Neutral Citation Number: [2023] EWCA Civ 20

Case No: CA-2022-000583

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES INSOLVENCY AND COMPANIES LIST
LORD JUSTICE NUGEE - [2022] EWHC 243 (CH)
MR JUSTICE NUGEE - [2020] EWHC 98 (CH); [2020] 2 CMLR 27

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/01/2023

Before :

LORD JUSTICE LEWISON
LORD JUSTICE NEWEY
and
LORD JUSTICE BAKER

- -

Between :

(1) MARK JOHN WILSON
(2) THOMAS ALEXANDER ROBINSON
(Joint trustees in Bankruptcy of Michael Bernard McNamara) — **Appellants**

- and –

MICHAEL BERNARD McNAMARA — **Respondent**

- -
- -

Deok Joo Rhee KC (instructed by **Eversheds Sutherland**) for the **Appellants**
George Peretz KC and John Briggs (instructed by **Edwin Coe LLP**) for the **Respondent**

Hearing dates : 14-15/12/2022

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 16/01/2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Lord Justice Lewison:

Introduction

1. Mr McNamara, an Irish national, was adjudicated bankrupt in England on his own petition. The underlying issue in this litigation is whether his entitlement under a pension scheme established in Ireland ("the Simcoe Scheme") forms part of his bankruptcy estate. Mr McNamara says that it does not; whereas his trustees in bankruptcy say that it does. Mr McNamara's argument was that the UK legislation which, on its face, did not exclude his entitlement under the Simcoe Scheme from forming part of his bankruptcy estate was incompatible with EU law. That question came before Nugee J in 2019 in the form of a preliminary issue. He decided that the UK national legislation (which on its face differentiates between UK pension schemes and foreign pension schemes) might be incompatible with EU law. He thus referred questions to the CJEU. The particular issue on this appeal is whether, when the case returned to these shores, Nugee LJ (as he had by then become) was wrong to deny the trustees the opportunity of arguing that even though the UK legislation was indirectly discriminatory (as the CJEU had decided), it was objectively justified and proportionate. The judge's judgment on the first hearing is at [2020] EWHC 98 (Ch), [2020] Pens LR 15; and his judgment on the second hearing is at [2022] EWHC 243 (Ch), [2022] BPIR 851.

2. The trustees put their case in three different ways. First, they say that as a result of the way in which the CJEU answered the questions referred, the judge was obliged to consider the question of justification. Second, they say that as a matter of national procedural law they were entitled to argue the question of justification as of right. Third, they say that even if the judge was not obliged to consider that question, and they were not entitled as of right to argue it, his discretionary decision to refuse the trustees permission to argue it was wrong.

How the issues came before the judge

3. The issues came before the judge in the form of a preliminary issue ordered by ICCJ Mullen, largely on agreed or assumed facts. There was originally one contested issue of fact (whether Mr McNamara was a "worker") in relation to which ICCJ Mullen directed evidence, but ultimately that question was not pursued.

4. He did not direct the service of statements of case; and no one asked him to.

5. The way that the issue was framed was whether by reason of various provisions of EU law, and in particular article 49 of the Treaty on the Functioning of the European Union ("TFEU"), Mr McNamara's interest in the Simcoe Scheme was:

> "to be treated for the purposes of section 11(1) and (2)(a) of the Welfare Reform and Pensions Act as rights under an 'approved pension arrangement' and hence excluded by that statutory provision from his bankruptcy estate."

The underlying facts and legislation

6. The agreed or assumed facts on which the judge reached his first decision were as follows.

7. Prior to his bankruptcy Mr McNamara was engaged in the building and property development business through Michael McNamara & Co ("MMC"), a company operating largely if not exclusively in Ireland.

8. On 20 December 2002 MMC as employer and trustee established an occupational pension scheme for Mr McNamara ("the MMC Scheme") with a payment of €6,161,256, paid as a single premium on a pension policy issued by Irish Life ("the Policy"), under which benefits would be paid on Mr McNamara's retirement or earlier death. The Policy was unit-linked, and the premium secured 6,161,256 units in a fund called the Future Fund. The asset underlying the Future Fund was a shopping centre in Dublin called St Stephens Green Shopping Centre. The policy was governed by Irish law.

9. In November 2010 MMC was put into receivership in Ireland at the suit of the National Asset Management Agency which had acquired MMC's debts to the Bank of Ireland. Its failure resulted from the crash in the Irish property market.

10. On 16 July 2009 Mr and Mrs McNamara established a new Irish company, Simcoe Industries Ltd ("Simcoe"), with Mr McNamara as director, and Mrs McNamara as director and secretary. Mr McNamara was a director of Simcoe from 16 July 2009 to 14 April 2012. He was also an employee of Simcoe from 1 December 2009 to 31 January 2011.

11. By Deed dated 31 August 2009 ("the Deed") Simcoe as Principal Employer established the Simcoe Scheme, with effect from that date, with Marine House Trustee ("Marine House") as pensioneer trustee and Mr and Mrs McNamara as additional trustees. The Simcoe Scheme is governed by Irish law.

12. The Simcoe Scheme was established as a retirement benefits scheme as defined in section 771 of the Taxes Consolidation Act 1997 (the applicable Irish legislation) ("TCA 1997"), to provide relevant benefits as defined in section 770(1) TCA 1997 for such of the employees of Simcoe and associated employers as should be included therein as Members. Under the rules annexed to the Deed, a person was eligible for inclusion in the Simcoe Scheme if he were an employee (which for this purpose included directors and officers) of the employers, and the employers so decided. The members of the Simcoe Scheme have in fact been Mr McNamara, Mrs McNamara and their son Ronan McNamara.

13. By clause 3 of the Deed the Simcoe Scheme was to be established so as to be capable of being approved by the (Irish) Revenue Commissioners pursuant to section 772 TCA 1997 and of being treated by the Revenue Commissioners as an exempt approved scheme pursuant to section 774 TCA 1997. By letter dated 28 October 2009 an (Irish) Inspector of Taxes wrote to Marine House on behalf of the Revenue Commissioners to the effect that the Simcoe Scheme had been approved as a retirement benefits scheme for the purposes of Part 30, chapter 1 of TCA 1997, and

would be treated as an exempt approved scheme for the purpose of section 774 TCA 1997, in each case with effect from 30 August 2009.

14. By clause 18 of the Deed if a member was entitled to a benefit under any other retirement benefits scheme, the trustees had power to accept a transfer payment in accordance with rule 9 of the rules. Rule 9 empowered the trustees to accept all or any of the assets of the other scheme relating to the Member. By Deed of Assignment dated 7 December 2009 MMC as trustee of the Policy assigned the Policy to Marine House and Mr and Mrs McNamara as trustees of the Simcoe Scheme, to hold the Policy subject to the provisions of the Policy documents and endorsements thereto, and in consideration of the Simcoe Scheme assuming the obligation to provide a pension appropriate to the Policy.

15. In the period ending 31 August 2011, the trustees of the Simcoe Scheme made certain payments to Mr McNamara. (He was born in 1950 and so had turned 60 in 2010). There was a dispute whether those payments represented his full entitlement to benefits under the Simcoe Scheme, but it was agreed that it should be assumed for the purposes of the preliminary issue that they did not, and that he had not received his full entitlement by the time of the commencement of his bankruptcy on 2 November 2012.

16. By Deed dated 26 July 2011 Mr McNamara was removed as trustee of the Simcoe Scheme by Simcoe (acting as principal employer), leaving Marine House and Mrs McNamara as the trustees.

17. On 13 April 2012 Simcoe was registered under the (UK) Companies Act 2006 as an overseas company that had established a UK establishment. The application for registration gave the date the establishment was opened as 1 December 2011, with an address in London, and with Mr McNamara as director and Mrs McNamara as director and secretary.

18. By the time of his bankruptcy it was agreed that Mr McNamara had moved his centre of main interests to the UK.

19. The agreed or assumed facts did not contain any facts which might have been relevant to the question of objective justification.

The legal framework

20. Sections 11 and 12 of the Welfare Reform and Pensions Act 1999 ("WRPA 1999") deal with the pension rights of those made bankrupt in the UK. Section 11 "(as amended)" relevantly provides:

> "**11 Effect of bankruptcy on pension rights: approved arrangements**
>
> (1) Where a bankruptcy order is made against a person on a bankruptcy application made or petition presented after the coming into force of this section, any rights of his under an approved pension arrangement are excluded from his estate.
>
> (2) In this section 'approved pension arrangement' means—

> (a) a pension scheme registered under section 153 of the Finance Act 2004
>
> …
>
> (h) any pension arrangements of any description which may be prescribed by regulations made by the Secretary of State
>
> …
>
> (11) In this section—
>
> …
>
> (b) 'pension scheme' has the meaning given in section 150(1) of the Finance Act 2004 and 'registered pension scheme' means a pension scheme registered under section 153 of the Finance Act 2004."

21. Section 12 relevantly provides:

> "**2 Effect of bankruptcy on pension rights: unapproved arrangements**
>
> (1) The Secretary of State may by regulations make provision for or in connection with enabling rights of a person under an unapproved pension arrangement to be excluded, in the event of a bankruptcy order being made against that person, from his estate for the purposes of Parts VIII to XI of the Insolvency Act 1986.
>
> (2) Regulations under this section may, in particular, make provision—
>
> (a) for rights under an unapproved pension arrangement to be excluded from a person's estate—
>
> (i) by an order made on his application by a prescribed court, or
>
> (ii) in accordance with a qualifying agreement made between him and his trustee in bankruptcy;
>
> (b) for the court's decision whether to make such an order in relation to a person to be made by reference to—
>
> (i) future likely needs of him and his family, and
>
> (ii) whether any benefits (by way of a pension or otherwise) are likely to be received by virtue of rights of his under other pension arrangements and (if so) the extent to which they appear likely to be adequate for meeting any such needs;

> (c) for the prescribed persons in the case of any pension arrangement to provide a person or his trustee in bankruptcy on request with information reasonably required by that person or trustee for or in connection with the making of such applications and agreements as are mentioned in paragraph (a).
>
> (3) In this section—
>
> 'prescribed' means prescribed by regulations under this section;
>
> 'qualifying agreement' means an agreement entered into in such circumstances, and satisfying such requirements, as may be prescribed;
>
> 'unapproved pension arrangement' means a pension arrangement which—
>
> (a) is not an approved pension arrangement within the meaning of section 11, and
>
> (b) is of a prescribed description."

22. Regulations have been made under both section 11(2)(h) and section 12 (1) WRPA 1999 (among other enabling provisions). Section 150 (1) of the Finance Act 2004 defines a "pension scheme"; and section 150 (7) defines an "overseas pension scheme." Part of that definition requires compliance with any requirements prescribed by HMRC. The substantive requirements are contained in regulation 2 of the Pension Schemes (Categories of Country and Requirements for Overseas Pension Schemes and Recognised Overseas Pension Schemes) Regulations 2006. That applies section 11 to a pension scheme to which section 308A of the Income Tax (Earnings and Pensions) Act 2003 applies. Section 308A, in turn, applies to a "qualifying overseas pension scheme". In order for an overseas pension scheme to be a "qualifying overseas pension scheme" the scheme administrator must give notice to HMRC; and give certain undertakings to HMRC. These formal conditions are contained in Schedule 33 para 5 to the Finance Act 2004.

23. The Simcoe Scheme was not registered under section 153 of the Finance Act 2004; and did not satisfy the formal requirements required by Schedule 33 para 5 of the Finance Act 2004.

24. Article 49 of the TFEU provides that within the framework of the treaty, restrictions on freedom of establishment of nationals of a member state in the territory of another member state are prohibited.

The competing arguments before the judge at the first hearing

25. At the first hearing Mr Peretz KC, for Mr McNamara, argued that the UK legislation discriminated between UK workers and migrant workers. The latter were likely to have accrued pension rights under foreign pension schemes which had not been registered with HMRC; and there was no particular reason why they should apply for recognition under section 153 of the Finance Act 2004, and many reasons why they would not. Legislation that discriminated between UK workers and migrant workers

from other EU member states amounted to a restriction on freedom of movement or freedom of establishment; and hence was incompatible with EU law. The consequence was that section 11 of WRPA 1999 should be read down so as to accommodate the Simcoe Scheme.

26. It is important to note how this argument was put in the skeleton argument before the judge.

27. There are, broadly speaking, two relevant forms of discrimination on the ground of nationality in EU law: direct discrimination and indirect (or covert) discrimination. Direct discrimination is generally unlawful without more. But provisions of national law which amount to indirect discrimination are not unlawful if they are justified by objective considerations independent of the nationality of the workers concerned, and if they are proportionate to a legitimate aim pursued by the national law.

28. It is, in my judgment, clear from Mr McNamara's skeleton argument before the judge that his case was advanced on the basis of indirect discrimination alone. Thus at paragraph 10 it was asserted that the UK Government did not assert that there was any reason of public policy that would provide objective justification for discrimination on the ground of nationality. At paragraph 12 it was asserted that the Insolvency Service had accepted that the national legislation was discriminatory and could not be objectively justified. At paragraph 81 reference was made to Case C-237/94 *O'Flynn v Adjudication Officer* [1998] ICR 608 (which concerned indirect discrimination); and it was said that a measure was indirectly discriminatory and (subject to objective justification) contrary to free movement if it was intrinsically more likely to affect migrant workers than national workers. Paragraph 86 returned to the question of objective justification. In Mr McNamara's skeleton argument in reply to the trustees' skeleton argument it was said at paragraph 17 that the trustees did not argue that any restriction or discrimination would be objectively justified.

29. Ms Rhee KC's argument for the trustees majored on the question whether the impugned legislation amounted to a restriction on free movement or freedom of establishment at all. It is undoubtedly the case that the trustees did not advance (even as a fall-back position) the argument that if they were wrong on their primary argument the indirect discrimination could, nevertheless be objectively justified. Nor did they argue the later point orally at the hearing.

The first hearing

30. The hearing lasted over one and a half days in early November 2019. In the course of the hearing (we were told during Mr Peretz' opening) the judge raised the question whether instead of registration under section 153 of the Finance Act 2004 there was a potential alternative route to exclusion from Mr McNamara's bankruptcy estate; namely as an overseas pension scheme, thus engaging section 11 (2) (h) (rather than 11 (2) (a)) of WRPA.

31. It might have been said that this strayed beyond the strict terms of the preliminary issue; but no objection was taken at the time. On the contrary, Ms Rhee adopted the judge's point at least in part; and submitted that, on the assumption that the Simcoe Scheme was an overseas pension scheme, the formal requirements of para 5 of Schedule 33 to the Finance Act 2004 were not particularly onerous or burdensome;

and for that reason could not be regarded as relevant restrictions. Nor was anything said about the possibility of objectively justifying the less onerous restrictions to qualifying as an overseas pension scheme. The judge proceeded on the basis that the Simcoe Scheme was, or probably was, an overseas pension scheme. No objection was taken to his doing so; and the fact that he did so is not a ground of any appeal to this court.

32. Towards the end of the hearing the judge discussed with counsel what form of relief would be appropriate in the event that unlawful discrimination were found to exist. He did that so that the question would not have to be revisited in the event that unlawful discrimination were to be found.

33. At the conclusion of the hearing the judge reserved judgment.

34. Although neither side had asked him to make a reference to the CJEU, the judge decided that the answer to the question whether the impact of insolvency on pension rights is within the scope of article 49 TFEU was "self-evidently a matter of EU law and … critical to the decision of this court." He therefore decided to make a reference.

35. We were told that he circulated a draft of his judgment in the usual way, although we do not know the precise date that he did so. It is likely to have been a few days before the hand down. The judge handed down his judgment on 23 January 2020. He did not make any order at that stage; but asked the parties to settle a draft form of order for reference for his approval. It took some time for that to be done, but in the end the draft was agreed; and the judge sealed it on 30 March 2020. During the whole of that process (both before and after receiving the judgment in draft) the trustees did not suggest that the judgment should be re-opened in order to permit them to advance the case on objective justification. Nor did the trustees seek to argue that if the judge were to allow the question of objective justification to be argued on the assumption that there were elements of the national legislation that amounted to indirect discrimination but which were nevertheless objectively justified, that would avoid the delay and expense of a reference to the CJEU.

36. That would, as Mr Peretz submitted before us, have required a wholesale change in the preliminary issue, both as to the possible agreement of further facts; or directions for evidence to be given.

The reference to the CJEU

37. The judge referred two questions to the CJEU by his order of 23 January 2020. The order for reference contained a summary of arguments of the parties, which said nothing about objective justification. The parties had the opportunity to make written observations to the CJEU. Mr McNamara's observations repeated the point in paragraph 52 that the trustees had advanced no grounds for objective justification; and referred also to the position taken by the relevant UK public authority (i.e. the Insolvency Service).

38. The trustees' observations acknowledged in paragraph 33 that it was "settled caselaw that unless objectively justified and proportionate to its aim" a provision of national law is indirectly discriminatory if it is intrinsically liable to affect nationals of other Member States more than nationals of the State whose legislation is at issue.

Paragraph 40 of those observations did contain an assertion that any indirect discrimination was in fact objectively justified and proportionate to its aim.

39. The European Commission also made written observations in which they pointed out at paragraph 89 that objective justification was not raised as a discrete point by the national court; nor did it receive much attention in the national proceedings. But their observations did deal with that question "in order to provide a full picture" of EU law. They stressed, however, that whether such justification existed was a matter for the national court.

40. The CJEU gave judgment on 11 November 2021 under the name *BJ and OV v Mrs M & others* (Case C-168/20), [2022] 1 WLR 3633. It gave its judgment without having the opinion of the Advocate-General (a procedure which is adopted if a case is not thought to raise a new point of law). At paragraphs [80] to [86] the court discussed the ingredients of indirect discrimination and concluded at [87]:

> "In the light of the principles enshrined in the case law … it must be found, in essence as was found by the referring court, that, while the preclusion from bankruptcy protection under Section 11 of the WRPA 1999 applies indistinctly to migrant workers and to national workers, the intrinsic nature of that provision and, in particular, the fact that it does not permit applications for approval of overseas pension schemes to be made following bankruptcy – which is for the referring court to ascertain – is liable, in practice, to affect a substantially higher proportion of migrant workers than national workers and there is a consequent risk that it will place migrant workers at a particular disadvantage, as a result of which that provision of national law must be regarded as indirectly discriminatory, unless it is objectively justified and proportionate to the aim pursued."

41. At [93] it repeated its conclusion that section 11 of the WRPA 1999 was a prohibited restriction on freedom of establishment "unless justified within the meaning of EU law". At [106] it repeated the point that section 11 amounted to a prohibited restriction on freedom of establishment "unless such a restriction is justified within the meaning of EU law, which must therefore be examined."

42. At [110] the court noted that the UK government had not made any written submissions; which suggested that the unequal treatment could not be justified by an overriding reason relating to the public interest. At [111] it also noted that the referring court did not specifically address any potential justification; and noted at [112] that the Commission had suggested some reasons which were "potentially" an overriding reason relating to the public interest. The court continued at [113]:

> "Whilst such an overriding reason relating to the public interest, subject to verification by the referring court, may be valid, it may require further clarification with regard to the specific objective of Section 11 of the WRPA 1999 of aiming to ensure a fair balance between appropriate protection for the interests of the bankrupt and the protection of the financial

> interests of the bankrupt's creditors in satisfying, at least in part, their claims against the bankruptcy estate."

43. The court then moved on to additional criteria required for justification and said at [116]:

> "In that regard, it will be for the referring court to ascertain whether, as regards pension arrangements already tax approved in an EU Member State but not in the United Kingdom, the requirement of additional approval prior to bankruptcy of such pension arrangements by the UK tax authorities as a condition to be satisfied in order for the pension rights in question to qualify for the protection laid down in Section 11 of the WRPA 1999 is proportionate to the objective pursued by that provision."

44. At [118] the court said:

> "Furthermore, it is for the referring court to ascertain whether there is a relationship between the tax rules relating to the legislation and to the regulation of pension schemes and the purpose of the national provision at issue which appears to consist of ensuring, in bankruptcy proceedings, a fair balance between the interests of the bankrupt in excluding his or her pension rights from the bankruptcy estate and those of the creditors in having those rights included in the bankruptcy estate as far as is possible."

45. Further references to the role of the referring court are contained in paragraphs [121] and [123]. Finally in the *dispositif* the court ruled:

> "Article 49 TFEU must be interpreted as precluding a provision of the law of a Member State which makes, in principle, the full and automatic exclusion from the bankruptcy estate of pension rights accrued under a pension scheme dependent on the requirement that, at the time of the bankruptcy, the pension scheme concerned be tax approved in that Member State, where that requirement is imposed in a situation where an EU citizen, who had, prior to becoming bankrupt, exercised his right of free movement by moving permanently to that Member State for the purposes of pursuing a self-employed economic activity there, has pension rights accrued under a pension scheme established and tax approved in his home Member State, unless the restriction on freedom of establishment constituted by that national provision is justified in so far as it furthers an overriding reason relating to the public interest, is appropriate to ensure that the objective it pursues is achieved and does not go beyond what is necessary to achieve that objective."

The effect of the judgment of the CJEU

46. It is common ground that because the reference to the CJEU was made before the UK's final withdrawal from the EU, the judgment is binding in its entirety.

47. Ms Rhee KC, on behalf of the trustees, argues that the judge was required to apply the whole of the CJEU's ruling and that entailed an investigation of the question whether the indirect discrimination that the CJEU found to exist was capable of objective justification. That is the import of the CJEU's repeated statement that whether the indirect discrimination is justified is for the national court to determine.

48. There is no doubt that a ruling by the CJEU on a question of EU law on a reference made before 31 December 2020 is binding on a national court; and that the national court must give full effect to the CJEU's interpretation of EU law: (Case C-614/14) *Ognyanov v Sofiyska gradska prokuratura* at [28]. The CJEU's ruling is contained in its *dispositif*, although like any judgment, it must be interpreted in the light of the reasons given for the ruling: *Arsenal Football Club plc v Reed* [2003] EWCA Civ 93, [2003] CMLR 25 at [31]. Moreover, unlike a decision *inter partes* given by an English court, a ruling by the CJEU has effect across the whole of the EU, and must be applied by national courts in all Member States. In other words, it is not a ruling addressed to the national court alone. Accordingly, as Wyatt and Dashwood's European Union Law states at 217:

> "The questions referred should be couched in terms which pose a general question of EU law, rather than the concrete issue as it falls to be decided in the instant case…"

49. It is equally clear that the CJEU has no jurisdiction to decide questions of fact that arise in national proceedings. Its jurisdiction is confined to questions of EU law. But what it can do is to distinguish between those parts of an overall dispute that can properly be characterised as questions of EU law, and those parts of a dispute that are properly regarded as questions of fact to be decided by the national court.

50. Once the CJEU has given its ruling on a question of EU law on a reference made by the national court, the national court may (but is not obliged to) hear the parties again and receive further arguments and evidence, provided that it gives full effect to the CJEU's interpretation of EU law: *Ognyanov* at [30].

51. Moreover, it is a settled principle of EU law that (subject to the principles of equivalence and effectiveness) disputes are governed by national procedural law: (Case C-312/93) *Peterbroeck v Belgian State* at [12]. The CJEU has no power to direct a national court about the procedure that it must follow. The judge held at [46] of the judgment under appeal that all that the CJEU was doing in stating that certain matters were for the referring court to ascertain, was to delineate what fell within the competence of the CJEU and what remained within the competence of the national court.

52. Ms Rhee, however, had two answers to this point. Both were based on *Peterbroeck* so it is necessary to explain that case in a little more detail. A corporate partner in a Belgian partnership was charged with non-resident tax under Belgian law on the ground that its seat was in the Netherlands. A complaint about that assessment was

rejected by the Belgian tax authorities. An appeal from the tax authorities lay to the Belgian court of appeal. On appeal from the tax authorities Peterbroeck sought to argue before the court of appeal that the application to a company with its seat in the Netherlands of a higher rate of tax than would have been applied to a Belgian company was an obstacle to freedom of establishment. The Belgian state objected that that argument was out of time under the Belgian tax code. The court of appeal considered that the point was a new point, and that those national provisions prevented the court from raising the point of its own motion; and hence limited the possibility of making a preliminary reference to the ECJ. The court of appeal was the first court with power to make a reference to the ECJ. It referred to the ECJ the question whether that time limit was compatible with EU law. Having stated at [12], as mentioned, that in principle detailed procedural rules are for the member states, the ECJ went on to say:

> "13 The Court has also held that a rule of national law preventing the procedure laid down in Article 177 of the Treaty from being followed must be set aside …
>
> 14 For the purposes of applying those principles, each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration."

53. The answer to the question posed by the Belgian court was:

> "21 The answer to be given to the question submitted by the Cour d'Appel, Brussels, must therefore be that Community law precludes application of a domestic procedural rule whose effect, in procedural circumstances such as those in question in the main proceedings, is to prevent the national court, seised of a matter falling within its jurisdiction, from considering of its own motion whether a measure of domestic law is compatible with a provision of Community law when the latter provision has not been invoked by the litigant within a certain period."

54. Ms Rhee drew two propositions from this case. First, if national procedural rules had the effect of preventing the application of EU law from being fully investigated, then the national rule must be disapplied. The full investigation of the question posed by this case included the question of justification; and therefore the judge was bound to overcome any domestic procedural rule which prevented that. Second, the national court must disregard or disapply any national procedural discretion to refuse permission to argue the question of justification if the potential for justification forms part of the judgment of the CJEU.

55. I do not consider that *Peterbroeck* supports either proposition. First, the provision in issue in that case was a time limit which prevented any court from making a reference to the ECJ at all. In this case, by contrast, a reference was made. Second, in that case what was in issue before the court of appeal was a question of EU law (namely whether there was discrimination in tax treatment) whereas what remains in this case is a question of fact, which is within the competence of the national court. The CJEU has already ruled on the questions of law raised by the reference. Third, the ultimate question, as the court observed at [14], is whether the procedural rule in question "renders application of Community law impossible or excessively difficult". Thus there is in general no objection under EU law to national time limits (such as limitation periods) provided that they do not make the application of EU law impossible or excessively difficult. Ms Rhee did not suggest that the ability of the trustees to raise the question of justification was impossible or excessively difficult. It could have been raised at an earlier stage in the case. Fourth, the ruling was limited to the "procedural circumstances" of that case; and the court also said at [14] that the "proper conduct of procedure" must be taken into account. The proper conduct of procedure is a matter for the national court. That is why, in Case C-201/06 *Cartesio Oktató és Szolgáltató bt*, Advocate-General Poiares Maduro said at [13] that even though the CJEU has provided the answer to a legal question referred the "national court may … end up deciding the case on the basis of a national procedural point of law without ever applying the Community law answer provided by [the CJEU]." The key point in *Peterbroeck* was that under national procedural law the aggrieved taxpayer never had the chance to raise the question of compatibility with EU law before a court; and hence the principle of effectiveness was breached.

56. Ms Rhee sought to draw some comfort from (Case C-173/09) *Elchinov v Natsionalna zdravnoosiguritelna kasa* [2011] PTSR 1308. One of the questions raised in that case was whether a rule of national procedure stating that a lower court was bound by rulings of a higher court was incompatible with EU law if the CJEU had interpreted EU law in a manner which showed that the ruling of the higher court was wrong. The CJEU said:

> "30. It follows from those considerations that the national court, having exercised the discretion conferred on it by the second paragraph of article 267 TFEU, is bound, for the purposes of the decision to be given in the main proceedings, by the interpretation of the provisions at issue given by the Court and must, if necessary, disregard the rulings of the higher court if it considers, having regard to that interpretation, that they are not consistent with European Union law.
>
> 31. In addition, it is appropriate to point out that, in accordance with settled case law, a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of European Union law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, that is to say, in the present case, the national procedural rule set out in para 24 of this judgment, and it is not necessary for the court to request or

> await the prior setting aside of that national provision by legislative or other constitutional means…"

57. Ms Rhee said that in this case the judge was "called upon" to apply EU law by giving full effect to the decision of the CJEU (including investigating the question of objective justification). I do not agree. On the contrary, I agree with Mr Peretz that because of his procedural ruling, the judge was not "called upon" to decide the question of objective justification at all. As Advocate General Poiares Maduro said in *Cartesio*, a dispute may be resolved by national procedural rules, without having to decide the substantive question of EU law.

58. Ms Rhee also relied on differences in nuance between the English version of the judgment and the French version. She said that the latter was more imperative than the former. I did not find that detailed textual analysis illuminating; and in any event the language of the case was English.

59. I agree also with Mr Peretz that Ms Rhee's argument could lead to very surprising consequences. Suppose that, having regard to the very sceptical way in which the CJEU assessed (albeit in principle) the question of objective justification, the trustees decided not to pursue the point. Could it then be said that, nevertheless, the judge was obliged to consider it? Or suppose that the judge had decided that he would allow the trustees the opportunity to plead a statement of case and to adduce evidence on the question, but as a result of consecutive failures to comply with deadlines for producing the evidence contained in court orders their statement of case was struck out, would the judge nevertheless have been obliged to consider the question? The answer in both cases is: obviously not.

60. I do not, therefore accept the trustees' argument that the effect of the CJEU's judgment was that the judge was obliged to consider the question of justification at the resumed hearing.

Were the trustees entitled to argue justification as a matter of national procedure?

61. The second way in which the trustees put the case is that, as a matter of national procedure, they were entitled to argue the question of justification. The litigation was triggered by the trustees' application for:

    i) A declaration that Mr McNamara's entitlement under the Simcoe Scheme vested in them as part of his bankruptcy estate; and in the alternative

    ii) A declaration that a transaction in or about April 2011 by which Mr McNamara released his interest to Mrs McNamara and Marine House was a transaction at an undervalue which ought to be set aside.

62. As I have said, what was before the judge was a preliminary issue ordered by ICC Judge Mullen on 18 June 2019. His order provided for the issue to be decided (with one potential exception) on agreed or assumed facts set out in a schedule to that order. He also directed the filing and service of sequential skeleton arguments (with Mr McNamara's skeleton argument being the first one). The question posed by the order was whether, by virtue of various provisions of EU law, the Simcoe Scheme was to be treated, for the purposes of sections 11 (1) and (2) (a) of the WRPA 1999 as an

approved pension scheme and hence excluded from Mr McNamara's bankruptcy estate.

63. Ms Rhee pointed out, correctly, that the parties' respective positions had not been pleaded. That is true, but since there were directions for the sequential service of skeleton arguments, the trustees knew what the case against them was before they were required to respond. Moreover the court has power under rule 12.11 of the Insolvency (England and Wales) Rules 2016 ("the IR") to direct the delivery of particulars of claim and defence; but the ICC judge was not asked to exercise that power. It was, as I have said, clear from Mr McNamara's skeleton argument that the case was put on the basis of indirect discrimination which is, in principle, capable of being objectively justified. Had the trustees wished to argue that point, or even to reserve their position on it, it would have been open to them to have done so. They could also have asked Judge Mullen to direct that evidence be called on the question of justification.

64. We have not been referred to any specific provision of the IR which deals with preliminary issues; but rule 12.1 applies the provisions of the CPR except in so far as disapplied by or inconsistent with the IR. The general principles relating to the court's power to order the trial of a preliminary issue are to be found in the judgment of David Steel J (sitting in this court) in *McLoughlin v Grovers* [2001] EWCA Civ 1743, [2002] QB 1312, and Neuberger J in *Steele v Steele* [2001] CP Rep 106. In the first of these, David Steel J said at [66]:

> "(a) Only issues which are decisive or potentially decisive should be identified. (b) The questions should usually be questions of law. (c) They should be decided on the basis of a schedule of agreed or assumed facts. (d) They should be triable without significant delay, making full allowance for the implications of a possible appeal. (e) Any order should be made by the court following a case management conference."

65. In the second, Neuberger J formulated a number of additional questions that the court ought to address before ordering the trial of a preliminary issue. The ninth of these questions was:

> "… the court should ask itself to what extent is there a risk that the determination of a preliminary issue could lead to an application for the pleadings being amended so as to avoid the consequences of the determination."

66. In relation to that question, he added:

> "Of course, the court could refuse permission to amend to avoid the determination of the preliminary issue being rendered irrelevant, but, in my judgment, the court cannot tie its hands by saying that it will in all circumstances refuse permission to amend. Even though it may render the costs and time taken up in the determination of a preliminary issue potentially irrelevant, it seems to me that it could be said to be very hard to deprive a claimant of the opportunity to amend when the

> amendment could keep his case alive and refusing the amendment would result in his case at least in part becoming untenable."

67. In the present case, the question posed by the preliminary issue was whether the Simcoe Scheme was to be treated, for the purposes of section 11 (1) and (2) (a) of the WRPA 1999 as an approved pension scheme and hence excluded from Mr McNamara's bankruptcy estate. There were two possible routes to a negative answer to that question. First, the court could have held that the various provisions of EU law on which Mr McNamara relied did not amount to restrictions on freedom of movement or freedom of establishment at all. Second, the court could have held that although they did amount to restrictions, they were objectively justified. In my judgment both potential routes to that answer were encompassed in the question as posed. The trustees chose to go down the first route, but not the second. Had they wished to keep the second route in reserve, they should either have pressed for the preliminary issue to be more narrowly drawn, or asked to be able to call evidence on the question of justification, or objected to the trial of the issue at all, on the basis that there were significant factual disputes that would (or at least might) arise.

68. It is true that the issue as framed, and the skeleton arguments served in relation to the issue, dealt with the effect of section 11 (2) (a), and not with section 11 (2) (h). It was Mr McNamara's case that the former subsection was incompatible with EU law, with the consequence that his interest in the Simcoe Scheme was excluded from his bankruptcy estate. One potential reason for disputing that consequence (which was the real underlying issue between the parties) would have been for the trustees to have argued that, even if section 11 (2) (a) could not easily be satisfied by an overseas pension scheme, there was an easier and simpler route to exclusion from the bankruptcy estate via section 11 (2) (h), with which the Simcoe Scheme could have complied but did not. The reduced requirements of section 11 (2) (h) (and paragraph 5 of Schedule 33 to the Finance Act 2004) were either not a relevant limitation or, if they were, because they were easily satisfied they were objectively justifiable. It is not as though the alternative route was unknown to the trustees. It had already been canvassed on behalf of the trustees in correspondence before the application was made and before the form of the preliminary issue was settled. But, for whatever reason, the trustees chose not to raise that argument before the court.

69. Ms Rhee also argued that the trustees were entitled to know the evidential case against them. The flaw in this argument, in my judgment, is that if justification (either of section 11 (2) (a) or section 11 (2) (h)) were to be in issue it would have been the trustees who bore the burden of establishing it. Rather than the trustees being entitled to know the evidential case against them, it was Mr McNamara who was entitled to know the evidential basis for justification. In so far as the evidential basis related to the question whether the Simcoe Scheme was (as the judge thought) an overseas pension scheme at all, that is not, as Ms Rhee eventually accepted, a ground of appeal. The only question raised by this appeal is that of objective justification on the basis that the Simcoe Scheme was (or was to be treated as) an overseas pension scheme.

70. The trial of the preliminary issue was just that: a trial. Parties are expected to bring forward the whole of their case relevant to the question to be tried. As the Supreme Court put it in *AIC Ltd v Federal Airports Authority of Nigeria* [2022] UKSC 16, [2022] 1 WLR 3223 at [31]:

> "Litigation cannot be conducted at proportionate cost, with expedition, with an appropriate share of the court's resources and with due regard to the rules of procedure unless they are undertaken on the basis that a party brings his whole and best case to bear at the trial or other hearing when a matter in dispute is finally to be decided (subject only to appeal)."

71. In *R (MH (Eritrea)) v Secretary of State for the Home Department* [2022] EWCA Civ 1296 Elisabeth Laing LJ observed at [54]:

> "As a general rule, the parties should not unilaterally send submissions to the Court, after the end of the argument, which raise points which should have been raised during the hearing. If, however, there is a matter which has arisen during the hearing, on which they wish to make further submissions, they should raise that with the Court during the hearing. The Court will then be able decide whether such submissions are necessary. If, after the hearing, counsel wish to raise a further point, they should tell the other party or parties, and ask the Court's permission before filing anything else. If the point concerns an issue which arose for the first time at the hearing, or which has unexpectedly come to light immediately afterwards, the Court may well agree to the filing of further short submissions, provided that the point is raised promptly after the hearing (and subject to a right of reply). An advocate will, however, rarely be given permission to file a document which puts forward arguments which could and should have been made during the hearing."

72. These observations plainly contemplate that even if a point has arisen in the course of the hearing, the court's permission to make further submissions is still necessary.

73. In those circumstances I do not consider that the trustees are entitled to argue the question of objective justification as of right under national procedural law.

Was the judge wrong to refuse an amendment?

74. Having reached the conclusion that the trustees are not entitled to argue the question of justification as of right, the issue then becomes: was the judge entitled, in the exercise of his discretionary case management powers, to refuse an application to amend?

75. The judge gave a number of reasons for refusing permission in the judgment under appeal:

    i) Justification had not been raised as an issue when he heard the preliminary issue in November 2019: para [51].

    ii) The trustees could have asked for a direction that the parties plead statements of case, but they did not; and the direction for sequential skeleton arguments

was designed to prevent either side being taken by surprise: paras [51] and [52].

iii) The hearing on November 2019 was not designed as an initial hearing of the preliminary issue: it was *the* hearing of that issue. Neither side had any reason to think that that hearing would be anything other than the final hearing of the issue. Nor did either side ask the judge to make a reference to the CJEU. That was something that he decided to do of his own motion: para [60].

iv) The position was therefore analogous to a case in which a party sought to raise a new point between circulation of a draft judgment and the final order: para [61]. It is also pertinent to note that in his first judgment, the judge expressed the provisional view that the domestic legislation did constitute discrimination prohibited by EU law: para [125].

v) The new point would raise a wholly new inquiry of some factual complexity and would require the trustees to approach Government for an explanation of the policy reasons behind the legislation. It would require a substantial further hearing with evidence: para [64].

vi) Nothing in the judgment of the CJEU departed from settled law (in particular there was no change to the law on justification): para [65].

vii) If the trustees had failed to anticipate a point they could have asked for an adjournment of the hearing to address the question of justification, which might or might not have been granted: para [67].

viii) It was far from obvious that the trustees would succeed in a defence of justification: para [69].

76. Once we are in the realm of discretionary case management decisions, it is wrong for an appellate court to intervene unless the decision is plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree: *Global Torch Ltd v Apex Global Management Ltd* [2014] UKSC 64, [2014] 1 WLR 4495 at [13]. It is also clear from [29] of the same case that the strength of a party's case on the ultimate merits of the proceedings is generally irrelevant when it comes to case management issues, unless a party has a case whose strength would entitle him to summary judgment.

77. Ms Rhee argued that the judge's decision was, indeed, plainly wrong. He failed to take into account developments in the case when considering whether the trustees had delayed in seeking to raise the question of justification, failed to consider the potential injustice to other court users (including relevant government departments); and was wrong to assume that the involvement of those departments would necessarily involve significant delay and costs. In addition he was wrong in failing to consider the likely merits of the justification point.

78. It is not entirely clear what "developments in the case" Ms Rhee relies on. At the hearing in November 2019 the judge raised the possibility of an alternative route to satisfying section 11 of the WRPA 1999, namely by relying on section 11 (2) (h) and the 2002 Regulations. That seems to be the relevant development. But the CJEU did

not differentiate between different parts of section 11; it considered section 11 as a whole. The question of justification was potentially in play in the preliminary issue, whether the relevant discrimination was to be found in section 11 (2) (a) or section 11 (2) (h); but the trustees chose not to raise it. In fact, the trustees might have had an easier task in justifying the latter rather than the former.

79. If the trustees really had been taken by surprise, they should have objected to the point being considered or, at the least, applied to the judge for permission to re-open the issue on receipt of the draft judgment. Ms Rhee did suggest that if, on receipt of the draft judgment, the trustees had applied for permission to raise and argue the question of justification they would have been "shouted down". But if an application in early 2020 would have been regarded as too late, I cannot see how that is anything but a powerful pointer to the conclusion that an application made nearly two years later is even less likely to succeed.

80. Nor is it sustainable to argue that the judge failed to take into account the overriding objective. He referred to it explicitly at para [68] and said that its requirements led to the conclusion that the trustees should not be permitted to run a justification defence.

81. As far as the principles governing amendments are concerned, Ms Rhee relied in her skeleton argument on the decision of Jacobs J in *PJSC Tatneft v Bogolyubov* [2020] EWHC 623 (Comm) permitting an amendment to a statement of case. But that was a very different case. The proposed amendment in that case was put forward a year before trial, and at the time of the hearing of the application there were still seven months before trial. The amendment raised a short point of Russian law in the context of facts that were either not substantially in dispute; or which would be explored at trial anyway. The opposing party was not prejudiced as there was still plenty of time for trial preparations; and the experts whose opinion would be relevant to the point would be giving evidence at trial in any event. I do not question the decision in that case (although as with many discretionary decisions it could not be said to be wrong to have decided it the other way).

82. On any view, to permit the trustees to advance a case of justification would be a very late development. There is a heavy burden on a party seeking a late amendment to justify it: *Swain-Mason v Mills & Reeve* [2011] EWCA Civ 14, [2011] 1 WLR 2375, *Nesbit Law Group LLP v Acasta Insurance Co Ltd* [2018] EWCA Civ 268. Of critical importance to the exercise of the discretion to permit or refuse the proposed amendment is the fact that in his reply skeleton argument for the November 2019 hearing, Mr Peretz plainly flagged up the point that the trustees were *not* running a defence of justification. In effect that put the trustees to their election. Either they should there and then applied for permission to raise the point, or they must be taken to have decided not to advance that defence.

83. As far as prejudice to third parties (including the government) is concerned, the general principle is that a judgment of the court binds no one except the parties to the proceedings and their privies. It is sometimes possible for a person directly affected by a judgment but who was not a party to apply to set aside or vary the judgment: CPR Part 40.9. It is also the case that, in certain circumstances the court has the power to grant injunctions that bind the whole world ("*contra mundum*" injunctions). But I can see no reason why a declaration made in these proceedings between the trustees and the bankrupt should have that effect.

84. It is also true that, as the judge pointed out, his decision will be a precedent for the future. But as he also correctly said, it would not preclude anyone in further proceedings from arguing that the indirect discrimination was in fact objectively justified. The judge has not decided that it cannot be objectively justified; he has merely ruled that, for procedural reasons, it is too late for the trustees themselves to advance that argument.

85. Moreover, the UK government had the opportunity to intervene in the proceedings before the CJEU but chose not to do so.

86. In my judgment the judge's decision to refuse to permit the trustees to raise the defence of justification is an unimpeachable exercise of judicial discretion.

The form of relief

87. The final point in the grounds of appeal related to the form of relief that the judge granted. Although this appeared, at first sight, to be a free-standing ground of appeal, Ms Rhee confirmed that it was in fact contingent on success on one (or more) of the other grounds of appeal; and did not press it in oral argument.

88. I therefore say no more about it.

Result

89. For these reasons, which are substantially the same as the judge's, I would dismiss the appeal.

Lord Justice Newey:

90. I agree.

Lord Justice Baker:

91. I also agree.