

Foster Wheeler – a trip through the labyrinth!

Sarah Asplin QC - 3 Stone Buildings

Lincoln's Inn, London WC2A 3XL

1. This is intended as a pocket guide to the first instance decision in Foster Wheeler Ltd v Hanley & Ors [2008] EWHC 2926 (Ch) which was heard by Patten J in October and November last year. As you will all be aware, it has since been appealed and we are still awaiting the judgment which is officially described as “not imminent”. In the meantime, therefore, it may be useful to analyse the decision as it stands in order to be in the best position to understand and process the Court of Appeal’s decision whenever it may become available.
2. As you will be aware, this is yet another spin off from attempts to equalise benefits as a result of the Barber decision. The claim was brought by the employer in relation to the defined benefit section of the Foster Wheeler Pension Plan. The Plan was approximately £100million in deficit and that figure was potentially increased by between £18 and £30million by the outcome of the proceedings.

Synopsis of effect of ECJ cases

3. Before plunging into the intricacies of the questions posed, the opening paragraphs of Patten J’s judgment contain a helpful synopsis of what the ECJ actually decided in the Barber, Coloroll and Avdel cases. In particular, it sets out the ECJ’s conclusions upon the implementation of the equal pay principle in pensions. At paragraph 12 Patten J restated the fact that employees have the right

to enforce their rights under Art 119 directly against the trustees of a scheme

“who are bound, in the exercise of their powers and performance of their obligations as laid down in the trust deed, to observe the principal of equal treatment.”

Having considered the decision in Coloroll at paragraphs 25-36, the judge concludes:

“These passages confirm that, from the date set by the ECJ in Barber for the application of art 119 to pension schemes (ie 17 May 1990), the provisions of the scheme have to be treated as modified to the extent necessary to become compliant with the principle of equalisation. Article 119 had a direct and immediate effect and did not simply impose upon trustees and employers an obligation to bring the scheme into conformity with what was required¹.

4. He also noted that this is the effect of section 62 Pensions Act 1995. In other words, the rules of the scheme are to be read as modified in order to comply with art 119 and such a modification extends to provisions of the scheme which confer a discretion. The Coloroll decision also indicates the form the imposed solution should take:

“the national court (see paras 31-32) is required to set aside any discriminatory provisions of national law and to apply

¹See para 16.

to the disadvantaged class of employees the arrangements enjoyed by the advantaged class.²”

This may appear blindingly obvious but its simplicity and importance will be revealed once we enter the labyrinth.

5. The judge also sets out another well known consequence of the post Barber regime which is nevertheless worth repeating:

*“...it is also apparent from the same paragraphs of the judgment in Coloroll that the immediate application of art 119 in this way so as to render a scheme compliant with the principle of equal pay **does not exclude the power of the trustees and the employer to resort to their rule-making powers contained in the scheme (“any other constitutional procedure”)** in order to create a new regime in respect of future pensionable service which is not discriminatory. That regime (unlike the one imposed by art 119 with effect from 17 May 1990) is not limited to equalising benefits by reference to the position of the formerly advantaged class. The only requirement is that the measures adopted should treat both sexes equally: (emphasis added) see para 33 of Coloroll.³”*

6. At paragraph 22 of the judgment Patten J summarises the principles which emerge from Barber, Coloroll and Smith v Avdel in the following way:

² See para 18

³ See para 19

“(i) in relation to pensionable service prior to 17 May 1990, art 119 has no application with the result that disparate retirement ages remain permissible and consequently the accrued pension rights of women based on a lower NRD of 60 remain unaffected by the application of art 119 with effect from 19 May 1990;

(ii) as from 17 May 1990, art 119 has direct effect and ipso facto operates to amend a pension scheme so as to eliminate discriminatory provisions relating to pension entitlement. But the existence of the accrued rights of women (in a case like the present) to retire at 60 and the inability of employers or trustees to backdate subsequent equalisation measures to 17 May 1990 mean that, for the Barber window, the only possible modification of the scheme in relation to retirement dates is the levelling up of retirement ages so as to grant members of the disadvantaged class the same rights as those of the advantaged class who, in most cases, will be women;

(iii) the adverse financial consequences for the employer and/or the pension scheme of the application of art 119 after 17 May 1990 do not justify any alternative interim regimes such as the levelling down of normal retirement age to 65 for both sexes; and

(iv) the imposition of modifications to a scheme in this form with effect from 17 May 1990 does not preclude the ability of the trustees and the employer to use their powers of

amendment under the scheme to bring into effect measures of their own choosing which achieve equal treatment between men and women in relation to their pension based on future pensionable service. These measures can involve levelling down the normal retirement age so long as equality is maintained.”

7. The judge also made clear by reference to Warren J’s decision in Harland and Wolff Pension Trustees Ltd v Aon Consulting Financial Services Ltd [2006] EWHC 1778(Ch) that pension rights acquired under art 119 in respect of service during the Barber window, cannot be altered retrospectively however widely the amendment power may be drawn. (This issue did not arise in the Foster Wheeler case itself, however because the Scheme included a provision prohibiting amendments altering accrued rights without member consent.)

Outworking in Toray and Trustee Solutions

8. How therefore, should rights acquired during the Barber window be given effect to? First, Patten J seeks some guidance by undertaking an analysis of two decisions of Lewison J in Trustee Solutions Ltd v Dubery [2006] EWHC 1426 (Ch) and Hodgson v Toray Textiles Europe Ltd [2006] EWHC 2612 and on appeal in Trustee Solutions sum nom Cripps v Trustee Solutions & Dubery [2007] EWCA 771.
9. In Toray, the Barber window had been closed by exercise of the power of amendment and in Trustee Solutions it was held that the attempts at closure had been ineffective and therefore, the window remained open. In that case, both the court and the Court of Appeal went on to consider whether the whole or part of a pension fell

within section 73(3)(b) Pensions Act 1995 for the purposes of priorities on a winding up.

10. The issue was whether in the case of a male member of the scheme with accrued pensionable service during the Barber window who had attained the age of 60, there arose an “entitlement to payment of pension”. Obviously, such an individual would have a tranche of service pre 17 May 1990 which accrued by reference to an NRD of 65 and his Barber window service accruing by reference to an NRD of 60.
11. Lewison J spelt out that a male member with service accrued in the Barber window had an absolute right to take that pension at 60 by way of European law. He concluded that as the rules of the Scheme did not permit a split pension, if a member wishes to take such a pension, he must retire at 60 and accept the application of an early retirement pension upon the remainder of his entitlement, the employer being unable to refuse consent to such early retirement, since such a refusal would be a breach of European law.⁴ Accordingly, he found that such a person has a right to the immediate payment of pension once he attains 60 and therefore, if they had attained 60 at the date of the winding up of the scheme, fell within section 73(3)(b). (He came to a similar conclusion in *Toray*.)
12. More importantly for our purposes, he had described the rights of members with Barber window service, in the following way:

⁴ See paras 61 and 62 of the judgment.

“A male member of the Scheme who has entitlement to pension accrued during a Barber window has the right to take pension accrued during that period at age 60. That is a right conferred upon him by European law. Moreover a female member had a right under the Scheme to retire at 60 and would have retained that right unless and until the Scheme was validly amended. An amendment of the Scheme cannot retrospectively remove accrued rights. The entitlement of which section 73(3)(b) speaks is not restricted to any particular kind of entitlement. It applies to an entitlement under European law just as much as it applies to an entitlement under the rules of the Scheme.”

13. However, the Court of Appeal in Cripps concluded that only that part of the pension payable at 60 as a result of accrual during the Barber window, fell within section 73(3)(b). On Patten J’s analysis of Sir Peter Gibson’s reasoning⁵, the Cripps decision, although strictly concerned with priorities under section 73, should be applied to any situation in which a member retires at 60 with tranches of pension accrued during the Barber window (with an NRD of 60) and other tranches accruing at an NRD of 65.

A quick outline of the Scheme in Foster Wheeler

14. The Scheme was established in 1956. The 1979 Deed was in force at the time of the Barber judgment and contained a definition of NRD which was 65 for men and 60 for women. Early retirement was available with employer consent after the age of 50 but was subject to a reduction of ½ % for each month before NRD. Lastly, the

⁵ (the only reasoned judgment)

amendment power was subject to a proviso protecting accrued rights.

15. After the Barber judgment, temporary measures were adopted (but never formalised) under which women joining after 1 April 1990 had an NRD of 65 and both men and women requesting early retirement having attained 60 would be granted it without the application of any early retirement factors (for men between 60 and 65). Eventually, in 1992 these measures were distilled into a booklet and announcement. The evidence as to who received either the booklet or the announcement was patchy and it was also significant that the booklet contained the usual proviso that the trust deed and rules were overriding.
16. The NRD change was effected by a revised deed in August 1993, purportedly with effect from 1 June 1992. (It was accepted by all that on any basis, it could only take effect from the date on which the deed was executed.) The 1993 Deed also contained a new provision in relation to early retirement which permitted actuarial reduction for periods before the member's 60th birthday.
17. There were various changes to the deed and rules but the next significant change occurred in April 2002. A new early retirement rule was introduced in the following form:

“If a Member is not entitled to a pension under sub-Rule 7(1) he may with the consent of the Company before Normal Retirement Date and after his 50th birthday elect to retire from Service and to receive an immediate pension of an

annual amount calculated as in sub-Rule 17(3)(a) but reduced to such extent (if any) as the Trustees shall, with the advice of the Actuary, consider to be reasonable and determine to be appropriate having regard to, among other things the period between the date of its commencement and the Member's 60th birthday.”

18. The early retirement rule was amended once again by virtue of a deed dated 30 April 2003 so as to provide:

“If a Member is not entitled to a pension under sub-Rule 7(1) he may with the consent of the company before Normal Retirement Date and after his 50th birthday elect to retire from Service and receive an immediate pension of an annual amount calculated as in sub-Rule 17(3)(a) but reduced to such extent (if any) as the Trustees shall, with the advice of the Actuary, consider to be reasonable and determine to be appropriate having regard to amount other things in respect of Pensionable Service prior to 1 April 2003, the period between the date of its commencement and the Member's 60th birthday and in respect of Pensionable Service after 31 March 2003, the period between the date of its commencement and the Member's Normal Retirement Date.”

The Labyrinth

19. Other than the bare bones set out above, the factual background of the Foster Wheeler case itself is very complex and little will be gained by my setting all of it out here. I will only refer to the

essential elements and leave you to plough through the precise details if it proves necessary for you to do so.

(i) estoppel

20. First I should mention that there are numerous issues which were canvassed by the employer concerning estoppel/contract based on various booklets and announcements. It is not very instructive to go into each of them. Suffice it to say that reliance on joining the scheme on the basis of policy statements and the like were either not pursued or dismissed by the judge as ineffective.

21. It is helpful however, to note that Patten J reconsiders all the recent authorities on the application of estoppel in the pensions context⁶. Not only did he conclude that the evidence as to distribution of the 1992 booklet was insufficient, but went on to re-examine the need for more than passive acceptance. He held, not surprisingly, that lack of complaint was insufficient to be taken as an effective waiver of the members' contractual right to rely upon the provisions of the scheme which required changes to be made pursuant to the amendment power. Furthermore, he noted the reference to the supremacy of the rules in the 1992 booklet which was being relied upon as the basis for the estoppel and concluded:⁷

“the April 1992 booklet also contains the proviso under which the provisions of the Trust Deed and Rules were

⁶ That is, Icarus (Hertford) Ltd v Driscoll [1990] PLR 1, ITN v Ward [1997] PLR 131, Redrow v Pedley [2002] EWHC 983 (Ch), Trustee Solutions (supra) and Steria Ltd v Hutchison [2006] EWCA Civ 1551.

⁷ See para 90

expressly preserved in priority to the contents of the booklet. Although this caveat does not appear in the annual reports, it must be taken to have operated as an assurance that the Trust Deed and Rules (as amended in accordance with cl9) remained at all times the governing instrument. In these circumstances, an argument that it would be unjust to require the Trustees or the Company to adhere to a date of equalisation which corresponds to the date of execution of the 1993 Definitive Deed and Rules becomes unsustainable.”

The argument had been that members were estopped from claiming an NRD of 60 in respect of service after 1 June 1992 on the basis of the announcements and booklets sent out in 1992 announcing the increase in NRD.

(ii) retrospective amendment

22. It was also accepted that under Barber principles, equalisation measures could not take effect retrospectively so as to cut down rights afforded and benefits already accrued as a result of the imposition of European law. Such measures could only be valid from the date on which the relevant deed was actually executed.⁸ It was common ground that the rules as subsequently amended could not remove or abrogate the rights of members to retire and to take their pension entitlement accrued on the basis of an NRD of 60.

(iii) the true nature of the mixed rights

⁸ see para 81 + 92

23. Patten J also sets out a useful analysis of the nature of the rights of a member with service during the Barber window. He explained that:

- (i) a female with a “mixed NRD” in the sense of pension entitlement accrued both with an NRD of 60 and for different periods, at 65, was already accruing pension with an NRD of 60 before 17 May 1990 and therefore, was unaffected by the application of art 119 during the Barber window. Subsequent changes to increase NRD to 65 could only be prospective and therefore, did not affect her accrued rights. The change for her arose as a result of subsequent accrual of benefits once the rules had been validly amended to close the window.
- (ii) in the case of male members, their right to a pension based on an NRD of 60 accrued only during the Barber window and was the effect of the direct application to their pension rights of art 119⁹. It was accepted that that entitled a male member under European law to take his NRD 60 pension rights at 60 notwithstanding the changes implemented by the 1993 Deed.¹⁰

(iv) How should the rights be implemented where a scheme makes no provision for split pensions and limited provision for reduction for early payment?

24. If Lewison J was right in *Trustee Solutions and Toray* and the right to take one benefits accrued during the Barber window once one attains the age of 60 is to be effected in the case at least, of the

⁹ see para 92

¹⁰ See para 16 above.

Toray scheme, by way of the early retirement provisions and the imposition of mandatory consent to such early retirement, are the tranches of benefit which accrued by reference to an NRD of 65 to be reduced for early payment?

(a) early payment

25. First, it was necessary to consider the precise terms of the rules. A member could retire after the age of 50, with company consent and on doing so would receive an immediate pension under rule 8 reduced

“to such extent (if any) as the Trustees shall, with the advice of the Actuary, consider to be reasonable and determine to be appropriate having regard to, among other things, the period between the date of its commencement and the Member’s 60th birthday.”¹¹”

Patten J not very surprisingly, concluded that the reference to “among other things” did not override the express reference to the period for reduction ending on the member’s 60th birthday and therefore, did not open the door to reduction in respect of the period between 60 and 65. Furthermore, the change to the rules in 2003¹² was intended to allow actuarial reduction for the period between a member’s 60 and 65th birthdays but as a result of the proviso to the amendment power, could only and was only intended to take effect prospectively. It only applied therefore, to benefits accrued after the relevant deed was executed.

¹¹ See para 17 above.

¹² See para 18 above.

26. The answer therefore, was that one could not rely on the 2002 early retirement rule in order to reduce all benefits accrued with reference to an NRD of 65 where such benefits were taken early with tranches of benefit due at 60. The rules only permitted such a reduction for benefits accrued after the 2003 provisions took effect.
27. You may well think that such a construction argument was audacious, foolhardy of even desperate. In any event, the outcome was not terribly surprising.

(b) what modifications to the rules are necessary to implement the effect of mixed NRDs then?

28. In the light of the changes to the rules which had been made in 1993, 2002 and 2003 and the effect of European law, what pension rights did mixed NRD members have then?
29. First, it was reiterated that the ECJ in *Coloroll* had emphasised that measures taken by an employer and trustees to bring a scheme into conformity with the equal pay principle had to result in men and women receiving the same pay for the same work but did not specify a particular level of pay. Therefore, the steps taken to close the Barber window need not replicate the interim solution imposed as a matter of European law during the window period.

30. It was argued therefore, that to give effect to the right to receive one's Barber window benefits at 60, it was necessary to imply a split pension regime upon the Scheme. However, Patten J began from the premise that it was accepted that the changes in the rules in 1993 had been effective to close the Barber window although they continued to provide for a single pension payable by reference to an NRD of 65. It was in these circumstances that Lewison J in *Toray* found a solution by construing the early retirement rules to allow all benefits to be taken at 60 without consent/with deemed consent.
31. The judge concluded quite rightly in my opinion, that it cannot be correct that the imposition of a split pension regime is the only proper method of implementing the equal pay principles. This undermines the wide margin of discretion in the hands of trustees and employers as to future changes to a scheme, referred to in *Coloroll* itself.¹³
32. Interestingly however, he concluded that a split pension regime could have been an effective means of enforcement of the mixed NRD member's rights. He stated:

“ . . . Mr Bryant submitted that because female employees were entitled to retire during this period [the Barber window] at 60 and to take the entirety of their pension on retirement, a similar right had to be conferred on their male counterparts by permitting them to retire early at 60 on a full pension. I am not persuaded about that. The right of female employees to a full pension at 60 was due to their

¹³ See paras 117 +118 of the judgment.

having accrued their pension rights up to then by reference to an NRD of 60 under the Scheme. No question of early retirement arose. But the decision in Barber that the principle of equalisation of retirement dates should not apply before the commencement of the Barber window on 17 May 1990 meant that male employees had a right to accrue and take only part of their pension by reference to an NRD of 60. In principle, I cannot see why the creation of a split pension scheme would not have given to them the degree of equalisation to which they were entitled under art 119 consistently with the reasoning in Cripps.”¹⁴

33. However, given the actual steps taken to close the Barber window, Patten J concluded that in the Foster Wheeler case, modification of the early retirement rule was the means by which effect could be given to the rights created as a result of European law.
34. He pointed out that notwithstanding the need for consent to early retirement under rule 8, it was accepted that after the execution of the 1993 Deed, a female member retained her right to retire at 60 and to take her NRD 60 pension unaffected by the rule changes. Her right to do so was not as a result of European law but was an accrued right, preserved by the proviso to the amendment power.
35. However, under the 1993 Deed such a right could only be given effect by means of the early retirement rule. Necessarily, that rule had to be modified to give effect to her rights and to those of male members whose benefits/rights had “piggy-backed” on those of female members during the Barber window.

¹⁴ See para 120 of the judgment.

36. The extent of the necessary modification is to be determined therefore, by female members' rights and not by the application of the Treaty¹⁵ and need go no further than what is required on ordinary principles to give effect to the rights being enforced. The logic is therefore, that since deeming of consent under the early retirement rule is sufficient to give effect to female rights (and as a consequence, male rights), nothing else is necessary and there can be no justification for further re-writing of the Scheme.
37. To put the matter another way, the fact that the Barber window was closed by the execution of the 1993 Deed by imposing a prospective NRD of 65 for both sexes, could not take away a female's accrued right to take part of their pension at 60. The 1993 Rules were silent as to this right. The principle of equalisation operated to confer the same "piggy-backing" rights for men. As the women's right could be carried into effect by the implication of consent to early retirement, the same route should be adopted to give effect to the "piggy-backing" rights. The judge concluded that:

“ . . . on analysis, it is the implication of terms necessary to give effect to female employees' rights which determines the regime applicable to men.”¹⁶

38. For Patten J it was conclusive that the employer and trustees had chosen to close the Barber window in the way in the form of the 1993 Deed. Having concluded that there was an effective closure,

¹⁵ See para 123 of the judgment.

¹⁶ See para 125 of judgment.

the judge found it impossible to conclude that a split pension regime should nevertheless be imposed in order to give effect to the Barber rights. The European court expressly stated that the discretion was that of the employer/trustees. The fact they might have chosen a different method of implementing the Barber judgment, is therefore, irrelevant.

39. The judge found further comfort in the judgment of Neuberger J (as he then was) in Bestrustees v Stuart [2001] PLR 283 in which he determined that one must give effect as much as possible to the attempts made to equalise and where they were ineffective or incomplete, the disadvantaged class should be accorded the same rights as the advantaged class. The approach should be to interfere as little as possible. Patten J took the same view and therefore, concluded that the implication of consent in the early retirement rule was the most minimal change required to make the 1993 Rules Barber compliant.

40. Finally, he returned to the question of whether the tranches of pension accrued with reference to an NRD of 65 should be actuarially reduced when taken at 60, (not as a matter of construction which he had already dealt with and rejected), but as a matter of law. He concluded that in the light of the change to rule 8 actually made in 1993, namely that there be no actuarial reduction between 60 and 65, it was impossible to conclude that such a result was necessarily implied by law. The trustees and the employer could have done so but did not. His conclusion was fortified by the decision in Smith v Avdel in which it was held that the

implementation of art 119 was not affected by the financial consequences for the employer.

41. The effect of the decision was therefore, that a member with a mixed NRD, having attained 60 could take **all** his or her pension early, consent being implied and with no reduction applied for the period between 60 and 65 whether as a matter of implication or construction of the rules. He could not whether at the company's or his election take only part of his pension and continue to accrue service under the Scheme.

(c) application of late retirement factors

42. It was agreed that where a mixed NRD member took his benefits after the age of 60, a late retirement factor would have to be applied to the NRD 60 benefits when the pension came into payment.
43. Finally there were a few more desperate attempts by the company to seek to introduce a split pension regime through the back door. I won't trouble you with them here. They all failed but are set out at paragraphs 134-146 of the judgment.

Conclusion

44. Although we await the Court of Appeal's take on all of this, Patten J's judgment is a very useful round up and analysis of all the principles with which one has to grapple when considering the equalisation labyrinth. It is always a relief to find most of the arguments in one place!

S.J.Asplin QC

19 May 2009