Neutral Citation Number: [2016] EWCA Civ 786

Case No: A3/2015/0237

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
Chancery Division, Birmingham District Registry
HH Judge Cooke

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 July 2016

Before :

LORD JUSTICE PATTEN
LADY JUSTICE GLOSTER
and
MR JUSTICE BAKER

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Between :

Grenville Holden Hampshire	**Appellant**
- and -	
The Board of the Pension Protection Fund	**Respondent**
- and -	
Secretary of State for Work and Pensions	**Interested Party**

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Gerry Facenna QC and **James Bourke** (instructed by **Walkers Solicitors**) for the **Appellant**
Nigel Giffin QC (instructed by **Stephenson Harwood**) for the **Respondent**
Jason Coppel QC (instructed by the **Government Legal Department**) for the **Interested Party**

Hearing dates : 22 and 23 June 2016

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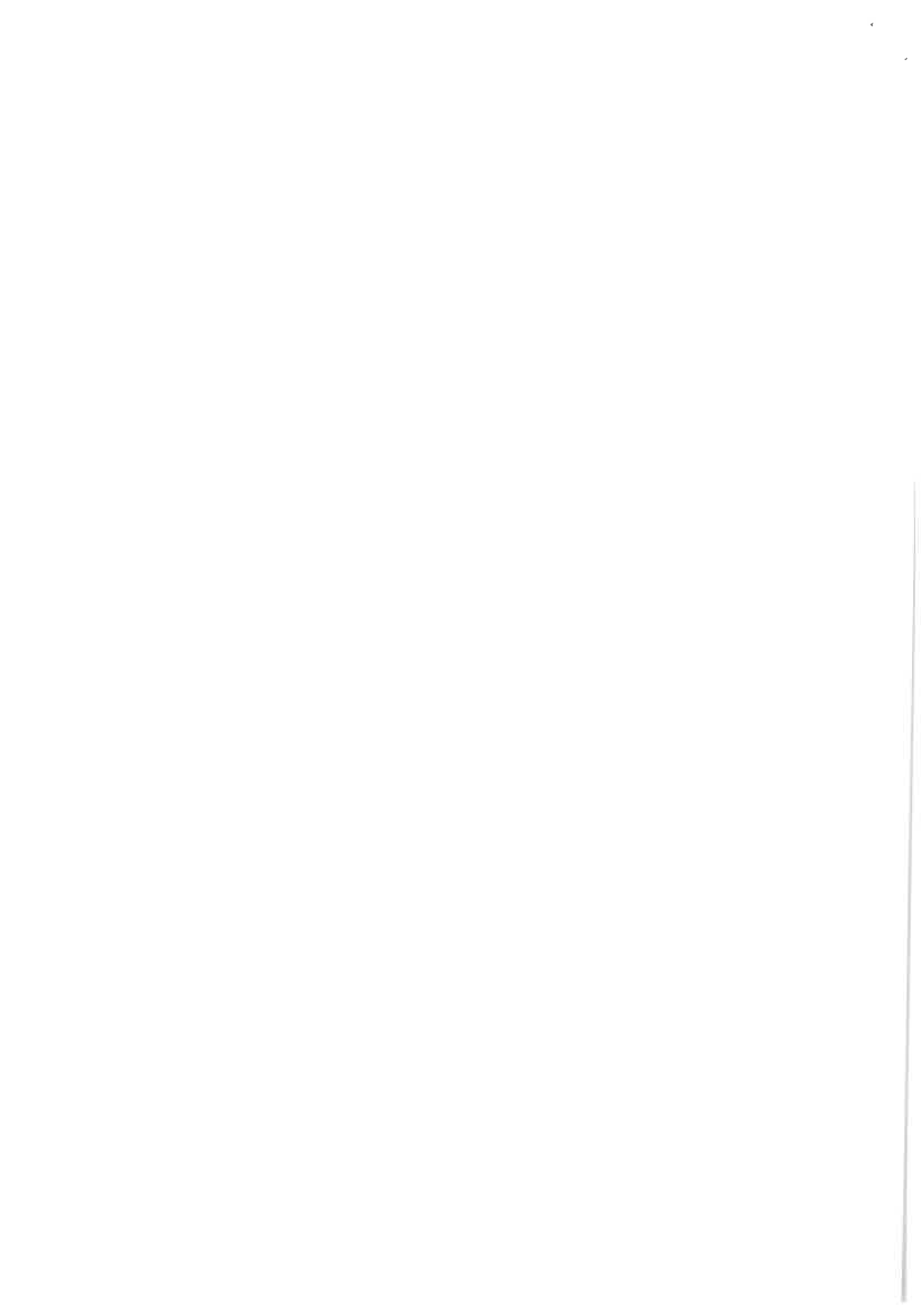
Approved Judgment



Lord Justice Patten :

1. This is the judgment of the Court.

2. This is an appeal by Mr Grenville Hampshire against an order of HH Judge Cooke (sitting as a judge of the Chancery Division) dated 23 December 2014. The order was made on the hearing of various preliminary issues which Morgan J had directed on 23 June 2014 in the context of an appeal by Mr Hampshire under s.217 of the Pensions Act 2004 ("the 2004 Act").

3. The appeal relates to the decision of the Board of the Pension Protection Fund ("the Board") to approve a valuation of the assets and protected liabilities of the T & N Retirement Benefits Scheme (1989) ("the Scheme") pursuant to s.144 of the 2004 Act. The valuation was obtained by the Board in order to determine whether it was obliged to assume responsibility for the Scheme following what is described in s.127 of the 2004 Act as a qualifying insolvency event: in this case the insolvency in 2006 of Turner & Newall Limited ("T&N") and a number of other Scheme employers.

4. In the event of a qualifying insolvency event the Board is required to assume responsibility for the Scheme if, amongst other conditions, the value of the assets of the Scheme at the relevant time was less than the amount of the protected liabilities at that time: see s.127(2)(a). The relevant time means the time immediately before the qualifying insolvency event occurred: s.127(4)(b). Protected liabilities are principally the cost of securing benefits for members of the Scheme which correspond in amount to the compensation that would be payable in accordance with the provisions of s.162 of the 2004 Act were the Board to be required to assume responsibility for those payments under the industry-funded Pension Protection Fund ("PPF"): see s.131. If the Scheme assets (at the date of the insolvency) are sufficient to meet the cost of the protected liabilities then the Scheme will be wound up by the trustees in accordance with s.154 of the 2004 Act. The protected liabilities will continue to be met out of the Scheme's own funds and the trustees of the Scheme will ordinarily use the assets to purchase annuities to ensure the payment of pensions in that amount. If, on the other hand, there is a deficit in the value of the Scheme assets then the property and liabilities of the Scheme are transferred by s.161(2) to the Board; the trustees of the Scheme are discharged from further liability; and the Scheme is treated as wound up with immediate effect after that time. Compensation is then payable by the PPF to the members of the Scheme in accordance with Schedule 7 of the 2004 Act.

5. The determination of whether following a qualifying insolvency event the Scheme continues to be administered by its own trustees using the assets of the Scheme or compensation becomes payable by the PPF depends on the actuarial valuation of the scheme assets and protected liabilities which is carried out in accordance with s.143. Once such a valuation is obtained and approved by the Board it becomes binding, subject to review, and is conclusive for the purpose of determining whether the s.127(2)(a) condition for the transfer of liability to the PPF is satisfied.

6. Mr Hampshire worked for T&N from 1971 to 1998 and was ultimately the Group Managing Director of its operations in Zambia and Zimbabwe. He was a member of the Scheme throughout his period of employment. In 1998 he became redundant following the takeover of T&N by the Federal-Mogul Corporation of America and took early retirement. He was then 51. He was notified by the trustees of the Scheme

that his pension would be £48,781.80 per annum before tax subject to increase at a minimum rate of 3% per annum.

7. Federal-Mogul filed for Chapter 11 protection in the United States in 2001 and the T&N Scheme entered PPF assessment on 10 July 2006, the relevant insolvency event being a proposal for a company voluntary arrangement in respect of a number of T&N group companies. At that time the Scheme had 34,285 members and assets of £1,188.4m. The normal pension age for employees under the Scheme in the case of Mr Hampshire was 62. At the time of the relevant insolvency event he was 58. Schedule 7 of the 2004 Act provides for compensation to be paid to members of a qualifying scheme amounting to either 90% or 100% of the pension payable under the scheme rules depending on whether the pensioner has attained normal pension age before the PPF assessment date; in this case in July 2006: see Schedule 7, paragraph 3. But pensioners who have not attained normal pension age by that date are also subject to the compensation cap imposed by paragraph 26. This limits the pension payable at age 65 to the cap fraction set out in paragraph 26(5) in cases where the compensation payable exceeds the amount of the compensation cap which is set annually by statutory instrument. From 1 April 2006 the cap at age 65 was £28,944.45: see the Pension Protection Fund (Pension Compensation Cap) Order 2006: 2006 SI No. 347. The Board is required to adjust the compensation cap by actuarial factors for those under the age of 65.

8. According to his evidence, for Mr Hampshire this meant that his 2006 pension (after adjustment for a lump sum) was reduced to £19,819 per annum, a reduction of about 67% in the pension he was contractually entitled to receive. The 2004 Act also limits the indexation of PPF compensation payments to pension entitlement attributable to post-1997 pensionable service so that Mr Hampshire has also lost most of his rights to have increases in respect of the pension payable. Accordingly, his pension has remained at about £20,000 per annum. But for the insolvency of T&N and the operation of Schedule 7 of the 2004 Act, he calculates that his pension entitlement would be approximately £76,302 per annum. Had Mr Hampshire reached normal pension age before the date of assessment in 2006 he would have been entitled to 100% of his starting pension entitlement without reduction by the compensation cap (although the position on pension increases would have been unaffected).

9. Mr Hampshire has challenged the level of pension payments he is entitled to under the 2004 Act in a number of ways. He and a group of other affected T&N pensioners have lobbied the government to make changes to the legislation in respect of long-service workers who, like him, have suffered significant reductions in their pensions due to the imposition of the cap. It is accepted that the cap applies only to a statistically small number of pensioners (about 0.1-0.2% of the total membership of the PPF) but that in the case of some of those affected it has the potential to cause hardship because they receive a level of compensation significantly lower than the pensions they were entitled to receive from their schemes. Ministers have also accepted that the cap was primarily intended to apply to highly remunerated executives who were members of a scheme for only short periods of time before the qualifying insolvency event and not to long-serving executives who may have worked all their life for the one company and who may have no alternative financial or pension arrangements from which to supplement their income. In their case the moral hazard justification for the cap is much less evident. There have been promises to

bring forward legislation to raise the compensation cap. Provisions (not yet in force) were included in the Pensions Act 2014 which adjust the cap for employees with more than 20 years' pensionable service but these provisions do not allow for the backdating of increased payments.

10. Mr Hampshire has therefore made a legal challenge to the level of compensation he is entitled to under the 2004 Act by relying on Article 8 of Directive 80/987/EEC ("the Directive") which deals with the protection of employees in the event of the insolvency of their employer. The Directive has now been superseded by Directive 2008/94/EC which, so far as material, is in all but identical terms but I shall concentrate on the Directive which was in force at the date of the qualifying insolvency.

11. The Directive in its terms operates at a relatively high level of generality. The background circumstances identified in its first recital are that:

> "it is necessary to provide for the protection of employees in the event of the insolvency of their employer, in particular in order to guarantee payment of their outstanding claims, while taking account of the need for balanced economic and social development in the Community;"

12. Article 1 which deals with the scope of the Directive states that it shall apply:

> "to employees' claims arising from contracts of employment or employment relationships and existing against employers who are in a state of insolvency within the meaning of Article 2(1)."

13. Article 3 deals in terms with claims for outstanding pay and Article 4 entitles member states to limit the liability of the guarantee institutions for such claims and to set ceilings on the payments made provided that those ceilings "[do] not fall below a level which is socially compatible with the social objective of this Directive".

14. Article 8 of the Directive is in the following terms:

> "Member States shall ensure that the necessary measures are taken to protect the interests of employees and of persons having already left the employer's undertaking or business at the date of the onset of the employer's insolvency in respect of rights conferring on them immediate or prospective entitlement to old-age benefits, including survivors' benefits, under supplementary company or inter-company pension schemes outside the national statutory social security schemes."

15. Unlike Articles 3 and 4, it incorporates no express power to limit liability under the "necessary measures" which it prescribes but it is also (unlike Article 3) entirely non-specific as to precisely what the obligation to take the measures necessary to protect the interests of employees in respect of their pensions actually entails. It is not in terms an obligation to pay the pensions that are due. The only qualification to Article 8 is Article 10 which provides that the Directive shall not affect the option of member states:

"to take the measures necessary to avoid abuses".

16. It is therefore common ground that any statutory machinery or other measures put in place to guarantee the payment of pensions due to employees of an insolvent company need not extend, for example, to cases where directors or other employees had abusively secured excessive pension entitlements from the company in the period leading up to its insolvency the burden of which would then fall on the state or a statutory rescue scheme such as the PPF.

17. Article 8 is not therefore on its face a very promising basis for a claim by an ex-employee that the state should ensure that a particular level of pension remains payable following the insolvency of the scheme employer. But its purpose and effect, Mr Hampshire contends, has been clarified by two decisions of the CJEU: Case C-278/05 *Robins and Others v Secretary of State for Work and Pensions* [2007] 2 CMLR 13 ("*Robins*") and Case C-398/11 *Hogan & Others v Minister for Social and Family Affairs (Ireland)* [2013] 3 CMLR 27 ("*Hogan*") the effect of which is said to be that Article 8 must be interpreted as imposing on member states a requirement to ensure that measures are in place which will guarantee to employees of insolvent companies at least half of the benefits to which they are entitled under the relevant occupational pension scheme.

18. *Robins* was a claim by employees against the UK government for *Francovich* damages based on its failure properly to implement the terms of the Directive. It was not contended that the Directive was directly enforceable. The case concerned the statutory regime in force prior to the 2004 Act under which pension fund assets were immune from claims by the general creditors of the insolvent company but were applied to fund in full pensions that were then in payment in priority to the benefits of employees who had not yet retired at the date of the insolvency. Any shortfall therefore fell on those non-retired members and the judgment in *Robins* refers to statistics indicating that in 2004 under this legislation about 65,000 members of pension schemes lost more than 20 per cent of expected benefits of whom some 35,000 suffered losses in excess of 50 per cent of those benefits.

19. Advocate General Kokott in her Opinion expressed the view that Article 8 in general mandated full protection for the employees' pension rights which she said meant that they should normally receive the whole of their expected pensions. She was prepared to accept (see [71]) that the level of protection could be reduced on grounds of disproportionate cost but said that those cases would be exceptional. The Advocate General concluded that the payment of any shortfall in the pensions was not, however, required to be guaranteed by direct payments from the state.

20. The CJEU agreed that Article 8 did not require the benefits to be state funded and gave member states some latitude as to how they secured the necessary protection: see [35]-[37]. The Court also rejected the Advocate General's view that Article 8 required pension benefits to be fully-funded:

> 39. The Directive is thus designed to reconcile the interests of employees with the need for balanced economic and social development.

> 40. Directive 80/987 is intended to guarantee employees a minimum level of protection under Community law in the event of the insolvency of their employer (Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 3), without prejudice, in accordance with its Article 9, to more favourable provisions which the Member States may apply or introduce.
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> 41. The level of protection required by the Directive for each of the specific guarantees that it establishes must be determined having regard to the words used in the corresponding provision, interpreted, if need be, in the light of those considerations.
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> 42. So far as the guaranteeing of rights to old-age benefits under supplementary pension schemes is concerned, Article 8 of the Directive cannot be interpreted as demanding a full guarantee of the rights in question.
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> 43. Admittedly, Article 8, like Article 7 of the Directive on national statutory social security schemes, but unlike Articles 3 and 4 of the Directive on outstanding claims relating to pay, does not provide any express option for Member States to limit the degree of protection.
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> 44. However, the absence of any explicit indication to that effect does not in itself imply, irrespective of the wording of the provision concerned, that the Community legislature intended to require an obligation to guarantee rights to benefits in their entirety.
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> 45. In this regard, in so far as it does no more than prescribe in general terms the adoption of the measures necessary to protect the interests' of the persons concerned, Article 8 of the Directive gives the Member States, for the purposes of determining the level of protection, considerable latitude which excludes an obligation to guarantee in full."

21. The paragraphs I have just quoted form part of the CJEU's answer to the first question on the reference which was whether Article 8 did require the employees' pension benefits to be fully funded by the member states. The second question was whether the UK legislation sufficiently implemented Article 8 and as the CJEU recognised it was this question which required them to consider whether the minimum level of protection which they had said in [40] was what the Directive was intended to guarantee, had been provided by the UK in this case:

> "55. There being no obligation to guarantee entitlement to benefits in full, it remains to determine the minimum level of protection required by the Directive.
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> 56. It must be pointed out that, unlike Articles 3 and 4 of the Directive, the words of which make it possible, notwithstanding

> the latitude given to the Member States, to determine the minimum guarantee of outstanding claims relating to pay (see *Francovich,* paragraphs 18 to 20), neither Article 8 of the Directive nor any other provision therein contains elements which make it possible to establish with any precision the minimum level required in order to protect entitlement to benefits under supplementary pension schemes.
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> 57. Nevertheless, having regard to the express wish of the Community legislature, it must be held that provisions of domestic law that may, in certain cases, lead to a guarantee of benefits limited to 20 or 49% of the benefits to which an employee was entitled, that is to say, of less than half of that entitlement, cannot be considered to fall within the definition of the word 'protect' used in Article 8 of the Directive."

22. Judge Cooke accepted the submission of Mr Giffin QC for the Board, which is repeated on this appeal, that the decision in *Robins* has to be read as referring to a legislative scheme in which very considerable numbers of employees suffered significant reductions in their pension entitlement by the combined effect of the order of priority for the application of scheme assets and the absence of any state or industry financed safety net in respect of employees who had not yet retired. The judge said that it was:

> "... not, in my view, to be read as a decision that a national scheme must be non-compliant with the Directive merely because it can be shown that two individual members of one scheme would still suffer losses of this extent, whatever their circumstances and whatever might be the reasons why they were not given greater protection.
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> 18. Nor in my view is it likely that the Court intended by its decision to lay down a rule that provision of security for 50% of contractual benefits would be sufficient compliance with the Directive. It could hardly be supposed, particularly in light of what was said at paras 79 and 80 of the judgment, that the Court intended to stipulate that there was an infringement in the case of the claimant whose benefits were restricted to 49% of the contractual level, but there would have been compliance if that figure was 50%. Thus the Court held that the UK scheme was not sufficient to comply, but did not stipulate any precise percentage of benefits that must be assured in order to achieve compliance."

23. The paragraphs ([79]-[80]) he refers to are part of the CJEU's answer to the third question which was whether a failure properly to transpose Article 8 into domestic law in this case exposed the UK to a liability in damages under the *Francovich* principle. This requires the Court to find that the Directive was intended to confer rights on individuals; that the breach was sufficiently serious; and that there was a direct causal link between the breach of the obligation on the state properly to transpose the Directive into domestic law and the damage sustained by the claimants.

24. The requirement that the breach should be sufficiently serious has to take into account the margin of discretion which the member state is given under the Directive in relation to the measure of protection which its national legislation must provide. In answering question 3 the CJEU said that it would be for the national Courts to consider whether the limits of the discretion under Article 8 had been "manifestly and gravely disregarded" which was the test accepted by the ECJ in *Brasserie du Pecheur SA and Factortame Ltd* (C-46 and 48/93) [1996] 1 CMLR 889 to deal with cases of this kind.

25. In explaining what this would involve, the CJEU said:

> "76. In order to determine whether that condition is satisfied, the national Court hearing a claim for reparation must take account of all the factors which characterise the situation put before it (Case C-224/01 *Köbler* [2003] ECR I-10239, paragraph 54).
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> 77. Those factors include, in particular, in addition to the clarity and precision of the rule infringed and the measure of discretion left by that rule to the national authorities, whether the infringement or the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, and the fact that the position taken by a Community institution may have contributed towards the adoption or maintenance of national measures or practices contrary to Community law *(Brasserie du Pêcheur and Factortame*, paragraph 56; *Köbler,* paragraph 55).
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> 78. In the present case the national Court will have to take into account the clarity and precision of Article 8 of the Directive with regard to the level of protection required.
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> 79. In that respect, it is to be emphasised that the parties in the main proceedings, the Member States which have submitted observations and the Commission have none of them been able to suggest with precision the minimum degree of protection that in their view is required by the Directive, if it should be considered that the latter does not impose a full guarantee.
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> 80. Furthermore, as held in paragraph [56] above, neither Article 8 of the Directive nor any other provision therein contains anything that makes it possible to establish with any precision the minimum level required in order to protect entitlement to benefits."

26. Mr Giffin said that in the light of these paragraphs it could not be said that *Robins* was a decision to the effect that Article 8 mandated in every or even in most cases a requirement that the protection guaranteed by the national scheme should amount to not less than 50 per cent of the employee's pension entitlement. The Board's position was and remains that whether a national system complies with Article 8 requires an assessment and evaluation of its effects across the whole range of protected

individuals. If this is the right approach then Article 8 is not capable of conferring on Mr Hampshire any individual and directly enforceable right to a specific level of compensation. Paragraphs [79] and [80] make it clear that the minimum level of protection will depend upon the facts and circumstances of each particular case. The judge, he says, was therefore right to say that the decision in *Robins* did not lay down any such rule. It would, he concedes, be theoretically possible, consistently with the Board's case that compliance with Article 8 must be determined by looking at the overall effect of the scheme, to mount a challenge to the statutory scheme on wider grounds of proportionality. But those arguments lie beyond the scope of the present preliminary issues and possibly beyond the scope of the current appeal from the Pensions Ombudsman. The first point is certainly correct.

27. The Board's contention is that Article 8 is, as a matter of construction, directed to the protection of employees' rights as a class. It is what Mr Giffin described as a system obligation. It does not create obligations owed to individual claimants and this re-inforces the view that it is not intended to confer a minimum level of pension in each individual case. As mentioned earlier, the Directive itself is expressed in entirely general terms in contrast to the provisions of Articles 3 to 5 which deal with outstanding pay and contain an express power to impose a ceiling to the liability in conformity with the "social objective" of the legislation. There is nothing, says Mr Giffin, to suggest that the social objective of the legislation differs as between Articles 3-5 and Article 8 and the justification for the apparent absence of any ceiling in Article 8 must be that Article 8 does not mandate any particular level of individual protection.

28. We were referred to the decision of Henderson J in *Independent Trustee Services Ltd v Hope* [2010] ICR 553 which was an application by the trustee of a company pension scheme with an insolvent scheme employer for directions as to whether it could properly implement a scheme under which the trustee would buy out benefits including those of certain high earning employees (who had taken early retirement) before entering into PPF protection. The proposal was to utilise the bulk of the scheme assets to fund the contractual benefits of those employees through the purchase of annuities leaving the PPF to provide compensation to all other members of the scheme.

29. Not surprisingly the judge rejected the proposals but in his judgment Henderson J said this about the decision in *Robins* and Article 8:

> "134. For these short reasons, I am satisfied that there is nothing in the Community law argument which should cause me to modify in any way the conclusions I have already reached on improper purpose and public policy. I also wish to emphasise that although, for the purpose of testing the Community law argument, I have assumed that the PPF compensation of members in the position of Mr Alcraft and Mr Lear may fall below the level required by article 8, I express no view on the question whether that assumption is correct.
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> 135. I would, however, make the following brief observations. (1) First, the pensions considered by the Court of Justice in

Robins v Secretary of State for Work and Pensions (Case C-278/05) [2007] ICR 779 were those of two ordinary workers, and were relatively modest in amount. There is no indication that the Court had the position of higher earners specifically in mind, let alone earners at the astronomical levels to which the world has now become accustomed in the financial sector. (2) Secondly, the Insolvency Directive clearly contemplates that, at least in some contexts, liabilities which are to be guaranteed may be capped at a level which is consonant with the social objective of the Directive: see article 4(3) and the recital quoted in para 121(1) above. (3) Thirdly, the compensation cap in the PPF was deliberately introduced with a "moral hazard" rationale, and was intended to prevent higher earners from manipulating the schemes of which they were members secure in the knowledge that the PPF would provide them with full compensation: see paragraph 9 of Mr Rubenstein's witness statement, based on statements made by the Department of Work and Pensions both in correspondence with the senior managers' action group and in discussions with the PPF. (4) Fourthly, in Mr Rubenstein's own words, "The cap affects only a relatively small proportion of relatively well paid employees". According to information supplied by the Department of Work and Pensions, and on the basis of earnings figures taken from 2006, only 7·3% of employees have a salary capable of generating a pension above the level of the cap even after 40 years' service, in a scheme where benefits accrue at the rate of one eightieth for each year of pensionable service, and only 18·1% would be capable of generating such a pension where the rate of accrual is one sixtieth. Mr Rubenstein goes on to say that in May 2008 only eight members of schemes which had by then entered the PPF were subject to the cap. I was informed that as at 31 May 2009 the number of members so affected had risen to 33.

136. In the light of these, and similar, considerations, it seems to me all but inconceivable that the Court of Justice would hold the existence of a cap on PPF compensation to be incompatible with article 8, and the real dispute would be about the level at which the cap may legitimately be set, having regard to the social and economic factors referred to in the Insolvency Directive and the degree of latitude afforded to member states by the relative imprecision of its wording."

30. Mr Giffin relies upon this passage as supporting the view that a cap on compensation levels would be lawful in principle even if it resulted in some individual members receiving less than 50 per cent of their contractual entitlement.

31. Taking paragraphs [79] and [80] of *Robins* in isolation there is obviously some force in that point. The difficulty, however, about that reading of those paragraphs is that it ignores the context in which those statements were made. The CJEU was there

considering the third question which was how the national Court should deal with the claim for *Francovich* damages. That required not only the application of the "manifest and grave disregard" test to the way in which the UK had chosen to legislate about the pension schemes of insolvent companies but, more importantly, a consideration of whether the Article 8 discretion could be said to have been abused at the time when the UK came to make its legislative choice. What the CJEU was saying in [79]-[80] was that neither Article 8 nor any other provision in the Directive itself stipulated a minimum level of protection and that without more it therefore gave member states no real guide as to what the minimum level should be. The position was therefore very similar to that in *Francovich* itself where the claim for damages for breach of Articles 1-4 of the Directive failed because the relevant provisions of the Directive failed to identify with sufficient precision the person liable to provide the necessary guarantee. For the purpose of considering a member state's liability in damages the provisions of the Directive are looked at historically to see whether as originally expressed they gave sufficient guidance as to the form which the transposing legislation should take. On one view therefore [79]-[80] are not in terms to be read as a qualification or contradiction of [57]. That is in the earlier part of the judgment where the question as to what constitutes the minimum level of protection is answered for the first time in response to the second question on the reference.

32. *Hogan* was also a claim for damages against Ireland by some former employees of Waterford Crystal. They were members of pension schemes under which they should have received benefits at normal retirement age equivalent to final salary minus the state pension. The only legislative measure taken by Ireland in response to Article 8 was s.7 of the Protection of Employees (Employers' Insolvency) Act 1984 which provided that pension contributions deducted or payable by employers during the 12 months preceding the insolvency were to be paid into the relevant occupational pension scheme. No other provision had been made to compensate employees for their loss of pension rights due to the insolvency and it was evident that the applicants in that case would suffer losses in their expected pension of more than 50%.

33. The Irish High Court referred a number of questions to the CJEU including:

> "5. Whether the measures adopted by Ireland ... fulfil the obligations imposed by ... [D]irective [2008/94] having regard to the social, commercial and economic factors considered by Ireland in the review of pension protection following the decision in *Robins and Others* ... and, in particular, having regard to the "need for balanced economic and social development in the Community" referred to in recital 3 [in the preamble to that] directive?
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> 6. Whether the economic situation ... constitutes a sufficiently exceptional situation to justify a lower level of protection of the plaintiffs' interests than might otherwise have been required and if so, what is that lower level of protection?"

34. In answer to these questions the CJEU said:

> "41. By its fifth and sixth questions, which it is appropriate to examine together, the national Court asks, in essence,

whether Directive 2008/94 is to be interpreted as meaning that the measures adopted by Ireland following the judgment in *Robins and Others* fulfil the obligations imposed by that directive, having regard to the need for balanced economic and social development, and whether the economic situation constitutes an exceptional situation capable of justifying a lower level of protection of the interests of employees as regards their entitlement to old-age benefits under a supplementary occupational pension scheme.

42. In *Robins and Others,* the Court, in interpreting Article 8 of Council Directive 80/987, now Article 8 of Directive 2008/94, acknowledged that the Member States have considerable latitude in determining both the means and the level of protection of rights to old-age benefits under supplementary occupational pension schemes in the event of the insolvency of the employer, which precludes an obligation to guarantee in full (*Robins and Others*, paragraphs 36 and 42 to 45).

43. The Court held however that provisions of domestic law that may lead to a guarantee of benefits under a supplementary occupational pension scheme limited to less than half of the benefits to which an employee was entitled does not fall within the definition of the word 'protect' used in Article 8 of Directive 80/987 (*Robins and Others*, paragraph 57).

44. That assessment takes account of the need for balanced economic and social development, by taking into consideration, on the one hand, divergent and rather unpredictable developments in the economic situations of the Member States and, on the other, the necessity of ensuring that employees have a minimum guarantee of protection if their employer becomes insolvent owing, for example, to unfavourable developments in economic conditions.

45. Against that background, it is not the specific nature of the measures adopted by a Member State that determines whether that Member State has correctly fulfilled the obligations laid down in Article 8 of Directive 2008/94, but rather the outcome of those national measures.

46. Furthermore, the measure mentioned by the national Court, which is referred to in paragraph 13 of the present judgment, does not seem, having regard to the information referred to in paragraph 18 of the present judgment, to be capable of guaranteeing the minimum level of protection required by *Robins and Others*.

47. Consequently, the answer to the fifth and sixth questions is that Directive 2008/94 must be interpreted as meaning that

> the measures adopted by Ireland following the judgment in *Robins and Others* do not fulfil the obligations imposed by that directive and that the economic situation of the Member State concerned does not constitute an exceptional situation capable of justifying a lower level of protection of the interests of employees as regards their entitlement to old-age benefits under a supplementary occupational pension scheme."

35. The seventh question in the reference was whether the conditions for a *Francovich* damages claim were satisfied and, in particular, whether Ireland's actions subsequent to the judgment in *Robins* amounted to a grave and manifest disregard of its obligations under Article 8. The Court said:

> "51. As soon as the judgment in *Robins and Others* was delivered, namely on 25 January 2007, the Member States were informed that correct transposition of Article 8 of Directive 2008/94 requires an employee to receive, in the event of the insolvency of his employer, at least half of the old-age benefits arising out of the accrued pension rights for which he has paid contributions under a supplementary occupational pension scheme.
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> 52 . In those circumstances, it must be held that, although the nature and extent of the obligation incumbent on the Member States under Article 8 of Directive 2008/94, which is intended to confer rights on individuals, were clear and specific, at the latest as of 25 January 2007, Ireland had not correctly fulfilled that obligation, which constitutes a sufficiently serious breach of that rule of law in the context of any examination which might be carried out in respect of that Member State's liability for damage caused to individuals.
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> 53. Consequently, the answer to the seventh question is that Directive 2008/94 must be interpreted as meaning that the fact that the measures taken by Ireland subsequent to *Robins and Others* have not brought about the result that the plaintiffs would receive in excess of 49% of the value of their accrued old-age pension benefits under their occupational pension scheme is in itself a serious breach of that Member State's obligations."

36. Mr Giffin, we think, acknowledges that the statements of principle in [43] and [51] of the judgment are unqualified in terms and are free of the ambiguities or inconsistencies which he says exist between [57] and [80] of the judgment in *Robins*. But he says there is no indication in *Hogan* that the CJEU intended to expand its interpretation of the effect of Article 8 and its judgment should not therefore be read as extending beyond what had been decided in *Robins*. The Court saw itself simply as applying *Robins* to the facts it had to consider. That is confirmed by the fact that it dispensed with any opinion by an Advocate General and proceeded straight to its own judgment. This procedure is only permitted when the reference raises no new point of law. *Hogan* was another relatively straightforward case because of the relative

absence of any real attempt by Ireland to provide for the pension rights of insolvent companies. The system was not capable on any view of guaranteeing the minimum level of protection identified as necessary in *Robins*. The CJEU did not therefore have to consider the issue of a cap or any question of minimum levels of compensation.

37. We think that Mr Giffin is right in his submission that *Hogan* was not intending to re-define the scope of the Article 8 obligation but merely to apply the decision in *Robins* to the Irish scheme. But, as I have already explained, that leaves the question as to what *Robins* in fact decided. The importance of *Hogan* lies in its apparent confirmation that [57] of *Robins* did establish a minimum level of protection that is of universal (and therefore individual) application. This might be said to be confirmed by the judgment in *Hogan* which on its face expresses in unequivocal terms the minimum content of the obligation to "protect" employees' pension benefits. The judgment also makes clear in [44] that the 50 per cent rule takes account of economic and social considerations such as those prevailing in Ireland at the relevant time. This reading of [43]-[44] is confirmed by [51] which is expressed in unqualified terms and is directed to how member states like Ireland should have read the decision in *Robins* as to what was required by Article 8. The nature and extent of the obligation were, as the Court says, clear and specific at the latest at the date of the judgment in *Robins*.

38. Judge Cooke accepted the Board's submissions that *Hogan* was no more than an application of the decision in *Robins* and did not therefore stipulate a universal minimum entitlement in terms of pension protection. He therefore declined to read [51] at all literally. The Court, he said,

> "was not considering the question whether it was open to states that provided a generally sufficient level of protection to place limits on that protection in the case of particular classes of employee, and cannot be taken by implication to have made a decision on that point by its choice of language in deciding a different issue.
>
> 33. Had that issue been before the court, like Henderson J I find it almost inconceivable that the Court would hold that it was unlawful per se to impose a cap on protected benefits. To do so would imply that the only proper system of protection was one that ensured a uniform minimum level of guarantee of benefits for every individual by reference to a percentage of those specified by the scheme, irrespective of the absolute level of those benefits. The potential for abuse is obvious. Given that "the need for balanced economic and social development" is a relevant consideration in setting the required level of protection (as the Court said in *Robins*) it is not obvious why that level should be set only by reference to a percentage of scheme benefits and not for instance partly by reference to absolute levels or maxima."

39. We are not agreed about this. The majority of the Court takes a different view and considers that the CJEU meant what it said. If this is right, it follows that the capping provisions which apply to Mr Hampshire's pension under the 2004 Act and the

regulations have not correctly or adequately transposed the provisions of Article 8 into domestic law. The point is not, however, entirely free from doubt and it is true that the statutory schemes under consideration in *Robins* and *Hogan* were very different from that under the 2004 Act where the cap affects only a small percentage of the membership of the Scheme. In these circumstances, we have come to the view that the point is not *acte clair* and we propose to refer it to the CJEU before determining the appeal on the first preliminary issue.

Enforceability

40. If Article 8 has the meaning and effect which Mr Hampshire contends it does have in the light of the judgments in *Robins* and *Hogan*, it will become necessary to consider the consequential issues of enforceability. The most usual and direct method of obtaining financial redress from the United Kingdom for its failure properly to give effect to Article 8 in national legislation would be to commence an action for *Francovich* damages. This was threatened by Mr Hampshire's former solicitors back in May 2013 but the claim was not proceeded with and is, according to the Secretary of State, now out of time. The real difficulty for Mr Hampshire in bringing such a claim was that he needed to show that he had suffered loss at the date of the qualifying insolvency in 2006 which was before *Robins* was decided. He would therefore have faced the same line of defence as employed in *Robins*: namely that until the CJEU had clarified what was the minimum level of protection required under Article 8 it could not be said that the United Kingdom's failure to transpose the Directive correctly was intentional and inexcusable: see *Robins* [77]-[80].

41. In these circumstances, Mr Hampshire has taken the much more indirect route of seeking to challenge the s.143 valuation. This valuation will determine whether the PPF assumes responsibility for the Scheme or whether it remains under the control of its trustee but will not in itself affect the level of pension payments. At best, Mr Hampshire will obtain a declaration as part of the appeal to the effect that Article 8 does establish a minimum level of PPF protection for all Scheme members that is directly effective and that the valuation has to be re-done. The other complication is that the Scheme assets appear to have an actuarial surplus over protected liabilities of some £50m which may mean that, even if the cap is disapplied in relation to Mr Hampshire and the other members it affects, the Scheme will continue to be administered by the trustees. Mr Coppel QC said that because Article 8, even if otherwise directly effective, does not have direct effect against the trustees as opposed to the Board the trustees will continue to be bound by the provisions of s.73 of the Pensions Act 1995, the 2004 Act and any other relevant legislation in relation to their distribution of the assets unless it is possible to read down the legislation on *Marleasing* principles so as to give it a construction which conforms with Article 8.

42. Morgan J made an order for preliminary issues as to whether Article 8 should be construed so as to have direct effect and, if so, whether it affected the Board's duties of approving the valuation under s.144 of the 2004 Act. Strictly speaking the *Marleasing* issue lies outside the scope of the issues directed and will depend on what Article 8 requires. But on the hypothesis that Mr Hampshire is right about the content of Article 8, we are agreed that we should at least determine the issue of whether a construction which has the effect of disapplying or at least significantly modifying the cap provisions would be permissible within the *Marleasing* principles. If the right view is that such a construction would go against the grain of the legislation but that

Article 8 does have direct effect then the precise extent and detail of any disapplication of Schedule 7 by the Board would have to be determined in the appeal or in subsequent proceedings along with any wider challenge on proportionality grounds.

43. We have not, however, been persuaded by Mr Coppel that the determination of the preliminary issues (including the 50 per cent point) will not assist Mr Hampshire in the circumstances of this case absent success on the *Marleasing* argument. The issues arise for decision on this appeal and are what Morgan J directed to be decided in the context of the statutory appeal from the Ombudsman's decision. It will be a matter for the Board and the trustees to consider what the effect on them is of the points we decide and any further issues about enforceability will have to be raised on the resumed hearing of the appeal in the Chancery Division once the outcome of the reference and this appeal is known.

Marleasing

44. The principles to be applied are set out in the judgment of Sir Andrew Morritt in *Vodafone 2 v Commissioners for Her Majesty's Revenue and Customs* [2010] Ch 77 and have recently been affirmed by the Supreme Court in *Swift v Robertson* [2014] UKSC 50; [2014] 1 WLR 3438 which concerned the implementation of Council Directive 85/577/EEC:

> "20. A national Court must interpret domestic legislation, so far as possible, in the light of the wording and purpose of the Directive which it seeks to implement. This is now well settled. Thus in Case C-350/03 *Schulte v Deutsche Bausparkasse Badenia AG* [2006] 1 CMLR 11, the Court of Justice of the European Union said at para 71:
>
> > "... when hearing a case between individuals, the national Court is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive (see *Pfeiffer and others*, [2005] 1 CMLR 44] paragraph 120)."
>
> 21. The breadth and importance of this principle was authoritatively set out in *Vodafone 2 v Commissioners for Her Majesty's Revenue and Customs* [2010] Ch 77, where, at paras 37 and 38, after listing the authorities to which the Court had been referred, Sir Andrew Morritt, C said:
>
> > "37 ... The principles which those cases established or illustrated were helpfully summarised by counsel for HMRC in terms from which counsel for V2 did not dissent. Such principles are that:

> "In summary, the obligation on the English Courts to construe domestic legislation consistently with Community law obligations is both broad and far reaching. In particular: (a) it is not constrained by conventional rules of construction (per Lord Oliver of Aylmerton in the *Pickstone* case, at p 126B); (b) it does not require ambiguity in the legislative language (per Lord Oliver in the *Pickstone* case, at p 126B and per Lord Nicholls of Birkenhead in *Ghaidan's* case, at para 32); (c) it is not an exercise in semantics or linguistics (per Lord Nicholls in *Ghaidan's* case, at paras 31 and 35; per Lord Steyn, at paras 48—49; per Lord Rodger of Earlsferry, at paras 110—115); (d) it permits departure from the strict and literal application of the words which the legislature has elected to use (per Lord Oliver in the *Litster* case, at p 577A; per Lord Nicholls in *Ghaidan's* case, at para 31); (e) it permits the implication of words necessary to comply with Community law obligations (per Lord Templeman in the *Pickstone* case, at pp 120H—121A; per Lord Oliver in the *Litster* case, at p 577A); and (f) the precise form of the words to be implied does not matter (per Lord Keith of Kinkel in the *Pickstone* case, at p 112D; per Lord Rodger in *Ghaidan's* case, at para 122; per Arden LJ in the *IDT Card Services* case, at para 114).
>
> 38. Counsel for HMRC went on to point out, again without dissent from counsel for V2, that:
>
> "The only constraints on the broad and far-reaching nature of the interpretative obligation are that: (a) the meaning should go with the grain of the legislation and be compatible with the underlying thrust of the legislation being construed: see per Lord Nicholls in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, para 33; Dyson LJ in *Revenue and Customs Comrs v EB Central Services Ltd* [2008] STC 2209, para 81 …"
>
> 22. It is important to note that, in order to observe the imperative that this guidance contains, the Court must not only keep faith with the wording of the Directive but must have closely in mind its purpose. Since the overall purpose of the Directive is to enhance consumer protection, that overarching principle must guide interpretation of the relevant national legislation."

45. Mr Facenna QC for Mr Hampshire submits that to keep faith with the wording and purpose of Article 8, paragraph 26 of Schedule 7 would have to be read as containing a proviso at the end of paragraph 26(1) so that the paragraph reads:

"26 (1) Where-

(a) a person becomes entitled to relevant compensation in respect of a benefit ("benefit A") under the scheme, and

(b) [subparagraph (2)(a), (b) or (c)] applies,

the amount of the compensation must be restricted in accordance with sub-paragraph (3), *except to the extent that this would result in that person receiving compensation equivalent to less than 50% of the relevant benefits protected under Article 8 of Directive 2008/94/EC.*"

46. Paragraph 28 (which deals with annual increase in the compensation payable) should also be read as saying:

"28 (1) This paragraph provides for the increases mentioned in sub-paragraph (3)(b) of paragraphs 3, 5, 8, 11, 15 and 22.

(2) Where a person is entitled to periodic compensation under any of those paragraphs, he is entitled, on the indexation date, to an increase under this paragraph of–

(a) the appropriate percentage of the amount of the underlying rate immediately before that date, or

(b) where the person first became entitled to the periodic compensation during the period of 12 months ending immediately before that date, 1/12th of that amount for each full month for which he was so entitled.

except that where an increase in accordance with subparagraph (a) or (b) would result in that person receiving compensation equivalent to less than 50% of the relevant benefits protected under Article 8 of Directive 2008/48/EC, the person shall receive such greater amount as is necessary to ensure compliance with Article 8 of that Directive."

47. Although conventionally described as a process of construction the real question for the Court in all these cases is whether it is possible to interpret the legislation so as to be consistent with and to give effect to the Directive without at the same time destroying the structure and fabric of the domestic statute in question. Where the domestic legislation was intended to give effect to the Directive but has for whatever reason failed accurately to transpose it into national law the task is likely to be more straightforward. But in many cases, like the present one, the form and contents of the domestic legislation will often relate back to other sources of legislative intent and even a purposive construction of the statute will not necessarily achieve compatibility with the Directive.

48. The Court is not entitled to assume the role of legislator in this process and to override or set aside what appear to be fundamental or important features of the existing

domestic legislation: see *Vidal-Hall v Google Inc* [2015] EWCA Civ 311; [2015] 3 WLR 409 at [90] where Lord Dyson MR said:

> "But it does not follow that it is never possible to interpret a measure by disapplying or striking down part of it in order to make it compatible with the Convention or a directive. Various interpretative techniques may be deployed in order to eliminate an incompatibility. The relevant question in each case is whether the change brought about by the interpretation alters a fundamental feature of the legislation or is inconsistent with its essential principles or goes against its grain, to use Lord Rodger's memorable phrase. In our view, there is no significance in the interpretative tool that is used. Reading in to a provision or reading it down may change a fundamental element of it. That is not permissible. But we do not see why, as a matter of principle, it is impermissible to disapply or strike down, say, a relatively minor incompatible provision in order to make the measure compatible. The question must always be whether the change that would result from the proposed interpretation (whichever interpretative technique is adopted) would alter a fundamental feature of the legislation. It will not be "possible" to interpret domestic legislation, whether by reading in, reading down or disapplying a provision, if to do so would distort or undermine some important feature of the legislation."

49. The disapplication of the cap imposed under Schedule 7 would in our view involve the removal of a fundamental feature of the existing legislation. We agree with Mr Giffin that it cannot be regarded as a mere detail. The interpretative amendments suggested by Mr Facenna are just that and would replace the cap in paragraph 26 with a new floor in terms of pension provision where at the moment there is none. This is a significant change in the form of PPF protection which may have important financial consequences for other occupational pension schemes and their members. We do not therefore consider that it is possible to achieve the enforcement of Article 8 by a *Marleasing*-compliant construction of the 2004 Act.

Direct effect

50. It is common ground that in order for the provisions of a Directive to have direct effect they must be both precise and unconditional. In *Francovich*, for example, the failure to identify the guarantor of the pay provisions with sufficient precision was fatal to the claim for direct enforcement. If the correct view about Article 8 were the one accepted by Judge Cooke it would follow that Article 8 cannot be directly effective. But if the judgments of the CJEU in *Robins* and *Hogan* are to be read in the way in which the majority of the Court consider that they should, as indicated in paragraph 39 above, then the Board's objection to Article 8 comes down to two points:

(i) direct effect depends and falls to be judged by reference to the terms of Article 8 itself and not by reference to how it has subsequently been interpreted by the CJEU; and

(ii) as in *Francovich* Article 8 does not specify who is to be the guarantor of the protected liabilities.

51. Mr Giffin submitted that support for the first of these objections can be found in the judgment in *Francovich* (at [17]) where the CJEU said:

> "Article 3 of the directive thus leaves the Member State a discretion in determining the date from which payment of claims must be ensured. However, as is already implicit in the Court's case-law (see the judgments in Case 71/85 *Netherlands v FNV* [1986] ECR 3855 and Case 286/85 *McDermott and Cotter v Minister for Social Welfare and Attorney General* [1987] ECR 1453, paragraph 15), the right of a State to choose among several possible means of achieving the result required by a directive does not preclude the possibility for individuals of enforcing before the national Courts rights whose content can be determined sufficiently precisely on the basis of the provisions of the directive alone."

52. In this part of the judgment the Court was considering the argument by Italy that the content of the guarantee in Article 3 was not sufficiently precise to be directly effective because Article 3 gave member states choices about the periods of employment in respect of which compensation should be provided. The Court's determination of this issue is set out in [18] of the judgment where it says:

> "In this case, the result required by the directive in question is a guarantee that the outstanding claims of employees will be paid in the event of the insolvency of their employer. The fact that Articles 3 and 4(1) and (2) give the Member States some discretion as regards the means of establishing that guarantee and the restriction of its amount do not affect the precise and unconditional nature of the result required."

53. Mr Facenna seeks to deal with this point by saying that the question whether the contents of a directive are sufficiently precise has to be answered not merely by reference to the terms of the directive itself but also by reference to any decision of the CJEU on the meaning to be given to those provisions. Thus in the present case (as stated in *Hogan* at [52]) the requirements of Article 8 were clear and specific at least as of 25 January 2007 when the judgment in *Robins* was delivered.

54. Mr Facenna relies on what is said in *Hogan* for more than the proposition that it is now clear what Article 8 requires. The date of the clarification was, he submits, relevant for the purposes of a *Francovich* damages claim where a lack of clarity in the directive itself may provide a temporary defence to a claim for damages based on its non-implementation. But a ruling of the CJEU authoritatively determining the meaning and effect of the directive "defines the meaning and scope of that law as it must be, or ought to have been, understood and applied from the time of its coming into force": see Case C-441/14 *Dansk Industri* EU:C:2016:278 at [40]). As we understand his argument, this must mean that, since the judgment in *Robins,* Article 8 should be treated as having direct effect and must be applied in that manner by national courts to any pre-existing disputes. We have not heard argument on whether

this may or may not be relevant in the case of Mr Hampshire where the qualifying insolvency of T&N pre-dates the decision in *Robins*.

55. The second objection to Article 8 having direct effect is that it does not identify who should be the guarantor of the protected liabilities. Mr Facenna says that a similar argument was advanced and rejected in Case C-441/99 *Riksskatteverket v Soghra Gharehveran* [2001] ECR 1-7687. In a case involving Article 5 the CJEU was asked to decide whether the Directive did not have direct effect because Sweden had decided to designate itself as the guarantor of the claims for pay rather than exercising the discretion under Article 5 to nominate institutions to guarantee the claims. In *Francovich* the existence of the discretion under Articles 3(1) and 5 was the reason why the directive was held to lack the precision necessary for it to have direct effect.

56. The Court distinguished the situation in *Francovich* from the one it had to consider:

> "39. It must, however, be pointed out in this regard that, unlike the situations described in paragraphs 37 and 38 above, in which the Member States has still not used the discretion it enjoys or has made only partial use of that discretion, the main proceedings concern a situation in which the Member State concerned has designated itself the person liable to meet claims of pay guaranteed under the Directive.
>
> 40. In such circumstances, it must be accepted that the Member State has made full use of the discretion which it enjoys under Articles 3(1) and 5 of the Directive in the implementation of the Directive.
>
> 41. Indeed, it appears that, once a Member State has decided not to set up guarantee institutions and consequently to determine the organisation, financing and operation of such institutions, as Article 5 of the Directive provides, and has chosen instead to provide for direct funding from public funds, it can no longer be maintained that that Member State must still take measures to give effect to Article 5 of the Directive."

57. In the present case the United Kingdom has established the industry-financed PPF as the guarantor of Mr Hampshire's protected liabilities. Mr Giffin says that this is not conclusive of the issue because this choice was made on the basis that the amount of compensation would be capped in absolute terms. Had the United Kingdom known that such a cap would be impermissible some alternative scheme might have been introduced involving, for example, the use of insurance by employers in the case of highly paid employees.

58. We do not consider that this is necessarily an answer to the fact that the United Kingdom has legislated for pension protection using the PPF as the guarantor. The cap does no more than to limit the liabilities of the statutory scheme. We accept the point that had it been known that those liabilities were subject to a minimum (and uncapped) level of protection, the costs involved might have dictated a modified form of scheme. But that point goes more to the question whether the content of Article 8

was sufficiently clear and precise. It does not alter the fact that the PPF has been chosen as the guarantor of the statutory scheme.

59. In the end, however, we have concluded that the question whether Article 8 has direct effect should form part of the reference to the CJEU and we so direct. The Court will liaise with counsel once this judgment has been delivered with a view to settling the form of the questions to be referred. Mr Hampshire also relies on Article 47 of the EU Charter as giving him an effective remedy in this case but we propose to defer consideration of that argument until after the outcome of the reference.

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