opinion of the Trustees, is unlikely to be recovered.

A Participating Employer may, if the Trustees consent, cease to be a Participating Employer for the purposes of the Scheme on such date as the Trustees shall determine if it shall make such contributions (or undertakes to do so in terms satisfactory to the Trustees) as the Trustees, having regard to the advice of the Actuary, shall determine, or if the Trustees, having regard to such advice, shall determine that no such contribution shall be required. Such determination shall be made in accordance with this Rule 5.2A, but having regard to such basis of calculation as the Trustees may reasonably determine in order to protect the interests of the Members.'

[26] I should mention for the sake of completeness that the Fund closed to new members on 1 November 1996.

The English proceedings

[27] On 15 June 2000 the Fund's board wrote to employers advising them of the amendment of 8 June 2000. The board informed employers that the Fund was intending to approach the court for confirmation that participating employers could be held liable for their *pro rata* share of deficits despite the fact that they had ceased to employ active or eligible members.

[28] This was followed by a further letter to employers on 6 March 2001, in which the Fund indicated that it wished to identify a representative employer for each relevant category of employers so that such representative employer could be cited as a defendant in the proposed proceedings. Employers were invited to complete an attached questionnaire and volunteer. On 21 September 2001 the Fund wrote a further letter to employers indicating that it had as yet received no volunteers to act as a representative defendant in certain categories.

[29] In the event, employers willing to represent the various categories were found and proceedings were launched in England. There were three defendants, representing the following categories of employers: [a] participating employers who employed no active members (ie members in respect of whom contributions were being paid) as at 8 June 2000 (the date of the rule amendment) – this class was

represented by FT Everard & Sons Ltd ('Everard'); [b] participating employers who employed no active members as at 8 June 2000 and also did not as at that date employ officers who would have qualified for membership – this class was represented by Pandoro Ltd ('Pandoro'); and [c] participating employers who employed active members as at 8 June 2000 – this class was represented by Everard (Guernsey) Ltd. (SACM, the defendant in the proceedings before me, probably belongs in the first of these categories. It certainly did not employ active members as at 8 June 2000.) It was not possible to find a representative defendant in respect of a fourth category of possible relevance, namely employers who only ever contributed to the pre-1978 section (ie who employed no contributing members on or after 6 April 1978).

[30] The essential question on which the Fund sought a ruling from the English court was whether a firm which at any time contributed to the Fund as an employer could be held liable for deficits in accordance with a rule adopted at a time when the firm in question was no longer contributing to the Fund, ie had ceased to employ active members. I should mention that according to the evidence of the only witness for the plaintiff, Mr McEwen, the rule amendment of 8 June 2000 was adopted on a 'belt and braces' basis, because the advice received by the Fund was that they could probably have levied the lump sum deficit contributions they did without a rule amendment.

[31] The first and second defendants (Everard and Pandoro) argued that they were not subject to the rule amendment of 8 June 2000 because they had ceased to employ active members when the change took effect. Unsurprisingly, the third defendant joined the Fund in arguing the contrary (it suited active employers as at 8 June 2000 to have the deficit burden spread among as larger a group of employers as possible).

[32] The matter was argued before Patten J in the Chancery Division. He delivered judgment on 22 March 2005 (the neutral citation of the case is *MNOPF Trustees Ltd v FT Everard & Sons Ltd & Others* [2005] EWHC 446 (Ch)). Patten J held, in summary, that the trust deed and rules at no stage made provision for participating employers to withdraw from the pension fund scheme. The accession

agreement signed by a party as an employer bound such party to the scheme for its duration. The liability of such parties during the duration of the scheme depended on the powers and degree of control which they conferred on the corporate trustee under the terms of their accession agreements. In the accession agreement the party agreed to be bound not only by obligations imposed on employers by the then current trust deed and rules but also by obligations arising from any variation to the trust deed and rules. Rule 29.2 (dealing with deficits) read with the power of variation in rule 30 empowered the board to adopt the amendment of 8 June 2000 and thereby to impose an obligation on any party which had agreed to participate as an employer in the pension fund scheme.

[33] The order made by Patten J, insofar as relevant to the present case, was as follows:

'On a true construction of the Current Trust Deed and Rules, the Participating Employers of the Scheme from which the claimant as trustee of the Scheme may require contributions (including lump sum contributions) to the Scheme are all companies or firms which have ever become Participating Employers or Employers in accordance with clause 6.0 of the Current Trust Deed or in accordance with documentation which previously governed the Scheme, whether or not they continue to employ Active Members.'

[34] Mr Fitzgerald did not seek to challenge the finding of Patten J that a party who at any stage was an employer or participating employer could be held liable for deficits even though such party had ceased to employ active members as at 8 June 2000. His argument was that SACM at no stage became an 'Employer' or 'Participating Employer' in the post-1978 section of the Fund. In other words, the decision of the Fund's board to levy lump sum deficit contributions from parties who had made contributions as employers on or after 6 April 1978 simply did not apply to SACM because it at no stage acceded to the status of an 'Employer' or' Participating Employer' in the post-1978 section of the Fund.

[35] Since the question before me is ultimately one of construction governed by English law, it is convenient here to quote Patten J's summary in para 40 of the principles applicable to the interpretation of pension fund trust deeds and rules:

‘The principles of construction relevant to a pension scheme were identified by Arden LJ in her judgment in *British Airways Pension Trustees Limited v. British Airways Plc* [2002] EWCA Civ 672. Whilst explaining that there are no special rules of construction to be applied, Arden LJ considered that the following factors are likely to be relevant to a consideration of a pension scheme. They can be summarised as follows:

(1) Members of a scheme are not volunteers: the benefits which they receive under the scheme are part of the remuneration for their services and so are in a different position in some respects from beneficiaries of a private trust;
(2) a pension scheme should be construed so to give a reasonable and practical effect to the scheme;
(3) pension schemes are often subject to considerable amendment over time: the general principle is that each new provision should be considered against the circumstances prevailing at the date when it was adopted rather than as at the date of the original trust deed;
(4) a provision of a trust deed must be interpreted in the light of the factual situation at the time it was created: this includes the practice and requirements of the Inland Revenue at that time, and may include common practice among practitioners in the field;
(5) the function of the Court is to construe the document without any predisposition as to the correct philosophical approach;
(6) a pension scheme should be interpreted as a whole: the meaning of a particular clause should be considered in conjunction with other relevant clauses.’

The deficit contributions levied

[36] It is unnecessary to describe in any detail the manner in which the deficit contributions were levied from time to time pursuant to the amendment of 8 June 2000. In summary, the deficit in the Fund’s resources for the purposes of meeting the defined benefits of beneficiaries in the post-1978 section was apportioned *pro rata* among all parties who had contributed to the Fund as employers at any time during the life of the post-1978 section. This would roughly mean that each such party would bear the deficit attributable to the period of time and quantum of contributions made by such party in respect of any particular member. Unsurprisingly, certain of the entities which had made contributions as employers had ceased to exist by the time the deficit contributions were levied. These so-called ‘orphan liabilities’ were apportioned *pro rata* among the extant employers.

[37] The quantification of SACM's liability for deficits, if it is liable at all, depends on whether the Fund has correctly identified the members in respect of whom SACM made contributions and has correctly calculated the quantum of the contributions. Save in respect of a Mr Benney, to whom I shall refer later, there is no dispute on these matters. If Mr Benney has correctly been included among the persons for whom SACM made contributions as a participating employer, SACM's liability for deficit contributions would be as follows: [a] £251 240 in respect of the actuarial valuation as at 31 March 2003; [b] £217 367 in respect of the actuarial valuation as at 31 March 2006 (incorporating an amount of £36 178 which was a shortfall in the deficit previously determined as at the 31 March 2003); [c] £464 934 in respect of the actuarial valuation as at 31 March 2009; [d] £150 811 in respect of the actuarial valuation as at 31 March 2013. On each occasion that the board determined the contributions, it also set a due date for payment and adopted a contribution collection policy would set out the rate of interest payable on contributions as from the due date. There is no dispute as to these rates.

[38] It is likely that further deficit contributions will be levied on parties such as SACM pursuant to actuarial valuations lying in the future.

SACM's participation

[39] As previously mentioned, SACM signed an accession agreement on 1 March 1950 in the form then prescribed. Although SACM contends that it did not lawfully become an 'Employer' in relation to the post-1978 section of the Fund, it was established by the evidence and ultimately not in dispute that as a fact SACM paid contributions in respect of qualifying officers employed by it in the period from 6 April 1978 until 28 February 1993. These contributions were paid on its behalf by its English subsidiary and agent, Safmarine (UK) Ltd ('SUK'). There were, according to annexure 'E' to the particulars of claim, 92 such members. The last contributions in respect of these persons were paid on dates ranging from 6 April 1978 to 28 February 1993. In respect of Mr Benney, the Fund received contributions until 30 June 1997. The Fund treated those contributions as having been made by SACM though there is a dispute as to whether SACM was the employer of Mr Benney.

[40] The explanation for the cessation of contributions as at 28 February 1993 (save in the case of Mr Benney) appears to be that with effect from 1 March 1993 the active members then employed by SACM were transferred into the employ of a company called Celtic Pacific. The latter was a service company which made naval officers available to ship owners. It seems that the members in question may well have continued to work on vessels operated by SACM but the latter was no longer responsible for paying contributions to the Fund.

[41] With effect from 30 March 1999 SACM sold its liner business, which historically had traded under the name Safmarine, to Safmarine (Pty) Ltd ('SPL'), a new subsidiary established for that purpose by the ultimate acquirer, Maersk. The Safmarine liner business was the enterprise in which SACM had primarily needed the services of naval officers who were members of the Fund. A number of officers who had been employed by SACM as at 28 February 1993 and whose employment had been transferred to Celtic Pacific on 1 March 1993 became employees of SPL with effect from 30 March 1999. SPL, for several years as from 1 March 1999, made contributions to the Fund in respect of these officers. It was common cause that SPL signed its own accession agreement – this would have been under the 1995 or 1999 version of the trust deed and rules. Despite the fact that SACM and SPL are different entities and that each signed its own accession agreement, the Fund appears initially to have drawn no distinction between the two. The result was that at one stage the Fund claimed from SACM deficit contributions associated with the contributions paid by SPL in the period since 1 March 1999. When, pursuant to correspondence, the distinction came to light, the Fund split the deficit contributions between SACM and SPL. In the current proceedings, the Fund only seeks deficit contributions in respect of contributions made by SACM up until 28 February 1993 (save for Mr Benney). In respect of the period thereafter, the Fund has claimed the relevant deficit contribution from Celtic Pacific and from SPL.

[42] It should also be mentioned here that on 23 September 1999 but with effect from 1 January 1999 the share capital in SACM was sold by its holding company, Safmarine & Rennies Holdings Ltd ('Safren'), to a Liberian company, Capital Finance SA ('CFSA'). This sale was on the basis that SACM would have disposed of its liner business and would only retain its bulk division. (Safren has subsequently

gone into liquidation. There is an indication in the documentary exhibits that if SACM is liable in the present proceedings, CFSA may consider itself to have recourse under the sale agreement against Safren.)

SACM's liability

Interpretation of 1978 definition of 'Employer'

[43] Mr Fitzgerald's main submission on behalf of SACM in oral argument was in summary the following. In terms of the 1978 rules the definition of the term 'Employers' sets out four categories of qualifying employers. The definition then adds the general qualification 'and who in any such case undertake in manner provided under Clause 2 of the Trust Deed the obligations imposed on Employers by the Trust Deed and the Rules and become contributors to the Fund'. The phrase 'in any such case' refers back to the four categories of qualifying membership. The third of those four categories in the 1978 definition was 'such other employers who were participating in the Scheme on 5th April 1978'. It follows, argued Mr Fitzgerald, that employers such as SACM who had signed accession agreements prior to the coming into force of the 1978 deed and rules would only become 'Employers' under the 1978 scheme if they signed the accession agreement prescribed by the 1978 deed.

[44] Mr Fitzgerald did not contend that the same argument would have held good in respect of the 1966 deed and rules. He pointed out that the definition of 'Employers' in the 1966 deed did not have a specific category for persons who were already participating as employers as at 5 October 1966. He also submitted that the 1966 version of the deed and rules was merely a consolidation, and that the consolidated trust deed still styled itself as a trust deed executed in 1937. He thus accepted that SACM remained a participating employer after 5 October 1966 even though it did not at that time execute a fresh accession agreement.

[45] Somewhat inconsistently with his stance in respect of the 1966 deed and rules, Mr Fitzgerald argued that his argument in respect of the 1978 deed and rules also applied to the 1992, 1995 and 1999 rules – he contended that with the adoption

of each of those new sets of documents, existing employers were required to sign fresh accession agreements if they were to remain as participating employers. I say that the argument is inconsistent, because the 1992, 1995 and 1999 documents omitted the express inclusion, in their definitions of 'Participating Employers', of employers who were already participating in the scheme immediately prior to the coming into force of the new version of the deed and rules.

[46] Be that as it may, the critical question is the interpretation of the 1978 deed and rules, because if Mr Fitzgerald's argument is correct in relation to that version of the deed and rules, the 1992, 1995 and 1999 version of the deed and rules could not have had the effect of converting SACM into a participating employer in the post-1978 section. Although the 1992 version of the deed and rules may not have required participating employers to sign fresh accession agreements, that version of the deed and rules would at best for the Fund have applied (in the absence of a fresh accession agreement) to parties who were already participants in the post-1978 section of the Fund, and on Mr Fitzgerald's argument SACM was not such an employer. (The same analysis would apply *mutatis mutandis* to the 1995 and 1999 deed and rules.)

[47] In support of his argument, Mr Fitzgerald contended that it was not implausible, given the significant changes brought about by the 1978 deed and rules, that the framers of the new documents would have required fresh accession agreements from employers who were already participating in the Fund. The amended deed and rules introduced a new defined benefit section into the Fund. It was that section which would apply to all contributions made to the Fund as from 6 April 1978. Participation in the post-1978 section was potentially more onerous to participating employers because a defined benefit pension scheme increases the risk that employers will need to make good any deficiencies in the Fund's financial ability to meet benefits.

[48] He also pointed out that the form of accession agreement prescribed by the 1978 deed was a form which required the employer to acknowledge having received a copy of deed and rules envisaged to have been executed in a date in the 1970s (in the event, 1978). Participating employers immediately prior to the coming into

force of the 1978 deed and rules would only have acknowledged by their accession agreements that they had received the 1937 deed and rules.

[49] Mr Fitzgerald said, furthermore, that the 1978 form of access in agreement contained an additional undertaking by the employer: '… and promptly to pay to the Fund all contributions due under the Rules'. However, I do not regard this as a significant alteration. From the outset the trust deed and rules have contained provisions which would have the same legal effect. For example, clause 8(b) of the 1937 rules provided, in relation to contributions, that each employer 'shall account to the Fund at such intervals and in such manner as the Committee may from time to time determine'. The requirement for prompt payment of contributions, ie by due date, has always been implicit, if not explicit.

[50] Linguistically, there is much to be said for Mr Fitzgerald's argument that the phrase 'in any such case' in the 1978 definition of 'Employers' applies *inter alia* to persons who were participating as employers immediately prior to 6 April 1978. It can be assumed that in formulating the 1978 deed and rules the persons responsible for its drafting had to hand the immediately preceding version of the deed and rules, and would where appropriate have adopted or varied the provisions of the 1966 deed and rules. The 1937 and 1966 deeds defined the term 'Employers' by describing two broad classes of qualifying employers (under the numbering (i) and (ii)) and then adding the general qualification 'and who in either case undertake…'. This was clearly a reference back to the two broad classes. The 1937 deed naturally had no occasion to refer to persons already participating as employers (there were none). Since the 1966 deed, despite its consolidated amendments, was as a matter of formulation described as a deed adopted in 1937, there was arguably no reason on that occasion to make reference to persons who were already participating employers. The framers of the definition in the 1978 rules grouped the qualifying employers under four numbered categories instead of two, and then added the qualification 'and who in any such case undertake…'. The use of the word 'any' rather than 'either' indicates that the drafters, appreciating that there were now four broad categories of qualifying employers rather than two, changed the general qualification so as to embrace all four categories.

[51] However, the purpose of interpretation is to arrive at the true intention of the parties. There are two possible reasons why the framers of the 1978 definition expressly included, as a third category of qualifying employers, such employers as were already participating in the scheme on 5 April 1978. The first, which is the one for which Mr Fitzgerald contends, is that because the 1978 deed introduced significant and potentially burdensome provisions, it was required that existing employers should sign fresh accession agreements. The second is that the framers wished to make clear that those employers already participating in the Fund would automatically qualify as such. The framers knew that existing employers had already signed the accession agreements prescribed in the definition of 'Employers' in the 1937 or 1966 rules. On the latter view, existing employers automatically qualified, while other employers who wished to participate would need to fall within the first, second or fourth of the qualifying categories and would need to sign an accession agreement.

[52] I am satisfied (for reasons which I shall presently explain) that the second of these views is correct. Linguistically, there are two alternative ways in which one could arrive at this conclusion. The first is to adopt a restrictive interpretation of the phrase 'in any such case', so that it applies only to the first, second and fourth numbered categories of qualifying employers. This limitation is not expressed but there are occasions where apparently wide and unlimited language can legitimately receive a restrictive interpretation. The second way would be to read clause 2 of the 1978 deed (to the requirements of which the 1978 definition of 'Employers' refers) as incorporating, in the case of existing employers, an implied reference to the virtually identical provisions for accession under predecessor versions of the deed and rules. Put differently, the words, 'form of Agreement set forth under the Second Schedule', in clause 2 of the 1978 trust deed could be read as including an accession agreement prescribed under the earlier versions of the deeds, such earlier accession agreement being in substantially the same 'form' as the one prescribed in the 1978 deed.

[53] Whichever of these methods is preferred, I am satisfied that the requirement that the accession agreement prescribed under clause 2 of the 1978 deed only needed to be signed by employers who were not already participating in the scheme

immediately prior to the coming into force of the 1978 deed and rules. A restrictive interpretation of the phrase ‘in any such case’ would not be inconsistent with the change from ‘either’ to ‘any’, because ‘either’ would have been inappropriate, whether the requirement of an accession agreement applied to only three or to all four categories in the 1978 definition. There are several considerations which lead me to this conclusion.

[54] Firstly, although the 1978 deed and rules introduced significant changes, they were, in character, variations to the 1937 deed and rules. They were adopted under the power of variation conferred by clause 19 of the 1937 deed and retained in the 1966 deed. If the 1978 deed and rules were not adopted under the power of variation in the preceding version of the deed, the 1978 documents would not have been valid at all, since the Committee of Management would not have had the power to adopt them. Nobody suggests that the 1978 the deed and rules was not validly adopted. No new trust or pension fund was created; the Fund continued to exist under varied rules. The character of the 1978 deed and rules as a variation of the deed and rules as they existed immediately prior to 6 April 1978 is not to my mind affected in the least by the fact that the 1978 deed recorded in one of its preambles that the revisions to the rules required to bring about the desired changes were such as ‘to require the adoption of new Rules’ and that it was thought ‘expedient’ at the same time ‘to adopt a new Trust Deed so that henceforth these presents may alone be looked to as the instrument regulating the Fund’. That being so, employers who had signed accession agreements prior to 6 April 1978 would without more have been bound by the 1978 deed and rules; under the form of accession agreement prescribed by the 1937 and 1966 deeds the employer in question agreed to be bound by any subsequent variation of the deed and rules.

[55] The requirement that there should be a signed accession agreement appears to me in general to have been a requirement imposed by the various versions of the deed and rules for the benefit of the Fund, not for the benefit of employers. It is the means whereby the Fund could be satisfied that the employer would be bound. That this is so is apparent from the fact that in every version of the deed or rules the Committee or trustee was given the power to dispense with the requirement of the prescribed form of accession agreement provided the Committee was otherwise

satisfied that the employer in question had undertaken the obligations imposed by the deed and rules. When the 1978 variations were adopted, the Committee of Management would have known that employers who had already signed accession agreements under the 1937 or 1966 deed had undertaken to be bound by further variations, including those adopted in 1978. There was thus no need in law for the framers of the 1978 deed and rules to have imposed a requirement that existing employers sign fresh accession agreements.

[56] There were also no equitable considerations which required that existing employers should sign fresh agreements. The 1978 deed and rules were adopted by the Committee, on which there was equal representation from employers and employees. In the nature of things, the employer representatives would have been drawn from companies and firms that were existing employers participating in the Fund. The 1978 deed and rules could only have been adopted because they enjoyed the support of a majority of the full number of employer representatives. Although there was no evidence to this effect, I can safely assume that in the period between the coming into force of the Social Security Pensions Act of 1975 and the adoption on 2 January 1978 of the 1978 deed and rules, there was communication with participating employers regarding the proposed changes. An existing employer who did not wish to participate in the post-1978 section could (unless such employer fell within the category of employers bound by the National Maritime Board agreements) simply have opted out by ceasing to pay contributions in respect of its employed officers (subject, of course, to the terms of the employment contract between such employer and its employed officers).

[57] Mr Maritz for the Fund also drew attention to the concluding phrase in the 1978 definition of ‘Employers’, namely ‘and become contributors to the Fund’. That general requirement is allied to the other general requirement that a participating employer should undertake the obligations of an employer in the manner required by clause 2 of the trust deed, and both these requirements are, semantically, applicable ‘in any such case’. Persons who were already employers immediately prior to 6 June 1978 would already have been contributors to the Fund; they would not ‘become’ contributors (even if they signed a fresh accession agreement) – they would simply continue contributing. This tends to indicate that the two general

requirements, ostensibly applicable ‘in any such case’, were not intended to apply to the third category of qualifying employers, namely those who were already participating as at 5 June 1978 and thus already contributing.

[58] The Committee would also have been aware that to require fresh accession agreements would be administratively burdensome. There were a great many participating employers immediately prior to the coming into force of the 1978 deed and rules. The Committee would have needed to send a request to each such employer and would have had to follow up with those who did not return a new signed accession agreement.

[59] Moreover, a requirement that existing employers sign fresh accession agreements would have led to disruption in the seamless transition of existing employers from the pre-1978 section to the post-1978 section. That a seamless transition was contemplated is perfectly clear. The 1978 rules defined ‘Post-1978 Service’ as meaning employment with an ‘Employer’ on and after 6 April 1978. In terms of clause 6 of the rules, an existing member as at 6 April 2008 was entitled to the pension specified in the pre-existing version of the rules up to 6 April 1978 and a pension as from 6 April 1978 as specified in the 1978 rules. On Mr Fitzgerald’s argument an existing employer did not become a participating employer in the post-1978 section unless, and presumably until, such employer signed a fresh accession agreement. The post-1978 section came into operation on 6 April 1978. What would happen if the existing employer only signed the fresh accession agreement in late 1978 or during 1979? Presumably, on Mr Fitzgerald’s argument, such person would not have been a participating employer in the post-1978 section in the intervening period (unless the accession agreement stated that it would have retrospective effect, something for which the prescribed form of accession agreement annexed to the 1978 deed did not make express provision). The term ‘Membership’ in the 1978 rules referred to officers employed by ‘Employers’ to whom the scheme applied. Contributions towards benefits could only be made by an ‘Employer’ and with reference to an employed ‘Member’. It would follow, on Mr Fitzgerald’s argument, that no contributions could be made in respect of an employed officer in the post-1978 section until the existing employer had signed a fresh accession agreement. Such a result, which was administratively inevitable, could not have been intended.

On the other hand, there would be no difficulty in accepting that a new employer did not qualify as such until it had signed an accession agreement.

[60] A further consideration is that, as in the case of the 1937 and 1966 deed and rules, the 1978 rules provided for a accession not only by employers but also by members. Clause 4 of the 1978 rules stated that the Fund was open to membership on the part of all those in 'Service' in accordance with the rules, the term 'Service' meaning employment with an 'Employer'. Clause 4 required that such members should

'ratify this agreement and express their assent to be bound by the Scheme and these Rules by the execution of the Form of Assent and Authority which is set out in the Third Schedule to the Trust Deed or by such other appropriate method as the Committee may prescribe'.

In the form prescribed in the third schedule to the 1978 trust deed, the employee in question acknowledge having received a copy of the trust deed and rules 'dated the ___ day of 197_,' and agreed to 'become' a member of and to contribute to the Fund and to be bound by all its provisions, rules and regulations or any subsequent variation thereof. He also authorised his 'Employer' to deduct the contributions payable to the Fund. It appears most implausible that the framers of the 1978 documents intended that the thousands of existing members of the Fund as at 1978 would have to sign fresh agreements of assent. The agreements of assent prescribed under the 1937 or 1966 deed sufficed, and the Committee would have known that. One thus cannot read clause 4 of the 1978 rules as requiring existing members to sign the form of assent prescribed in the third schedule to the 1978 trust deed. If that is so, there is no reason why fresh accession agreements should have been required from the employers of those same members. Yet on Mr Fitzgerald's argument, the existing members (who did not need to sign fresh assent agreements) could not continue to be members unless and until their existing employers signed fresh accession agreements. Such a view is so far removed from business sense and practicality that it can be rejected.

[61] That the draftsman could (on the view I take of the clause) have made his intention clearer is obviously so. Nevertheless, I remind myself of the fifth general

principle of interpretation in Lord Hoffmann's oft-quoted speech in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 All ER 98 (HL):

'The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigourously when he said in *The Antaios Compania Neviera SA v Salen Rederierna AB* [1985] 1 AC, 201:

"… if detailed and syntactical analysis of words in a commercial contract is going to lead to a conclusion which flouts business commonsense, it must be made to yield to business commonsense"'.

Although (using Lord Hoffmann's vivid word) the draftsman of the contract in the *Investors Compensation Scheme* matter may have 'mangled' the language, it was nevertheless clear, having regard to the dictates of business common sense, that the phrase used in that contract, 'any claim (whether sounding in rescission for undue influence or otherwise)' should be interpreted (without the need for rectification) as meaning 'any claim sounding in rescission (whether for a undue influence or otherwise)'.

[62] There was evidence as to how the Committee in fact conducted itself administratively following the adoption of the 1978 deed and rules, in particular that the Committee had not called upon or required existing employers to sign fresh accession agreements and that, save for a few isolated instances apparently unrelated to any such requirement, existing employers had not signed fresh accession agreements. This evidence was led, and submissions were made in argument, on the unstated assumption that the manner in which the Committee and employers conducted themselves in and after 1978 was admissible in construing the 1978 deed and rules. Such evidence might have been admissible if the matter were governed by South African law (see *MTK Saagmeule (Pty) Ltd v Killyman Estates (Pty) Ltd* 1980 (3) SA (A) at 12F-H; Christie *The Law of Contract in South Africa* 6th Ed at 226-227). However, my subsequent researches have indicated that English law does not permit regard to be had to subsequent conduct in interpreting contracts (*James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC

583 (HL) at 603E, 611D-E and 615A; *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 (HL) at 252C-F, 260C-G, 261A-262B, 265E-268E, 272E-273A; *Bank St Petersburg & Another v Arkangelsky & Another* [2013] EWHC 3529 (Ch) paras 56-57), and this is stated by a leading author also to be applicable to trust deeds (*Lewin on Trusts* 18th Ed para 6.12). I thus do not intend to examine the evidence though I accept, if it were admissible, that it would provide strong support for the Fund's interpretation.

[63] It was pointed out by Mr Maritz that a departure from the way in which the 1978 deed and rules were implemented by the Fund and employers would have catastrophic consequences for many members and for the Fund. According to the actuarial report as at 31 March 2003 the Fund had 2 821 active members (ie for whom contributions were still being made), 12 093 pensioners and widows/dependants in receipt of pensions, and 15 193 deferred pensioners (members in respect of whom contributions had been made and with a prospective entitlement to a pension upon reaching retirement age).[2] Among these would be the 92 persons listed in annexure 'E' to the particulars of claim and in respect of whom SACM made contributions over varying periods from 6 April 1978 to 28 February 1993. In a significant number of these 92 instances, there are pensioners or widows in receipt of a pension; others are deferred pensioners. I have not been given data as to how many employers who have contributed since 6 April 1978 were already participating employers as at that date but it is fair to assume that there are a number of them and that since 6 April 1978 they made substantial contributions in respect of a significant number of employees. Since we know that only in a few isolated instances did such employers sign fresh accession agreements, an acceptance of Mr Fitzgerald's argument would lead to the conclusion that the contributions made by such employers over a period of many years as from 6 April 1978 were not made by 'Employers' in respect of 'Members' as envisaged in the rules and could thus not be received by the Fund as contributions or give rise to pension benefits. The putative members and employers who contributed to the post-1978 section of the Fund would at best have a claim for a refund of contributions. Putative members and their widows and dependants would not be entitled to the

[2] See expert bundle at p 26.

pension benefits which they expected to receive pursuant to many years of contributions. The Fund might be obliged to stop paying pensions currently in the course of payment to such persons, and would possibly need to recoup pensions paid in error over many years. (I do not presume to comment on the requirements for such refund claims under English law.)

[64] While it would be pleasing to be able to reach an interpretation which avoided these catastrophic consequences, I do not think they are relevant in interpreting the 1978 deed and rules. English law, like our own, would lean against an interpretation leading to absurdity or to a very unreasonable result (*Chitty on Contracts* 29th Ed Vol 1 para 12.055). In the present case, however, the calamitous consequences, if a finding were now made against the Fund, would in the main be the result of many years of erroneous implementation rather than anything inherently harsh or unreasonable in Mr Fitzgerald's proposed interpretation. Put differently, if the 1978 deed and rules bear the interpretation for which Mr Fitzgerald contends, the hardship would not have been nearly as significant, as it will now be, if the deed and rules had been correctly applied from the outset, ie if fresh accession agreements had promptly been sought from all existing employers. I do accept, though, that not inconsiderable inconvenience and hardship would nevertheless be inherent in Mr Fitzgerald's interpretation, because there would inevitably have been a period of delay between the coming into force of the 1978 deed and rules and the signing of fresh accession agreements by existing employers. That is a consideration to which I referred earlier.

[65] No reference was made in argument to the powers of the Committee in terms of clause 7 of the 1978 trust deed. The concluding part of that clause reads as follows:

'… The Committee shall also have full power conclusively to determine all questions or matters of doubt arising on the construction or operation of the Trust Deed or the Rules or otherwise relating to the Fund. Every such determination or decision of the Committee under this Clause, whether made upon a question actually raised or implied in the acts or proceedings of the Committee, shall be conclusive and binding on all parties.'

[66] It seems, at very least, to be implied, from the manner in which the Committee dealt with pre-existing employees as from April 1978, that the Committee interpreted the definition of 'Employer' in the 1978 rules as not imposing any requirement that pre-existing employers should sign fresh accession agreements. Since I was not addressed on the scope of clause 7, I prefer not to place reliance on it. Nevertheless, and for the reasons I stated earlier, I conclude that it was not a requirement for participation in the post-1978 section of the Fund that an employer such as SACM, which had signed an accession agreement prior to 6 April 1978, was required to sign a fresh accession agreement. This being so, the effect of Patten J's judgment in the English proceedings is that the Fund is entitled to exact deficit contributions from SACM. As I have said, by the end of the trial there was, save for the case of Mr Benney, no dispute that SACM was the contributing employer in respect of the persons listed in annexure 'E' to the particulars of claim and that the deficit liability was correctly calculated.

Compliance by other means?

[67] If, contrary to the above conclusion, Mr Fitzgerald's argument were the correct one, the question might arise whether there was not in any event compliance with the requirement that SACM should undertake the obligations of an employer in the manner provided in clause 2 of the 1978 trust deed. As previously mentioned, clause 2 of the trust deed required employers participating in the scheme to undertake the obligations imposed by the rules either by entering into the prescribed form of accession agreement 'or otherwise to the satisfaction of the Committee of Management'. I have already suggested that this is one of the indicators pointing to the conclusion that the qualification in the definition of 'Employers' read with clause 2 of the trust deed was inserted for the benefit of the Fund, not employers. In the present case, the Fund *de facto* accepted that SACM was a participant in the post-1978 section of the Fund. From 6 June 1978 until at least 1 March 1993 the Fund accepted contributions made on behalf of SACM. SACM, through its agent SUK, rendered monthly contribution returns as from April 1978 until at least February 1993. There was also written and telephonic correspondence between the Fund and SACM's agent, SUK, regarding SACM's participation in the Fund on random occasions over the period 1980 to 1989 where it was either taken for granted that

SACM was a participating employer or it was clarified that the participating employer was SACM, not SUK (there was some confusion in the Fund's records in that regard).[3]

[68] I would have thought, in the light of these considerations, that it was fairly arguable that the original accession agreement signed in 1950, coupled with the monthly rendering of contribution returns and payments of contributions in respect of April 1978 and in respect of each succeeding month until February 1993, satisfied the Committee that SACM had undertaken the obligations of an employer under the 1978 rules. It is almost a case of *res ipsa loquitur.* However, I raised with Mr McEwen in evidence whether the Committee had ever considered or applied the provision 'or otherwise to the satisfaction…' in clause 2. He replied that he was not personally aware of that having been done. Mr Maritz did not pick up on this aspect in further questioning or in argument. I thus do not base my decision on this alternative and express no final opinion on it; I mention it only lest it otherwise be thought that an obvious answer to the case had been overlooked.

The 1950 accession agreement

[69] In their heads of argument SACM's counsel submitted that SACM's obligations must be determined with reference to what was within the contemplation of the parties when SACM signed its accession agreement in 1950. It was argued that when SACM agreed to be bound by the obligations undertaken by employers under the 1937 deed and rules or under any subsequent variation thereof, it could never have been envisaged that SACM would become liable for deficit contributions at a time when it had long since ceased to employ qualifying officers or to contribute to the Fund.

[70] This argument seems to me to be closed to SACM by Patten J's judgment in the English proceedings, the correctness of which was not challenged. It could just as well be said that an employer who only joined the Fund after 6 April 1978 but then ceased, some years before the amendment of June 2000, to employ active

[33] See (in chronological order) at 2/626;4/1665; 2/628; 2/630; 2/634; 2/642; 2/644; 2/646; 2/648A; 2/655; 2/624A; 2/656; 2/657; 2/624B; 2/660.

members would not have envisaged, when signing its accession agreement, that it might be found liable for deficit contributions long after it had ceased to employ active members. There is no distinction in that regard between a pre-existing employer and one who only joined the Fund after 6 April 1978. Patten J's judgment authoritatively established that employers who signed accession agreements were bound by subsequent variations, even though they had ceased to employ active members.

[71] In the context of the above argument, SACM's counsel submitted in their heads of argument that the accession agreement signed by SACM had to be interpreted in the light of the circumstances prevailing in 1950, when liability of the kind arising from the amendment of June 2000 would not have been present to the minds of the parties. Apart from the fact that the end-point of the argument would be, as I have said, contrary to Patten J's judgment, I do not think it is correct that the accession agreement falls to be interpreted with reference to the circumstances prevailing when SACM signed the accession agreement or with reference to any particular factors which may have been present at that time to the mind of the Fund on the one hand and SACM on the other. The accession agreement was in a form prescribed by the trust deed. Its meaning cannot change from year to year nor can it mean one thing for a particular employer and a different thing for another employer. And, most importantly, the fact that the employer agreed, in the accession agreement, to be bound by any subsequent variations is inconsistent with an attempt to limit the terms which can bind such employer. Provided a particular variation was adopted in accordance with the power of variation conferred by the trust deed, and provided the Committee did not breach any other duty when adopting the variation, the employer is bound, whether or not such employer foresaw the possibility of such a variation. Particularly in the case of a pension fund which is expected to be in existence for many years, it may very well occur that amendments are made at a later time which nobody would have envisaged at an earlier time. An employer who acceded to the Fund in its early days was aware that variations could be made in the future, the content of which was unknown and unknowable, given that variations would be made in response to unpredictable changing circumstances.

[72] Mr Fitzgerald argued, further, that the undertaking signed by SACM in 1950 only bound it to the obligations imposed on employers under the 1937 deed and rules or any variation of them, and that the 1978 deed and rules were not merely a variation. I have already explained why that contention must be rejected.

Estoppel

[73] I should mention for the sake of completeness that, although SACM pleaded estoppel in very wide terms, Mr Maritz in argument confirmed that he relied on estoppel only in relation to the question whether SACM was the employer of the particular members listed in annexure 'E' (and in the event this only remained relevant to the position of Mr Benney). The Fund did not contend in argument that SACM was estopped from asserting that it never became an 'Employer' in the post-1978 section of the Fund by virtue of its failure to have signed a fresh accession agreement.

[74] I think this view is probably correct. Because the Fund's understanding was that pre-existing employers did not need to sign fresh accession agreements, it was not led to believe, by SACM's continued payment of contributions, that SACM had signed a fresh accession agreement.

[75] It might be thought that estoppel could be invoked, more generally, to establish the interpretation of the 1978 deed and rules for which the Fund contends. Following the decision of the English Court of Appeal in *Amalgamated Investment & Property Co Ltd v Texas-Commerce International Bank Ltd* [1982] 1 QB 84, there have been many English cases in which litigants have sought to rely on a form of estoppel known as estoppel by convention. Evidence of subsequent conduct, inadmissible in interpreting a contract, has often been relied upon in an endeavour to make out a case of estoppel by convention. The requirements for successful reliance on estoppel by convention seem to present particular difficulties in relation to pension funds schemes, because the trust deed and rules are intended to apply to a large number of people (see *Redro plc v Pedley & Others* [2002] EWHC 983 (Ch) paras 59-66; *In re IMG Pension Plan: HR Trustees Ltd v German & Another* [2009] EWHC 2785 (Ch) paras 185-189; *Stena Lines Ltd v Merchant Navy Ratings*

Pension Fund Trustees Limited & Another [2010] EHC 1805 (Ch) paras 134-155). A mere passive acquiescence by a group of members or employers in the manner of implementation adopted by trustees appears to be insufficient; the requirement is for both sides consciously to have adopted a particular interpretation which they shared with each other. Since I was not addressed on estoppel by convention or the authorities I have cited, I shall say nothing more about it.

Mr Benney

[76] The Fund has apportioned to SACM a *pro rata* share of the deficit attributable to SACM's alleged employment of Mr Benney over the period 1 October 1978 to 30 June 1997. Mr Fitzgerald argued that the Fund failed to prove that SACM was the employer of Mr Benney. (SACM should not be criticised for adopting this stance; the current controllers of SACM only acquired the company with effect from 30 March 1999 and thus do not have knowledge of any of the relevant facts.)

[77] The Fund made discovery of, and included in the trial bundle, all the contribution forms in its possession submitted on behalf of SACM. The earliest available records date back to February 1966. As noted, the Fund treated Mr Benney as having commenced employment with SACM in October 1978. The contribution return made in respect of that month by SUK on behalf of SACM listed Mr Benney as one of 19 members in respect of whom contributions were being made.[4] A single cheque was enclosed in payment of these members' contributions. It is common cause that the rest of the persons listed in this contribution return were employees of SACM and that SUK was SACM's English agent. The form did not distinguish between the position of Mr Benney and the other members. The form specified a single Employers Econ number in respect of all of the members listed in the form. (The Econ number was a unique employer number allocated by the Superannuation Funds Office in England, which was a department within Inland Revenue.) The contribution returns in each succeeding month followed the same pattern, with no distinction between Mr Benney and the other employees of SACM.

[4] 5/1967I.

[78] With the transfer of the employment of SACM's other members to Celtic Pacific in March 1993, Mr Benney was the only remaining member for whom contribution returns were made as from April 1993. The first three contribution returns in this era (April, May and June 1993) were submitted, as before, in the name of SUK. Thereafter and until June 1997 (the last contribution month in respect of Mr Benney) the contribution forms were made variously in the names 'Safmarine (Pentow)', 'Pentow Safmarine', 'Safmarine', 'Pentow' or (in one instance) 'Safmarine (UK) Ltd'. Safmarine was a trading name of one of SACM's businesses until that business was sold on 30 March 1999. These returns reflect the unique code assigned to SACM in the Fund's records and SACM's Econ number (though in some instances one or other of the codes is omitted).

[79] Mr Benney took optional early retirement under the Fund's rules in 1997 and has been a pensioner in the Fund for a number of years. According to the Fund's records, Mr Benney signed a retirement application form on 21 August 1997. He named his employer as 'Pentow Marine' of Cape Town. Annexed to the application were payslips issued by Pentow Marine (Pty) Ltd ('PMPL'). These payslips (not all of which are fully legible) appear to span a period of April 1992 to June 1997.

[80] In the agreement of 23 September 1999, in terms whereof CFSA acquired the share capital in SACM from Safren, it was recorded in an annexure that one of SACM's investments was a 50% shareholding PMPL and it was further stated in a disclosure schedule that SACM was in the process of disposing of its investment in Pentow Marine.

[81] On the other hand, on 22 December 2008 SACM's then attorney, Mr Ash, deposed to two affidavits in interlocutory proceedings in which he stated his instructions to be that Safmarine and Pentow Marine had been 'business units within' SACM.

[82] SACM did not offer any evidence to clarify the matter. It is thus unclear whether and during what periods the Pentow Marine business was conducted as a trading division of SACM or through a subsidiary or through a company in which SACM held only a 50% shareholding. What is perfectly clear is that SACM and its

English agent SUK at all times dealt with the Fund on the basis that Mr Benney was an SACM employee for whom SACM was liable to make contributions to the Fund. Apart from the general manner in which monthly contribution returns were rendered, there were several specific occasions on which SACM through SUK expressly stated to the Fund that it was the employer of Mr Benney. For example, on 17 June 1980 SUK advised the Fund (with copy to Safmarine in Cape Town) that all officers for whom SUK paid contributions were employed by SACM.[5] As noted, among the officers in respect of whom SUK was paying contributions at that time was Mr Benney. On 7 November 1988 the Fund wrote to SUK seeking clarity as to which company employed a specified list of members, including Mr Benney. On 9 November 1988 SUK replied that all those officers were in the employ of SACM.[6] On 18 November 1988, and at a time when there was confusion as to whether SACM had ever signed an accession agreement, SACM completed an employer's application form in which it identified SUK as its agent and listed the merchant naval officers in its employ. The first name on that list was Mr Benney's.[7] There is no evidence in the Fund's records that PMLP or any other entity owning the Pentow Marine business signed an accession agreement. The Fund pleaded that if SACM was not in fact the employer of Mr Benney, SACM is estopped in these proceedings from so contending. I accept that proposition. If SACM had not represented that it was the contributing employer in respect of Mr Benney, the Fund would not have accepted contributions in respect of him without obtaining an accession agreement from his actual employer. As matters stand, those contributions were received on the strength of a representation that they were made on behalf of SACM as a participating employer, and Mr Benney has for some years on that basis been in receipt of a pension from the Fund.

[83] I thus find that for purposes of these proceedings Mr Benney is to be treated on the same footing as the other members in respect of whom SACM made contributions.

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[5] See 2/628.
[6] See 2/642 and 2/644.
[7] See 2/648A-D.

Release

[84] SACM pleaded that its membership of the Fund terminated with effect from 30 March 1999 (assuming it had ever been a participating employer in the post-1978 section). The precise import of the plea is unclear. In the light of Patten J's judgment, a participating employer would not cease to be such merely because it ceased to employ qualifying officers.

[85] SACM, in raising this defence, placed reliance on a supposed acknowledgement by the Fund, in a letter dated 8 September 2005, that SACM had ceased to be a participating employer with effect from 30 March 1999. This letter was written by the Fund to SACM after it had learnt of the distinction between SACM and SPL and that the relevant members had been employed by SPL as from 30 March 1999. The second and third paragraphs of this letter read as follows:

'We have previously been advised that [SACM] sold its shipping business to [SPL]. We have split the liability between these two companies at what we understand to be the appropriate date of 30 March 1999. This invoice relates only to [SACM] in respect of MNOPF membership up to 30 March 1999.

An invoice [for £251 240] is enclosed, together with payment instructions. Please refer to the Policy regarding the terms applying on late payment.'

[86] Mr Maritz correctly contended that by no stretch of the imagination can this letter be regarded as an acknowledgement that SACM was released from liability as a participating employer. On the contrary, the letter demanded payment of a substantial sum of money based on the fact that SACM was a participating employer liable for deficit contributions in respect of the period for which it had made contributions to the Fund. The demand in the letter was in accordance with the judgment of Patten J delivered about five months previously.

Prescription

[87] SACM raised a special plea of prescription in relation to a part of the claim but this was abandoned at the trial.

Conclusion and order

[88] It follows that the claim must succeed. It may seem hard on parties such as SACM that they should be held liable for deficits arising from contributions made many years previously in circumstances where they have for some years not employed any active members. However, the fact that parties so placed may be held liable for deficit contributions was authoritatively determined by the judgment of Patten J, the correctness of which has not been challenged in these proceedings. Any employer who considered that the board exercised an improper discretion in adopting the amendment of 8 June 2000 was at liberty to bring proceedings to set the resolution aside. It appears from Mr McEwen's evidence that no such challenge has been mounted either in England or elsewhere. SACM has certainly not done so.

[89] The employment of two counsel was warranted. Counsel were in agreement that the costs reserved in the interlocutory orders of 23 June 2010 and 1 October 2013 should follow the result.

[90] I shall therefore make an order in terms of the draft furnished to me by the plaintiff's counsel, subject to my handwritten insertion in para 3 regarding the reserved costs.

ROGERS J

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