Neutral Citation Number: [2021] EWHC 1436 (Admin)

Case No: CO/2220/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 May 2021

Before :

THE HON. MR JUSTICE BOURNE

- - - - - - - - - - - - - - - - - - - -

Between :

THE QUEEN

on the application of

(1) ENTERPRISE MANAGED SERVICE LIMITED **(2) AMEY PLC**	**Claimants**
- and -	
SECRETARY OF STATE FOR THE MINISTRY OF HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	**Defendant**
- and -	
(1) NORTHAMPTONSHIRE COUNTY COUNCIL **(2) NORTHAMPTON BOROUGH COUNCIL** **(3) DAVENTRY DISTRICT COUNCIL**	**Interested Parties**

- - - - - - - - - - - - - - - - - - - -

- - - - - - - - - - - - - - - - - - - -

Paul Bowen QC and Tim Johnston (instructed by **Blake Morgan LLP**) for the **Claimant**
Joanne Clement and Stephen Kosmin (instructed by **Government Legal Department**) for the **Defendant**

Nigel Giffin QC and Patrick Halliday (instructed by **Burges Salmon LLP**) for the **2nd and 3rd Interested Parties**

Hearing dates: 16th March 2021 – 18th March 2021

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Thursday 27th May 2021 at 10.30am.

The Hon. Mr Justice Bourne :

Introduction and statutory background

1. This claim for judicial review concerns secondary legislation, namely the Local Government Pension Scheme (Amendment) Regulations 2020/179 ("the 2020 Regulations"). The Claimants challenge the lawfulness of regulation 1 of the 2020 Regulations, which gives retroactive effect to amendments made to regulation 64 of the Local Government Pension Scheme Regulations (SI 2013/2356[1], "the LGPS Regulations"). The Claimants also seek rulings about the proper interpretation of regulation 64(2ZAB) of the LGPS Regulations.

2. In particular, the First Claimant contends that the retroactive introduction of regulation 1 infringed its rights under ECHR Article 6, because it effectively determined a litigious claim which the First Claimant had brought to enforce its rights under the legislation as it was prior to the amendment. Both Claimants contend that the introduction of regulation 1 infringed their property rights under ECHR Article 1 of Protocol 1, by interfering with rights which they had enjoyed under the legislation as it previously stood.

3. The statutory background to the Local Government Pension Scheme ("LGPS") is described in a passage of the Defendant's skeleton argument which I understand is not contentious and from which I have therefore taken much of the next few paragraphs.

4. The LGPS Regulations have effect under the Public Service Pensions Act 2013, which provides that regulations may establish schemes for the payment of pensions and other benefits to categories of workers including local authority workers. Section 3 of the 2013 Act makes further provision about such regulations. Section 3(3)(b) provides that such regulations may "make retrospective provision" (subject to section 23, which restrains the power to make retrospective provision which would have adverse effects on individuals' pensions).

5. The LGPS is a funded, statutory public sector pension scheme. The LGPS is one of the largest defined benefit pension schemes in the world and is the largest defined benefit scheme in England and Wales. In March 2019 over 18,000 employers participated in the LGPS, it had 5.9 million members (active, deferred and pensioner) and assets of around £287 billion invested in a range of UK and global equities, bonds and alternatives.

6. The LGPS is administered by authorities each of which has been designated as an administering authority for a given geographical area. The great majority of administering authorities are local authorities, along with some other bodies such as the Environment Agency. Each administering authority is required to maintain its own individual pension fund out of which pension benefits are paid to members. There are currently 87 administering authorities, operating 89 separate funds. The LGPS Regulations are a single set of national rules which govern the LGPS.

---

[1] The LGPS Regulations updated and replaced the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007 and the Local Government Pension Scheme (Administration) Regulations 2008 ("the 2008 Regulations").

7. The LGPS is a funded, rather than an unfunded, pension scheme. That means that it, and the pension benefits which are paid to members, are not funded directly by the Exchequer. Instead, each administering authority maintains investment funds from which the pension benefits are provided. These funds are exposed to the market. If poor market performance causes a deficit in an authority's particular fund, the burden of meeting the deficit will fall on the participating employers. In the case of local authorities, ultimately that burden would predominantly fall on local taxpayers through rises in council tax.

8. Each administering authority sets contribution levels for the scheme employers in its area. The contribution is made up of a primary rate (the cost of meeting the employer's future pension liabilities) and the secondary rate (the employer's share of any estimated deficit that has arisen). Contributions are set every three years by the fund's independent actuary.

9. Three types of employer participate in the LGPS:

(1) Schedule 2 Part 1 bodies, including all local authorities who are obliged to offer LGPS membership to their staff.
(2) Schedule 2 Part 2 bodies. This group includes some wider public sector and connected bodies which may offer LGPS membership to some or all of their staff.
(3) Schedule 2 Part 3 bodies. This group includes those that participate in the LGPS through an "admission agreement". An admission agreement is an agreement entered into between the employer and the administering authority. The agreement must have certain statutory features[2] and is extended to those employers who carry out public functions, either under contract with a participating employer or because they have a "community of interest" with such an employer (sometimes called "community admission bodies").

10. When a local authority outsources services to a contractor, its employees previously engaged in the provision of the service will be transferred to the contractor under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"). Government policy requires that staff who are compulsorily transferred to such a contractor must be allowed to continue in membership of the LGPS or be offered a broadly comparable scheme. Most contractors choose the former option, in which case the contractor is admitted to the LGPS fund as an "admission body" through an admission agreement. At the outset, the administering authority allocates to the admission body a notional "pot" of assets within the fund which is often equivalent to the pensions liabilities in respect of the transferred employees. Once admitted to the LGPS, the contractor is liable to make regular "employer contributions" to the fund[3]. Employer contributions are calculated as a percentage of employee members' pay, set for a three year period at a level designed to ensure that the fund's pension liabilities are fully funded. Employer contributions may change every three years, following the periodical actuarial assessment, due to a number of factors such as investment performance or changes in life expectancy.

---

[2] Set out in Schedule 2 to the LGPS Regulations.
[3] Employees also make employee contributions.

11. This case arises because of the impossibility of knowing, in advance, whether the relevant assets in a fund will be sufficient to provide the relevant pension benefits from time to time. The possibility that there may instead be a deficit in a fund, necessitating further contributions from an employer, is referred to as the "pension risk".

12. It should also be noted that any surplus or deficit could result from the investment performance of, or the revaluation of, assets which were notionally assigned to the employees in question before the contractor's admission. In other words, the existence of a surplus or deficit in some cases may have little or nothing to do with contributions made by the contractor.

13. Given the possibility of a deficit, when a local authority enters into a contract for services with an admission body, it is not unusual for the contract (or a side agreement) to make provision about pension risk. In particular, the local authority may agree to bear some or all of the pension risk, i.e. to meet some or all of the admission body's employer contributions to the LGPS. Agreements of this kind are sometimes referred to as "pass-through arrangements". They can take various forms and their terms will be the subject of negotiation in any given case. Sometimes a local authority will agree to pay all pension contributions and charges. Sometimes, conversely, the scheme employer will agree to pay the excess if contributions rise above a specified level.

14. Pass-through arrangements are entered into for commercial reasons and will typically be the subject of commercial negotiation. They may obviously affect the price which a contractor is willing to fix for providing the services. That price may be increased by a "premium" if the contractor is to bear all the pension risk, or be subject to a "discount" if the contractor is not bearing any of the risk.

15. This case concerns what happens when a contract comes to an end and the contractor/employer exits the LGPS. The administering authority must obtain an actuarial valuation of "the liabilities of the fund in respect of benefits in respect of the exiting employer's current and former employees" at the exit date: see regulation 64(2)(a) of the 2013 Regulations. Under regulation 64(2)(b) as originally enacted in 2014, the authority was also required to obtain a certificate showing the "exit payment due from the exiting employer in respect of those benefits", i.e. the amount which needed to be paid to ensure that there were sufficient assets in the fund to meet the liabilities associated with those benefits.

16. Following the amendments with which I am concerned, if there is a surplus, the certificate may conversely show that there is an "excess of assets in the fund relating to that employer over the liabilities specified in paragraph (2)(a)".

17. It should be borne in mind that the "benefits in respect of the exiting employer's current and former employees", and the existence of a surplus or a deficit in relation to the liability to pay such benefits, will be attributable to the whole of the service of those employees, occurring (where applicable) before as well as during the period when the contractor was the employer, and to employees' and employer's contributions made and to the performance of the fund during the whole of that time.

18. If there is a deficit, then, subject to any pass-through arrangement, the employer has to make up the difference as a single lump sum "exit payment" to the LGPS.

19. Pass-through arrangements can and typically do specify whether the exit payment will in fact be paid by the contractor, or whether that risk will be passed by agreement to the local authority.

20. Until 14 May 2018, the possibility of liability for an exit payment created an apparent asymmetry in the scheme, because there was no provision for what should happen in the converse situation where the fund was in surplus at the point of exit of an employer. In particular, there was no power to return excess contributions to employers. In some cases, for this reason, employers were wary of increasing their contributions ahead of anticipated exits from the LGPS because of the risk that they would end up in credit, with what was sometimes referred to as a "trapped surplus".

21. From the early 2000s, the LGPS had been subject to significant deficit problems. In or around 2014, the Secretary of State was advised that guidance should be given to promote the early targeting of cessation deficits in the run up to employer exits. At or around the same time, feedback from actuaries and administering authorities reported employers' reluctance to increase their contributions because of the trapped surplus issue.

22. In May 2016, the Defendant published a consultation paper on various proposals for reform to the LGPS. One of the proposals was to introduce "exit credits", in order to give more flexibility to administering authorities to manage liabilities when employers leave the LGPS and to address the concern that employers who were nearing their exit were reluctant to pre-fund any deficit. Most of the consultation responses supported this proposal.

23. As a result, the Defendant made the Local Government Pension Scheme (Amendment) Regulations (SI 2018/493, "the 2018 Regulations"). These came into force on 14 May 2018. They amended regulation 64 of the LGPS Regulations.

24. Regulation 64(1), which previously had provided for an "exiting employer" to be liable to pay an exit payment, now provided that such employer was "liable to pay an exit payment or entitled to receive an exit credit". Regulation 64(2), which previously had provided as stated above for an actuarial valuation at the exit date and for a revised rates and adjustments certificate showing the exit payment due, now also provided in the alternative for the certificate to show "the excess of assets in the fund relating to that employer over the liabilities specified". New regulation 64(2ZA) provided:

> "If an exit credit is payable to an exiting employer, the appropriate administering authority must pay the amount payable to that employer within three months of the date on which that employer ceases to be a Scheme employer, or such longer time as the administering authority and the exiting employer may agree."

25. By amended regulation 64(8), an "exit credit" was defined as the amount required to be paid to the existing employer by the administering authority to meet the

excess of assets in the fund relating to that employer over the liabilities specified in regulation 64(2)(a).

26. It will be necessary to consider further whether the consequences of these amendments can fairly be described as "unintended", but it is common ground that as a result of their introduction, a number of LGPS Funds came under an obligation to pay sizeable exit credits to admission bodies when their contracts came to an end. That was the position for the Interested Parties in the present case, in which the Second and Third Interested Parties participated as local authority employers. It is also a matter of record that, after the 2018 Regulations came into force, concerns were raised by those parties and others about the payment of exit credits in cases where the terms of service contracts and pass-through arrangements had been agreed before 14 May 2018. It was contended that these exit credits were an unjustified windfall because, thanks to the pass-through arrangements, the exiting employer had not taken on any pension risk.

27. Much of the history is set out in the witness statements of Suzanne Clarke, Deputy Director of the Local Government Finance Reform and Pensions division at the Ministry of Housing, Communities and Local Government. Ms Clarke exhibits the relevant ministerial submissions which followed the 2016 consultation and the Government's response to the consultation. These indeed did not refer to the impact of exit credit payments on existing pass-through arrangements.

28. Following the 2018 Regulations coming into force on 14 May 2018, a series of stakeholders including local authorities and the Local Government Association ("LGA") expressed concerns, complaining that exit credits were providing windfalls at local authorities' expense in cases where the contractor had borne no pension risk. At least one authority pointed out that strong asset returns could mean that an employer would become entitled to an exit credit exceeding the total of all pension contributions which that employer had paid. Ms Clarke observes that while the pricing of contracts would have taken account of pass-through arrangements, the pricing of contracts before the contents of the 2018 Regulations were known would not have taken into account the availability of exit credits.

29. There were discussions between the Defendant and stakeholders including the LGA. Proposals for further legislative change were considered. The Defendant published a further consultation document on 8 May 2019. This put forward the view that it was unfair for employers to receive exit credits in cases where pass-through arrangements meant that the local authority had borne all of the costs and the risk in relation to the service provider's liabilities to the pension fund through the life of the contract. The consultation document set out a proposal to amend the LGPS Regulations to provide that an administering authority must take into account a scheme employer's exposure to risk in calculating the value of an exit credit and could assess the value at nil if satisfied that the service provider had not borne any risk. It was proposed that such a change would be retrospective to 14 May 2018 and thereby would apply to all scheme employers exiting the scheme on or after 14 May 2018, and that in cases of dispute as to the level of risk that a service provider had borne, the appeals and adjudication provisions contained in the LGPS Regulations would apply.

30. Following the consultation, the Defendant made the 2020 Regulations on 25 February 2020. They came into force on 20 March 2020 but had retrospective effect from 14 May 2018. Regulation 3 made further amendments to regulation 64 of the LGPS Regulations. Paragraph (2ZA), quoted above, was deleted. New paragraphs (2ZAB) and (2ZC) provided:

> "(2ZAB) An administering authority must determine the amount of an exit credit, which may be zero, taking into account the factors specified in paragraph (2ZC)…
>
> (2ZAC) In exercising its discretion to determine the amount of any exit credit the administering authority must have regard to the following factors –
> (a) the extent to which there is an excess of assets in the fund relating to that employer over the liabilities specified in paragraph (2)(a);
> (b) the proportion of this excess of assets which has arisen because of the value of the employer's contributions;
> (c) any representations to the administering authority made by the exiting employer and, where that employer participates in the scheme by virtue of an admission agreement, any body listed in paragraphs (8)(a) to (d)(iii) of Part 3 to Schedule 2 to these Regulations; and
> (d) any other relevant factors."

31. The definition of "exit credit" was accordingly amended from "the amount required to be paid …" to "the amount paid …".

32. Regulation 4 of the 2020 Regulations contained a transitional provision, providing that these amendments do not apply to exit credits that have been paid on or after 14 May 2018 and before 20 March 2020. However, the amendments did apply to exit credits such as those arising in the present case which, prior to the amendments, were <u>payable</u> between 14 May 2018 and 20 March 2020 but were not in fact <u>paid</u>.

The factual background in more detail

33. The Claimants are private companies that provide contracted-out services to local authorities in the discharge of the local authorities' statutory powers and responsibilities. The Second Claimant ("EMS") is a subsidiary of the First Claimant ("Amey").

34. On 3 May 2011, EMS entered into a contract with the Second and Third Interested Parties ("the councils") to provide environmental services for a term of seven years ("the services contract"). It thereupon became the employer of a number of employees of the councils by operation of TUPE. The pension rights of the employees were provided for by EMS becoming an admission body in relation to the LGPS. That occurred by way of an admission agreement between EMS and Northampton County Council ("NCC").

35. Under the admission agreement, EMS was obliged to pay to NCC the amounts due under, initially, the 2008 Regulations and from 1 April 2014 the LGPS Regulations. At the time of the admission agreement in 2011, the contribution rate payable by EMS was 18.9% of members' pensionable pay. EMS would also be liable for any

exit payment which might arise under what was then regulation 38(2) of the 2008 Regulations, and subsequently under regulation 64 of the LGPS Regulations.

36. By the terms of the services contract, EMS also entered into pass-through arrangements with the councils. The contract price included a sum which would effectively reimburse EMS for the employer contributions of 18.9% referred to above, and it was also agreed that the councils would reimburse EMS for any increase in that required contribution rate (with some non-material exceptions). EMS conversely would reimburse the councils if the required contributions fell below that rate, a fact relied on by the councils to show that the contracting parties contemplated the local authorities not merely shouldering pension risk but also taking benefit where it arose. Of most immediate importance for present purposes is the fact that the councils also agreed to indemnify EMS in respect of any exit payment it might be required to pay to NCC at the end of the contract term (again, subject to non-material exceptions).

37. Although there has been some debate between the parties about the appropriateness of terms such as "risk premium discount", it is common ground that the allocation of risk by the pass-through arrangements affected the contract price, which would have been higher if the councils had not agreed to bear the burden of any increase in the contribution rate and of any exit payment liability. According to the evidence of John Currid, a member of Amey's strategic pensions team, the difference in this case was £3.9 million, amortised as £557,000 per annum.

38. The possibility of an exit credit did not exist when these agreements were made, and therefore was not provided for or reflected in any way.

39. In 2016, in accordance with the LGPS Regulations, there was a valuation of NCC's LGPS fund and a revised rates and adjustment certificate was issued. This stated that there would be a surplus at the expiry of the contract. The employer contributions were therefore reduced to zero, and the benefit of that reduction was passed on to the councils pursuant to the pass-through arrangement.

40. In 2018, as I have said, exit credits were introduced as one of a number of reforms made by the 2018 Regulations. Ms Clarke in her evidence reviews the responses to consultation ahead of the 2018 Regulations. Whilst the introduction of exit credits was generally supported, a couple of far-sighted respondents suggested that exit credit provisions should be capable of being disapplied in cases where risk-sharing arrangements (such as pass-through arrangements) were already in place. Ms Clarke adds:

> "Despite these responses, MHCLG did not anticipate that the mechanism to correct the problem of the so-called trapped surplus, namely the requirement to pay exit credits, would give rise to windfall payments as in fact resulted. That the extent to which the scale of the windfalls was not fully appreciated upon receipt of the 2016 consultation responses must be understood in the context that pass-through arrangements could take a variety of forms and that bespoke terms were negotiated in each case. Such features made it difficult to predict the effect of the exit credit provisions generally."

41. Meanwhile, despite employer contributions reducing to zero, the performance of the fund assets attributed to EMS's current and former employees was such that, when the contract expired on 3 June 2018, a further certificate obtained in October 2018 identified a surplus of £6,518,000.

42. Under the terms of regulation 64(2ZA) as it then was, NCC was required to pay that sum to EMS by 3 September 2018.

43. The evidence of Ms Clarke records that on 27 November 2018, the councils wrote to the Defendant about the EMS case, stating that EMS stood to be enriched by £6.5 million for no good reason. They enclosed a briefing note which contained the summary of legal advice referred to at paragraph 88 below.

44. NCC initially accepted that it was liable to make the payment. However, the councils maintained their objection. Payment of the exit credit would reduce the value of the assets in the fund and therefore could affect their financial interests as continuing scheme employers. By an email dated 19 December 2018, NCC showed Amey/EMS correspondence between solicitors on the subject and told them that discussions were ongoing involving the LGA and HM Treasury. They said that "our intention is still to make payment of the exit credit" but that they had been asked to hold off making the payment until after a meeting which was set for 7 January 2019.

45. As is apparent from my commentary on the evolution of the 2018 and 2020 Regulations above, a bigger picture was emerging. A note of a meeting between officials of the Defendant and the LGA on 8 January 2019 referred to exit credits for various employers totalling £82 million which either had been paid or would arise in the next year. Around half were said to relate to cases where the employer had retained all pension risks, but the other half related to cases involving side agreements insulating the employer from risk.

46. There were at least two meetings in January 2019 at which LGA officials met with Government representatives to discuss this issue. The prospect of regulatory change requiring pass-through arrangements to be taken into account was referred to in an LGA bulletin in February 2019. NCC sent EMS a copy of the bulletin and claims to have told it that the question of whether changes should be retrospective was under consideration.

47. Following further discussions, NCC refused to pay the exit credit to EMS. On 25 March 2019, EMS issued a claim in the Chancery Division of the High Court for the amount of the exit credit ("the Chancery claim"), and on 1 May 2019 EMS applied for summary judgment.

48. Then, as I have said, the consultation paper ahead of the 2020 Regulations was published on 8 May 2019. NCC then applied to join the councils as co-Defendants to the Chancery claim, and this was ordered on 30 May 2019. Defences (and a Counterclaim by the councils) were filed. There have been successive orders staying the Chancery claim in light of, first, the proposal to amend regulation 64 and second, these judicial review proceedings.

49. The 2019 consultation documents provide further evidence that the intention behind the 2020 Regulations was to prevent the perceived unfairness of an entitlement to exit credits in cases where the employer had not borne any pension risk. The consultation paper which was published shortly after the local elections on 8 May 2019 stated that the Government intended to make the change retrospective to 14 May 2018.

50. Ms Clarke explains how, following a range of responses to the consultation, it was decided to replace an entitlement to an exit credit with a broad discretionary power conferred on the administering authority to determine the amount of any exit credit, having regard to any relevant considerations. The allocation of pension risk would be one of the relevant considerations but the Defendant did not intend to dictate what the outcome should be in any particular case. The timeframe for payment was extended to six months to enable authorities to determine the appropriate level of any exit credit.

51. It was decided that, on the one hand, Government should not accede to the suggestion of some authorities that exit credits should be precluded in respect of any admission agreement entered into before 14 May 2018 but that, on the other, the amendments should be retroactive. According to Ms Clarke, it was considered that this was the only way to remedy the "pure windfall problem" which arose where service providers and admission authorities had entered into risk-sharing agreements before the exit credit provisions came into force on 14 May 2018.

52. Ms Clarke states that the potential effect on Convention rights was considered, and the view was taken that administering authorities as public bodies would be required under the Human Rights Act 1998 to exercise their new discretion in such a way as to avoid any breach on the facts of each case.

53. It was decided that providing for any attempt to recoup any exit credits which had actually been paid after 14 May 2018 would be administratively unwieldy and would be likely to lead to costly and complex litigation. However, whilst the Defendant did not wish to reward any administering authorities which had declined to make exit credit payments that had fallen due, nevertheless "the imperative to remove an unjustified windfall payment from an exiting employer" meant that the amendments would apply in such cases.

54. Finally, Ms Clarke confirms that although the Defendant was made aware of the various claims and disputes concerning exit credits, officials did not give advice on, and the Defendant could not form a view on, the merits of those claims.

55. The 2020 Regulations further amending regulation 64 therefore came into force on 20 March 2020 but took retrospective effect from 14 May 2018. Subject to this challenge, they extinguish EMS's accrued right to an exit credit. EMS would retain the right to have the amount of an exit credit determined by the administering authority, albeit that the amount could be zero. However, EMS asserts that the Defendant's apparent intention when introducing the 2020 Regulations was that an administering authority would make no exit credit in a case such as this, where liability for an exit payment had been passed to the local authority by means of pass-through arrangements.

56. The present claim also concerns a number of exit credits that the First Claimant ("Amey") or its subsidiaries were expecting to receive at the end of other contracts with local authority clients. The expiry of these contracts occurred before 20 March 2020 in some cases and after that date in others. Amey relies on a number of the arguments set out below as to the lawfulness of the 2020 Regulations in its claim for declaratory relief relating to those prospective exit credits.

The grounds of challenge

57. The Claimants contend that:

i) The retrospective extinction, by the 2020 Regulations, of the Chancery claim brought by EMS is a violation of its right to a fair trial, contrary to common law and to ECHR Article 6.

ii) The retrospective removal, by the 2020 Regulations, of EMS's right to an exit credit and of Amey's right to exit credits in respect of contracts which expired before those Regulations came into force on 20 March 2020, is a breach of the Claimants' property rights at common law and under ECHR Article 1 of Protocol 1 ("A1P1").

iii) Regulation 3 of the 2020 Regulations should be interpreted as allowing administering authorities, when determining the size of any exit credit, to take account of the fact that the contractor gave the local authority a discount on the contract price in return for the pass-through arrangements in respect of the pensions risk. This is said to be principally relevant to exit credits claimed by Amey in respect of contracts expiring on or after 20 March 2020 (when those Regulations came into force), but is also potentially relevant to EMS's claimed exit credit and Amey's claimed exit credits in respect of contracts expiring before that date.

iv) In the alternative to ground 3, it would be unlawful (irrational, unfair and/or contrary to ECHR Article 14 in conjunction with A1P1) to interpret regulation 3 as providing for the Claimants to be deprived of exit credits because they had entered into pass-through arrangements while contractors who had not entered into such arrangements would not be so treated.

Ground 1

58. EMS's case is that it had a vested right to an exit credit and that this was a civil right for the purpose of ECHR Article 6. It argues that the introduction of retrospective legislation extinguishing its exit credit claim interfered with its right to a fair trial in the determination of that civil right.

59. The parties broadly agree, albeit for different reasons, that any common law rights do not add anything to the reach of fair trial rights under the ECHR. It has therefore not been necessary to carry out a separate analysis of the common law position.

60. Before turning to the law on Article 6, it is necessary to mention a preliminary point raised by the Defendant. Ms Clement, representing the Secretary of State, invites me to dismiss the claim for one discrete reason. She observes that the

primary relief sought by the Claimants is a quashing order in respect of regulation 1 of the 2020 Regulations, insofar as it has retroactive effect, and that case law has drawn a distinction between a challenge to the validity of the legislation and a challenge to its application in a particular case. She refers to authority for the proposition that legislation will not be unlawful because of a lack of proportionality "unless it is incapable of being operated in a proportionate way in all or nearly all cases". See, for example, *Christian Institute v Lord Advocate* [2016] UKSC 51, (2017) SC (UKSC) 29, at [88]. Her objection is that the 2020 Regulations as a whole do not prevent a party from receiving an exit credit; they merely remove an absolute right and replace it with a discretion which in some cases could yield the same result. In short, there is no possibility of the Claimants surmounting the high hurdle of the *Christian Institute* test.

61. It seems to me that there is a brief practical answer to the preliminary point. The Claimants allege that the application of the 2020 Regulations has resulted in a breach of their Article 6 and/or A1P1 rights. If that contention makes headway, it will be necessary to consider what legal consequences it has, and what if any relief should be granted. I agree with both Mr Bowen QC, for the Claimants, and Mr Giffin QC, representing the councils, that that will be the opportune moment to consider the effect of the point.

The law

62. The material part of paragraph 1 of ECHR Article 6 provides:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

63. The rights recognised by Article 6 may be infringed by the enactment of retrospective legislation which affects the result of pending proceedings. See *Zielinski v France* (1999) 31 EHRR 19 in which the European Court of Human Rights ("ECtHR") said at [57]:

> "The court reaffirms that while in principle the legislature is not precluded in civil matters from adopting new retrospective provisions to regulate rights arising under existing laws, the principle of the rule of law and the notion of fair trial enshrined in article 6 preclude any interference by the legislature—other than on compelling grounds of the general interest—with the administration of justice designed to influence the judicial determination of a dispute."

64. The "*Zielinski* principle" was applied by the Court of Appeal in *R (Reilly) v Secretary of State for Work and Pensions (No. 2)* [2016] EWCA Civ 413, [2017] QB 657. The claimants had applied for jobseeker's allowance ("JSA") under the Jobseekers Act 1995. Section 17A of the 1995 Act allowed JSA to be withheld from applicants who refused to participate in an unpaid work scheme "of any prescribed description". The Secretary of State made regulations creating such a scheme, but the regulations were defective because they contained no "description"

of the scheme as section 17A required. The regulations also required applicants for JSA to be given written notice of what they were required to do and of the consequences of failing to do it. The claimants initially challenged the lawfulness of the requirements which were applied to them. The courts ruled that the regulations were ultra vires because of the lack of "description", and that the notice requirements had not been complied with. While further appeals were pending, Parliament passed a new Act retrospectively validating the earlier regulations, all notices purportedly given under them and all sanction decisions affected by the court rulings. This had the practical effect of determining the pending appeals against the claimants.

65. The claimants in *Reilly* thereupon sought judicial review of the Secretary of State's decision to promote the new Act, complaining of an infringement of their Article 6 rights. The Court of Appeal agreed that there had been an infringement and made a declaration of incompatibility in respect of the new Act.

66. The relevant authorities, in particular from the ECtHR, were reviewed both at first instance and in the Court of Appeal, where Underhill LJ quoted this summary from the first instance judgment of Lang J:

> "The principles which I draw from the case law cited above are that, although Parliament is not precluded in civil matters from adopting new retrospective provisions to regulate rights arising under existing laws, the principle of the rule of law and the notion of a fair trial and equality of arms contained in article 6.1 'precludes any interference by the legislature … with the administration of justice designed to influence the judicial determination of a dispute' (*Zielinski v France* 31 EHRR 19, para 57) or 'influencing the judicial determination of a dispute to which the state is a party' (*National & Provincial Building Society v United Kingdom* 25 EHRR 127 , para 112). This can only be justified in law 'on compelling grounds of the general interest' (*Zielinski v France*, para 57) and 'any reasons adduced to justify such measures be treated with the greatest possible degree of circumspection' (*National & Provincial Building Society v United Kingdom*, para 112). These principles have been cited with approval by the Supreme Court in *AXA General Insurance Ltd v HM Advocate* [2012] 1 AC 868, para 122, per Lord Reed JSC."

67. The Court of Appeal noted that Parliament's intention was to give effect to the original legislative intention. However, it rejected a submission that either of the defects in the regulations, prior to amendment, was a "mere technicality". Underhill LJ continued at [99]:

> "As to the inequity argument, Mr Eadie's point is of course that JSA claimants who had good cause for failing to participate, or in whose cases there had been a breach of the prior information duty, would not be liable to sanctions in any event, and that it followed that those who were affected by the 2013 Act would only be, in short, the undeserving. It was entirely justified to deprive them of what would otherwise be a windfall. We see the

> force of this argument, but in our view it cannot outweigh the importance to be attached to observance of the rule of law. The starting-point must be our rejection of Mr Eadie's previous submission that this is a mere drafting error case where the defect on which the claimants who had brought appeals relied self-evidently failed to reflect the intention of Parliament. In such a case it is understandable that the weight to be given to respecting the letter of the law should be less; and that is at least the primary strand in the reasoning of the ECHR in such cases as *National & Provincial*, *OGIS* and *EEG*. But here, as we have said, there is no doubt that Parliament, in enacting section 17A, and the Secretary of State, in making regulation 4(2)(c), intended that the claimants should have the benefit of the very provisions which were then not applied. In such a case the fact that relying on those provisions might give them an undeserved benefit does not seem to us a sufficient reason for intervening in existing proceedings to deprive claimants of the outcome to which they were unquestionably entitled on the basis of the law as it then stood and indeed which some of them had already achieved in the FTT. The integrity of the judicial process is a Convention value of fundamental importance. The rule of law enures for the benefit of the undeserving as well as the deserving."

68. The Court of Appeal therefore found a breach of Article 6. Calculating that the cost of repaying those sanctioned claimants who had brought appeals (and whose Article 6 rights were therefore infringed) would be about £1.3 million, it thought it "clear beyond argument" that that cost could not justify a breach of Article 6. Nor was it persuaded by the potential unfairness of distinguishing between those sanctioned applicants who had, and those who had not, brought appeals. That distinction was simply "in the nature of Article 6".

69. From the Strasbourg case law, the Claimants argue that the present case resembles *Azienda Agricola Silverfunghi S.A.S. and others v Italy* (2014, Applications 48357/07, 52677/07, 52687/07 and 52701/07). In this case, Italian laws provided measures to support agricultural employers in the form of exemptions from payment of some social security and other contributions. Employers interpreted the law as enabling them to benefit from two such measures, but the State applied the two measures as alternatives. A number of firms commenced proceedings to challenge administrative decisions on the point, and were successful at first instance and on appeal. Pending appeals to the Court of Cassation, the State enacted legislation providing that the benefits could not be accumulated. The Court of Cassation then found in the State's favour, applying the new legislation but also on the basis that the legislation was "only apparently retroactive, it having now been given the original intended meaning of the law".

70. The ECtHR at [76] restated the *Zielinski* principle and added:

> "Respect for the rule of law and the notion of a fair trial require that any reasons adduced to justify such measures [*i.e. measures "designed to influence the judicial determination of a dispute"*] be treated with the greatest possible degree of circumspection …

> Financial considerations cannot by themselves warrant the legislature substituting itself for the courts in order to settle disputes (see *Scordino v Italy* …)".

71. The Court rejected the suggestion that the lower courts' interpretation was contrary to the original intention of the legislator, but added at [81] that even if the new law was interpretative in nature and reinforced the original intention of the legislator, "that fact, by itself, cannot justify an intervention with retroactive effect". The judgment continues at [82]:

> "Indeed, even accepting … that legislative intervention was necessary to eliminate any doubt about the extent and method of application of the benefits at issue, the Government have not shown that there existed a necessity to apply the legislation retroactively, in such a way as to affect firms whose proceedings were pending. The Court highlights that financial considerations cannot by themselves warrant the legislature substituting itself for the courts in order to settle disputes.
>
> … while the aim of the law may have been legitimate, and worthy of intervention to regulate the future provision of the said benefits, the Court is unable to identify in the circumstances of the present case any compelling general-interest reason capable of outweighing the dangers inherent in the use of retrospective legislation which had the effect of influencing the judicial determination of a pending dispute to which the State was a party."

72. The Court went on to consider whether "the applicant companies were attempting to take advantage of a weakness in the system". Clearly such a finding might have prevented a finding of breach of Article 6. On the facts, however, it was found that the companies had acted reasonably and could not have foreseen a reaction by the Italian Parliament. That was in contrast with cases such as *National & Provincial* and *OGIS* to which I shall refer shortly. Where there was more than one possible interpretation of the previous legislation, it was reasonable for the companies to rely on the more favourable one for them. The relevant laws were aimed at helping the agricultural industry and a cumulative effect would boost that sector, although it would also affect revenue collection. The "utility and aim" of such monies was to be contrasted with the "windfall which would have been made by the applicants" in *National & Provincial* and *OGIS*.

73. The Court concluded:

> "88. The foregoing considerations are sufficient to enable the Court to conclude that in the circumstances of the present cases the applicant companies' institution of proceedings cannot be considered to have been an attempt to benefit from the vulnerability of the authorities or the law (contrast with *National & Provincial Building Society*, and *OGIS-Institut Stanislas*, §§ 109 and 71, respectively). Neither has it been established that there were any compelling general interest reasons capable of outweighing the dangers inherent in the use of retrospective

> legislation which has the effect of determining pending proceedings in favour of the State.
>
> 89. There has accordingly been a violation of Article 6 § 1 of the Convention."

74. The Defendant, on the other hand, has referred me to Strasbourg cases in which the State's legislative intervention in litigious matters was held to be justified.

75. *National & Provincial Building Society and others v UK* (1997) 25 EHRR 127 concerned taxation on interest paid to investors of building societies. Such tax was collected at source from building societies at rates set annually by statutory instrument. In 1986, a new statutory regime was introduced. The tax liability of all building societies would be calculated on a quarterly basis on the actual interest paid to investors during the actual year of assessment. This replaced the previous arrangement in which the societies paid sums measured by reference to interest paid during their accounting periods (which differed as between societies) in the previous year. Transitional regulations were designed to ensure that any tax arising in any gap between the end of a society's accounting period and the new tax year would be paid. In lengthy judicial review litigation, the transitional regulations were found to be ultra vires and void. In March 1991, the societies brought restitutionary claims to recover sums paid to Inland Revenue pursuant to the void regulations. Then, with effect from 25 July 1991, Parliament passed section 53 of the Finance Act 1991, which deemed the regulations to have been valid. This had retrospective effect, save where a challenge to the regulations had been commenced before 18 July 1986 (a condition which only the Woolwich could satisfy). At around that time the societies commenced further judicial review claims, seeking declarations that Treasury Orders establishing the relevant tax rates from 1986 onwards were unlawful. In May and June 1992 they commenced further claims for restitution of the sums which would be due to them if the judicial review claims succeeded. However, on 16 July 1992 Parliament enacted section 64 of the Finance (No. 2) Act 1992, retrospectively validating the Treasury Orders. The new sections 53 and 64 ensured that the societies' remaining claims could not succeed.

76. The ECtHR decided that there had been no breach of Article 6. The Court at [109] described the original judicial review as having exposed a "loophole", and considered that the societies:

> "… must reasonably be considered to have anticipated at the close of the Woolwich (1) litigation that the Treasury would seek Parliament's approval to cure the technical defects in the 1986 Regulations and would not be content on public interest grounds to allow a substantial amount of already collected revenue to be lost on account of a technicality."

77. Concluding that there had been no breach, the Court continued:

> "111. While it is true that it was openly acknowledged by the authorities that the enactment of section 64 of the 1992 Act was intended to bring an end to the judicial review proceedings brought by all three applicant societies, those proceedings were in reality a next stage in the struggle with the Treasury and a deliberate strategy to frustrate the original intention of

Parliament. This is borne out by the aim of the applicant societies in bringing the contingent restitution proceedings to recover no more than they had paid to the Inland Revenue under the 1986 Regulations. Given the reaction of the authorities to the outcome of the Woolwich (1) litigation, the applicant societies could not safely rely on the Treasury remaining inactive in the face of a further challenge to Parliament's original intention, the more so since that challenge was directed at the validity of the Treasury Orders which formed the legal basis for the very substantial amounts of revenue collected from 1986 onwards not just from building societies but also from banks and other deposit institutions.

112. As noted above the Court is especially mindful of the dangers inherent in the use of retrospective legislation which has the effect of influencing the judicial determination of a dispute to which the State is a party, including where the effect is to make pending litigation unwinnable. Respect for the rule of law and the notion of a fair trial require that any reasons adduced to justify such measures be treated with the greatest possible degree of circumspection. However, Article 6(1) cannot be interpreted to prevent any interference by the authorities with pending legal proceedings to which they are a party. It is to be noted that in the case at issue the interference caused by section 64 of the 1992 Act was of a much less drastic nature than the interference which led the Court to find a breach of Article 6(1) in the *Stran Greek Refineries and Stratis Andreadis v Greece* case. In that case the applicants and the respondent State had been engaged in litigation for a period of nine years and the applicants had an enforceable judgment debt against that State in their favour. The judicial review proceedings launched by the applicant societies had not even reached the stage of an inter partes hearing. Furthermore, in adopting section 64 of the 1992 Act with retrospective effect the authorities in the instant case had even more compelling public interest motives to make the applicant societies' judicial review proceedings and the contingent restitution proceedings unwinnable than was the case with the enactment of section 53 of the 1991 Act. The challenge to the Treasury Orders created uncertainty over the substantial amounts of revenue collected from 1986 onwards. It must also be observed that the applicant societies in their efforts to frustrate the intention of Parliament were at all times aware of the probability that Parliament would equally attempt to frustrate those efforts having regard to the decisive stance taken when enacting section 47 of the Finance Act 1986 and section 53 of the 1991 Act. They had engaged the will of the authorities in the tax sector, an area where recourse to retrospective legislation is not confined to the United Kingdom, and must have appreciated that the public interest considerations in placing the 1986

> Regulations on a secure legal footing would not be abandoned easily."

78. Similarly, *OGIS-Institut Stanislas, OGEC St Pie X et Blanche de Castille v France* (Application No 42219/98 and 54563/00, 27 May 2004) arose from claims by the management boards of private schools for reimbursement of social security contributions in respect of teachers. A programme of "equalisation" was in progress, whereby the proportion of contributions paid by the State would be the same in respect of state school and private school teachers. The Conseil d'Etat ruled that in the absence of a decree restricting the recoverable amount, the boards could recover the full contributions although these exceeded what was necessary to achieve equality. Legislation was then introduced to restrict the recoverable amount, applying to all cases that had not been finally decided.

79. At [34], the Court considered that the applicants:

> "…could not have been unaware, in view of the principle of equalisation of positions, that the State was not obliged to reimburse contributions at the rate of 1.5% and that this rate had been used by the Council of State only for pragmatic considerations and to fill a gap in the absence of a decree setting the share of the contribution to be borne by the State."

80. The Court, at [37], thus considered the case to be similar to *National & Provincial*, and that the purpose of legislative intervention had been to ensure compliance with the initial will of the legislature, and that "the applicants had tried to benefit from a windfall effect due to the lack of regulatory power and could not reasonably have expected the State to remain inactive in the face of a new claim for full reimbursement". It was also relevant that the applicants had not yet obtained a final judgment. The Court concluded at [40] that the legislation "responded to an obvious and compelling justification of general interest".

81. A final example of a no-breach case is *Tarbuk v Croatia* (2012 Application no. 31360/10). The applicant had been detained on suspicion of spying in connection with the civil war in the former Yugoslavia. After the end of the war he was released under a general amnesty. He commenced proceedings for compensation under general principles of Croatian law applying to persons detained but released without charge. The Croatian Government then introduced retrospective legislation removing the right to compensation from persons released under the amnesty, so his claim was dismissed. He claimed that the effect of the legislation constituted a breach of his rights under article 6(1). The ECtHR dismissed the claim. It found, again, that the new legislation was intended to fill a "legal gap", in this case applying to those who had been released without conviction but who had not been victim of any miscarriage of justice. The Court found that it was not unforeseeable that such new legislation would be passed. It considered that the case was distinguished from other Article 6 claims by the fact that the applicant had not obtained a first-instance judgment or made any other "relevant progress", by contrast with cases such as *Stran Greek Refineries v Greece* (1994) 19 EHRR 293 where proceedings had been pending for years and there had been a judgment.

The issues

82. Ms Clement submits that Article 6 was not engaged in the present case. EMS had no "right" to an exit credit payment and therefore the 2020 Regulations did not interfere with any Article 6 rights in relation to such a payment.

83. Mr Giffin also contends that EMS did not obtain a right to an exit credit payment and therefore suffered no interference with its Article 6 rights, but for a different reason. He submits that the claimed payment of £6.5m would have constituted unlawful state aid under Article 107(1) of the Treaty on the Functioning of the European Union ("TFEU"), and therefore that the 2018 Regulations (prior to amendment) must be construed as not entitling EMS to such a payment. Ms Clement opposes that submission for the Defendant, and her submissions were adopted by Mr Bowen.

84. If EMS did have a right to an exit credit payment such that there was an interference with its Article 6 rights, Ms Clement submits that the interference was justified and the Article 6 claim must fail because:

i) The 2020 Regulations were not "designed" to interfere in the proceedings brought by EMS, to which the Defendant was not party.

ii) Instead, there were compelling grounds for making the 2020 Regulations and for retrospectively removing what was an undeserved or unjustified windfall for employers who had never been exposed to pension risk in the LGPS.

iii) The rationale or justification for the 2020 Regulations was not wholly financial. Instead they were made to address widespread concerns about unjustified windfall payments to exiting employers.

iv) The 2020 Regulations did not in fact make it impossible for an exit credit to be paid, or indeed impose a bar on it being paid in all cases where there were pass-through arrangements, but instead required the administering authority to consider all relevant factors in deciding whether to pay an exit credit or not.

v) EMS could at all material times have foreseen that legislation would be introduced to deprive them of an automatic right to an exit credit payment.

vi) In assessing any interference and its justification, it is relevant that EMS's proceedings were stayed at an early stage and EMS had not obtained even a first-instance judgment.

vii) EMS cannot rely on the absence of any equivalent to the 2020 Regulations in Scotland for the inference that the regulations have no compelling justification.

viii) In applying the 2020 Regulations to pending cases where exit credits had not been paid but not to those where they had been paid, the Defendant did not create any unlawful "perverse incentive" for administering authorities to withhold payments which were lawfully due, but was instead entitled to have regard to the administrative and litigious consequences of seeking to recover payments which had already been made.

ix) In summary, if Article 6 is engaged and the *Zielinski* principle is applicable, the Secretary of State was pursuing compelling grounds in the public interest, having carefully balanced the respective interests involved. The Secretary of State's policy objective could not have been achieved unless the amendments were made retrospectively.

Was Article 6 engaged?

85. As I have said, the first question raised by Ms Clement is whether EMS had any right to an exit credit, and therefore any civil right whose determination would engage Article 6.

86. Regulation 64(2ZA) and (8) of the LGPS Regulations, as added and amended, by the 2018 Regulations, stated in clear language that the administering authority must pay to an exiting employer the amount required to meet an excess of assets over liabilities in the relevant fund. It is not disputed that an excess existed in the present case. On the face of it, therefore, EMS had a statutory right to a payment before the LGPS Regulations were further amended by the 2020 Regulations, as it asserted in the Chancery claim.

87. However, the Interested Parties pleaded defences to that claim, upon which there has been no judicial determination. In particular, the councils contended that it was an implied term of their contract with EMS (and/or of the EMS admission agreement) that no exit credit should be paid to EMS for its own benefit, i.e. that if payable it should be paid to the councils. That is on the basis that the parties had contracted for all material pension risks to be borne by the councils, and that this should apply to "upside" as well as "downside" risks.

88. The parties to the Chancery claim have disclosed differing legal advice about its merits. EMS has disclosed advice from Elizabeth Ovey of counsel, to the effect that in the absence of the 2020 Regulations the claim was strong and would have had prospects of success of 70-80 per cent. On the other hand, the briefing note mentioned at paragraph 43 above, which was disclosed by the Defendant, records counsel having advised that there was a 60 per cent chance of defeating an exit credit claim on the basis of the implied term argument alone.

89. In my judgment, the *Zielinski* principle is not confined to cases where a court claim is undisputed or indisputable. The ECtHR in that case referred to an offending measure being "designed to influence the judicial determination of a dispute" without such a qualification. The Court of Appeal in *Reilly* commented on those words at [44]:

> "… it is important to appreciate that the core principle on which the court's reasoning is based is that it is—at least prima facie—contrary to the rule of law for the state to interfere in current legal proceedings in order to influence the outcome in a manner favourable to itself. That seems to us self-evidently correct."

90. If the legal proceedings in question were clearly without merit, then it might also be questionable whether the supervening legislation was in fact designed to influence their outcome. In the present case, however, the Chancery claim was

based on a clearly identifiable statutory cause of action and there was at least a serious prospect of it succeeding. The effect of the 2020 Regulations was to make that "outcome" impossible.

91. I therefore do not consider that the Defendant's contentions about the merits of the Chancery claim prevent Article 6 from being engaged.

State aid

92. During the period between the making of the 2018 Regulations and the making of the 2020 Regulations, and when EMS left the LGPS, TFEU Articles 107-109 made it unlawful in the UK to grant state aid which had not been pre-notified to the European Commission and did not fall within any specified exemption (none is said to be relevant). In particular, Article 107(1) provides:

> "Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."

93. Given the size of the exit credits in issue and the cross-border nature of the services market, the potential impact on competition and on inter-state trade is not in dispute.

94. It is also common ground between the Defendant and the councils that in order to "favour" undertakings, the aid must confer a "selective advantage" on the recipient. The issue between them is whether the provision for exit credits in regulation 64 as originally amended by the 2018 Regulations, fitted that description.

95. The nature of selective advantage is discussed in Bacon J's textbook *European Union Law of State Aid* (2017, "Bacon"). Paragraph 2.114 states:

> "Despite the number of cases which have addressed the selectivity condition, it remains the most difficult of the State aid conditions to apply in practice, and the assessment of selectivity has thus been described as 'a difficult exercise with an uncertain outcome'. The basic problem is that not every measure that can be described as producing an advantage for one or more groups of undertakings over others is regarded as selective within the meaning of Article 107(1). Rather, the case-law of the Court has distinguished two particular situations where a measure with differential effects may nevertheless escape classification as aid on the basis of a selectivity analysis: the favoured undertakings may not be comparable, properly speaking, to the non-favoured group; and the different treatment may be justified by the nature and scheme of the relevant system. To address those issues a three stage analysis of selectivity has emerged for complex cases (particularly tax cases). First, the relevant reference system must be identified. Secondly, it must be established whether the measure is prima facie selective, in light of that reference system.

> The third question is whether the measure is justified by the 'nature or scheme' of the system."

96. The choice of "reference system" involves identifying a benchmark applying to the generality of undertakings, against which the provisions alleged to be aid may be measured (ibid 2.116).

97. Mr Giffin argues that the present case does not require the application of this three stage approach. Instead, the payment of £6.5 million to EMS would be a one-off benefit for a single undertaking, of a kind which can be readily recognised as selective.

98. However, Ms Clement responds that the three stage approach is appropriate because the LGPS Regulations contain a "general scheme".

99. In my judgment Ms Clement is right. The LGPS Regulations are potentially applicable to all undertakings and they apply general rules to all participating undertakings.

100. If the three stage approach is adopted, Mr Giffin submits that the reference system in this case should be, simply, "the generality of undertakings". That, he says, reveals that exit credits under the 2018 Regulations amounted to selective aid because they were only available to some LGPS admission bodies and not to the generality of undertakings.

101. That, however, overlooks the need to ask whether undertakings are being favoured by comparison with others that are in a "comparable legal and factual situation" (Bacon 2.115). It seems to me that the choice of a reference system involves identifying the undertakings that are comparable. Otherwise the "relevant reference system" would be the same – the "generality of undertakings" – in every case.

102. As Ms Clement points out, any undertaking could in principle be admitted to the LGPS, and the LGPS Regulations are of general application. However, any undertaking which in fact was not within one of the three categories specified in schedule 2 to the LGPS Regulations would not be in a comparable factual and legal situation to those which were.

103. I therefore agree with Ms Clement that the reference system consisted of entities admitted to the LGPS, and I am not persuaded that it should consist of a wider group such as all undertakings providing environmental services.

104. On that basis I do not consider that regulation 64, as amended by the 2018 Regulations, conferred a selective advantage. All entities admitted to the LGPS were potentially eligible for exit credits or liable to make exit payments, depending on the state of the relevant fund at the point of their exit from the LGPS. The state of the fund at that time (referred to in Mr Giffin's submissions as "a matter of pure chance") was in my judgment comparable to the "random event" referred to by the CJEU in *Commission and Spain v Government of Gibraltar and United Kingdom* [2012] 1 CMLR 44 at [83], ruling that a system of taxation which favoured operators who made either no profit or a very high profit did not confer selective advantages:

> "The advantages alleged by the Commission resulting from measures applicable without distinction to all economic operators, namely the requirement to make a profit, which would benefit unprofitable operators, and those resulting from the capping of tax, which would benefit very profitable operators, do not mean that the tax regime under consideration can be regarded as entailing selective effects. Those effects are not such that they favour "certain undertakings" or "the production of certain goods" within the meaning of art.87(1) EC, but are merely the consequence of the random event that the undertaking in question is unprofitable or very profitable during the period of assessment."

105. For completeness, I should add that if the amended regulation 64 had conferred a selective advantage, I would not have found that it was "justified by the nature or scheme of the system". To meet that condition, a measure must be consistent with the principle of proportionality and therefore not go beyond what is necessary to achieve the objective being pursued (see Bacon paragraph 2.134 and the authorities cited there). The present case arises precisely because regulation 64, as amended by the 2018 Regulations, produced effects going beyond those necessary to achieve its objectives i.e. a balance of benefit and risk and a solution to the "trapped surplus" problem.

106. For these reasons, the state aid argument did not prevent EMS from acquiring rights under Article 6 (or A1P1).

<u>Justification</u>

107. The next question, and the first under the justification heading, is whether the 2020 Regulations were "designed" to interfere with the Chancery claim. It seems to me that this can alternatively be viewed as another aspect of whether the *Zielinski* principle is engaged at all.

108. Ms Clement submits that whilst the Defendant was aware of the Chancery claim, he was not party to that claim, had not seen the pleadings and had no concluded view of its merits. According to the witness statement of Suzanne Clarke, Deputy Director of the Local Government Finance Reform and Pensions division at the Ministry of Housing, Communities and Local Government, the 2020 Regulations were not adopted so as to achieve a particular outcome in any particular case.

109. I agree with the submission of Mr Bowen that the latter point was effectively answered by the Court of Appeal in *Reilly* at [85]:

> "In our view the fact that the 2013 Act was of general application—that is, that it validated the 2011 Regulations and the standard-form regulation 4 notices in the case of all claimants, whether they had appealed or not—does not mean that it was not "designed" to interfere with pending appeals within the meaning of the *Zielinski* principle. The ECHR rejected the identical argument by the Italian Government in *Scordino v Italy* 45 EHRR 7, holding that the fact that the law of 1992 "was not

> aimed specifically at the present dispute, or any other dispute in particular" was immaterial given that it "had the effect of frustrating proceedings then in progress of the type brought by the applicants": see para 130 of its judgment, set out at para 67 above. We do not understand the court necessarily to be saying that the only thing that matters is the effect of the legislation in question, so that an entirely unintended impact is enough to engage article 6.1. But on any view it clearly is saying that it is not necessary that there be any intention to target any particular claimant: there will be a breach of the *Zielinski* principle if the intention—or part of the intention—is to interfere with the outcome of a class of claim generally. The observations of the minority at para O-I4 of their opinion in *Draon v France* 42 EHRR 40 —see para 66 above—are to the same effect."

110. In the present case, it is quite clear that the Defendant made a policy decision that exit credits in cases of this kind should not have to be paid. That included exit credits which were, and were known to be, the subject of litigation such as the Chancery claim by EMS. Therefore, part of the Defendant's intention in introducing the 2020 Regulations was to interfere with (or, to use a less pejorative-sounding word, to determine) the outcome of a class of claim including the Chancery claim. The justification for this measure must be assessed in that light.

111. That conclusion is not altered by the fact that the Defendant was not party to the Chancery claim. The basic formulation of the *Zielinski* principle as quoted above is not based on the premise that the State's legislative measure is designed to ensure its own victory in pending litigation. Rather the objection is to retrospective legislative measures which are specifically designed to influence the outcome of pending litigation. As explained by the Court of Appeal in *Reilly* (see paragraph 67 above), the principle supports not only "the notion of a fair trial and equality of arms" but also "the principle of the rule of law". The rule of law and the right to a fair trial are potentially affected when a party begins litigation in good faith on the basis of the law as it stands, and then a retrospective change to the law is made which determines the litigation against him.

112. As Mr Bowen points out, the ECtHR in *Ducret v France* (Application no 40191/02, 12 September 2007) stated at [33] that its case law on this principle "goes beyond disputes within which the State is a party". There, a retrospective change to financial services law which effectively determined the outcome of litigation between a private financial institution and a private borrower was held to have infringed the borrower's Article 6 rights.

113. It is true that, as Ms Clement ripostes, nearly all of the relevant Strasbourg authorities refer to litigation to which a State was a party and in that sense, *Ducret* could be regarded as an outlier. It is, however, unnecessary for me to decide whether *Ducret* would be followed by this Court in a case on similar facts, because the facts of this case are not similar. The Chancery claim was not a dispute between private parties, but was between a private company (which had been providing public services) and public authorities. Although the Defendant, who made the Regulations, and the councils who benefited from them, were different arms of the State, all were State bodies.

114. I am therefore not persuaded that the identity of the parties defeats the Article 6 claim, though the Defendant's purpose in making the 2020 Regulations remains relevant to the question of justification.

115. I move then to what is perhaps the central issue in the case, namely the public interest reasons for introducing the 2020 Regulations on a retrospective basis so as to defeat claims including the EMS claim.

116. Ms Clement submits that EMS's case illustrates the force of the windfall arguments. From the evidence of Mr Currid, it appears that a total of £4.213 million was paid into the LGPS fund by EMS during the lifetime of the contract (though a sum equal to those contributions was part of the contract price paid by the councils). EMS now claims an exit credit consisting of the entirety of that sum, plus a further c. £2.3 million.

117. Against that, Mr Bowen insists that EMS paid a fair price for the pass-through arrangements because the overall contract price was fixed with regard to all relevant matters including those arrangements.

118. The EMS case is not the only one in which the figures are startling. In Ministerial submissions on this subject on 17 September 2019 and 22 January 2020, reference was made to another case in Greater Manchester where a contractor had made pension contributions of around £7 million over a decade and now stood to benefit from an exit credit estimated at around £12.5 million. I have been told that there are also judicial review proceedings in that case which are presently stayed.

119. Nevertheless, the question of justification depends in my judgment on a wider assessment of the measure in question. The figures in individual cases are part of the wider picture, but only part of it.

120. Cases like *National & Provincial* and *OGIS* show that legislation to correct a technical defect in the law, or to close a loophole, may be permissible even if it effectively determines pending litigation. In some cases where this has been justified, the ECtHR has commented that the party who is deprived of an advantage will, or should, have anticipated the closure of the loophole. Typically such a party may be characterised as having tried to exploit a loophole, or a Governmental weakness. The correcting legislation typically will give effect to the previous manifest intention of the legislature in a case where for some reason that intention was being frustrated.

121. However, as the ECtHR said in *Silverfunghi*, the mere fact of giving effect to the legislature's intention is not enough to justify an interference with pending litigation. The State may take legislative action which is considered reasonably necessary and in the public interest, but something more is needed to justify making it retroactive in a way which will determine pending litigation.

122. So in *Reilly*, the Court of Appeal accepted that the Government was giving effect to Parliament's intention to impose conditions on applicants for JSA, and that applicants may have received an "undeserved benefit". But that benefit was derived from the previous laws on which the applicants were entitled to rely at the time.

Respect for the rule of law precluded retroactive changes which would defeat their claims which were meritorious at the time they were commenced.

123. The cases show that justification ordinarily cannot be derived from purely financial considerations. There must be an important policy reason for making this kind of retroactive provision, and the reason will most readily be found in cases where the legislative intention is clearly being frustrated by some technical defect or loophole. In such a case, the party who benefits from the loophole may be regarded as having a windfall, and can be expected to anticipate that action will be taken to close the loophole.

124. In my judgment, the present case is not on all fours with any of the decided cases which I have been shown. It is not the same as *Silverfunghi*, where the courts had interpreted a disputed point of law adversely to the State and the State intervened to impose its preferred interpretation. Nor is it the same as *Reilly*, in which the State was seeking to enforce threshold requirements against JSA applicants, found that those requirements were not valid and then sought to validate them retrospectively. Nor, on the other hand is it the same as *National & Provincial*, where the State attempted to implement a tax policy by transitional provisions, discovered that those provisions were ineffective because of technical defects and then retrospectively corrected the defects.

125. Instead, this is a case of a policy error. The introduction of an unfettered right to an exit credit consisting of the surplus in the fund, though well intentioned, turned out to be a bad idea. That was not because of any technical defect in the operation of the 2018 Regulations. The Defendant, following a consultation, decided that an employer's potential liability to make an exit payment to cover a deficit should be counterbalanced by the potential to receive an exit credit in the event of a surplus. It failed to anticipate that illogical results would follow.

126. Whilst the parties have especially concentrated on pass-through arrangements as weakening or eliminating the need for exit credits, it seems to me that there was a more general failure to analyse the financial implications of exit credits. Whatever agreement a local authority and an employer may have reached about pension risk, it is startling that the exiting employer can receive back, by way of an exit credit, all of its contributions and more. That outcome is all the more startling if the relevant surplus arises from the market performance of funds which had accumulated before the employer joined the LGPS.

127. Once the lack of logic in the provision of unrestricted exit credits was recognised, there was a strong public interest in remedying the position by enacting the 2020 Regulations, even if that would dash the hopes of employers who were about to exit from the LGPS and receive an exit credit when the 2020 Regulations were brought into effect.

128. The key question is whether there was also a sufficiently compelling public interest in making the 2020 Regulations retroactive, preventing the payment not only of exit credits which were anticipated but also of those which had actually fallen due but had not been paid.

129. The answer is not straightforward, because this is not a simple case of Government encountering, and then removing, an unexpected technical obstacle to a previous legislative intention.

130. Nevertheless, in my judgment the Defendant was justified in correcting its own policy error with retroactive effect, for the following reasons:

i) Although the exit credits did not result from a mere technical error, they can, at least in some cases, be fairly characterised as a windfall. That is for two reasons. First, in a case such as that of EMS, the parties made their economic bargain on the basis of pension risk which they knew about, but without any adjustment for the possibility of exit credits which did not exist at the time. Second, the surplus (in this case far exceeding all contributions by or referable to EMS) would or could arise from the performance of a fund which, though notionally associated with the admission body at the point of admission, did not come from that body in the first place.

ii) The effect of paying exit credits which had fallen due when the 2020 Regulations came into force would be to diminish the ability of the LGPS funds to provide pension benefits, creating a real risk of future deficits which ultimately would fall on local taxpayers. That point in my judgment is not a "purely financial" consideration. I accept the submission made by Mr Giffin QC for the Interested Parties that it concerns the allocation of resources between different parties.

iii) The benefit of the windfall would be for commercial companies. Whilst it must be recognised that the 2020 Regulations made serious inroads into their legal rights, the case is different from *Reilly* where the JSA applicants, who in the judgment of the Court of Appeal were entitled to rely on the law as it previously stood, by their nature were needy people and stood to lose social security benefits as a result of the law change.

iv) Although this is not a case like *National & Provincial* where the societies could and should have assumed that the authorities would correct the tax position, it is nevertheless a case in which the correction could have been anticipated. Retroactive legislation was expressly under consideration at the time when the Chancery claim was commenced. Whilst the prospect of such legislation no doubt did provide an incentive to local authorities to withhold payment, that same prospect diminished the scale of the inroad into EMS's Article 6 rights.

v) The Strasbourg cases make clear that the point reached by any relevant litigation before the interference is a relevant factor. This is not the most weighty factor, but its relevance must weigh against the Claimants. By contrast with cases where claimants obtained first instance and appeal judgments only to be frustrated by a last minute law change, this is a case where the proceedings were stayed at a very early stage.

vi) Although the 2018 Regulations created unambiguous rights to exit credits, it does not follow that the Chancery claim was bound to succeed. I cannot rule on, and am not well placed even to comment on, the merits of the defences, but the councils have raised an arguable contention that, having contracted to share

pension risk, the parties impliedly agreed that they would share any "up side" as well as the "down side". That makes the interference with EMS's Article 6 rights less extreme, though it remains substantial.

vii) The extinction of the Chancery claim does not leave EMS with no rights, but instead with a claim for a discretionary exit credit which should be based on a balancing of circumstances weighing for and against such a payment. That is a more proportionate measure than a simple removal of any claim to an exit credit.

131. I was also not persuaded that the claim is strengthened by the lack of any analogue to the 2020 Regulations in Scotland, where Ms Clement told me that similar concerns have not arisen, there being a significantly lower level of outsourcing of services by local authorities.

132. For these reasons I consider that there were compelling public interest reasons for making the 2020 Regulations retroactive and thereby interfering with EMS's Article 6 rights, and ground 1 therefore fails.

Ground 2

133. EMS and Amey contend that the retrospective removal, by the 2020 Regulations, of EMS's right to an exit credit and of Amey's right to exit credits in respect of contracts which expired before those Regulations came into force on 20 March 2020, is a breach of the Claimants' property rights at common law and under A1P1. The Claimants accept that if they do not succeed under A1P1 then there is no alternative common law ground.

134. Having rejected ground 1, I will take ground 2 more briefly because, as Mr Bowen recognises on the Claimants' behalf, the challenge under A1P1 cannot succeed where the Article 6 challenge has failed. See *Reilly* at [107]:

> "It is inevitable that if a legislative choice is justified on grounds of compelling public interest it will satisfy the less onerous test for A1P1 purposes. But the reverse is not necessarily the case."

<u>The law</u>

135. A1P1 provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

136. Interference with a possession is justified if the measure in question is lawful, is in the public or general interest and is proportionate in the sense of striking a fair balance between the demands of the general interest of the public and of individual rights. Interference with A1P1 rights can be justified more readily than interference with Article 6 rights.

137. At an international level, the ECtHR accords national authorities a "margin of appreciation", respecting the fact that national institutions are often better placed than an international court to decide how to strike a fair balance, because of their closer understanding of conditions in their own country. At the domestic level, the courts also recognise that they are not well placed to question the judgment of Government or Parliament in relation to matters of public expenditure. The courts therefore give appropriate weight and respect to that judgment, and will not interfere with a decision in that area unless the judgment of the executive or legislature is "manifestly without reasonable foundation". See *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21, [2019] 1 WLR 3289 at [65] per Lord Wilson, *R (Drexler) v Leicestershire County Council* [2020] EWCA Civ 520, [2020] ELR 399 at [52] – [75] per Singh LJ and *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2020] EWCA Civ 542 at [127]-[141] per Hickinbottom LJ.

138. There is some elasticity in the application of that test, as was recognised by Hickinbottom LJ in *JCWI* at [140], depending on the extent to which a decision involves economic and/or social policy and on any discriminatory effects which a measure may have.

139. Weightier considerations may be needed to justify the deprivation of a person's property than the mere control of it: *R (Mott) v Environment Agency* [2018] UKSC 10, [2018] 1 WLR 1022.

140. The ECtHR in *Back v Finland* (2005) 40 EHRR 48 said that a "special justification" was required for legislation which retroactively interfered with existing contracts, though in the same breath it observed that in "remedial social legislation" it was permissible to take such measures "in order to attain the aim of the policy adopted".

141. The ECtHR has also said that when the State is correcting a mistake by its own authorities, it is necessary to ensure "that the remedying of old injuries does not create disproportionate new wrongs": *Albergas and Alauskas v Lithuania* (2014, Application 17978/05) at [59].

142. A wider margin may be allowed when a decision is made by Parliament rather than the executive: *JCWI* at [140] per Hickinbottom LJ.

Discussion

143. The Claimants assert that the 2020 Regulations interfered with their property rights. In the case of EMS, the relevant possession is said to be the statutory entitlement to an exit credit of £6,518,000 and the Chancery claim to enforce that entitlement. Amey and EMS also rely on their statutory right to exit credits in those cases where their contracts with the local authorities have expired, but where the credit has not been quantified because the administering authority in each case has

failed or refused to obtain and disclose an actuarial valuation and revised rates and adjustments certificate under regulation 64(2) and then to make payment within 3 months.

144. For present purposes I will assume that the Claimants' claims to exit credits amounted to possessions for the purpose of A1P1, although that question is also contested on the basis that the Claimants' right to the payments was disputed.

145. The Defendant accepts that if the Claimants have a "possession" for the purposes of A1P1, then regulation 1 of the 2020 Regulations amounts to an interference with the peaceful enjoyment of property.

146. The Claimants do not question the lawfulness of the 2020 Regulations insofar as they changed the law prospectively. The Defendant was entitled to substitute a discretionary scheme for what had been a straightforward entitlement to exit credits. The question is whether the retroactive interference with crystallised rights was justified.

147. In my judgment, any such interference was justified for the reasons set out under Ground 1 above. The Defendant's decision, that it was necessary not to make what were seen as undeserved windfall payments, was not manifestly without reasonable foundation.

148. The considerations listed at paragraph 130 above manifestly made the interference proportionate despite its retroactive operation and its effect of depriving the Claimants of their crystallised rights. The aim of avoiding windfall payments and protecting the pension funds was legitimate. Regulation 1 of the 2020 Regulations was rationally connected to that aim, because it prevented the payment of large sums which had fallen due at the point when the 2020 Regulations came into force. The preventing of those specific payments was a significant part of the rationale for introducing the 2020 Regulations.

Grounds 3 and 4

149. Ground 3 arises in practice if Grounds 1 and 2 fail and the Claimants therefore have no absolute right to an exit credit but instead are reliant on an exercise of discretion by the administering authority under regulation 64(2ZAB). It also applies to claims for exit credits arising after the 2020 Regulations were made, the prospective effect of those regulations not being in dispute.

150. By Ground 3, the Claimants seek a declaration that an administering authority, when exercising its discretion under regulation 64(2ZAB):

> "… may take into account the relative share of risk, including the amount of any discount given to a local authority by a contractor in return for passing-through their liability to pay any increase in employer contributions and an exit payment."

151. Ground 4 is an alternative to Ground 3, and is a claim for a declaration that the Claimants' rights under ECHR Article 14 in conjunction with A1P1 would be infringed if regulation 64(2ZAB) were interpreted so as to deprive the Claimants

of any exit credit where they had entered into pass-through arrangements, whereas contractors who had not entered into pass-through arrangements would be treated as eligible to receive exit credits.

152. These grounds are two sides of the same coin, namely the contention that the existence of pass-through arrangements should not be treated as dispositive of a claim for a discretionary exit credit.

153. The point arises because of the existence of documents giving the impression that the existence of pass-through arrangements could be dispositive. In particular:

i) The consultation document referred to at paragraph 29 above stated that in such circumstances it "would be unfair for a service provider to receive an exit credit" and identified an intention "to make changes that would mean that service providers cannot receive the benefit of exit credits in such cases."

ii) The Explanatory Memorandum to the 2020 Regulations states:

> "7.2 It has become apparent that the payment of exit credits in all circumstances may not be appropriate. For example, where a local authority has outsourced services to a service provider it will be a party to the admission agreement between the administering authority and the service provider. However, it is not uncommon for the local authority to enter into a side agreement with the service provider whereby the local authority assumes the pensions risk in exchange for a lower contract price from the service provider. Some such contracts were entered into before exit credits were available under the Regulations. In such cases, a local authority may have explicitly assumed responsibility for any deficit and the resulting exit payment arising at the end of the contract, while the responsibility for any surplus and the resulting exit credit is not similarly explicitly assigned and by default would be paid to the service provider."

iii) Evidence has been adduced of the Funding Strategy Statements of a number of local authorities. These take various approaches to the question and some do not mention it. But some exclude the possibility of paying an exit credit where pass-through arrangements are in place.

154. In pre-action correspondence the Defendant referred to his response to the 2019 consultation, which stated among other things that his intention was to ensure that authorities "will not be obliged to enquire into the precise risk sharing arrangements adopted" and that "it will be for those parties to set out why the arrangements made by them make payment of an exit credit more or less appropriate". He also stated:

> "It is not accepted that the effect of the Amendment Regulations is to prevent any exit credit being paid to an employer that has passed through its pension liabilities to a local authority …".

155. The Defendant's Summary Grounds of Resistance stated that "the 2020 Regulations do not prevent an exit credit from being paid to those who have entered into pass-through arrangements" and "there is no live issue between the parties to this litigation about the correct interpretation of regulation 64 of the LGPS".

156. The Defendant's Detailed Grounds stated that the proposition in ground 3 had never been disputed and that ground 4 was therefore academic, and repeated that there was no "bar on an exiting employer receiving an exit credit simply on the basis that they have entered into a pass-through arrangement".

157. Mr Bowen invites me to conclude that there is an obvious need for the position to be clarified. He refers to the judgment of Lang J, granting permission for all four grounds, who said in relation to grounds 3 and 4:

> "… this issue is not academic and the claimants' concern is justified. The adjudicators, who will have to determine these disputes, are likely to be assisted by the court clarifying the scope of their discretion, when considering contracts with pass-through clauses, in the light of the steer given by the Government's consultation paper and then the Explanatory Memorandum as to the rationale behind the 2020 amendment. I note with concern Mr Currid's evidence about the differences in the interpretation of regulation 64 by the administering authorities in their 'funding strategy statements". However, in my view, it is not appropriate to make a declaration at permission stage and, in any event, I consider that the claimants' proposed declaration may be too narrowly drafted."

158. Ms Clement reiterated that there is no dispute. The words of the amended regulation require the administering authority to have regard to all relevant factors. These will include the nature and extent of pension risk and any premium or discount. She agrees that the explanatory memorandum should not be interpreted as changing the meaning of the regulation, and points out that it does not in fact state that exit credits should not be paid where there are pass-through arrangements. On behalf of the Defendant she expressed ambivalence about whether any clarification should be expressed in a declaration.

159. Mr Giffin also submits that grounds 3 and 4 disclose no real and present dispute. However, he does not support the Claimants' suggested form of declaration. He argues that this would paint a partial picture, obscuring the fact that the regulation requires regard to be had to "any" relevant factors in addition to the relevant factors stipulated at paragraphs (a) to (c) of regulation 64(2ZC) (see paragraph 30 above). The councils' position is that administering authorities may have regard to the fact that the intention of the 2020 Regulations was to prevent unjustified windfall payments, and to consider whether payment of an exit credit would be "consistent with the pricing of the contract". If the contract was "priced on the assumption that there would be no such credit", it would not normally be a lawful exercise of discretion to award one.

160. Both Ms Clement and Mr Giffin submit that Ground 4 does not arise, because the 2020 Regulations, properly understood, do not draw a rigid distinction between cases which do and those which do not involve pass-through arrangements.

161. In my judgment it is appropriate for this Court to give some clarification about the parameters of the discretion to award exit credits. In particular:

i) The essential obligation of the decision maker is to make a rational and fair application of regulation 64(2ZAB) and (2ZC), giving the words their clear meaning.

ii) Paragraph 7.2 of the explanatory memorandum could give the impression that no exit credit can or should be paid in the circumstances described in that paragraph. That impression would be misleading, because the regulation requires a multi-factorial discretion to be applied, having regard to all relevant facts of which the decision maker is made aware. The regulation does not make any single factor conclusive.

iii) Regard may always be had to the fact that, by the legislation as amended by both the 2018 Regulations and the 2020 Regulations, the Defendant provided for the possibility of exit credits.

iv) Regard also may always be had to the fact that, by the legislation as amended by the 2020 Regulations, a multi-factorial discretion was provided to replace, and no doubt was thought to be fairer than, an absolute entitlement.

v) Regard must be had to the relevant factors stipulated at paragraphs (a) to (c) of regulation 64(2ZC).

vi) The regulation does not give primacy to any single factor. The weight given to any relevant factors therefore will always depend on the facts of the individual case.

162. Ground 3 succeeds to that extent. In my view it has never given rise to any substantial dispute between the Claimants and the Defendant.

163. Now that the substance of the Court's guidance is known, I will hear counsel further on the question of whether it should take, or would be more helpful in, the form of a declaration, and if so, on the precise wording of such a declaration.

164. Ground 4 is therefore academic and no ruling on it is needed.

Conclusion

165. The above guidance can be given in response to Ground 3, and may be contained in a declaration if that is considered appropriate after hearing further submissions.

166. Grounds 1, 2 and 4 will be dismissed.