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Neutral Citation Number: [2020] EWHC 1598 (Admin)

Case No: CO/571/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22nd June 2020

Before :

THE HONOURABLE MR JUSTICE LEWIS

- -

Between :

PAUL HUGHES AND OTHERS	**Claimants**
- and –	
THE BOARD OF THE PENSION PROTECTION FUND	**Defendant**

(1) THE SECRETARY OF STATE FOR WORK AND PENSIONS

First Interested Party

(2) 20-20 TRUSTEES SERVICES LIMITED

Second Interested Party

AND OTHER INTERESTED PARTIES

- -

Gerry Facenna Q.C. and James Bourke (instructed by **Walkers Solicitors**) for the **1st and 2nd, and 6th to 25th Claimants**
Tom de la Mare Q.C., Thomas Seymour and Iain Steele (instructed by **Farrer and Co LLP)** for the **3rd to 5th Claimants**

Nigel Giffin Q.C. and Patrick Halliday (instructed by **Hogan Lovells International LLP**) for the **Defendant**
Jason Coppel Q.C. and Zoe Leventhal (instructed by **Government Legal Department**) for the **First Interested Party**
Fraser Campbell (instructed by **Allen & Overy LLP**) for the **Second Interested Party**
The other Interested Parties did not appear and were not represented

Hearing dates: 18 to 22 May 2020

- -

APPROVED JUDGMENT

THE HONOURABLE MR JUSTICE LEWIS:

INTRODUCTION

1. This a claim brought by 24 individual claimants and a 25th claimant, BALPA, which is a body representing airline pilots. They seek to challenge a decision of the Board of the Pension Protection Fund ("the Fund") on the method the Board proposes to adopt to ensure that pension scheme members receive at least 50% of the value of their accrued pension benefits if their employer becomes insolvent.

2. In summary, following an employer's insolvency, a pension scheme which has insufficient assets to meet certain protected liabilities is transferred to the Fund. The Board is then under a statutory obligation to make compensation payments to members of the scheme. The statutory provisions provide for payment of an amount equal to (1) 100% of the benefits fixed by their scheme for those members who have attained the normal pension age ("NPA"), or who have retired early for health reasons, before the assessment period for calculating the value of the assets begins or (2) 90% of the benefits fixed by the scheme for those members below NPA on the date the assessment period begins. In addition, there is an upper ceiling or cap on the compensation payable to the latter group. The cap was initially fixed at £27,777.78 in 2005. It has been increased in line with earnings and was £40,020.34 in 2019/2020. Those who were below NPA at the start of the assessment period, and whose compensation is capped, receive 90% of the amount of the compensation cap not 90% of the value of their accrued pension entitlement.

3. In 2018, the Court of Justice of the European Union gave a ruling on the interpretation of Article 8 of Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer ("the Directive"). It ruled that Article 8 of the Directive required member states to ensure that employees received benefits corresponding to at least 50% of the value of an employee's accrued pension entitlement: see case C-17/17 *Hampshire v Board of the Pension Protection Fund* [2019] ICR 327 ("*Hampshire*"). In the light of that decision, the Board decided that it would conduct an actuarial valuation of the pension benefits payable to a member over time, compare that sum with the amounts that would be paid out of the Fund over time, and, if the payments from the Fund were estimated to provide less than 50% of the value of the benefits, the Board would pay an additional amount of compensation, referred to as an "uplift". In some cases, the actual amounts received by a member of a pension scheme over time could be less than 50% of the amounts that would have been paid by the pension scheme itself.

4. The issues that arise are:

   (1) Does the imposition of a cap on the amount of compensation that an employee can receive constitute unlawful discrimination on grounds of age contrary to European Union law or Article 14 of the Convention on the Protection of Human Rights and Fundamental Freedoms ("the Convention") read with Article 1 to the First Protocol, or otherwise breach an applicable principle of proportionality?;

(2) Does the method adopted by the Board to ensure that an employee receives at least 50% of the value of accrued entitlement comply with the requirements of Article 8 of the Directive as interpreted by the Court of Justice in *Hampshire*?;

(3) What, if any, limitation period applies to claims against the Board for arrears of compensation in cases where an employee has been paid less than the amount of compensation lawfully due?;

(4) Is the fixing of interest on unpaid sums at a rate equivalent to bank base rate a breach of any principle of EU law and, if so, what interest is payable?; and

(5) During the period when the value of the assets and liabilities of the pension scheme is being assessed, are trustees of the scheme restricted to paying an amount of benefits which is no more than the compensation that the Board will have to pay if the pension scheme does eventually transfer to the Fund?

5. That summary is a necessarily brief description of the issues that arise. This judgment describes (1) the legislative framework including the EU legislation and the relevant provisions of the domestic legislation (2) the facts, and then (3) considers the relevant issues in turn.

THE LEGISLATIVE FRAMEWORK

The EU Provisions

6. The Directive imposes obligations on member states relating to the protection of employees and former employees in the event of the employer's insolvency. The Directive replaces an earlier, 1980, Directive dealing with the topic. The third recital (which is in materially similar terms to that in the 1980 Directive) provides that:

> "(3) It is necessary to provide for the protection of employees in the event of the insolvency of their employer and to ensure a minimum degree of protection, 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. To this end, the Member States should establish a body which guarantees payment of the outstanding claims of the employees concerned."

7. Articles 1 and 2 of the Directive deal with its scope and the definition of insolvency. Article 3 of the Directive requires Member States to ensure that guarantee institutions guarantee the payment of employees' outstanding claims. Article 5 requires Member States to lay down detailed rules governing the organisation, financing, and operation of the guarantee institutions which comply with specified principles. Chapter 3 of the Directive contains provisions concerning social security. Article 8 of the Directive (which is in materially similar terms to Article 8 of the 1980 Directive) provides as follows:

> " Article 8

> 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 occupational or inter-occupational pension schemes outside the national statutory social security schemes."

8. Article 11 provides that the Directive shall not affect the option of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees. Article 12 deals with abuse and provides so far as material:

> "This Directive shall not affect the option of Member States:
>
> (a) to take the measures necessary to avoid abuses….."

The Domestic Implementing Provisions

9. Chapter 3 of the Pensions Act 2004 ("the Act") provides for pension protection for eligible pension schemes (which are defined in section 126 of the Act). In essence, when an employer becomes insolvent, a scheme enters a period of assessment to determine if the assets of the pension scheme are sufficient to meet its protected liabilities. Those are defined to include an amount equal to the compensation that would be payable by the Board if the pension scheme transferred to the Fund, and certain other liabilities. If the assets are sufficient, the pension scheme is wound up and the assets distributed to members. If the pension scheme's assets are insufficient to meet those liabilities, its assets are transferred to the Fund and the Board becomes responsible to pay compensation, calculated in accordance with Schedule 7 to the Act, to the individual members. The relevant statutory provisions are as follows.

The Assessment Period

10. Section 132(2) of the Act defines the beginning and end of the assessment period in the following terms:

> "(2) Where, in relation to an eligible scheme, a qualifying insolvency event occurs in relation to the employer, an assessment period–
>
> (a) begins with the occurrence of that event, and
>
> (b) ends when–
>
> (i) the Board ceases to be involved with the scheme (see section 149),
>
> (ii) the trustees or managers of the scheme receive a transfer notice under section 160, or
>
> (iii) the conditions in section 154(2) (no scheme rescue but sufficient assets to meet protected liabilities etc) are satisfied in relation to the scheme,
>
> whichever first occurs."

11. A 'qualifying insolvency event' is defined in section 127(3) of the Act. There are restrictions imposed on the trustees of the pension scheme during the assessment period. These include restrictions on the amount of the pension benefits that the

trustees may pay to members. These are designed to ensure that the trustees do not pay out to members more than the amount of compensation that members would be paid by the Fund if the scheme were ultimately to transfer to the Fund. Section 138(2) of the Act provides that:

> "(2) The benefits payable to or in respect of any member under the scheme rules during the assessment period must be reduced to the extent necessary to ensure that they do not exceed the compensation which would be payable to or in respect of the member in accordance with this Chapter if–
>
> (a) the Board assumed responsibility for the scheme in accordance with this Chapter, and
>
> (b) the assessment date referred to in Schedule 7 were the date on which the assessment period began."

The Duties of the Board to Assume Responsibility for the Scheme

12. Section 143 of the Act provides that the Board must determine whether the assets of the scheme are less than its "protected liabilities". "Protected liabilities" are defined as "the cost of securing benefits… which correspond to the amount of compensation which would be payable …" by the Board under the statutory provisions, liabilities which are not liabilities to members, and the estimated costs of winding up the scheme (see section 131 of the Act).

13. Section 127(2) of the Act provides, so far as material, that:

> "(2) The Board must assume responsibility for the scheme in accordance with this chapter if –
>
> (a) the value of the assets of the scheme at the relevant time was less than the amount of the protected liabilities at that time…."

14. The Board must give the trustees a transfer notice (see section 160 of the Act). That brings the assessment period to an end and the Board assumes responsibility for the scheme. Section 161 of the Act provides, so far as material, that:

> "(1) Where a transfer notice is given to the trustees or managers of an eligible scheme, the Board assumes responsibility for the scheme in accordance with this Chapter.
>
> (2) The effect of the Board assuming responsibility for a scheme is that–
>
>> (a) the property, rights and liabilities of the scheme are transferred to the Board, without further assurance, with effect from the time the trustees or managers receive the transfer notice,
>>
>> (b) the trustees or managers of the scheme are discharged from their pension obligations from that time, and
>>
>> (c) from that time the Board is responsible for securing that compensation is (and has been) paid in accordance with the pension compensation provisions,

and, accordingly, the scheme is to be treated as having been wound up immediately after that time."

The Pension Compensation Provisions

15. Section 162(1) of the Act provides that:

"(1) Schedule 7 makes provision for compensation to be paid in relation to a scheme for which the Board assumes responsibility in accordance with this Chapter, including provision for–

(a) periodic compensation to be paid to or in respect of members,

(b) lump sum compensation to be paid to members,

(c) a cap to be imposed on the periodic compensation and lump sum compensation payable, and

(d) annual increases to be made to periodic compensation."

16. Schedule 7 provides, essentially, that a person who is (or would become) entitled to a pension will receive annual periodic compensation. That compensation is fixed at either 90% or 100% of the pension which the person would have received if the scheme had not transferred to the Fund. Members receive an amount equal to 100% of the annual value of the pension benefits payable under the scheme if they had attained NPA (or had retired on ill-health grounds or were in receipt of a survivor's pension) before assessment day (i.e. the date when the assessment period began). Members will receive 90% of the annual value of the pension if they were below the NPA specified by the particular scheme on assessment date. There is also a compensation cap applicable to those below NPA on assessment date. The annual value of their compensation is capped at a prescribed amount. A person whose pension under the scheme would have exceeded the amount of the cap is entitled only to compensation equivalent to 90% of the capped pension. There is provision for increases in the value of the compensation in the period prior to it becoming payable (i.e. in the period between the assessment date and the pensioner attaining NPA). There is also provision for the annual amount of compensation in payment to be increased by the lower of the amount of annual price inflation or 2.5% in respect of years of service after 5 April 1997.

17. The provisions are complex but their operation can be seen by reference to paragraph 3 of Schedule 7 to the Act which deals with persons in receipt of a pension at assessment date.

"(1) Compensation is payable in accordance with this paragraph where, immediately before the assessment date, a person is entitled to present payment of a pension under the admissible rules of the scheme.

(2) That person ("the pensioner") is entitled to periodic compensation in respect of that pension ("the pension") commencing at the assessment date and continuing for life or, in a case to which sub-paragraph (8) applies, until such time as entitlement to the pension would have ceased under the admissible rules.

(3) The annual rate of the periodic compensation is the appropriate percentage of the aggregate of–

(a) the protected pension rate, and
(b) any increases under paragraph 28 (annual increases in periodic compensation).

(4) In sub-paragraph (3) *"the appropriate percentage"* means–
(a) in a case to which sub-paragraph (7) applies, 90%, and
(b) in any other case, 100%.

(5) In sub-paragraph (3) *"the protected pension rate"* means the annual rate of the pension, under the admissible rules, immediately before the assessment date.
…..

(7) This sub-paragraph applies where the pensioner has not attained normal pension age in respect of the pension before the assessment date and his entitlement to the pension–
(a) is attributable to his pensionable service, and
(b) did not arise by virtue of any provision of the admissible rules of the scheme making special provision as to early payment of pension on grounds of ill health.

(10) This paragraph is subject to–

paragraph 26 (compensation cap), and

paragraph 30 (power of Secretary of State to change percentage rates by order)."

18. The "assessment date" is the date when the assessment period in relation to the pension scheme began (see paragraph 2 of Schedule 7 to the Act). Similar provisions are made for persons who are active members of the scheme. Those are persons still employed by the employer at the time of insolvency. They will receive compensation equal to 100% of the value of their pension benefits if they had attained NPA before assessment date and 90% if they were below NPA on assessment date (the compensation becomes payable if they survive to NPA): see paragraphs 8 and 11 of Schedule 7 to the Act. Provision is also made for deferred members, that is persons who had ceased to be employees at the time of insolvency but had retained membership of the pension scheme and would in due course have been eligible to receive benefits based on their pensionable service with the employer. Deferred members will receive compensation equal to 90% of the pension benefits payable under the scheme if they are below NPA on assessment date (and survive to NPA): see paragraph 15 of Schedule 7 to the Act.

19. Payments to persons aged below NPA on assessment date are subject to the compensation cap provided for by paragraph 26 of Schedule 7 to the Act. That paragraph is complicated but, effectively, involves substituting the amount of the compensation cap for the annual value of the pension payable under the pension scheme. The compensation cap was originally fixed in 2005 at £27,777.78 for a person aged 65. It increases annually in line with earnings inflation. It was £40,020.34 in 2019/2020 for a person aged 65. The amount of the cap is reduced by actuarial factors for each year that a person is below the age of 65 (see paragraph 26(7) of Schedule 7 to the Act). A person below NPA on assessment date receives 90% of the capped amount.

20. The following hypothetical example illustrates the operation of the compensation cap. Take a male pensioner who, on retirement in 2005, would have been entitled under his scheme to an annual pension of £50,000. If he had reached the NPA under the scheme on the assessment date, he would receive compensation equal to 100% of the annual value of the pension, that is, he would be entitled to receive annual periodic compensation of £50,000. If he had not reached NPA on the assessment date, he would receive 90% (the appropriate percentage for a person under NPA) of the amount of the compensation cap (not the annual value of the pension). In 2005, such a person would receive 90% of £27,777.78 (the amount of the cap ignoring any actuarial reduction for present purposes) not 90% of £50,000 (the annual pension which he would otherwise have been entitled to under the scheme). Consequently, he would receive annual periodic compensation of £25,000.

21. The position is further complicated by amendments made by Schedule 20 to the Pension Act 2014 which introduced paragraph 26A into Schedule 7 to the Act. Those amendments apply to payments from 6 April 2017 onwards. The compensation cap comprises “the standard amount” for persons with 20 or fewer years of pensionable service. In relation to those with more than 20 years’ pensionable service, the compensation cap is increased by 3% for each year of pensionable service in excess of 20 years. The material provisions are in the following terms:

> “**26A**
>
> (1) This paragraph gives the meaning of *“the compensation cap”* for the purposes of paragraph 26.
>
> (2) The amount of the compensation cap for a person depends on the person's age and length of pensionable service at the time when the person first becomes entitled to the relevant compensation.
>
> (3) “The compensation cap” for a person who has 20 or fewer years of pensionable service at that time is the standard amount.
>
> (4) “The compensation cap” for a person who has more than 20 years of pensionable service at that time is—
>
> (a) the standard amount, plus
>
> (b) for each additional year, an amount found by multiplying the standard amount by 3%.
>
> (5) A person has an “additional year” for each whole year of pensionable service that exceeds 20 years of pensionable service.
>
> (6) If the total amount calculated under sub-paragraph (4)(b) would exceed the standard amount, it is to be treated as being equal to the standard amount.
>
> (7) In sub-paragraphs (3) and (4) “the standard amount”—
>
> (a) for a person who is 65 years old at the relevant time, means the amount specified by the Secretary of State by order, and

(b) for a person of any other age at the relevant time, means the amount specified under paragraph (a) as adjusted in accordance with actuarial adjustment factors published by the Board."

Increases

22. There are provisions governing increases in the value of the compensation in the period before it becomes payable (i.e. between assessment date and the member attaining NPA). It is not necessary in this judgment to deal with those provisions. The amount of the annual periodic compensation which a person is paid is also increased annually by the percentage provided for by paragraph 28 of Schedule 7 to the Act. The amount does not increase by reference to the indexation provisions contained in the original pension scheme. The annual percentage increase provided for by paragraph 28(3) of Schedule 7 to the Act is:

"the lesser of –

(a) the percentage increase in the general level of prices in Great Britain for the period of 12 months ending with the 31st May last falling before the indexation date; and

(b) 2.5%."

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23. The annual increases only apply to amounts payable in respect of pensionable service which occurs on or after 6 April 1997 (see paragraph 28(3) and (6) of Schedule 7).

Survivors' Benefits

24. Provision is made for the widow or widower of a pensioner (and similar provisions apply where active and deferred members die). They are entitled to receive ½ of the periodic compensation that the scheme member was entitled to, together with the annual indexation increases provided for by paragraph 28 of the Schedule. Paragraphs 4(2) and 4(3) of Schedule 7 to the Act provide:

"(2) Subject to sub-paragraph (4), the pensioner's widow or widower is entitled to periodic compensation commencing on the day following the pensioner's death and continuing for life.

(3) The annual rate of the periodic compensation at any time is half of the annual rate of the periodic compensation (including any increases under paragraph 28) to which the pensioner would at that time have been entitled under paragraph 3 in respect of the pension had the pensioner not died".

The Fund's Assets

25. The Fund itself is principally funded from the assets of pension funds transferred to the Board, levies raised on all eligible pension schemes, and investment income from those sources: see section 173 of the Act. Two types of levies are imposed on schemes. One comprises a risk-based levy assessed by, amongst other things, reference to the difference between the scheme's assets and the amount of its liabilities and the likelihood of the employer becoming insolvent. The second is a

scheme-based levy assessed by reference to the amount of a scheme's liabilities: see section 175 of the Act. The Fund is not funded from general taxation.

26. In the 2018/2019 financial year, the Fund had assets of £36.3 billion. 38% of those assets came from pension schemes' assets transferred to the Fund. 23% came from levies. 27% came from returns on investments. The remainder (12%) came from assets recovered from insolvent employers. Liabilities amounted to approximately £29.6 billion. The Fund had reserves of approximately £6.7 billion, giving it a safety margin in the event that liabilities turned out to be greater (for example, if members lived longer than expected) or investment returns lower than expected.

THE FACTS

27. The claimants were members (or in two cases, the surviving spouses of two members) of one of four pension schemes whose employer became insolvent. Four individuals were identified by the claimants as representative of the position of members under those four pension schemes.

The Turner and Newall Scheme ("the T & N Scheme").

28. Mr Hampshire, the second claimant, was born on 31 October 1947. Following graduation, he began working for Turner and Newall in August 1971. Mr Hampshire was a member of the T & N Scheme from 1971 until the end of 1998. Under the terms of the scheme, the normal pension age was 62. A member aged over 50 with two years' membership was permitted to retire early.

29. Mr Hampshire was made redundant on 31 December 1998 and took early retirement with the consent of the trustees. He was then aged 51. He began receiving an annual pension of £48,781.80 a year and a lump sum. He was entitled under the T & N Scheme to annual increases on the pension of the lower of 5% or the increase in retail price indexation (subject to a minimum increase of 3% a year).

30. On 10 July 2006, the T & N Scheme entered into assessment on the insolvency of the employers. Mr Hampshire's pension benefits were therefore limited to an amount equal to that which would be payable if the T & N Scheme were ultimately transferred to the Fund (in accordance with section 138(2) of the Act). At that time, Mr Hampshire was 58 and was still under the NPA of 62 for his scheme. As a result, the compensation cap was applied to him and he received 90% of the capped amount.

31. Mr Hampshire's annual pension was £60,234 per annum as at 10 July 2006. As a result of the imposition of the cap, that was limited to £22,021. He was entitled to receive 90% of that amount. He therefore received a pension of £19,891 per annum, as compared with the amount he was entitled to under the T & N Scheme. His pension was therefore reduced by 67%. Furthermore, most of his pensionable service took place before 6 April 1997 (he worked from 1971 to the end of 1998). He was not eligible to receive any annual increases under paragraph 28 of Schedule 7 to the Act in respect of approximately 26 years of pre-6 April 1997 pensionable service. Under the scheme he would have received annual increases of 5% or inflation (subject to a minimum of 3%) in respect of those years of pensionable service.

32. Taking those factors into account, in the financial years following the T & N Scheme entering assessment, Mr Hampshire has calculated the amounts he would have received under the scheme and the amounts actually received. They are:

Tax year ended	Scheme pension	Pension received
2007	£62,041	£19,841
2008	£63,902	£19,956
2009	£65,819	£19,959
2010	£67,794	£19,595
2011	£69,828	£20,014
2012	£71,923	£20,082
2013	£74,080	£20,182
2014	£76,3030	£20,210
2015	£78,592	£20,220
2016	£78,592	£20,220
2017	£83,378	£20,255

33. Mr Hampshire says that he had completed approximately 29 years of pensionable service. From April 2017, therefore, he benefitted from the amendments to the compensation cap for long serving employees. The cap applicable to him was increased by 3% a year, or a total of 27%, for the 9 years of pensionable service in excess of 20 years, from 6 April 2017. For the tax year ending in 2018, therefore, Mr Hampshire says the figures for what he was entitled to under the T & N Scheme and what he actually received are:

2018	£85,879	£25,753

34. The T & N Scheme is still in assessment. Mr Hampshire challenged the valuation obtained by the Board as to whether the assets in the scheme would meet liabilities. That raised issues which were, ultimately, referred to the Court of Justice as explained below.

35. There is also some limited information available on survivors' benefits under the T & N Scheme. Spouses of deceased members are entitled to ½ of the deceased member's pension. That pension was calculated on the basis that a member had not elected to commute part of the pension to a lump sum. In the case of Mrs Forsyth, her husband was born on 25 September 1944. He retired in 2002. He received an annual pension but commuted part of that pension into a lump sum. The T & N Scheme entered assessment on 10 July 2006. As Mr Forsyth was below the NPA of 62, the compensation cap was applied to his pension benefits (in accordance with section 138(2) of the Act). He died on 4 March 2015. Mrs Forsyth became entitled to a survivor's pension. She received a pension calculated as ½ of her late husband's capped annual pension (that being calculated by reference to the amount of the capped pension reduced to take account of the fact that part of the pension had been commuted to receive a lump sum). I have not been provided with the figures of the benefits that Mrs Forsyth would have been entitled to under the T & N Scheme or the amounts actually paid.

The Heath Lambert Group Pension Scheme ("the HLG Scheme")

36. The first claimant, Paul Hughes, was born on 25 September 1946. After qualifying as an accountant, and working elsewhere, he joined CH Heath in 1975. He worked in various senior roles in the company. He left employment in 1999 and worked for other companies. He ceased work in 2003, aged 56, as his wife, sadly, had become terminally ill.

37. Mr Hughes was a member of the HLG Scheme from 1975 until he left the scheme in 1999. Under the scheme, his NPA was 60. However, he was permitted to retire early and draw his pension benefits. On retirement, he was entitled under the HLG Scheme to an annual pension of £66,245 (he had commuted part of his pension to receive a lump sum). Different indexation provisions applied to different parts of this pension. Roughly 2/3 (£47,443.47 at retirement) increased annually by 5%. A small part increased in line with inflation but capped at 5% annually. Part (approximately £13,744.84) would not be increased until age 65 at which point annual increases in line with retail price inflation but capped at 3% would apply.

38. The employer became insolvent and the HLG Scheme entered into assessment on 26 May 2005. From that date, Mr Hughes' pension benefits were reduced to those which would be payable if the HLG Scheme were transferred to the Fund. The assessment was concluded, and the HLG Scheme in fact transferred to the Fund on 10 March 2010.

39. As Mr Hughes was 59 on the date assessment began, he was below his NPA of 60. The compensation cap was therefore applied to him. As he was 6 years below the age

of 65, the cap was actuarially reduced. He received 90% of the capped amount. Mr Hughes was in receipt of a pension of £66,245 per annum immediately before assessment. On the application of the compensation cap, that was reduced to £17,481 per annum, that is, a little over 26% of his scheme entitlement. Mr Hughes calculates the figures for the tax years ended 2007 to 2018 and they are, broadly, as set out in the following table:

Tax year to April	Scheme pension	Pension received
2007	£71,568	£17,636
2008	£74,438.43	£17,746
2009	£77,456	£17,822
2010	£80,642.01	£17,872
2011	£83,900.41	£17,899
2012	£87,597.27	£17,978
2013	£91,481.40	£18,060
2014	£95,449.33	£18,143
2015	£99,652.51	£18,217
2016	£103,923.11	£18,625
2017	£108,289.69	£18,288
2018	£112,958.64	£21,719

40. There is also some limited amount of information available on survivors' benefits under the HLG Schemes. Spouses of decided members were entitled to ½ of the deceased member's pension. That pension was calculated on the basis that a member had not elected to commute part of the pension to a lump sum. In the case of Mrs

Mackenzie-Green, her husband retired at age 50 in 2003. His NPA was 60. The HLG Schemes entered into assessment on 26 May 2005 when Mr Mackenzie-Green was still below NPA. Mr Mackenzie-Green, therefore, had the compensation cap applied to his pension. He died on 11 September 2005. Mrs Mackenzie-Green received a pension calculated as ½ of her late husband's capped annual pension (that being calculated by reference to the amount of the capped pension reduced to take account of the fact that part of the pension had been commuted to receive a lump sum). She was also entitled under the pension scheme to a lump sum calculated as the difference between five times his annual pension and the pension he had actually received in the two years or so between his retirement and his death. She did not receive this lump sum. I have not been provided with the figures of the benefits that Mrs Mackenzie-Green was entitled to receive under the HLG Scheme and the amounts actually paid.

The BMI Scheme

41. Some of the claimants were pilots employed either by BMI or Monarch airlines. BALPA represents those, and other members, of the BMI and Monarch Schemes. In relation to the BMI Scheme, the provisions operated as follows. The NPA was 55 for those who joined the BMI Scheme before 1 August 1983 and 60 for those who joined after that date. A member of the BMI scheme accrued a pension of 1/50th of final salary for each year of pensionable service (or, for certain categories of members depending on the amount of their pension contribution, 1/53rd). Annual pension increases were provided for. These were 3% for years of pensionable service prior to 6 April 1997 and the lesser of 5% or retail price index (subject to a minimum guarantee of 3% a year) thereafter.

42. The BMI Scheme, like all the other schemes in issue in these proceedings, was contributory. The salaries of pilots and first officers were generally relatively high. In March 2010, the pensionable salary range for BMI captains was £78,636 to £110,073 and for first officers it was £44,910 to £71,802. As a result, pensions for retired pilots and first officers were high.

43. BMI became insolvent. The BMI Scheme entered assessment on 25 June 2010 and transferred to the Fund on 12 March 2013. The compensation cap applied from the assessment date. An example of the effect is provided by the third claimant, Captain Parsons. He was born in 1939 and joined the BMI Scheme in 1982. His NPA was 55 which he attained on 12 March 2014 (after the assessment date). According to the evidence, his pension calculated under the BMI Scheme would have been £79,069. The compensation cap in his case, actuarially adjusted for age, was £27,646 and he would have been entitled to 90% of this figure, namely £24,881.

The Monarch Scheme

44. Under the Monarch Scheme, the NPA was 55 for those who joined the scheme before 1 July 2000 and 60 for those who joined after that date. A member of the Monarch Scheme accrued a pension of 1/50th of final salary for each year of pensionable service before 1 October 2005, and 1/55th (or 1/60th in certain cases) for service from that date. Annual pension increases were provided for by agreement between the trustees of the scheme and the employer. On the evidence, an annual increase of 4% below the rate of price inflation was payable for years of service prior to 6 April 1997 (subject to a minimum of 3% and a maximum of 8%). Increases equivalent to the

retail price index, capped at 5%, were payable in respect of years of service after that date.

45. Monarch Airlines became insolvent. The Monarch Scheme entered assessment on 10 November 2014 and transferred to the Fund on 2 November 2016. An example of the effect is provided by the fourth claimant, Captain Bruce. He was born on 1 July 1960 and joined the Monarch Scheme on 1 January 1990. He ceased employment at age 54 on 1 January 2015. His NPA was 55 which he would attain on 1 July 2015, after the assessment date. The compensation cap was therefore applied to him. He was entitled to receive an amount equal to 90% of the compensation cap, actuarially adjusted for age. That yielded an annual sum of £24,947. The figures indicate that he would been have been entitled to a pension under the Monarch Scheme of around £53,765. In addition, he would have received annual increases for his service prior to April 1997 under the Monarch Scheme but received no such increases once assessment began.

The Hampshire Litigation

46. Mr Hampshire was concerned at the reduction of his pension benefits once the T & N Scheme moved into assessment. He objected to the valuation of the assets of the scheme undertaken to determine if the assets would meet the reduced liabilities payable or whether the scheme should transfer to the Fund. Mr Hampshire appealed to the Pension Protection Fund Ombudsman against the decision of the Board to approve the valuation. The Ombudsman dismissed the appeal. He appealed against that decision to the High Court. Morgan J. directed that two preliminary issues be tried, namely:

(1) whether Article 8 of the (predecessor) to the Directive was directly effective; and

(2) if so, whether it affected the Board's duties in deciding to approve a valuation under section 144 of the Act?

47. Before the High Court, Mr Hampshire contended that Article 8 of the Directive was directly effective and imposed an obligation, enforceable in domestic courts, to ensure that each individual member of a pension scheme received 50% of the value of the benefits payable under a pension scheme. The High Court rejected that argument. Mr Hampshire appealed. The Court of Appeal referred three questions to the Court of Justice for a preliminary ruling, namely:

> "1. Does Article 8 of Directive 80/987/EEC (now superseded by Article 8 of Directive 2008/94/EC) require member states to ensure that every individual employee receives at least 50% of the value of his accrued entitlement to old-age benefits in the event that his employer becomes insolvent (with the sole exception of cases of abuse, to which Article 10(a) of that Directive applies)?
>
> 2. Alternatively, subject to the findings of the national courts regarding the facts of the cases, is it sufficient under Article 8 80/987/EEC for a member state to have a system of protection where employees usually receive more than 50% of the value of their accrued entitlement to old-age benefits but some individual employees receive less than 50% by virtue of:

> (i) a financial cap on the amount of compensation paid to employees (in particular employees who have not reached their pension scheme's normal pension age at the time of the employer's insolvency); and/or
>
> (ii) rules limiting the annual increases in the compensation paid to employees or the annual revaluation of their entitlements prior to pension age?
>
> 3 Is Article 8 of Directive 80/987/EEC directly effective in the circumstances of the present case?"

48. The decision and reasoning of the Court of Justice are considered below. In brief, as appears from the ruling at the end of its judgment in *Hampshire* at [2019] ICR 327 page 338, the Court of Justice ruled that:

> "1. Article 8 of Parliament and Council Directive 2008/94/EC of 22 October 2008 on the protection of employees in the event of the insolvency of their employer must be interpreted as meaning that every individual employee must receive old-age benefits corresponding to at least 50% of the value of his accrued entitlement under a supplementary occupational pension scheme in the event of his employer's insolvency.
>
> "2. In circumstances such as those in the main proceedings, article 8 of Directive 2008/94 has direct effect and may, therefore, be invoked before a national court by an individual employee in order to challenge a decision of a body such as the Board of the Pension Protection Fund."

The Response of the Board to the Court of Justice's Decision in *Hampshire*

49. The Board recognised that the ruling could well affect certain of the persons being paid compensation by the Fund. It considered that legislation would ultimately be enacted to implement the ruling but that, in the meantime, the Board itself should take steps to ensure that persons received 50% of the value of their accrued old-age benefits. It set outs its approach in a document issued in November 2018. That document summarised the ruling in the following terms:

> **"The ruling**
>
> The Court of Justice of the European Union (the CJEU) ruled in September 2018 that pension scheme members should receive at least 50% of the value of their accrued old-age benefits if their employer became insolvent."

50. The Board considered that the vast majority of persons receiving compensation from the Fund (referred to in the document as the PPF), and an earlier scheme referred to as the "FAS", would be receiving 50% of the value of their pension entitlement but a small number may not. It identified those likely to be affected as:

> "members who are receiving less than 50% of their entitlement will mostly be those whose PPF compensation or FAS assistance is capped and/or those for whom there is a difference between the indexation/revaluation rates that they were due in their original scheme, and in the PPF/FAS. There may also be other differences between scheme and PPF/FAS benefit structures.

We expect those affected by the judgment who have been capped will typically be affected to a greater extent than those where the differences arise from indexation/revaluation rates."

51. The document continued by noting that:

"Although the ruling is clear that members should receive at least 50% of their accrued old age benefits, it does not provide complete clarity on *how* that is to be achieved".

52. The document confirmed that the Board would pay arrears of compensation to those affected but noted that the time period in relation to which arrears would be paid may be affected by the time limits under the Limitation Act 1980 ("the 1980 Act"). It said the Board would not treat time as continuing to run after the *Hampshire* judgment without further notice. The Board set out its proposed interim process to increase payments in the following terms:

"For PPF members

To work out if a member is affected, we will assess the total actuarial value of the member's scheme benefits payable from the insolvency date, using their original scheme benefit structure (e.g. not subject to the PPF cap and using the original revaluation and indexation rates) and compare it against the total actuarial value of their PPF benefits (from the same date).

If the total actuarial value of the member's PPF benefits is less than 50% of the total actuarial value of their original scheme benefits, we will increase their level of PPF benefits until the actuarial value of their benefit equals 50% of the actuarial value of their original scheme benefits. This may mean that a member will initially receive more than 50% of the pension they would have received from their scheme, because we have taken into account the difference between their scheme and PPF level of indexation and revaluation.

The adjustment considered necessary to achieve the 50% minimum guarantee will be based upon a one-off valuation exercise and will not be further adjusted (upwards or downwards) in the light of subsequent events.

This approach means that we can ensure members receive at least 50% of the value of their scheme benefits without having to change the levels of indexation as set out in the legislation for either PPF or FAS."

53. That is the decision under challenge in these proceedings. The actual process conducted by the Board is explained in more detail in the witness statements of Ms McCrory, the Board's Chief Actuary. Ms McCrory also responds to the evidence of the claimants including the actuarial report and additional note prepared by Mr Benstead.

54. The Board proposes to carry out a single, one-off calculation comparing (1) the actuarially assessed value of the Fund compensation from the date a scheme enters assessment for the expected life time of the member with (2) the actuarially assessed value of the future scheme benefits of the member. If the assessed value of the Fund compensation would be less than 50% of the assessed value of future benefits, the Board will make a single adjustment to the value of the compensation paid out of the

Fund to ensure that the actuarially assessed value of the Fund compensation is at least 50% of the assessed value of the benefits under the pension scheme.

55. One consequence of this approach is that the amount of the additional payment, that is the "uplift" to compensation payments from the Fund, tends to be "front loaded". That is, amounts of compensation are paid in the early years of a member's retirement than are higher 50% of the amount that would have been paid by the scheme but, in later years, compensation is paid which is lower than 50% of the amount that would have been paid under the scheme. That is because, over the years, the Fund will apply the annual indexation increases to its compensation payments provided for in paragraph 28 of Schedule 7 to the Act. Those are often lower than the actual annual indexation increases that the scheme would have paid. The Fund has to pay higher amounts of compensation in earlier years, to take account of the fact that payments in future years will be increased at rates lower than those which would have been paid by the scheme in order to ensure that, overall, the member receives 50% of the actuarially assessed value of the benefits.

56. There are a number of particular features of that method of calculation to which the claimants object. First, that approach does not provide for a payment in each pension year of an amount of compensation equal to 50% of the benefits that the member would have received in that pension year under the scheme. In the earlier years, the member may have received an amount which was more than 50% of the benefits payable under the scheme. In later years, the amount of compensation may be less than 50% of the amount of the benefits that would have been in paid in a particular pension year.

57. Secondly, the calculation is based on actuarial assumptions such as the expected length of the life of the member and other assumptions such as those related to the rate of inflation in future years. If a member lived beyond his or her actuarially expected life, then the overall cumulative payments of compensation could be less than 50% of the overall cumulative benefits he would have received under the scheme. An example would be Captain Parsons. The value of his compensation payments is calculated on the assumption that he will live to 86. If he lives longer, the overall payment of Fund compensation will be less than 50% of what he would have received under the BMI Scheme. Similarly, the Fund compensation payable to Captain Bruce is calculated on the basis that he will live to the age of 88 or 89. If he lives longer, then the amounts of compensation he would have received will be less than 50% of the benefits that he would have received under the Monarch Scheme.

58. Ms McCrory accepts that the approach of making a one-off adjustment to Fund compensation involves making assumptions about what will happen in future, for example how long the member will live and what the future rates of inflation will be. She recognises that:

> "It is, of course, in the nature of actuarial assumptions that individual experiences will differ to a greater or lesser extent from the assumptions used".

59. A further issue arises in relation to survivor benefits, that is the compensation paid to a spouse or civil partner of a member after the death of the member. The Board includes assumptions about whether a member will die leaving a survivor and will build that into the calculation of the value of the member's benefits under the scheme.

By that method, the Board contends, it ensures that the value of the compensation paid to the member includes 50% of the value of the benefits (including the benefits payable to survivors). The actual compensation paid to the survivor will be an amount equal to 50% of the annual periodic compensation payable to the member at the date of death. The claimants contend that that means that a survivor may receive less than he or she would have received under the relevant pension scheme. By way of example, a survivor under the BMI Scheme would have been entitled to 2/3 of the deceased member's pension (calculated on the pension payable before commutation of part of the pension to a lump sum). The claimants contend that some survivors do, or may, receive less than 50% of this amount.

60. There is no evidence of the actual payments made to survivors under the four schemes. Two of the claimants, Mrs Forsyth and Mrs Mackenzie-Green, are persons in receipt of a survivor's pension. There are no figures indicating whether the compensation amounts received are less than 50% of the amounts they would have received (both in particular years or the predicted, cumulative payments for their anticipated lives) under the relevant pension scheme. The parties indicated that the issues raised are ones of legal principle, and no facts are needed to resolve them. It would have been preferable if evidence had been provided of the relevant claimants' factual position. That would have assisted in the practical understanding of the operation of the compensation arrangement. It is always better to decide issues of law in the context of a clear factual framework.

61. One further point should be made. The problem of ensuring payment of at least 50% of the benefits payable under a scheme is particularly acute in cases where members are subject to the compensation cap. In most cases, if a member is receiving 90% of the value of the pension benefits that the member would have received under the scheme, there is unlikely to be a problem. Even with different and lower rates of annual increases being paid on the Fund compensation, that would rarely if ever result in the amount of compensation, at least viewed cumulatively, falling below 50% of the actual benefits that would be paid. There may be an issue if the overwhelming bulk of pensionable service is pre-April 1997. Then, a pension scheme may have made provision for inflation or minimum increases but no annual increase would be paid on compensation relating to pre-April 1997 service. That could in certain cases mean that a person would, ultimately, receive less than 50% of actual benefits payable under the scheme. The evidence of Mr Benstead, who assessed the BMI and Monarch Schemes, is that that could happen. He refers to the position of Captain Farrant who had reached NPA before the assessment date and so was not subject to the compensation cap. His pensionable service occurred mainly prior to April 1997 and he receives no annual increase on his Fund annual compensation. He would have received increases under the BMI Scheme. Mr Benstead estimates that if Captain Farrant lived to the age of about 92 he would then receive less than 50% of the benefits that he would have received under the BMI Scheme.

<u>The Reasons Underlying the Compensation Cap</u>

62. The final topic where is it necessary to summarise the relevant evidence relates to the reasons for the imposition of the compensation cap. Ground 2 challenges the lawfulness of the cap under EU law and the Convention.

63. The legislation itself as enacted in 2004 and coming into force in 2005 provided for members below NPA at assessment date to receive 90% of their benefits and imposed a compensation cap calculated as £27,777.78 (an amount which is higher than the median annual earnings and more than twice mean pension income) as explained in the first witness statement of Ms Clark who was a senior civil servant with responsibility for private pensions policy between 2014 and 2019.

64. The second interested party, the Secretary of State for Work and Pensions, identifies six reasons for the compensation cap. The thinking, or reasons, underlying the statutory provisions is described in the two witness statements of Ms Clark and appears from the contemporaneous documentation. Mr Coppel Q.C. for the Secretary of State explained that the White Paper published prior to the Act initially proposed a compensation cap for everyone whether above or below NPA. The thinking developed and the cap was applied only to those below the NPA in the particular scheme. He took me to a series of documents predating the Act which referred to the reasons, or summarised the thinking, of those involved in developing the policy which ultimately found expression in Schedule 7 to the Act.

65. A policy note of 20 November 2003 summarised the proposals as involving a step at NPA resulting in 100% protection for those at NPA at the date of assessment but only 90% for people below NPA and also the application of a compensation cap. It said that step was considered justified to combat moral hazard, to protect the living standards of pensioners and to do so in a way that was not disproportionately complex or counter to the overall objectives. The body of the note refers to the percentage limit and the compensation cap being designed to combat moral hazard. That is, if the Fund provided full protection, then company decision-makers and trustees would be less concerned to ensure that the pension scheme was properly funded as members would receive the pensions they were expecting even if the scheme was not properly funded. The policy note said that both the percentage limit and the compensation cap would affect the actions of those in a position of influence who would care about the effect of losses on other employees and members. The monetary cap was said to have a "crucial additional impact" as it would "bite on relatively high earners many of whom will be in a position of influence within the company". It was said that the extra loss they personally would incur because of the compensation cap would make them all the more likely to exert influence to ensure that the scheme was properly funded. The policy note also considered the reasons why it was not considered appropriate to apply the cap to those who had already reached NPA as they had less opportunity to make up any loss and had adjusted to a certain level of income in retirement. It explained why it was considered appropriate to apply the compensation cap to those who were below NPA but had in fact retired. It was considered fairer to treat all persons below NPA in the same way. The policy note considered alternatives including removing the compensation cap but noted that the department recognised the importance of the cap in combating moral hazard through its indirect impact on those in a position of influence.

66. Mr Coppel next referred to a note produced in May 2004 by officials considering the justification for differential treatment between those above and those below NPA from the point of view of the Convention. It set out the arguments in favour of full protection but noted that:

> "(2) But there are also arguments against providing full protection.

(a) The most important of these is moral hazard. We want employers, decision-makers and trustees to ensure that schemes are funded to deliver on the promises made. They will tend to take less care to ensure this if they believe the PPF will at no significant cost to them or their company provide full protection for:

(i) their own pension, if they are in the scheme (applies to employers, directors, others in a position of influence within the company, trustees who are members of the scheme);

(ii) the pensions of other scheme members – because the decision-makers will care about their employees' contentedness and hence productivity; their personal reputations; the fact that they would have to justify their decisions under difficult circumstances in the future (e.g. pensioners tying themselves to railings outside their homes); the pensions of people they may know personally, and because on the whole they will be caring people, the pensions of existing and past employees more generally".

67. The document continues by referring to the fact that the concerns of employers, decision-makers and trustees referred to in paragraph 2(a)(i) were much more likely to focus on the treatment of members under NPA. It says that those concerns referred to in paragraph 2(a)(ii) were also likely to focus on those members below NPA but to a lesser extent. The note refers to the experience in the United States and the responses to the consultation which strongly suggested the need to take major steps to combat moral hazard. It also referred to a further key argument against full protection in paragraph 2(b) of the document, namely the cost to the levy payer. The document went on to note that:

> "There are a number of tools theoretically at our disposal to combat moral hazard. We could;
>
> (a) Offer less than full protection in various ways. That is the most obvious and straightforward route. It also helps to control the cost (point 2(b)). In particular we could
>
> (i) offer less than 100% protection for the benefits promised, whatever their level. This would carry weight against both 2(a)(i) and (ii) above; and or
>
> (ii) cap the benefits payable in some way so that those with high salaries and/or benefits will receive less than full protection. This is particularly (but not solely relevant) for 2(a)(i) because company decision-makers are more likely to have high salaries and benefits. It is therefore also particularly relevant for people below NPA."

68. That document considered other options including limiting the protection offered to company decision-makers but dismissed that option. It was thought that a general cap offered protection against moral hazard more widely and that something targeted at directors would be a blunt instrument. It would unfairly harm those who tried to do the right thing and those who in practice had no influence in this area while failing to catch some of those with influence. The document continued by stating that it was believed that the importance of addressing moral hazard was so strong that people still some distance from NPA should not receive full protection and that both the 90% limit and the cap were important tools to employ. It set out the reasons why those

above their NPA should not suffer a cut in income. It recognised the possible anomalies that could be created and considered alternatives.

69. The third document to which I was referred was a policy justification paper on the Fund and the Human Rights Act 1998 and seeking advice from the Law Officers. The document described the proposed solution. It explained how the department had sought to balance the aims of ensuring that individuals received compensation as close as possible to the pension they were expecting, minimising costs on employers to encourage continued provision of occupational pensions and limiting the potential for abuse and "unwanted behavioural consequences (moral hazard)". The paper noted employers' concerns about the costs of the Fund. It dealt with moral hazard which it defined in this context as the risk that those with the ability to influence the way the pension scheme is run would take less care than they otherwise would because of the existence of the Fund. It considered means of dealing with this, including a risk-related levy and powers to address deliberate manipulation of the situation. The document then dealt with providing less than full protection and said:

> "16. This is a standard weapon used in insurance/compensation schemes to address moral hazard. The Department considers it necessary to provide less than full protection to a major proportion of scheme members, by limiting their compensation to 90% of full scheme or PPF benefits and capping benefits in monetary terms. This plays a key role in balancing protection with costs. The Department believes that the imposition of the cap will mean incentives to manipulate or take less care will be significantly diminished. Moreover it considers that this approach provides essential incentives for all parties, including members, to ensure that their scheme is well funded."

70. The document stated that the percentage limit and the cap addressed moral hazard in a number of ways. These included, in what was called group (i), the direct impact on potential incomes of decision-makers in terms of the effect on their own pensions if the scheme were transferred to the Fund and they received less than the full amount they were expecting. They also included the indirect effect on decision makers because they would have cause to be concerned about the impact on others if they underfunded the pension scheme. These others were described as group (ii) and included (a) key influencers (b) employees (who would see if their pension scheme was not being well-funded and if they became discontented this could affect productivity and profits) and (c) deferred members and pensioners. In terms of the proposed monetary cap, the document said:

> "24. The proposed monetary cap is designed in particular to impact on those in positions of power or influence, both at director ((i) above) and at senior manager ((ii)(a) above) level."

71. The document referred to the need to control costs. It set out an analysis of the implications of the proposed approach including the anomalies that it generated. This included the position of those above NPA who would not be subject to the percentage limit or the cap. It also considered the position of those who had retired early as compared to those who had not. It considered alternatives.

72. Finally, I was shown extracts from the standing committee of the House of Commons which considered the Pensions Bill. The pension minister referred to the importance of moral hazard and the risk that those with the ability to influence the way in which the pension scheme is run might take less care than they otherwise would if they knew that the Fund would provide 100% protection. The discussion focussed on the provision of 90% rather than 100% of benefits and did not focus on the compensation cap.

73. Parliament did enact Schedule 7 to the Act which fixed a limit of 90% of benefits and imposed a compensation cap in relation to those below NPA at assessment date. The cap was fixed at £27,777.78 for 2005/2006 so that a person who received 90% of the capped amount would receive £25,000. The cap was more than twice the mean pensioner income and higher than median annual full-time earnings in the United Kingdom in 2005/2006. The compensation cap is increased annually in line with earnings inflation. There is some reference in the documents to a minister indicating at the time that only 2% of those below pensionable age would be affected.

74. Standing back from the detail, a reasonable interpretation of the background material is this. The concern was to combat what was described as moral hazard, that is, the risk that those with influence over the way the pension scheme was run would take less care to ensure that the pension scheme was properly funded if members would receive 100% of the value of their benefits from the Fund in the event of insolvency. In addition, there was a perceived need to address the concerns of employers who were concerned about the costs of the Fund in order to ensure that they were not deterred from continuing to provide occupational pensions. Combatting moral hazard was not seen as limited to imposing limits on the pensions of the decision-makers or those in a position of influence. The view was that those persons would be affected by limits on their own pensions and, in particular, on the benefits payable to other employees who were members of the scheme. The decision-makers would be influenced by the imposition of losses on their colleagues and employees for a variety of reasons. The means of doing so was to impose a limit of 90% on the benefits that could be taken by all persons below the NPA specified in their scheme and a compensation cap on relatively high earners.

75. Much of the discussion on combatting moral hazard focussed on the imposition of a 90% limit on benefits. That limit has not been challenged in these proceedings. There was, however, also reference to the compensation cap and an appreciation that it would affect scheme members generally (not just decision-makers and those in a position of influence) as appears, for example, from the May 2004 note. That note also expressed a concern about limiting the protection of persons who were directors but who had tried to do the right thing and of those who in practice had no influence in this area. Those involved also expressly considered and decided it was inappropriate to apply the 90% and the compensation cap to those already above NPA. They also considered and decided that it was inappropriate to exclude those below NPA who had already retired from the application of the 90% limit and the

compensation cap. The arrangements overall were also thought to be an improvement on the previous arrangements.

76. The documents I was referred to did not include any express consideration prior to the Act of the impact of the compensation cap on long-serving employees who by reason of their length of service may find their benefits affected by the compensation cap.

77. I was shown an extract from a debate in December 2012 where the then Minister of State for Work and Pensions stated that he had become increasingly concerned over a period of two and a half years that the compensation cap "acts in a penal way and not on those it was intended to affect" (whom the Minister referred to as "fat cats") and where there might have been a moral hazard issue – "but on longer serving workers". He said that:

> "it is much harder to justify a cap for people who have worked all their life for one firm, made their financial plans on the basis of the pension and have nowhere to top it up".

78. In 2014, Parliament enacted amendments to Schedule 7 to the Act. Those amendments came into force in 2017 and apply prospectively only. They provided for an increase in the amount of the cap for persons with more than 20 years of pensionable service. The pensioner receives a 3% increase for each year of pensionable service above 20 years. Read in isolation, that appears to be a recognition that the effects of the compensation cap ought to be mitigated to some extent for one group of pensioners, namely those with long service.

79. There is further information on the numbers affected by the compensation cap in the statement of Mr Taylor who is a member of the Board. As at March 2019, the Board had assumed responsibility for paying compensation to a total of 284,464 members from 974 schemes that had transferred to the Fund. A further 140,050 members were in schemes in assessment. At the time that the amendments to the compensation cap for long-serving employees came into force in 2017, there were 550 members subject to the cap (and 355 benefitted from the long-service provisions). A further 62 capped persons retiring in the two years to April 2019 also benefitted. Ms McCrory also gives further evidence. She says that approximately 0.5% of persons in receipt of compensation from the Fund are subject to the compensation cap. The proportion of non-pensioners, that is persons who are below NPA and so are not yet in receipt of pensions but whose compensation will be subject to the compensation cap once they reach NPA and compensation starts to be payable, is not known precisely but Ms McCrory says that she would expect that to be a smaller proportion than 0.5%. The Board's view overall is that the proportion of members who will receive benefits from the Fund and be subject to the compensation cap would be no more than 0.5% and may also be a little less. The evidence of Ms McCrory is that the cost to the Fund of removing the compensation cap would be approximately £200 million in respect of future compensation for pensioner members already within the Fund. That is just under 1% of the liabilities of the Fund. Further amounts would need to be paid in arrears. Assuming that there was no limitation period on arrears, Ms McCrory estimates that these could amount to a further £40 million. There would also be an increased cost for those whose schemes in future years transfer to the Fund. Those figures are unknown but Ms McCrory states that it is reasonable to assume that that would amount to 1% of liabilities. Ms McCrory reviews the current funding position

of the Fund. She concludes that the removal of the cap would not have any immediate and directly discernible impact on the rate at which the levy on eligible schemes is set.

The Present Proceedings

80. A claim form was filed on 4 February 2019 and issued by the court on 11 February 2019. The decision under challenge is described as the decision regarding the method of implementing Article 8 of the Directive and the date of the decision is given as November 2018. Two of the grounds (grounds 3 and 4) relate to that decision. Another ground (ground 2), in fact, challenges the imposition of the compensation cap by Schedule 7 to the Act and says that that is unlawful. A further issue concerns the proper interpretation of section 138(2) of the Act. Ground 1 is no longer pursued.

81. By an order dated 1 April 2019, Morris J. ordered that there be an oral hearing at which permission would be considered and, if granted, the substantive hearing of the claim would follow immediately over three days commencing on 11 June 2019. The matter was subsequently stayed pending the decision of the Court of Justice in case C-168/18 *Pensions-Sicherungs-Verein VVaG v Gunther Bauer.*

82. The hearing took place over 5 days beginning on 11 May 2020. The hearing was conducted remotely. It was a public hearing in that persons, including the parties, had access to a link and could, and many people did, observe proceedings. I am grateful to counsel for the high quality of their submissions. I am also grateful to them and their legal teams for the efficient preparation of bundles, including the preparation of bundles during the hearing itself, dealing with the necessary materials and authorities. That enabled the hearing to be conducted fairly and efficiently. There was a full hearing on all issues. Following the hearing, written submissions were invited from the parties on the decision of the Court of Appeal in *R (Badmus and others) v Secretary of State for the Home Department* [2020] EWCA Civ 657 which was handed down after the conclusion of the hearing.

83. For the reasons given below, I grant an extension of time for bringing the challenge on ground 2. The other grounds of claim were brought within time. I grant permission to apply for judicial review on grounds 2, 3 and 4, and, if necessary, in relation to the issue relating to section 138(2) of the Act.

84. Against that background, I deal with each of the issues set out in paragraph 4 above in turn.

THE FIRST ISSUE – DOES THE COMPENSATION CAP GIVE RISE TO UNLAWFUL DISCRIMINATION ON THE GROUNDS OF AGE CONTRARY TO EU LAW OR THE CONVENTION?

85. Ground 2 of the claim form alleges that the compensation cap is contrary to EU law because it involves unlawful discrimination on the grounds of age or is disproportionate. The remedy sought is a declaration that the provisions imposing the compensation cap be disapplied. Ground 2 further alleges that the compensation cap is contrary to Article 14 of the Convention, read with Article 1 of the First Protocol. That ground raises the following discrete issues:

(1) Was the claim challenging the lawfulness of the compensation cap brought within time and, if not, should an extension of time be granted?

(2) Does the statutory scheme involve the implementation of EU law such that Article 21 of the EU Charter of Fundamental Rights and the general principles of non-discrimination apply?

(3) If so, do the statutory provisions involve (a) differential treatment (b) on grounds of age (c) between persons in a materially similar position?

(4) If so, can the Secretary of State demonstrate that the provisions pursue a legitimate aim and are appropriate and necessary to achieve that aim? and

(5) Do the statutory provisions involve (a) differential treatment on grounds of status within the ambit of Article 14 of the Convention, read with Article 1 of the First Protocol and (b) if so can the Secretary of State demonstrate that the provisions are objectively justifiable?

(1) The Timing Issue

86. Mr Coppel for the Secretary of State, supported by Mr Giffin Q.C. for the Board, submitted that the claims by these 25 claimants were brought more than three months after the grounds of challenge first arose and so were out of time. In their submission, the grounds of challenge first arose either when the relevant legislation was enacted or, alternatively, when the statutory provisions became applicable to the claimants when their respective pension schemes entered assessment. That was in 2006 for the T & N Scheme claimants, 2005 for the HLG Scheme claimants, 2012 for the BMI Scheme claimants and 2014 for the Monarch Scheme claimants. BALPA represented pilots in those last two schemes and no different time-limit arose so far as BALPA was concerned. Mr Coppel submitted that no extension of time should be granted. The claimant has not applied for one as required by Practice Direction 54A. The question of whether the individual claimants may be able to bring a private law claim for payment of compensation and, so far as EU law was concerned, might seek to argue in that claim that they were entitled to compensation without the application of the compensation cap was a matter to be decided when any such proceedings were brought and was not a reason for extending time for bringing this public law judicial review claim.

87. Mr de la Mare Q.C. for the claimants contended that the challenge was to the scheme as amended by the Board to ensure that pension members received at least 50% of their benefits notwithstanding the cap. That occurred in November 2018 so the claim was brought in time. He submitted that the date a scheme entered assessment could not be the date when grounds first arose as many members would be under pensionable age at that date and would not be entitled to any pension at that age. Further, he submitted that an extension of time should be granted, if necessary, both as the issues could be raised in any event by the individual claimants in private law proceedings and because they raised issues of general public importance. Further, the issue would continue to arise as other schemes went into assessment and the lawfulness of the cap would arise there.

Discussion

88. CPR 54.5 provides that a claim for judicial review must be filed:

> "(a) promptly; and
>
> (b) in any event not later than three months after the grounds to make the claim first arose".

89. In order to determine when the grounds first arose it is necessary to identify the measure which the claimants are seeking to review. In the present case, in relation to ground 2, that measure is the statutory provisions which impose a compensation cap, principally paragraphs 3, 11, 15 and 26 and 26A of Schedule 7 to the Act. The ground of challenge is that those provisions of primary legislation are contrary to EU law or incompatible with Convention rights.

90. I do not accept the submission of the claimants that the Board, in effect, created a new statutory compensation scheme in November 2018 when it adopted a mechanism to ensure that pensioners received at least 50% of the value of their accrued pension entitlement. The Board has had to consider modifying the practical effects of the operation of the statutory provisions by providing for payment of an uplift, or additional compensation, in cases where the operation of the statutory provisions results in a member receiving less than 50% of the accrued pension entitlement in order to give effect to the directly effective right conferred by Article 8 of the Directive. But the Board has not created new statutory provisions or created a new scheme. The provisions that the claimants seek to disapply are, still, the relevant provisions of Schedule 7 to the Act. Furthermore, I do not accept that the fact that Mr Hampshire's appeal challenging the valuation of the assets of the T & N Scheme is still outstanding assists in determining whether his claim for judicial review is in time within the meaning of CPR 54.5. The question is whether this claim, that is the judicial review claim, was filed more than 3 months after ground 2 first arose not whether other proceedings were brought within time and could be used to challenge the lawfulness of the compensation cap. I deal below with the question of an extension of time for bringing the claim.

91. In the context of a claim relating to legislative provisions, the grounds for bringing a claim for judicial review first arise in relation to a particular claimant when that claimant is affected by the legislative provisions under challenge (not the date on which the legislative provisions were enacted or came into force). That is consistent with the decision of the Court of Appeal in *R (Badmus and others) v Secretary of State for the Home Department* [2020] EWCA Civ 657, esp. at paragraphs 78 to 82. It is consistent with the decision of the Divisional Court in *R v Customs and Excise Commissioners ex p. Eurotunnel Ltd* [1995] C.L.C. 392 and the observations of Rose J., as she then was, in *R (Clarke) v HMRC* [2017] UKUT 379 at paragraph 62, both the latter cases being ones on which Mr Coppel relied.

92. In the present case, the grounds of claim first arose on the date that a particular claimant's pension scheme entered assessment to determine whether the value of the scheme's assets exceeded its protected liabilities (i.e. the cost of paying benefits equal to the amount of the statutory compensation which would be payable by the Fund, which were calculated by reference to the compensation cap and other liabilities). The pension scheme would be wound up if it could pay those liabilities or would be transferred to the Fund if it could not. Furthermore, from the date when the scheme

entered assessment, the trustees of the scheme were required by virtue of section 138(2) of the Act to reduce the pensions being paid to those members below NPA to ensure that the pension benefits did not exceed the amounts which would be payable by the Fund. Those in receipt of pension during assessment would therefore have their benefits reduced by reference to the statutory provisions including the compensation cap. Members not yet in receipt of pension would see their position materially alter on assessment date (i.e., the date the scheme entered assessment). If the scheme transferred to the Fund, and they were below NPA on assessment date, they would be eligible to receive compensation calculated by reference to the compensation cap. If the scheme had sufficient assets to meet its protected liabilities, it would be wound up. Members could no longer rely upon receiving the pension benefits provided for by the scheme if they were below NPA on assessment date. Spouses or partners with contingent rights to a survivor's pension would be eligible, if they survived their spouse or partner, to receive benefits calculated by reference to the value of the member's pension determined in accordance with the statutory provisions not the scheme provisions.

93. Persons entitled to benefits under a pension scheme where an employer became insolvent and the scheme entered assessment were, therefore, affected by the legislation, including the provisions relating to the compensation cap, on the date when the pension scheme entered assessment. All the individual claimants were members of schemes (or were the surviving spouses of members of such schemes) which entered assessment more than three months (indeed many years) before the claim was issued. The 25th claimant, BALPA, is said, in the evidence of Mr Moore, to be acting on behalf of the claimants in the BMI and Monarch Scheme (not other airlines) and is in a similar position to those claimants. The ground of claim relating to the statutory provisions imposing the compensation cap first arose in the claimants' cases when their particular scheme entered assessment. That was more than three months before the claim was filed. Their claim for judicial review of the compensation cap was, therefore, brought out of time.

94. In any event, ground 2 of claim could not have arisen later than the date on which a person was in receipt of a pension paid by trustees or compensation payable by the Board. In either case, the payments would be calculated applying the compensation cap. In the case of compensation paid by the Board, that would result from the application of the provisions in Schedule 7 to the Act. In the case of schemes in assessment, the trustees would be obliged by section 138(2) of the Act to reduce the benefits payable to ensure that they did not exceed the amounts that would be payable by the Board if the scheme transferred to the Fund.

95. In the case of Mr Hughes, for example, that date was 26 May 2005 when his scheme entered assessment. He was in receipt of a pension at that date but he was under the NPA applicable in his scheme as he had retired early. The trustees were, therefore, required to reduce his pension payments to ensure that they did not exceed the payments that would be made by the Fund under Schedule 7 to the Act. That included calculating what he would be paid by the Fund applying the compensation cap. Similarly, as regards Mr Hampshire, the date in his case is 10 July 2006. On that date, his scheme entered assessment. He was in receipt of a pension and the trustees were obliged to reduce his pension benefits to an amount which did not exceed that which would be payable under Schedule 7 of the Act including the compensation cap. In the

case of Captain Parsons (who was in the BMI Scheme) and Captain Bruce (who was in the Monarch Scheme), they began to receive compensation from the Fund in 2014 and 2016 respectively. As they were below NPA on the date their pension schemes entered assessment, their statutory compensation was calculated by reference to the statutory provisions including the compensation cap. In relation to the two survivor claimants, Mrs Forsyth and Mrs Mackenzie-Green, their husband's pension benefits were reduced when their schemes entered assessment and, at that stage, the amount they would be entitled to receive in the event they survived their husbands would be affected by the compensation cap. In any event their spouses died in 2015 and 2005 respectively. They began to receive their survivors' pensions, which was one half of their husbands' pension as reduced by the application of the compensation cap, on those dates. In all those cases, those particular claimants began receiving a pension or compensation more than three months (indeed many years) before the claim was filed.

96. No details are given for the other 18 individual claimants (save that they were all below their NPA at the time that their scheme entered assessment). No evidence has been adduced that any of those 18 claimants were not in receipt of a pension (or statutory compensation) at the time that the claim was filed. There was no suggestion in argument that any particular claimant fell into that group. The inference is that those 18 claimants have also received pension benefits or compensation reduced by the application of the compensation cap over three months before the claim for judicial review was filed on 4 February 2019. All the claimants are, on the evidence, out of time to bring this claim for judicial review on that alternative basis.

97. I next consider whether there is a good reason for extending the time for bringing the claim under CPR 3.1(2). I recognise the importance of compliance with time limits in public law cases. I accept that it is regrettable that the claimants did not include an application for an extension of time within the claim form, as required by paragraph 5.6 of Practice Direction 54D, and have not filed any evidence to explain the delay. Nonetheless, I consider that it is appropriate and just to extend time in this case for the following reasons.

98. Judicial review usually concerns the bringing of a public law challenge to a decision or other measure. The time-limit in CPR 54.5 prevents a person bringing a claim for judicial review if he or she does not act promptly or in any event no later than three months after the grounds first arose. If the decision or measure produces consequences only in public law, the fact that the claimant is out of time to bring a claim for judicial review means that there will be no other available means of establishing the invalidity of the public law decision or other measure. In some cases, however, both public law and private law rights arise out of the same set of facts. In private law claims, there may be different time limits applicable. An individual may be able to bring a claim to enforce private law rights within those different, usually longer, time-limits and it may be necessary, as part of consideration of that claim, to consider any public law issues which arise.

99. In the present case, the 24 individual claimants could bring a claim to enforce the payment of compensation against the Board under the relevant paragraph of Schedule 7 to the Act or, where the pension scheme is in assessment and has not yet transferred to the Fund, against the trustees of the scheme. That applies, for example, to Mr Hughes, Captain Parsons and Captain Bruce and the other claimants in relation to the HLG, BMI or Monarch Schemes which have transferred to the Fund. They

could bring a claim against the Board for unpaid compensation, alleging that the compensation cap was unlawful under EU law and could not be relied upon to justify the payment of reduced compensation. They could bring that claim and seek arrears of compensation for at least 6 years before the claim was brought (or, if the claimants are correct, without limitation). In Mr Hampshire's case, and the case of other T & N Scheme claimants, their scheme is still in assessment. They could claim against the trustees of the scheme for unpaid benefits. The trustees may say that they are prevented by section 138(2) of the Act from paying more than would be payable by the Board under Schedule 7 to the Act, including the compensation cap, if the T & N Scheme ultimately transferred to the Fund. The T & N Scheme claimants could contend that the compensation cap gave rise to unlawful discrimination and so could not be applied to reduce their benefits. The issue of the lawfulness of the compensation cap under EU law could, therefore, be raised in other, private law proceedings. Indeed, this court could simply order under CPR 54.20 that this claim continue in relation to ground 2 as if it had not been started as a claim for judicial review under CPR 54 but as a claim under CPR 8. That is a powerful factor in indicating that it would be right to extend time to allow this judicial review claim to be brought.

100. That consideration is reinforced by the fact that the claim raises issues of general importance which are likely to arise in future cases in any event. The issue concerns the lawfulness of the arrangements made to protect the pension benefits of those whose employers have become insolvent. It applies to these four schemes and to other schemes, including schemes where employers have recently become insolvent.

101. There is no prejudice in the circumstances of this case in granting an extension of time. The absence of prejudice is not a reason for granting an extension of time. The presence of prejudice may be a factor relevant to refusing an extension of time.

102. In the circumstances, therefore, I extend the time for bringing this claim to 11 February 2019, the date on which the claim was finally issued by the court.

(2) Does the Scheme involve the implementation of EU law?

103. Mr Coppel submitted that the EU law governing non-discrimination on grounds of age and proportionality only apply in relation to measures taken by member states when they are implementing EU law. He submitted that Article 8 of the Directive requires protection for pension rights when an employer becomes insolvent by ensuring that (1) everyone receives 50% of the value of his or her pension benefits and (2) no one's benefits is reduced to such a level as to put the person at risk of poverty. That, he submitted, is the result of the decisions in *Hampshire* and *Bauer*. Any additional measures outside those areas are matters of choice for national law and do not involve the implementation of EU law. As such, the provisions of the Charter and general principles of EU law do not apply. He relied upon the decisions of the Court of Justice in joined cases C-609/17 and C-610/17 *TSN* [2020] ICR 336 and the Supreme Court in *R (HC) v Secretary of State for Work and Pensions* [2017] UKSC 73, [2017] 3 W.L.R. 1486 as confirming that proposition and as analogous to the present case.

104. Mr de la Mare submitted that the requirements of paying at least 50% of the value of old age benefits and not exposing pensioners to risk of poverty are ways in which the

obligation to protect pension rights are achieved. They do not exhaust the scope of EU law. If a member state adopted measures for protecting rights but provided a different degree of protection for UK nationals as compared with EU nationals, or those resident in the UK as compared with those resident in the European Union, that would involve the implementation of EU law. Similarly, he submitted, applying the provisions in a way which involved unlawful discrimination on grounds of age or in a way which was disproportionate would arise in the implementation of EU law.

Discussion

105. Article 21(1) of the Charter provides that:

> "1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited."

106. Article 51 of the Charter provides that the provisions of the Charter apply to member states "only when they are implementing Union law".

107. Non-discrimination on grounds of age, and proportionality, form part of the general principles of EU law: see e.g. case C-555/07 *Kucukdeci v Swedex GMBH & Co KG* [2011] 2 C.M.L.R. 27. Those principles apply to member states only when they are implementing EU law.

108. Those principles continue to apply in the United Kingdom at present. The United Kingdom ceased to be a member of the European Union on 31 January 2020 and repealed the European Communities Act 1972 which gave effect to all rights, powers, liabilities, obligations and restrictions created by or arising under the EU Treaties. The United Kingdom Parliament has provided, however, that those provisions of the 1972 Act continue to have effect until the end of a transition, or implementation, period which ends on 31 December 2020: see section 1A of the European Union (Withdrawal) Act 2018.

109. The central question is whether the United Kingdom was implementing EU law when it enacted the provisions imposing the compensation cap. In my judgment, it was. First, Article 8 of the Directive provides that member states shall ensure that the necessary measures are taken "to protect the interests of" employees and those who have left employment "in respect of rights conferring on them immediate or prospective entitlement to old-age benefits including survivors benefits". The Court of Justice has recognised that member states have a considerable latitude in deciding the means and levels of protection and, having due regard to proportionality, may reduce the accrued entitlement in the event of an employer's insolvency. Article 8 of the Directive requires member states to guarantee "each individual employee, without exception, compensation corresponding to at least 50% of the value of their accrued entitlement" (see the Court of Justice in *Hampshire* [2019] ICR 327 at paragraphs 41 to 42 and 50). In *Bauer* the Court of Justice recognised that a reduction in benefits may still be manifestly disproportionate where it left the person at risk of poverty even if the pensioner received more than 50% of the value of accrued benefits. Article 8 is not limited to providing 50% of the value of such benefits and protecting from the risk of poverty. Those are ways in which the obligation imposed by Article 8 of the Directive to take the necessary measures to protect pension rights is achieved. If a

member state adopts other measures to protect pensions in the event of insolvency, it would still be implementing the obligation in EU law to take the necessary measures to protect pension rights. If a member state took further measures but provided for different levels of protection on grounds of nationality, or place of residence, or sex, or age, that would fall within the scope of the implementation of EU law. It would not, as Mr Coppel submitted, be nothing to do with EU law and would not simply be a matter of choice for a member state subject to its own rules.

110. In the present case, the United Kingdom, at least in part, adopted a set of rules in the Act in order to achieve the result required by the Directive, namely, to protect pension rights in the event of insolvency. It is now clear that if the provisions fail to guarantee at least 50% of the value of the accrued entitlement, those provisions, including the compensation cap, have to be modified in order to avoid a breach of Article 8 of the Directive. The adoption of the rules in the Act still involved the implementation of EU law and the content of the rules can still be measured against other principles of EU law such as the principles governing unlawful discrimination on grounds of age.

111. The two cases principally relied upon by Mr Coppel are not, in fact, analogous to the present case. In the *TSN* case, the relevant provision, Article 7 of Directive 2003/88, expressly provided that member states must take the necessary measures to ensure that "every worker is entitled to paid annual leave of at least four weeks". The workers in that case were in fact entitled to more than four weeks paid annual leave under Finnish law. They were ill and unable to take all their annual leave during the relevant year. Finnish law allowed them to carry forward those parts of the four weeks leave that they had not used but they could not carry forward any additional leave to which they were entitled under Finnish law. The Finnish court referred the question of whether the provisions of the Charter protected accrued leave in excess of the four weeks annual leave provided for by Article 7 of Directive 2003/88. It was in that context that the Court of Justice considered whether the rules governing the grant of additional leave involved the implementation of EU law and, in particular, whether national rules which exceeded the minimum period of four weeks leave provided for by Article 7 of Directive 2003/88 implemented the Directive so that the provisions of the Charter applied. The Court noted at paragraph 46 of its judgment that:

> "…the mere fact that domestic measures come, as is the situation in the present case, within an area in which the European Union has powers cannot bring those measures within the scope of EU law, and therefore, cannot render the Charter applicable…"

112. The Court noted that there was a shared competence between the EU and member states in respect of social policy. It noted that member states remained free to adopt measures which were more stringent than those forming the subject matter of action by the EU legislature. At paragraph 50, the Court noted that:

> "… the situations at issue are different from the situation in which an Act of the Union gives the member states the freedom to choose between various methods of implementation or grants them a margin of discretion which is an integral part of the regime established by that Act, and from the situation in which such an Act authorises the adoption, by the member states, of specific measures intended to contribute to the achievement of the objective of that Act…"

113. The Court noted that the grant by member states of rights to paid annual leave which exceeded the minimum period of four weeks laid down in Article 7 of Directive

2003/88 was not capable of affecting the minimum protection guaranteed to those workers. It concluded at paragraph 52 by stating that:

> " It follows from all of the foregoing that, where the member states grant, or permit their social partners to grant, rights to paid annual leave which exceed the minimum period of four weeks laid down in article 7(1) of that Directive, such rights, or the conditions for a possible carrying over of those rights in the event of illness which has occurred during the leave, fall within the exercise of the powers retained by the member states, without being governed by that Directive or falling within its scope: see, by analogy, *Hernández* , para 45."

114. The situation in *TSN*, therefore, was one where the relevant EU legislation laid down a specific obligation as to the precise amount of annual leave to be granted to provide minimum protection. Member states retained the power to grant additional leave and the act of exercising that power and providing for additional rights did not involve the implementation of EU law. By contrast, the provision in the present case (Article 8 of the Directive) does not specify a minimum. It specifies an obligation to provide protection of pension rights. The case law of the Court of Justice has interpreted that as including, at least, a guarantee of 50% of the value of the accrued entitlement and ensuring that the level of protection provided does not put pensioners at risk of poverty. But that is not an exhaustive description of the scope of the obligation provided for by Article 8 of the Directive. Rather this is the type of case recognised in paragraph 50 of the judgment in *TSN* where an act of the EU legislature gives member states a discretion to choose between different methods of implementation or grants them a wide margin of discretion. In exercising that discretion, and in choosing how to protect pension rights, a member state is implementing EU law. The prohibition on discrimination therefore applies to the rules they adopt to protect pension rights in the event of insolvency.

115. The second case relied upon by Mr Coppel is not analogous to the present situation. That is the decision of the Supreme Court in *R (HC) v Secretary of State for Work and Pensions* [2017] 3 W.L.R. 1486. That concerned the extent of the rights of third-country nationals to reside in the United Kingdom as they were the primary carers of British national children who would be forced to leave the European Union if their primary carers were not allowed to reside in the UK. That is known as the *Zambrano* principle after the case in which the derivative right of residence for primary carers was first established by the Court of Justice. The claimant in *HC* sought access to non-contributory social assistance. She submitted that the refusal to grant such benefits amounted to discrimination contrary to Article 21 of the Charter. The Supreme Court held that it was not sufficient to show that the claimant was a person within the scope of the EU Treaty as she was a primary carer with a derivative right to reside in the UK. The right conferred by EU law was limited to the practical support sufficient to avoid the children of a primary carer being obliged to leave the European Union. The right did not extend to entitlement to financial assistance (over and above the limited support required by the *Zambrano* principle itself). Thus, the provision of non-contributory social security benefits or assistance to such carers did not involve the implementation of EU law but was a matter for national law. The provisions of the Charter did not therefore apply. That decision depends upon the nature of the specific EU right in issue in that case. The decision cannot be transferred and applied to the very different situation in the present case

116. In the circumstances, the statutory provisions governing the payment of compensation included in Schedule 7 to the Act were a means of implementing Article 8 of the Directive. They were intended to protect pension rights in the event of the employer's insolvency. The provisions of the Charter, and the general principles of EU law, do apply to those statutory provisions.

(3) Do the statutory provisions involve differential treatment on grounds of age between persons in a materially similar position?

117. My conclusions on this issue can be stated shortly. The statutory provisions governing the imposition of the compensation cap do involve differential treatment on grounds of age. Those who are above the NPA (which is fixed by reference to a specific age) do not have the compensation cap applied to them. Those who are below the NPA do have the compensation cap applied to them. The differential treatment does apply to those in materially similar provisions. A person in a particular scheme with pensionable service yielding benefits above the level of the compensation cap does not have the cap applied if he or she has attained NPA on the date when the scheme enters assessment. A person in the same scheme with pensionable service yielding benefits above the level of the compensation cap will have the cap applied if he or she is below NPA on assessment date and will receive a lower amount of compensation. Persons in materially similar positions are therefore treated differently on grounds of age.

(4) Can the Secretary of State demonstrate that the provisions pursue a legitimate aim and are appropriate and necessary to achieve that aim?

118. Mr Coppel identified six aims underlying the scheme, five of which are interrelated. The principal justifications for both the provision of 90% rather than 100% compensation and for the application of the compensation cap involved two aims. The first is moral hazard. That is properly understood as the aim of encouraging responsible decision-making on the part of the decision-makers to ensure that a scheme is properly funded. That aim will be assisted if the decision-makers are aware that they, and their colleagues and employees generally, will suffer significant pension losses if they make poor decisions. The second was to ensure that the costs of the scheme for pension protection were not such as to deter employers from continuing to provide occupational pension schemes. Mr Coppel submitted that three of the other stated aims explain why the decision was taken to ensure that the provision of less than full compensation applied to all those below NPA on assessment date (whether already retired or not) but did not apply those who had attained NPA. Finally, Mr Coppel submitted that there was a sixth aim of encouraging people to work for longer thereby contributing to the economy and reducing burdens on the state.

119. Mr Coppel submitted that a broad margin of discretion is afforded to decision-makers both in deciding whether a particular aim is a legitimate one and whether the means adopted are suitable and necessary. The decision is to be afforded particularly strong respect where it has been specifically considered, as it was here, by Parliament and where the effects of the decision were known and where alternatives were considered. Mr Coppel accepted that the burden of justification (which is on the Secretary of State) increased as the harshness of the effect of the provisions was greater. In that regard, he submitted the Secretary of State needed to justify the scheme as it stood

now in 2020. The proportion of pensioners affected by the compensation cap was relatively small (approximately 0.3% of existing members within the Fund, and an anticipated 0.5% of future persons whose scheme would enter the Fund). The cost of providing compensation without the cap for those presently in the Fund would be about £200 million which was a significant sum. The persons affected had lost significant amounts of their pension but they were relatively well off (as the compensation cap had been fixed at an amount equivalent to twice median earnings). Further, the effect had been mitigated first by the requirement that each individual receive at least 50% of the value of the accrued pension benefits under the scheme and secondly by the introduction of the long service cap. It was the differential treatment provided for by the statutory scheme as modified in those respects that fell for consideration. In those circumstances, Mr Coppel submitted that the compensation cap did seek to pursue legitimate aims and the measure was suitable and appropriate to achieve those aims.

120. Mr Coppel focussed on the case law concerning the Convention, rather than EU law. He submitted that, whilst the language used by the Court of Justice was different from that used by the European Court of Human Rights, the tests used were essentially similar and the result would be the same applying either test. In particular, both Courts recognised the broad measure of discretion enjoyed by decision-makers and also that Article 51(3) of the Charter provided that in so far as it contained rights which corresponded to rights guaranteed by the Convention (here the right not to be unlawfully discriminated against on grounds of age) the meaning and scope of the Charter rights were to be the same as those laid down by the Convention. Mr Coppel reminded me that the court looked at the groups of people below and above the relevant age, and did not focus on the individual who was a few days or months short of reaching the relevant age. Further, he submitted that age was not a suspect characteristic calling for particularly weighty circumstances before differential treatment on grounds of age could be justified.

121. Mr de la Mare submitted that the moral hazard objective identified at the time was in fact directed to creating a risk to the pensions of high earners who were decision-makers or influencers. He submitted it was not intended to apply to or explain provisions affecting those who were not such persons but were simply employees with high salaries or long service or both. The attempt to justify the compensation cap by those factors was to use an ex post facto justification which should be scrutinised carefully. Further, there was a lack of evidence to assess the effect of the imposition of the compensation cap over the 15 years in which it had been in operation to determine if it were affecting the pensions of the targeted group or others. He further submitted that concerns over costs could not be an appropriate means of achieving a legitimate aim.

Discussion

122. The approach that the court is to take is well-established in the case law. The court must consider whether the decision-maker is pursuing a legitimate aim and whether the measure in question is appropriate and necessary for achieving that aim. In assessing that issue, the gravity of the effects on those subject to the differential treatment is to be weighed against the importance of the legitimate aims pursued. Consequently, the more serious the effects of the differential treatment on those affected, the more cogent must be the justification for the measures. Furthermore, and

importantly, legislatures and governments enjoy a broad margin of discretion both in terms of determining what is a legitimate aim and also in deciding whether the means adopted to achieve that aim are appropriate and necessary. See generally, the observations of Baroness Hale in *Seldon v Clarkson, Wright & Jakes* [2012] ICR 716, especially at paragraph 50 and the decision of the Court of Appeal in *Lord Chancellor and Secretary of State for Justice and others v McCloud and others* [2018] EWCA Civ 2844; [2019] IRLR 477, especially at paragraphs 85 and 144.

123. The importance of recognising the breadth of the discretion enjoyed by a decision-maker, particularly a body such as an elected legislature or accountable government minister or public body, to pursue a particular social policy has been recognised and emphasised by the courts. Further, the extent to which the decision-maker has specifically considered the issue and considered alternatives is relevant. Leggatt L.J., as he then was, explained the compelling reasons for allowing a broad area of discretion to the decision-maker in matters of social and economic policy where the democratically elected branches of government are better placed in principle than the courts to determine such matters: see *R (SC and others) v Secretary of State for Work and Pensions and others* [2019] EWCA Civ 615.

124. I also accept Mr Coppel's submission that the focus of the court is on the groups above and below NPA rather than focussing on an individual who might be a few days short of achieving the relevant age. As Lord Hoffman put it in *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 A.C. 173 at paragraph 41 " a line must be drawn somewhere" and "All that is necessary is that it should reflect a difference between the substantial majority of the people on either side of the line". Further, while I accept that very weighty reasons are required to justify differential treatment on certain grounds (referred to as "suspect" grounds) such as race or sex, age is not such a suspect ground; see per Lord Walker in *Carson* [2006] 1.A.C. 173 at paragraphs 58 to 60.

125. I accept that the aim of combating moral hazard, in the wider sense of seeking to ensure that decision-makers act responsibly to ensure that a pension scheme is properly funded, was in fact an aim identified at the time the measures were enacted and is a legitimate aim. I also accept that it is legitimate to have regard to cost considerations in the sense of ensuring the funding necessary by way of levies on schemes do not deter employees from continuing to provide occupational pensions and that was an aim identified at the time. I do not accept Mr de la Mare's submissions that these are ex post facto rationalisations of the measure. I do not consider, on the facts of this case, that the absence of evidence as to the effects of the operation of the compensation cap assists in determining whether the compensation cap is lawful.

126. *If* it is appropriate to impose a compensation cap or other measures to achieve those two aims, then I would accept that applying those measures to all those below NPA on assessment date (whether already retired or not) but not to those who have attained NPA on assessment date would be appropriate and necessary. I doubt that the aim of ensuring that there was a fairer distribution of assets than occurred prior to 2005 would be sufficient to justify a system which is otherwise unlawfully discriminatory. In truth, that aim, viewed alone or together with the other aims, does not assist in resolving the issues in this case. I deal below with the sixth aim of encouraging people to work longer.

127. Addressing moral hazard and cost concerns on the part of employers are, therefore, legitimate aims. I accept that it is open to Parliament to decide that an appropriate and necessary means of achieving those aims is to pay 90% of pension benefits, rather than according full protection, to those below NPA on the date the pension scheme enters assessment following the insolvency of the employer. Parliament is entitled to take the view that such measures will encourage decision-makers to act prudently and responsibly and avoid undue risks in managing the pension scheme not only to protect their own pensions (if they are members of the scheme) but also colleagues and employees generally. The impact on those affected, although significant, does not render the measure inappropriate or unnecessary. Indeed, the lawfulness of those provisions is not challenged in these proceedings.

128. The more difficult question is whether the imposition of the compensation cap in its original form, or as modified in 2017, is an appropriate and necessary means of achieving those aims. I bear in mind that Parliament itself decided upon the imposition of a compensation cap and the documents establish that it considered the need to provide less than full protection by means of limiting compensation to 90% and imposing a compensation cap. It is rare that a court would find that a conscious decision of that nature, in an area of economic and social policy, was not appropriate. Ultimately, however, I am driven to the conclusion that the compensation cap, as originally enacted and as modified in 2017 was not, in the circumstances of this case, an appropriate means of achieving the aims. I reach that conclusion for the following reasons.

129. First, the context in which the issue arises is the adoption of measures to protect the accrued pension benefits of persons whose employer becomes insolvent. Those pension benefits will generally have been funded and built up over time from contributions by the employees concerned and the employer as part of the overall remuneration package of employees. The protection consists of the payment of compensation funded by the assets of pension schemes transferred to the Fund and by levies on pension schemes generally (not out of general taxation). Secondly, the compensation cap applies to a small proportion of persons whose scheme transfers to the Fund (in fact up to 0.5% and, on the evidence, it was not contemplated that it would be more than about 2%). Yet the impact of the statutory provisions imposing a compensation cap on that small group of employees is significant. It can produce very serious financial losses for such persons. The facts of these cases illustrate the kinds of very substantial reductions in their accrued pension benefits that a small number of employees will suffer. A cogent justification is needed for measures having that effect.

130. Thirdly, those taking decisions in relation to a pension scheme know there will be adverse financial consequences for all members below NPA if they manage the scheme imprudently as they will only receive 90% of their pension benefits. The decision-makers know there will be an effect on their colleagues and other employees if they do not run the scheme in a prudent manner. It is not easy to see that the imposition of a further, very significant cut in accrued pension benefits for a very small group of employees would realistically or reasonably add weight to the aim of combating moral hazard in the form relied upon. Similarly, it is hard to see that the imposition of the compensation cap on a small number of pensioners, and reducing very significantly the degree of protection of the accrued benefits of that small group,

would realistically be appropriate or necessary to reassure employers that the costs of the Fund would not be such as to deter them from providing occupational pensions.

131. Fourthly, there is a further significant consideration which is the requirements of the Directive itself. As indicated, the aim is to provide for the protection of employees and former employees in the event of insolvency. The case law of the Court of Justice establishes that a member state has considerable latitude in determining both the means and the level of protection and there is no obligation to provide full protection. The Court of Justice has, however, held that member states have to "guarantee each individual employee, without exception, compensation corresponding to at least 50% of the value of their accrued entitlement" (*Hampshire* [2019] ICR 327 at paragraph 50). Mr Coppel submits that that directly effective obligation mitigates the harsh effect of the compensation cap (and in that he is factually correct). He submits that it is the domestic statutory scheme with the directly effective guarantee of 50% (and since 2017 the modification for long service) which needs to be justified.

132. To my mind, however, the more significant fact, and a better way of understanding the position, is that the provisions of paragraphs 26 as enacted in 2004, and as modified by the addition of paragraph 26A, of Schedule 7 to the Act do not satisfy the aims of the Directive that the legislation was, in part, meant to implement. They fail as enacted to provide protection for pension rights in the event of an employer's insolvency. Those provisions will have to be modified to that extent in any event. That reinforces the conclusion that the kind of compensation cap provided for by the terms of the legislation, here paragraphs 26 and 26A of Schedule 7 to the Act, was not an appropriate means of achieving the aim of protecting accrued pension entitlements. Furthermore, for the reasons given above, the fact that the harsh effect of the compensation cap on that small group of pensioners affected will be mitigated by directly effective provisions of EU law does not make the compensation cap (even as now applied) appropriate to achieve the relevant aims.

133. One further point is this. By 2017 (and perhaps earlier), it was realised that it was not appropriate for the compensation cap to be applied to long serving employees whether because of the unduly harsh effect on them, or because the compensation cap was not intended to apply to such employees or because of some other reason. For that reason, paragraph 26A of Schedule 7 to the Act provides that employees with more than 20 years pensionable service will have the compensation cap increased by 3% for each additional year of pensionable service. That applies prospectively from 6 April 2017 and does not apply to compensation paid prior to that date. The modification does not provide mitigating effects for long-serving employees in respect of compensation or benefits paid prior to 2017. The fact that changes were made to the payment of compensation or benefits from 6 April 2017 either does not affect the assessment of the position prior to 6 April 2017 or indicates, if anything, that the application of the compensation cap to a small sub-set of long serving employees in respect of pre-6 April 2017 benefits or compensation had results which were either unintended or which would not now be considered acceptable. That would, if anything, support the conclusion that the statutory provisions imposing the compensation cap prior to 2017 were not an appropriate means of achieving the relevant aims in that period.

134. Furthermore, the limited mitigation given by the 2017 modifications for long serving employees, that is those with more than 20 years pensionable service, does not serve

sufficiently to diminish the adverse effects of the compensation cap so as to make the statutory provisions an appropriate means of achieving the legitimate aims. Notwithstanding the minimum guarantee required by Article 8 of the Directive, and the increase in the compensation cap for long serving employees from 2017 onwards, the other factors referred to above still lead to the conclusion that the statutory provisions imposing the compensation cap are not an appropriate means of achieving the legitimate aims.

135. Finally I turn to the sixth aim which is expressed in the Secretary of State's written skeleton argument and in Ms Clark's witness statement as encouraging people to work for longer thereby contributing to the economy and reducing burdens on the state. I have real doubts as to whether the statutory provisions imposing the compensation cap are rationally connected with this aim. The compensation cap only applies to a small percentage of pensioners who will have high value pensions (because of either high salaries, or long service, or a combination of both). That is thought to be probably up to 0.5% of present and anticipated pensioners whose schemes enter the Fund. Further the compensation cap is tied to having attained NPA when the pension scheme entered assessment on the employer becoming insolvent. It is not immediately clear why applying a compensation cap to a small group of employees with high value accrued pension benefits because they had not attained NPA when their employer became insolvent is rationally connected to an aim to make people work longer and reduce the burdens on the state. In any event, given the factors referred to above, it would not be appropriate to impose the compensation cap, and require that small group of workers who had accrued high value pensions but who had not attained NPA at assessment date, to suffer the severe financial effects of the cap (even with the mitigation afforded by the directly effective right to at least 50% of their accrued pension entitlement and, from 6 April 2017 onwards, the long-service modifications to the amount of the compensation cap).

136. Mr Coppel indicated that the court was focussing on the statutory provisions as they presently stood (i.e. subject to the 50% minimum required by Article 8 of the Directive and, from 6 April 2017, with the modification for long-serving employees). In fact, as I indicated during argument, the claim involves consideration of the position of arrears which is accepted as being recoverable at least from 2012 onwards, and may, subject to the outcome of the challenge on ground 4 or in the case of schemes still in assessment, be recoverable for a longer period. It is, therefore, necessary to address the lawfulness of the compensation cap over a longer period than simply the present day. In any event, there is no suggestion that there is any other evidence or any other argument relevant to the lawfulness of the compensation cap for any particular period which was not in fact advanced in this case.

137. For those reasons, I would hold that the imposition of the compensation cap did amount to unlawful discrimination on grounds of age from 2005 when it was first imposed.

138. For completeness, I note that ground 2 of the claim also refers to a breach of the principle of proportionality. Mr de la Mare confirmed in argument that that was only relied upon in the event that the court decided that the treatment complained of did not in some way involve differential treatment on grounds of age of persons in materially similar circumstances. As the differential treatment does do that, it is not necessary to consider any question of proportionality under EU law separately from

the question of whether the measures are appropriate and necessary to achieve a legitimate aim.

(5) Do the statutory provisions involve (a) differential treatment on grounds of status within the ambit of Article of the Convention, read with Article 1 of the First Protocol and (b) if so can the Secretary of State demonstrate that the provisions are objectively justifiable?

139. Mr Coppel submitted that addressing the issues by reference to the Convention would involve consideration of the same arguments, and would lead to the same result, as consideration of the issue of justification under EU law. His arguments are summarised in paragraphs 118 to 120 above. Mr de la Mare's arguments were also the same as those advanced in relation to EU law, although he submitted that the test of justification was different, and stricter, under EU law than the Convention.

Discussion

140. Article 14 of the Convention provides that:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

141. The rights guaranteed include those in Article 1 of the First Protocol to the Convention namely:

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

142. In considering whether the statutory provisions imposing the compensation cap are incompatible with Article 14 of the Convention read with Article 1 of the First Protocol it is necessary to consider whether (1) there is differential treatment (2) on grounds of other status (3) in relation to a matter falling within the scope, or ambit, of Article 1 of the First Protocol to the Convention and (4) which the defendant cannot show is objectively justified.

143. Here there is differential treatment on grounds of other status (namely age, by reference to whether a person has or has not reached NPA when the pension scheme enters assessment) in relation to a matter falling within Article 1 to the First Protocol. I understood at the hearing that that was accepted but it is, in any event, the case here.

144. The question then is whether the defendant has shown the measure to be objectively justified. Differential treatment:

> "is, however, discriminatory if it has no objective or reasonable justification; in other words, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised"

(per the Grand Chamber in *Carson v United Kingdom* (2010) 51 EHRR at paragraph 61).

145. In broad terms, one way of approaching that question is to ask whether the defendant has demonstrated that (1) the measure pursues a legitimate aim (2) the measure is rationally connected to that aim (3) no less intrusive measures could have been adopted to achieve that aim and (4) the measure is not without reasonable foundation. In relation to point 4, I accept that this is an area involving general social and economic policy adopted by the legislature where the appropriate test is whether the choice made by the decision-maker is manifestly without reasonable foundation rather than using language which asks whether the measure strikes a fair balance. There is a need to respect the democratic legitimacy of the decision-maker for the reasons given by Leggatt L.J. in *SC* discussed above. Where such a body has given careful consideration to what aim is to be achieved and whether the achievement of that aim justifies the anticipated adverse effects on particular groups, the courts ought to give significant weight to such assessments in considering the proportionality of the measure. The court will still need to ensure that there is a reasonable foundation for the measure and that the justification is not so weak or arbitrary as to be unjustifiable. The court must still consider the grounds of justification carefully and a point may come

> "where the justification for the policy is so weak, or the line has been drawn in such an arbitrary position, that even with the broad margin of appreciation accorded to the state, the court will conclude that the policy is unjustifiable"

(see per Baroness Hale at para 18 in *Humphreys v Revenue and Customs Commissioners* [2012] UKSC 18; [2012] 1 WLR 1545).

146. Further discussion of the approach the courts are to adopt comes in the judgment of Singh L.J. in *R (TD and others) v Secretary of State for Work and Pensions* [2020] EWCA Civ 618. Singh L.J. emphasised that it is the difference in treatment that has to be justified; it is not enough to show that the underlying policy is justified. That involves examining whether the difference in treatment is manifestly without reasonable foundation (see paragraphs 54 to 57 and 64 to 65).

147. This is one of those probably very rare cases where it is right to reach the conclusion that the imposition of the compensation cap is unjustifiable. I bear in mind that Parliament considered and enacted the relevant provisions and modified them in 2017. But, essentially for the reasons set out at paragraphs 127 to 137 above in relation to EU law, the statutory provisions in paragraph 26 as originally enacted, and as modified in 2017 by paragraph 26A of Schedule 7 to the Act, and as currently applied are without reasonable foundation. The inconsistencies between the means adopted and the underlying purpose, as reflected in the Directive, to protect pensions in the event of insolvency, together with the scale of the adverse effects visited on a small group of persons who have an accrued entitlement to pension benefits built up by contributions over time, demonstrates that, exceptionally, the justification for the measures is so weak as to be without reasonable foundation.

<u>THE SECOND ISSUE – THE LAWFULNESS OF THE APPROACH ADOPTED BY THE BOARD TO ENSURE THAT A PERSON RECEIVES 50% OF THE VALUE OF THE ACCRUED ENTITLEMENT.</u>

148. The second issue, ground 3 of the claim, concerns the method adopted by the Board to give effect to the minimum level of protection required under Article 8 of the Directive. The Board has adopted the approach described above at paragraphs 49 to 59. In essence, it makes an actuarial valuation as at assessment date of the value of the benefits payable under the scheme and compares that with an actuarial valuation of the compensation payable by the Board. If the value of the compensation is less than 50% of the assessed value of the scheme benefits, it pays an uplift or additional amount. The method adopted by the Board means that it may pay more than 50% of the value of the pension benefits that would have been payable under the scheme in some (typically the early) years and an amount that is less than 50% of the value of benefits that would have been payable in later years. In terms of survivors' benefits, it includes the value of a survivor's benefits, determined by actuarial assumptions, in its calculation of the value of the member's scheme benefits and of the compensation when carrying out the one off calculation. It then pays any survivor's benefits at the rate provided in the Act, i.e. at 50% of the member's compensation as at the date of the member's death.

149. The three issues that arise are:

(1) Is the Board required to operate a system whereby it ensures that, in each year in which compensation is payable, the amount of the compensation is not less than 50% of the amount of the scheme benefits that would have been payable in that year?

(2) Is it open to the Board to use an actuarial valuation of the benefits to be provided or must it ensure that, over the lifetime of a member, the cumulative value of the compensation paid is no less than 50% of the actual amount of benefits that would have been paid under the scheme? and

(3) Does the system of dealing with survivors' benefits satisfy the requirements of Article 8 of the Directive?

<u>The Submissions</u>

150. Mr Facenna Q.C., for the claimants, submitted that the case law of the Court of Justice establishes that each individual employee is entitled to receive at least 50% of the value of the pension benefits payable under the scheme. That he submitted, in reliance on the Court of Justice decision in *Robins* and its subsequent decisions in *Hogan* and *Hampshire*, is an obligation to ensure that the member receives at least half of the value of the accrued entitlement throughout that member's lifetime in relation to each pension year. Further, that includes taking account of increases in the value of a pension over time. He submitted that the reasoning of the Court also emphasises that the guarantee is concerned with the actual outcomes for individual members.

151. He submitted that the use of actuarial assumptions will not achieve that guarantee as those assumptions are, in essence, predictions about the future. They will not accurately or correctly reflect what happens in the case of each individual employee. That means that the approach adopted by the Board may fail to achieve an outcome, for each individual member, where at least 50% of the value of each member's accrued entitlement will be paid. He submitted that the basic problem was that the

Board has to protect the long-term interests of each member throughout the period of retirement and the use of a one-off actuarial valuation is not capable of ensuring that the guaranteed minimum level is met.

152. He further submitted that the Board had to conduct an exercise year on year to ensure in each year that the value of the compensation paid in that year did not fall below the benefits that would have been paid under the scheme in that year. He submitted that it was not open to the Board to adopt an approach which took a cumulative approach to valuation whereby it was sufficient if the amount of compensation paid was equal to 50% of the value of the benefits that would have been paid during a member's lifetime but where the compensation in some years might be more than 50% and in others less than 50%. In any event, the approach adopted did not ensure that the cumulative approach, based on a one-off actuarial valuation at the outset, would guarantee a cumulative 50% for each and every individual.

153. Finally, Mr Facenna submitted that the approach adopted did not ensure that survivors would receive 50% of the value of the benefits to which they were entitled under the scheme. They had separate rights to a pension, in some cases based on 2/3 of the member's pension at death, in some cases calculated on the pre-commutation values of pensions (and carrying with it its own entitlement to a lump sum). A scheme based on paying 50% of the member's compensation on death would result, in some cases at least, in a survivor not receiving 50% of the survivor's benefits that would have been paid under the pension scheme.

154. Mr Giffin, for the Board, submitted that the normal position would be that compensation in the case of insolvency would be calculated in accordance with the legislative scheme laid down in Schedule 7 to the Act. The present problem arises only because of the mismatch between the operation of the statutory provisions and the directly effective right recognised in *Hampshire*. The Board is seeking to determine how best to achieve the guarantee required, pending the adoption of legislation setting out precisely how compensation should now be calculated.

155. Mr Giffin submitted that the course taken by the Board is to make a one-off calculation of the value, as at the assessment date, of total future scheme benefits. That calculation involves taking into account all the relevant features of the scheme, including indexation increase, and entitlements to survivor benefits. It is based on actuarial assumptions (such as those relating to life expectancy, inflation and likelihood of survivor's benefits being payable and for how long). That enables the Board to determine the value of the accrued pension entitlements. The Board then compares that calculated value with the value of the compensation that the Board would pay over the person's expected lifetime. If the value of the compensation would be less than 50% of the calculated value of the accrued entitlement, the value of the compensation is increased accordingly.

156. Mr Giffin submitted that approach to the guarantee, basing it on 50% of the value of the accrued entitlement to future benefits, calculated as at the assessment date, is consistent with, or at least not prohibited by, the case law of the Court of Justice and is, therefore, a means open to the Board of complying with Article 8 of the Directive.

<u>Discussion</u>

157. The starting point is the wording of Article 8 of the Directive and the case law of the Court of Justice. In considering that case law it is important to understand the factual premises upon which the Court was proceeding and the questions that were referred. It is in that context that its reasoning, and the answers to the questions referred, need to be addressed. Furthermore, there may be a difference between how to calculate the value of the 50% accrued pension entitlement and the machinery by which that 50% is paid out over a person's lifetime. Consideration will need to be given as to the extent to which the Court has addressed each of those issues in its case law.

158. Article 8 of the Directive is concerned with ensuring that "the necessary measures are taken to protect the interests of employees" in the event of the employer's insolvency "in respect of rights conferring on them immediate or prospective entitlement to old age benefits, including survivors' benefits" under occupational pension schemes.

159. The interpretation of that provision was considered first in Case C-278/05 *Robins v Secretary of State for Work and Pensions* [2007] I.C.R. 779. That case concerned the employees of a company which became insolvent. When the pension schemes it operated were being wound up, it transpired that the assets would be inadequate to meet all the claims of the members. The relevant rules resulted in a reduction in the prospective entitlements of employees not yet in receipt of a pension. Actuarial evidence was used to demonstrate the degree of shortfall. Calculations carried out by actuaries demonstrated that what was described as the payment expectation of the first claimant was reduced to 20% of her original entitlement under the scheme and that the second was reduced to 49% of his entitlement. No more detail was given of how those calculations were arrived at. The claimants sued the United Kingdom government alleging a breach of Article 8 of the Directive. The High Court referred three questions to the Court of Justice. First it asked if member states were required to ensure that employees' accrued rights were fully funded by the member state in the event of the employer's insolvency. Secondly, if not, it asked whether the existing legislation in force sufficiently implemented Article 8 of the Directive. The third question related to the conditions for determining if the state was liable in damages.

160. On the first question, the Court of Justice ruled that the Directive was intended to guarantee employees a minimum level of protection in the event of the employer's insolvency. The Directive was not to be interpreted as requiring that accrued pension rights be funded in full or by the member states. On the second question, the Court noted that, on the unchallenged evidence, two of the claimants would receive only 20% and 49% respectively of the benefits to which they were entitled. The material part of its reasoning on the second question was at paragraph 56 and 57 where the Court said:

> "56…… 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.
>
> 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."

161. The actual answer to the second question given by the Court was that the system of protection such as that at issue in the proceedings was not compatible with Article 8 of the Directive: see paragraph 62 and the ruling.

162. The second principal case is Case C-398/11 *Hogan v Minister for Social and Family Affairs* [2013] 3 C.M.L.R. 746. That concerned a reference from the High Court of Ireland. It arose in the context of the insolvency of the Waterford Crystal Company. The assets of the pension scheme came to 130 million euros and its liabilities were 240 million euros. There was a difference of view between the actuaries. The judgment of the Court records that the claimants' actuary considered that the claimants would receive between 18% and 28% of the amounts to which they would have been entitled if they had received the present value of their accrued old-age pension rights. The actuary for Ireland indicated that it would be between 16% and 41%. A fuller explanation of how those figures were calculated was not given nor, it seems, was it considered necessary to address the issues in the case. The case proceeded on the basis that the actuarial evidence demonstrated that the 50% guarantee envisaged by the Court of Justice in *Robins* would not be met. The questions referred were designed to establish whether that state of affairs was consistent with Article 8 of the Directive. The fifth question referred asked whether the measures adopted by Ireland fulfilled Article 8 of the Directive in the light of the decision in *Robins* and the need referred to in the recital for balanced economic and social development. The sixth question asked whether the economic situation was sufficiently exceptional to justify a lower level of protection than might otherwise have been the case. Those questions were considered together by the Court of Justice. They appear to be asking, in effect, whether *Robins* did in all cases require a 50% guarantee or whether the economic situation could justify the adoption of a lower level of protection. The Court's reasoning and answers come at paragraphs 42 to 47 of its judgment in the following terms:

> "42. In *Robins* [2007] 2 C.M.LR. 13, the Court, in interpreting art. 8 of Council Directive 80/987, now art. 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* [2007] 2 C.M.L.R. 13 at [36] and [42]–[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 art 8 of Directive 80/987 (*Robins* [2007] 2 C.M.L.R. 13 at [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 art. 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 [13] of the present judgment, does not seem, having regard to the information referred to in [18] of the present judgment, to be capable of guaranteeing the minimum level of protection required by *Robins* [2007] 2 C.M.L.R. 13.

"47. Consequently, the answer to the fifth and sixth questions is that Directive 2006/94 must be interpreted as meaning that the measures adopted by Ireland following the judgment in *Robins* [2007] 2 C.M.L.R. 13 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."

163. By the seventh question, the Court was asked whether the fact that measures taken by Ireland following the decision in *Robins* had not brought about the result of ensuring that claimants would receive in excess of 49% of the value of their old-age pension benefits amounted to a serious breach of the member state's obligation in the context of the rules for establishing state liability in damages. The Court responded by saying:

"51. As soon as the judgment in *Robins* [2007] 2 C.M.L.R. 13 was delivered, namely on 25 January 2007, the Member States were informed that correct transposition of art. 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.

"52. In those circumstances, it must be held that, although the nature and extent of the obligation incumbent on the Member States under art. 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."

164. Pausing there, I do not consider that the rulings of the Court of Justice in those two cases are definitively addressing the issues that arise in this case, namely how the 50% guarantee is to be calculated and whether a particular system of implementing Article 8 of the Directive is required. The Court clearly establishes that member states do not have to fund the guarantee themselves (they can, for example, require employers to obtain insurance) and they do not need to ensure that pension rights (however valued) are guaranteed in full. However, inherent in the concept of protection is the idea that the level of protection does not fall below 50% of the value of the accrued benefits. In the cases, the Court received and used actuarial evidence to establish that the level of protection established by member states fell below the level necessary. To that extent, the cases proceeded by reference to evidence based on actuarial valuations. The Court, however, was not being asked to rule in those cases on whether any particular method of valuation of accrued benefits was required. It was not saying that an actuarial assessment of the value of future rights as at the date of insolvency was required (or was sufficient). It was not addressing that issue with that level of forensic precision.

165. Nor does the fact that the Court accepted that the member state could discharge its obligation by requiring employers to obtain insurance assist. Mr Giffin submitted that that indicated that employees may never receive the 50% guarantee as insurance companies could themselves become insolvent. He submitted that that indicated that the 50% guarantee could not have been intended to be a 50% guarantee of the actual amounts that would have been received under the pension scheme. Hence, he submitted, it was open to the member state to fix a method of actuarial valuation that might, if assumptions proved not to be correct, lead to less than 50% of accrued entitlement. In my judgment, the Court was, in its reference to insurance companies, considering means for achieving the result required by the Directive other than by member states themselves providing protection. It was not indicating that, when a member state did provide protection by establishing a guarantee institution such as the Fund, the protection provided for employees could be less than the 50% of accrued entitlement, appropriately calculated. Similarly, caution should be exercised in placing too much weight on the use of the word "outcome" in paragraph 45 of *Robins* as Mr Facenna sought to do. That word was used in the context of questions asking if the guarantee was to be 50% or whether it could be lower where a state adopted measures because of the economic situation which lead to less than 50% protection. It was not focussed on the issues arising in this case. The decisions in *Robins* and *Hogan* are of assistance in understanding the nature of the obligation imposed by Article 8 of the Directive but do not resolve the issues that arise in this case.

166. The third significant case is *Hampshire* itself. The Court of Appeal recorded, in its judgment, that Mr Hampshire contended that, following the employer becoming insolvent, his annual pension would be reduced by the operation of the compensation cap and the lack of annual inflation increases for years of service pre April-1997 from approximately £76,302 to £19,819 per annum (see [2016] EWCA Civ 786 at paragraph 8 of the judgment). The Court of Appeal recorded the submissions of Mr Giffin on behalf of the Board. He submitted that whether a national system complied with Article 8 of the Directive required consideration of the whole range of individuals who were protected. He submitted that it was what he described as a system obligation, aimed at employees as a class and was not intended to provide a minimum level of protection in each individual case (see paragraphs 26 to 27 of the judgment). The Court of Appeal referred the following questions to the Court of Justice for a preliminary ruling:

> "1. Does article 8 of Directive 80/987/EEC (now superseded by article 8 of Directive 2008/94) require member states to ensure that every individual employee receives at least 50% of the value of his accrued entitlement to old-age benefits in the event that his employer becomes insolvent (with the sole exception of cases of abuse, to which article 10(a) of that Directive applies)?
>
> "2. Alternatively, subject to the findings of the national courts regarding the facts of the case, is it sufficient under article 8 of Directive 80/987/EEC for a member state to have a system of protection where employees usually receive more than 50% of the value of their accrued entitlement to old-age benefits but some individual employees receive less than 50% by virtue of— (a) a financial cap on the amount of compensation paid to employees (in particular employees who have not reached their pension scheme's normal pension age at the time of the employer's insolvency); and/or (b) rules limiting the annual increases in the compensation paid to employees or the annual revaluation of their entitlements prior to pension age?

"3. Is article 8 of Directive 80/987/EEC directly effective in the circumstances of the present case?"

167. The Court of Justice first set out its understanding of the relevant United Kingdom law and the facts: see case C-17/17 *Hampshire v Board of Pension Protection Fund* [2019] ICR 237 at paragraphs 7 to 32. It noted that the amount of compensation payable under Schedule 7 to the Act was capped for those under NPA and those employees received 90% of the capped amount. It noted that the statutory provisions did not provide an adjustment for inflation for compensation attributable to employment prior to 6 April 1997. See paragraphs 12 to 14. The Court then set out its understanding of the facts. It set out the details of Mr Hampshire's retirement at 51. It noted that following the employer becoming insolvent and the scheme entering assessment in 2006, when Mr Hampshire was 58, his pension was set at £19,819 to reflect the fact that he was below NPA and was therefore subject to the compensation cap. It noted Mr Hampshire's contention that this was 67% of the entitlement to £60,240 per annum that he would have had if his employer had not become insolvent. It noted that he had lost most of his rights to annual increases for inflation as most of his service was pre-April 1997. It noted that according to Mr Hampshire's calculations, he was now receiving approximately 25% of his accrued pension entitlement. See paragraphs 20 to 26.

168. It was against that understanding of the law and the facts, that the Court of Justice considered the first and second questions and dealt with them together. It said at paragraph 39 that the referring court was asking in essence whether Article 8 of the Directive must be interpreted as meaning that:

> "every individual employee must receive compensation corresponding to at least 50% of the value of his accrued entitlement under a supplementary occupational pension scheme in the event of his employer's insolvency, or whether it is sufficient that such compensation is guaranteed for the great majority of employees, but, owing to certain limitations imposed by national law, some of those employees receive less than 50% of the value of their accrued entitlement".

169. It summarised its understanding of the case law at paragraphs 41 to 43 of its judgment in the following terms:

> "41. …states have considerable latitude in determining both the means employed for the purposes of that protection and the level of protection provided, which does not include an obligation to guarantee in full *Robins v Secretary of State for Work and Pensions* (Case C-278/05) [2007] ICR 779; [2007] ECR I-1053, paras 36 and 42–45; *Hogan v Minister for Social and Family Affairs* (Case C-398/11) [2013] 3 CMLR 27 , para 42 and *Webb-Sämann v Seagon* (Case C-454/15) [2017] 2 CMLR 18 , para 34.
>
> "42. As a result, article 8 of Directive 2008/94 does not preclude member states, in the pursuit of legitimate social and economic objectives and, in particular, having due regard for the principle of proportionality, from reducing the accrued entitlement of employees in the event of their employer's insolvency.
>
> "43. However, as regards article 8 of Directive 80/987, now article 8 of Directive 2008/94, the court has held that provisions of domestic law that may, in certain cases, lead to a guarantee of benefits limited to less than half the entitlement accrued cannot be considered to fall within the definition of the word "protect" used in that provision: *Robins* , para 57. " .

170. The Court stated that it had confirmed that interpretation in *Hogan* and repeated its observation at paragraph 51 of the judgment in *Hogan* that correct transposition of Article 8 of the Directive:

> "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."

171. It confirmed that the case law made it clear that the level of protection provided for by Article 8 of the Directive "is an individual minimum guarantee for each and every employee" (see paragraph 47 of its judgment).

172. At paragraphs 50 to 53, the Court of Justice said this:

> "50. Consequently, article 8 of Directive 2008/94 requires member states to guarantee each individual employee, without exception, compensation corresponding to at least 50% of the value of their accrued entitlement under a supplementary occupational pension scheme in the event of his employer's insolvency, although that does not mean that, in other circumstances, the losses suffered, even if less than 50%, could also be regarded as manifestly disproportionate in the light of the obligation to protect the interests of employees, referred to in that provision: *Webb-Sämann* , para 35.

> "51. Moreover, as stated, in essence, by the Advocate General in points 48 to 53 of her opinion, in order to ensure the full effectiveness of the minimum protection afforded to employees in the event of their employer's insolvency by article 8 of Directive 2008/94, which requires that that protection lasts for the entire pension period, the compensation corresponding to at least 50% of the value of their accrued entitlement must be calculated taking into account the envisaged growth in the pension entitlement throughout that period, in order to prevent, as a result of the passage of time, the amount guaranteed falling below 50% of the initial value accrued for one pension year.

> "52. In the light of the above, the answer to the first and second questions is that article 8 of Directive 2008/94 must be interpreted as meaning that every individual employee must receive old-age benefits corresponding to at least 50% of the value of his accrued entitlement under a supplementary occupational pension scheme in the event of his employer's insolvency.

173. The actual ruling of the Court on the first and second questions is in the following terms:

> "1. Article 8 of Parliament and Council Directive 2008/94/EC of 22 October 2008 on the protection of employees in the event of the insolvency of their employer must be interpreted as meaning that every individual employee must receive old-age benefits corresponding to at least 50% of the value of his accrued entitlement under a supplementary occupational pension scheme in the event of his employer's insolvency."

174. The Court refers to the opinion of Advocate General Kokott. Paragraphs 48 to 53 of her opinion are directed to question 2(b), namely whether a member state could have a system whereby employees usually receive more than 50% of the value of their accrued entitlement but some employees may receive less by reason of rules limiting the annual increases in the compensation paid to employees or the annual revaluation. The Advocate General dealt with that question under the heading "Does Article 8 of

the Directive also protect envisaged growth in the pension entitlement (question 2(b))?"

175. The Advocate General said that the question arose as to whether the minimum guarantee under Article 8 of the Directive "relates only to the value of the claims at the time of the insolvency" or also "includes envisaged growth in the level of benefit over the entire pension period". She considered that existing case law made it clear that Article 8 of the Directive referred to the "protection of the entire pension entitlement acquired through contributions". She observed at paragraphs 51 to 53 of her opinion that:

> "51. If envisaged growth in the pension entitlement was not included in the calculation of the minimum protection, however, insufficient account will be taken of the contributions previously paid, as the envisaged annual increase is factored into contributions.
>
> "52. National systems of protection under art. 8 of Directive 2008/94 must therefore also guarantee growth in the entitlement insofar as over the years the guaranteed amount may not fall below 50% of the value originally accrued for a pension year.
>
> "53. The second question in its entirety must, therefore, be answered in the negative.

176. There have been other decisions of the Court of Justice, notably in Case C-454/15 *Webb-Saman v Seagon* [2017 2 C.M.L.R. 18, and Case C-168/18 *Pensions-Sicherungs-Verein VVaG* judgment on 19 December 2019. They do not add materially to the consideration of the issues that arise in this case. I was also referred to the decision in *Lloyds Pension Trustees v Lloyds Bank Plc and other* [2019] Pens. L.R. 5, largely as support for the proposition that payments calculated by referenced to actuarial assumptions would not necessarily provide a person with the required benefits if that person lived longer than the actuarial prediction (see paragraph 387 of the judgment).

177. Against that background, the following considerations arise from that case law read in context. First, the guarantee provided for by Article 8 of the Directive is owed to each and every individual employee. It is not sufficient that most of the employees will receive payments of the amount envisaged by the Directive. Each employee must receive payments of the amount envisaged by Article 8 of the Directive.

178. Secondly, the protection requires that a person receives 50% of the value of the accrued pension entitlement arising out of the contributions that he or she has made to the pension scheme. That involves not simply considering the value of the accrued entitlement as at the date of insolvency: it must also include protection in respect of any envisaged growth in the pension entitlement throughout the period that the pension will be paid.

179. There is scope for argument as to how that value is to be calculated. There are occasions when the language of the Court suggests that it is dealing with the calculation of the value at a particular point in time of accrued future entitlement. The fact that the evidence on which the Court relies is, in the main, actuarial evidence as to the value, at a particular point of time, of future entitlements arising under the pension scheme is consistent with that approach.

180. There are, however, clear indications that what the Court of Justice had in mind was that, over the lifetime of a member, the compensation that the member will receive will be equal to 50% of the benefits that he or she would have received under the rules of the pension scheme. That that is the correct approach is apparent from a number of considerations.

181. Most clearly, the correct transposition of the Directive is said to require that the employee receives "at least half the old-age benefits arising out of the accrued pension rights for which he has paid": see *Hogan* paragraph 51, and *Hampshire* at paragraph 45. That also accords with the concept that increases in pension due to inflation must also be included within the scope of the Article 8 guarantee and that the scope of the guarantee is aimed at protecting the value of the benefits over the entire pension period. That is not conclusive as those future entitlements could be given a present value and some of the language used (such as "envisaged" growth, rather than actual increases) could be said to be consistent with valuation at a particular time of future anticipated entitlements. But, reading the judgments overall, the conclusion that I have reached is that the Court of Justice interprets Article 8 of the Directive as intended to provide a minimum level of protection for the pensioner over the entire period of his or her pension entitlement. The level of protection must have regard to the level of benefits payable on insolvency and any increase in the benefits payable over time. The guarantee is intended to ensure that the sums that the member receives will equal 50% of the amounts, over time, that the member would have received under the pension scheme.

182. That, however, is not the end of the matter. The case law stops short of prescribing the method by which that result is to be achieved. My reading of the case law simply means that any scheme designed to secure the Article 8 guarantee must, ultimately, ensure that a pensioner receives 50% of the value of the accrued entitlement in the sense of the value of the benefits that would be paid by the scheme over the period of entitlement. That does not, of itself, determine whether the scheme as devised by the Board would run counter to that obligation.

183. In that regard, it is important to bear in mind that it is for the Board to determine what scheme it wishes to adopt pending legislation to ensure that the Article 8 guarantee is satisfied. It is for the Board to determine whether it prefers to adopt one scheme rather than another, in order to reduce administrative complexity and costs, and thereby limit the amount of the levy (or the amount of the transferred assets or returns) spent on such matters rather than on the payment of compensation. But the scheme adopted by the Board must be one that can be operated in accordance with Article 8 of the Directive or sufficient modifications will need to be made to it to ensure that Article 8 will be complied with. The scheme that the Board wishes to adopt is based on a one-off calculation, at the date of assessment, of the value of future entitlements (including annual increase and survivors' benefits). The actual payments made will be made in accordance with the existing scheme of Schedule 7 to the Act (including the indexation provisions in paragraph 28). The Board wishes to follow that scheme partly, it seems, to reduce complexity and cost and partly to operate so far as it can within the constraints of the current legislation. The issue is to what extent, if at all, must the Board make adjustments (or adopt a new scheme) in order to ensure compliance with Article 8 of the Directive.

The First Issue

184. The first issue concerns the question of whether the Board must construct the scheme so that, in each year, the Board pays compensation equivalent to 50% of the amount of pension benefits that would have been paid under the pension scheme in that year. This, Mr Facenna submitted, is what is required for the reasons summarised above. For the reasons already given, I do not consider that the case law requires such an approach. The references to “outcomes” in *Hogan* or to the guarantee relating to pension entitlement “over the years” or taking account of envisaged growth in pension entitlement to prevent the amount guaranteed, as “a result of the passage of time”, falling “below 50% of the initial value accrued for one pension year” (see paragraph 52 of the opinion of the Advocate General, and paragraph 51 of the judgment of the Court, in *Hampshire*) do not establish that as a requirement. Those comments were made in the context of seeking to identify the scope of the Article 8 guarantee, and ensuring it applied not simply to pension benefits payable as at the date of insolvency but also increases payable over time due to inflation. Neither those comments, nor any other observations in the case law, prescribe a method involving a year on year assessment to determine if the amount of the compensation in that year falls below 50% of the amount of the benefits that would have been paid under the pension scheme in that year.

185. In those circumstances, it is appropriate to consider the matter as one of principle. First, the relevant provisions are contained in a directive. That is a measure which sets out the objective to be achieved but leaves the precise method of implementation to the member state: see Article 288 of the Treaty on the Functioning of the European Union. Secondly, the underlying aim of the Directive is clear: it is to provide for protection for employees in the event of the insolvency of an employer. The language of the specific obligation, Article 8, is however broad. The obligation is to ensure that the necessary measures are taken “to protect the interests of employees” in respect of rights conferring immediate or prospective entitlement to certain benefits. That language is not apt to dictate the requirements of the scheme by which the member state provides the relevant protection. Thirdly, the Court of Justice has itself consistently recognised, as appears from paragraph 41 of its judgment in *Hampshire* that:

> “member states have considerable latitude in determining both the means employed for the purposes of that protection and the level of protection provided”.

186. In those circumstances, a member state may choose to adopt a scheme which operates by considering each year whether the amount of compensation paid is equal to the pension benefits that would have been paid in that year. That would be one way in which the guarantee of 50% protection could be achieved. But the member state is not obliged to adopt that system. The Board is entitled instead, if it chooses, to adopt a scheme which involves a one-off calculation, and then to pay out the compensation due as a result of that calculation over the period of the pension. That may involve paying more than 50% in some years and less in others provided that, overall, the cumulative level of compensation paid does not fall below 50% of the value of the benefits that would have been paid under the scheme over the lifetime of the pensioner.

The Second Issue

187. The second issue concerns the question of whether it is sufficient if the Board makes an actuarial calculation of the value of all existing and future entitlements at a particular point in time. As indicated above, the obligation is intended to ensure that over a member's lifetime, the compensation he or she receives will be equal to 50% of the benefits that the member would have received under the scheme. Put simply, the obligation is to provide 50% of the actual value, over time, of the benefits not 50% of the actuarially predicted value. If the system adopted by the Board leaves open the possibility in an individual case that that member may, ultimately, receive less by way of compensation then the system will need to have a way of identifying and dealing with that eventuality.

188. As I have indicated, the precise details of the system are a matter for the Board not the court. It may be useful to observe, however, that the present problem may not in fact require major changes to the system adopted by the Board.

189. First, in the majority of cases (over 99% it seems), members would not have been subject to the compensation cap. Further, the years of pensionable service may include years after 6 April 1997 when some level of annual increase because of inflation would be provided (albeit less than that provided by the pension scheme in issue). Given that the calculation of benefits would be based on the employee receiving 90% of the value of his or her pension entitlements, and there would be some annual increases on the compensation paid, there may, in fact, be no realistic possibility of the compensation falling below 50% (even if the member lives longer than expected and even if inflation estimates differ). In those circumstances, the scheme may be sufficient to meet the guarantee. There may be other checks that can be built in and it is for the Board, not the court, to design those. Examples suggested in argument were alerts if life expectancy or inflation assumptions departed from those built into the calculation and could lead to the individual receiving less than the 50% guaranteed. The court was not asked to rule on details but was asked simply to consider the principle. The expectation is that the Board will review the operation of the scheme in the light of this judgment.

190. Secondly, the greatest problem giving rise to difficulty was, on the evidence, seen to be those members whose pension benefits were capped and who had large periods of pre-April 1997 pensionable service. In the event, I have found that the compensation cap is unlawful and must be disapplied. To the extent that the compensation cap created the problem, that will have been solved. If I had reached a different decision, and had found that the compensation cap was lawful, and if that could lead to a member receiving overall less than 50% of the cumulative value of the pension benefits that he or she would have received, the Board would again have had to consider adjustments to the system. They would have had to ensure that some mechanism existed to prevent an individual member at some stage receiving compensation which would be less, overall, than 50% of the benefits that he or she would have received under the pension scheme.

191. Thirdly, it seems there may be the possibility that there may be a subset of persons who might receive compensation which is less than 50% of the cumulative benefits that they would have received under the pension scheme. This possibility is referred to by Ms McCrory in paragraph 57 of her first statement. There is also evidence to suggest that, in some cases, if a person lives for longer than the expected actuarial lifetime, and has considerable pre-April 1997 pensionable service (or if inflation

assumptions prove to be markedly wrong), such persons may receive less than 50% of the cumulative value of benefits. The Board will need to consider, as explained in paragraph 189 above, adjustments to the system to ensure that that possibility is identified and addressed.

The Third Issue

192. The third issue concerns survivors' benefits. The Board has adopted a system whereby the value of any survivor's benefits is factored into the calculation of the member's benefits. The Board then pays a survivor ½ of the compensation being paid to the member as at the date of the member's death (together with annual increases in respect of post April 1997 pensionable service). The claimants contend that that approach will, or may, result in survivors not receiving 50% of the value of their survivors' benefits. In the discussion that follows, I refer to the member as he, and the survivor as she, as that reflects the position of the only two survivors who are claimants (Mrs Forsyth and Mrs Mackenzie-Green). It may be that the member is a woman and the survivor a man. It may be that the member has a civil partner. The same principles apply and references to he and she, and member and spouse, are simply used to reflect the factual situation of these two claimants and is not intended to reflect any assumptions as to the sex or marital status of the pensioner or the survivor.

193. The approach taken by the Board is, in my judgment, wrong in principle. The context is that a member will have paid contributions to the pension scheme in return for benefits for him and, if he dies, for his survivor. The payments to the survivor are calculated by particular rules of the pension scheme. They may provide for a survivor to receive ½ of the member's pension and that may be based on the pension received prior to commutation of any part of the pension as is the case with the two claimants here. In other cases, a survivor may receive 2/3 of the member's pension (as would be the case if one of the claimants who is a member of the BMI Scheme were to die leaving a survivor). There may be other differences such as entitlement to payment of a lump sum. The factual context, therefore, concerns payments to a different person, the survivor, of benefits calculated differently from those payable to the member.

194. The wording of Article 8 of the Directive is concerned with protecting the rights of employees. But it specifically recognises that those rights will include survivors' benefits. While the entitlement to the benefits derive from rights acquired by the member and are funded by contributions made by that member and his employer, the benefits themselves are intended to be enjoyed by the survivor after that member's death. They are intended to make financial provision for the survivor during her lifetime. The obligation "to protect the interests of employees" applies to the payments made to survivors. Just as payment of less than 50% of the value of the pension benefits during the member's lifetime would not be considered to "fall within the definition of the word "protect"" (see per the Court of Justice at paragraph 57 of its judgment in *Robins*), payment of an amount that is equivalent to less than 50% of the value of the benefits that would be paid to the survivor would not provide protection of survivors' benefits.

195. For completeness, I note that this approach to Article 8 of the Directive is consistent with the approach of the Court of Justice on whether survivors' benefits amount to pay within the meaning of (now) Article 157 of the Treaty on the Functioning of the

European Union (formerly Article 119 of the EEC Treaty) so that the prohibition on discrimination applied to such benefits. In Case C-109/91 *Ten Oever v Stichting Bedrifts-Pensioenfonds* [1995] 2 C.M.L.R. 357 at paragraphs 11 to 13 on page 425, the Court of Justice said:

> "11. It is also established that this pension scheme is funded wholly by the employees and employers in the industry concerned, to the exclusion of any financial contribution from the public pursue.
>
> "12. It must be inferred from those factors that the survivor's pension in question falls within the scope of Article 119 EEC.
>
> "13 This is so notwithstanding that, by definition, a survivor's pension is not paid to the employee but to the employee's survivor. Entitlement to such a benefit is a consideration deriving from the survivor's spouse's membership of the scheme, the pension being vested in the survivor by reason of the employment relationship between the employer and the survivor's spouse and being paid to him or her by reason of the spouse's employment."

196. The Board will need to consider how it manages its approach to survivors' benefits in the light of that conclusion. I am not asked to rule on whether the approach may lead, or has led, to the compensation paid to Mrs Mackenzie-Green, or which would be payable to Mrs Forsyth if the T & N Scheme transfers to the Fund, being less than 50% of the value of the survivor's benefits that would have been paid to each of them under the relevant pension scheme following the death of their husbands. I do not have the evidence necessary to determine that issue. They were entitled to ½ of the pension under the relevant pension scheme (calculated by reference to the pre-commutation pension of their spouses) together with annual increases (for all periods of pensionable service). The guarantee would require them to receive compensation equal to 50% of ½ of their spouses' pension calculated in accordance with the relevant scheme. It is not possible for this court, on the evidence provided to determine whether the system adopted by the Board will achieve that. Further, there is evidence that Mrs Mackenzie-Green would have received a lump sum payment of the difference between five times her husband's pension and the actual amount (approximately 2 years) of pension received by him before his death. Again, that would appear to be part of the survivor's benefits and the compensation paid would need to ensure that it included an element equal to 50% of the value of that aspect of her survivor's benefits. Those are all matters for the Board to consider in the first instance in accordance with this judgment both in relation to these two claimants and other survivors. The Board will need to consider the system, and any adjustments necessary, in light of the need to ensure that any survivor receives compensation of at least 50% of the value of the survivor's benefits, over time.

THE THIRD ISSUE – THE APPROPRIATE LIMITATION PERIOD

The Issue

197. The next issue is whether any time limits under the 1980 Act apply to any claim against the Board for arrears of compensation. The claimants say there is no time limit. The Board says that there is a six year limitation period and, under the 1980 Act, a claimant cannot claim arrears of compensation in respect of a period more than six years before the claim was issued. They may seek to rely on that to resist payment

of arrears in respect of periods more than six years before the date of the judgment of the Court of Justice in *Hampshire*, i.e. periods before 6 September 2012 (the judgment in *Hampshire* having been handed down on 6 September 2018).

198. This issue concerns only claims against the Board. I am specifically not asked to rule on limitation periods applicable to any claim by any of the T & N claimants, such as Mr Hampshire, against the trustees as that scheme is still in assessment and any claim for arrears will be brought against the trustees of the T & N Scheme. The issue affects claims for arrears against the Board in respect of the HLG Scheme as it transferred to the Fund before 6 September 2012. The issue does not, on the facts, affect claims by members of the former BMI or Monarch Schemes as transfer took place within the six year period in any event.

The Submissions

199. Mr Facenna relied upon the principle of equivalence in European Union law whereby a claim to a remedy for a right derived from European Union law cannot be treated less favourably than a similar domestic law right would be treated, relying on case C-326/96 *Levez v TH Jennings* [1999] I.C.R 521, and the decision of the Supreme Court in *Totel Ltd. v Revenue and Customs Commissioners*. He submitted that a claim against the Board for arrears of compensation was similar to a claim by a member against the trustees of a pension scheme for arrears of payment due under the pension scheme. That claim would not be subject to any limitation period as it fell within section 21(1)(b) of the 1980 Act.

200. Mr Facenna submitted that the essential characteristics of a claim against the Board for arrears of money unlawfully withheld are similar to those of a claim against the trustees of a pension scheme for arrears of payment. Further, he submitted that the purpose of the claim in both cases would be the same. In each case, the claim would be for payment of arrears of money due because of underpayment in respect of pension benefits because of a breach of EU law. He submitted that it would be odd if those claimants whose pension scheme was in assessment were not subject to any limitation period whereas those who schemes had transferred to the Fund were only able to claim arrears for a period of six years. He submitted that the payments would be met in part from the assets of the scheme which would be transferred to the Fund. He submitted that the situation was the same as that in *Lloyds Banking Group Pensions Trustees Ltd. v Lloyds Bank plc and others* [2019] Pens. L.R. 5. where Morgan J. held that the relevant comparator of a claim for arrears of payments by a beneficiary under a pension scheme was an action for the recovery of trust property within the meaning of section 21(1)(b) of the 1980 Act. That was not subject to a limitation period and so the imposition of a six-year limitation period under section 134 of the Equality Act 2010 infringed the principle of equivalence.

201. Mr Giffin submitted that the claim against the Board for any arrears of payment was not comparable to a claim against trustees of a pension scheme. Claims against the Board were claims for payment of statutory compensation. They were brought against the Board in respect of assets of the Fund and the claimants were not beneficiaries of a trust. The claims against trustees would be claims by beneficiaries under a trust against trustees in respect of property held on trust for them as beneficiaries. Statute drew a distinction between claims for enforcement of money due under a statute (where a six-year limitation period applied) and claims for the recovery by

beneficiaries of trust property (where no limitation applied). Consequently, the claim against the Board was not comparable to a claim against trustees.

The Statutory Provisions

202. Section 9 and 21 are the material provisions of the 1980 Act. Section 9 provides that:

> **"Section 9 Time limits for actions for sums recoverable by statute**
>
> (1) An action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued.
>
> (2) Subsection (1) above shall not affect any action to which section 10 of this Act applies."

203. Section 21 of the 1980 Act provides:

> **"21 Time limits for actions in respect of trust property**
>
> (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—
>
> (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
>
> (b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use.
>
> (2) Where a trustee who is also a beneficiary under the trust receives or retains trust property or its proceeds as his share on a distribution of trust property under the trust, his liability in any action brought by virtue of subsection (1)(b) above to recover that property or its proceeds after the expiration of the period of limitation prescribed by this Act for bringing an action to recover trust property shall be limited to the excess over his proper share. This subsection only applies if the trustee acted honestly and reasonably in making the distribution.
>
> (3) Subject to the preceding provisions of this section, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued. For the purposes of this subsection, the right of action shall not be treated as having accrued to any beneficiary entitled to a future interest in the trust property until the interest fell into possession.
>
> (4) No beneficiary as against whom there would be a good defence under this Act shall derive any greater or other benefit from a judgment or order obtained by any other beneficiary than he could have obtained if he had brought the action and this Act had been pleaded in defence."

The Case Law

204. The principles governing remedies, including the principle of equivalence, identified in *Levez* , were summarised by Morgan J. at paragraph 440 of his judgment in *Lloyds* in the following terms:

"(1) it is for the domestic legal system of each member state to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law;

(2) it is compatible with Community law for national rules to prescribe, in the interests of legal certainty, reasonable limitation periods for bringing proceedings; normally, reasonable limitation periods do not infringe the principle of effectiveness as it cannot be said that this makes the exercise of rights conferred by Community law either virtually impossible or *213 excessively difficult, even though the expiry of such limitation periods entails by definition the rejection, wholly or in part, of the action brought;

(3) the rules laid down by the domestic legal system must not be less favourable than those governing similar domestic actions (the principle of equivalence);

(4) it is for the national courts to ascertain whether the procedural rules intended to ensure that the rights derived by individuals from Community law are safeguarded under national law comply with the principle of equivalence;

(5) the Court of Justice can provide the national court with guidance as to the interpretation of Community law, which may be of use to it in undertaking such an assessment;

(6) the principle of equivalence requires that the rule at issue be applied without distinction, whether the infringement alleged is of Community law or national law, where the purpose and cause of action are similar;

(7) the principle is not to be interpreted as requiring member states to extend their most favourable rules to all actions brought in the relevant area of law;

(8) in order to determine whether the principle of equivalence has been complied with in a particular case, the national court must consider both the purpose and the essential characteristics of allegedly similar domestic actions;

(9) whenever it falls to be determined whether a procedural rule of national law is less favourable than those governing similar domestic actions, the national court must take into account the role played by that provision in the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts."

205. The application of the principle of equivalence was considered by the Supreme Court in *Totel Ltd. v Revenue and Customs Commissioners* [2018] 1 W.L.R. 4053. That case concerned traders who wished to appeal against assessment of value added tax ("VAT") in the United Kingdom. They were required by the relevant statutory provision to pay or deposit the tax notified, unless they were able to establish that would cause hardship, before the appeal would be considered. That obligation was a feature of appeals of assessments in respect of a number of other types of tax such as insurance premium tax, landfill tax, climate change levy and others. Payment first, however, was not a condition for appealing assessments of other taxes such as income tax, capital gains tax, corporation tax or stamp duty land tax. The first question was whether appeals against assessment of tax such as income tax was a true comparator with appeals against assessments of VAT for the purpose of the principle of equivalence. Lord Briggs, with whom the other members of the Supreme Court agreed, considered that the question should be considered as follows.

206. First, the question whether any proposed domestic claim is a true comparator with an EU law claim is context-specific. Secondly, the court must focus on "the purpose and essential characteristics of allegedly similar claims" (see paragraph 10 of the judgment in *Totel*). Lord Briggs observed at paragraph 11 that:

> "11. Of particular importance within the relevant context is the specific procedural provision which is alleged to constitute less favourable treatment of the EU law claim. This is really a matter of common sense. Differences in the procedural rules applicable to different types of civil claim are legion, and are frequently attributable to, or at least connected with, differences in the underlying claim. A common example is to be found in different limitation periods. Thus, in England and Wales, the primary limitation period for personal injury claims is three years, whereas the primary limitation period for most other claims is six years. There is a 20-year prescription period for property claims in Scotland. To treat personal injury and, for example, property claims as true comparators for the purpose of deciding whether the shorter limitation period for personal injury claims constituted less favourable treatment would make no sense. This is because it is no part of the purpose of the principle of equivalence to prevent member states from applying different procedural requirements to different types of claim, where the differences in those procedural requirements are attributable to, or connected with, differences in the underlying claims."

Discussion

Claims for Compensation Payable under Schedule 7 to the Act

207. I start with claims arising from underpayments by the Board because the Board calculated the amount of compensation payable under Schedule 7 to the Act by applying the compensation cap. That is, the Board paid compensation to those under NPA at assessment date at an amount equal to 90% of the capped amount. In the light of my finding that the application of the compensation cap involved unlawful discrimination contrary to European Union law, that compensation cap has to be disapplied. The Board should have paid an amount equal to 90% of the annual pension that would have been paid under the relevant pension scheme. In other words, the provision in paragraph 3(10) of Schedule 7 to the Act that the paragraph was subject to "paragraph 26 (compensation cap)" would not have applied. The Board would have paid "the appropriate percentage" i.e. 90% of "any protected pension rate" which means "the annual rate of the pension under the admissible scheme" (see paragraphs 3(3), (4) and (5) of Schedule 7 to the Act). The same applies in relation to the similar provisions relating to active members and deferred members (see paragraphs 11 and 15 of Schedule 7 to the Act). The question is whether the claimants can recover such underpayments in respect of periods more than 6 years before they start proceedings or, in the present case, 6 years before the decision in *Hampshire* as the Board has said that it will not without further notice treat time as continuing to run after the *Hampshire* judgment.

208. The claimants' case is that a claim by members against the Board for such underpayments is equivalent to a claim by members against the trustees of a pension scheme for an underpayment for similar reasons. Such a claim would be a claim "to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee" within the meaning of section 21(1)(b) of the 1980 Act. There is no limitation period applicable to such claims. Consequently, they claim that there should be no limitation period on what they say is the equivalent claim in

respect of underpayments by the Board. All parties either agree, or are prepared to work on the basis that, a claim by a member of a scheme against the trustees for underpayment of benefits under the pension scheme falls within the scope of section 21(1)(b) of the 1980 Act. That is consistent with the judgment of Morgan J. in *Lloyds*. I proceed on that basis.

209. Applying the approach in *Totel* the position is this. The context is that the Act creates a system for the payment of compensation in the event of an employer becoming insolvent and its pension scheme has insufficient assets to meet its protected liabilities. The Act establishes a statutory corporation, the Board (see sections 107 and 108 of the Act). It establishes a Fund (see section 173 of the Act). It provides for the Fund to comprise assets from pension schemes transferred to the Board, and from levies on pension schemes. Section 162 and Schedule 7 to the Act "makes provision for compensation to be paid in relation to a scheme for which the Board assumes responsibility". The Board will have to assume responsibility where the value of assets of the scheme is insufficient to pay benefits to members which correspond to the compensation that would be payable by the Board if it assumed responsibility for the scheme and paid compensation in accordance with section 162 and Schedule 7 (see sections 127 to 131 of the Act).

210. The essential characteristic of the cause of action created by Act is that it creates a statutory right to compensation for those who have retired (or active or deferred members on retirement). That appears, for example, from paragraph 3 of Schedule 7 to the Act dealing with persons in a scheme for which the Board assumes responsibility if, immediately before assessment, the person was entitled to payment of a pension. In those circumstances "Compensation is payable in accordance with this paragraph" (paragraph 3(1)) and:

> "(2) That person ("the pensioner" is entitled to periodic compensation in respect of that pension ("the pension") commencing at the assessment date and continuing for life ….."

211. Similar provisions giving rise to a statutory right to annual periodic payments on attainment of the NPA apply to active members and deferred members (see paragraphs 11 and 15 of Schedule 7 to the Act). Similar statutory rights are given to survivors.

212. The nature of the right then is a statutory right to compensation enforceable against the Board. The compensation is paid out of the Fund provided for by section 173 of the Act. Prima facie, that is an "action to recover any sum recoverable by virtue of any enactment" within section 9 of the 1980 Act.

213. A claim by members of a pension scheme for underpayment of benefits has different legal characteristics. It involves a claim by persons who are beneficiaries under a trust to recover trust property from the trustees of the scheme. The characteristics of the claim, or cause of action, are very different from a claim against the Board.

214. In terms of purpose, there is a degree of similarity, or overlap, between the two claims. In each, the claimants are seeking to recover either money representing compensation from the Board for amounts which should have been paid or benefits under the scheme that the trustees should have paid but did not. The Board is to pay compensation under Schedule 7 to the Act. That was subject to the compensation cap

and, if that is removed, the amount of compensation that should have been paid would have been higher. In the case of pension schemes in assessment, the members would have received the benefits payable under the scheme (i.e. uncapped) but for the provisions of section 138(2) of the Act. That section prohibits trustees from paying benefits which would be greater than the amounts payable by the Board if the Board had assumed responsibility. The limit on the trustees arises by reason of a statutory provision which limits the amount of benefits they can pay by reference to the statutory compensation provisions. If those are disapplied, the Board must pay more and, consequently, the trustees can pay more to the pensioners under the scheme. That analysis, however, also serves to underline the difference between claims against the Board and claims against trustees. The Board is paying (and can only pay) the amounts of statutory compensation provided for by the Act (read in accordance with EU law). The trustees are paying benefits payable under the trust. When the statutory restrictions are disapplied in relation to the Board, the trustees can then pay more of the benefits out of the trust property.

215. Comparisons of different causes of action for the purposes of the EU law principle of equivalence are notoriously difficult. It is often difficult to seek to equate different forms of action. In the present case, however, I am satisfied that a claim to enforce a statutory right of compensation against a statutory corporation is different from a claim by a beneficiary of a trust to recover trust property from trustees. There is, in principle, nothing wrong with having different limitation periods for different types of causes of action serving different purposes. For those reasons, a claim against the Board for arrears of compensation payable under Schedule 7 to the Act resulting from underpayment because of the application of the compensation cap is subject to the six-year limitation period provided for by section 9 of the 1980 Act.

216. That conclusion is consistent, in my judgment, with the decision of Morgan J. in *Lloyds*. There the claim was by members of a pension scheme against the trustees. Essentially, by reason of different pension ages, different benefits had been paid to male and female pensioners at various times. Section 67 of the 2010 Act provided that each occupational pension scheme should include an equal treatment rule which had the effect that where any term of the pension scheme was or became less favourable to a woman than a man, the term was to be modified. Section 134 of the 2010 Act provided that arrears of benefit could not be paid in respect of a period more than 6 years before the proceedings commenced. Morgan J. held that that did give rise to a breach of the principle of equivalence as there was no limitation period governing claims by beneficiaries against the trustees for the recovery of trust property under section 21(1)(b) of the 1980 Act. In the *Lloyds* case, however, the claims both involved a claim by the beneficiaries of a trust against the trustees claiming that benefits should have been paid under the scheme out of trust property. In one case, a claim in relation to pension benefits by reason of the operation of the equal treatment rule, the claim had a six-year limitation period. In relation to other claims, there was no such limitation period. Given that the essential characteristics of both claims were that it was a claim by a beneficiary under a trust against the trustees for recovery of trust property, it is understandable that Morgan J. held that the application of a limitation period in relation to one claim but not another breached the principle of equivalence. The present case is different. It involves different causes of action against different persons.

217. For completeness, I note that there was no suggestion in the claim form, or in argument, that the obligation under EU law to provide an effective remedy applies to claims for arrears of compensation. The claimants were correct to take that approach. The position is that the compensation cap was unlawful when adopted and could have been disapplied if a claimant had brought a claim. European Union law has consistently recognised that national law may lay down reasonable time limits for bringing claims including rules limiting claims for arrears to a particular period before a claim was brought (see, e.g., *Levez* at paragraph 19, and Case C-410/92 *Johnson v Chief Adjudication Officer* [1994] E.C.R. I-5383).

Claim for Shortfalls

218. There is also a question about a claim against the Board in relation to payments that the trustees should have made during the assessment period but did not. The trustees of the pension schemes may have reduced the benefits payable to members of the HLG Scheme and the BMI Scheme after the assessment date and prior to the transfer of that particular scheme to the Fund. In those circumstances, section 163(4)(b) of the 1980 Act provides that the Board must:

> "if any amount so paid was less that that entitlement (or if no amount was paid in respect of that entitlement), pay an amount to the member or person concerned equal to the aggregate of:
>
> (i) the amount of the shortfall and
>
> (ii) the interest on that amount…."

219. A claim for payment of such a shortfall would again involve a claim to enforce payment of an amount due by virtue of any enactment. Such a claim would be subject to the limitation period in section 9 of the 1980 Act. There would be no breach of the principle of equivalence for the reasons given in relation to a claim for arrears of compensation. There was a suggestion that the original claim against the trustees for underpayment of the pension benefits during the assessment period might have been transferred to the Board under section 161(2) of the Act and be enforceable against the Board (and so, fall within section 21(1)(b) of the 1980 Act and not be subject to any limitation period). The alternative interpretation is that the statutory provisions, and in particular the terms of sections 161 and 163 of the Act, effectively brought any claim against the trustees to an end on transfer of the scheme to the Fund and created instead the statutory obligation on the Board to pay the shortfall conferred by section 163(4)(b) of the Act. I did not hear full argument on that issue and express no view on it.

Payments Required to Meet the Obligations of Article 8 of the Directive

220. The question also arose as to whether the limitation period would apply to payments made to ensure that any compensation did not fall below the 50% guarantee provided by Article 8 of the Directive. It is unclear on the evidence whether any such case will yet have arisen in relation to any of the 24 individual claimants, or whether it would arise now given the disapplication of the compensation cap, nor how the Board would address that issue in the light of this judgment. It is not, therefore, possible, or appropriate, to speculate on what time limits might be applicable in respect of such

payments. The matter would be more appropriately considered in the context of a specific claimant or claimants on specific facts.

THE FOURTH ISSUE - INTEREST

221. The claimants also seek a ruling on interest on arrears. In argument, Mr Facenna submitted that the provisions governing interest contained in regulation 17 of the Pension Protection Fund (General and Miscellaneous Amendments) Regulations 2006 ("the 2006 Regulations") breached the EU law principle requiring that remedies be effective. He further submitted that this court, on a judicial review claim, ought to fix an appropriate level of interest for, it seems, the 24 individual claimants.

222. The question of what interest is payable is better dealt with in the context of a specific claim or claims, based on evidence, where the facts can be identified and the matter can be the subject of full argument. The evidence in the present case is sparse and relates to only a small number of the claimants. For those reasons, it is not appropriate to deal with any issue relating to interest in this judgment.

THE FIFTH ISSUE – THE OBLIGATION OF TRUSTEES DURING THE ASSESSMENT PERIOD

223. The fifth issue concerns the T & N Scheme which is still in assessment and has not yet transferred to the Fund. The issue concerns the obligation of the trustees to reduce the benefits payable during the assessment period. For convenience, I set out the terms of section 138(2) of the Act again:

> "(2) The benefits payable to or in respect of any member under the scheme rules during the assessment period must be reduced to the extent necessary to ensure that they do not exceed the compensation which would be payable to or in respect of the member in accordance with this Chapter if–
>
> (a) the Board assumed responsibility for the scheme in accordance with this Chapter, and
>
> (b) the assessment date referred to in Schedule 7 were the date on which the assessment period began."

224. Mr Campbell, for the second interested party, the trustees of the T & N Scheme, submits that, in accordance with ordinary principles of statutory interpretation, that sub-section limits the amount of benefits that the trustees may pay so that they do not exceed the compensation which would be payable in accordance with Chapter 3 of the Act. That is compensation calculated, and payable, in accordance with section 162 and Schedule 7 to the Act. If additional payments would have to be made by the Board to comply with the guarantee conferred by Article 8 of the Directive, those are not, Mr Campbell submitted, compensation "payable to or in respect of the member in accordance with this Chapter". Further, he submitted that it would not be open to this court to interpret section 138 to include payments required by Article 8 of the Directive relying on the duty of a court to give an interpretation of domestic legislation consistent with the Directive, in accordance with the case law of the Court of Justice. He submitted that to do so would not be in accord with the principles accepted by the Court of Appeal in *Vodafone 2 v Revenue and Customs Commissioners* [2010] Ch. 77 where the Court implicitly accepted that any

interpretation had to "go with the grain of the legislation" and "be compatible with the underlying thrust of the legislation" and should not involve the court making decisions for which they are not equipped or which may give rise to practical repercussions which they are not equipped to evaluate: see per the Chancellor, Sir Andrew Morritt, at paragraph 38. Mr Campbell submitted that the level of compensation is a fundamental feature of the legislation and reflects Parliament's view of the correct balance between competing interests. To require trustees to pay more than provided for by section 138 of the Act construed, in accordance with the usual principles of statutory interpretation, would be to go against the grain of the statute. Further, he submitted that that would involve a choice that the court was not equipped to make. It would mean that the costs of complying with the guarantee provided by Article 8 of the Directive would be borne by private actors, the trustees, whereas the Directive gave a choice as to whether the trustees, or the Fund or the Secretary of State should bear the costs.

225. Mr Facenna for the claimants, supported by Mr Giffin and Mr Coppel on this issue, submitted that section 138(2) of the Act, on its ordinary construction, means that the trustees must pay that which the Board would pay if it assumed responsibility for the scheme. Secondly, and alternatively, if that were not correct, that was the obvious underlying intention and the subsection should be construed to achieve that by treating it as dealing with compensation payable in accordance with Chapter 3 and any directly effective rights.

Discussion

226. It is appropriate to start with the proper meaning of section 138(2) of the Act as a matter of statutory interpretation in accordance with ordinary, domestic law principles of statutory construction. This involves consideration of the meaning of the words in the particular context in which they are used, having regard to other permissible aids to interpretation such as any relevant presumptions, the legislative history of the provision and other background material in so far as that assists in identifying the defect that the provisions are intended to cure or the purpose that the provisions are intended to achieve: see, for example, the observations of Lord Nicholls of Birkenhead in *R v Secretary of State for the Environment, Transport and the Regions, Exp. Spath Holme Ltd.* [2001] 2 AC 349, at pages 397A-399E.

227. The context is as follows. Chapter 3 of the Act is headed "Pension Protection". As appears from its terms, it was intended to establish a system of compensation in respect of the pension benefits of individuals whose employer became insolvent. Chapter 3 of the Act is, at least in part, intended to implement the obligation imposed by the Directive to pay compensation to members of that scheme. Chapter 3 of the Act, therefore, provides for the Board to pay compensation to individual members of schemes whose employer has become insolvent and where the value of the assets of the pension scheme are assessed as insufficient to pay the amount equal to the amount of benefits that the Board would pay if the pension scheme were transferred to the Fund. The amount of compensation payable by the Board may be less in certain cases than the benefits that would be payable under the pension scheme. Section 138(2) of the Act was intended to ensure that, during assessment and while the value of the scheme's assets were being assessed, the trustees of the scheme did not pay benefits out of the scheme which would exceed those which would be payable if the scheme did ultimately transfer to the Fund.

228. Against that background, the meaning of section 138(2) of the Act is clear. The benefits payable under the scheme must be reduced to the extent necessary to ensure that, during the assessment period, they do not exceed the compensation that would be payable to a member in accordance with Chapter 3 of the Act if the Board assumed responsibility in accordance with Chapter 3. The phrase "in accordance with this Chapter" is used twice in the subsection. On each occasion, it is intended to mean that the member is not paid more than the Board would be liable to pay if it assumed responsibility for the scheme. That means that the trustees may pay out of the scheme's assets amounts no more than the Board would pay if it assumed responsibility, that is, the amounts in Schedule 7 to the Act, and in addition, amounts required to ensure that the statutory compensation meets the guarantee required by Article 8 of the Directive. That reflects the key object of the section. The phrase "in accordance with this Chapter" is not intended to mean "calculated solely by reference to the provisions of this Chapter" and to exclude any directly effective obligations enforceable against the Board by reason of Article 8 of the Directive.

229. If that interpretation were wrong, then I would need to interpret the section in accordance with the duty on this court to interpret legislation to give effect so far as possible to the Directive (as established by the consistent law of the Court of Justice such as Case C-106/89 *Marleasing SA v LA Commercial Internacional di Alimentacion* [1990] E.C.R. I-4135). All that would be necessary would be to read in words such as "and directly effective rights enforceable against the Board" after the words "in accordance with this Chapter". That would not go against the grain of the legislation. Nor would it involve making choices that the court is not equipped to make. Rather, that interpretation would be consistent with the purpose underlying the legislation as a whole. Parliament has created a system of protection for pensions in the case of an employer's insolvency which is intended to implement the Directive. It has done so by creating the Board and providing for the Fund. The assumption underlying section 162 and Schedule 7 to the Act is that the provision made would reflect the requirements of the Directive. Trustees of pension schemes in assessment were prevented from making payments in excess of the amounts that would be payable by the Fund if the Board assumed responsibility. To the extent that the Board must make higher payments of compensation to reflect the guarantee provided by Article 8 of the Directive, it is consistent with the statutory scheme as a whole that trustees of pension schemes should be permitted to pay benefits which are equal to but do not exceed the amounts that would be payable by the Board.

CONCLUSION

230. The imposition of the cap on compensation payable by the Board constitutes unlawful discrimination on grounds of age contrary to EU law. The cap on compensation provided for in paragraphs 26 and 26A of Schedule 7 to the Act must be disapplied. Article 8 of the Directive does not require the Board to assess whether the compensation payable in each pension year is equivalent to 50% of the pension benefits that would have been payable under the relevant pension scheme in that year. The Board is entitled to adopt a scheme which ensures that the overall compensation payable during retirement (or the lifetime of a survivor) will equal 50% of the amount of the benefits that the member (or the survivor) would have received under the pension scheme. The precise mechanism by which the Board is to achieve that is a matter for the Board. The limitation period provided for by section 9 of the 1980 Act

applies to claims for arrears of compensation payable by the Board under section 162 and Schedule 7 to the Act resulting from underpayments due to the application of the compensation cap. During the assessment period, the trustees of a pension scheme must ensure that the benefits paid under the pension scheme do not exceed the compensation that would be payable by the Board and any sums it must pay by reason of directly effective rights conferred by Article 8 of the Directive.