

LRT PENSION FUND TRUSTEE COMPANY LIMITED

v

HATT

KNOX J

Questions addressed to the court

LRT Pension Fund - Issues requiring resolution

(It is envisaged that questions (1)-(10) would be dealt with first, either together or grouped (1)-(2), (3)-(6), (7)-(10). If the answer to (7) is No, (13)-(15) would be substituted for (8)-(10) as part of the first stage as they largely cover the same ground.)

OS Question 1A

Is there a merged fund?

(1) Did a merger of funds under s16 LRTA 1989 take place on 1 April 1989?

(2) If not, did the merger take place on 1 July 1992?

OS Question 1B

Who are the trustees of the Fund?

(3) Did the Trustee Company become trustee of the Interim Deed by appointment on 31 March 1989?

(Divides into)

(a) was execution of the Deed of Appointment by it necessary?

(b) was its execution ineffective because of (i) defects in the constitution of its Board of Directors or (ii) the absence of a Board resolution authorising it?

(It is understood that no Defendant seeks to argue that the Trustee Company's appointment was void on the ground that it was unsuitable: though questions of suitability are raised under Q.4-5 below).

(4) If so did the Deed of Appointment of 31 March 1989 discharge the individual trustees notwithstanding s37(1)(c) Trustee Act 1925, by operating as an exercise of the power of amendment in the Interim Deed?

(5) If the Trustee Company was not already sole trustee of the Fund before the Definitive Deed of 31 March 1989, did it become so by virtue of that Deed?

(Divides into)

(a) was execution by the individual trustees of the Interim Deed necessary for the Definitive Deed to be effective?

(b) if not, was execution by the Trustee Company necessary?

(c) if so, was its execution ineffective for the reasons in (3)(b) above, viz (i) defects in Board or (ii) no Board resolution to execute?

(d) did the provision in the Definitive Deed for the Company to be sole trustee discharge the individual trustees notwithstanding s37(1)(c) Trustee Act 1925?

(e) or was the Definitive Deed in any event wholly void because its adoption was in breach of one or more of the duties referred to under Q2 below? [To be dealt with under (8)-(10)].

(6) If the Trustee Company has been validly appointed sole trustee of the new Fund, have the assets and liabilities of the old schemes nevertheless devolved only on Mr King as the surviving individual trustee of the Interim Deed because of the terms of s16?

OS Question 2

What if any constraints applied in relation to the Definitive Deed, and what trusts now apply in consequence?

(7) Is the Definitive Deed of 31 March 1989 procedurally valid?

(as question (5)(a) - (c) above: if the answer is No, go to question (13))

(8) If so, was LRT in breach of all or any of

(a) the express provisions of the Interim Deed;

(b) an implied restriction on the purposes for which LRT's powers in the Interim Deed could be exercised:

(c) a fiduciary duty imposed on it by the Interim Deed;

(d) an implied obligation of good faith owed to its past or present employees

in preparing and executing a Definitive Deed and Rules which (whether or not such features accord with current practice for occupational pension schemes):

(i) did not reproduce expressly the provisions of Clause 5 of the Interim Deed

(ii) did not include a minimum 2 employer's contribution multiple

(iii) did not preclude the chairman of the trustee body from exercising a casting vote

(iv) did not require pensioner representation on the trustee body

(V) gave the final decision on the level of employer contributions to LRT

(vi) permitted the use of surplus to reduce employer contributions otherwise payable

(vii) permitted amendment of the Rules otherwise than with the sanction of a general meeting of members

(viii) permitted a payment of ultimate surplus in a winding-up to the employer without providing expressly that members' benefits must first have been augmented to the maximum Inland Revenue limit

(ix) provided for the costs of management to be borne out of the Fund

(x) provided no additional benefits for pensioners and deferred pensioners at 31 March 1989 compared with their position under the old schemes

(xi) provided less favourable benefits for new entrants than for members of the old schemes at 31 March 1989

(xii) did not require any surplus existing at the date of merger to be applied rateably or otherwise for the benefit of members and other individual persons interested under the old schemes

(xiii) did not provide the same level of benefits for non-dependent widows as under the old schemes?

(9)(a) Was the approval and execution of a Definitive Deed and Rules having any or all of features (i)-(xii) inconsistent with the trustees' duties under the Interim Deed?

(b) if not, does the present evidence show the Definitive Deed to be void on the ground that the Trustee Company executed it without proper consideration of its contents?

(10) If the answer to any part of (8) or (9) is yes, is the effect that the Definitive Deed and Rules were

(a) wholly void

(b) void as respects members and assets transferred from either or both of the old schemes but valid as respects the remainder

(c) void insofar as their provisions conflict with the duties identified in (8) or (9), so that the Rules may contain one or more lacunae

(d) valid but subject to an obligation on LRT, or LRT and the Trustees, to rectify the offending provisions, enforceable in such a way that the Rules are in effect to be treated as overridden

(e) valid with the only potential liability for the breach a claim for damages (if any) against LRT?

Consequential questions affecting the fund(s)

If the funds are merged but the Definitive Deed and Rules are void as respects some or all of the assets it is assumed to be common ground that those assets must still be held on the trusts of the Interim Deed with an obligation on LRT, or on LRT and the trustees, to bring suitable definitive provisions into effect. If there was not a complete merger on 1 April 1989 further questions arise:-

(11) If the merger is still not effective (so that old scheme assets are still held on separate trusts) is “new money” derived from contributions and payments made by reference to the new Fund documents from 1 April

1989 held otherwise than as a single fund on the trusts of the Interim Deed and Definitive Deed so far as valid?

(12) If the merger of funds was not effective on 1 April 1989 then as respects any period between then and extinguishment of liabilities of the old schemes under s16(3) LRTA 1989:

(a) has the accrual of benefits and contribution liabilities in respect of old scheme members continued under the old scheme rules as they were at 31 March 1989?

(b) if so what is the effect of the provisions in the Rules of the New Fund for “Deemed Service” to be credited to old scheme members?

(c) can new entrants who never had any rights under the old schemes before 1 April 1989 claim such rights where this would be to their advantage for service from that date?

1 These proceedings arise from the amalgamation of two contracted-out final-salary pension schemes for employees of the defendant London Regional Transport (“LRT”) which was intended to be effected on 1 April 1989 pursuant to s16 of the London Regional Transport Act 1989 (“the 1989 Act”). Those two pension schemes were the London Transport 1970 Superannuation Fund (“the Staff Fund”) and the London Transport Pension Fund (“the Wages Fund”). As the names which I have described them by indicate, the former was for staff grade employees and the latter for wages grade employees. The scheme which is the product of that amalgamation (“the New Scheme”) was established initially by an Interim Trust Deed (“the Interim Deed”) dated 26 November 1986 and made

between LRT (1) and Barry Gordon Dale, who retired from the Board of LRT on 18 February 1988, was discharged by a Deed of Discharge dated 24 April 1991 and is not a party to these proceedings, Philip Dennis Marsden who died on the 17 November 1991 and Ian Eric King the Second Plaintiff (“Mr King”) (2). The 1989 Act received the Royal Assent on 7 February 1989 and shortly thereafter on 31 March 1989 two Deeds were executed which were intended to establish the New Scheme in definitive form. The first, (“the Deed of Appointment”) was a Deed described on its back sheet, but not in the body of the deed, as a Deed appointing new Interim Trustees and was made between the abovementioned Messrs Dale and Marsden and Mr King (“the Original Trustees”) (1) LRT (2) and the First Plaintiff LRT Pension Fund Trustee Company Ltd (“the LRT Trustee Company”) (3). The intention of the parties to the Deed of Appointment was to secure the replacement of the Original Trustees by the LRT Trustee Company as the sole trustee of the New Scheme. The second deed executed on 31 March 1989 was called a Definitive Trust Deed and was made between LRT (1) and the LRT Trustee Company (2) and it contained in the usual way a schedule of Rules which were intended to govern the amalgamated funds as from 1 April 1989. I shall call it “the Definitive Trust Deed”. Questions have arisen due to the claimed defective procedure adopted to give effect to this intended amalgamation whether one or both of the Deed of Appointment and the Definitive Trust Deed are void or liable to be set aside to a greater or lesser extent and whether there was indeed an amalgamation on the 1 April 1989. Questions also arise on the substance of the amalgamation process whether the Rules of the New Scheme are in part beyond the powers of LRT and the LRT Trustee Company. It is however common ground between the Plaintiffs and the Defendants who apart from LRT consist of various representatives of different categories of pensioners or prospective pensioners, that if the intended amalgamation on 1 April 1989 was not effective there was in any event an effective procedure adopted in 1992 whereby the intended amalgamation was effected on 1 July 1992. There is therefore no doubt that the intended amalgamation has occurred and that the New Scheme exists but there are doubts whether it occurred on 1 April 1989 or 1 July 1992.

2 LRT is the same legal entity as the London Transport Executive (“LTE”) but it was renamed and reorganised by the London Regional Transport Act 1984 after the abolition of the Greater London Council. LTE had been established by the London Transport Act 1969 and was itself the successor of the London Transport Board which was originally a statutory agent of the British Transport Commission after the nationalisation of the railways by the Transport Act 1947. The Transport Act 1962 broke up the British Transport Commission and distributed its assets, the relevant ones for present purposes being those that were vested in the London Transport Board, broadly speaking those undertakings now or lately vested in or controlled by LRT. There has been a long history of amalgamations of undertakings and pension schemes stretching back to and beyond the London Passenger Transport Act 1933 which set up the London Passenger Transport Board. Reliance was placed by Mr Walker in particular, who appeared principally to represent the interests of members of the New Scheme who joined LRT after 1 April 1989, on the control that has throughout been placed over pension scheme provisions and amalgamations either by provisions requiring Parliamentary approval, of which an example is s80(15) of the London Passenger Transport Act 1933, or an order by the appropriate Minister. S74 of the Transport Act 1962 is an example of the latter and is highly material to these proceedings. So far as relevant it provides as follows:

“(1) The Minister may make orders

(a) with respect to the provisions of pensions by the Boards and by the subsidiaries of the Boards for or in respect of ---

(i) their employees or persons who have been in their employment

(b) for the establishment and administration of existing or future pension schemes and pension funds for any of the purposes of the foregoing paragraph ...

(2) Without prejudice to the powers conferred by the foregoing subsection, the Minister may make orders -

(a)

(b) for modifying any pension scheme the participants in which include persons of any of the descriptions in sub-paragraphs (i) ... of paragraph (a) of the foregoing subsection, so as to ensure that changes cannot be effected in the pension scheme without the approval of the Minister . . .

(d) for re-arranging, amalgamating, simplifying and assimilating pension schemes the participants in which include any such persons

(6) (a) Orders under this section shall be so framed as to secure that no person other than the Boards, ... and any subsidiary of any Board ... is placed in any worse position by reason of the order

(b) An order shall not be invalid by reason that in fact it does not have the result of securing that all such persons are not placed in any worse position by reason of the provisions of the order, but if the Minister is satisfied or it is determined as hereinafter mentioned that any such order has failed to secure that result, the Minister shall as soon as may be make the necessary amending order”

3 The Boards in that section originally included the London Transport Board and by virtue of the London Regional Transport Act, 1984, s25(1) includes LRT since that last mentioned provision came into force.

4 Between 1969 and 1984 this control was transferred to the Greater London Council under s18 of the Transport (London) Act 1969 but the ministerial control was restored by the London Regional Transport Act 1984 and the procedure under s74 of the Transport Act 1962 in particular was reintroduced by s25 of the 1984 Act and remained in force in early 1989 although as appears below LRT chose not to use it.

5 There has therefore been imposed by Parliament a continuous measure of control vested in an outside authority over pension scheme modifications and amalgamations which LRT or its predecessors desired to effect. The identity of the outside authority has changed over the years but the general nature of the control did not alter for many years prior to 1989 when the important events with which these proceedings are concerned occurred.

6 I turn now to the provisions made by the Rules of the Wages Fund and the Staff Fund. These are typically highly complex and voluminous and it is only necessary to describe in any detail those provisions in respect of which criticisms have been levelled at the Rules of the New Scheme. I therefore propose to mention only very briefly, if at all, the many provisions of the Rules of the Wages Fund and the Staff Fund in respect of which no significant criticism is levelled at the corresponding provisions of the Rules of the New Scheme.

The Wages Fund

7 The Wages Fund was established in the usual way by an Interim Trust Deed followed by a Definitive Deed with Rules in a Schedule to the latter. Those deeds were dated 9 December 1966 and 6 December 1968 respectively. The sixteen interim trustees under the Interim Trust Deed were replaced by a single company called the London Transport Pension Fund Trustees Limited in the Definitive Trust Deed. Under the Rules governing the Wages Fund there were the following features which are relevant for present purposes:

8 The Board was defined to include the London Transport Board and in relation to matters after 1 January 1970 the London Transport Executive.

9 The management of the fund other than its investment was vested in a committee of sixteen of whom eight were nominated by the Board and eight by interested unions. The Chairman was expressly denied a casting vote and was to be elected by the Committee and not appointed by the Board. The investment of the fund was the responsibility of the Trustees.

10 Membership was limited to employees of the Board although in certain cases membership could continue if service of the Board had come to an end. To be eligible employees had either to be members of an existing scheme for Male Wages Grades employees on 31 December 1966 or not be member of a salaried staff scheme, have one year's service and be over 25 and (if male) under 64 or (if female) under 59. The minimum age was reduced to 22 from 1 January 1984.

11 Membership was also divided into two sections, one called “*the LCBS Section*” standing for London Country Bus Section, the other, called “*the LTE Section*”, covering all other members.

12 Members were required to contribute according to scheduled scales based on their pensionable pay, the contributions for the LCBS section being somewhat lower than those for the LTE Section. The rates were all below 5% of contributory pensionable pay.

13 By Rule 19(a) the Board was required to contribute an amount equal to a multiple of members’ contributions and that multiple was to be determined by the Actuary from time to time and was not to be less than two and one third in the case of the LTE Section or one in the case of the LCBS Section. Sub-rule 19(c) originally required the Board to reimburse the Fund for any expense properly incurred in connection with the management of the Fund but this was deleted with effect from 1 January 1984.

14 The benefits, as is usual, consisted primarily of a pension, the basic provision being one for a pension of one sixtieth of final average pensionable pay for each year of membership up to a ceiling of 40 years less state retirement benefit. There were also widows’ and dependents’ pension provisions and provisions for lump sums on death in service or in certain cases thereafter. The only important provision for the purpose of these proceedings is that in favour of a member’s widow. Where a member died in service or in receipt of a pension or entitled to a deferred pension leaving a widow, she became entitled under Rule 25 to a pension of one one hundred and sixtieth of the member’s final average pensionable pay for each year of contracted out employment (without benefit of cost of living increases) but if the widow was dependent on the member she also became entitled to a pension under Rule 25(A) of one half of the member’s pension subject to a discretion vested in the Committee to reduce the

pension payable to her under Rule 25 by up to the amount by which the pension under Rule 25 exceeded the guaranteed minimum pension under the Social Security Pensions Act 1975.

15 Rule 29B provided for pension increases for members of the LTE section who were in receipt of a pension and for their widows or dependents similarly entitled (save under Rule 25) by the same amount as those enjoyed by civil servants under the Pensions (Increase) Act 1971 which effectively linked civil service pensions to the cost of living.

16 Rule 45(a) required an actuarial review at least once every five years and a report from the Actuary to the Committee whether or not the assets of the Fund together with future income were likely to be sufficient to meet the benefits as they fell due to be paid and the extent of any surplus or shortfall.

17 Under sub-rule (b) if there was an apparent surplus as a result of such a review the Committee were empowered, if the Actuary so advised and the Board and the Trustees consented, to use it either

a) by amending the scale of contributions of members (this would have a similar repercussion on the Board's liability to contribute its multiple) or

b) increasing benefits by a rule amendment or

c) in such other manner as might be for the benefit of the Fund and its Members. There was no provision for a reduction in the Board's contribution alone.

Rule amendments were permitted by Rule 47 by resolution of the Committee but required confirmation in every case by the Trustees, the Board and also by the Actuary but only, as regards the Actuary, if benefits or contributions were affected in any way. Limitations on the power of amendment were imposed to prevent the alteration of the purpose of the Fund from that of providing pensions and other benefits to Members or the payment of any part of the Fund to the Board otherwise than as permitted by the Trust Deed or the Rules or so as to reduce existing pensions or so as to exceed the 80 year perpetuity period from 1 January 1967.

18 Upon discontinuance the Fund was to be wound up and subject to priority payments under the Social Security Pensions Act 1975 the balance of the proceeds was directed to be applied at the discretion of the Committee and of the Trustees in making further provision for allowances or other benefits under the same conditions as payments otherwise receivable under the Rules on an equitable basis on the advice of the Actuary and any remaining balance after augmenting the benefits to the maximum extent indicated was directed to be paid to the Board. The reference to "*the maximum extent indicated*", although not grammatically explicit, is accepted to be a reference to the maximum extent possible without imperiling the fiscal advantages of the Fund.

19 Finally it is to be noted that the Rules did not confer any power on the Board to discontinue its contributions unilaterally or to wind up the Fund. Any such measure would have required a rule amendment, a process which required the Committee to resolve upon it with the Board's and the Trustees' confirmation and, if benefits or contributions were affected, that of the Actuary.

The Staff Fund

20 The Staff Fund was also established by an Interim Trust Deed dated 1 December 1970 and a Definitive Deed dated 3 November 1972 with a single company trustee called London Transport Trustee Company Ltd which was the sole trustee of the Interim Trust Deed and is separate from the LRT Trustee Company and the company which was the Trustee of the Wages Fund.

21 The Rules of the Staff Fund, in the form which they took in January 1979 and retained in early 1989, the period when the principal events in issue in these proceedings occurred, contained the following material provisions:-

22 There was established not only a Management Committee but also a Council elected by members. The Council as a body was only empowered by Rule 54 to discuss all questions relating to the Fund and its management and control and agree on representations to be made to the Management Committee for its decision. The Management Committee was by Rule 50 directed to consist of twelve persons, six of whom were to represent the members and were drawn from the Council and appointed by it and six were to represent and be nominated by the Executive (LRT's predecessor London Transport Executive). Provision was later made for the addition of two more members, one to represent a category of members called A & S members (standing for Administration and Supervisory) and the other to represent the Executive, but the balance was maintained. The Management Committee had entrusted to it the management and direction of the Fund other than the investment thereof which was the responsibility of the Trustees. The Chairman of the Management Committee and of the Council was to be elected by the Executive Committeemen i.e. those

nominated by the Executive. He was given a casting vote both at the Council and the Management Committee if there was equality of votes.

23 Membership of the Staff Fund was open to full time salaried staff of the Executive between the ages of 18 and 60 for men and 55 for women. Membership was also defined so as to include former employees of the London Passenger Transport Board or British Transport Commission who were or became members or employees of a National Transport Authority, defined in such a way as to include for example British Railways Board, National Bus Company or any transport undertaking established by legislation passed after 1 January 1970 or any subsidiary of any such undertaking. The evidence before me did not establish whether there were any such members who were not salaried staff of LRT and, if so, how numerous they were. The indications are that the vast majority of the members of the Staff Fund were employees of LRT or its predecessor.

24 Members' contributions were regulated by Rule 11 and were fixed broadly speaking at 6% of contributory pensionable salary but this was reduced to five and two-thirds % and then 5% for 1988 and 1989 respectively.

25 The Executive's contribution was fixed by Rule 14(1) as a multiple of the total contributions paid by members, the multiple to be determined by the Actuary from time to time and not to be less than two and one-third in the case of the Executive or one and one-half in the case of a National Transport Authority.

26 The primary benefit by way of pension was defined by Rule 17(2) as one-sixtieth of Final Average Pensionable Salary for each year of contributory membership up to 40 less state retirement benefits which

were defined in the case of those who ceased to contribute or attained State pension age after 1 January 1975 as 10.10 per annum for each year of contributory membership up to 40 years.

27 Other benefit provisions were in usual form and need not be set out in detail in this judgement save that it should be mentioned that the provisions for dependent widows was the same as that described above in the Wages Fund. Similar provisions for pension increases in line with the civil service pensions provisions under the Pensions (Increase) Act 1971 were included by Rule 27 as were contained in Rule 29B of the Wages Fund.

28 Rule 42 required actuarial reviews at not less than five year intervals as and when the Management Committee directed with a report whether or not the assets of the Fund together with future income expected to be received was likely to meet the benefits as they fell due and the extent of any surplus or shortfall. Subrule (3) provided that if it appeared as a result of an actuarial review that there was a surplus beyond the requirement of the Fund, the Management Committee might, if the Actuary so advised and the Executive and the Trustees consented, utilise it:

(i) by amendment of the sum contributed by the Executive under Rule 14

(ii) by amendment of the rate of contribution in accordance with Rule 11

(iii) subject to amendment to the Rules in accordance with Rule 43 by increasing benefits under the Rules provided Inland Revenue approval was not thereby prejudiced or

(iv) in such other manner as might be for the benefit of the Fund and its members or other beneficiaries as the Management Committee should determine.

This rule therefore unlike the corresponding Rule 45(b) of the Wages Fund expressly contemplated a possible adjustment of the Executive's contribution alone. Otherwise the two rules are closely similar.

29 The Rule amendment procedure under Rule 43 is also widely different from that under the Wages Fund in that the principal resolution required is that of a general meeting of members by more than half the members present in person or by proxy subject to approval or confirmation by the Management Committee, the Executive and, if benefits or contributions are affected, the Actuary. Similar qualifications to the power of amendment as were contained in Rule 47 of the Wages Fund Rules regarding the main purpose of the Fund, payments to the Executive, reduction of pensions in possession and the 80 year perpetuity period were added to Rule 43 of the Staff Fund.

30 Rule 44 dealt with the discontinuance of the Fund. As corrected from its original ungrammatical form it provided that subject to priority payments in accordance with Section 40(3) of the Social Security Pensions Act 1975 and to costs and expenses of winding up, the balance, if any, should be applied at the discretion of the Management Committee and the Trustees to making further provision for allowances or other benefits payable under the same condition as payments otherwise receivable under the Rules on an equitable basis on the advice of the Actuary. Any remaining balance after augmenting the benefits to the maximum extent indicated should be paid to the Executive.

31 Provisions were also included for Annual General and Extraordinary meetings of members. The Chairman of the Fund if present was the chairman with a casting vote in the no doubt improbable event of equality of votes. In this connection it should be borne in mind that the definition of members in the Staff Fund rules includes pensioners and persons prospectively entitled to pensions other than dependents.

The Amalgamation

32 After the London Regional Transport Act 1984 had reconstituted the London Transport Executive as the LRT concern was expressed by union representatives concerning the future for pension provisions and on 18 January 1985 Colin Norman Coles (“Mr Coles”), then Group Pensions Controller but now a director of the LRT Trustee Company and Director of Pensions at LRT, though not a board member of LRT, wrote to interested union leaders to tell them that the LRT Board had discussed the matter and would continue unaltered the pension policy established by the London Transport Executive, that index linked pensions and other benefits would be provided through funds with a uniform scale of benefits and administered through bodies with equal representation of management and staff. In particular it was said that the LRT Board wished to pursue the policy of amalgamating the Staff Fund and the Wages Fund into a single fund with one administrative body combining the current functions of the management committees and Trustees. Further a proposal was made that the then separate meetings held from time to time regarding the Wages Fund and the Staff Fund should be combined. This led to the formation of a Joint Working Party on pensions (“the JWP”) on which the interested trade unions, notably the National Union of Railwaymen (“NUR”), the Transport Salaried Staffs Association (“TSSA”), the Associated Society of Locomotive Engineers and Firemen (“ASLEF”), and the Transport and General Workers Union (“TGWU”) were represented. This met for the first time on 12 July 1985 and continued to meet at intervals throughout the

period before these proceedings were issued on 6 June 1991, both before and after the enactment of the 1989 Act and the intended amalgamation on 1 April 1989.

33 At the first meeting of the JWP, attended by the representatives of ASLEF, TGWU and TSSA, the LRT Board proposals for the proposed amalgamation were given to the meeting and the included benefits to continue unchanged but with an improved death in service lump sum of twice pensionable pay and for assets and liabilities of the two existing funds to be totally amalgamated.

34 At this stage and for some time to come the intention of LRT was to utilise a Ministerial order under s74 of the Transport Act 1962 as the vehicle whereby the proposed amalgamation would be effected. Mr Coles said as much in a letter dated 5 August 1985 sent to the Unions represented on the JWP. That contained a handwritten schedule setting out what Mr Coles at that stage envisaged as the proposals for the New Scheme Rules as compared with the relevant Rules of the Wages Fund and the Staff Fund. The proposal that the Chairman should have a casting vote as in the Staff but not in the Wages Fund was clearly stated. The proposed amalgamation of Trustees' and Committee's functions was also set out with an outline of how the Board of the intended LRT Trustee Company would be constituted with 8 LRT nominated members including the Chairman and 8 from the members' side. Finally the proposed new procedure for rule amendments was stated to be "*rules amended by EGM, Trustees, Bd*".

35 At the second meeting of the JWP on 4 November 1985 attended by representatives from inter alia ASLEF, NUR, TGWU and TSSA, the letter sent by Mr Coles and various other matters were discussed none of any direct materiality to the present issue save that some of the union members confirmed their agreement in principle to the amalgamation provided that

their members were not disadvantaged. There were concerns expressed in particular by the TSSA representative of possible cross subsidisation of one fund by another on the merger and at the continuation of differential contribution rates by different categories of employee, notably wages and staff.

36 The proposal to proceed by ministerial order continued through the third meeting of the JWP on 3 February 1986 and the fourth on 4 August 1986 when a draft order was circulated and it was said that the draft rules were nearing completion and would be distributed shortly. At the fourth meeting a specific question what the minimum employer's contribution would be was asked by the TSSA representative and Mr Coles replied that no change from the existing 70:30 split between employer and members was proposed. Finally it was also stated that the Board of LRT now conceded that there should be a common contribution rate for members of 5% of pensionable pay less 20 per annum.

37 Between 4 August and 31 October 1986 following discussions with the Department of Transport a decision was taken by LRT, as an administrative step rather than a Board decision, to include the pension merger proposals in a private Bill then intended to be deposited by LRT for other purposes of its undertaking. As a part of the machinery for this proposal an Interim Trust Deed was submitted by Mr Coles to the LRT Board with a memorandum dated 31 October 1986 for the authorisation of its sealing by LRT. The Board gave its authority on 13 November 1986 and the Interim Trust Deed was executed and dated 26 November and the Bill deposited shortly thereafter that month.

38 The Interim Trust Deed, although always intended as a vehicle for the proposed

amalgamation, was in a form appropriate to the setting up of a new pension scheme and contained no reference in its terms to the Wages Fund, the Staff Fund or any intention to effect a merger of any existing schemes. The parties were as already stated LRT (1) and Messrs Dale and Marsden and King who were defined as follows “(hereinafter called “*the Trustees*” which expression includes any Trustees of this Deed hereafter appointed)” (2).

The expression would therefore clearly be apt to apply to the LRT Trustee Company if and when formed and made a trustee of the trusts of the Interim Deed. Recital A read as follows:

“ LRT are desirous of establishing a Pension Scheme to come into operation on and from the first day of January One thousand nine hundred and eighty eight for the purpose of providing pensions and other benefits for and in respect of staff of LRT or their subsidiaries or associated companies and staff who have been employed by LRT or their subsidiaries associated companies or predecessors and Members of LRT and to that end have determined to establish under irrevocable trusts on and from the date of these presents and as hereinafter appears a Pension Scheme to be known as the LRT Pension Fund (hereinafter called “*the Fund*” which expression shall where the context so requires mean or include either or both the Scheme hereby established and the moneys and investments making up the Fund hereby constituted) for providing retirement pensions and other benefits for such of the said staff as are or shall hereafter become eligible to participate therein (hereinafter called “*the members*”) in accordance with the regulations governing the Fund to be set out in a Definitive Trust Deed (hereinafter called “*the Definitive Deed*”) and in Rules (hereinafter called “*the Rules*”) made under the provisions of the Definitive Deed.”

39 The operative clauses included. the following:

“1. LRT HEREBY ESTABLISH the fund to the extent that it shall come into operation on the first day of January One thousand nine hundred and eighty eight and constitute the same under irrevocable trusts to be administered in accordance with the provisions of the Definitive Deed and the Rules made thereunder.

2. LRT HEREBY APPOINT the Trustees to be the Trustees hereof

3. LRT COVENANT that within twenty four months of the date hereof they will prepare the Definitive Deed and Rules scheduled thereto drawn so as

(1) to conform with the provisions hereof and to enable the Trustees to carry out the purposes of the Fund and

(2) to ensure that the Fund may be approved by the Commissioners of Inland Revenue under the provisions of the Finance Act 1970

4. LRT COVENANT and subject to compliance by LRT with the covenants of Clause 3 hereof the Trustees COVENANT to execute the Definitive Deed not later than twenty four months after the date hereof

5. IT IS HEREBY AGREED that the Definitive Deed shall provide -

(1) that no moneys from the Fund shall in any circumstances be payable to or paid to LRT save insofar as they are a surplus remaining after the termination and dissolution of the Fund or they are required to be paid to LRT under the provisions of the Finance Act 1986

(2) that except as aforesaid no benefits from the Fund shall accrue to or be enjoyed by LRT

(3) that the trusts of the Fund shall not in any event continue beyond a period of Eighty years from the date of these presents unless therebefore it is by legislation made or is otherwise determined to be lawful for the trusts to continue.”

40 Clause 6 contained provisions regarding investment on which nothing turns. Clause 7 contained a power of amendment in the following terms:

7. THE Trustees and LRT may at any time amend any of the provisions of this Deed by Supplemental Deed and in particular but without prejudice to the generality of such

power they may extend the period of twenty four months referred to in Clauses 3 and 4 hereof by a further period of twelve months if they consider it necessary to do so PROVIDED that no amendment shall be made which -

(1) varies the main purposes of the Fund namely the provision of retirement pensions and other benefits as herein described

(2) reduces the benefit of any pensioner

(3) save so as to comply with any Act of Parliament authorises the payment of any part of the Fund to LRT or

(4) extends the operation of the Fund beyond the trust period.”

41 It was common ground that the reference in clause 5(1) to a requirement under the Finance Act 1986 that sums be paid to LRT was based on a misunderstanding of the relevant provisions which were indeed intended to impose a fiscal sanction on excessive surpluses in exempt funds but did not in terms direct payment to the employer.

42 The Bill which became the 1989 Act contained only one clause Clause 19, which when enacted became s16 that dealt with pension schemes. The rest of the Bill and thereby of the 1989 Act, had no relevance to these proceedings. The preamble made no specific mention of the proposed pension scheme merger although there was the usual recital:

“It is expedient that the other powers in this Act contained should be conferred upon the Corporation” [LRT] “and that the other provisions in this Act contained should be enacted.”

43 No petition was presented against Clause 19 and accordingly no evidence was addressed at the Committee stage in either House on the subject. In the light of the decision of the House of Lords in *Pepper v Hart* [1992] 3 WLR 1032 research was conducted into what was said by or on behalf of the promoters, LRT, and that produced one sentence spoken at the Committee stage in the House of Commons by LRT's Parliamentary Agent in introducing the unopposed parts of the Bill and before calling a witness formally to prove the preamble. That sentence was as follows:

“Clause 19 provides for the machinery for amalgamating two pension schemes, on which I do not think it necessary to provide any further information.”

44 As I have already found the first part of that sentence was accurate, but it did not need the research that was conducted to establish it and I derive no help from that evidence.

45 It will be convenient at this stage to set out s16, as it became, in the 1989 Act: it read as follows against a side note “*Amalgamation of Pension Funds*” to which at least some regard may legitimately be had as a guide to the purpose of the section; *Reg v Schildkamp* [1971] AC 1:

“16. -- (1) In this section -

“**the appointed day**” means such day as may be fixed by appointment resolution of the Corporation under this section as the day upon which the winding-up of the old schemes and the application to the assets of the old schemes of the trusts of the new scheme are to have effect;

“appointment resolution” means the resolution passed by the Corporation under subsection (2)(a) below;

“the new scheme” means the London Regional Transport Pension Scheme constituted by the trust deed;

“the old schemes” means the pension fund and the superannuation fund:

“the pension fund” means the London Transport Pension Fund:

“the superannuation fund” means the London Transport 1970 Superannuation Fund:

“the trust deed” means a deed dated 26 November 1986 and made by the Corporation and the trustees whereby the new scheme was constituted: and

“the trustees” means the trustees of the trust deed.

(2)(a) The Corporation shall publish in a newspaper circulating in London and in the London Gazette notice of the passing of the appointment by resolution and of the day fixed thereby and the date so fixed shall not be earlier than the expiration of 28 days from the date of the last publication of the notice.

(b) A photostatic or other reproduction certified by an officer of the Corporation designated by them for the purposes of this subsection to be a true reproduction of a page or part of a page of any newspaper or gazette being a page or part of a page bearing the date of publication and containing the notice mentioned in paragraph (a) above shall be evidence of the publication of the notice and of the date of publication.

(3) On the appointed day -

(a) all property, rights and liabilities of or vested in the trustees of the pension fund and of the superannuation fund shall be transferred to and vest in the trustees upon the trusts of the new scheme set out in the trust deed: and

(b) every member of either of the old schemes shall become a member of the new scheme and his membership of the old scheme shall for all purposes be deemed to have been membership of the new scheme.

(4) Upon the transfer in accordance with the provisions of subsection (3) above of the property, rights and liabilities of the old schemes each of the old schemes shall be discontinued and wound up.”

46 It was accepted before me that the format of this section was copied from s48 of the British Railways (No 2) Act 1986 which performed a similar function in relation to two British Railways pension funds. There was however this important difference in practice between the two sections that “*the trust deed*” referred to in the British Railways section was a

Definitive Trust Deed with annexed Rules so that Parliamentary approval must be taken to have been given to the coming into effect of those Rules whereas in s16 of the 1989 Act the expression "*the trust deed*" refers to the Interim Deed and not the Definitive Trust Deed later executed and by the same token not to the Rules scheduled to the latter.

47 I shall return later to the true construction of s16 of the 1989 Act and the extent to which LRT complied with its requirements. It should however be mentioned at this stage that a copy of clause 19, later s16, was sent to Mr Knapp, General Secretary of the NUR, on 19 November 1986.

48 To return to the period after the Bill had been lodged in Parliament on behalf of LRT, the first draft of the New Scheme Rules was distributed at the fifth meeting of the JWP on the 23 January 1987. That draft contained no difference in treatment between entrants after the intended merger and existing members. It did contain a Rule 13 requiring LRT to contribute a multiple of not less than two and one third members' contribution, the multiple to be determined by the Trustees with the consent of the Board after actuarial investigation. There had in fact recently been received on or shortly after 2 December 1986 the Actuary's report on the Staff Fund as at 31 December 1985 showing a past service deficit of 32.6 million but reporting a very significant improvement in the financial position of the Staff Fund since the date of the previous review as at 31 December 1982 and containing an estimate that the current past service deficit of 32.6m would be liquidated over a period of about 13 years if LRT paid the minimum contribution of two and one third times the relevant employees' contributions in lieu of the 2.9 multiplier then currently being paid by LRT. There was also a statement that the joint contribution flowing from the current level of members' contributions and the minimum level of employers' multiplier were greater than was likely to be required in the long term to provide the current benefits.

49 Mr Coles submitted a memorandum to the Board of LRT on 23 February 1987 in the light of the imminent freedom of employees to choose a personal pension or SERPS rather than an occupational final salary scheme such as those run by LRT. Two of the subjects dealt with were index linking and new entrants. As regards the former he mentioned the possibility of limiting index linking to 5 % or a higher figure or continuing the current unlimited index linking and as regards new entrants he mentioned the possibility of a new section with lower benefits while continuing the current scheme with unaltered benefits for future service for existing staff. This latter was the policy approved on 5 March 1987 by the LRT Board, which requested a further report setting out the various ways in which that policy could be adopted. Mr Coles provided that further report on 29 May 1987 and recommended (*inter alia*) that all employees over 18 should be admitted immediately to the New Scheme unless they opted out and that the new scale of benefits be index linked up to 10% p.a. plus further increases to maintain real values if the Fund could afford it. The Board on 4 June 1987 resolved to take the Actuary's advice. The Actuary's advice on 18 June as regards benefit provisions for future entrants was that they should be based on a pension scale of one sixtieth of earnings in excess of the State basic pension and that benefits in payment should be index linked with an upper limit of 5 % per annum. This advice was put before the LRT Board with a memorandum by Mr Coles dated 10 July 1987 in which (*inter alia*) he recommended that index linking up to 10% be retained but recognised that the Board might wish to have a lower ceiling in view of the actuarial report. The latter was in fact the course the LRT Board ultimately adopted.

50 At the 7th JWP meeting on 4 August 1987 Mr Coles reported the LRT Board decision on pension policy and confirmed that there would be no change to the then current pension structure for existing members including indexation apart from the improvements by way of reduction of contributions to 5% and an increase in death benefit to 2 times pay and that new members would be granted indexation limited to 5% in any one year though ex gratia increases would be considered if funds were available. He gave as the Board's reasons for the amalgamation administrative cost savings, greater efficiency, advantages of "one roof" and extension of

greater “*democracy*” to all members. The Union representatives expressed concern at the revision of terms for new entrants. They were also anxious that LRT should not encourage members to opt out of the LRT schemes in favour of personal pensions. The first of many delays to the Bill before Parliament was announced and it was said that the amalgamation would probably be delayed to April 1988.

51 At the 8th meeting of the JWP on 3 September 1987 which Mr Dale attended as a finance member of the LRT Board, Mr Coles repeated the Board’s policy decisions mentioned above at the 7th meeting of the JWP and added as a decision at an informal Board meeting to be put before a full Board a proposal that (*inter alia*) pensionable pay for new entrants would switch to an integrated basis that is to say there should be deducted for them but not for existing members the current flat rate state pension in calculating pensionable salary. The Union representatives repeated their objections to the imposition of a cap on index linking for new members but were primarily concerned that personal pensions might be made attractive to new and younger members so as to lead to them not joining the LRT scheme. By the end of the meeting it was agreed that amalgamation of the Wages Fund and the Staff Fund might proceed and that Mr Coles would implement the contribution reduction for Staff Fund members to five and two thirds per cent in January 1988 and the reduction of the employer’s multiplier from two and nine tenths to two and one third with effect from January 1986.

52 A meeting of 18 directors (9 LRT nominees and 9 Union nominees) designate of the yet unformed LRT Trustee Company was convened for the 28 October 1987 and held that day with only two absentees. Questions of administration and delegation of functions was discussed. Also the Interim Trust Deed was circulated to the directors designate in January 1988.

53 Shortly before this on 22 December 1987 Mr Coles circulated to the Unions represented on the JWP a new draft of the Rules of the New Scheme. This had important differences from the version previously circulated. There was included for the first time the distinction between existing and new members' pensionable salary that the latter's alone would be integrated ie be subject to deduction of the current flat rate state pension. The LRT contribution was described by Rule 16 as a multiple of the total contributions paid by the member ...

“the said multiple shall be determined by the Board on the advice of the Actuary following an investigation under Rule 43”.

This clearly removed the minimum contribution of a two and one third multiple. The 5% cap on index linking in respect of benefits for new members and their dependents was introduced by Rule 28(1)(i) in line with the Actuary's recommendation. Employees in the wages grade were made eligible for membership between the ages of 18 and 22 without a waiting period. So far as the management provisions were concerned there was no express provision for the Chairman of the Fund to be given a casting vote nor was it provided that he should be nominated by LRT. Mr Coles' covering note with the draft New Rules merely stated on this aspect

“the Trustees are nominated (still on 50:50 basis) as described; and their duties incorporate those of the present two bodies (of trustees and management committee)”.

Other features of this draft included the introduction of advice from the actuary on the LRT contribution under Rule 16. This tied in with the

removal of the minimum two and one third multiple contribution. The amendment of Rules was now to be entrusted under Rule 44 to the Trustees with the confirmation of an LRT Board resolution and if contributions or benefits were affected in any way by the Actuary and if benefits payable or prospectively payable to any person were adversely affected by a resolution of members at an Extraordinary General Meeting. Rule 45 for the first time gave an express power to the Trustees to wind up the Fund and it also removed the express requirement that the ultimate balance payable to the LRT should be struck after augmenting benefits to the maximum extent permissible. Finally there was introduced Rule 47 which provided that all expenses in connection with the operation and investment of the Fund should be borne by the Fund.

54 Reports were given to members of the Staff Fund and the Wages Fund in 1988 mentioning the merger proposals and stating that existing members would automatically transfer to the new single fund with all existing rights maintained.

55 The only specific written acceptance of any part of the new draft Rules was contained in a letter from Mr Knapp General Secretary of the NUR dated 12 February 1988 in which he said his committee had considered the new rules and accepted them for existing members but were not prepared at that stage to accept the rules for new entrants.

56 The 9th meeting of the JWP followed shortly afterwards on the 18th February and there was specific mention of the alteration to the minimum contribution by LRT. The minutes on this subject read:

“R16/43 - earlier problems of Rule interpretation following actuarial valuations was now eased by revisions to these Rules, including the

abandonment of the previous minimum (two and one third) employer's contribution multiplier."

No protest at the meeting about this is recorded.

57 Not long afterwards in March 1988 a booklet called "*The pensions cross-roads - which way should I go?*" was issued to all LRT staff. This included a statement after a brief mention that a merger was due in 1988 between the Staff Fund and the Wages Fund:

"LRT will continue to contribute more than twice the total of the members' (pre-tax) contributions."

The booklet was primarily concerned to explain in outline the choice now being made available to members between staying with LRT's occupational pension schemes or scheme, SERPS and personal pensions.

58 On 25 April 1988 Mr Coles submitted a memorandum to the LRT Board setting out what had happened to date in the context of a recommendation regarding the fixing of the "*appointed date*" for the proposed amalgamation.

59 Mr Coles reminded the LRT Board of the procedure for amalgamating LRT pension schemes under the Transport Act 1962 and the "*no worsening*" clause therein and went on as follows:

“4. Owing to many factors, including the different actuarial provisions of the two Funds, it is doubtful whether an amalgamation under such an Order can be achieved without infringing the “**no worsening**” conditions. Therefore LRT inserted a clause in the LRT Bill deposited in November 1986 giving LRT power to amalgamate pension schemes.”

He went on to state the provisions of the relevant clause in the Bill regarding the fixing of the appointed day and recommended that it should be 1 September 1988 or such date as determined by the LRT Secretary if Royal Assent was deferred.

60 He went on to state the procedure for rule changes in the Wages Fund and the Staff fund saying of the latter

“Under the 1976 Superannuation Fund the position is even more difficult in that in addition members at a General Meeting have to agree changes. It is likely that if it were decided to change these rules prior to amalgamation such a change would be strongly resisted and the ability to achieve acceptance must be strongly doubted.”

He went on to put three possibilities to the LRT Board, first to proceed as planned with the amalgamation as soon as possible after the Bill was passed, second to introduce a new fund for new entrants only and third, to seek rule amendments in the two funds to achieve the proposed transfer of costs currently being paid directly by LRT to the New Fund direct. The Board chose the first of the three possibilities and specifically resolved that the “*Appointed Day*” for the amalgamation should be 1 September 1988 or such date as determined by the Secretary to LRT.

61 I accept Mr Coles' explanation that the principal reason for choosing the private Bill procedure rather than the procedure by Ministerial Order under the Transport Act 1962 was that the Unions might object to the slightly less generous benefits which were to be given to new members and not that there was an question of a reduction in benefits to existing members. In addition there was the factor mentioned in his memorandum to the LRT Board that the actuarial advice then available showed a substantial excess of liabilities over assets in the Staff Fund and the opposite position in the Wages Fund.

62 Mr Coles sought advise in mid 1988 from solicitors regarding the merger of pension schemes but as these solicitors were not provided with either the terms of the proposed legislation or the Interim Trust Deed their advice did not address the problems which principally arise in these proceedings, although it did identify as a possible industrial relations problem the possibility of an argument that the amalgamation of the Wages Fund (then in surplus) with the Staff Fund (then in deficit) involved a subsidy out of the former for the benefit of LRT.

63 The actuaries to the Wages Fund gave their valuation statement of that Fund as at 31 December 1986 on 29 June 1988 as showing an excess of assets over liabilities accrued of 92.4m. At the same time the certificate required under the Finance Act 1986 if the detrimental fiscal consequences of what the Inland Revenue regarded as overfunding were to be avoided was also given to the effect that the value of the assets of the Wages Fund did not exceed 105 per cent of the value of the liabilities of that Fund when ascertained in accordance with the relevant Regulations. These contain very much more conservative assumptions than were adopted by the actuaries to the Wages Fund.

64 The 10th meeting of the JWP on 13 October 1988 was the occasion for the circulation of a redraft of the proposed New Scheme Rules. Specific mention was made at the meeting of the fact that the Chairman of the Fund would be one of the nine management nominees, and this was included in the redrafted Rules which also made some provision towards integrating male and female pension entitlement. The details of that process are not relevant to these proceedings.

65 The directors designate of the LRT Trustee Company, including all five of the persons who on the same day signed the Memorandum of Association as subscribers. Messrs Mead, Miller, Coles, Marsh and King, met on 26 October 1988 and decided various administrative matters.

66 A general notice incorporating the formal notices regarding contracting out and its effects, was sent to all staff of LRT and its subsidiaries dated 14 December 1988 by Mr Coles. This repeated the news of the proposed merger and said that all existing members and pensioners would transfer to the new fund bringing all their old rights with them and would continue to enjoy exactly the same excellent rights and benefits with the bulk of the cost still borne by the employers.

67 Three improvements on merger were identified *viz*:

a) death benefit up from 1.5 to 2 times annual pensionable pay

b) members contributions 5% of pensionable pay less 20 per annum

c) entry age reduced to 18

68 Two further changes affecting new entrants after the merger date were also specified:

a) the integration of the state retirement pension in the definition of reckonable pay for pension purposes and

b) the limitation on indexation of pensions to 5% “(unless monies are available for more)”.

69 Mr Coles notified the LRT Board on 17 January 1989 of the expectation that the Royal Assent to the Bill, to become the 1989 Act, would be given in February and that the merger date was therefore likely to be 1 April 1989. He also gave an estimate of the amount of costs of delay to LRT in the postponement of shifting costs to the Fund from LRT and in introducing less generous benefits to new entrants. This was noted by the LRT Board on 2 February 1989. By this time the LRT Trustee Company had been incorporated on 24 January 1989.

70 The Articles of Association of the LRT Trust Company provided that the Regulations in Table A to the Companies (Tables A to F) Regulations 1985 should apply to the Company with various exceptions which did not include Regulations 90 and 92. Article 2 defined “*LRT Nominated member*” as:

“a member of the Company who has been nominated for such membership by London Regional Transport in accordance with the Rules of the LRT Pension Fund.”

and “*other member*” as:

“a member of the Company nominated for such membership by any other body in accordance with such Rules”.

71 Articles 11, 12, 13, 14, 15 and 16 read as follows:

DIRECTORS AND MANAGEMENT

“11. The Directors of the Company shall always be members of the Company and the number of Directors unless otherwise determined by a General Meeting shall not be less than two nor more than twenty-four and, subject to the provisions of Regulation 90, there shall always be an equal number of LRT nominated members and of other members as Directors.

12. The first Directors shall be Michael Marsh, Colin Norman Coles, Ian Eric King, Henry Mead and Christopher Andrew Miller.

13. Subject to Article 11 hereof, the Directors shall have power from time to time and at any time to appoint any other member of the Company to be a director.

14. A Director shall ipso facto vacate the office of Director if he ceases to be a member of the Company.

PROCEEDINGS OF DIRECTORS

15. The Directors may determine the quorum necessary for the transaction of business and unless otherwise determined six Directors being three Directors who are LRT nominated members and three Directors who are other members shall be a quorum.

16. The Directors shall appoint a director who is an LRT nominated member to be the chairman of the Board of Directors ...”

72 Regulations 88, 90 and 92 of Table A include the following:

“88. Questions arising at a meeting shall be decided by a majority of votes. In the case of an equality of votes, the chairman shall have a second or casting vote.....

90. The continuing directors or a sole continuing director may act notwithstanding any vacancies in their number, but, if the number of directors is less than the number fixed as the quorum, the continuing director or directors may act only for the purpose of filling vacancies or of calling a general meeting.

92. All acts done by a meeting of directors. or of a committee of directors, or by a person acting as a director, shall, notwithstanding that it be afterwards discovered that there was a defect in the appointment of any director or that any of them were disqualified from holding office, or had vacated office, or were not entitled to vote, be as valid if every such person had been duly appointed and was qualified and had continued to be a director and had been entitled to vote.”

73 The Royal Assent to the 1989 Act was given on 7 February 1989 and on 10 February a memorandum addressed to the Chairman and Board members of LRT and Mr Coles, was signed by Mr King as Secretary to LRT. It recited inaccurately the Board resolution empowering the Secretary to determine the Appointed Day for the amalgamation which had in fact been that it should be 1 September 1988 or such date as determined by the Secretary to LRT. The inaccuracy was that 30 was substituted for 1 September 1988. Nothing turns on that slip. The memorandum stated what was to happen under the 1989 Act on the Appointed Day and went on:

“Due to delays in the parliamentary process the Bill authorising amalgamation has only just received Royal Assent. I now, therefore, appoint 1 April 1989 to be the appointed day for the amalgamation of the funds in accordance with the Board’s resolution.”

74 Mr Coles gave notice to the Board of LRT by memorandum of 27 February 1989 of Mr King’s appointment of the appointed day on 1 April 1989 and advertisements appeared in the London Gazette dated 24 February and in the Evening Standard dated 1 March 1989 stating that notice was thereby given that “*pursuant to a resolution of London*

Regional Transport the 1 April 1989 shall be the appointed day for the purposes of” s 16 of the 1989 Act.

75 On 9 March 1989 the LRT Board with Mr Coles’ memorandum of 27 February before it nominated eight nominees as trustees by which was meant directors of the LRT Trustee Company. That left one more to be nominated.

76 The LRT Trustee Company held its first board meeting on 14 March 1989. There were present four out of the five original member signatories to the Memorandum namely Messrs Marsh, Coles, King and Miller. It was stated that the fifth, Mr Mead, was in hospital following an accident. It was resolved that in pursuance of the powers contained in Article 13, 12 named persons, 9 of whom were present, should be and were thereby appointed as directors of the Company. Five of those 12 persons were LRT nominees as were three of the original members, Messrs Marsh, Coles and King. Copies of draft Rules were distributed to the Directors present and the Secretary was asked to send a copy to the four absent directors. It was also agreed that Mr Coles should prepare a paper outlining the principal changes of the new Fund as compared with the two current Funds ie the Wages Fund and the Staff Fund. A subcommittee was formed to ensure that all legal aspects of the new Fund were considered.

77 The 11th meeting of the JWP on 20 March 1989 was told of the Royal Assent of the 1989 Act, that the merger would take place on 1 April 1989 and that the necessary formalities including issue of public notices in the London Gazette and Evening Standard had been completed. The changes in the draft rules as regards new entrants were again summarised by Mr Coles who pointed out that existing provisions of the Staff Fund and Wages Fund would continue for current members and for the 5000 “*accelerated*” entry wages staff who would benefit from the relaxed entry conditions that is to say the lowering of the minimum age to 18, but that

new entrants would be subject to the limited indexation and integrated pay provisions already described. There were renewed union protests at what were called “*these lesser term for new entrants*”. No mention was made of Chairman’s casting vote or of minimum LRT contributions.

78 Mr Coles’ memorandum summarising the changes in the draft Rules for the New Scheme as compared with those for the Wages Fund and the Staff Fund was dated 28 March 1989 and sent to Directors of the LRT Trust Company. It listed changes under heads of major and minor changes but did not mention the removal of a minimum employer’s contribution or the Chairman of LRT Trustee Company’s casting vote. There was sent with the memorandum, as incorporated in it in relation to management changes merging the functions of the Trustees and Management Committee of the Wages Fund and Staff Fund, a typed version of the schedule sent by Mr Coles in the letter mentioned above dated 5 August 1985 and sent to the unions represented on the JWP. The description therein of rule amendment provisions “*rules amended by EGM, Trustees and Board*” was not accurate in relation to the proposed new Rules because a general meeting of members was only to be required under Rule 44(1)(c) if the benefits payable or prospectively payable to any person were adversely affected. No great harm was done by that inaccuracy because the list of changes included in the memorandum as item (vii) among the minor changes:

“Rule amendment only subject to a General Meeting if benefits adversely affected.”

This effectively cured the defect in the Schedule. Equally the proposal that the Chairman should have a casting vote was clearly stated in the Schedule and that made good the lacuna on the subject in the memorandum.

79 The second board meeting of the LRT Trustee Company was held on 30 March 1989. Of the five original members only three, Messrs Coles, King and Miller were present with six other persons appointed directors on 14 March 1989. Mr King reported that the sub-committee then set up to ensure that all legal aspects were considered was satisfied that all the legal aspects of setting up the New Fund had been considered and all the necessary action taken. The draft rules of the New Scheme were gone through and subject to a few minor amendments were agreed to.

80 The next day the Deed of Appointment was executed. As already mentioned the parties were Messrs Dale, Marsden and King (1) LRT (2) and the LRT Trustee Company (therein called "*the Company*") (3). It recited the appointment of the Original Trustees (called "*the Original Interim Trustees*") by the Interim Deed (mis-stating its date but nothing turns on that), that the Original Trustees desired to be discharged from the trusts imposed on them by the Interim Deed and that the Original Trustees and LRT agreed that the LRT Trustee Company which it was intended should be the Trustee of the Fund under a Definitive Deed of Trust should be appointed Trustee under the Interim Deed and the LRT Trustee Company agreed to such appointment. The operative part read as follows:

“NOW THIS DEED WITNESSES that from the date hereof the Original Interim Trustees shall be discharged from the trusts imposed on them by the Interim Trust Deed and from that date the Company shall become the Trustee under that Deed.”

The Deed of Appointment was duly executed by all parties to it.

81 On the same day 31 March 1989 the Definitive Trust Deed was executed by LRT (1) and the LRT Trustee Company (2) but not by any of

the Original Trustees. It was expressed to be supplemental to the Interim Deed and recited the constitution of the Fund (an expression defined to mean or include either or both the Scheme thereby established and the assets making up the Fund thereby constituted) and LRT's covenant to prepare and execute a Definitive Deed and Rules, the appointment of LRT Trustee Company as trustees of the Interim Deed, and the vesting of the assets of the Staff Fund and the Wages Fund by virtue of the provisions of s16 of the 1989 Act in the Trustees of the Interim Deed as from the appointed day determined in accordance with s16 of the 1989 Act as 1 April 1989. The operative parts included the following:

“1 THE Fund is established with effect from the first day of April One thousand nine hundred and eighty nine (“**the commencing date**”) under the provisions of the Interim Deed and the Rules set out in the Schedule hereto (“**the Rules**”) as amended from time to time in accordance with the provisions of the Rules.

2 LRT confirm the appointment of the Trustees of the Fund and the vesting in them of all investment monies and other assets for the time being constituting the Fund and the trusts constituted by the Interim Deed and this Deed.

3 The purpose of the Fund is the provision of retirement pensions and other benefits for an(sic) in respect of such staff and former staff of LRT and of any subsidiary of LRT and of any associated company as defined in the Rules and Members of the Board of LRT as are or shall hereafter become eligible to and participate therein in accordance with the provisions and regulations governing the Fund set out in this Deed and in the Rules.

5 THE Trusts of the Fund constituted by this Deed and the Interim Deed shall continue for a period not exceeding eighty years from the commencing date unless before that date it is by legislation made or is otherwise determined to be lawful for the trusts to continue.

6 UPON the discontinuance of the Fund the affairs thereof shall be wound up in accordance with the Rules and any surplus of the Fund remaining thereafter shall be paid to LRT.

7 THE Trustees and LRT may at any time amend any of the provisions of this Deed provided that such amendment shall not:

(1) vary the main purpose of the Fund as described in Clause 3;

1 authorise the payment of any monies to LRT (except as provided
herein) nor the application of monies for any purpose other than for
the benefit of the Fund;

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4 reduce without his consent the benefit of any person already in
receipt of a pension on the date of the Supplemental Deed;

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(4) extend the operation of the Fund beyond the period specified in clause 5 hereof.”

82 Rules of the New Scheme were in the Schedule. These ran to 54 Rules over 28 pages and need not be set out in full. The Rules upon which reliance was placed in argument included the following:

“3(1) The LRT Pension Fund Trustee Company Limited (the Trustees) shall be responsible for the management and direction of the Fund including the determination of all claims made thereon and the payment thereof of the benefits prescribed by the Rules.

(2) The Trustees’ decision upon all questions arising under the Rules or in connection with the management and direction of the Fund (except as regards matters left to the certificate of the Actuary) shall be final and conclusive.

4(1) Persons shall be nominated to serve as Directors as follows:

1 nine persons by the Board (of whom at least the same number must be Members as those who are Members nominated by the other bodies mentioned below),

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(b) one person each by:

Transport and General Workers’ Union

National Union of Railwaymen

Associated Society of Locomotive Engineers and Firemen

London Transport Joint Trades Committee

Transport Salaried Staffs’ Association,

(c) two persons from and by Sections One and Five of the Council and

(d) two persons from and by Sections Two, Three and Four (combined) of the Council”.

These Rules have to be read in conjunction with Article 16 of the LRT Trustee Company’s Articles and Regulation 88 of Table A which give a casting vote to the Chairman of the Board who has to be an LRT nominated member.

83 Rule 16 provides:

“16 The Board and Associated Companies shall contribute to the Trustees in respect of each accounting period a multiple of the total contributions paid by their respective Members in that accounting period excluding Voluntary Contributions and special additional contributions under Rule 15. The said multiple shall be determined by the Board on the advice of the Actuary following an investigation under Rule 43.”

84 Rule 24 reads:

“24 If a member dies leaving a widow or widower then a pension shall be paid to the widow or widower for any period such as is mentioned in Section 36(6) of the Act. The amount of this pension shall be the minimum amount described in Rule 29.”

Rule 29 provides for the payment of a guaranteed minimum pension under the legislation governing contracted out employment, “*the Act*” being defined as the Social Security Pensions Act 1975 or any statutory notification thereof. It can conveniently be mentioned at this stage that was common ground before me that there was a potentially less generous provision for a member’s widow under the Rules of the New Scheme than under the Wages Fund or the Staff Fund where the widow was not (as she very frequently is) a dependent. If she is a dependent there is no difference in benefit between the several Rules but if she is not, under Rule 24 of the New Scheme Rules her benefit is limited to the guaranteed minimum pension. Under both the Wages Fund and the Staff Fund such a widow was entitled to a pension of one one hundred and sixtieth of the relevant member’s pensionable salary for each year of contracted out employment but the management committee was empowered to reduce that provision to any figure down to, but not below, the guaranteed minimum pension. So long as the latter power was fully exercised there would be no difference between the New Scheme Rule provisions for non dependent widows and that contained in the Wages Fund and the Staff Fund but the possibility that it would not be exercised to the full in the latter two funds is an advantage as compared with the provisions of the New Scheme Rules. It is also to be noted that the disadvantage would not affect surviving spouses in receipt of pensions at the date of merger since all existing benefits in relation to members who died before 1 April 1989 are preserved by Rule 8 (2) of the New Scheme Rules. It is therefore only in relation to the spouses of members living on 1 April 1989 that the potential detriment under the New Scheme Rules exists but that detriment is accepted to be a defect in those Rules.

85 The other relevant Rules of the New Scheme are Rules 43, 44 and 45, the material portions of which read as follows:

“43(1) The Trustees shall from time to time appoint the Actuary to advise them on actuarial questions arising in connection with the Fund, and to make such valuations and reports and give such certificates as the Trustees may require.....

1 A comprehensive actuarial review of the financial position of the Fund shall be made by the Actuary as and when the Trustees direct but at least once in every three years and six months.

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4 The actuarial review shall include advice on the Board’s contribution under Rule 16. The Trustees shall review the report and, on the advice of the Actuary, with the consent of the Board may recommend changes in the Rules to a General Meeting in one or more of the following ways:

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1 by amendment to the Members’ contribution payable under Rule 13.

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(ii) by increasing any benefit payable under the Rules.

(iii) by some other means.

44(1) The Rules may be amended (including retrospectively) by the Trustees provided that the amendment be first confirmed:-

(a) by a resolution of the Board and

(b) if contributions or benefits are affected in any way, by the Actuary and

1 if the benefits payable or prospectively payable to any persons are adversely affected, by a resolution of Members at a General Meeting convened for that purpose.

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45(1) The Fund shall be wound-up if the Trustees so resolve, with priority given to the liabilities of the Fund in accordance with Section 40(3) of the Act and for this purpose a Member shall be regarded as having left the Service on the date of such winding up if he has not already done so.

1 Subject to paragraph (1) of this Rule and subject to payment out of the Fund of all costs, charges and expenses of the winding-up, any balance shall be applied at the discretion of the Trustees to making further provision for a Member of benefits; such provision being on an equitable basis on the advice of the Actuary and having regard to the accrued proportion of the benefits to which it would have been expected that such a Member would otherwise have become entitled from the Fund.

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4 Subject to paragraph 2 of this Rule any remaining balance shall be payable to the Board.

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47 All expenses in connection with the operation and investment of the Fund and all the salaries mentioned in Rule 6, shall be borne by the Fund

86 No doubts were felt as to the efficacy of the merger process until an opinion of Counsel was taken in October 1990 on behalf of interested

unions and accordingly effect was given as from 1 April 1989 to the Rules of the New Scheme.

87 Another event on 1 April 1989 which was only put in evidence after the hearing had started was a change of employer in connection with LRT's bus undertaking. Before 1 April 1989 LRT operated through two subsidiaries London Buses Limited ("LBL") and London Underground Ltd ("LUL"). Their functions appear from their titles. It was estimated in evidence that there were some 18,500 active employees (ie excluding pensioners or deferred pensions) of the Staff Fund or the Wages Fund in LBL and some 18,700 such employees in LUL.

88 Two subsidiaries of LBL, Orpington Buses Ltd and Stanwell Buses Ltd had had parts of LBL's bus operations transferred to them in 1986. The remainder of LBL's bus operations was transferred to a number of other subsidiary companies of LBL formed in December 1988 with this in view. These latter subsidiaries took over all save approximately 530 employees of LBL on 1 April 1989. None of these subsidiaries, as opposed to Orpington Buses Ltd and Stanwell Buses Ltd, participated in the Wages Fund or the Staff Fund or consented to their members being members of those schemes. They all acted as though they were employers under the New Scheme which all concerned thought was in operation as from 1 April 1989.

89 The Actuaries to the New Scheme, R Watson & Sons, gave their formal report as at 1 April 1989 on 13 March 1990 pursuant to Rule 43(2) of those Rules. For present purposes the salient features of that report were as follows:

(1) The membership involved was broadly as follows

	Wages Fund	Staff Fund	New Entrants	Total
Pensioners and Dependents	21,574	10,241	-	31,815
Their pensions in payment (M)	26.03	27.10		53.13
Deferred Pensioners	6,665	2,220		8,875
Deferred pension (M)	7.29	3.73		11.02
Members in service	23,350	9,888	5,410	38,648
Their pensionable pay (M)	220.24	120.71	45.45	386.40

These figures were later corrected as mentioned below.

(2) The combined assets had a market value of 1,468m of which 9% was freehold and leasehold land, 66.9 % equity investments and 5.1% unit trusts. The balance of 19% was made up of fixed interest and index-linked securities and cash.

(3) For the Purposes of the review and in particular the assessment of the balance between the value of assets and liabilities accrued in respect of services rendered up to 1 April 1989 the actuaries adopted the usual

Practice of discounting the future flow of income and capital from the investments rather than taking their market value. That balance struck on the basis of the several economic and statistical assumptions set out in the report showed a past service surplus of 460m which was not surprisingly described as very substantial. It was very much higher than the combination of the valuations contained in the final reports of the Wages Fund at 31 December 1986 and of the Staff Fund as at 31 December 1985 which revealed a past service surplus of 92.4m in the Wages Fund and an excess of liabilities over assets of 32.6m in the Staff Fund in respect of current and deferred pensions and of both past and expected future pensionable service assuming employer contributions at a rate 1.8 times the employees' contribution.

- 1 The reasons for the marked increase in past service surplus, effectively the difference between the actual experience between the final valuations of the Wages Fund and the Staff Fund and the assumptions made in those final valuations were identified by the actuaries. The principal reason was the larger investment returns than those assumed (161m out of 189m). These figures illustrate vividly first, the extent to which any evaluation of past service surplus, or indeed deficit, is dependent upon the assumptions on which the valuation is based and, secondly, that there can be no question of such assumptions being immutable. Nor of course would all experienced actuaries adopt exactly the same assumptions at any given time in relation to any given scheme.
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- 4 So far as future service was concerned the actuaries assessed the level of contribution required to meet the cost of the year by year accrual of benefits in the future. In practice this meant an evaluation of the required LRT contribution since the members' contribution was taken to be fixed at that specified under Rule 13 and the variable was therefore treated as the employer's contribution under Rule 16 and expressed as a multiple of the members' contributions. Taking the members' contributions as 1 the actuaries evaluated the employer's contribution required in respect of the future as 2.75

times the members' contribution, giving a total of 3.75 times members' contributions.

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7 The actuaries assessed the overall position, that is to say taking into account the past service surplus mentioned above and the level of contribution required for future service, and gave their preliminary advice pursuant to Rule 16 on the assumption that no changes in the Rules by amendment of members' contributions, increase in benefits or by other means were made and said this:

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“We find that, if the whole of the past service surplus were to be utilised to reduce the level of the LRT Board's contribution from the multiple of 2.75 which is required to cover the cost of the year by year accrual of benefits, the LRT Board's contribution multiple could be:

a) nil for a period of 9 years

1 0.65 if the surplus were to be utilised over the expected future service working lifetime of the membership which is a period of some 13 years on average.

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At the end of the periods of 9 and 13 years mentioned above the LRT Board's multiple could be expected to revert to 2.75.”

It almost goes without saying that no such advice could or would have been given had the Rules still contained a requirement that the employer's contribution should be a minimum of two and one third times the members' contributions. Had the situation arisen under the Wages Fund actuaries' advice would have been directed under Rule 45 to the

possibilities of using the surplus by amendment of the scale of contributions, increase of benefit or in such other manner as might be for the benefit of the Fund and its members. Amendments of the scale of contributions would have involved an alteration of both the members' and LRT's contributions given the fixed proportionate link between the two under Rule 19. A somewhat similar position would have obtained under the Staff Fund save that there was a specific provision there in Rule 42(3) (i) for utilising a surplus in amending the employer's contribution under Rule 14 without reducing the members' contribution. However since Rule 14 contained the requirement that LRT's contribution should not be less than two and one third times the members' contributions that provision for unilateral reduction of the employer's contribution could only operate in relation to an excess over the minimum two and one third multiple.

(7) Not surprisingly in the light of the substantial past service surplus the actuaries found that the assets were sufficient to cover liabilities if there were an immediate discontinuance. Perhaps, more surprisingly they were also able to certify that the Fund was not excessively over-funded in the sense of exceeding 105% of the value of the liabilities of the Fund when the assets and the liabilities were valued in accordance with the Pension Scheme Surpluses (Valuation) Regulations 1987.

90 The employer's contributions after the final valuations in the Wages Fund and the Staff Fund at 31 December 1986 and 1985 respectively were both set at 2.33 the members' contributions. In the Wages Fund there was a past service surplus of 92.4m and there was an estimate of a 3.4 times members contribution cost for providing future service benefits, but the size of the past service surplus was such that if it had been permissible the employer's multiple could have been reduced to 1.75 members' contributions. But the Rules prevent that so the minimum 2.33 was applied. In the Staff Fund there was no past service surplus but a deficiency of about 30m. However the cost of future service benefits where members' contributions at roughly 6% were 1% higher than in the Wages Fund or indeed the New Scheme, was only 2.8 times members'

contributions. On that basis fixing the LRT contribution at the minimum 2.33 multiple was estimated to be likely to liquidate the past service deficiency over the expected future service working lifetime of the work force.

91 The same level of LRT contributions of 2.33 times members' contributions was adhered to with effect from 1 April 1989 in relation to the New Scheme until well after the actuaries' formal valuation as at 1 April 1989 mentioned above was received in March 1990.

92 In the meanwhile separate booklets were issued for existing members of the Wages Fund and Staff Fund and those who were admitted on 1 April 1989 as a result of the lowering of the age qualification for membership on the one hand and new members who joined after 1 April 1989 on the other. The latter stated the limitation on index linking for new members to 5% and more only if finances permitted.

93 The first intimation of- any disquiet regarding the application of a past service surplus occurred during the 12th meeting of the JWP on 23 November 1989 when it was stated that an actuarial valuation as at 1 April 1989 was due, whereupon a T&G representative expressed the view that any surplus should not lead to an employer's contribution holiday. At the same meeting a TSSA representative drew attention to the absence of an employer's minimum contribution in the Rules of the New Scheme and said he thought it fairer if a minimum could be incorporated, even if lower than before.

94 Before issuing their formal report on the New Scheme as at 1 April 1989 the actuaries got into contact with Mr Coles on behalf of LRT in a letter dated 5 February 1990 in which there was a discussion, the details of

which are not material for my purposes, regarding a possible alternative valuation incorporating a one half per cent lower assessed rate of future dividend growth. This would have had the effect of reducing the assessed value of the Fund by 167M and thereby the past service surplus from 460M to 293M. In fact that reduced dividend growth assumption was not made and the estimate of past service surplus was 460m as already mentioned. The very substantial reduction caused by an alteration of only one half per cent in assumed dividend growth provides further illustration, if needed, of the extent of possible disparities in estimates of past service surpluses.

95 The same half per cent reduction in assumed dividend growth would, the actuaries said in their letter of 5 February 1990, have required an LRT contribution of 1.4 times members' contributions assuming the past service surplus to be liquidated over the expected future service working lifetime of the existing membership, whereas, as mentioned above only 0.65 times members' contribution was in fact included as the estimated LRT contribution in the formal report, which did not adopt the half per cent reduction in assumed dividend growth. In discussing these differing estimates of LRT contributions the actuaries pointed out that they had assumed that LRT had a free hand as to the level of the multiple of members' contributions it paid, notwithstanding the minimum of 2.33 guaranteed under the rules of the old funds.

96 The actuaries' report as at 1 April 1989 showing a substantial overall past service surplus of 460M was before the 13th meeting of the JWP on 10 April 1990 when Mr Coles on behalf of LRT indicated that the Board was willing to negotiate a package of improvements in return for a reduction in the employer's multiple below 2.34 times members' contribution and said that it was not anticipated that LRT would seek a contribution "*holiday*". The union representatives mentioned a long series of improvements which they would want to see implemented. This was followed by a specific list of improvements in priority order in a letter from the General Secretary (*sic*) to the NUR dated 24 August 1990. At the

same time challenges were being made by an association called the Fifty Five Society on behalf of LRT pensioners to the propriety of using any part of the past service surplus to fund a reduction in LRT contributions. They l