

Neutral Citation Number: [2018] EWHC 3251 (Admin)

Case No: CO/1588/2018

IN THE HIGH COURT OF JUSTICE

**QUEEN’S BENCH DIVISION**

**ADMINISTRATIVE COURT**

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 28/11/2018

**Before** :

LORD JUSTICE HAMBLEN

and

MRS JUSTICE WHIPPLE DBE

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**Between :**

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| --- | --- | --- |
|  | **The Queen**  **(on the application of British Telecommunications PLC)** | Claimant |
|  | **- and -** |  |
|  | **Her Majesty’s Treasury** | Defendant |
|  | **- and -** |  |
|  | **BT Pension Scheme Trustees Limited** | Interested Party |

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**Dinah Rose QC, Fraser Campbell and Celia Rooney** (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Claimant**

**Martin Chamberlain QC and Tim Johnston** (instructed by **Government Legal Department**) for the **Defendant**

**Jonathan Hilliard QC and Iain Steele** (instructed by **Allen & Overy LLP**) for the **Interested Party**

Hearing dates: 7 & 9 November 2018

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Approved Judgment

**Introduction and overview**

1. This is the judgment of the Court.
2. The Claimant (“BT”) applies for judicial review of the decision of Her Majesty’s Treasury (“HMT”) announced on 22 January 2018 (“the Decision”) to implement an extension of the provision of full indexation of the guaranteed minimum pension payable to all members of public service pension schemes (“PSPS”) who reach state pension age (“SPa”) between December 2018 and April 2021. By amendment BT also seeks judicial review of the recent decision of the Chancellor of the Exchequer dated 1 November 2018 maintaining his original agreement with the Decision (“the 1 November 2018 decision”).
3. BT has a private sector pension scheme. Under the terms of Section B of the BT Penson Scheme (“BTPS”) BT says that it is obliged to “mirror” the Decision to extend full indexation for Section B Members. This will cost BT around £120 million, a cost that will not be shared by its competitors as they have no similar contractual mirroring provision.
4. As a private sector pension scheme, the BTPS is in a materially different position from the PSPS that are the target of the Decision and its policy objective. BT alleges that, despite this, HMT has refused to adopt or even properly to consider the alternative means by which it could have achieved its objective, and which could have avoided or alleviated the adverse, arbitrary and discriminatory impact on BT of the Decision and the 1 November 2018 decision, and has thereby acted unlawfully.
5. Specifically, BT contends that the Decision and the 1 November 2018 decision were made on the assumption that all the alternatives put forward by BT would interfere with Section B members’ property rights. This was an error of law as the option of amending the rules of the Principal Civil Service Pension Scheme (“PCSPS”) (“the PCSPS workaround”) would not have done so, but this option was never considered on that basis.

**The Statutory Background**

1. The parties provided an agreed note summarising the relevant statutory background, which is largely as set out below.

*‘Contracting out’ and GMPs*

1. For many decades prior to 6 April 2016, state pensions consisted of two tiers: a basic state pension, and an additional state pension (“AP”) related to earnings. While anyone who paid National Insurance Contributions for a minimum number of years was entitled to the basic state pension, not everyone built up an AP.
2. Under the two-tier system an employer operating an occupational pension scheme could ‘contract out’ of the AP if their occupational pension scheme fulfilled certain requirements. Such contracting out reduced the National Insurance Contributions payable (and was governed originally by the National Insurance Act 1959, and then by Part III of the Social Security Pensions Act 1975 (“SSPA 1975”) and Part III of the Pension Schemes Act 1993 (“PSA 1993”)). One basic rationale of this ‘contracting out’ was that since members of a contracted out occupational pension scheme would receive benefits from their scheme largely equivalent to AP, there was no need for the members and the employer to pay National Insurance contributions so that the members received AP as well. By contracting out the employer and members received a rebate on their National Insurance contributions. In return the State paid a reduced AP once the individual became entitled to state pension payments.
3. From 6 April 1978 to 5 April 1997, an employer could contract out of the AP if their occupational pension scheme provided a minimum level of guaranteed benefits, known as a ‘guaranteed minimum pension’ (“GMP”). Future accrual of GMP was abolished in 1997, but GMP entitlements which accrued before that time have been protected.

*Statutory Increases to GMPs*

1. Between 1978 and 1988 contracted-out pension schemes were not obliged to index their members’ GMP entitlement. The government department responsible for social security calculated how their AP would have been increased each year as if they were not contracted out and then made a deduction – the contracted-out deduction – of an amount basically equivalent to their GMP. The result was that the AP element of their state pension was increased each year by an amount equivalent to the indexation of their GMP. The statutory basis of the contracted out deduction in respect of the schemes which are relevant to this case is s.46 of the PSA 1993, under which each individual’s GMP entitlement is deducted from their AP, once their AP has been indexed.
2. GMP that accrued between 1988 and 1997 was indexed on a different basis, under s.109 of the PSA 1993. That provision imposes obligations on all schemes that formerly participated in contracting-out (whether public service or private sector) in respect of GMP accrued between April 1988 and 1997. It provides as follows:

“**109. – Annual increase of guaranteed minimum pensions.**

(1) The Secretary of State shall in each tax year review the general level of prices in Great Britain for a period of 12 months commencing at the end of the period last reviewed under this section.

(2) Where it appears to the Secretary of State that that level has increased at the end of the period under review, he shall lay before Parliament the draft of an order specifying a percentage by which there is to be an increase of the rate of that part of guaranteed minimum pensions which is attributable to earnings factors for the tax year in the relevant period for–

(a) earners who have attained pensionable age; and

(b) widows, widowers and surviving civil partners.

(3) The percentage shall be –

(a) the percentage by which that level has increased at the end of the relevant period under review; or

(b) by 3 per cent,

whichever is less …”

1. The effect of an order under s.109 (a “s.109 Order”) is therefore, in respect of post-April 1988 GMP, to require schemes to pay GMP increases up to a maximum of 3%.
2. Where the increase in prices was above 3% – say 4% – the GMP would be increased by 3% by the employer under s.109. The State would apply a 4% increase to the AP but then (via the contracted-out deduction mentioned in paragraph 10 above) reduce the AP by the GMP as increased at 3%, so that the State would in effect increase the AP by 1%. The individual would effectively receive full indexation by the combination of these two mechanisms.

*Statutory Increases to Public Service Pensions*

1. The Pensions (Increase) Act 1971 (“PIA 1971”) and the SSPA 1975 (“the Increases Legislation”) provide for the indexation of pensions payable under PSPS, including the PCSPS. The PCSPS is an “official pension” for this purpose (PIA 1971, section 5 and Schedule 2, paragraph 4).
2. “Official pensions” are increased at an annual rate specified in an order made under s.59(1) of the SSPA 1975 (a “s.59 Order”). This mechanism for increasing official pensions as against increases in prices is parasitic upon the mechanism for increasing certain social security benefits, including the AP, as against increases in prices under ss.150 and 151 of the Social Security Administration Act 1992 (the “Administration Act”). Section 150 of the Administration Act requires the Secretary of State annually to determine whether the benefits have retained their value in relation to the general level of prices. The Secretary of State may make a direction under s.151 of the Administration Act that the benefits are to be increased by a specified percentage. Where the Secretary of State has so directed that the benefits are to be increased, s.59(1) SSPA 1975 requires the Treasury to make an order increasing official pensions on the basis of the same specified percentage.
3. Section 59(1) provides for the indexation of pensions that began before or during the previous 12 months (s.59(1)(a) and (b)).  For the purposes of the Increases Legislation, a pension begins after service, often on the day following the last day in service (s.8(2) PIA 1971).  Accordingly, only official pensions that are in payment or are preserved may be increased pursuant to a s.59 Order. An individual pensioner’s GMP entitlement will fall into one or other of these categories.
4. Section 59(1) provides as follows:

“**59. – Increase of official pensions.**

(1) Where by virtue of section 151 of the Administration Act a direction is given that the sums mentioned in section 150(1)(c) of that Act are to be increased by a specified percentage the Minister for the Civil Service shall by order provide that the annual rate of an official pension may, if a qualifying condition is satisfied or the pension is a derivative or substituted pension or a relevant injury pension, be increased in respect of any period beginning on or after the date on which the direction takes effect –

(a) if the pension began before the beginning of the base period for that direction, by the same percentage as that specified in the direction;

(b) if the pension began during the base period, by that percentage multiplied by A / B where A is the number of complete months in the period between the beginning of the pension and the end of the base period and B is the number of complete months in the base period …”

1. Section 59(5) then provides that a s.59 Order shall not apply in respect of the GMP element of an official pension. This is because the GMP element of a contracted-out pension is already effectively indexed via the mechanism outlined above (via the AP and the effect of any s.109 Order). Section 59(5) prevents ‘double indexation’ by reducing the amount of an official pension, to be increased under the s.59 Order, by the amount of any GMP of which it is comprised. Section 59(5) provides as follows:

“**59. – Increase of official pensions.**

…

(5) The increases in the rate of a pension that may be provided for by an order under this section are to be calculated by reference to the basic rate of the pension as authorised to be increased by section 1 of the said Act of 1971 or by any order under section 2 of that Act or this section; but where—

(a) a person is entitled to a guaranteed minimum pension when an order under this section comes into force; and

(b) entitlement to that guaranteed minimum pension arises from an employment from which (either directly or by virtue of the payment of a transfer credit) entitlement to the official pension also arises;

the amount by reference to which any increase authorised by that or any subsequent order is to be calculated shall be reduced by an amount equal to the rate of the guaranteed minimum pension.”

1. There are various situations, however, in which it is not desirable for the GMP to be deducted from the official pension under s.59(5) such as to prevent indexation of GMP under a s.59 Order. Section 59A SSPA 1975 therefore allows for a direction to be made (a “s.59A Direction”)disapplying s.59(5) in specified cases. It provides as follows:

“**59A.— Modification of effect of section 59(5).**

(1) This section applies where the amount by reference to which an increase in an official pension is to be calculated would, but for the provisions of this section, be reduced under section 59(5) of this Act by an amount equal to the rate of a guaranteed minimum pension.

(2) The Minister for the Civil Service may direct that in such cases or classes of case as may be specified in the direction—

(a) no such reduction shall be made; or

(b) the reduction shall be of an amount less than the rate of the guaranteed minimum pension;

and in any case to which such a direction applies the increase shall, in respect of such period or periods as may be specified in the direction, be calculated in accordance with the direction, notwithstanding section 59(5).”

1. The effect of a s.59A Direction is therefore to ‘switch back on’ the indexation of public service pensioners’ GMP entitlement by the pension scheme: a s.59 Order will increase the full amount of an official pension, including the GMP element. However the indexation provided by the scheme as a result of a Direction will be reduced by the amount of any increase made as a result of a s.109 Order: s.59A(2A) SSPA 1975.
2. Sections 59 and 59A SSPA are treated as if they are contained in Part 1 of the PIA 1971: s.59(7) SSPA 1975.

*The abolition of the additional state pension*

1. The Pensions Act 2014 introduced a new single-tier state pension for persons reaching SPa from 6 April 2016 onwards. It abolished the AP for them.
2. As a result, the Pensions Act 2014 also abolished the mechanism by which the GMP entitlement of individuals receiving official pensions was in effect indexed (as described above). On 1 March 2016, the Government announced that it would continue to fully index (or price protect) the GMP of public service pensioners reaching the SPa after 5 April 2016 and before 6 December 2018. It did so by making a s.59A Direction, which applied (among others) to all public service pensioners reaching SPa between those dates.
3. In the Decision the Government announced its intention to make a further s.59A Direction and to add a further category of individuals to whom it would apply, namely: all those public service pensioners who reach SPa between 6 December 2018 and 5 April 2021.
4. BT contends that, as an alternative to making a s.59A Direction, the Government could have secured full indexation of PCSPS pensions by amending the PCSPS itself.

*The PCSPS*

1. The PCSPS was established under s.1(1) of the Superannuation Act 1972 (“SAA 1972”), set out below, and can be amended under s.2(9) thereof.

“**1.-Superannuation schemes as respects civil servants, etc**

(1) The Minister for the Civil Service (in this Act referred to as “the Minister”) –

(a) may make, maintain, and administer schemes (whether contributory or not) whereby provision is made with respect to the pensions, allowances or gratuities which, subject to the fulfilment of such requirements and conditions as may be prescribed by the scheme, are to be paid, or may be paid, by the Minister to or in respect of such of this persons to whom this section applies as he may determine; …

**2.— Further provisions relating to schemes under s. 1.**

…

(9) Any scheme under the said section 1 may amend or revoke any previous scheme made thereunder.

(10) Different schemes may be made under the said section 1 in relation to different classes of persons to whom that section applies, and in this section “the principal civil service pension scheme” means the principal scheme so made relating to persons serving in employment in the civil service of the State.

(11) Before a scheme made under the said section 1, being the principal civil service scheme or a scheme amending or revoking that scheme, comes into operation the Minister shall lay a copy of the scheme before Parliament ….”

**The Factual Background**

*The BTPS*

1. There are three categories of members under the BTPS: Section A members, who joined before December 1971; Section B members, who joined between December 1971 and March 1986; and Section C members, who joined the scheme (or the BT New Pension Scheme, which was merged into the Scheme in 1994) between April 1986 and March 2011. The Rules applicable to each section of members, including in respect of indexation, are different.
2. These proceedings concern BT’s additional liabilities arising out of the Decision in respect of Section B members under the BTPS Rules. Pension increases for the Section B members are governed by Rule 10.2, which provides for increases to mirror those payable under the PCSPS in accordance with the Increases Legislation. It provides as follows:

**“10.2 Pension increases**

Any pension in payment will be increased from time to time in accordance with:

(i) the Pensions (Increase) Act 1971, and

(ii) Sections 59 and 59A of the Social Security Pensions Act 1975,

as if the pension was payable under the Principal Civil Service Pension Scheme 1974 (and any amendment or replacement of that scheme) …”

1. The Section A rules contain a materially identical provision, but in addition contain a rule that their purpose is to provide that Section A members receive the maximum benefits which could be paid “relating to superannuation in the Civil Service”. This means that Section A benefits mirror the benefits, including indexation, payable to civil servants. A similar statement of purpose is not found in the Section B rules.
2. On BT’s understanding, that means that the Section B rules do not mirror the PCSPS in the same way that Section A does. It follows, according to BT, that indexation paid on PCSPS pensions otherwise than pursuant to the Increases Legislation (for example, if indexation is provided for by amended rules of the PCSPS itself) would not have a ‘read across’ impact to Section B members of the BTPS under Rule 10.2 (this is “BT’s Construction”). BT accepts that if indexation was implemented by means of an amendment to the PCSPS, that would read across to Section A members. The parties, including the Interested Party (the Trustee of the BTPS), have agreed that this question of construction should not be resolved in these proceedings, in the absence of participation by BTPS members. At a CMC on 30 July 2018 the Court approved an Order upon the basis of:
   1. BT undertaking that:

“….it does not seek to: (a) challenge the Decision on the grounds that the defendant reached any particular conclusion as to the construction of the terms of Section B of the BT Pension Scheme (“BTPS”) rules; or (b) otherwise ask the Court to find that its construction of Section B of the BTPS rules is the correct one”, and

* 1. each party agreeing that:

“….in their view; (a) it is not necessary for the Court to determine the proper construction of the terms of Section B of the BTPS rules in order to resolve this claim; and (b) given the absence of any party arguing for a construction different from that advanced by the Claimant, it would not be appropriate to do so”; and

* 1. each party undertaking:

“not to argue outside these proceedings that anything the Court may say in relation to the construction of Section B of the BTPS rules is binding on any of them or any other person, including members of the BTPS”.

1. We shall accordingly proceed to resolve the issues raised in these proceedings on the basis of these agreements and undertakings. BT’s Construction therefore remains open to possible subsequent challenge, including by an affected BTPS member.

*The Interim Solution*

1. As set out in the Statutory Background, prior to April 2016, the AP provided ‘top-up’ indexation on the GMP portion of contracted-out pensions. As a result of the introduction of the new state pension (“nSP”), the abolition of the AP meant that without action by the Government certain public sector pensioners would be worse off because of the changes.
2. On 4 September 2015, HMT officials advised the Chief Secretary to the Treasury to introduce an interim solution (“the Interim Solution”), which would provide persons in PSPS reaching SPa between 6 April 2016 and November 2018 with full indexation of the GMP portion of their pension. This would be achieved by using a s.59A Direction to ‘switch back on’ the indexation otherwise ‘switched off’ by s.59(5). This proposal, including the use of the ministerial direction, was approved by the Chief Secretary on 17 September 2015 and reported to relevant departmental ministers in October 2015.
3. Around that time, BT raised its concerns about the potential read across impact on the BTPS. There was initial correspondence in January 2016 and a meeting on 3 February 2016. On 11 February 2016, BT’s Pensions Director, Mr Paul Rogers, wrote to HMT setting out the impact that any ministerial direction would have in respect of the BTPS. The letter proposed alternatives to such a direction, such as the State continuing to meet GMP increases for public sector scheme members outside of the PCSPS framework or introducing a statutory override for private sector schemes. Mr Rogers stated that he welcomed the comment made at the meeting that HMT recognised that the read across impact on BT was “an unintended consequence” and “was open to exploring ways to mitigate this”. He also observed that adopting an alternative mechanism would “be consistent with the Government’s stated intention that private sector schemes will not be required to ‘replace’ the GMP increases that are (effectively) currently provided by the State”.
4. On the same day, HMT presented the Chief Secretary with advice, recommending that ministers adopt the Interim Solution, in the form of a s.59A Direction, and consult on longer term solutions. HMT noted that this approach could be interpreted as the “Government being overly generous to the public sector and imposing cost on the private sector schemes who mirror public sector provision”.
5. On 1 March 2016, the Government announced that it would continue to index the GMP benefits of public sector workers reaching SPa between 5 April 2016 and 6 December 2018 (“the 2016 Announcement”). It was explained that “to manage the transition to the nSP, the Government will continue its practice of fully price protecting” the GMP of public sector workers where the AP “uprating rules do not apply” and that the Government had taken into account “historical commitments made by previous governments”. It was said that the Government expected to launch a consultation on how best to address the implications of changes resulting from the introduction of the nSP, recognising its increased value “and seeking to balance simplicity, fairness and cost for members, public service pension schemes and the taxpayer”.
6. On 8 March 2016, the then Chairman of the BT Group, Sir Michael Rake, wrote to HMT regarding the 2016 Announcement. He explained that, if the 2016 Announcement was implemented by way of a ministerial direction, this would substantially increase BT’s liabilities in respect of the BTPS. He requested HMT to consider making the change not by ministerial direction, but by another way such as a change to the rules of the PCSPS or the State continuing to pay the increases directly. He said that BT had obtained legal advice from a QC that either approach would eliminate the cost impact on the BTPS.
7. On 17 March 2016, the Chief Secretary was provided with a ministerial submission (“the March 2016 Submission***”***) in relation to BT’s proposals. It summarised those proposals as follows:

“i. An alternative legislative approach which would look to carve the Principal Civil Service Pension Scheme (PCSPS) (which BTPS mirrors) out of the Treasury Direction under s.59 of the Social Security Pensions Act 1975 and instead make changes via the PCSPS scheme rules;

ii. An alternative delivery approach which would see these payments be made through the State rather than the public service pension schemes.”

1. It then noted that:

“From a policy perspective, the BT Group are right that the intention of this policy was not to impose a cost on BTPS but rather to deal with an inequality in the public service schemes. However, having considered both of these options we have reservations from a policy and legal perspective.”

1. In relation to the PCSPS workaround it stated that:

“[redacted] the government doesn’t have the legal powers necessary to deliver this option. Further it is possible the government or BT made commitments to these private sector employees at the point of privatisation. It is not clear the Government should deliberately craft the relevant legal instruments to deprive the affected members of the BT Pension Scheme (and possible other private sector ‘mirror’ schemes) of the rights they would otherwise have been entitled to. [redacted] Finally, while we expect most other ‘mirror’ schemes to mimic the PCSPS, it is possible a solution which works for BT, might not work for other ‘mirror’ schemes, including because they mirror a different public service pension scheme.”

1. On 21 March 2016 there was a meeting between HMT and BT. Following the meeting HMT sent an email to Mr Rogers explaining in detail why HMT considered that the option of amending PCSPS rules was not feasible, the conclusion being that “under current primary legislation, there is no power to amend the PCSPS scheme rules so that indexation is payable under those rules, rather than under the PIA 71/SSPA 75”. Mr Rogers replied by email the following day stating that, having considered it further with their solicitors, Freshfields Bruckhaus Deringer LLP (“Freshfields”), they remained of the view that the PCSPS option was “feasible from a legal perspective” and setting out reasons for that view. On 23 March 2016, Mr Rogers sent a further email stating that “in view of the different legal opinions, we are willing for you to take an independent QC opinion on this matter and we will pay for the cost”. This offer was not taken up.
2. On 24 March 2016, the Chief Secretary and the Minister for Pensions replied to Sir Michael Rake’s letter of 8 March 2016. It referred to the meeting which had taken place and observed that:

“Specifically, Treasury officials set out the reasons we are of the view that the proposals from your letter cannot be taken forward, and officials have shared the detailed legal analysis with your colleagues to allow them to consider. However, it was also agreed that further work must be done to look at ways for the government to support schemes like BT, where they decide to no longer follow the indexation provisions of the public service pension schemes. We have asked both Treasury and Department for Work and Pensions officials to continue discussions with your colleagues and to keep us informed of progress. And though the finer details have still to be worked through, we believe one option would be for this to form part of the government’s consultation on the long-term solution to GMP indexation and equalisation for public servants.”

1. The 2016 Announcement was given effect on 6 April 2016 by way of a ministerial direction under s.59A, which disapplied s.59(5) in respect of pensioners reaching SPa between 6 April 2016 and 5 December 2018 (“the 2016 Direction”). Given the terms of BTPS Section B Rule 10.2, it is said that the effect of the 2016 Direction was to increase BT’s liabilities by around £200 million. No challenge was made to the 2016 Announcement or Direction.

*The Consultation*

1. On 28 November 2016, HMT published its consultation (“the Consultation”), inviting responses on the question of whether “public service pension schemes should pay full indexation on GMP earned while a member of a PSPS, for someone who reaches SPa after 5 December 2018”. The three specific options being considered and upon which HMT sought responses were:
   1. The Full Indexation Option - this would provide GMP indexation to pensioners in PSPS reaching the SPa on or after 6 December 2018, likely by way of an extension of the 2016 Direction. The Consultation recognised that the adoption of this option would “mean that a large number of individuals would be compensated when they were already better off as a result of the new State Pension” and stated that its long term cost would be around £5 billion.
   2. The Case-by-Case Option - under this proposal, HMT would consider the need for ‘top-up’ indexation for public sector pensioners on a case by case basis, by assessing whether a pensioner had in fact suffered any loss as a result of the abolition of the AP. The Consultation noted that, while this option would not provide full indexation to all members, a pensioner in a PSPS would be “compensated for the value of the loss of indexation” where he or she had “lost financially” as a result of the introduction of the nSP. It was estimated to cost around £1.5 billion.
   3. The Conversion Option - if adopted, this would convert the GMP elements of a public sector pension into ordinary scheme benefits. There would therefore be no need to provide for indexation through a ministerial direction. It was estimated to cost around £5 billion.
2. In addition, it was made clear that the Government would be interested in views on solutions other than the three identified options.
3. In a section dealing with the impact on the wider public sector and the private sector it was stated as follows:

“The government recognises that, for some private sector organisations and wider public sector organisations, the way any of these policy options are implemented is relevant in determining whether it would impact on their pension scheme. We are keen to hear from such organisations and representatives of their scheme members and pension fund trustees. We wish to understand: how their rules align to those of the public service pension schemes; whether the government should take action to avoid a read across, and if so what specific actions they feel the government could take to avoid direct implications for their pension schemes, including which policy options would be expected to directly require changes to such schemes.

Question 12

How could the delivery of any of the policies in the consultation impact wider public sector or private sector schemes who are not ‘official pensions’ under the PIA 1971?

Question 13

If wider public sector or private schemes who are not ‘official pensions’ are impacted by any policy set out in the consultation, why were the pensions designed to mirror official pensions originally?

Question 14

Should the government take action to avoid any read across between private sector schemes and any policy announced?

Question 15

Are there actions the government could take to restrict the impact on wider public sector or private sector pension schemes who are not ‘official pensions’ under the PIA?

Question 16

Why should government allow for members of schemes whose rules mimic/mirror those in the public services, to be deprived of the benefit of those rules?”

*BT’s Consultation Submission*

1. BT responded to the Consultation on 20 February 2017. Its Consultation Submission explained that the extension of the Interim Solution would further substantially increase its liabilities in respect of the BTPS, and that such an “unintended and arbitrary outcome would be profoundly unfair” in circumstances where “private sector schemes were not intended to bear such increased liabilities and, indeed, most other private sector schemes [would] not be affected”.
2. BT’s Consultation Submission noted that, while it was a matter for the Government to decide whether to honour perceived commitments made by its predecessors to public sector pensioners, “BT has made no commitment that [BTPS] members will always receive full indexation on their pension rights and, moreover, the [BTPS] Rules do not provide members with any such right”. It went on to note that, in circumstances where the BTPS had already suffered an unanticipated increase in liabilities as a result of the 2016 Direction, implementation of the Full Indexation Option by way of ministerial direction should not be preferred to a number of alternative options.
3. In the Summary it was stated that there were steps which the Government could take to avoid the “unintended consequences” for BT – “see paragraph 1.11 below”.
4. Paragraph 1.11 was in the following terms:

“1.11 In order to prevent substantial, unnecessary and unjustified costs arising in respect of private sector employers, we request that HMT makes certain adjustments to its proposals:

(a) introducing into legislation a unilateral employer statutory modification power, which is subject to an employer consultation requirement, to address additional GMP increases (a “Statutory Override”) (see paragraphs 3.2(c)-(d) below, and either

(b) implementing full indexation (or the case by case option) through:

(i) an Act of Parliament other than the Increases Legislation (as defined in paragraph 2.8 below); or

(ii) an amendment to the rules of, specifically, the Principal Civil Service Pension Scheme (“PCSPS”) (see paragraph 3.2(b) below); or

(c) converting GMPs into ‘normal’ scheme pension and revoking the ministerial direction which has been used to implement a full indexation requirement (see paragraph 3.3 below).”

1. In relation to the Full Indexation Option it was stated at paragraph 3.2 as follows:

“(b) …. if continued full indexation was implemented through an Act of Parliament other than the Increases Legislation, our view is that the Section B pensions increase rule would not be triggered. For example, if continued full indexation was required under a new statutory regime via a new Pensions Act, or by regulations or order under existing primary legislation other than the PIA71 or SSPA75 (e.g. the Pensions Act 2014), there should be no consequential, unintended additional funding impact on Section B of the BTPS. In a similar vein, implementing continued full indexation through a PCSPS rule amendment, rather than via legislation, would also avoid the unintended Section B impact.

(c) That said, the legal analysis is likely to be complex and there could be differing views on how the Section B pension increase rule should be interpreted (with the potential need for clarificatory Court proceedings). This approach may also not ‘work’ for other affected private sector schemes, depending on their scheme rules. Given this legal uncertainty, we would urge Government to also introduce into legislation a Statutory Override.

(d) The Statutory Override would enable affected private sector employers to make amendments to pension scheme rules unilaterally to remove any additional GMP increases payable as a result of the abolition of defined benefit contracting-out. It would override certain restrictions contained in section 67 of the Pensions Act 1995 (“**Section 67**”) and the Rules themselves….

We enclose as an Annex advice received from Freshfields (which we have shared previously with HMT and DWP) setting out the clear public interest basis for introducing such a Statutory Override. Included as Appendix 1 to the Annex is a ‘high level’ public interest justification for the Statutory Override….”

1. BT’s Consultation Submission also explained that adoption of either the Case-by-Case or Conversion Options, whether for all PSPS, or in respect of the PCSPS only, could avoid or at least substantially alleviate the cost impact of the Decision on BT.
2. The Annex referred to at paragraph 3.2(d) was attached to the Consultation Response and was dated 30 June 2016 (the “Freshfields Advice”). In it, Freshfields stated that:

“1.1 We have been asked to advise [BT] in relation to the introduction of a statutory power to modify the rules of affected private sector schemes such as the [BTPS] to change the requirements to provide increases on guaranteed minimum pensions. Such a modification power would override certain restrictions contained in section 67 of the Pensions Act 1995 …”.

1. Freshfields advised that pension benefits protected by section 67 would amount to a property right protected by Article 1 of Protocol 1 ECHR (“A1P1”) (paragraph 1.2) and that “in order to ‘decouple’ the BTPS from the practices of the PCSPS in relation to the payment of increases on GMPs, it would be necessary to amend the relevant increases rules of the BTPS” (paragraph 3.1) in relation to which it was thought necessary to introduce a statutory modification power (paragraph 4.1). The Freshfields Advice identified arguments in favour of such a power.

*HMT’s decision making*

1. In a submission to the Chief Secretary dated 13 October 2017 it was recommended that it be agreed in principle to respond to the Consultation by extending the Interim Solution for a further two years and use the intervening time to investigate HMT’s preferred option of Conversion in more detail (“the October Submission”). In a summary paragraph, the October submission referred to the nSP and the Consultation. The Chief Secretary was invited to give a “preliminary steer (subject to separate advice on private sector impacts) to extend the current solution for two years. However, we recommend you agree to consider an alternative solution during this period (known as ‘conversion’) which we believe is a better long-term solution”.
2. The Analysis section of the October Submission provided as follows:

“7. We do not believe case-by-case is a deliverable option. Current systems are unable to separate nSP entitlement (earned through NICS contributions) gained from either public service or other employment. It would require schemes to hold data on GMP, public service pension and old/new State Pension and run a shadow system over 40-50 years. This would add major burdens to public service schemes (and departments), increase the risk of incorrect administration and require major investment now in HMRC/DWP State Pension/NICS systems. In addition, this solution would not be future-proof if nSP changed in future.

8. We believe there are significant operational and legal reasons why we should extend the interim solution for now:

* Schemes are undertaking a GMP data reconciliation exercise (linking HMRC NICS data with scheme data), which will not complete until December 2018. Allowing more time would give us greater confidence in underlying data.
* The implications of the *Walker v Innospec* Supreme Court judgement for public service schemes are not yet clear. Mr Walker had a GMP entitlement, and the court’s judgment may extend to others with similar entitlement. This judgment enforces survivor pension rights for same-sex couples in the Innospec private pension scheme. Without a full understanding of these implications it would not be advisable to add further complexity at a moment of legal uncertainty. In addition, there is a pending legal challenge concerning Lloyds Bank’s approach to GMP equalisation, which could have unknown read across for public service schemes.

9. We believe that conversion is the preferred solution in the longer-term, although this cannot be implemented now:

* Conversion would require, at a minimum, amending the Pension Schemes Act 1993 and the Social Security Pensions Act 1975, through an affirmative consequential order made under the Pensions Act 2014. Finding Parliamentary time would be challenging where a non-legislative vehicle, the Treasury direction, is available to deal with the problem in the short term.
* GMP legislation is known to be complex to administer and there have been instances where large amounts of money has been overpaid in public service schemes. This included a total of £125m discovered in 2008 made over several years, and est. total of £50m up to 2017 (see submission 24 July 2017). Conversion could simplify this system if implemented correctly, removing requirements for public service schemes to follow burdensome GMP uprating legislation and the need for schemes to hold GMP data beyond a certain point. Public service schemes believe this solution is deliverable, based on data and systems available, although some work will be required in order to develop systems to deliver the conversion process. If implemented well, it could also be more transparent for scheme members.

10. **Government’s obligation to index/equalise is met by the current solution, but we believe conversion would be a better long-term solution. Do you agree to extend the current solution for two years and to commit to exploring conversion during this period?**

11. Implementing conversion will need to be accompanied by a defensible methodology developed with the Government Actuary’s Department, suitable legislation and a full legal analysis.

12. The AME costs of extending the interim solution would be a few £million over the SR period, and a total cost of up to a few hundred £million, spread over the next 40-50 years (covering future indexation/equalisation of pension entitlements of those reaching SPa for two years beyond December 2018). This would be a small proportion of the total £5bn liability of extending the current solution permanently or conversion, and these costs are unavoidable in order to meet legal obligations. Estimations of cost per year are limited by data quality.”

1. Private sector impacts were then considered and in relation to BT it was stated that:

“15. BT has estimated that either conversion or full extension of the current solution would add an additional £c600m to their total scheme liabilities, a figure that we question. To prevent this cost to scheme, BT has requested that we consider a statutory override of scheme rules, an Act of Parliament or an amendment to Civil Service Pension Scheme rules (which BT mirror). BT has stated it believes “case-by-case” would be a more appropriate methodology on the grounds of reduced cost, although we do not believe this is a deliverable methodology.

16. Treasury Legal Advisers have indicated that there is a risk of judicial review from BT of our consultation response. Our initial view is that at privatisation in 1984 it was the policy intent that the rights of BT employees to future pension benefit indexation be protected, regardless of any future changes in the pension system.

17. We are seeking your preliminary and in principle agreement that we should develop our consultation response on the basis of extending the interim solution, with a commitment to look at conversion as a long-term solution. In order to meet our legal obligation to fully consider all responses to the consultation a final decision will only be made once all the issues raised by consultees have been fully considered. We will provide further advice on potential private sector impacts.”

1. The October Submission was attached to an email which highlighted various points including the following:

“A few points worth bringing out for you:

* We are seeking a preliminary policy steer on our consultation response (with further advice on private sector impacts, see below). For reasons outlined, we wish to extend the current solution by two years with a review of a more suitable long-term option during this period.
* This is a decision falling out of the introduction of new State Pension in 2016, namely how we continue to index (price protect) and equalise (pay equal payments to men and women) the pensions of a certain cohort of public servants. The previous system in place between 1978 and 1997 (with the mechanism remaining in place until 2016) did this for us. We have clear legal obligations to continue to do index/equalise, following counsel advice. This is a cross-public sector policy, with all public service schemes impacted.
* We consulted on three options. Two of the three have the same cost in term of additional liabilities (£5bn, around 0.5% of the value of public service pension liabilities). One option has a headline cost of £1.5bn of additional liability – however – this does not include the additional operational costs to DEL of this solution, and we now consider it to be unworkable and not deliverable.
* This decision will have private sector impacts, for workforces in ex-nationalised industries such as BT. We will provide the CST with separate advice on this – legal advice has indicated this is a contentious issue with a chance of challenge.”

1. By an email dated 27 October 2017, officials confirmed that the Chief Secretary agreed with the recommendation in the October Submission.
2. In a further Submission to the Chief Secretary dated 23 November 2017 (“the November Submission”) it was recommended that there be confirmation of the intention to extend the Interim Solution for a further two years and that it be agreed “not to legislate to change the rules of some affected private sector schemes (by removing or enabling the removal of their obligations to index pensions in accordance with the legislation governing public service schemes)”.
3. The summary paragraph of the November Submission referred to the Consultation, to the Chief Secretary’s preliminary agreement to extend the Interim Solution for another two years while the longer-term approach was reviewed, and that “British Telecom, one of the two largest private sector schemes impacted by this decision, has asked that we consider a legislative carve-out for their scheme. We recommend against exempting BT or any other scheme.”
4. The November Submission provided the background leading to the extension of the Interim Solution. It stated that there were some private sector funded schemes which mirrored public service schemes and that under the Interim Solution the full cost of GMP indexation now also fell on those private sector schemes. The November Submission as originally disclosed was subject to various redactions on grounds of legal professional privilege which were removed shortly before the hearing. In a section headed “Impact on British Telecom” it was stated that (the previously redacted sections are in italics):

**“Impact on British Telecom:**

9. However, the BT defined benefit Pension Scheme (BTPS) also faces considerable extra cost, if we proceed. BT was privatised in 1984 and two sections of the BTPS (A & B, covering employees up to 1986) mirror the indexation requirements of the Civil Service Pension Scheme. BT has asked us to legislate to exclude section B members (employed at privatisation) from the obligation in BTPS rules to index pensions in accordance with the legislation governing public service schemes so that extending the interim solution does not impose additional costs upon them.

10. BT argue the current “interim solution” has already added c£250m to scheme liabilities, and extending this policy to cover all those reaching SPa in future would add around a further £500m (just under 1% of the scheme’s total liabilities). Government Actuary’s Department think that the cost of extending the current “interim” approach forward for two years might represent c£150m of that £500m (a proportion of the overall extra liability quoted by BT).

11. GAD has said that assumptions and data provided by BT (subject to future market conditions), appear reasonable. The decision to extend the current policy forward a further two years will mean that BT will have to fund fully indexed GMP benefits for its scheme members who reach SPa by the end of 2020.

12. BT have suggested a number of solutions for this: (i) a new Act; (ii) amending the 1974 civil service scheme; or (iii) providing a statutory override*.* *TLA advise that in each case there would need to be a policy justification for preferring the interests of BT to the interests of the scheme members.* The scheme rules have the result that members are entitled to benefit from an HMT direction in the same way as members of the 1974 civil service scheme *and there would need to be a legally defensible justification for interfering with BT scheme members’ property rights. There are significant legal issues with the first option BT have put forward:*

* *Section B members of the BTPS have an “Article 1 Protocol 1” property right under the European Convention of Human Rights to pension increases under the Pensions (Increase) Act 1971 and the Social Security Pensions Act 1975 as if the pension was payable under the 1974 civil service pension scheme. Any interference with these rights requires a legitimate aim and proportionate means of furthering that aim*. BT suggest a legitimate aim would be to prevent an increase in the scheme’s deficit and the resulting risk it is placed into the Pension Protection Fund (a lifeboat for failed pension schemes). However, DWP believe this risk is low. Extending the “interim” would appear to add just under 1% to the BTPS’s total liabilities.
* BT also consider the decision to end contracting-out and fully index public servants’ GMPs, moving the cost of indexation to their scheme, to be “unforeseen and arbitrary”, creating a “new, unexpected and proprietary right for a narrow group of individuals”. *However, the mere fact that a property right generates an unexpected ‘windfall’ for members, one that imposes corresponding costs on the scheme, would not justify preferring BT’s interests to members’.*
* BT has also argued that there is precedent in government policy for this, as in the Pensions Act 2014 when DWP gave employers the power to amend schemes to take into account the additional costs imposed on them by the ending of contracting-out. *However, that power only enables schemes to adjust future accruals, not past ones, whereas in this case what is at issue is an accrued A1P1 right to indexation on accrued benefits.*

*13. TLA advise that it may be possible to devise a mechanism to avoid impacting on schemes such as BT e.g. if the Secretary of State agreed to make negative resolution regulations under s.67 of the Pensions Act 1995. However, that would require identifying a legally defensible justification for the interference in property rights, a justification which we would test with Counsel in the light of the difficulties outlined above. There is however no guarantee that we could develop a defensible justification.*

14. In addition, there would be practical and presentational issues in carving BT out from their obligations:

* BT’s suggestion of an Act would require Parliamentary time to legislate, in a challenging Parliamentary context. This would be required by March 2018. We are unsure how many other schemes mirror public service indexation. We might well receive similar claims from some other affected schemes, but others might object to such measures.
* Since 2015, Treasury “New Fair Deal” policy ensures that members of public service schemes transferred compulsorily to the private sector retain their pension rights (and a similar policy was in place previously). A decision to carve BT out would seem to contradict this policy. If we decided to do so, the Government could be seen as acting to remove BTPS obligations to index pension benefits in the same way as under the 1974 civil service scheme BT have requested this. Government could also to be seen to be acting against members’ financial interests. It would be asked why it was preferring the interests of BT to those of BTPS members.

*15. Legal risk is high. A judicial review brought by members or trade unions is likely and, unless we were able to develop a defensible justification for interfering in property rights, there is a high risk of the judicial review being successful.”*

1. The questions posed for the Chief Secretary at the end of the November Submission were:

18. Do you (i) agree that we should extend the Government’s “interim” GMP equalisation and indexation policy forward to cover those reaching their SPas until 4 April 2021, to meet legal obligations to public service pensions? Do you (ii) also agree to rejecting BT’s request for the Government to legislate to remove or enable the removal of their obligations under the BTPS rules? If not agreeing (ii) [sic], should we work further with DWP on the possibility and implications of a carve out for BT and seek Counsel’s opinion?”

1. The November Submission was attached to an email which explained as follows:

“I attach:

* A final submission advising on private sector impacts of this decision, focused on BT’s consultation response and their request for a carve-out.
* A write-round letter summarising our position.
* A draft consultation response (for reference). We will be clearing this with TLA – but the substantial nature of what we’re intending to say in our response won’t change.
* Our exchange in October when CST agreed her preliminary steer.

This is a decision relating to a previous consultation between November 2016 and February 2017. We consulted on how to meet our obligations to continue to index and equalise (make equal payments) to male and female public servants.

* The consultation response only attracted a small number of submissions (68). In the big picture this is a minor announcement concerned with a methodology to meet our obligations which continue into the future. This falls out of the new State Pension introduction in 2016.
* We previously sought CST’s steer that we would extend the current solution beyond 6 December 2018 for a further two years (we are seeking a decision now in order to ensure schemes can implement in time). We recommend that the current solution continues until April 2021 (for administrative simplicity – linked to when pension indexation increases are applied). During this time we will investigate (develop methodology and potentially look to legislate if possible) a longer-term solution known as conversion – which could lessen the burdens on departments.
* Last time we advised (in October), CST was content for us to proceed on this basis – subject to this further advice on private sector impacts. BT, in particular, have asked for us to legislate for a carve-out of their obligation to follow public service pension index rules (in their scheme rules). We recommend against doing so – the bar for removing indexation rights from BT members would be very high.
* BT have written again (on 21 November), which should arrive shortly with your office. We have seen a copy already but will provide you with a draft shortly.”

1. The draft Consultation Response which accompanied the November Submission contained the following passage at paragraph 3.6, under the heading “Private sector impacts”:

“As indicated, there were some requests that the government consider introducing legislation or altering scheme rules in order to allow such private sector schemes to deviate from obligations to follow such indexation requirements. However, the government does not believe that it is appropriate to legislate or to alter scheme rules to allow this to happen and this would not, in any event, be a matter for legislation on the indexation of public service pensions.”

1. In an email of 27 November 2017 from the Chief Secretary’s private office, the Chief Secretary agreed to the recommendations made and specifically “not to legislate to change the rules of some affected private sector schemes (by removing or enabling the removal of their obligations to index pensions in accordance with the legislation governing public service schemes)”.
2. The Chief Secretary then sought clearance from the Chancellor of the Exchequer. The Chancellor’s private office requested a short summary of the decision taken by the Chief Secretary and an email summary was provided on 8 December 2017 (“the 8 December email”) in the following terms (with previous redactions in italics):

**“BT/PUBLIC SERVICE PENSIONS CONSULTATION**

* You received advice on this, and asked a Junior minister to look into the detail. The CST has been considering.
* In order to ensure we continue to meet our legal obligations to index (price protect) and equalise (make equal payments to men and women) public service pensions, we need to issue a response to the Treasury “GMP equalisation and indexation consultation”.
* We propose that the CST extends the current, interim solution from 6 December 2018 until 4 April 2021 while we investigate longer-term solutions.
* This will also apply to a section of BT’s scheme (from before when BT was privatised). BT asked for a legislative carve-out, arguing that this will impose an additional £500m of cost (equivalent to around 1% of scheme liabilities). BT are linking this additional cost to their ability to continue to invest in digital infrastructure.
* We recommend against providing an exemption: we would be criticised for reducing former public sector workers pension rights *and the legal bar for interfering in accrued rights is high. Were we to agree an exemption for BT, legal advice is that the risk of challenge is high and the chances of successfully defending such a challenge are low*. **CST agrees.**
* Are you content with this approach?”

1. On 12 December 2017 the Chancellor’s private office indicated that he was content with the approach set out.
2. By a letter dated 14 December 2017, copied to the Prime Minister, Sir Jeremy Heywood (the Cabinet Secretary) and the Secretary of State for Health, the Chief Secretary sought clearance from the Economic Affairs Committee to publish the Government’s response to the Consultation. That clearance was given by letter dated 19 January 2018, sent by the Economic and Domestic Affairs Secretariat to the Chief Secretary’s private secretary.

*The Decision*

1. In the Consultation Response (published in January 2018), HMT announced its Decision to extend the Interim Solution to cover persons in PSPS reaching SPa between 6 December 2018 and 5 April 2021. It stated in the Executive Summary that the outcome of the Consultation was that the Interim Solution would be extended for a further two years and four months and that during this period “the government will investigate the possibility of an alternative long-term methodology, known as ‘conversion’”.
2. The Consultation Response summarised the responses received to the Consultation in Chapter 3. So far as BT’s Consultation Submission was concerned, the Consultation Response said this:

“3.19 The other consultee [BT] requested that the government should craft its response in such a way as to avoid the read across from public service schemes to their private sector scheme. However, the government believes that it would not be appropriate to act in a way that would deprive members of indexation, to which they would otherwise be entitled. Acting to do so would also raise legal questions, including whether there was a legitimate aim to justify such an interference in the property rights of scheme members. In addition, some of the mechanisms suggested by [BT] to avoid [the read across from public service schemes to BT’s private sector scheme] are outside the scope of the government’s statutory powers.”

1. The Government then gave its response in Chapter 4. The Government’s response in relation to the three options considered in the Consultation and its conclusion was as follows:

“*Case-by-case approach*

4.1 Based on the detailed responses received in this consultation, the government does not believe that a case-by-case solution should be implemented. Although, if deliverable, the additional liability to public service schemes is less than the cost of full indexation or conversion it would be both challenging and costly to implement and administer. In addition, the government does not believe this could be shown to precisely deliver obligations to index public service pensions.

4.2 Case-by-case would be a very complex solution for schemes to implement, and differs significantly from the interim solution currently in place. Running a case-by-case solution would require ongoing work, for many years, in order to calculate whether a member would be better off under the old or new system.

4.3 New systems would be needed to make annual comparisons between actual and notional benefits and to deliver data on National Insurance contributions. These systems would need to take account of public service employment, state pension entitlements and public service pensions (including GMPs) related to that employment. Such a system would need to account for and separate out data on rights earned while in employment covered by public service schemes, other employments, through National Insurance credits (from periods of unemployment) and through voluntary National Insurance contributions. This would involve fundamental changes to HMRC and DWP systems, as well as public service schemes’ rules and systems. The systems required to run this solution do not currently exist, and could not be easily designed.

4.4 The government will therefore not implement a case-by-case solution to resolve the issue of GMP indexation and equalisation. This solution would increase public service pension liabilities by less than alternative solutions, but does not meet the policy tests set out in the original consultation. Importantly, implementing a case-by-case solution would not make the system more transparent and easier to understand for members or adequately honour the commitment to fully index public service pensions.

*Full indexation*

4.5 Full indexation, or extending the current interim solution permanently, meets the key policy tests set out in the government’s consultation. These tests are primarily ensuring that members are at least as well off as before introduction of the new State Pension and that pension payments made to men and women continue to be equal.

4.6 This policy, along with conversion, was generally favoured in responses to the consultation as a way to meet the government’s obligations to index and equalise public service pensions.

4.7 However, despite meeting these tests, full indexation was noted in the consultation as a more burdensome way of meeting the government’s obligations. Scheme administrators and pensions advisers pointed out that full indexation would leave in place current GMP legislation and underpins which are complex to administer.

*Conversion*

4.8 The option to convert guaranteed minimum pension benefit into normal scheme benefit was strongly supported.

4.9 In the original consultation, Government Actuary’s Department provided estimates that the increase in schemes’ liabilities of conversion would be broadly equivalent to that of full indexation. Both conversion and full indexation meet the test of ensuring that members and their survivors are at least as well off as they would have been, had the new State Pension not been introduced.

4.10 Conversion may be less burdensome administratively in the long-term than the full indexation (extending the current interim solution permanently). If implemented correctly, it should make the system more transparent and make it easier for members to see how their benefits have been derived.

4.11 Accurate reconciled data would be required in order to start the process of converting GMP. Public service schemes are currently reconciling GMP data with HMRC, to ensure members are able to receive accurate GMP payments. This exercise is due to complete in December 2018, and improved scheme data will help in determining longer-term policy.

4.12 To implement conversion properly would require an agreed methodology. A longer-term decision to convert would also need to be underpinned by suitable legislation.

4.13 The government remains prepared to consider conversion as an option in future, at a time where there is a legally and practically robust conversion methodology and when this can be underpinned by appropriate legislation. The government intends to continue to review this position, following the reconciliation exercise, and will investigate further whether conversion best meets the tests set out in the government’s original consultation.

Conclusion

4.15 In this response, the government is discounting the case-by-case method in future, for the reasons outlined above. The government believes that conversion may best meet the policy tests set out in the original consultation, but that methodology and legislative issues need further consideration.

4.16 The current interim solution is in place for members who reach SPa on or before 5 December 2018, and meets the obligations of government to index and equalise public service pensions.

4.17 **The government is announcing the extension of the current interim solution so that it applies to those who reach SPa on or before 5 April 2021. Members of public service pension schemes with guaranteed minimum pension entitlements, who reach SPa on or after 6 December 2019 and before 6 April 2021 will be covered by this extension of the interim solution.** The end date of 5 April 2021 is the day before annual guaranteed minimum pension increase orders are applied.

4.18 The additional liability created by this further extension of the current policy solution will be a proportion of the estimated cost of full indexation.

4.19 During this period, the government will review the possibility of implementing conversion as a longer-term solution. It will continue to consult with departments and schemes to decide whether a suitable methodology and legislation can be brought forward to enable conversion to take place in the future. The government will also continue to take account of alternative solutions that may also address this issue.”

1. On 31 January 2018, BT emailed HMT seeking further explanation of the reasons for its conclusion that it should not adopt BT’s request. In its reply, by letter dated 14 February 2018, HMT stated that:

“In considering its response to this consultation the government has sought to balance the interests of scheme members, public service schemes and departments, those private sector schemes affected by this policy as well as the taxpayer.

…

We believe that removing the existing obligation of the BT Pension Scheme to index in line with the Principal Civil Service Pension Scheme 1974 would be to act against the interests of members. As you have recognised, these members have a property right to indexation. The bar for removing these rights is high.

You put forward several proposals as to how government could deliver its policy objectives to equalise and index the public service GMP but avoid the impact on the BT Pension Scheme… All such proposals would involve the government acting against members interests, and as the consultation response says the government believes that it would not be appropriate to act in a way that would deprive members of indexation to which they would otherwise be entitled.

There would in addition be legal issues as to whether the high legal bar to removing property rights was met. Our view is that there would be a significant risk of a legal challenge being brought were the government to craft a policy which interfered with members’ rights*. …”*

1. On 14 March 2018, BT sent its pre-action protocol letter to HMT setting out the grounds upon which it challenged the Decision as unlawful (“the PAP Letter”). One of the grounds (set out at paragraphs 8(a) and 40-45 of the PAP letter) was that HMT’s refusal to implement its proposals by way of amendment to the PCSPS, on the basis that this would interfere with the property rights of members of the BTPS, was an error of law.
2. In its response on 9 April 2018 (“the PAP Response Letter”), HMT further explained its reasons for its Decision. In relation to the rejection of “BT’s suggested amendment to the PCSPS” HMT stated that:

“12. BT contends that HM Treasury should have implemented its decision to provide full indexation of GMP by way of an amendment to the rules of the Principal Civil Service Pension Scheme 1974 (“**PCSPS**”), rather than through use of the powers in s. 59A of the SSPA 1975.

13. BT contends that this possibility was rejected on the basis that it would involve unlawfully interfering with the property rights of BTPS members (¶41). This is incorrect. The reasons why it was rejected are as follows.

14. **First**, even assuming HMT had the power to make the amendment suggested by BT, it would not be appropriate to exercise it merely in order to deny to BTPS members benefits they would otherwise receive. It was appropriate for HMT to decide (as set out in para. 3.19 of the Response to Consultation) not to circumvent the entitlements that would otherwise flow to the Section B members, in essence in order to save BT money. Under the BTPS, those members are entitled to increases where increases are made to official pensions under the PIA 1971 and the SSPA 1975. BT’s suggested approach would be to prefer the interests of BT to the interests of BTPS scheme members, without adequate reason.

15. **Secondly**, because, from a policy perspective, HMT did not consider that BT’s approach was the correct one, it was not necessary to determine whether that approach would have resulted in the infringement of the Section B members’ rights. Certainly, if HMT had otherwise favoured BT’s approach, it considered that legal issues would have arisen as to whether or not that approach would have resulted in such an infringement. But the fact remains that HMT did not favour BT’s approach as a matter of policy. If the decision fell to be taken again, irrespective of the correct legal analysis in relation to A1P1, the decision would have been the same. These issues are therefore irrelevant to BT’s proposed claim.

16. **Thirdly**, in any case, even on BT’s own case, an amendment to the PCSPS rules would not necessarily result in the Section B members of the BTPS having no entitlements under the BTPS rules, and this position would result in *“legal uncertainty”*. It was for this reason that BT considered that the “statutory override” (addressed below) was necessary.”

1. HMT’s reasons for rejecting the Case-by-Case Option and the Conversion Option were further explained.

*The proceedings*

1. BT issued its Claim Form in these proceedings on 19 April 2018 together with its Statement of Facts and Grounds (“the Claim Grounds”). These were subsequently amended and, very recently, re-amended.
2. HMT has provided amended Detailed Grounds for Resisting the Claim (“the Resistance Grounds”).
3. The Interested Party has also provided Grounds. Now that it is clear that the BT Construction issue will not be determined, its stance is neutral.
4. On 8 May 2018 Ouseley J adjourned BT’s application to be listed as a rolled up hearing. Further directions were given by Whipple J on 30 July 2018.

*The 1 November 2018 decision*

1. The italicised passage from the 8 December email had originally been redacted on the grounds of legal professional privilege but the redaction was removed shortly before the hearing, together with redactions in other documents, including the October and November Submissions.
2. HMT accepts that the italicised passage contained an inaccurate summary of the legal advice before the Chief Secretary and that “an accurate summary would have been that the prospects of successfully defending a legal challenge were low, unless a defensible justification could be developed; and the Chief Secretary had decided not to commission further legal work with a view to developing such a justification”. It was decided that this inaccuracy should be drawn to the attention of the Chancellor and that he should be asked if he still agreed with the Decision.
3. A submission was prepared for the Chancellor (“the 2018 Submission”). The Chancellor was also provided with the November Submission. The 2018 Submission provided that:

“**BT/PUBLIC SERVICE PENSIONS JUDICIAL REVIEW**

* In January 2018 we announced our intention to continue to index and equalise the guaranteed minimum pension (an element of occupational pension) for public servants reaching State Pension age between 6 December 2018 and 5 April 2021, using a direction. This ensures we meet our legal obligations to public servants in this area.
* Some private sector schemes “mirror” public service schemes. When a direction requires public service schemes to provide indexation, the private sector schemes have to provide the same.
* BT requested a legislative carve-out for its pension scheme (and other similarly-affected private schemes). The decision was taken by the Chief Secretary in the first instance. She decided not to offer a carve out. You were then asked whether you agreed, which you did. The reasons were given publicly in a consultation response, which you and the CST cleared, as follows:

“*The other consultee [i.e. BT] requested that the government should craft its response in such a way as to avoid the read across from public service schemes to their private sector scheme. However, the government believes that it would not be appropriate to act in a way that would deprive members of indexation, to which they would otherwise be entitled. Acting to do so would also raise legal questions, including whether there was a legitimate aim to justify such an interference in the property rights of scheme members. In addition, some of the mechanisms suggested by the consultee to avoid this impact are outside the scope of the government’s statutory powers.*”

* BT are judicially reviewing the decision not to provide a carve- out. Unfortunately the short summary of the CST’s decision that you were given was incorrect. We need to ask you whether you still agree.
* The advice you received said this

“*We recommend against providing an exemption: we would be criticised for reducing former public sector workers pension rights and the legal bar for interfering in accrued rights is high. Were we to agree an exemption for BT, legal advice is that the risk of challenge is high and the chances of successfully defending such a challenge are low.* ***CST agrees****.*” (Emphasis added.)

* The underlined sentence was an inaccurate summary of the legal advice that was before the CST. It should have said this:

“Were we to agree an exemption for BT, legal advice is that the risk of challenge is high and the chances of successfully defending such a challenge are low unless we were able to develop a defensible justification for interfering in the property rights of pensioners. CST decided not to commission the further legal work necessary to test whether a legally defensible justification could be developed.

* We need to know whether you maintain your original decision, in the light of this correction.”

1. On 1 November 2018 the Chancellor’s private office was chased for an answer by HMT’s Legal Advisors by an email in the following terms:

“This case is due for hearing before the High Court early next week. The court will need to know whether or not the CX maintains his original decision (i.e. the question posed below) and court deadlines mean that we need to communicate this to the court by noon tomorrow. I am sorry to chase this up, but this is key to the proceedings”.

1. Later the same day, the Chancellor’s private office communicated his decision to maintain the Decision (“the 1 November 2018 decision”) in the following terms:

“The CX saw the additional clarification on legal advice. He still thinks this is fine and agrees with the recommendation. Hopefully that gives you what you need”.

1. By their re-amended Grounds BT contends that the 1 November 2018 decision is unlawful on the same grounds as the Decision and for additional reasons.

**The evidence before the Court**

1. In addition to various documents, the most relevant of which have been summarised and cited from above, there were various witness statements before the Court. For BT there were two statements from Mr Paul Rogers, BT’s Director of Pension Risk; for HMT, there were four statements from Mr Paul Kirk, Head of the Public Service Pensions Branch of HMT, and one statement from Mr Peter Spain, the Head of the Civil Service Pensions Technical team in the Cabinet Office; and for BTPS, there was one statement from Mr Paul Spencer, Chairman of the Trustees of the BTPS.

**The Claim Grounds**

1. The Claim Grounds are:

*Ground 1* – The supposed property rights of BTPS members.

*Ground 1A* – Error of law implementing indexation via an amendment to the PCSPS would not have been *ultra vires*.

*Ground 2* – Irrationality and disproportionality: the rejection/postponement of the Conversion Option.

*Ground 3* - Irrationality and disproportionality: the rejection/postponement of the Case-by-Case Option.

*Ground 4* – The November 2018 decision.

1. For reasons set out below, we grant permission to apply for judicial review on Grounds 1 and 1A, but refuse permission on the other Grounds.
2. We agree with HMT that the logical order in which to consider these Grounds is first, Grounds 2 and 3; secondly, Grounds 1 and 1A and thirdly, Ground 4.
3. This means that consideration is given first to the decision as to which option to implement (Grounds 2 and 3) and then to the decision as to the means of such implementation (Grounds 1, 1A and 4). This also reflects the chronology of the decision making with the “policy steer” being decided upon following the October Submission and the final decision, having regard to private sector impacts, being made following the November Submission.

*Ground 2 - the rejection/postponement of the Conversion Option.*

1. BT complained that although HMT’s Consultation Response identified the Conversion Option as a possible long-term solution, that option was effectively “kicked into the long grass” by HMT’s decision to consider further the methodology and legislative issues raised by the Conversion Option during the extension period of the Interim Solution. BT contended that the lack of proper timescale, and “creeping” nature of the extended Interim Solution, was irrational and/or disproportionate in its effect on BT, which was left shouldering the cost of the Interim Solution in the meanwhile, which was itself said to be arbitrary and discriminatory.
2. HMT’s reasons for taking time to consider the Conversion Option were set out in the Consultation and Consultation Response. In summary, they were:
   1. The complexity of this option. The Consultation noted that this option was “likely to involve some administrative complexity” and that “the tools to undertake this exercise do not currently exist and would need to be developed…”.
   2. The need for further data to support HMT’s consideration of this option. Specifically, the Consultation Response stated that HMT required accurate reconciled data before making a decision about conversion. That data was anticipated by December 2018 and consisted of data compiled by PSPS which were reconciling GMP data with HMRC to ensure that members are able to receive accurate GMP payments.
   3. The requirement of suitable legislation to underpin this option, referred to in the Consultation Response.
   4. The need to consider the consequences of ongoing litigation regarding GMP equalisation (between men and women), also referred to in the Consultation Response. This was a reference to the Supreme Court’s decision in *Walker v Innospec Ltd* [2017] UKSC 47, a decision handed down on 12 July 2017.
3. BT argued that none of these points, taken alone or together, provided a lawful basis for rejecting the early implementation of the Conversion Option. That option, BT argued, was recognised by all to be the most desirable option; thus, the effect of the Consultation Response was simply and irrationally to postpone its introduction.
4. HMT relied on these points as providing obviously rational and compelling reasons for deciding to take time to investigate the Conversion Option further.
5. In submissions with which BT did not take issue, HMT sub-divided BT’s rationality challenge under this Ground into three separate strands. First, it contains an element based on the *Tameside* line of authority, to the effect that HMT failed to ask itself the right question and failed to take reasonable steps to inform itself sufficiently to answer that question correctly - see *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014 at 1065B. HMT submitted that the bar for *Tameside* challenges is high and the Court can only intervene if no reasonable authority could have been satisfied, on the basis of the inquiries made that it possessed the information necessary for its decision - see *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2015] 3 All ER 261 at [100]. Secondly, it contains an element based on irrationality in its strict sense, to mean that HMT acted irrationally in deciding indefinitely to postpone implementation of the Conversion Option. Thirdly, it contained a discrimination element which was another way of arguing irrationality, noting that the Supreme Court in *R (Gallaher Group Ltd and Others) v Competition and Markets Authority* [2018] UKSC 25 has recently confirmed that equal treatment is not a distinct principle of domestic law but is to be judged by established public law concepts of irrationality and legitimate expectation in domestic law ([24] and [41], per Lord Carnwath).
6. We reject BT’s challenge under Ground 2, in all of the various ways that challenge is put, essentially for the reasons given by HMT. As to *Tameside*: HMT conducted a consultation in which the right questions were posed; those questions were appropriate to the overarching issue of determining how public sector pensions should be indexed and equalised in light of the nSP. With the benefit of the various responses to the Consultation, HMT asked itself the correct question about what it should do next; the answer given was that it rejected the Case-by-Case Option, it needed more time to investigate the Conversion Option, and in the meanwhile it would adopt the full Indexation Option by extension of the Interim Solution. It cannot be said that no reasonable authority could have reached that conclusion on the information before HMT. To the contrary, HMT’s conclusion would appear to us to be manifestly rational and based on at least reasonable information.
7. There was no irrationality in its strict sense either. This part of BT’s challenge seemed to proceed, at least in part, on a false basis: contrary to the way BT put this case in its written argument (noting that Ground 2 was hardly touched on in oral submissions), the Conversion Option had not been recognised by HMT as the “best” option; rather HMT recognised that it was widely supported in the consultation responses, and HMT wished to investigate it further. Thus, HMT did not commit to implementing conversion at the end of the investigation, or at all. The issues under consideration by HMT went wider than timetabling; they converged on the single question of “whether conversion best meets the tests set out in [HMT’s] original consultation” (para 4.13 of the Consultation Response). HMT gave coherent reasons for needing more time to consider this question; we have summarised those reasons above. We find no irrationality in those reasons. We reject BT’s criticisms of them. They provide an obviously reasonable justification for wanting more time to investigate and consider whether to implement conversion in the longer term. The precise timeframe for investigation and consideration is a matter for the Government. In this respect, Government has a wide margin, because this task must be accommodated alongside Government’s other commitments and must be prioritised accordingly. The timeframe set out in the Consultation Response does not, even arguably, exceed that wide margin.
8. We also reject the discrimination argument. BT argues that HMT discriminates against it in two connected ways (i) by eliding the distinction between public and private sector schemes, by making BTPS subject to the Interim Solution in the same way as PSPS are subject to that solution, when BTPS is materially different from PSPS because it is in the private sector; and (ii) by treating BT unfairly, by imposing the Interim Solution on it, when other materially comparable private sector schemes are not subject to the Interim Solution (we summarise from [39]-[41] of the Re-Amended Statement of Facts and Grounds).
9. We consider BT’s discrimination argument to be misconceived. It is not the actions of HMT which cause BTPS to be subject to the Interim Solution, but BT’s own BTPS rules, Rule 10.2 in particular. It is that rule which causes BT to be treated “like” a public sector scheme and “unlike” its private comparators. It is, therefore, the BTPS rules which elide the difference between it and PSPS and which create a material difference between BT and competitors whose pension schemes do not contain such a rule.
10. When HMT decided to adopt the Interim Solution following the Consultation, it did not discriminate or act irrationally in a *Gallaher* sense. It treated all pension funds which are subject to the Increases Legislation – and who are in that sense materially similar - in the same way.
11. For all these reasons we do not consider Ground 2 to be arguable and accordingly refuse permission.

*Ground 3 - the rejection/postponement of the Case-by-Case Option.*

1. BT advanced similar complaints in relation to HMT’s rejection of the Case-by-Case option. BT argued that the costs of implementing this option were acknowledged to be lower than other options under consideration and it was therefore incumbent on HMT to consider this option further; the failure to do so was irrational and discriminatory.
2. HMT acknowledged in the Consultation Response that the Case-by-Case Option would cost less than the Full Indexation or Conversion Options, but that it would be both challenging and costly to implement or deliver. The precise reasons for rejecting the Case-by-Case Option were set out in the Consultation Response. In summary, they were:
   1. The complexity of this option. It would require ongoing work for many years to calculate whether a member would be better off under the old or new system.
   2. New systems would be required to make annual comparisons between actual and notional benefits. Those systems do not currently exist and could not be easily designed, given the complexity of the annual calculations.
   3. This option would not make the system more transparent and easier to understand for members which was one of the policy objectives of the Consultation.
   4. This option would not adequately honour the commitment to fully index public service pensions.
3. BT’s main argument was that HMT did not undertake a cost-benefit analysis before rejecting this option and thus it was not open to HMT to rely on the cost and complexity of implementation, by comparison with other options, as a reason for rejecting it. BT argued that this failure was *Tameside* irrational, as well as irrational in the strict sense. Specifically, BT argued that the third reason, namely, the asserted lack of transparency for members, is simply wrong because (i) the outcome for pensioners would be easy enough to understand, even if the mechanism for arriving at it was complex, and (ii) anyway, HMT has failed to explain why the outcome in fact achieved, of the extension of the Interim Solution, is any more transparent than the adoption of the Case-by-Case Option would have been. BT further challenged the rationality of the fourth reason because the effect of the Case-by-Case Option would have been to avoid windfalls to those pensioners who are in fact better off under the nSP, while protecting those that would be worse off under the new arrangements, which (BT says) is precisely the point of the Consultation, namely to ensure that public sector workers did not lose out by the new arrangements.
4. HMT resisted BT’s challenge on a number of grounds. It argued that the Consultation itself anticipated that the Case-by-Case Option would cost less than the other two options (£1.5 billion as against £5 billion) and that the relative inexpense of the Case-by-Case Option was recognised in the Consultation Response. There was no *Tameside* irrationality in failing to obtain a more detailed analysis, given HMT’s overall view, for all the reasons summarised above, that in any event this was not a “deliverable” option. That decision was itself the sort of macro-economic decision, largely based on political judgment, to which the courts should apply a low intensity of review (see *IBA Healthcare Ltd v Office of Fair Trading* [2004] ICR 1364, per Carnwath LJ at [91]-[92]). HMT was entitled to conclude that the Case-by-Case Option would lack transparency. That conclusion was obviously rational: it is desirable that pensioners should be able to understand the mechanism as well as the outcome of any pension calculation, this being part and parcel of the wider and legitimate objective of enabling pensioners to plan and make appropriate financial decisions. Further, it is clear that the Case-by-Case Option would not honour the commitment to indexation of public service pensions; that was an issue on which HMT consulted and HMT was entitled to take it into account in rejecting this option.
5. We accept HMT’s arguments. HMT was plainly entitled to reject the Case-by-Case Option for the reasons it gave and based on the information it had before it, which was sufficient. There were obvious and significant problems associated with this option, even if it would end up costing less in the long run. It was not discriminatory for reasons we have already given in the context of Ground 2.
6. For all these reasons we do not consider Ground 3 to be arguable and accordingly refuse permission.

*Grounds 1 and 1A – The supposed property rights of BTPS members and further error of law in that implementing indexation via an amendment to the PCSPS would not have been ultra vires.*

1. As developed orally at the hearing, BT’s core case on these two grounds, which we take together, was that the PCSPS workaround provided a free-standing and workable option, which did not interfere with BTPS members’ property rights and which was capable of being implemented by HMT, and that in failing to recognise it as such, HMT erred in law and/or acted irrationally and/or discriminated against BT, such that the decisions should now be set aside and re-taken adopting a legally correct approach to the PSCPS workaround.
2. BT submitted that:
3. HMT understood in November 2017, when the Decision was in the process of being made, that BT was putting forward alternative routes by which the Government’s policy objective could be achieved without impacting BT and that these included as separate options (i) amending the PCSPS rules (i.e. the PCSPS workaround) and (ii) implementing a statutory override (“the Statutory Override”) that would have permitted BT to amend the BTPS rules.
4. This was how matters were presented to Ministers, and they were told that these were separate options.
5. Ministers were advised that any means of avoiding a read across impact on the BTPS would interfere with members’ property rights and would be unlawful unless such interference could be shown to be legally justifiable. They were not told that the option of amending the PCSPS rules would not interfere with such rights.
6. Ministers only ever considered whether BT’s alternative options should be adopted on the erroneous legal basis that they would all interfere with BTPS members’ property rights and there has never been a consideration of whether an option should be adopted which (i) would not impact on BT and (ii) would not interfere with property rights.
7. For documentary support of these submissions, BT relied in particular on:
8. The identification of the PCSPS workaround as a separate option as set out in:

(i) The October Submission which stated at paragraph 15 that:

“… BT has requested that we consider a statutory override of scheme rules, an Act of Parliament **or** an amendment to Civil Service Pension Scheme rules (which BT mirror)….” (emphasis added)

(ii) The November Submission which stated at paragraph 12 that:

“12. BT have suggested a number of solutions for this: (i) a new Act; (ii) amending the 1974 civil service scheme; **or** (iii) providing a statutory override*.*” (emphasis added)

1. The treatment of all BT’s options as involving the need for legislation and interference with BTPS members’ property rights as set out in:

(i) The email attaching the November Submission which stated that:

“…BT, in particular, have asked for us to legislate for a carve-out of their obligation to follow public service pension index rules (in their scheme rules). We recommend against doing so – the bar for removing indexation rights from BT members would be very high….”

(ii) The November Submission which stated among other things that:

“12…. The scheme rules have the result that members are entitled to benefit from an HMT direction in the same way as members of the 1974 civil service scheme *and there would need to be a legally defensible justification for interfering with BT scheme members’ property rights….*

13. *TLA advise that it may be possible to devise a mechanism to avoid impacting on schemes such as BT e.g. if the Secretary of State agreed to make negative resolution regulations under s.67 of the Pensions Act 1995. However, that would require identifying a legally defensible justification for the interference in property rights….*

….

15. *Legal risk is high. A judicial review brought by members or trade unions is likely and, unless we were able to develop a defensible justification for interfering in property rights, there is a high risk of the judicial review being successful.”*

(iii) The 8 December email which stated that:

“BT asked for a legislative carve-out…

We recommend against providing an exemption: we would be criticised for reducing former public sector workers pension rights *and the legal bar for interfering in accrued rights is high…”*

(iv) The Consultation Response which stated at paragraph 3.19 that:

“….the government believes that it would not be appropriate to act in a way that would deprive members of indexation, to which they would otherwise be entitled. Acting to do so would also raise legal questions, including whether there was a legitimate aim to justify such an interference in the property rights of scheme members….” (emphasis added)

1. HMT submitted that there were five answers to BT’s case, each of which is determinative, namely:
2. BT’s Consultation Submission never suggested the PCSPS workaround as a stand-alone option. It was advanced together with the Statutory Override which was said to be “necessary”. In such circumstances BT cannot complain that the question put to the Chief Secretary and answered by her was in terms of whether to provide a legislative carve-out for BT.
3. BT’s options were rejected on policy grounds and the legal issues raised were merely additional reasons for the Decision.
4. There was no legal power under the SAA 1972 to amend the PCSPS rules to provide indexation, because this could only be done by the special, bespoke powers conferred by s.59/s.59A.
5. There was no legal power under the SAA 1972 to amend the PCSPS rules to provide indexation, because this would be using statutory powers for a private, collateral purpose.
6. The PCSPS workaround would have interfered with Section B members’ property rights.
7. Each of these suggested answers will be addressed in turn.

(1) BT’s Consultation Submission

1. HMT emphasised that this was a carefully drafted document with a detailed legal annexe provided by Freshfields and that the documents must be read together. The “steps” which BT were inviting HMT to take were those set out in paragraph 1.11 which involved at (a) the Statutory Override “and” at (b) either an Act or Parliament ((b)(i)) or amendment to the PCSPS ((b)(ii)).
2. Although paragraph 3.2(b) referred to the fact that the PCSPS amendment could be effected without legislation, paragraph 3.2(c) made it clear that the Statutory Override was in any event being requested for the reasons there stated, namely: (i) legal complexity and uncertainty in relation to BT’s Construction, and (ii) the fact that this approach might not work for other private schemes. “Given this legal uncertainty” BT stated that it “would urge” the Government to introduce the Statutory Override.
3. The integral nature of the Statutory Override to BT’s proposals was further borne out by the annexed Freshfields Advice which addressed at length the public interest justification for introducing the “necessary” Statutory Override, and why and how it justified interference with BTPS members’ property rights.
4. Whilst BT acknowledged that paragraph 1.11 of the Consultation Submission included the Statutory Override as a feature of the proposed means of implementing full indexation, including amending the PCSPS, it was submitted that this was merely a summary and that the detail which followed identified that the PCSPS amendment (or workaround) did not require legislation. Further or alternatively, it was submitted that the Statutory Override was only being urged upon the Government and that it must have been apparent that if the Government decided not to adopt it, the identified option of amending the PCSPS without legislation remained.
5. In our judgment it is clear from the BT Consultation Submission considered as a whole that the Statutory Override was put forward as a necessary element of BT’s alternative options, essentially for the reasons given by HMT. Paragraph 1.3 makes it clear that the “steps” which the Government could take to avoid “unintended consequences” for BT are those set out in paragraph 1.11. Paragraph 1.1l clearly and unequivocally proposes that there be the Statutory Override in addition to one of three possible options, which included an amendment of the PCSPS (the others being the use of legislation other than the Increases Legislation and the Conversion Option). Paragraph 3.2(c) provides compelling reasons for including the Statutory Override. The subject matter of the Freshfields Advice is the Statutory Override and its lawfulness.
6. It was not for HMT to seek to infer what BT’s fall back options might be. If BT wished to put forward alternative fall back proposals then it was for BT to identify them in its full and carefully drafted Consultation Submission. Amending the PCSPS as a stand-alone option was never put forward, expressly or impliedly.
7. HMT could accordingly reasonably have understood that all of BT’s proposed options would require the Statutory Override and the need for legislation and could reasonably have approached its decision making on that basis. In our judgment, the PCSPS workaround was put forward by BT as a stand-alone option (without the necessity of the accompanying Statutory Override) for the first time in BT’s PAP Letter, by which time the Decision had already been taken.
8. Irrespective of what BT had said in its Consultation Response, BT submitted that HMT did understand that BT was putting the PCSPS workaround forward as a free-standing alternative. BT argued that this was borne out by the references in the October and November Submissions to amendment of the PCSPS as an alternative – using the word “or” to distinguish it from other options. Reliance was also placed on a passage from Mr Kirk’s witness statement which was said to be to similar effect, although it was BT’s case that it is the documents, rather than after the event rationalisation from officials, which matter.
9. The use of the disjunctive “or” in the October and November Submissions needs, however, to be considered in context. In particular:
10. The email attaching the November Submissions indicated that it was HMT’s understanding that BT was asking for a legislative “carve out”. That term is not defined in the November Submission and it may have been being used loosely to encompass all of BT’s various options; but it obviously includes the Statutory Override.
11. The Recommendation made in the November Submission was that the Chief Secretary “agree not to legislate”.
12. Paragraph 9 of the Submission referred to the fact that “BT has asked us to legislate”.
13. The body of paragraph 12 of the November Submission (which contains the disjunctive “or”) highlighted legal issues relating to the Statutory Override.
14. The question asked of the Chief Secretary in the November Submission, paragraph 18, was whether she agreed to “rejecting BT’s request for the Government to legislate to remove or enable the removal of their obligations under the BTPS rules?”.
15. The answer she gave to the November Submission on 27 November 2017 was that she agreed “not to legislate to change the rules of some affected private sector schemes (by removing or enabling the removal of their obligations to index pensions in accordance with the legislation governing public service schemes)”.
16. In our judgment, when the November Submission is considered in context and as a whole, it shows that HMT reasonably understood that all BT’s proposed options involved the Statutory Override and the need to legislate. If so, then HMT cannot be criticised for approaching the Decision on that basis. Equally, in those circumstances, in so far as the Decision was based on the assumption that BTPS members’ property rights would be interfered with if BT’s proposed options were adopted, including the option of amendment to the PCSPS, that cannot be a ground of challenge or criticism since it was and is common ground that the Statutory Override would interfere with such rights.
17. We accordingly accept HMT’s first answer to BT’s case on Grounds 1 and 1A.

(2) Whether BT’s proposals were rejected on policy grounds

1. HMT’s case, and Mr Kirk’s evidence, was that BT’s proposals were rejected on policy grounds, regardless of the legal issues raised. Mr Kirk explained HMT’s approach as follows:

“103. ….prior to sending the November Submission, we consulted DWP over the cross-cutting issues raised in BT’s Consultation response, and their proposals. DWP were concerned about the wider policy implications of carving out the BTPS, as this would essentially provide a mechanism for BT (and possibly others) to change pension indexation rates and reduce the inflation-proofing of scheme members’ pensions. This would reflect poorly on Government and leave it open to significant criticism. It could also lead to similar requests from other pension schemes.

1. He noted that BT’s proposals could contradict wider government policy and that was why the November Submission explained that Government could be asked why, if it implemented BT’s proposals, it was preferring the interests of BT to those of BTPS members. He said:

“104. The November Submission refers to this as one of the “*presentational*” aspects of the decision. As the submission makes clear, our advice was that a carve-out for BT should not be offered, and that Ministers would struggle to justify it in public or before Parliament. … HMT considered that Ministers would be seen to have preferred the interests of BT over those of its pension fund members. The recommended approach was to prefer neither.”

1. HMT submitted that these policy concerns were reflected in a number of the documents and in particular:
2. As early as the March 2016 Submission HMT were highlighting policy concerns, stating that: “It is not clear the Government should deliberately craft the relevant legal instruments to deprive the affected members of the BT Pension Scheme (and possible other private sector ‘mirror’ schemes) of the rights they would otherwise have been entitled to”.
3. In the November Submission, as reflected in:

Paragraph 12: *“TLA advise that in each case there would need to be a policy justification for preferring the interests of BT to the interests of the scheme members”;* and

Paragraph 14 and the reference there to “presentational issues”, including: “If we decided to [carve BT out], the Government could be seen as acting to remove BTPS obligations to index pension benefits in the same way as under the 1974 civil service scheme BT have requested this. Government could also to be seen to be acting against members’ financial interests. It would be asked why it was preferring the interests of BT to those of BTPS members”.

1. In the Consultation Response at paragraph 3.19 in which the first reason given for the Government choosing not to “craft its response in such a way as to avoid the read across from public service schemes to their private sector scheme” was that: “the government believes that it would not be appropriate to act in a way that would deprive members of indexation, to which they would otherwise be entitled”. (emphasis added). It was then stated that acting to do so would “also” raise legal questions.
2. The fact that the Chief Secretary was asked in the November Submission if she wished officials “to work further with DWP on the possibility and implications of a carve out for BT and seek counsel’s opinion”, but decided not to do so. If she had been minded to accept BT’s proposal as a matter of policy, the obvious solution would have been to commission this further legal work.
3. BT disputed that the Decision was made on grounds of policy, or, if it was, on grounds of policy that could be divorced from the legal reasons given. It highlighted the fact that paragraph 3.19 of the Consultation Response stated that the PCSPS workaround would “also” raise legal questions, which would include “whether there was a legitimate aim to justify such an interference with property rights” (emphasis added) and submitted that this showed that HMT had reached its Decision at least in part on the basis that the PCSPS workaround would interfere with property rights. BT also stressed that the November Submission referred to “practical and presentational issues” as being in addition to the legal issues already identified.
4. We accept HMT’s case on this issue. Giving a fair reading to the Consultation Response and the November Submission which led to it, and with which the Chief Secretary agreed, the policy reasons for refusing to implement the PCSPS workaround were both separate from the concerns about interference with legal rights of BTPS members, and provided the central plank in HMT’s rejection of the PCSPS workaround. The other points made, about interference with rights and acting outside the scope of HMT’s powers, were additional.
5. In our judgment there were very obvious policy issues facing the Government regardless of whether BTPS members’ property rights were involved, and these were a free-standing basis for the decision reached. Whether or not there was a need to legislate, BT was asking the Government to “craft” a solution to suit its private interests. If the Government did so, the consequence would be that Section B members would not get the pension benefits which they would otherwise obtain. The savings in pension payments which BT would achieve through crafting a solution to suit them would necessarily be matched by the loss to Section B members of an equivalent amount in pension benefits. That raised self-evident presentational and policy questions. There was a clear risk that the Government would be seen as preferring the interests of BT over its Section B members, a risk which would be liable to give rise to questions by Section B Scheme members, unions, Parliament, press and public.
6. These policy concerns were reflected in the Consultation itself which included the following specific questions: why private pension schemes such as BT’s were originally designed to mirror official pensions (Question 13); whether the Government should take action to avoid any read across (Question 14); what actions the Government could take to avoid any read across (Question 15); and why the Government should deprive members of private sector schemes of the benefit of rules that mimic public services (Question 16).
7. That these questions obviously arise is borne out by the blatant nature of any BT crafted solution adopted. The Statutory Override would specifically remove the existing prohibition on varying pension scheme rules to the detriment of scheme members without their consent. Even if the PCSPS was amended without any Statutory Override, that would either involve making a s.59A Direction for all PSPS except the PCSPS, or making amendments to all PSPS.
8. BT contended that if and in so far as the Decision was based on policy considerations it was procedurally unfair as it was not provided with the opportunity to address such policy concerns. But, this is unfounded. Questions 12 to 16 of the Consultation clearly raised policy issues and invited responses to them.
9. BT also complained that the reference in paragraph 14 of the November Submission to the Treasury “New Fair Deal” is inappropriate as it only governs contemporary staff transfer exercises. But, it is clear from the November Submission itself, and from Mr Kirk’s statement, that HMT were not misled as to the applicability of the New Fair Deal. Paragraph 14 makes it clear that it only applied “since 2015”. The point being made was simply that if the Government was to adopt one of BT’s proposed solutions, questions might be asked as to whether the Government was still committed to the principles set out in the “New Fair Deal”. In any event, this was only one of the “practical and presentational issues” identified, and there was no suggestion that it obliged the Government to act in any particular way.
10. For all these reasons, we accept HMT’s case that the Decision was made and is supportable on policy grounds. There was no development in oral argument of the suggestion that such a policy decision would be open to challenge and we do not consider there to be any merit in such a challenge.
11. We accordingly accept HMT’s second answer to BT’s case on Grounds 1 and 1A.

(3) Whether there was no legal power under the SAA 1972 to amend the PCSPS rules to provide indexation, because this could only be done by the special, bespoke powers conferred by s.59/s.59A.

1. HMT submitted that the Increases Legislation provides a specific and bespoke statutory regime for regulating increases to public service pensions (“official pensions”) in payment and preserved pensions in order to protect their value. It was designed for this purpose and it is the only legislation which has ever been used for that purpose.
2. The PIA 1971 was introduced in order to provide for increases to official pensions to be made to reflect inflation. This was originally carried out pursuant to s.2 PIA 1971 until its repeal and replacement by ss.59 and 59A SSPA 1975, which were expressly stated by s.59(7) to have effect as if they were contained in the PIA 1971.
3. The combined effect of s.59(1) and s.59(5) was said to be that   
   the Minister must make an order whenever a direction is made under the Social Security legislation. The order permits pension authorities to increase official pensions. The permitted percentage by which pensions may be increased is determined by the direction made under the Social Security legislation and before calculating the increases provided for in a s.59 Order, GMP is to be deducted.
4. HMT accordingly submitted that, contrary to BT’s argument, it was wrong to describe these provisions as setting a minimum for increases. There is no choice about whether to make an order and there is no choice about the percentage increase. So, for example, a minister could not, using these powers simply decide that although the inflation measure specified under the Social Security legislation was 2%, he would like to authorise pension authorities to index official pensions by 10%. Nor, subject to s.59A, could he decide that pension authorities should not deduct GMP before indexation. That deduction is mandatory because of the use of the word "shall" in s.59(5).
5. Under s.59(5) GMP is accordingly required to be deducted before indexation. Unless and until a s.59A Direction is made, the statutory obligation to deduct GMP in s.59(5) applies. The specified means to modify that mandatory effect of s.59(5) is by making a s.59A Direction.
6. HMT further contended that this is the applicable regime governing indexation increases to official pensions is borne out by practice. Since 1975 there has been an increase order made under s.59(1) in every single year bar two, in both of which there was no positive inflation in the preceding year. Since 1979 there have been four s.59A Directions, and there has at all times been a s.59A Direction in force. Each s.59A Direction has revoked the previous one and added to the categories of cases which are covered by it. In effect, whenever the Government has identified a class of pensioner whose GMP is, for whatever reason, not being indexed, a s.59A Direction has been made to index that pension. This is what was done by the 2016 Direction, and, although it was wider in scope than prior directions, its rationale was the same.
7. HMT submitted that the general powers conferred under the SAA 1972 do not derogate from the specific and bespoke regime for indexation increases to official pensions provided under the Increases Legislation.
8. In this connection, HMT relied on the canon of construction *generalia specialibus non derogant* as summarised by *Bennion on Statutory Interpretation* (6th ed.) at Section 88. *Bennion* there cites from the judgment of the Earl of Selborne LC in *The Vera Cruz* (1884) 10 App Cas 59 at p68:

"Where there are general words in a later Act capable of reasonable and sensible application, without extending them to subjects specifically dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered or derogated from merely by force of such general words without any indication of a particular intention to do so."

1. HMT submitted that this principle applies here. Sections 59 and 59A specifically dealt with indexation increases to official pensions and are deemed to be part of the PIA 1971. The SAA 1972 is a later Act and contains only general words.
2. BT contended that the SAA 1972 was intended to modernise the way that PSPS were administered and formed. The aim was to take them outside direct statutory control and put them under the control of a minister, with particular statutory safeguards, such as the duty to consult (s.1(3)) and the duty not to reduce accrued pension rights (s.2(3)).
3. Subject to these safeguards, it was submitted that the powers to make and amend PSPS under the SAA 1972 are intentionally very broad. Section 1 provides that the minister may “make, maintain and administer schemes” with respect to “pensions, allowances or gratuities”. Section 2(9) provides that any s.1 scheme “may amend or revoke any previous scheme made thereunder”. The wording of these provisions is wide enough to cover increases to pensions generally, including to allow for inflation.
4. It was submitted that there is no inconsistency between there being such a power under the SAA 1972 and the statutory provisions for mandatory pension increases under the PIA 1971 and under ss. 59 and 59A SSPA 1975. It was said that these are directed at a different aim: namely, mandatory minimum pension uprating increases across all PSPS, whereas the powers under the SAA 1972 are discretionary powers to be exercised in relation to individual pension schemes.
5. By way of example, BT submitted that if it was decided, as a result of historic commitments made, to give differing increases, or increases calculated on a differing basis, to different PSPS then that could be done under the SAA 1972 general powers.
6. In support of this analysis, BT relied on the Interpretation section of the PIA 1971, s.17, which in relation to the meaning of “basic rate” refers to increases under the PIA 1971 or “made otherwise than under or by reference to this Act”.
7. In terms of case law, BT relied in particular on *Cusack v Harrow London Borough Council* [2013] 1 WLR 2022. In *Cusack*, the Supreme Court were asked to decide the question of whether, when erecting barriers preventing access to a public highway over a pedestrian footway from the forecourt of a property, a local highway authority was entitled to rely on either s.66(2) of the Highways Act 1980 (“HA 1980”) (under which it would be required to pay compensation to the relevant property owner), or s.80, (under which it would not be required to pay compensation). The Council had elected to use s.80 HA 1980, which the claimant argued (and the Court of Appeal agreed) was *ultra vires*. The Supreme Court unanimously allowed the appeal, holding that the Council was entitled to rely on either provision. Lord Carnwath (with whom Lord Sumption and Lord Hughes agreed) stated that:

“27. In my view…Mr Sauvain is right in his submission that the council is entitled to rely on the clear words of section 80 of the 1980 Act for the power they seek. There is no express or implied restriction on its use…the fact that section 66(2) may confer an alternative power to achieve the same object, which is subject to compensation, is beside the point. That is clear in particular from the Westminster Bank case [1971] AC 508: see para 10 above. There also the legislation provided two different ways of achieving the council's objective, one under the planning Acts and the other under the Highways Act, only the latter involving compensation. The authority was entitled to rely on the former.

28. Lord Reid (giving the majority speech) said, at p 530:

“Here the authority did not act in excess of power in deciding to proceed by way of refusal of planning permission rather than by way of prescribing an improvement line. Did it then act in abuse of power? I do not think so. Parliament has chosen to set up two different ways of preventing development which would interfere with schemes for street widening. It must have been aware that one involved paying compensation but the other did not. Nevertheless it expressed no preference, and imposed no limit on the use of either. No doubt there might be special circumstances which make it unreasonable or an abuse of power to use one of these methods but here there were none.”

1. At paras [55] to [61] of the judgment of Lord Neuberger (with whom Lord Sumption and Lord Hughes also agreed) general observations were made as to the guidance to be provided by canons of construction in statutory interpretation, it being stated as follows:

“57. It was suggested on behalf of the council that this case represented an opportunity for this court to “make it clear that canons of construction should have a limited role to play in the interpretation” of statutes (and indeed contracts). In my view, canons of construction have a valuable part to play in interpretation, provided that they are treated as guidelines rather than railway lines, as servants rather than masters. If invoked properly, they represent a very good example of the value of precedent.

58. Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim or purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved. However, that does not mean that the court has a completely free hand when it comes to interpreting documents: that would be inconsistent with the rule of law, and with the need for as much certainty and predictability as can be attained, bearing in mind that each case must be resolved by reference to its particular factors.

59. Thus, there are some rules of general application—eg that a statute cannot be interpreted by reference to what was said about it in Parliament (unless the requirements laid down in *Pepper v Hart* [1993] AC 593 are satisfied), or that prior negotiations or subsequent actions cannot be taken into account when construing a contract. In addition, particularly in a system which accords as much importance to precedence as the common law, considerable help can often be gained from considering the approach and techniques devised or adopted by other judges when considering questions of interpretation. Even though such approaches and techniques cannot amount to rules, they not only assist lawyers and judges who are subsequently faced with interpretation issues, but they also ensure a degree of consistency of approach to such issues.

60. Hence the so-called canons of construction, some of which are of relatively general application, such as the so-called golden rule (that words are prima facie to be given their ordinary meaning), and some of which may assist in dealing with a more specific problem, such as that enunciated by Sir John Romilly MR in *Pretty v Solly* 26 Beav 606, 610. With few, if any, exceptions, the canons embody logic or common sense, but that is scarcely a reason for discarding them: on the contrary. Of course there will be many cases, where different canons will point to different answers, but that does not call their value into question. Provided that it is remembered that the canons exist to illuminate and help, but not to constrain or inhibit, they remain of real value.”

1. Lord Neuberger then concluded as follows in relation to the provisions of the HA 1980 in issue in *Cusack:*

“61. Although the principle expressed by Sir John Romilly MR, sometimes referred to by the Latin expression *generalia specialibus non derogant*, is a valuable canon of construction, I do not consider that it applies in relation to section 66 and section 80 of the Highways Act 1980 . That is because I do not think that it is possible to treat section 66(2) as a specific provision in contrast with section 80(1) as the more general provision. They are, as Mr Sauvain QC for the council submitted, simply different provisions concerned with overlapping aims and with overlapping applications.”

1. BT submitted that these considerations equally applied here. Sections 1 and 2 SAA 1972 and ss.59 and 59A SSPA 1975 are to be considered “overlapping” provisions. There is no conflict between them and there is no room for the application of the canon of construction, *generalia specialibus non derogant*.
2. For all these reasons BT submitted that there was no limitation on the Government’s use of its wide powers under the SAA 1972 for indexation increases to PCSPS pensions.
3. In our judgment, HMT’s case as to the applicable statutory regime is correct, largely for the reasons given by it. In particular:
4. The starting point is the PIA 1971. As its title, preamble and contents make clear, this was an Act introduced for the specific purpose of providing for increases to official pensions to allow for inflation. Sections 59 and 59A have effect as if contained in that Act.
5. The SAA 1972 established a general power to establish PSPS and to make the rules by which they are governed. Although the powers conferred thereunder may be wide enough to amend PSPS rules to provide for pension increases, the Act says nothing about providing for increases, still less increases to allow for inflation.
6. Sections 59 and 59A set out a detailed and self-contained regime for the indexation of official pensions. Section 59(1) provides for an order to be made to increase official pensions to reflect inflation based on a specified percentage. That specified percentage is required to mirror that specified in relation to social security benefits. Section 59(5) requires that GMP be deducted from the amount by reference to which the indexation increase is to be calculated. A s.59A Direction is the specified means by which, for classes of case, that deduction is not to be made, or not to be made in full.
7. The statutory scheme is therefore for indexation increases to be specified under s.59(1), but for indexation of the GMP element of the increase to be switched off under s.59(5), unless for any particular class of case there is a contrary direction under s.59A. Sections 59 and 59A contained detailed provisions as to how that scheme is to operate.
8. To allow general powers under the SAA 1972 to be used to specify indexation increases would be contrary to and undermine this carefully structured statutory regime and thereby conflict with it. The SAA 1972 says nothing about increases to official pensions to allow for inflation, about how and when such increases are to be calculated or announced, or about how the GMP element of such increases is to be addressed.
9. The obvious intent of Parliament was that it was the Increases Legislation, and that legislation only, that should be used for increases to official pensions to allow for inflation. It is not necessary to resort to canons of construction to arrive at that conclusion, but it is further supported by the principle *generalia specialibus non derogant.*
10. The SAA 1972 and the Increases Legislation are not overlapping provisions, still less, as in *Cusack*, overlapping provisions contained in the same statute. They are different statutes addressing different purposes. The Increases Legislation addresses increases in official pensions to allow for inflation. It applies across the board to all official pensions. The SAA 1972 addresses the establishment and government of individual PSPS. Its focus is those schemes and their rules, not official pension indexation increases.
11. The issue is not, as much of BT’s argument assumed, whether the SAA 1972 can ever be used to effect a pension increase for a PSPS, but rather whether it can be used to carry out, in whole or in part, the indexation increases provided for under the Increases Legislation, thereby cutting across and supplanting the ss.59/59A statutory regime. In our judgment SAA 1972 powers cannot be so used.
12. We accordingly accept HMT’s third answer to BT’s case on Grounds 1 and 1A.

(4) Whether there was no legal power under the SAA 1972 to amend the PCSPS scheme rules to provide indexation, because this would be using statutory powers for a private, collateral purpose.

1. It is well established that statutory powers can only be used for the purpose for which they were conferred and not for some other purpose – see, for example, *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997*; R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245, [198]-[199].
2. As stated by Lord Bridge in *R v Tower Hamlets London Borough Council, ex parte Chetnik Developments Ltd* [1988] 2 WLR 654 at p660-661 (emphasis added):

“My Lords, I start my consideration of the issue from a basic principle which I have found nowhere more clearly expressed and explained than by Professor Sir William Wade Q.C. in Administrative Law, 5th ed. (1982), pp. 355-356 in the chapter entitled "Abuse of Discretion" and under the general heading "The Principle of Reasonableness." After quoting from authorities going back to Rooke's Case (1598) 5 Co. Rep. 99b, the author introduces a new subheading "No unfettered discretion in public law" and writes, at pp. 355-356, 357:

The common theme of all the passages quoted is that the notion of absolute or unfettered discretion is rejected. Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely - that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended.

…

Thus before deciding whether a discretion has been exercised for good or bad reasons, the court must first construe the enactment by which the discretion is conferred. Some statutory discretions may be so wide that they can, for practical purposes, only be challenged if shown to have been exercised irrationally or in bad faith. But if the purpose which the discretion is intended to serve is clear, the discretion can only be validly exercised for reasons relevant to the achievement of that purpose.”

1. Public law powers may not therefore be exercised for the purposes of conferring private, collateral benefits upon third parties. For example, in *Dodd v Salisbury and Yeovil Railway Co.* (1859) 1 Giffard 158, it was held to be unlawful to use a power to take property, which had been conferred for the purpose of constructing a railway, in order to make roads as part of railway works to benefit the owner of Sherborne Castle, who had offered to contribute to the road’s cost. Sir John Stuart VC stated as follows at p.164:

"So far as this part of the case is concerned, it is really this, that because the owner of Sherborne Castle thinks the proposed road would be a convenience and has offered to contribute to the expense, the company insist on taking the plaintiff's property. Anything more opposed to the spirit of the statute can hardly be  
conceived.”

1. Similarly, in *Porter v Magill* [2002] 2 AC 357 it was held that a local authority’s power under s. 32 of the Housing Act 1985 to dispose of land could not be exercised for the benefit of a political party represented on the council. As Lord Bingham stated at p466F-G:

"… a public power is not exercised lawfully if it is  
 exercised not for a public purpose for which the power  
 was conferred, but in order to promote the electoral  
 advantage of a political party. The power at issue in the  
 particular case is section 32 of the Housing Act 1985, which  
 conferred power on local authorities to dispose of land  
 held by them subject to conditions specified in the Act.  
 Thus a local authority could dispose of its property,  
 subject to the provisions of the Act, to promote any  
 public purpose for which such power was conferred, but  
 could not lawfully do so for the purpose of promoting  
 the electoral advantage of any party represented on the  
 council."

1. HMT submitted that the public purpose for which the general powers relied upon under the SAA 1972 were conferred was in order to make and administer PSPS. It is concerned with public service pensions and the interests of public service pensioners.
2. In the present case BT seeks the exercise of those general powers in order to pay indexation on GMP otherwise than by means of the Increases Legislation (were that to be permissible, contrary to our conclusions above), or to amend the PCSPS to ensure that members of that scheme achieved indexation on GMP, or its equivalent, in a manner which did not require an indexation uplift by means of the Indexation Legislation. This is to be done, not in the interests of civil service pensioners, but in the interests of BT in order to avoid it incurring a pension liability to its Section B members. Civil service pensioners have no interest in pension indexation increases being effected in any way other than by the usual and conventional means under ss.59 and 59A. That means that to comply with BT’s request would entail using public powers conferred in relation to public service pension schemes in order to affect the provision of benefits under private pension schemes, and to do so to serve the financial interests of BT – to save BT money, in short. That would appear to be a clear example of using statutory powers for a collateral purpose.
3. BT submitted that the Government recognised that it was legitimate to have regard to the “unintended consequences” on BT in considering what steps should be taken in regard to indexation. It recognised that the Government’s policy objective was price protection of public sector pension rights and it was no part of its intention or policy to affect private pension schemes. In those circumstances it was clearly legitimate to have regard to the impact on private sector pension schemes, as the “Questions” raised in the Consultation recognised.
4. A 2017 Consultation does not, however, tell one anything about the purposes for which statutory powers were conferred under a 1972 statute. Our conclusion on the public purpose for which SAA 1972 exists is unaffected by the Consultation.
5. In any event, the Consultation raised wider questions in the context of possible new legislation, in relation to which historic *vires* issues would be irrelevant.
6. In our judgment, for all these reasons, it would not have been lawful to use general powers under the SAA 1972 to meet BT’s request to amend the PCSPS scheme rules or (assuming other legal hurdles could be overcome) to provide for indexation of GMP.
7. We accordingly accept HMT’s fourth answer to BT’s case on Grounds 1 and 1A.

(5) Whether the PCSPS workaround would have interfered with Section B members’ property rights.

1. This issue is to be addressed on the assumption that there is no Statutory Override but merely an amendment to the PCSPS rules.
2. HMT submitted that the PCSPS workaround would also have interfered with the Section B members’ property rights, even if implemented without any legislative change. A1P1 provides:

“(1) 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.

(2) 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.”

1. Strasbourg case law establishes that the term “possessions” has an autonomous meaning. In *Broniowski v Poland* (Application no 31443/96, judgment of 22 June 2004), the Court was asked to decide whether A1P1 has been violated by Poland’s acts and omissions in relation to the Claimant’s entitlement to compensatory property which dated back to the Second World War. The Court found as follows:

“129. The concept of “possessions” in the first part of Art.1 of Protocol No.1 has an autonomous meaning which is not limited to the ownership of material goods and is independent from the formal classification in domestic law. In the same way as material goods, certain other rights and interests constituting assets can also be regarded as “property rights”, and thus as “possessions” for the purposes of this provision. In each case the issue that needs to be examined is whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by Art.1 of Protocol No.1”

1. “Possessions” may include claims in respect of which a claimant has a “legitimate expectation” of obtaining effective enjoyment of a property right. In *Kopecky v Slovakia* (Application no. 44912/98, judgment of 28 September 2004), the applicant complained that there had been an infringement of his rights under A1P1 when coins which had been confiscated from his father by the former Communist regime in 1959 were not returned to him under the Extra Judicial Rehabilitations Act 1991 since he could not prove where the coins were. The Grand Chamber of the Strasbourg Court rejected the claim but summarised what is required to establish a violation of A1P1 in the following terms:

“35. An applicant can allege a violation of Article 1 of Protocol No. 1 only in so far as the impugned decisions related to his ‘possessions’ within the meaning of this provision. ‘Possessions’ can be either ‘existing possessions’ or assets, including claims, in respect of which the applicant can argue that he or she has at least a ‘legitimate expectation’ of obtaining effective enjoyment of a property right. By way of contrast, the hope of recognition of a property right which it has been impossible to exercise effectively cannot be considered a ‘possession’ within the meaning of Article 1 of Protocol No. 1, nor can a conditional claim which lapses as a result of the non-fulfilment of the condition (see *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, §§ 82-83, ECHR 2001-VIII, and *Gratzinger and Gratzingerova v. the Czech Republic (dec.)* [GC], no. 39794/98, § 69, ECHR 2002-VII).”

1. In *Stretch v United Kingdom* (Application no 44277/98, Judgment of 24 June 2003), the Court held that an individual who had enjoyed an option to renew a lease enjoyed a legitimate expectation of being entitled to do so even though its inclusion in the original lease was *ultra vires*. The Court stated as follows:

“34.  While it is true that under English law the option was rendered invalid due to the operation of the doctrine of *ultra vires*, the Court observes that the applicant had entered into the agreement with Dorchester on the basis that he would have the possibility of extending the term of the lease. Neither party had been aware that there was any legal obstacle to this term forming part of the applicant’s consideration for agreeing to the contract. The applicant proceeded to build on the land, pay ground rent to the local authority and enter into sub-leases with other persons who conducted business in the premises which he constructed. He clearly expected to be able to renew the option and continue to obtain the benefit of rent from the occupation of those premises which he had sub-let. He reached in negotiations with the local authority the stage of preparing a draft renewal lease with an agreed increased ground rent, already signed on his side and had proceeded to enter into agreements with his sub-lessees. The local authority, West Dorset, itself only raised the problem of invalidity at a very late stage (October 1995, according to the first instance judge).

35.  The Court considers, in the circumstances of this case, that the applicant must be regarded as having at least a legitimate expectation of exercising the option to renew and this may be regarded, for the purposes of Article 1 of Protocol No. 1, as attached to the property rights granted to him by Dorchester under the lease.”

1. HMT contended that a similar analysis applies here. The Section B members of the BTPS entered into their agreement with BT in the expectation that any indexation of the PCSPS would be given effect through the Increases Legislation. There can be no other reasonable explanation for their decision to contract in the terms that they did. That expectation has been borne out by the invariable administrative practice followed since then.
2. BT submitted that a mere hope or expectation that one might, in the future, acquire property will not found an A1P1 claim under the Convention – see *Marckx v Belgium* (1979-80) 2 EHRR 330, at [50]; *X v Federal Republic of Germany* (1979) 18 DR 216, at [219]. It submitted that that is the position that applies in this case. BTPS Section B members have no present entitlement to any particular inflation-related increases: under Rule 10.2 of the Section B Rules, increases will only be paid if and to the extent that there is a relevant increase to PCSPS pensions, of a type that reads across to Section B under that Rule. Unless and until there is such an increase, Section B members can have no more than a hope or expectation. It follows that if the Government pursued a mechanism for increasing PCSPS pensions that did not read across under Rule 10.2, such as the PCSPS workaround, there would be no interference with any property rights.
3. BT further submitted that there was insufficient evidence to support a legitimate expectation that the Increases Legislation would always be used for indexation. In particular, there has never been any representation that the means for uprating pensions will be ss. 59 and 59A SSPA 1975 in future cases. Further, there have only been four directions under s.59A. The first three directions can be disregarded as they related to anomalous, exceptional situations. The fourth direction, the 2016 Direction, can be disregarded as it was done on an interim basis and in the expectation of a consultation being carried out. Yet further, the effect of the Consultation process was to entirely destroy any prior legitimate expectation; the fact that the Government professed to have an open mind as to the route by which future uprating should take place and sought submissions on that question is inconsistent with the idea of an assurance by the Government that it would proceed only under s.59A.
4. It is probably unnecessary to decide this issue as the Consultation Response made it clear that the Government did not want to pursue an option that would involve complicated and contentious legal issues. If necessary, however, we would hold that Section B members’ property rights are engaged in this case.
5. The starting point is the terms of the Scheme B rules. We agree with HMT that the obvious assumption underlying Rule 10.2 is that indexation would be done using the Increases Legislation and that in that way the Section B members would benefit “as if” their pension was payable under the PCSPS. That can be the only purpose of referring to that Legislation, including (under Rule 1.2(i)) “as it may have been, or may from time to time be, amended, modified or re-enacted”.
6. Building on that, it is the fact that the invariable administrative practice since then has been to use the Increases Legislation for indexation increases. As Mr Kirk stated in his first statement:

"For nearly 50 years since the coming into force of the Pensions Increase Act 1971 public service pensions have been increased, usually on an annual basis, as a means of protecting pensioners from inflation. The Increase Act 1971 applied to the entirety of a public servant's occupational pension."

As he stated in relation to use of s.59A directions:

"The invariable practice from the outset of the old two-tier state pension was that the Treasury direction be used to switch back on full indexation for public service GMP in any circumstances where that would otherwise not be provided by the AP."

1. Mr Spain is the head of the civil service pensions technical team at the Cabinet Office and has long experience in dealing with civil service pensions. He agreed in his witness statement with Mr Kirk’s description of the role of the Increases Legislation. Next, it is BT’s own case that the right which would be interfered with by the Statutory Override is a property right. As explained in the Freshfields Advice:

“3.4 …. in Sections A and B of the BTPS, although it may be arguable that the right to an increase does not arise until the calculation date in the relevant year, there is no flexibility as to the basis of that calculation. Therefore, the right to an increase in accordance with the Increases Legislation, as if payable under the PCSPS, automatically “crystallises” into a subsisting right as at the calculation date each year.

3.5 Our view is therefore that the right to payment of the Additional Increases constitutes a “subsisting right” within the meaning of Section 67….

….

5.3 The provision of a “subsisting right” for the purposes of Section 67 would, in our view, constitute a proprietary interest capable of amounting to “property” for the purposes of A1P1….”.

1. So far as civil servants are concerned, the Court has recently confirmed that their entitlement to compensation payments under a scheme made under s.1 SSA give rise to domestic law rights and constitute rights under A1P1, see *R (PCSU) v Minister of the Cabinet Office* [2017] EWHC 1787 (Admin) at [71]-[72].
2. Whilst the Statutory Override is a more overt interference with that right than the PCSPS workaround, in that it enables the right to be removed rather than circumvented, the aim and the practical end result is the same in both cases, as is the underlying right being interfered with. As HMT submitted, in those circumstances to draw sharp distinctions between them is to elevate form over substance, which the Strasbourg Court generally deprecates.
3. We do not consider that the Consultation changes matters. Whilst that contemplated new legislative options being taken, it did not suggest that if, instead, full indexation was to be continued on an interim basis, that would lead to any change in the conventional means of achieving indexation, namely through the Increases Legislation.
4. Finally, even if it be the case, as BT submitted, that the evidence did not bear out the existence of a substantive legitimate expectation as a matter of domestic law, that does not mean that there may not be a property right for the purpose of A1P1, as is made clear by *R (PCSU) v Minister of the Cabinet Office* at [73].
5. We accordingly accept HMT’s fifth answer to BT’s case on Grounds 1 and 1A.

*Conclusion on Grounds 1 and 1A*

1. BT’s Re-Amended Statement of Facts and Grounds makes a number of wider points beyond those addressed above, to the effect that the Decision was “arbitrary, discriminatory, disproportionate, irrational and/or inadequately reasoned” (see [4] by way of example).
2. We have addressed discrimination above, in the context of Ground 2. The same analysis applies in the context of Grounds 1 and 1A.
3. More generally, we are satisfied that the Decision to impose the Interim Solution was not arbitrary, disproportionate, irrational or inadequately reasoned. For all the reasons given by HMT we are satisfied that the Decision was not flawed in any of those ways and was one which the Chief Secretary was entitled to reach.
4. Grounds 1 and 1A fail for each and all of the reasons given by HMT.

*Ground 4 – the November 2018 decision*

1. By its Re-Amended Statement of Facts and Grounds dated 5 November BT contended that the 1 November 2018 decision was unlawful on the same grounds as the Decision. In light of our conclusions in relation to grounds 1, 1A, 2 and 3 above, this challenge falls away, because we have rejected all of those grounds in relation to the Decision.
2. BT argued, however, that there are additional flaws in the 1 November 2018 decision, which go beyond the pleaded grounds in relation to the Decision and require separate analysis. These additional flaws form Ground 4 of BT’s challenge and can be summarised as follows (taken from BT’s Re-amended Statement of Facts and Grounds at [86I]):
   1. The Chancellor was not invited to consider whether to approve the PCSPS option and in consequence made no decision whether to reject it or not.
   2. The Chancellor was wrongly informed that the PCSPS proposal would interfere with property rights.
   3. The Chancellor was not informed of BT’s arguments raised in the context of this judicial review, relating to the power to pursue the PCSPS workaround via the SAA 1972 and the absence of interference with property rights if the PCSPS workaround was adopted (both of those arguments having been raised in BT’s pleadings and witness statements prepared for this hearing).
   4. The Chancellor was invited to approve the decision at extremely short notice and was told that his decision was “key” to these proceedings. Consequently, no fair or proper reconsideration of this claim took place and there was no genuine reconsideration of the decision.
3. BT argued that the late disclosure, including the removal of redactions from the October and November submissions, substantially affected the pleaded issues in this case, narrowing them, and undermining HMT’s case that it had rejected the PCSPS workaround for policy reasons. That material showed that the Consultation Response (the first Decision) and the 1 November 2018 decision were both made on the false basis that all of BT’s options involved interference with a property right; whatever had been the position at the time of the Consultation Response, by 1 November 2018 it was very clear that BT was putting forward the PCSPS workaround as a free-standing option which would not interfere with the Section B members’ property rights at all.
4. HMT answered BT’s reamended pleading (now including ground 4) in a Note dated 7 November 2018, which we were invited to treat as an addendum to its Detailed Grounds. We are content to do so.
5. HMT submitted that these latest complaints are misguided. The Chancellor was not being asked to reconsider the Decision afresh. He was simply being invited to consider the inaccurate summary of legal advice provided to him in the 8 December email, now corrected in the 2018 Submission, and to say whether that correction made any difference to his earlier confirmation of the Decision. He was asked to do that in advance of this case for obvious reasons: if the Chancellor took the view that in light of the correction he could no longer support the Decision, then the inevitable result would be that the Decision would be withdrawn by HMT bringing an end to this challenge, without the need of any court hearing; if, on the other hand, the Chancellor stood by his earlier confirmation of the Decision, then HMT would be able to resist the argument that the error in the 8 December email was a material error which should, in and of itself, result in the Decision being quashed. HMT argued that the Chancellor’s 1 November 2018 decision went to a very small point and could properly be taken quickly; there was no difficulty with the way matters were summarised for the Chancellor: he was not being asked to review the Decision afresh, and thus the short memorandum was adequate and correct when it referred to interference with rights; in fact the Chancellor called for the original November Submission and he had that before him as well, so he understood what had occurred before and what arguments were being mounted.
6. It was regrettable that HMT disclosed material so late in the day. It would of course have been better if HMT had unredacted the relevant documents, and spotted the error in the 8 December email, at an earlier stage. But the redactions had been applied (in the main) to legal advice, and removal of those redactions was therefore voluntary; the error was corrected as soon as it was detected, no doubt in the course of preparation for this hearing. Ms Rose opened her case on the basis that the late-disclosed material had a significant impact on this case, but we disagree. We have already dealt with the main points raised by BT, and it can be seen that the late-disclosed material plays a small part, overall, in our analysis. Specifically, it does not weaken HMT’s case that the PCSPS workaround was refused for policy reasons.
7. As to the scope of the 1 November 2018 decision, we accept HMT’s argument that the Chancellor was not being asked to review the Decision as a whole, he was simply being asked to consider whether the correction to the error now identified in the 8 December email caused him to change his earlier confirmation of the Decision. This was a proper request. We are not persuaded that BT had any right to expect the Chancellor to review the entirety of the Decision, or take account of arguments advanced in the course of litigation, after the Decision. We are not persuaded that the Chancellor erred in law in performing this narrow task. We were shown no authority to support BT’s argument that the Chancellor was required to review the whole matter afresh.
8. Once the narrow scope of the Chancellor’s review is recognised, the speed of the decision and the summary nature of the information put before him is readily comprehensible and appropriate to the task in hand. It discloses no error of law.
9. Separately, we have already concluded that all options put to HMT by BT, including the PCSPS workaround, did in law engage the A1P1 rights of Section B members. There was no error in that assertion in the memorandum.
10. We reject BT’s submission that the 1 November 2018 decision cannot stand. It can. It follows that the error identified late in the day consisting of the inaccurate summary of the earlier legal advice ceases to have any relevance because in light of the later decision, we can be confident that the inaccuracy would not have made a difference to the earlier Decision: s. 31 (2A) applies.
11. For all these reasons we do not consider Ground 4 to be arguable and accordingly refuse permission.

**Conclusion**

1. For the reasons outlined above, we refuse permission to apply for judicial review on Grounds 2, 3 and 4. We grant permission on Grounds 1 and 1A but refuse the application. We are grateful to counsel for their clear and skilfully presented arguments.