Neutral Citation Number: [2018] EWHC 3343 (Ch)

Case No: HC-2017-001399

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (CHD)

Royal Courts of Justice
7 Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 6 December 2018

Before:

MR JUSTICE MORGAN

- -

Between:

LLOYDS BANKING GROUP PENSIONS TRUSTEES LIMITED	**Claimant**
- and -	
(1) LLOYDS BANK PLC **(2) HBOS PLC** **(3) ANGELA SHARP** **(4) JUDITH CAIN** **(5) SUSAN DIXON** **(6) SECRETARY OF STATE FOR WORK AND PENSIONS** **(7) HER MAJESTY'S TREASURY**	**Defendants**

- -

- -

Edward Sawyer (instructed by **Allen & Overy LLP**) for the **Claimant**
Keith Rowley QC, John Cavanagh QC and Andrew Mold (instructed by **Herbert Smith Freehills LLP**) for the **First and Second Defendants**
Andrew Short QC and Nicholas Hill (instructed by **Walkers Solicitors**) for the **Third to Fifth Defendants**
Holly Stout (instructed by Government Legal Department) for the **Sixth and Seventh Defendants**

Hearing dates: 3 December 2018

- -

Judgment Approved

MR JUSTICE MORGAN:

1. I handed down judgment in this case on 26 October 2018. The neutral citation of that judgment is [2018] EWHC 2839 (Ch). On 3 December 2018, I heard submissions on matters which were consequential on that judgment, including the form of the order to be made to give effect to it. At that hearing, I resolved a number of differences between the parties as to the form of the order. There was one particular point on which I heard detailed submissions and then gave my ruling, with reasons. In view of the fact that my earlier judgment may have been of interest in the pensions industry generally, it was agreed that it would be helpful for me to set out in a short judgment my reasons on the new point which had been argued. This judgment contains those reasons. I will use the same abbreviations as in my earlier judgment.

2. The parties provided me with a draft order which contained, in particular, a declaration in relation to Method D2, as described in my earlier judgment. The draft order contained a declaration that Method D2 was not at present available to be adopted as the Banks had not consented to that being done and their consent was required pursuant to section 24E(2) of PSA 1993. The draft order then provided:

> "However, in principle, Method D2 is a lawful method to which the Banks could consent [provided that benefits are first adjusted in accordance with paragraph 2 above and paragraph 4.5 below]."

3. The words in square brackets in this part of the draft order were suggested by the RBs but were opposed by the Banks and by the Crown. The words in brackets cross-referred to paragraphs 2 and 4.5 of the draft order. In summary, those paragraphs provided that whereas the Trustee was obliged to equalise benefits, the Banks were entitled to require the Trustee to adopt Method C2. Thus, the words in brackets provided that the Trustee had first to adopt Method C2 to equalise benefits and only then would it be able to use Method D2, if the Banks consented. The Banks and the Crown submitted to me that, in order to implement Method D2, it was not necessary first to equalise benefits in accordance with Method C2.

4. I said comparatively little about Method D2 in my earlier judgment. The description of Method D2 in Appendix B stated that it operated in the same way as Method D1, save that Method D2 involved GMP conversion pursuant to sections 24A to 24H of PSA 1993. I described Method D1 in various places in my earlier judgment. One such place was in [286]-[288], by reference to an illustration provided by Aon Hewitt, the actuaries instructed by the Banks. I will not repeat that description in this judgment.

5. Because the figures used in the Aon Hewitt illustration were not the same as the figures used in the worked examples in Appendix B to my judgment, I will explain how the Aon Hewitt method for implementing Method D1 would apply to the examples in Appendix B.

6. All of the examples in Appendix B show figures, year by year, for the unequalised female pension and the unequalised male pension. Indeed, all of the examples show the same figures for the unequalised female pension and then the same figures for the unequalised male pension (although the male and female figures are of course different from each other). The differences between one worked example and another result from the method of equalisation being illustrated in the example. If one takes the examples for Method B or C1 or C2, it can be seen that the first seven columns of the examples are the same. It can also be seen that it is the right-hand column of the example which sets out the different results of equalisation using the different methods.

7. The difference between the parties which has now arisen is whether, for the purposes of Method D2 (and indeed for Method D1 if that were relevant), it is open to the actuary to determine the higher of the actuarial equivalents of the unequalised male and female pensions or whether he must determine the actuarial equivalent of the equalised pension.

8. In my earlier judgment, as explained at [286]-[288], I found that Method D1 involved the determination of the actuarial equivalent of the unequalised female pension and of the unequalised male pension. One then found which actuarial equivalent was the greater and pensions were equalised by awarding to each sex the higher actuarial equivalent. That finding did not involve determining the actuarial equivalent of the pension following equalisation (using whatever method of equalisation was appropriate). Transferring that finding to the examples in Appendix B, the result is that one determines the actuarial equivalent of the unequalised female pension and of the unequalised male pension and one determines which of these actuarial equivalents is the higher. One does not determine the actuarial equivalent of the equalised pension as illustrated by the figures in the right-hand column.

9. In my earlier judgment, I stated that Method D2 initially operated in the same way as Method D1. Therefore, for the purposes of Method D2, it follows that I also held that one calculated the actuarial equivalent of the pre-conversion benefits (see section 24B of PSA 1993) in the same way as for D1 and then one equalised these benefits by taking the higher of the actuarial equivalent of the unequalised female pension and of the actuarial equivalent of the unequalised male pension. The higher of these equivalents was then used for the purposes of GMP conversion. This conclusion is consistent with the 2016 Consultation Document, to which I referred in my earlier judgment: see, in particular, Stage 5 of the ten-stage process put forward for consultation.

10. Therefore, on the basis of my earlier findings, the right order to make should be as per the draft order but without the words in square brackets.

11. At the hearing on 3 December 2018, it was explained to me that the higher actuarial equivalents of the unequalised female pension and of the unequalised male pension ought to be the same as, or very close to, the actuarial equivalent of the equalised pension as illustrated by the figures in the right-hand column for Method C2. If there were to be any difference it would be because an actuary, when calculating an actuarial equivalent, might use a discount rate which was not consistent with the interest rate of 1% over base rate which I had specified should be used to calculate the figures in the right-hand column for Method C2: see my earlier judgment at [383].

12. Having had the explanation which I set out in the last paragraph, I remain of the view that the appropriate order to make in relation to Method D2 is an order which permits the actuary to determine the higher of the actuarial equivalents of the unequalised female and the unequalised male pensions and does not compel the actuary to determine the actuarial equivalent of the equalised pension.

13. It is for the actuary, rather than the court, to determine the actuarial equivalents of the unequalised pensions. For that purpose, the actuary will have to make certain actuarial assumptions. Those assumptions are for the actuary and I do not intend to give any ruling as to what he should assume about interest or discount rates, or any other matter. When I previously considered the issues arising in relation to Method C2, I was asked to fix an interest rate to be used for the purposes of the right-hand column in the illustration of Method C2 and I did so. I made a pragmatic decision as to what that interest rate should be in order to make Method C2 work in a practical way. That interest rate is to be used if Method C2 is adopted. However, if Method C2 is not adopted but Method D2 were to be adopted, then my choice of interest rate is not intended to bind the actuary.

14. Mr Short argued that in order to apply Method D2, or Method D1 for that matter, it was necessary to find out what the member was entitled to by way of equalised benefits and it was only once that matter had been identified that one could determine the actuarial equivalent of the equalised benefits. There is a logic to that submission which might have been upheld if, for example, I had held that members were entitled to equalised benefits in accordance with Method A3. However, I do not feel it is appropriate to apply that logic where I have held that the method of equalisation ought to be Method C2. The logic of the submission produces an inappropriate result, namely, that an actuary is being directed to adopt a particular interest or discount rate which he might consider to be inappropriate.

15. It was suggested that there might be other paragraphs of my earlier judgment which led to a different result. Reference was made to [7] and the example in [392]. In [7], I referred to "Method D" involving a two-stage process. At that point, I was discussing the costs of the various methods. On any view, Method D involves a two-stage process in that Method D can only operate for the future and, as to the past, one has to adopt a different method (on my findings, in relation to the methods which I was asked to consider, the different method is Method C2). The comment in [7] might have been right for a further reason, depending on which method emerged later in the judgment as the method to be used for equalisation. If I had accepted the submission that the RBs could insist on the adoption of Method A3, and then the Trustee wished to have GMP conversion using Method D2, it might indeed have been the case that the actuarial equivalent would have to be calculated by reference to the figures in the right-hand column of the illustration of Method A3.

16. At [392] in my earlier judgment, I gave an example of something which was not Method D2 but which I said produced a result which was similar to Method D2. The purpose of the example was to show that GMP conversion under the statutory provisions was not itself a method of equalising benefits. Instead, it involved a process of removing the terms of a scheme which referred to GMP. It could be applied to a scheme where benefits had always been equal or to a scheme where benefits had been equalised. When GMP conversion takes place, in full compliance with the statutory conditions, it is not open to anyone to oppose such conversion on the ground that it involves interference, minimum or otherwise, with anyone's rights. Such conversion is authorised by statute in accordance with the statutory conditions. The example used in [392] did not amount to a ruling that Method D2 was only available where benefits had previously been equalised under Method C2.

17. Accordingly, I will make the order as drafted but without the words in square brackets.