Neutral Citation Number: [2014] EWHC 1362 (Ch)

Claim No: HC12D03101

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Rolls Building,
110 Fetter Lane,
London EC4 1NL

Monday, 14 April 2014

BEFORE:

MRS JUSTICE ROSE

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BETWEEN:

(1) DAVID BIRDWOOD ARCHER
(2) PETER COOPER
(3) JOHN BAKER
(4) DAVID PAUL SAUNDERSON
(5) LUCY ANNE CALVER

Claimants

- and -

(1) TRAVIS PERKINS PLC
(2) THE BSS GROUP LIMITED
(3) PTS PLUMBING TRADE SUPPLIES LIMITED
(4) PTS GROUP LIMITED
(5) TRAVIS PERKINS TRADING COMPANY LIMITED
(6) NIGEL STUART GAMBLE

Defendants

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MISS E CAMPBELL (instructed by Wragge & Co LLP) appeared on behalf of the Claimants.
MR A SPINK QC and MR D GRANT (instructed by Squire Sanders (UK) LLP) appeared on behalf of the First to Fifth Defendants.
MR K BRYANT QC (instructed by Osborne Clarke) appeared on behalf of the Sixth Defendant.

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Approved Judgment

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Monday, 14 April 2014

J U D G M E N T

MRS JUSTICE ROSE:

1. The five Claimants in this action are the trustees of the BSS Group Pension Scheme which was established under an interim trust deed dated 24 March 1952. Travis Perkins plc, the First Defendant, is currently the principal employer under the Scheme, and the Second to Fifth Defendants are other sponsoring employers of the Scheme. BSS Group Limited, the Second Defendant, was the principal employer at all times material to the issues in this case. Mr Gamble, the Sixth Defendant, is a proposed representative beneficiary. He is a commercial director of the Third Defendant. The Scheme is a final salary pension scheme.

2. The dispute relates to whether the Scheme has been amended to equalise the normal retirement date ('NRD') for men and women at aged 65, following the judgment of the Court of Justice of the European Union in Barber v The Guardian Royal Exchange Insurance Group [1991] 1 QB 344. That judgment was handed down on 17 May 1990. In common with most pension schemes in this country, the one in issue here provided for an NRD of 60 for women and 65 for men. Also in common with most schemes, the employers here decided that they would respond to the Barber judgment by equalising the pension age for all employees at 65. The question in issue here is when did they actually achieve that?

3. It is common ground that the longstop date for the equalisation of the NRD under this Scheme is 4 April 2013. At that date, the employers executed a capping deed which would have had the effect of equalising every member's NRD at 65 if this had not been achieved before then. This then creates what is currently known as the "*Barber* window", a period after 17 May 1990 in which the Scheme unlawfully discriminated between the NRDs of men and women, and in which the members of the Scheme had rights arising from that unlawful discrimination. Subsequent case law has determined that equalisation could not be made retrospective if it was to the disadvantage of one class of members, even if the power to amend conferred by the Scheme in question allowed for retrospectivity. That meant that during the "*Barber* window" in this Scheme, the men and women must be treated as having an NRD of 60.

4. The issues that would need to be decided in order to ascertain what would be the length of the *Barber* window here are of two kinds. First, what are the applicable provisions determining how an amendment to the rules of this pension scheme can be made? This depends on whether the power to amend was validly exercised in 1977 or 1982, and on the meaning of certain wording in the provisions of the deed. Secondly, there are issue as to whether certain announcement booklets or other actions taken on the part of the employers were effective to make the amendment needed to equalise pensions. Some of these events are relied on as having made the change for some, but not all, of the relevant categories of members.

5. The power of amendment was set out in clause 12 of the 1953 definitive deed. As

well as the categories of members who joined at various times after the Barber decision, there is a separate issue about a particular class of Scheme members who were former employees of the company Cadel Limited, who were previously members of the Meyer International Group Pension Scheme, and who transferred into this Scheme in or about November 2012.

6. Let me briefly summarise the issues that would be raised by a trial of this action. The original power of amendment in clause 12 of the 1953 deed provided that amendments could be made to the Scheme either by way of deed or by way of insertion of particulars into a schedule to the Scheme Rules, such insertion to be signed by the Trustees and a principal employer and witnessed by at least one person. The first issue in this case is whether the 1977 deed changed this. That deed purported to introduce an additional option by a new sub-clause 6 of clause 12. Sub-clause 6 provided that:

> "(vi) if notice in writing of any alteration or modification should be given in a form agreed by the Trustees and the Principal Employer to persons affected thereby, the trusts, powers and provisions of the Deed and of the Rules shall, pending the execution of the deed or the insertion of particulars in the relevant schedule of the Rules, be deemed to be altered or modified."

7. This wording was readopted without change in the 1982 deed, although there may actually have been a difference in the proper construction of the 1977 and 1982 versions of the deed. Mr Gamble, the representative Defendant, would have argued that the purported introduction of the power to make alterations in the manner described in sub-clause 12(vi) was beyond the powers of amendment in the 1953 deed. It would involve, he says, a substantial widening of the power of amendment and a corresponding reduction in the protection given to members. The first issue would therefore be whether the amendment in the 1977 deed was valid.

8. The second issue relates to the making of the 1982 deed. Apparently only an unexecuted copy of it can be found. No one knows where the signed copies (if they exist) are. A court hearing this case would have to make a decision whether the 1982 deed was ever executed.

9. The third issue is the proper construction of the amendment power in clause 12(vi). There are various points raised on construction:

> (a) Mr Gamble argues that even if the 1977 deed did validly introduce a power to amend by notice, any such amendment of the rules could only be effective if it was later confirmed either by a deed or by an insertion of the change into the relevant schedule of the rules. This could not have been done, he says, retrospectively, because that is not permissible – see the Harland & Wolff Pension Trustees v Aon Consulting Financial Services Limited [2007] ICR 429. Since there has been no deed or insertion prior to 4 April 2013, no notice to amend can have taken effect pursuant to clause 12(vi).

(b) it is unclear what is required in order to comply with the wording of clause 12 which refers to amendments being made "after consulting the Actuary". There is a dispute about whether it is enough that actuaries were involved in the drafting and discussion of the proposed amendment without them being formally consulted and about whether it is necessary for the actuary to have expressed a firm, positive opinion about whether the proposed amendment satisfies the conditions specified in clause 12.

10. The fourth issue in the case is the identity of the Actuary who has to be consulted. Although the wording of the 1977 deed version of clause 12(vi) is the same as the 1982 deed version, the definition of the phrase "the Actuary" is different in the two versions. In the 1977 deed the term "Actuary" was defined as "The actuary or actuaries for the time being appointed by the Trustees". In the 1982 deed, although the wording of clause 12 was identical, the definition of the Actuary was different. It was defined as "A Fellow of the Institute of Actuaries or the Faculty of Actuaries in Scotland, or a firm of such Fellows." For this reason, it may be important to work out whether the 1982 deed was validly executed and so whether that definition of the Actuary or the definition in the 1977 deed was the applicable provision at the time that the amendment was sought to be made after Barber. This is because it might be argued that the firm of actuaries actually involved in making the amendment, although undoubtedly fellows of the relevant institute, might not be regarded as having been appointed by the Trustees.

11. The fifth issue is then the compendium of issues arising from the different announcements made and booklets issued by the employers over the years since May 1990, whether they were effective to make a change and in respect of which categories of members. The main announcement relied on is one made in November 1990 and sent to female members of the Scheme. But there are some earlier announcements that the First to Fifth Defendants also now wish to rely on at trial. The Sixth Defendant may wish to argue that it is not clear to whom the 1990 announcement was sent. Similarly, as regards booklets issued to Scheme members between 1991 and 1993, there would be arguments about to whom they were circulated and in what version. There are questions about whether the 1990 announcement itself complied with the requirements of clause 12(vi), assuming that the power of amendment by notice had been validly incorporated into the deed, and whether the change which the employer sought to make (as set out in the 1990 announcement) would itself comply with the Barber ruling, or whether it would have had adverse effect on the members' accrued rights.

12. The sixth issue is that relating to the ex-Cadel members who joined the Scheme on or about November 1992. The companies' case is that when the ex-Cadel members joined the Scheme, they did so on legally binding terms that they would continue to accrue benefits on the basis of a retirement age of 65.

13. The seventh issue concerns the 1996 deed made in September 1996 and a number of points as to whether that deed was properly made pursuant to sub-clauses of clause 12 other than the contentious sub-clause (vi). The issue here is whether clause 12 was complied with in respect of the requirement for consultation with the actuary, and whether the proviso in 12(v) which prevents amendments being made

which affect the value of benefits already earned is engaged, so as to invalidate the change in NRDs which purport to be effected by the 1996 deed.

Representation orders

14. So far as the representation order for Mr Gamble is concerned, he seeks to represent the interests of all those who would argue that the equalisation date is 4 April 2013 and not earlier. Mr Gamble says there are 5 different categories of member. First, all those who joined before 1 August 1990. The significance of that date is that the companies say that any new female member coming in after 1 August 1990 had an NRD of 65 from the start, because there was a notice given under clause 12(vi) either to them as individuals when they were provided with a copy of their terms and conditions of employment, or by way of a generic announcement applicable in their case. The second category is all those who joined between 1 August 1990 and 31 December 1990, the latter date being significant because the November 1990 announcement said that it was to take effect from 1 January 1991. The next category is those who joined after 1 January 1991, which, as I have said, is the date on which the November 1990 announcement said it was to come into effect. The fourth class is those who joined on or after 3 September 1996, which is the date on which the 1996 deed was made. The fifth category is the ex-Cadel members.

15. I am asked, therefore, to make an order under CPR 19.7(1)(b) that Mr Gamble represent those beneficiaries under the Scheme. As I have said, he will represent all the members whose interest is that the equalisation of NRDs takes place as late as possible in relation to each category of members. He has made a witness statement in which he states that the Defendant companies notified all the Scheme members about the application to appoint him as a representative beneficiary by way of announcement on 19 October 2012, inviting members to make comments to Mr Gamble's solicitors if they so wished. He has confirmed through his counsel today that no comments or objections were received by those solicitors. I am told that the position here is within CPR 19.7(2)(c), that the persons to be represented cannot easily be ascertained because the class includes surviving spouses and we cannot know now who they are. It also falls, therefore, within CPR 19.7(2)(d)(i) and also (ii), in that he should represent a class of persons who had the same interest in a claim, and some of the members of that class fall within CPR 19.7(2)(c), and it would further the overriding objective to appoint him to represent them. I am told that, as at 1 June 2012, there are many hundreds of members in each of categories 1, 3 and 4, and 29 in category 2, and 80 ex-Cadel members, so the number or people who would otherwise need to be involved in the litigation is very great.

16. The representation order will be drawn up in the form considered by Sir Andrew Morritt C in Capita ATL Pension Trustees v Zurkinskas [2010] EWHC 3365 (Ch). He held that the form of order may fall within CPR 19.7(2)(d)(ii) if Mr Gamble represents a class of persons who have the same interest in a claim, and to appoint a representative would further the overriding objective. The Chancellor held in that case that it would further the overriding objective because it would be impossible to settle disputed points of interpretation of a pension scheme in one

Part 8 claim otherwise. In that event, multiple Part 8 claims would be needed, thereby greatly increasing the cost and expense to the benefit of no one – see paragraph 13 of his judgment. He concluded, therefore, that representation orders sought in that claim were authorised by CPR 19.7(2) so as to confer jurisdiction on the court to approve the compromise propounded by the parties, and I consider that the same points apply here. I will, therefore, make the representation order sought in respect of Mr Gamble.

17. There is also a representation order sought whereby Travis Perkins, the First Defendant, would represent all members of the Scheme whose interests lie in the equalisation of ages having happened at the earliest possible time dealt with in each of the issues. The idea of making complementary interest-based representation orders is supported by authorities dealing with these kinds of pension scheme disputes about late and contested equalisation of NRDs. That way, the members whose interests are aligned with the companies' interests are bound by the result if the company were to lose in a contested trial. By making this representation order those members are also bound by the outcome of this litigation. In fact, it appears to be agreed that there will most likely be no members who are directly affected in this way, but there are many people who left the company before 1 August 1990 and are currently in receipt of their pensions. It is appropriate to make this kind of order even though in this case there is currently no difficulty as regards the expected ability of these Defendants to fund both the settlement under the Scheme and the liabilities to fund the pensions of those who are not in the categories affected by the settlement, and I will therefore also make that representation order.

Approval of the compromise

18. Turning now to the approval of the compromise, the court's approval is required by CPR 19.7(5) to settle a claim in which a party is acting as a representative under that rule. Sub-rule (6) provides that the court may approve a settlement where it is satisfied that the settlement is for the benefit of all the represented persons. If the court is so satisfied then according to CPR 19.7(7) the judgment or order is binding on all persons represented in the claim unless the court otherwise directs. The parties have negotiated a compromise of the claim and I am asked to give my approval to the settlement on the grounds that it is for the benefit of the represented classes. Mr Gamble has received advice from specialist legal advisors to help him to arrive at that conclusion on behalf of those whom he represents. The compromise reached sets out the agreed NRDs for each category of member over set periods between 16 May 1990, when Barber was handed down, and 3 April 2013, the longstop date as to when equalisation definitely happened. I am told by Mr Gamble and by Mr Spink who appears on behalf of the employers that negotiations have taken place over many months. Throughout that time, Mr Gamble has been advised by counsel and solicitors. There have been offers and counter offers made. In his third witness statement dated 8 April 2014, Mr Gamble explains that he has received independent legal advice from his solicitors Osborne Clark and leading counsel Keith Bryant QC who appeared for him today. He confirms that he has been fully advised about the terms of the compromise and he understands the rationale for it and its implications.

19. There is one carve-out from the compromise relating to a small number of senior executives and directors who may have been promised special terms more generous than those that apply to other employees. Mr Gamble is not one of those people. They will be bound by the settlement but it does not apply to them if they have a more favourable deal for any particular period of pensionable service than the terms of the compromise.

20. I have seen the confidential Opinion of Mr Bryant. He sets out his general approach to compromise having regard to the judgment of Sir Andrew Morritt C in Zurkinskas. He has considered the merits of the arguments for and against each issue in relation to each category of member and used that to determine what is the appropriate NRD at which compromise should be reached. He describes in that Opinion the arguments on which Mr Gamble could rely on each of the issues and sets out his conclusions on the prospects of success of those arguments. He notes that the matters raised by the dispute are factually and legally complex and sets out his overall conclusion is that the terms of the proposed compromise reflect a reasonable outcome for all categories of members in respect of all periods of pensionable service.

21. There is no doubt that the compromise brings advantages to all those involved. It avoids the costs and uncertainties which a full trial of this complicated claim would bring. It also clarifies the position for those administering the Scheme and the benefits payable to the members. I have therefore concluded that the proposed compromise is for the benefit of all those represented both by the First Defendant and by Mr Gamble. There is no reason not to exercise my discretion to approve the compromise.

22. I have seen the summary of the compromise set out in the skeleton argument of Mr Gamble.

(a) Category 1 includes people joining before 1 August 1990. Their pre-Barber position is the same as the contractual differential, because Barber was declared by the Court of Justice as being of prospective effect only. There is an inevitable Barber window for them up to 31 December 1990, because it is not alleged that anything was done in relation to them to change the NRD prior to the 1990 November announcement. This means that the women continued with their contractual entitlement and the men had the advantage of the Barber judgment to equalise their NRD at 60. The dispute kicks in then at the third period for the time between 1 January 1991 to 2 September 1996, the latter date being when the 1996 deed came into effect. The companies would say that equalisation had occurred by then and Mr Gamble would say that it should still be both enjoying an NRD of 60, because there had been no effective amendment to the pre-existing rule. The compromise is that everyone in category 1 has an NRD of 62 for that period. For the period after the 1996 deed to the date of the capping deed on 3 April 2013, the companies regard their case as stronger and the NRD agreed for category 1 members is 64.5. After the capping deed date everyone has an NRD of 65.

(b) As regards category 2 members who joined between 1 August 1990 and 31 December 1990, in the period up to 31 December 1990 the companies have agreed

as a compromise that all members should be treated as if there had been no change to their terms and conditions prior to the November 1990 announcement coming into effect, even though at trial they might have argued that new joiners after 1 August had had some change in their terms and conditions. After 1 January 1991 the compromise NRD is 61.25, so slightly more favourable to the members of this category because Mr Gamble would have argued that the 1990 November announcement did not apply to new joiners, as it was addressed only to existing members. Between 1 January 1991 and 2 September 1996 the compromise NRD is the same as for category 1, i.e. 64.5 and again post 4 April 2013 it is 65 for all.

(c) For the category 3 members joining on or after 1 January 1991, for the period up to 2 September 1996, the NRD would be 61.5. It would be argued by the companies that these members were joining the Scheme after equalisation had already taken place because of the November announcement. Between the date of the 1996 deed and the longstop deed, this category have an NRD of 64.5, and post the longstop deed they had an NRD of 65.

(d) Category 4 members who joined on or after 3 September 1996 have an NRD of 64.5 for their pensionable service between then and the longstop date, and thereafter of 65.

(e) The ex-Cadel members who joined in November 2002 from their previous employer's scheme are treated as having an NRD of 64.5 up to the day before the capping deed, i.e. 3 April 2013. That is because the companies would have argued that they came from a scheme where they all had NRDs of 65 and it was made clear to them that they continued with the Defendants on that basis. As with everyone else, they have an NRD of 65 after 4 April.

23. This is not a settlement whereby everyone receives a lump of money but one which sets their NRDs and the companies agree to pay whatever the costs turn out to be of this new NRD structure. The estimated cost, I am told, if all of the issues had been decided in Mr Gamble's favour would be about £29.5 million for the companies and the estimated cost of the settlement is about £9.2 million, excluding legal costs. That is what the parties have concluded is a fair reflection of their assessment of the merits of the different issues.

24. There is no agreed minute of order before me because there are still some matters outstanding in relation to the implementation of the Scheme, in particular because the members will have split NRDs and hence there is a debate about how to deal with this, for example by the inclusion of the flexible retirement dates. However, it was useful to have this hearing today to approve the compromise in principle - today being within the window of court time that had been set down for the trial of the matter. It was only shortly before trial that the parties were able to come to terms on the compromise but they were not able within that time to pin down the final points that need to be set out in a full minute of order.

25. I have seen a copy of the draft order in its current state, and it raises a couple of issues. The main area still being discussed, as I have mentioned, is in relation to

flexible retirement. This is one way of dealing with the fact that the members of the Scheme now have different NRDs applicable to different periods of their pensionable service. The Scheme needs to include rules as to when members can retire and start taking their pension, and what tranches of their pension they can take at that or other times. Ms Campbell, speaking for the Trustees today, did not want to be left in the position where the compromise extends only to determining the split NRDs and the Trustees are left with no guidance as to how to implement this new scheme. The Scheme Rules in the 1996 deed, and also in the 1982 deed, do not contemplate split NRDsbut now have to be interpreted against that background. The Trustees are content, in principle, with a two-stage approach to drawing up the orders in this case, so long as they can be sure that there is a second stage. The most orthodox approach, she said, would be to indicate that I am happy in principle with what is proposed and then wrap up everything in due course in one order. The Trustees in this case want to include an agreed mechanism in the order so that it is all there in one place and approved by the court. The company Defendants are considering these proposals but they have not had enough time to consider fully whether or not they can agree to these provisions, either in principle or in the detail as to the drafting. They are content to leave the detail until the beginning of next term but they want an order or at least a much clearer indication in principle that the main aspects of the case are now compromised. I am told that it would not be unusual in an order approving a settlement of this type to include some of the implementation detail in the approved order, even though this is really a matter between the Trustees and the companies. It is therefore not a matter germane to the issues in dispute generated by the Barber judgment. Mr Spink says that if this claim had gone to trial, there would have been a ruling and an order just determining the NRDs and the companies could not thereafter have been forced to include in that order disputed matters about implementation. The companies could have agreed to include these matters in the final court order if they were not contentious, but if there is no agreement the Trustees would have had to go back to court to get it sorted out. The companies do not want to make the compromise of the dispute dependent on an agreement in due course about flexible retirement provisions. So Mr Spink urged me to indicate that if the parties are not able to agree then the court order will embody the compromise and a different way will have to be found to resolve any contentious matters relating to the implementation mechanism in due course. Mr Bryant, appearing for Mr Gamble, does not have a view on behalf of the members he represents on this issue other than to say that their interest is in having all matters, including how the compromise is going to be implemented, resolved as soon as possible.

26. Another issue raised by the proposed draft order is clause 4 which would provide that the order takes effect so as to be binding on any person represented by the first defendant or the sixth defendant upon the expiry of 42 days after the dispatch of a letter from the Trustees to all affected members for whom the Trustees have addresses, notifying each category of member of the compromise and of its effect on the benefits of the category of the member concerned and of their right to apply to the court under the terms of this order. It goes on to provide that any such member shall be at liberty to apply before the expiry of 42 days to vary or set aside the order at his own risks as to the costs of the application.

27. I queried in the course of argument why this was being included because it seems to me to undermine the whole point of engaging the Rule 19.7 procedure. That procedure provides for the court to make a representation order after being satisfied that adequate consultation with the class has taken place. If the court then approves the compromise that is binding on the members of the class. The Rule 19.7 procedure acknowledges that there may be people unborn or not easily ascertained who might turn out to be unhappy with the way the litigation was conducted but nonetheless the representation order is made and when the court approves the compromise, those people are bound. I am not convinced that it is appropriate in a complex case such as this with several thousand members to include a clause which appears to provide that any one of them could within 42 days throw some or all of the dispute back up into the air by applying to vary or set aside the order. Mr Bryant argued that this should be included because the membership had not been contacted about the dispute since they were asked about Mr Gamble acting as a representative back in October 2012. In fact Ms Campbell tells me that there was a general announcement that went out earlier this year telling members that the court case was about to start. But even if there has been a gap in keeping the members informed that is as much Mr Gamble's responsibility as their representative as it is the responsibility of the companies and the Trustees.

28. Further, it seemed to me undesirable as well to include clause 4 because it was unclear what the legal effect of the clause was, both if it was activated (for example, does it only upset the binding nature of the compromise for that person or for everyone) and also if it is not activated (in that it was not suggested that someone who fails to complain within 42 days is thereby precluded in some way from coming to court and asking for the compromise to be overturned on grounds on which such applications can generally be made). It therefore appeared to muddy the waters in an unsatisfactory manner.

29. Over the short adjournment counsel discussed this further and I was then told by Mr Spink that the concern is not with the special members (as defined in the order) but with people who may have some estoppel argument based on their personal circumstances rather than any strict legal entitlement. The parties have proposed an alternative suggestion to clause 4 and this alternative seems to be much more sensible. The proposal now is that the outcome of today's hearing should be communicated by the Trustees by letter as soon as possible, inviting members to bring to the Trustees' attention any personal circumstances that they feel should alter their position from that which would otherwise apply under the compromise. The letter would invite them to do this within 42 days of the letter and the matter will not come back to court for the final order to be made until that period has expired. The final order approving the compromise will then have binding effect on the represented classes and would not then need to contain any provision like clause 4.

30. Having heard the submissions of the parties, I will make the representation orders for Mr Gamble and for the First Defendant, and I will also indicate that I do, on the material that I have seen, give my approval for the compromise pursuant to CPR 19.7(6) and that includes the cost provisions set out in paragraph 3 of the order. That compromise will then be binding on all the represented people, but the

drawing up of the order will be delayed, first to enable notification to the members to see if that flushes out people with individual circumstances that might need to be incorporated into the final version of the order to mitigate the binding effect of the compromise on them, and secondly to give the parties a chance to incorporate in the order agreed provisions as to the implementation of the compromise, to give the Trustees the signposts they need to administer the Scheme going forward. The matter can come back either before me on the papers if that is possible, and I will then decide whether I need to hear the parties further before making that final order.

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