Case No: A3/2016/1518

Neutral Citation Number: [2017] EWCA Civ 1482
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
MR JUSTICE WARREN
HC2015000392

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/10/2017

Before:

LORD BRIGGS OF WESTBOURNE JSC
LORD JUSTICE LONGMORE
and
LORD JUSTICE FLOYD

- -

Between:

SAFEWAY LIMITED	**Appellant**
- and -	
(1) ANDREW NEWTON	
(2) SAFEWAY PENSION TRUSTEES LIMITED	
("The Trustee")	**Respondents**

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- -

Mr Brian Green QC and Mr Sebastian Allen (instructed by **DWF LLP**) for the **Appellants**
Mr Andrew Short QC and Mr Michael Uberoi (instructed by **Burges Salmon LLP)**) for the **First Respondent**
Mr David E. Grant (instructed by **Eversheds Sutherland International) LLP)** for the **Second Respondent**

Hearing dates: 4-6th July 2017

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Judgment

Lord Briggs of Westbourne JSC:

Introduction

1. This is the judgment of the court. This appeal from the order of Warren J made in the Chancery Division of the High Court on 29 February 2016 raises for determination the date upon which the Normal Pension Ages ("NPAs") applicable under the occupational pension scheme for employees of the Safeway Group, the Safeway Pension Scheme, ("the Scheme") were equalised at 65 years old for both men and women (having previously been 65 years old for men and 60 years old for women). The appellant, Safeway Limited, which is the principal employer under the Scheme, contends that NPA equalisation occurred on 1 December 1991, that being the date notified to Scheme members for that purpose by a prior written announcement, and the date by reference to which a subsequent formal amendment of the Scheme by deed was stated to be retrospectively effective. The first respondent, Mr Andrew Newton, who acts in a representative capacity for members of the Scheme with an interest in doing so, asserts that the judge was right to conclude that NPA equalisation did not occur until 2 May 1996, that being the date of execution of the deed by which the Scheme was formally amended. If that is correct, it follows that the NPA for men had also to be treated as 60 rather than 65 for the period between December 1991 and May 1996. The aggregate financial consequence of the determination of this issue is estimated to amount to more than £100 million.

2. The correct choice between those dates depends upon the resolution of# two issues. The first is whether the power to amend the terms of the pension scheme could be exercised by the principal employer, with the agreement of the Scheme trustee, otherwise than by deed and, in particular, by a written announcement of the terms and commencement date of the proposed amendment. The judge decided that it could not.

3. The second issue is whether, if the power of amendment could only be exercised by deed, the power to do so retrospectively, for the purposes of equalisation of NPAs, was prohibited by the directly applicable EU principle of equal treatment then enshrined in Article 119 of the Treaty of Rome (now Article 157 of the Treaty on the Functioning of the European Union) to which, like the judge, we will refer as "Article 119". The judge decided that Article 119 did have this prohibitory effect, with the result that he held, and so ordered, that NPAs under the Safeway Scheme were only equalised at 65 years with effect from 2 May 1996.

Disposition

4. For the reasons which follow, we have concluded that the judge was correct in his determination of the first issue. The power of amendment conferred by the then applicable provisions of the Scheme, namely clause 19 of the Definitive Trust Deed dated 1 April 1984, could only be exercised by deed, and not by written announcement.

5. As to the second issue we have, unlike the judge, come to the conclusion that its determination raises a question of EU law which needs to be referred to the Court of Justice. Since the application of the correct principle to the facts of this case will therefore remain to be determined by this court in due course, we prefer to express no firm view of our own about its merits. Nonetheless we will explain why, in respectful

disagreement with the judge (expressed both in this case at first instance and in *Harland & Wolff Pension Trustees Limited v Aon Consulting Financial Services Limited* [2006] EWHC 1778 (Ch)), we do not consider the question of EU Law to be *acte clair*.

6. The Scheme was originally established and regulated by an Interim Trust Deed dated 16 March 1978 ("the 1978 Deed"). It contained, at Clause 11, the following power of alteration:

> "(A) The Principal Company may by deed at any time and from time to time before the execution of the Definitive Deed but subject to the consent of the Trustees alter or add to all or any of the trusts powers and provisions of this deed provided that no such alteration or addition shall be inconsistent with the provisions of clauses 2, 5(1) and (2) and 13 hereof.
>
> (B) After execution of the Definitive Deed the power of alteration of and addition to the trusts powers and provisions of this deed the Definitive Deed and Rules and deeds supplemental thereto shall be as set out in the Definitive Deed."

7. As anticipated in Clause 11(B), a Definitive Deed and Rules for what was then described as the Argyll Foods 1981 Pension and Life Assurance Plan was executed on 1 February 1982 ("the 1982 Deed") by Argyll Foods Limited as employer and Argyll Foods Group Pension Trustees Limited as trustee. The 1982 Deed contained, at Clause 19, the same amendment power as that which I am about to describe, as having been in force at the material time in the 1990s.

8. The 1982 Deed was replaced on 1 April 1984 by a Trust Deed and Rules between the same parties ("the 1984 Deed"), which contained the following power of amendment, again at Clause 19:

> "POWER OF ALTERATION OF DEED AND RULES
>
> The Principal Company may at any time and from time to time with the consent of the Trustees by Supplemental Deed executed by the Principal Company and the Trustees alter or add to any of the trusts powers and provisions of the Scheme including this Trust Deed and the Rules and all Deeds and other instruments in writing supplemental to this Trust Deed and the Deeds specified in the Second Schedule hereto and may exercise such powers so as to take effect from a date specified in the Supplemental Deed which may be the date of such Deed or the date of any prior written announcement to Members of the alteration or addition or a date occurring at any reasonable time previous or subsequent to the date of such Deed so as to give the amendment or addition retrospective or future effect as the case may be."

9. At all material times until (at least) November 1991 the Scheme was expressed as providing NPAs of 65 for men and 60 for women. By 1991 this was to be found

expressed by way of definition of Normal Pension Age in Rule 2 of the Scheme's Rules. Rule 23 gave the principal company a widely drawn power by notice in writing to the Trustee to augment the benefits conferred by the Rules either for all beneficiaries or in respect of any specified beneficiary or class of beneficiaries under the Scheme. The Rules were annexed as the Third Schedule to the 1984 Deed.

10. The Second Schedule to the 1984 Deed sets out a convenient list of instruments which had the effect of amending or supplementing the terms of the Scheme, including the 1978 Deed, the 1982 Deed and various Deeds of Amendment, including two between 1978 and 1982, and no less than seven between the dates, respectively, of the 1982 and 1984 Deeds.

11. On 19 May 1990 the European Court of Justice delivered judgment in *Barber v Guardian Royal Exchange Assurance Group* (Case – C262/88) [1991] 1QB 344, holding that the direct effect of Article 119 made it unlawful discrimination within the community for pension schemes to provide for different NPAs for men and for women. But the Court of Justice held that (because of the absence of any sufficiently clear prior jurisprudence) the direct effect of Article 119 could not be relied upon to claim a pension entitlement by reason of that discrimination with effect prior to the publication of that decision on 17 May 1990. Subject to that restraint upon retroactivity, imposed in part because of concerns expressed by the United Kingdom as to the large financial consequences for pension schemes which commonly discriminated between men and women in that way, the Court held that it was for national courts to apply Article 119 so as to safeguard the equal treatment right in relation to pensions thereby conferred.

12. In common no doubt with many others, those responsible for the Safeway Scheme set about responding to the need to equalise NPAs by amendment of its terms. On 1 September 1991 there was published to all members of the Scheme an announcement ("the 1991 Announcement"), to the effect that the Trustee had decided to amend the Scheme by introducing a single NPA for men and women set at age 65, following what it described as a trail blazed by the European Court in the *Barber* case.

13. The following are extracts from the 1991 Announcement:

> "Changes To Your Scheme Benefits
>
> This announcement brings you advance news of two significant changes to the Safeway Pension and Family Benefits Scheme which the Company and Trustee intend to introduce with effect from 1 December 1991."

The first change, about automatic annual increases to pensions in payment is not material to this case. The passages quoted below relate to the proposed equalisation of NPAs:

> "A common Normal Pension Age for men and women of 65 – Treating men and women differently in employment practices has long been outlawed. Surprisingly, in the pensions area it has been possible to allow different treatment, especially with

> regard to pension ages. A recent case in the European Court is set to change all that…"
>
> "**European Court blazes new pensions trail**
>
> You may have heard about a case recently which involved Guardian Royal Exchange (GRE) and one of their former employees, a Mr Barber. He claimed he had been a victim of sex discrimination when refused a pension from GRE following redundancy at an age when a woman would have received one. After a lengthy battle which ended up at the European Court, the case was settled in favour of Mr Barber. This is an important judgment as it means that changes are now inevitable in many company pension schemes with regard to different retirement ages for men and women.
>
> It is still somewhat uncertain as to how the court decision will work in practice. However, the Company and the Trustee have decided that it is right to act now to equalise Normal Pension Age. They are continuing to monitor the situation and will make any further changes which may be required as a result of clarification of the effects of the judgment."

The 1991 Announcement contained the following footnote:

> "It is emphasised that the Trust Deed and Rules are the legal basis of [the Scheme], and that this announcement is intended only for the purpose of general guidance and information. You should note that the changes described in this leaflet represent an alteration to your Terms and Conditions of employment."

14. The 1991 Announcement was signed "JP Kinch, Secretary". Mr Kinch (who gave evidence at the trial) was company secretary of both the principal employer company (i.e. then named Argyll Foods and now Safeway) and the Trustee. The judge held, and it is not challenged on appeal, that the 1991 Announcement emanated from the employer company and the Trustee.

15. By letter dated 1 December 1991 to those of its employees who were members or eligible to become members of the Scheme, Safeway formally confirmed that the changes to pension benefits described in the 1991 Announcement had been made with effect from 1 December 1991. Again, the letter was signed by Mr Kinch, but he did so only on behalf of the principal company and certain other employer companies within the Safeway Group. We will call it "the 1991 Letter". Although there were some issues at trial about whether the 1991 Letter was received by all members and potential members of the Scheme, the judge was content to proceed upon the basis that the combined effect of the 1991 Announcement and the 1991 Letter together constituted an announcement for the purposes of clause 19. In this court the parties appeared to be content to treat the 1991 Announcement as qualifying for that purpose on its own. We are content to adopt that assumption.

16. From the beginning of December 1991 the Scheme was administered on the basis that the previously different NPAs for men and women had indeed been equalised by the adoption of a common NPA of 65. Thus, members' benefits were calculated on that basis, even if not in payment. Payments to members retiring thereafter were made on that basis, as were transfer payments, and payments following members' death in service.

17. Meanwhile, no corresponding amendment was made by deed, so as to vary the differential NPAs for men and women provided for in the Rules, until 2 May 1996 when the principal company and the Trustee executed a further Trust Deed and Rules for the Scheme ("the 1996 Deed"). The Rules, which constituted the Second Schedule to the 1996 Deed, provided for a common NPA of 65 years for men and women. For general purposes, the revision of the trusts powers and provisions was stated to have effect retrospectively from 6 April 1988, but the equalisation of NPAs was (subject to irrelevant qualifications) to have retrospective effect from 1 December 1991, the date identified in the 1991 Announcement as the effective date for equalisation of NPAs.

18. The Scheme had by the date of execution of the 1996 Deed been administered upon the basis that equalisation of NPAs had already occurred, with effect in relation to pensionable service from December 1991 onwards. But it has not been alleged, at trial or on appeal, that this gave rise to any amendment by way of convention estoppel, or otherwise, if Clause 19 of the 1984 Deed did not confer a power to amend by announcement.

Construction of Clause 19

Submissions

19. For Mr Newton, Mr Andrew Short QC submitted that Clause 19 had a clear meaning. Its first part identified a single means of amendment, namely by deed. Its second part (beginning "and may exercise such powers so as to take effect from a date …") is solely directed to defining the date from which an amendment by deed may take effect. The language of Clause 19 could not, he submitted, be interpreted so as to confer a separate power of amendment by announcement, and nothing about the context in which Clause 19 was included within the 1984 Deed, nor any reference to the purpose for which the power was conferred, could justify Safeway's case to that effect.

20. Mr Brian Green QC for Safeway made no attempt to suggest that, as a matter of mere language, Clause 19 pointed towards a construction which permitted amendment by announcement. Rather, he submitted that the following factors compelled the court to that conclusion:

    i) A distinction was to be drawn between purely textual amendments to the documents setting out the terms of the Scheme which, he accepted, had to be made by deed, and substantive amendments which, regardless of the text, nonetheless altered the terms of the Scheme with immediate effect upon the trusts affecting the fund, the duties of the Trustee and the rights of members, which could be altered by announcement.

ii) Clause 19 expressly contemplated that alterations of the substance would, or at least could, occur before alteration of the text.

iii) There was a widespread practice within the pensions industry to announce alterations and then implement them prior to reflecting such alterations by formal revision of trust deeds and rules. Clause 19 should be interpreted as having been designed to authorise the adoption of that practice in the administration of the Safeway Scheme.

iv) An interpretation of Clause 19 which prohibited alteration of the substance by announcement would leave a trustee which implemented an announcement in advance of a formal amendment by deed in breach of trust, and therefore vulnerable to personal liability, in the event that no valid retrospective amendment to the text was made. This was, he submitted, an unreasonable, impracticable and therefore unacceptable interpretation.

Analysis

21. The judge rejected substantially similar submissions from Mr Green to those summarised above. In our view he was clearly right to do so. The starting point is that the Clause 19 power of amendment forms part of a sophisticated, professionally drafted code for the administration of a valuable and complex business trust, a context in which those having recourse to the terms of the written instruments which regulate it are in principle entitled to assume that clear language means what it says.

22. The parties to the 1984 Deed are the principal employer, upon which the Deed imposes substantial financial obligations, and the corporate Trustee, upon which the Deed imposes fiduciary duties. But the Deed exists primarily for the benefit of non-parties, that is the employees upon whom pension rights are conferred whether as members or potential members of the Scheme, and upon members of their families (for example in the event of their death). It is therefore a context which is inherently antipathetic to the recognition, by way of departure from plain language, of some common understanding between the principal employer and the Trustee, or common dictionary which they may have employed, or even some widespread practice within the pension industry which might illuminate, or give some strained meaning to, the words used.

23. As Neuberger J said in *Bestrustees v Stewart* [2001] Pens.L.R. 283, at paragraph 33:

> "… I bear in mind that a pension scheme is likely to continue for a substantial period of time and that those most affected by them and entitled to protection from the trustee, the employer and indeed the court, will be people who are comparatively poor, who will not have easy access to expert legal advice, and who will not know what has been going on in relation to the management of the Scheme. In those circumstances, it seems to me that protection of the beneficiaries requires the court to be very careful before it permits a departure from the plain wording and plain requirements of the trust deed…"

Although in the different context of the requirement for a written record (satisfied in a sense by either of the rival interpretations in this case), we regard that dictum as fully applicable in the present context and as reinforcing the requirement to give plain language its plain meaning.

24. The language of Clause 19 is not merely plain, it is unmistakable. The opening part of the clause defines the single mode (namely amendment by deed) whereby the trusts, powers and provisions of the Scheme may be altered or added to. The second part clearly and expressly directs itself to identifying the range of dates (the choice from which must be specified in the supplemental deed) within or among which the effective date of an alteration or addition may be selected. It includes the date of any prior written announcement to members of the alteration or addition, and any date within a reasonable time-frame previous or subsequent to the date of the amending deed.

25. The separate purposes of the two parts of Clause 19 are all the clearer when it is compared with its predecessor in the 1978 Deed, quoted above. That made provision for precisely the same power of amendment by deed as is contained in the first part of Clause 19, but omitted any provision as to commencement date, including therefore any provision permitting retrospectivity by reference to an earlier announcement. If one asks what the first manifestation of what is now the second part of Clause 19 was intended to achieve for the principal company and Trustee (first implemented in the 1984 Deed) the answer could not be clearer, namely to give the principal company and Trustee appropriate flexibility as to the commencement date.

26. The evidence before the judge fell woefully short of establishing any industry practice which would require a very strained meaning to be given to the clear language of Clause 19. Mr Kinch, who had been involved in the administration of the Scheme since well before 1982, merely said that it had always been his understanding that amendments could be made by announcement. A subjective understanding of the parties to a written instrument cannot, short of rectification, override its objectively ascertained meaning. Further, even if the "private dictionary" principle (by which a special meaning can be attributed to words previously used by parties to a document) had survived its condemnation by the House of Lords in *Chartbrook v Persimmon* [2009] UKHL 38, the evidence fell well short of establishing any sufficient private dictionary in the present case.

27. There was no evidence of any kind sufficient to establish that some custom of the trade required Clause 19 to be given a special meaning. Mr Green relied upon a series of decisions which illustrated occasions on which those responsible for the administration of pension schemes had implemented announcements in advance of making amendments to the trust deeds and rules of the relevant schemes. While maintaining neutrality as to the issues, Mr David E. Grant for the second respondent trustee company added to that list (to which we ourselves might add *Capita (Banstead 2011) Ltd v RFIB Group Ltd* [2014] EWHC 2197 (Comm) and [2015] EWCA Civ 1310; [2016] 2 WLR 1429) so that, by the end of the appeal, the court had cases decided between 1990 and 2016, illustrating the mixed fortunes of trustees and legal advisers who proceeded on that basis. Mr Green submitted with vigour that, for every reported case, there were numerous further examples known to pensions experts (including himself) which illustrated that practice and submitted that, in the absence

of contradiction from his opponents, the court should simply accept what he said without question.

28. We do not for one moment question Mr Green's wide experience in this field, still less his complete integrity. Our difficulty lies in the underlying assertion that the widespread existence of such a practice justifies reading a limited power of amendment by deed as containing, in addition, a power of amendment by announcement. It is plain that, in some of the cases, including the earliest, namely *Icarus v Driscoll* [1990] Pens. L.R. 1, amendment by announcement might subsequently have been made effective by way of estoppel by convention, although *Redrow v Pedley* [2002] EWHC 983 (Ch) may be said to cast doubt on that analysis. It is clear that some schemes do provide for announcements to have substantive effect pending formal amendment of trust deeds and rules. The amendment power underlying the important decision of the ECJ in *Smith v Avdel Systems Limited* (Case C-408/92) [1995] ICR 596 to which we will refer in due course, is a case in point.

29. Furthermore, all the illustrations by way of reported cases post-date the relevant date for the interpretation of Clause 19 which is either 1984 (when it was first introduced into the Scheme) or, at the latest, 1996, although some of them describe implemented announcements carried out at an earlier date.

30. Nor in our view is there anything in Mr Green's submissions about the unreasonableness of the consequences of the judge's interpretation, in terms of the exposure of trustees to breach of trust. As Mr Short put it, this puts the cart before the horse. Pension trustees who administer their schemes upon the basis of announced alterations on the assumption that they will in due course be confirmed by an authorised amendment, with retrospective effect, do so at their own risk. Save for the difficulties about retrospectivity introduced by the ECJ's interpretation of the effect of Article 119, those risks might historically have appeared to be modest or even insignificant, at least for as long as insolvency did not intervene between the announcement and its implementation by an amending deed. In fact, in the present case, the 1991 Announcement was made several weeks before the stated implementation date, and a reasonable Scheme member reading that announcement might well have supposed that the requisite amending deed would be prepared and executed before 1 December 1991.

31. For those reasons we would dismiss the appeal on the construction issue.

The Article 119 Issue

32. The Court of Justice decided in the *Barber* case that the use of different NPAs for men and women in an occupational pension scheme was unlawful because of the direct effect of Article 119, but with effect only from 17 May 1990. Thereafter, pension trustees, employers and, if necessary, the courts came under an obligation to take all necessary steps to equalise NPAs as soon as possible, so as to bring schemes using different NPAs for men and for women into conformity with the equal treatment principle of EU law.

33. It might at first sight be thought surprising that the equal treatment principle contained nonetheless a restraint on retroactive changes to NPAs by employers and pension trustees with the requisite power to make such changes with retrospective effect, and

all the more so where the Trust Deed and Rules contained an express power to do so with effect from the date of an earlier announcement of a decision to make such a change, even if the means of equalisation consisted of what may be described as levelling down (that is by raising an NPA for women to the level of that established for men under that scheme), with a consequential reduction in the value of the rights of the previously advantaged class, namely women. In such a case, employees deciding to join or to leave the scheme or carrying out pensionable service under its terms would know from the date of the announcement that NPAs were going to be equalised by levelling down from the date stated in the announcement. In the present case that is (albeit as we have found without authority) what the principal company and Trustee actually did so that, from the announced date of the change, there was no practical discrimination at all as between men and women in relation to their NPAs thereafter.

34. It would by contrast not be at all surprising if the obligation under EU Law to equalise previously unequal treatment of pension rights could not be implemented by levelling down in relation to pensionable service in the past if to do so would detract from vested indefeasible rights (from the domestic law perspective) arising from that service. In such circumstances it would be understandable for EU Law to require a process of levelling up rather than levelling down, as the only justified way of giving effect to the equal treatment principle without an unfair derogation from accrued rights.

35. A trilogy of decisions of the Court of Justice, all handed down on the same date in September 1994, persuaded Warren J that he was bound to recognise a EU Law restriction on retrospective equalisation of NPAs, namely that the differences in treatment in respect of pensionable service on or after 17 May 1990 could only be remedied with retroactive effect (that is prior to the date of the relevant amending instrument) by levelling up, by augmenting the rights of the disadvantaged class so as to bring them into line with the advantaged class, in this case by giving men the same NPA as women, even where the scheme's deed and rules permitted retrospective levelling down. The judge's cogent reasoning for that conclusion is to be found both in paragraphs 132 to 146 of his judgment under appeal, and in paragraphs 36 and following of his judgment in the *Harland & Wolff* case.

36. Mr Green sought to derive a number of uncontentious principles from the trilogy of 1994 cases (and from some which preceded them) in an analysis with which we broadly agree. We will set them out with only the briefest references to the decisions from which they have been derived. The 1994 cases are *Coloroll Pension Trustees Ltd v Russell* (Case C-200/91) [1995] ICR 179, *Smith v Avdel Systems Ltd* (Case C-408/92) [1995] ICR 596 and *Fisscher v Voorhuis Hengeglo BV* (Case C-57/93) [1995] ICR 635.

37. First, Article 119 makes it unlawful under EU Law to provide men and women with different pension benefits (and in particular different NPAs) in relation to pensionable service undertaken after 17 May 1990. This is the date established in the *Barber* case as that from which this principle was applicable throughout the EU, and is commonly described as the date of the opening of the *Barber* window. Thereafter there is an obligation on employers, pension trustees and, if necessary, upon the courts of member states, to give effect to that principle: see the *Coloroll* case, in particular at paragraphs 25 to 28 of the Judgment.

38. Secondly, employers and pension trustees may take effective measures available to them under domestic law (including the terms and rules of the relevant Scheme) to implement Article 119 by levelling down, that is reducing the rights of the advantaged class to those of the disadvantaged class, with respect to future pensionable service (i.e. service undertaken after the taking of those effective measures). But in relation to the period from the opening of the *Barber* window until the taking of those effective measures (generally described as the closing of the *Barber* window) employers and trustees will be required to confer the same rights upon the disadvantaged class as those enjoyed by the advantaged class: see the *Fisscher* case, in particular at paragraphs 33 to 37 of the Judgment, the *Coloroll* case at paragraphs 32 to 36 of the Judgment and the *Smith* case at paragraph 17 of the Judgment.

39. Thirdly, the benchmark for ascertaining, during the period when the *Barber* window is open, the rights of the advantaged class is to be found by reference to the trust deed and rules of the relevant scheme, because that provides the sole and exclusive system or frame or point of reference for the purposes of achieving equal treatment. The origins of this principle in the EU authorities are well summarised by Warren J in paragraphs 35 to 41 of the judgment under appeal, by reference to *Razzouk and Beydoun v EC Commission* (Cases 75/82 and 117/82) [1984] 3 CMLR 470, *The Netherlands v Federatie Nederlandse Vakbeweging* (Case 71/85) [1987] 3 CMLR 767 and *Nimz v Freie und Hansestadt Hamburg* (Case C-184/89) [1992] 3 CMLR 699.

40. Fourthly, the objective of Article 119 during the period when the *Barber* window is open is concerned with levelling up the rights of the disadvantaged class to those enjoyed by the advantaged class, but not with giving either the advantaged class more generous rights than they previously enjoyed, still less giving the disadvantaged class more generous rights than previously enjoyed by the advantaged class. This is, Mr Green submits (and we agree), the effect of the second and third principles described above. It also reflects what may be described as a principle of minimum interference with domestic rights, where a directly applicable EU right is to be applied, as explained by Arden LJ in *Foster Wheeler v Hanley* [2009] EWCA Civ 651, at paragraph 33:

> "Accordingly, the court should, where possible, give effect to *Barber* rights by adhering to the provisions of the relevant scheme where it is possible to do so in preference to some other approach. If some departure is required, it should in general, so far as practicable, represent the minimum interference with the scheme provisions."

41. Applied to the present case, it is common ground that the principal company and the Trustee implemented measures which closed the *Barber* window on 2 May 1996, the date of the making of the 1996 Deed, and did so by a legitimate process of levelling down, that is increasing the NPA for women from 60 to 65, pursuant to the amendment power contained in Clause 19 of the 1984 Deed. Mr Green expressly abjured any submission that, if ineffective upon the true construction of Clause 19, the 1991 Announcement coupled with the *de facto* implementation of it from that date constituted effective measures sufficient to close the *Barber* window with respect to pensionable service undertaken after November 1991.

42. It is also common ground that, for pensionable service undertaken during the period between the opening of the *Barber* window and 30 November 1991, this requirement to level up means that men needed to be given pension rights flowing from an assumed NPA of 60. This is because women enjoyed an NPA of 60 during that period and, there being no announcement of any proposed change taking effect prior to 1 December 1991, women had an indefeasible right to an NPA of 60 in relation to pensionable service before December 1991 which could not be adversely affected by an amendment made under Clause 19.

43. The difficulty in the present case arises from the fact that, from 1 December 1991 until the closing of the *Barber* window, women enjoyed only a defeasible right in domestic law (under the 1984 Deed and Rules) since for the whole of that period, there was in place an announcement to increase their NPA to age 65, capable of being implemented by the retrospective application of Clause 19 at any date thereafter, however remote. Nor was this defeasibility some small black cloud on the horizon. Members and their advisers paying careful regard to the 1991 Announcement and the terms of the 1984 Deed would have regarded the change of NPA as something approaching a racing certainty, not least because the change was *de facto* implemented, and women members were treated as having an NPA of 65 in respect of all pensionable service undertaken thereafter.

44. As Mr Green puts it, if the advantaged class (women) had only a defeasible right to an NPA of 60 during that period, and if this was the benchmark for the application of Article 119 by levelling up, why should men be given anything better? Furthermore, why should the effect of giving men and women an NPA of 60 in respect of pensionable service during that period have the effect not merely of improving women's rights to an NPA of 60 by making them indefeasible, but also improving men's rights both by reducing their NPA from 65 to 60, and making those rights indefeasible as well?

45. The judge held that he was bound to reach that conclusion by the decision of the Court of Justice in the *Smith* case, because it was in all material respects indistinguishable from the present case. This was because he analysed the *Smith* case as one in which the Court of Justice disallowed a levelling down of the rights of the advantaged class with retrospective effect during the period when the *Barber* window remained open. He held that, even where the employer and trustee had under domestic law a power to level down the rights of the advantaged class with effect in relation to accrued pensionable service in the past, the EU principle enshrined in Article 119 made this illegitimate.

46. We can well understand why the judge thought that the language of the judgment of the Court of Justice in the *Smith* case appeared to lead to that conclusion, but we have not been persuaded, upon a close analysis of the decision, including the opinion of the Advocate General which the Judgment broadly applied, that this is necessarily what the *Smith* case decides, in particular because it appears to produce a result which gives both the advantaged and disadvantaged classes better pension rights than those of the advantaged class during the relevant period, which as a matter of well-established EU principle are meant to be the benchmark for equalisation under Article 119 during the period when the *Barber* window remains open. In our view the critical question, which we consider should be decided by means of a reference to the Court of Justice, is whether the *Smith* case really does establish a principle which requires defeasible

rights to be rendered indefeasible during that period, where there exists an undoubted power in the employer and/or trustee under domestic law to level them down with effect upon past pensionable service.

47. Before addressing the *Smith* case directly, we need first to analyse the *Coloroll* case which, although the decision was handed down on the same day as the *Smith* case, was argued earlier. In the *Coloroll* case, any power of retrospective amendment of the scheme which the employer and trustee might have enjoyed had come to an end by the relevant time, because of the insolvency of the employer. It was treated as a case in which amendment of the provisions of the scheme or the trust deed could not be achieved by the employer or trustees, without recourse to the assistance of the national courts: see paragraph 28 of the Judgment. The result was that the rights of the (female) advantaged class by reference to accrued pensionable service were not liable to be cut down by the exercise of any powers available to the employer or trustee under the scheme. They had become, in short, indefeasible rights.

48. The position (or at least the position as it appeared to the Court of Justice) in the *Smith* case is much less clear. The *Barber* window opened (as always) on 17 May 1990, and the employer and trustee amended the rules of the relevant scheme so as to provide for a common NPA for men and women of 65 years by notice dated 1 July 1991 which, it was common ground, was an effective measure complying with Article 119 so as to raise women's NPA from 60 to 65 with effect for pensionable service thereafter. But the amendment purported also to level down by raising women's NPA in respect of pensionable service from May 1990 until 1 July 1991, i.e. with retrospective effect. This was held to have been invalid since, during that period, Article 119 required levelling up rather than levelling down.

49. There does not appear to have been any analysis, either in the Industrial Tribunal which referred the case, or in the Court of Justice itself, of the terms and effect of the power of amendment in that scheme. But the energies of counsel in this case have unearthed the relevant power of amendment which, upon analysis by this court, appears to have contained sufficient provisos for the protection of accrued rights as would have made such a retrospective amendment invalid under domestic law. Thus, in fact and in domestic law, women's rights to have applied an NPA of 60 in their favour in relation to pensionable service undertaken prior to 1 July 1991 were indefeasible under domestic law.

50. Mr Short submitted that, whatever the true position as a matter of domestic law, the case was argued and decided in the Court of Justice upon the implicit assumption that there was a power in the relevant scheme to amend by levelling down in respect of accrued past pensionable service. He said that this was implicit in the way in which the Industrial Tribunal framed the questions for determination by the Court of Justice (for which see paragraph 13 of the report of the Judge Rapporteur), and Warren J made that assumption both in the judgment under appeal (at paragraph 72) and in his earlier judgment in the *Harland & Wolff* case (at paragraph 25).

51. In our view this is not an assumption which can safely be made about the *Smith* case in the Court of Justice, for a number of reasons. The first is that there was not in fact any analysis of that question, either in the report of the Judge Rapporteur, in the Advocate General's Opinion or in the Judgment. The supposed validity of the

retrospective amendment as a matter of domestic law was not even expressly identified as a working assumption.

52. Secondly, there are some indications that the thinking both of the Advocate General and of the Court of Justice was that to use Article 119 as a means of overriding domestic law rights and powers by the retroactive levelling down of accrued pension rights earned from past pensionable service required some EU Law justification, rather than merely the exercise of existing rights in domestic law to achieve that purpose: see paragraph 13 of the opinion of the Advocate General Van Gerven and paragraph 20 of the Judgment of the Court where it was held that:

> "It follows that, as far as those latter periods are concerned, Community law imposed no obligation which would justify retroactive reduction of the advantages which women enjoyed."

The "latter periods" to which reference is there made appear to be the periods between 17 May 1990 and 1 July 1991, and the period prior to 17 May 1990: see paragraphs 18 and 19.

53. If the employer and trustee had a domestic law power to derogate from defeasible pension rights by reference to past pensionable service, then it is hard to see why any EU justification for the exercise of that power should be necessary. By contrast, if the only basis upon which the employer and trustees were under an obligation to equalise pension rights was that imposed by Article 119, regardless of limitations upon their domestic law powers and duties, then the reference to justification makes sense, as the only basis for overriding them.

54. Thirdly, and assuming for the moment that the Court of Justice did intend to prohibit levelling down by reference to past service even where authorised by the terms of the relevant scheme, it is not clear whether the court perceived a tension between preserving indefeasible rights on the one hand, and turning defeasible rights into indefeasible rights, on the other, if indeed (as here) the scheme rendered rights arising from past service defeasible in that sense. In short, the answer to the rhetorical question posed by Mr Green, and set out at paragraph 44 above, does not seem to us to be apparent from a detailed review of the *Smith* case.

55. Thus, in a case where, as here, the employer and Trustee had an undoubted right under Clause 19 of the 1984 Deed to increase women members' NPA from 60 to 65 with respect to pensionable service undertaken on and after 1 December 1991, there appears to be an uncertain question of EU Law whether, for the purpose of equal treatment under Article 119, women's defeasible rights should, during the period when the *Barber* window remains open, be treated as indefeasible, and men's rights elevated for the purpose of satisfying Article 119 to the same indefeasible level. An affirmative answer to that question would appear to conflict with the principle that the domestic law rights of the advantaged class during the relevant period should be treated as the benchmark or sole point of reference. To answer that question in the negative would appear to conflict with the interpretation of the *Smith* case which Warren J regarded as binding upon him, in two successive decisions, and which might at least at first sight appear to flow from a simple interpretation of the language used by the Court of Justice.

Section 62 of the Pensions Act 1995

56. An additional issue in these proceedings is whether Section 62, which was intended to provide a domestic law framework for the implementation of Article 119 in relation to pension rights, and which came into force from 1 January 1996, had the effect of closing the *Barber* window for this Scheme. We propose to say nothing about that question at this stage since, in our view, it raises no separate or distinct question of EU Law. Rather, it is a matter of English statutory construction which would better be resolved when the Court of Justice has answered the EU Law questions referred to earlier in this judgment.

57. For those reasons we propose to refer those questions to the Court of Justice and invite the parties to make written submissions as to the appropriate form and content of a suitable reference.