Neutral Citation Number: [2020] EWHC 98 (Ch)

Case No: BR-2012-004866

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST

In the Matter of Michael Bernard McNamara
And in the Matter of the Insolvency Act 1986

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

Date: 23 January 2020

Before :

MR JUSTICE NUGEE

- -

Between :

(1) MARK JOHN WILSON
(2) GEORGE MALONEY
(Joint Trustees in Bankruptcy of
Michael Bernard McNamara) **Applicants**

- and -

(1) MOIRA McNAMARA
(2) MARINE HOUSE TRUSTEES LTD
(3) IRISH LIFE ASSURANCE PLC
(4) MICHAEL BERNARD McNAMARA **Respondents**

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Mr George Peretz QC and **Mr John Briggs** (instructed by **Edwin Coe LLP**) for **Mr McNamara**

Ms Deok Joo Rhee QC and **Mr James Barker** (instructed by **Eversheds Sutherland (International) LLP**) for the **Joint Trustees in Bankruptcy**

Hearing dates: 5 and 6 November 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE NUGEE

Mr Justice Nugee:

Introduction

1. This judgment is given on the hearing of a preliminary issue in an application in the bankruptcy of Mr Michael Bernard McNamara. Mr McNamara was made bankrupt by Mr Registrar Jones on 2 November 2012 on his own petition, presented that day. Prior to his bankruptcy Mr McNamara had been a high profile property developer operating primarily, if not exclusively, in the Republic of Ireland. But he and his wife had moved to London in July 2011, and the Court accepted that he had moved his centre of main interests (or COMI) from Ireland to England by the date of presentation of the petition.

2. The Applicants in the substantive application, dated 1 November 2018, Mr Mark Wilson and Mr George Maloney, are the current Joint Trustees in Bankruptcy of Mr McNamara (**"the Joint Trustees"**), Mr Maloney being one of the original trustees and Mr Wilson being a successor trustee. They brought the application in order to claim for the benefit of the bankruptcy estate an investment held in an Irish pension scheme, the Simcoe Industries Limited Retirement Plan, in the form of a unit-linked retirement policy issued by the 3rd Respondent, Irish Life Assurance plc (**"Irish Life"**). The policy is held by the trustees of the pension scheme, who are now the 1st Respondent, Mrs Moira McNamara (Mr McNamara's wife) and the 2nd Respondent, Marine House Trustees Ltd (**"Marine House"**). The Joint Trustees' primary claim is that the beneficial interest in the policy remained with Mr McNamara at the time of his bankruptcy and so vested in his trustees as part of his estate and is now vested in them as the current trustees; they have an alternative claim that if he divested himself of his interest in the policy before his bankruptcy then the transaction by which he did so constituted a transaction at an undervalue and should be set aside.

3. The application was issued against the first three Respondents only. On 29 March 2019 Mr McNamara applied to be added as a party. He sought relief under a number of heads, but in essence his case was that any rights he had under the pension scheme should be excluded from the bankruptcy estate. The basis for this contention was that if instead of being a member of an Irish pension scheme he had been a member of a UK registered pension scheme his rights under it would have been excluded from the estate, and EU law required the same treatment to be accorded to his rights under his Irish pension scheme. By Order dated 18 June 2019 ICCJ Mullen ordered that Mr McNamara be joined, that his EU point be tried as a preliminary issue on the basis of agreed or assumed facts, and that he be the applicant in relation to the issue and the Joint Trustees the respondents.

4. The preliminary issue is in the following terms:

> "Whether by virtue of Articles 21, 45 and/or 49, 50 or 56 of the Treaty on the Functioning of the EU and/or Article 24 of Parliament and Council Directive 2004/38/EC and/or Article 7(2) of Parliament and Council Regulation 492/2011/EU, the pension rights of the bankrupt Michael Bernard McNamara under the Simcoe Industries Limited Retirement Pension Plan held with Irish Life Assurance plc (having policy no. 80001007) and approved by the Revenue Commissioners in Ireland for the purposes of Part 30, Chapter 1 of the Irish Consolidation Act 1997 (as evidenced by a letter dated 28 October 2009 from the Revenue Commissioners in Ireland) at the commencement of the bankruptcy are 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 text of this issue as I have set it out is not identical to that ordered by ICCJ Mullen. First, the underlined parts in the first line are in a draft amendment put forward on behalf of Mr McNamara, but I do not think anything turns on this as the argument for him in the event proceeded by reference to Art 49 of the Treaty on the Functioning of the European Union (**"TFEU"**). Second, I have added the italicised words in the penultimate line to make the wording of the issue more grammatical and to bring it in line with the wording of s. 11 of the Welfare Reform and Pensions Act 1999 (**"WRPA 1999"**). The reference in the eighth line to the "Irish Consolidation Act 1997" should in fact be to an Irish Act called the Taxes Consolidation Act 1997 (**"TCA 1997"**).

5. That is the issue which has been argued before me, by Mr George Peretz QC for Mr McNamara, and Ms Deok Joo Rhee QC for the Joint Trustees. None of Mrs McNamara, Marine House or Irish Life has taken any part in the hearing.

Facts

6. The agreed and assumed facts were scheduled to ICCJ Mullen's Order. There was initially one fact in dispute (whether Mr McNamara had been an employee as well as a director of Simcoe Industries Ltd), and ICCJ Mullen had provided for evidence to be filed on that issue, but that too is now agreed. I therefore do not have to resolve any issues of fact, and can take the facts from the schedule, supplemented by the documents in evidence.

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, no. 80001007, 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 NAMA (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 (as is not now disputed) 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 a pension scheme, the Simcoe Industries Limited Retirement Plan (**"the Simcoe Scheme"**), with effect from that date, with 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 s. 771 TCA 1997, to provide relevant benefits as defined in s. 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 s. 772 TCA 1997 and of being treated by the Revenue Commissioners as an exempt approved scheme pursuant to s. 774 TCA 1997. By letter dated 28 October 2009 an 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 s. 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 is in fact a dispute whether these payments represented his full entitlement to benefits under the Simcoe Scheme, but it is 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. Mr McNamara made a witness statement dated 2 November 2012 in support of his petition. In that statement he set out the evidence he relied on for England having become his COMI. It included the following statements:

    (1) He had ceased to be an Irish tax resident by 2012, and advised the Irish Revenue Commissioners by letter dated 26 March 2012 from his tax advisers that he now resided in London and that they should write to him at his English address.

    (2) He had registered for VAT with HMRC and his UK tax adviser had submitted his VAT return for the period ended 31 July 2012, and a self-assessment tax return for the year ended 5 April 2012.

19. Although not part of the agreed and assumed facts, Ms Rhee suggested that Mr McNamara's move to London was a carefully managed process. She did not challenge the fact that Mr McNamara had successfully moved his COMI to London but pointed to the chronology of events, as appears from the agreed facts and from Mr McNamara's own witness statement in support of the petition, as follows:

    (1) The downturn in the Irish property market occurred in mid to late 2007.

    (2) In March 2010 Mr McNamara was told that loans to the value of £890m owed by him to Irish banks were being transferred to NAMA.

    (3) Mr McNamara submitted business plans and proposals to repay the loans to NAMA as required by Irish legislation, but these were rejected by NAMA in November 2010 and receivers were thereafter appointed to the assets relating to the transferred loans.

    (4) In February 2011 Mr McNamara moved to London on a part-time basis.

    (5) In April 2011 Mr McNamara drew down benefits from the Simcoe Scheme.

    (6) In June 2011 Mr McNamara was removed as trustee from the Simcoe Scheme.

    (7) In July 2011 Mr and Mrs McNamara moved to London on a full-time basis.

    (8) In November 2012 Mr McNamara petitioned for his bankruptcy.

    She submitted that this was a carefully orchestrated series of events.

20. I have not heard any oral evidence and do not think I can reach any conclusion on whether Mr McNamara deliberately moved to London with the intention of establishing a COMI here so that he could in due course be made bankrupt in London rather than Dublin. But what these facts do show is that at the time he moved he owed very large personal liabilities to NAMA (and indeed these were not his only liabilities, as the NAMA loans, according to Mr McNamara, amounted to about two thirds of his total liabilities and the total claims against his estate, according to Mr Wilson, are in excess of €1 billion), and that NAMA had rejected his proposals and appointed receivers to the underlying properties, and it does seem a reasonable

inference that at the time he re-located to the UK his future bankruptcy was either inevitable, or at least very probable. The suggestion that he moved to London with a view to that bankruptcy taking place here rather than there seems a plausible one, although as I have said I do not think I should proceed on the basis that it has been proved.

The relevant UK legislation

21. Protection for the pension rights of those made bankrupt in the UK is now found in ss. 11 and 12 WRPA 1999. The effect of s. 11 is to exclude the rights of a bankrupt under an approved pension arrangement, which includes any UK pension scheme that has been registered with HMRC, from his bankruptcy estate. It provides, so far as relevant, as follows:

> "**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."

The section came into force on 29 May 2000.

22. The Simcoe Scheme has never been registered with HMRC under s. 153 of the Finance Act 2004 (**"FA 2004"**).

23. If a pension scheme is not an approved pension scheme for the purposes of s. 11 WRPA 1999, it may be possible for the bankrupt nevertheless to benefit from s. 12 WRPA 1999. This provides, so far as relevant, as follows:

> "**12 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."

24. Regulations have been made under both s. 11(2)(h) and s. 12(1) WRPA 1999 (among other enabling provisions), namely The Occupational and Personal Pension Schemes (Bankruptcy) (No. 2) (Regulations) 2002, SI 2002/836 (**"the 2002 Regulations"**). By reg 1(1) they came into force on 6 April 2002.

25. Reg 2 of the 2002 Regulations sets out the arrangements which are prescribed under s. 11(2)(h) WRPA 1999 and hence are approved pension arrangements. It includes the following provision in reg 2(1)(c):

"**2 Prescribed pension arrangements**

(1) The arrangements prescribed for the purposes of section 11(2)(h) of the 1999 Act (pension arrangements which are "approved pension arrangements") are

arrangements (including an annuity purchased for the purpose of giving effect to rights under any such arrangement)—

…

(c) to which section 308A of the 2003 Act (exemption of contributions to overseas pension scheme) applies;"

26. Reg 3 of the 2002 Regulations deals with unapproved pension arrangements for the purposes of s. 12(1) WRPA 1999. It provides as follows:

"**3 Unapproved pension arrangements**

(1) For the purposes of section 12 of the 1999 Act (effect of bankruptcy on pension rights: unapproved arrangements), a pension arrangement falling within—

(a) section 157 of the Finance Act 2004 (de-registration);

(b) paragraphs 52 to 57 of Schedule 36 to that Act; or

(c) section 393A of the 2003 Act,

shall be an "unapproved pension arrangement" if it satisfies the conditions specified in paragraph (2) below.

(3) The conditions referred to in paragraph (1) above are that the pension arrangement—

(a) is established under—

(i) an irrevocable trust, or

(ii) a contract, agreement or arrangement made with the bankrupt;

(b) has as its primary purpose the provision of relevant benefits; and

(c) is the bankrupt's sole pension arrangement or his main means of pension provision (other than a pension under Part II of the Social Security Contributions and Benefits Act 1992 (contributory benefits) or Part II of the Social Security Contributions and Benefits (Northern Ireland) Act 1992 (contributory benefits))."

27. Reg 4 of the 2002 Regulations provides that the bankrupt may make an application to the Court for an exclusion order for the purpose of excluding his rights under an unapproved pension arrangement from his estate (pursuant to s. 12(2)(a)(i) WRPA 1999).

28. Reg 5 of the 2002 Regulations provides for the making of exclusion orders as follows:

"**5 Exclusion orders**

(1) Subject to paragraph (2) below, an application for an exclusion order shall be made to the court within a period of—

(a) thirteen weeks beginning with—

(i) the date on which the bankrupt's estate vests in the trustee in bankruptcy in accordance with the provisions of section 306 of the 1986 Act (vesting of bankrupt's estate in trustee), or

(ii) in the case of a scheme referred to in regulation 3(1)(a) above, the date, if later than that referred to in head (i) above, on which any rights of the bankrupt vest in the trustee in bankruptcy on the de-registration of the scheme by Her Majesty's Revenue and Customs by virtue of section 157 of the Finance Act 2004; or

(b) thirty days beginning with the date on which a qualifying agreement is revoked in accordance with the provisions of regulation 6 below.

(2) The court may, either before or after it has expired and where good cause is shown, extend the period referred to in paragraph (1)(a) or, as the case may be, (1)(b) above.

(3) In deciding whether to make an exclusion order and, if so, whether to make it in respect of part or all (but not exceeding the total amount) of the excludable rights, the court shall have reference to—

(a) the future likely needs of the bankrupt and his family;

(b) whether any benefits by way of pension or otherwise (other than a pension under Part II of the Social Security Contributions and Benefits Act 1992 or Part II of the Social Security Contributions and Benefits (Northern Ireland) Act 1992 (contributory benefits) or an income-related benefit or universal credit under Part 1 of the Welfare Reform Act 2012) are likely to be received by virtue of rights of the bankrupt which have already accrued under any other pension arrangements at the date on which the application for an exclusion order is made and the extent to which they appear likely to be adequate for meeting any such needs."

29. Reg 6 deals with qualifying agreements (pursuant to s. 12(2)(a)(ii) WRPA 1999). It provides, so far as material, as follows:

"**6 Qualifying agreements**

(1) A qualifying agreement shall be made within a period of nine weeks beginning with the later of the following—

(a) the date on which the bankrupt's estate vests in the trustee in bankruptcy in accordance with the provisions of section 306 of the 1986 Act (vesting of bankrupt's estate in trustee); or

(b) in the case of a scheme referred to in regulation 3(1)(a) above, the date, if later than that referred to in sub-paragraph (a) above, on which any rights of the bankrupt vest in the trustee in bankruptcy on the de-registration of the scheme by Her Majesty's Revenue and Customs by virtue of section 157 of the Finance Act 2004.

(2) A qualifying agreement made between the bankrupt and the trustee in bankruptcy shall be by deed and incorporate all the terms which they have

expressly agreed."

30. As can be seen reg 2(1)(c) of the 2002 Regulations provides that a pension arrangement shall be an *"approved pension arrangement"* if, among other things it is an arrangement to which s. 308A of *"the 2003 Act"* applies. This is a reference to the Income Tax (Earnings and Pensions) Act 2003 (**"ITEPA 2003"**), s. 308A of which provides as follows:

> "**308A Exemption of contribution to overseas pension scheme**
>
> (1) No liability to income tax arises in respect of earnings where an employer makes contributions under a qualifying overseas pension scheme in respect of an employee who is a relevant migrant member of the pension scheme.
>
> (2) In subsection (1) —
>
> *"qualifying overseas pension scheme"*, and
>
> *"relevant migrant member"*
>
> have the same meaning as in Schedule 33 to FA 2004 (overseas pension schemes: migrant member relief)."

The purpose of sch 33 to FA 2004 is to enable a member of an overseas pension scheme, and his employer, to claim relief against contributions to that scheme in appropriate circumstances. It is not necessary to set out here the full definitions of *"relevant migrant member"* and *"qualifying overseas pension scheme"* which are both quite extensive (see paras 4 and 5 of sch 33 respectively), although I will have to look at the latter in more detail below.

31. Reg 3(1)(c) of the 2002 Regulations provides that a pension arrangement shall be an *"unapproved pension arrangement"* if, among other things, it falls within s. 393A of ITEPA 2003. This provides as follows:

> "**393A Employer-financed retirement benefits scheme.**
>
> (3) In this Chapter "employer-financed retirement benefits scheme" means a scheme for the provision of benefits consisting of or including relevant benefits to or in respect of employees or former employees of an employer."

There is an exclusion for registered pension schemes. *"Relevant benefits"* is defined by s. 400 of ITEPA 2003 to have the same meaning as in s. 612(1) of the Income and Corporation Taxes Act 1988 (**"ICTA 1988"**). It is not necessary to set out this lengthy definition: it includes the usual benefits provided by pension schemes such as pensions and lump sums given on retirement or death.

Summary of submissions for Mr McNamara

32. The overall submission made by Mr Peretz can be summarised as follows. As a matter of EU law, Mr McNamara's rights should not depend on whether he had spent his working life in the UK (and had acquired pension rights in a UK registered pension scheme) or was a migrant worker who had spent most of his working life in another Member State such as Ireland and had moved to the UK before becoming

bankrupt. The key problem was that unless a migrant worker was fortunate enough to have acquired rights in a scheme registered with HMRC in the UK (something that was not usually under his control, but a matter for his employer), a literal reading of s. 11 WRPA 1999 would mean that he would not receive the same protection for his pension rights on bankruptcy as a UK worker. That meant that the Court was obliged to "read down" s. 11 WRPA 1999 so as to give it a conforming interpretation under which the Simcoe Scheme was to be regarded as an approved pension arrangement, with the result that Mr McNamara's rights under the Simcoe Scheme were excluded from his estate.

Summary of submissions for the Joint Trustees

33. The submissions of Ms Rhee for the Joint Trustees can be summarised as follows. The provisions applicable on personal insolvency differ from one Member State to another. The UK provisions on the protection of pension rights in bankruptcy are just part of the overall UK insolvency regime. The question is whether they constitute a restriction on freedom of movement, and in particular (since reliance is placed on Art 49 TFEU) the right of establishment. They plainly did not in fact deter Mr McNamara from relocating to the UK in exercise of the right of establishment. Nor can it be said that they were likely to do so: that could only be done if it could be shown that the UK insolvency regime as a whole was less favourable to the bankrupt than (in this case) the Irish insolvency regime, and no attempt had been made to do that. Mr McNamara could not pick and choose the bits of the UK insolvency regime he liked and challenge the bits he did not like. Even if that was wrong, and it was appropriate to look at the UK provisions on pension rights in bankruptcy by themselves, they did not constitute an obstacle or restriction to the freedom of establishment; nor had it been shown that they were less favourable to Mr McNamara than the Irish provisions on pension rights in bankruptcy.

34. These submissions revealed a fairly fundamental disagreement as to the principles of EU law which I will have to consider below; but first I will set out in more detail the effect of the UK provisions. They are unfortunately intricate and difficult to summarise.

Effect of being an authorised pension scheme for the purposes of s. 11 WRPA 1999

35. The effect of s. 11 WRPA is to give a high level of protection to the rights of a bankrupt under an approved pension scheme – what Mr Peretz referred to as a *"gold-standard"* protection – but it is not absolute.

36. First, ss. 342A to 342C of the Insolvency Act 1986 (**"IA 1986"**) give the Court power to deal with *"excessive contributions"*. Such provisions were initially introduced by s. 95 of the Pensions Act 1995 (**"PA 1995"**), but were replaced by provisions introduced by s. 15 WRPA 1999. It is not necessary to set them out in detail but broadly speaking they enable the Court to adjust the bankrupt's rights under an approved pension scheme excluded by s. 11 WRPA 1999 (or rights under an unapproved pension scheme excluded under s. 12 WRPA 1999) if satisfied that such rights derive to any extent from excessive contributions. Excessive contributions are those which unfairly prejudice the bankrupt's creditors, and for this purpose the Court is directed in particular to consider whether any of the contributions were made for the purpose of putting assets beyond the reach of creditors, or whether the total

amount of pension contributions made by or on behalf of the bankrupt were excessive in view of his circumstances when they were made. The Court is given various powers, if satisfied that excessive contributions have been made, to restore the position to what it would have been had they not been made, including requiring the pension scheme to make a payment to the trustee in bankruptcy and reducing the bankrupt's rights under the scheme accordingly.

37. It is to be noted that the focus of these provisions is not the circumstances prevailing after the bankrupt has become insolvent (the needs of the bankrupt and his family and the like), but the circumstances prevailing at the time the *contributions* were made: the Court is directed to have particular regard to whether they were made for the purpose of putting assets beyond the reach of creditors, or were excessive in view of the bankrupt's circumstances at the time they were made: s. 342A(6)(a) and (b). I need not consider if these are the only potentially relevant circumstances, but they are the ones specifically mentioned in the legislation, and the form of the provisions as remodelled by WRPA 1999 can be contrasted with the original form of these provisions introduced by PA 1995 (which were limited to occupational pension schemes) where the Court was also directed to consider in particular whether the level of *benefits* under the scheme and any other occupational scheme to which the bankrupt was entitled or likely to become entitled was excessive in all the circumstances: s. 342A(3)(a)-(c).

38. Second, once a pension is in payment, it is possible for a trustee in bankruptcy to apply for an income payments order as with other income of the bankrupt: see s. 310 IA 1986 under which the Court may make an income payments order on the application of the trustee in bankruptcy before the bankrupt's discharge, and in particular s. 310(7) which provides that the income of the bankrupt for this purpose comprises:

> "every payment in the nature of income … including … and (despite anything in section 11 or section 12 of the Welfare Reform and Pensions Act 1999) any payment under a pension scheme"

(excluding payments by way of guaranteed minimum pension (s. 310(8)).

39. Subject to these statutory exceptions however, the protection given by s. 11 WRPA to the rights under registered pension schemes would appear to be absolute. Mr Peretz said that the evident purpose behind giving the pension rights of bankrupts such a high level of protection was to avoid them losing their pensions and being thrown onto the resources of the state in old age: see *re Henry (A Bankrupt)* [2016] EWCA Civ 989 at [45] where Gloster LJ said in relation to s. 11:

> "Parliament has decided to draw the balance between, on the one hand, the interests of the state in encouraging people to save through the medium of private pensions (so that in old age or infirmity they will not be a burden on the resources of the state), and, on the other, the interests of creditors in receiving payment of their debts, by the mechanism of sections 342A to 342C of the 1986 Act which enable a trustee to claw back excessive pension contributions made by the bankrupt where such contributions have unfairly prejudiced the bankrupt's creditors."

But it can be assumed, Mr Peretz said, that some (or indeed many) migrant workers come to the UK with the intention of settling here, and that rationale would apply just

as much to them as to UK workers.

40. I am not convinced that identifying the purpose behind s. 11 WRPA 1999 is of particular significance to the resolution of this case, as the relevant principles of EU law to my mind require focus on the effect of the national law provisions in question rather than the policy underlying them. But in case it is of any relevance, I should say that I think the position is rather more complex than Gloster LJ assumed. The question whether and to what extent the pension rights of a bankrupt should be available to his creditors or exempted by statute, and the rationale for such exemptions, has a long history: in *Krasner v Dennison* [2001] Ch 76 at [48] Chadwick LJ referred to provisions to that effect going back at least 130 years, giving as an example the Naval and Marine Pay and Pensions Act 1865. I was not taken through it in any detail, but the question was briefly considered by the Goode Committee (the Pensions Law Review Committee, chaired by Professor Goode), which reported in 1993: see *Pension Law Reform: the Report of the Pensions Law Review Committee* – Cmd 2342-1 at §§4.14.33 to 4.14.35. The Committee was only concerned with occupational schemes, and the reasons it gave for recommending that future pension rights should not be available to creditors were that employers did not establish schemes in order to benefit creditors, nor was tax relief given for that purpose; that the evidence submitted to them showed a broad consensus in favour of exempting future pension entitlements from the claims of creditors; and that in any event protective trust provisions (under which pension rights would be forfeited on bankruptcy and so not available to creditors anyway) were widely adopted by schemes and this would give statutory effect to the practice. None of that refers directly to the interests of the state in preventing members being a burden on state resources in old age (although the reference to tax relief being given may indirectly reflect this interest).

41. The Goode Committee's recommendations were accepted by the Government and given effect to by ss. 91 to 95 PA 1995. These were however, like the report, limited to occupational pension schemes, and it was held by Ferris J in *re Landau* [1998] Ch 223 and by the Court of Appeal in *Krasner v Dennison* [2001] Ch 76 that rights under pensions and annuity policies not held under occupational schemes did vest in the trustee in bankruptcy. It is apparent from the Explanatory Notes to WRPA 1999 that what prompted the new provisions in ss. 11-16 WRPA 1999 was that the protection given by PA 1995 only applied to occupational pension schemes and it was thought desirable that a similar statutory protection should be provided in relation to other types of pension arrangements.

42. At the same time the opportunity was taken to provide a different level of protection for approved and unapproved pension arrangements in s. 11 and s. 12 WRPA respectively (as considered in more detail below). The Explanatory Notes do not really explain the thinking behind this: they explain that approved arrangements are broadly those recognised for tax purposes (at that stage as exempt approved schemes under Part XIV of ICTA 1988), and that s. 12 enables rights under an unapproved scheme to be protected in the same way as rights under an approved scheme in prescribed circumstances, adding:

> "The intention is to cover circumstances where the other pension benefits that the bankrupt will receive are likely to be inadequate to meet his reasonable needs and those of his dependants."

43. This brief review of the history suggests that it is an oversimplification to say that the purpose behind s. 11 WRPA 1999 was to avoid individuals becoming a burden on the resources of the state in old age. I think a more detailed account of the purpose behind ss. 11-16 taken together is that pension rights are intended, and tax relief is given, to support individuals in the future in retirement, not for the benefit of creditors if the individual becomes bankrupt before retirement, and that save where excessive contributions can be shown to be made, those rights should be exempted from bankruptcy. That however does not explain why s. 11 should be (broadly) limited to tax-approved schemes. I was not shown any material specifically addressing this question but I think it is likely to be because one of the features of tax approval (as it then stood) was that it limited the benefits that could be paid to the member (for example in occupational schemes by reference to his salary and period of service). There is by contrast no limit to the benefits that can be provided under unapproved schemes, so it is not perhaps surprising that it was thought inappropriate to exempt those in their entirety, but only to the extent that they were reasonably needed by the bankrupt and his family.

44. In those circumstances I accept Ms Rhee's submission that the discernible policy underlying the provisions of WRPA, that is to enable bankrupts to retain pension rights up to a certain level, applied both to s. 11 and s. 12 WRPA, but, as she accepted, the mechanism for giving effect to that, and the practical operation of it, is rather different for approved pension arrangements under s. 11 and unapproved pension arrangements under s. 12.

Registration under FA 2004

45. The pension rights of a bankrupt will most commonly be exempted under s. 11 WRPA 1999 on the basis that the pension scheme in question is registered for tax purposes with HMRC under s. 153 FA 2004. As appears above, the Simcoe Scheme was not in fact so registered. There was some discussion before me as to whether it could have been. That depends in part on whether a scheme established outside the UK is capable of being registered at all under s. 153, and in part on whether, if so, the Simcoe Scheme could meet the criteria for registration. Neither counsel was disposed to argue these points. Mr Peretz said that it did not affect his argument whether the Simcoe Scheme could have registered, or whether that was impossible: if it was not impossible, there were nevertheless impediments to it doing so. Ms Rhee said that her position was that registration under s. 153 was in principle available to overseas schemes as well as UK schemes, and did not understand that to be disputed, but she was not going to say that the Simcoe Scheme could have done so in this case as she did not need to.

46. In those circumstances I will assume, without deciding (although I note that s. 150(7) FA 2004 does appear to contemplate this as a possibility), that a scheme established outside the UK can in principle register with HMRC under s. 153. Nevertheless Mr Peretz submitted that there were good reasons why overseas schemes would be inhibited from doing so. He took me in some detail through the provisions of Part 4 of FA 2004 which explain the consequences of registration.

47. It is not necessary to set them all out. The chief advantages of being a registered pension scheme are (i) that relief is given against income tax for contributions to the scheme by or on behalf of a member (see ss. 188ff), and (ii) that the fund itself is

exempt from income tax and capital gains tax (see ss. 186-7). But both of these reliefs are only relevant to a scheme if the payment of contributions, or the receipt of income and capital gains respectively, would otherwise give rise to a liability to UK taxes, and in a case like that of the Simcoe Scheme where no further contributions were being made, and there is no reason to suppose that the fund was deriving income or capital gains from a UK source, there is no obvious reason why there should be a liability to UK taxes at all.

48. On the other hand registration brings with it a number of disadvantages: by s. 160(1) the only payments which such a scheme is authorised to make to, or in respect of, a member are those specified in s. 164; and s. 164 is quite prescriptive as to the payments that can be made (see ss. 164-169). If a scheme makes an unauthorised payment to a member, tax at 40% is payable, either by the member (under s. 208 FA 2004), or, if the member does not pay, by the scheme administrator (under ss. 239-241 FA 2004). Moreover by regulations made under FA 2004 (the Registered Pension Schemes (Provision of Information) Regulations 2006, SI 2006/567), the administrator of a registered pension scheme is obliged to send detailed information to HMRC in relation to a large number of reportable events.

49. Mr Peretz submitted that in the circumstances, registration was not a mere formality: it was a significant step which carried with it potentially onerous obligations. Even if (which is not something that can be assumed), a pension scheme established outside the UK could comply with the requirements for UK registration as well as whatever the requirements of its home jurisdiction were, it was therefore not something that such a scheme should undertake unadvisedly.

50. I accept this submission, and I accept that even on the assumption I have made that the legislation is in principle capable of applying to pension schemes established outside the UK, it would be surprising if many such schemes thought it advantageous to register with HMRC in the UK. In particular I do not find it surprising that an Irish pension scheme established in such a way as to comply with the requirements of the Irish tax legislation should not wish also to have to comply with the (different) requirements of the UK tax legislation.

51. I also accept that it is self-evident that migrant workers (whether employed or self-employed) from other EU Member States are more likely than UK nationals to have acquired pension rights in other Member States, and that it follows that they are more likely than UK nationals to have pension rights under arrangements which are not registered under s. 153 FA 2004, either because such arrangements could not meet the requirements for registration, or because there are solid reasons why they would choose not to be so registered.

Qualifying overseas pension scheme under s. 308A ITEPA 2003

52. As appears above, however, s. 11 does not only apply to pension schemes registered under s. 153 FA 2004. It also applies to prescribed arrangements, that is those set out in reg 2 of the 2002 Regulations. That includes qualifying overseas pension schemes to which s. 308A ITEPA 2003 applies.

53. It is necessary to say rather more about the requirements for being a qualifying overseas pension scheme, as Ms Rhee's submission was that this was a perfectly

adequate way for the pension rights of someone such as Mr McNamara to obtain the protection of s. 11 WRPA 1999. To be a qualifying overseas pension scheme, a scheme must first be an *"overseas pension scheme"*: sch 33, para 5(1) FA 2004. This is a defined term, the definition being found in s. 150(7) FA 2004 as follows:

> "In this Part *"overseas pension scheme"* means a pension scheme (other than a registered pension scheme) which–
>
> (a) is established in a country or territory outside the United Kingdom, and
>
> (b) satisfies any requirements prescribed for the purposes of this subsection by regulations made by the Board of Inland Revenue."

In the present case the Simcoe Scheme plainly satisfied the condition in sub-para (a); as to sub-para (b), the relevant regulations are The Pension Schemes (Categories of Country and Requirements for Overseas Pension Schemes and Recognised Overseas Pension Schemes) Regulations 2006, SI 2006/206 (**"the 2006 Regulations"**).

54. Reg 2 of the 2006 Regulations sets out the prescribed requirements for a scheme to be an overseas pension scheme for the purposes of s. 150(7) FA 1994. Reg 2(1) provides that such a scheme (unless an overseas public service scheme, or a scheme established by an international organisation) must satisfy the requirements in paras (2) and (3). Reg 2(2)(a) provides that para (2) is satisfied if, among other things:

> "the scheme is an occupational pension scheme and there is, in the country or territory in which it is established, a body–
>
> (i) which regulates occupational pension schemes; and
>
> (ii) which regulates the scheme in question".

55. Reg 2(3) provides that para (3) is satisfied if the scheme is *"recognised for tax purposes"*, and that a scheme is so recognised if it meets each of 3 conditions. Condition 1 is that the scheme is open to persons resident in the country in which it is established. Condition 2 is satisfied if, among other things, the scheme is established in a country where there is a system of taxation of personal income under which tax relief (including exemption from tax) is available in respect of pensions, and all or most of the benefits paid by the scheme to members who are not in serious ill-health are subject to taxation. Condition 3 is satisfied if the scheme is approved by the tax authorities in the country or territory in which it is established.

56. I was not addressed in any detail on whether the Simcoe Scheme met these conditions and so was an overseas pension scheme as defined, Ms Rhee's position being that it was not for the Joint Trustees to explain whether the Simcoe Scheme could have qualified as a qualifying overseas pension scheme, and Mr Peretz's position being that whether or not it could have done, there was no reason for it do so (see below). But as far as I can see the likelihood is that the Simcoe Scheme was (and is) an overseas pension scheme. It would seem undoubtedly to be an occupational pension scheme as defined (see reg 2(5), cross-referring to s. 150(5) FA 2004). And although I had no evidence or submissions on the point, I would have thought it likely that the remainder of reg 2(2) was also satisfied on the basis there was a body in Ireland which regulates pension schemes including the Simcoe Scheme, possibly the Revenue

Commissioners (on the basis that they have a role under TCA 1997 in approving schemes) but more probably the Pensions Board, referred to in some of the material before me as having been established by the Irish Government under the Pensions Act 1990 to ensure that pension schemes are run in line with the Act. As for the requirements of reg 2(3), conditions 1 and 3 would seem to be satisfied, and, although again I had no evidence or submissions on the point it appears to me that condition 2 was as well. The Irish model of exempt approval for pension schemes appears very similar both in language and effect to the UK model of exempt approval that formerly applied here before it was replaced by the system of registration; and although I was not addressed on them, the provisions of Part 30 (ss. 770 to 790) of TCA 1997 were before me from which it appears both (a) that Ireland has a system of taxation of personal income under which exemptions are available in respect of pensions (see s. 774 which confers a number of exemptions from income tax) and (b) that most of the benefits paid by the scheme to members are subject to taxation (see s. 779 under which pensions paid under a scheme are charged to income tax). I proceed on the basis that the Simcoe Scheme was, or at any rate probably was, an overseas pension scheme as defined in s. 150(7) FA 2004.

57. The next question is what was required for the Simcoe Scheme to be a qualifying overseas pension scheme. That is found in para 5 of sch 33 to FA 2004. Para 5(1) provides as follows:

> "For the purposes of this Schedule an overseas pension scheme is a qualifying overseas pension scheme if—
>
> (a) the scheme manager has given to the Inland Revenue notification that it is an overseas pension scheme and has provided any such evidence that it is an overseas pension scheme as the Inland Revenue may require,
>
> (b) the scheme manager has undertaken to the Inland Revenue to inform the Inland Revenue if it ceases to be an overseas pension scheme,
>
> (c) the scheme manager has undertaken to the Inland Revenue to comply with any prescribed benefit crystallisation information requirements imposed on the scheme manager, and
>
> (d) the overseas pension scheme is not excluded from being a qualifying overseas pension scheme by sub-paragraph (3)."

58. It can be seen that there are effectively three requirements (para 5(1)(d) and (3) can be ignored as it deals with a case where there have been significant previous failures to comply with requirements). The scheme has to give the Revenue (now HMRC) notification that it is an overseas pension scheme, and provide evidence to that effect; the scheme has to give an undertaking that it will inform HMRC if it ceases to be an overseas pension scheme; and the scheme has to give an undertaking to comply with certain prescribed information requirements. Ms Rhee submitted that none of these was particularly onerous or burdensome, and that it was for Mr Peretz to explain why they were. I agree that certainly the first two do not appear onerous, and the third one would not in practice have been onerous for the Simcoe Scheme. This is because the prescribed requirements (found in reg 2 of regulations called The Pension Schemes (Information Requirements – Qualifying Overseas Pension Schemes, Qualifying Recognised Overseas Pensions Schemes and Corresponding Relief) Regulations

2006, SI 2006/208) only require information to be given in relation to relevant migrant members, and by para 4 of sch 33 to FA 2004 a relevant migrant member, among other things, has to be resident in the UK at a time when contributions are paid to the scheme (see para 4(1)(b)). In the case of the Simcoe Scheme no contributions were made in respect of Mr or Mrs McNamara after they moved to the UK, and hence there were no relevant migrant members and no information to give. In those circumstances I accept that it has not been shown that it would be unduly onerous or difficult for the Simcoe Scheme to qualify as a qualifying overseas pension scheme.

59. Mr Peretz said that that did not matter. Whether or not the Simcoe scheme could have been a qualifying overseas pension scheme, it was unrealistic to expect it to have done so. The main effect, and normal purpose, of a scheme satisfying the requirements to become a qualifying overseas pension scheme would be to obtain relief against UK taxes on member's and employer's contributions in respect of relevant migrant members. But as already explained there were no relevant migrant members in the Simcoe Scheme. There was therefore no reason for the Simcoe Scheme to take the trouble to qualify as a qualifying overseas pension scheme. Indeed the only benefit of doing so would be that the members' pension rights would enjoy protection if they later became bankrupt in the UK, something that Mr Peretz described as hypothetical.

60. In Mr McNamara's case I am very doubtful if the prospect of him becoming bankrupt in the UK was in fact hypothetical; see paragraph 20 above where I conclude that his bankruptcy was, if not inevitable, very probable, and may very well have been the very reason for his re-location. But Mr Peretz submitted that the issues in the case should not really be decided by reference to Mr McNamara's own particular position, but as a matter of general principle.

61. As a matter of general principle, I accept the point that there is usually little reason for an overseas pension scheme to go to the trouble of notifying, and giving undertakings to, HMRC so as to become a qualifying overseas pension scheme unless it is expected that contributions are going to be made to the scheme by or on behalf of members who have moved to the UK and are relevant migrant members. I also accept that many migrant workers who come to the UK from other Member States are likely to have rights under pension arrangements that do not have any reason to take the necessary steps to become qualifying overseas pension schemes (even if they could otherwise qualify); and that whether they do so or not is not usually a decision for the member but for the scheme itself. In the case of ordinary employees who are members of occupational pension schemes, they generally have no control over the decisions of those running the scheme. Ms Rhee said that whatever the position with ordinary employees, the same was not necessarily true of the self-employed, a submission that I will have to come back to.

Effect of not being an approved pension arrangement

62. If a pension scheme does not qualify as an approved pension arrangement for the purposes of s. 11 WRPA 1999, there is still the possibility that the bankrupt's rights under it might be excluded from his estate pursuant to s. 12 WRPA 1999. But this is a less advantageous provision from the point of view of the bankrupt.

63. First, the arrangements have to fall within one of the categories of *"unapproved pension arrangement"* in reg 3 of the 2002 Regulations. I do not think this is in

practice difficult to achieve. Counsel were agreed that a pension scheme established outside the UK could qualify as an unapproved pension arrangement. Assuming that is right, a pension arrangement can qualify, among other things, if (i) it is an employer-financed retirement benefits scheme as defined in s. 393A ITEPA 2003; (ii) it is established under irrevocable trust; (iii) it has as its primary purpose the provision of relevant benefits and (iv) it is the bankrupt's sole or main means of pension provision (other than the state pension): see paragraphs 26 and 31 above. Most occupational pension schemes established under trust are likely to meet these conditions, and the Simcoe Scheme would appear to do so, as both counsel accepted: I see no reason why the Simcoe scheme should not satisfy (i)-(iii) above, and since Ms Rhee said that the understanding of the Joint Trustees was that it was Mr McNamara's main (if not only) pension provision, it would appear to satisfy (iv) as well.

64. Second, the bankrupt either has to reach an agreement with the trustee in bankruptcy in accordance with reg 6 of the 2002 Regulations, or apply to the Court for an exclusion order under reg 5 of the 2002 Regulations.

65. In the former case, he is obviously dependent on the trustee agreeing; and there is quite a short time limit of 9 weeks, which (save in the case of a scheme becoming deregistered) runs from the date the bankrupt's estate vests in the trustee: see reg 6(1). There is no power in the 2002 Regulations to extend this time limit.

66. In the case of an application to the Court there is also quite a short time limit of 13 weeks, again normally running from the date of the vesting of the bankrupt's estate in the trustee: reg 5(1)(a). There is in this case an express power for the Court to extend the time limit, but only where *"good cause"* is shown: reg 5(2). And the bankrupt does not have any guarantee that an exclusion order, even if duly applied for, will be made: the Court has a discretion whether to make one (in whole or in part), and is expressly directed to have regard to the future likely needs of the bankrupt and his family, and whether he has any other accrued pension rights: reg 5(3).

67. Mr Peretz referred to this regime as giving only a *"bronze-standard"* protection as compared with that available under s. 11 WRPA 1999. It could not, he said, be regarded as parity of treatment. But in his submission that was what EU law required.

Insolvency Service guidance

68. In support of his submissions, Mr Peretz referred to the guidance given by the Insolvency Service. The Insolvency Service is an executive agency of the Department of Business, Energy and Innovative Skills, and has a number of functions, which includes acting in bankruptcies (by Official Receivers) where no outside trustee is appointed.

69. The guidance to which I was referred comes from two sources. One is the Technical Manual. This is a manual containing guidance on case administration matters for the use of Insolvency Service staff, but it is the practice of the Insolvency Service to make it available to the public and it is published online under the Insolvency Service's Freedom of Information Publication Scheme, and periodically updated.

70. The parts of the Technical Manual to which I was referred are in Chapter 61 which

deals with pensions, and date from December 2012 (with later amendments as noted below). They are as follows:

Para 61.2, headed "Pensions and bankruptcy":

> "In any case where the bankruptcy order was made on a petition presented on or after 29 May 2000, all approved pension arrangements will not form part of the bankrupt's estate…"

Para 61.14, headed "A pension administered outside the UK":

> "A pension arrangement administered outside the UK is unlikely to have achieved the necessary UK tax-approval to qualify it as an approved pension that would be excluded from the estate (see paragraph 61.21). The exception to this is an occupational pension scheme set up by a government outside the UK for the benefit, or primarily the benefit, of its employees, which is automatically excluded from the estate.
>
> If the pension is held in another European (EU) country, the guidance at paragraph 61.39 should be followed. Otherwise the official receiver, as trustee, will need to consider the value of the pension against the likely costs of obtaining the orders required to deal with the pension… The cost of such an order is likely to be prohibitive and the best way to deal with the pension interest is likely to be to enter into a qualifying agreement with the bankrupt."

Para 61.39, headed "The exclusion of a pension administered from another EU member state (amended March 2018)":

> "As explained in paragraph 61.14, a pension administered from another EU member state is likely to be an unapproved pension.
>
> In order to ensure parity of treatment for any EU national who has exercised their right to freedom of movement within the EU, The Service has, as a matter of policy, decided to instruct the official receiver to seek to exclude the majority of EU pensions arrangements by entering into qualifying agreements (see paragraph 61.41) with the bankrupt.
>
> Such a qualifying arrangement should be sought if the EU pension arrangement is an occupational pension scheme (where the bankrupt was an employee but not a director of the company), or the arrangement is a recognised pension scheme under the laws of the EU state in which it is based (see paragraph 61.40).
>
> Where the pension arrangement is not recognised under the laws of the EU state in which it is administered, the official receiver should still enter into a qualifying agreement, but on the same terms as for a non-EU unapproved pension (see paragraph 61.42). Where there is doubt, the advice of the Senior Official Receiver's Office should be sought."

Para 61.40, headed "Establishing if the scheme would be tax approved in country in which it is administered":

> "The following Parts of the Technical Manual give some guidance whether a pension scheme might be tax approved in the country in which it is administered:
>
> Chapter 43.1, Part 3 – Germany

> Alternatively, HMRC provide a list of pensions that they have recognised as meeting tax requirements of the country in which they are established. If a scheme is not on the list, it does not necessarily mean that the scheme does not meet tax requirements in its own country, it may be that the scheme provider has not applied for HMRC recognition."

Para 61.41, headed "Qualifying agreements – EU pensions (amended February 2016)":

> "Where the official receiver is required to enter into a qualifying agreement … in relation to an EU pension (see paragraph 61.39), the terms of the agreement will be, essentially, unconditional except for some requirements in respect of IPA/IPOs in that the bankrupt should agree to provide information regarding the drawing of the pension during bankruptcy or the term of any existing IPA/IPO…."

Para 61.42, headed "Qualifying agreements for unapproved pensions (amended March 2018)":

> "Where the official receiver is minded to enter into a qualifying agreement in relation to an unapproved pension, he/she will need to consider entering into an agreement that provides some return to the creditors, because an unapproved pension is a vesting asset which the official receiver should realise. In reaching such an agreement the official receiver should take into account the types of matters considered by a court when dealing with an application for an exclusion order … and also any excessive pension contributions …
>
> Where however the pension is one that is administered in a foreign EU state, the qualifying agreement should be unconditional, provided that the pension is 'approved' within the state of its establishment (see paragraphs 61.39 to 61.41)."

71. The other source of guidance is what are called "Dear IP" letters. These are guidance in the form of periodical bulletins issued by the Insolvency Service to insolvency practitioners. The relevant Dear IP letter was issued on 25 July 2018 and is as follows:

> "**95 Pensions in bankruptcy – exclusion of a pension administered from another EU State**
>
> The Insolvency Service is concerned to ensure that EU citizens who have exercised their right to free movement within the EU are not disadvantaged by the operation of UK law.
>
> All approved (by HMRC) pensions in cases made on a petition (or application to the Adjudicator) presented on or after 29 May 2000 are excluded from the bankrupt's estate. A pension administered from another EU State may be approved in the State of establishment but not approved by HMRC in the UK.
>
> If a pension is unapproved by HMRC it is possible for the bankrupt to seek to exclude their rights from the bankruptcy estate under the Occupational and Personal Pension Schemes (Bankruptcy) (No. 2) Regulations 2002 by entering into a qualifying agreement with their trustee. Guidance has been given to Official Receivers that they should enter into such agreements where the EU pension arrangement is an occupational scheme (and where bankrupt was an employee but not a director of the company) or where the arrangement is a recognised pension

> scheme under the laws of the EU State in which it is based. The guidance to Official Receivers in that in such cases the qualifying agreement should be unconditional, the practical effect of which will be to treat the bankrupt in the same way as a UK national with comparable UK pension arrangements."

It can be seen that this closely follows the guidance in the Technical Manual.

72. There was some debate before me as to the precise meaning of the Dear IP letter. Ms Rhee said that the reference in the first paragraph to the concern that EU citizens should not, by moving to the UK, be *"disadvantaged by the operation of UK law"* invited a comparison with the law of their home state, and presupposed that the UK position was less beneficial to them. I do not think it is necessarily so limited. It could in context refer to EU citizens being worse off than UK citizens in a comparable position.

73. Ms Rhee also suggested that the reference in the third paragraph (and the similar reference in para 61.39 of the Technical Manual) to a *"recognised pension scheme"* must be a reference to an overseas pension scheme that satisfied all the conditions in the 2006 Regulations, or at any rate those in reg 3 of the 2006 Regulations, and it was for HMRC, not the Courts, to decide if a scheme did satisfy all those requirements. I do not agree. If that had been intended one would have expected some reference to the detailed requirements in the 2006 Regulations. As I read these documents, the references are not to schemes that have been recognised by HMRC, but to schemes that are recognised under the laws of the state in which they are established in the sense of being tax approved: see para 6.40 of the Technical Manual which refers to schemes meeting tax requirements in their own country, whether or not they have applied for HMRC recognition. I see no reason to doubt that the Simcoe Scheme is recognised in this sense, as the Revenue Commissioners agreed to treat it as an exempt approved scheme under TCA 1997 (paragraph 13 above).

74. There was also some discussion before me as to the meaning of the words *"where the EU pension arrangement is an occupational scheme (and where bankrupt was an employee but not a director of the company) or where the arrangement is a recognised pension scheme"* in the Dear IP letter (and the very similar wording in para 61.39 of the Technical Manual). Does it mean "in the case of occupational pension schemes those where the bankrupt was an employee but not a director, and in the case of other (non-occupational) schemes those which are recognised"; or does it mean "a scheme which is either an occupational scheme where the bankrupt was an employee but not a director, or a scheme (whether occupational or not) which is recognised"? If the former then an occupational scheme under which the bankrupt was a director (which would include the Simcoe Scheme) would not qualify even if it was recognised, but if the latter then a scheme that was recognised would qualify, whether or not the bankrupt was a director. Mr Peretz submitted that it was the latter.

75. Having initially had my doubts about it, I think he is right on this. On either view what is clear is that an ordinary (non-director) employee who is a member of an occupational scheme will benefit from this practice whether the scheme is recognised or not, no doubt because recognition of the scheme will usually not be a matter for them, and because they will not usually be in a position to choose the amount of contributions that are made to the scheme on their behalf. But in other cases – that is where the bankrupt has taken out a personal pension scheme, or was a director in

relation to an occupational pension scheme – the risk of the bankrupt being able to choose his own level of contributions (and so use the scheme to shelter assets from an impending bankruptcy), and the bankrupt's responsibility for choosing whether the scheme is registered or not, are both likely to be greater. Registration with the appropriate tax authorities is likely to be some safeguard against the risk of excessive contributions being made, as one would expect the tax authorities to exercise some control over the level of contributions, or benefits, or both. In those circumstances I agree with Mr Peretz that the meaning of the relevant wording is that a qualifying agreement should be entered into on unconditional terms if either the bankrupt was a (non-director) employee under an occupational pension scheme, or the scheme, whether occupational or not, was registered.

76. Mr Peretz said that overall the guidance given by the Insolvency Service was a recognition that EU law required parity of treatment for pension arrangements established in other EU Member States, and as such was a considered view by an official government entity to the effect that the legislation in WRPA 1999 as it stood did not comply with EU law.

77. Ms Rhee pointed out that the Technical Manual is addressed to Official Receivers for what are likely to be the smaller bankruptcies, and that the Dear IP letter actually only records the guidance given to Official Receivers. She pointed out that the Dear IP letters carry a disclaimer to the effect that the contents are the view of the Insolvency Service and not a full and authoritative statement of law; and that the Insolvency Practitioners Association, which requires its members to *"comply with"* Statements of Insolvency Practice merely requires its members to *"take note"* of Dear IP letters; and said that the guidance would not by itself be any protection to trustees in bankruptcy, who are potentially liable to creditors for not getting in assets of the estate.

78. I accept all that and I accept that trustees in bankruptcy are entitled in cases of any doubt to obtain an authoritative ruling from the Court. But none of that detracts from the point made by Mr Peretz, which to my mind is well-founded, that the guidance does show that the view of the Insolvency Service is that EU citizens who have rights under pension schemes recognised in their home countries should benefit from having them protected (by way of unconditional qualifying agreements) in order to ensure parity of treatment for EU citizens. That is a policy decision, and I accept is likely to be based on a view as to what EU law requires. Whether it does so require is the key issue.

EU law – the legislative provisions relied on

79. The case for Mr McNamara is based on the right to freedom of movement, one of the four fundamental freedoms of the EU. This is now expressed in Art 21(1) TFEU as follows:

> "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect."

80. Further provision in relation to freedom of movement is found in Title IV of TFEU, headed "Free Movement of Persons, Services and Capital". Title IV is divided into a number of chapters. Chapter 1 is headed "Workers". The first article in Chapter 1 is

Art 45, which provides, so far as material, as follows:

> "1. Freedom of movement for workers shall be secured within the Union.
>
> 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment…"

81. Chapter 2 of Title IV is headed "Right of establishment". The first article in Chapter 2 is Art 49, which provides as follows:

> "Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.
>
> Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital."

82. Chapter 3 of Title IV is headed "Services". The first article in Chapter 3 is Art 56, which provides, so far as material, as follows:

> "Within the framework of the provisions set out below, restrictions on the freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended."

83. These provisions of TFEU are supplemented by a number of other legislative provisions. Mr Peretz relied in particular on Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union to move and reside freely within the territory of the Member States (the **"Citizens' Rights Directive"** or **"CRD"**).

84. The Citizens' Rights Directive applies both to workers and the self-employed: see recital (2) referring generally to the *"free movement of persons"* and recital (3) referring to the need to codify the existing instruments *"dealing separately with workers, self-employed persons* [and others]*"*. Art 7(1), so far as material, provides:

> "All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:
>
> (a) are workers or self-employed persons in the host Member State; or…"

85. Recital (20) to CRD provides as follows:

> "In accordance with the prohibition of discrimination on grounds of nationality, all Union citizens and their family members residing in a Member State on the basis of this Directive should enjoy, in that Member State, equal treatment with nationals in

> areas covered by the Treaty, subject to such specific provisions as are expressly provided for in the Treaty and secondary law."

86. This was given effect to by Art 24, headed "Equal Treatment", which provides, so far as material, as follows:

> "1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty…."

87. Despite the wording of the preliminary issue which refers to Arts 21, 45 and/or 49 TFEU (and in his draft amendment Arts 50 and 56), Mr Peretz said that for his purposes it was sufficient to rely on Art 49 TFEU (and Art 24 CRD). He did not need to rely on Art 45 TFEU, and there was no need to resolve the question whether Mr McNamara was a "worker" for the purposes of Art 45. Mr McNamara was exercising the right of establishment under Art 49 TFEU, and the right of residence under Art 7 CRD, when he moved to London.

Equivalence of Arts 45 and 49?

88. Mr Peretz advanced a number of propositions of EU law. The first was that it made no difference to his case that he relied solely on Mr McNamara's right of establishment under Art 49. He submitted that the relevant principles of EU law applied indifferently or equally as between the various provisions concerned with freedom of movement. Ms Rhee submitted that although similar considerations applied, it was important to bear in mind that Arts 45 and 49 applied to different situations and that what might be an obstacle to a worker might not be for the self-employed.

89. As illustrations of the proposition that the same principles apply to the various provisions conferring freedom of movement, Mr Peretz relied on two decisions of the European Court of Justice (**"ECJ"**). The first was *Ramrath v Ministre de la Justice* Case C-106/91 ECR I-3351. This concerned the right of Mr Ramrath to practise as an auditor in Luxembourg. The ECJ said that it was not yet clear whether the facts of his case fell within the provisions of the Treaty relating to freedom of movement of workers, freedom of establishment, or freedom to provide services (then Arts 48, 52, 56 and 59, now Arts 45, 49, 52 and 56 TFEU), but that it was unnecessary for it to consider this; and referred to *"freedom of movement for persons"* as one of *"the fundamental principles of the Treaty"*, which could only be restricted by rules justified in the general interest: see at [15]-[17], [24] and [29].

90. The second case relied on by Mr Peretz was *Commission v Denmark* Case C-150/04 [2007] 2 CMLR 16. Danish legislation on the taxation of pensions provided a system of tax deductions and exemptions for pension arrangements but only for those taken out with institutions established in Denmark; a different and less beneficial tax treatment was applicable to other pension arrangements. The ECJ held that the requirement to have an establishment in Denmark was equally an obstacle to the freedom to provide services, the freedom of movement of workers and the freedom of establishment. It did however consider all three separately. I think it helpful to cite the relevant passage, at [40]-[45], in full as follows:

> "40. With regard to Art. 49 EC [now Art 56 TFEU], two categories of situation in which such a requirement is liable to have a dissuasive effect must be distinguished. In the first, service providers are dissuaded from establishing themselves in Denmark because of the costs involved. Such a situation constitutes, of itself, a denial of that freedom (see, to that effect, *Commission v France* (C-496/01) [2004] E.C.R. I-2351 at [65]; and *Commission v Italy* (C-439/99) [2002] E.C.R. I-305 at [30]). In the second, the recipients of those services are dissuaded from becoming members of a pension scheme with a pension institution established in another Member State, in view of the important role played, at the time when a pension insurance contract is taken out, by the possibility of obtaining tax relief under that head (see *Danner* at [31]).
>
> 41. Secondly, with regard to freedom of movement for workers, salaried workers who have carried on an occupation in a Member State other than Denmark and who are subsequently employed, or seek employment, in the latter Member State will normally have concluded their pension and life assurance contracts or invalidity and sickness insurance contracts with insurers established in the first state. It follows that there is a risk that the provisions in question may operate to the particular detriment of these workers who are, as a general rule, nationals of other Member States (see, to that effect, *Bachmann* (C-204/90) [1992] E.C.R. I-249; [1993] 1 C.M.L.R. 785 at [9]; and *Commission v Belgium* (C-300/90) [1992] E.C.R. I-305 at [7]).
>
> 42. In the present case, the grant of a right to deduct or exempt contributions, provided that the pension scheme is taken out with a pension institution established in Denmark, is, because of the efforts and costs which it entails, liable to dissuade the insured person from transferring his place of residence to Denmark and, therefore, constitutes an obstacle to freedom of movement for workers.
>
> 43. Thirdly, for the same reasons as above, the view must be taken that the contested legislation also constitutes an obstacle to the freedom of establishment in Denmark of self-employed workers who are nationals of another Member State.
>
> 44. By not granting any right to deduct or exempt contributions paid to pension institutions established in other Member States, the contested legislation is liable to dissuade self-employed workers from establishing themselves in Denmark.
>
> 45. Having regard to the foregoing, it must be held that the contested legislation constitutes an obstacle to freedom to provide services, freedom of movement for workers and freedom of establishment."

It can be seen that in considering each of the three relevant rights (right to provide services, right of establishment and right of freedom of movement for workers), the ECJ refers to the requirement as *"liable to have a dissuasive effect"* [40], *"liable to dissuade the insured person from transferring his place of residence to Denmark"* [42], and *"liable to dissuade self-employed workers from establishing themselves in Denmark"* [44].

91. I was not referred to any other material on this first proposition of Mr Peretz's. On the basis of these cases I conclude that although the rights of freedom of movement

for workers (Art 45), freedom of establishment (Art 49), and freedom to provide services (Art 56) are all facets of the fundamental right of freedom of movement (now found in Art 21 TFEU) and that the basic principles applicable to them are the same, nevertheless the three rights are not identical and do need to be looked at separately, as the ECJ did in *Commission v Denmark*. In particular I accept Ms Rhee's submission that what may be an obstacle or restriction to freedom of movement in the case of a worker will not in all cases be equally an obstacle or restriction in the case of a self-employed person seeking to exercise the right of establishment. Whether it is or not requires a consideration of the facts, and since the factual situation of self-employed persons is not in all respects the same as that of workers, it is possible that what is an obstacle for one is not for the other.

Restrictions not limited to provisions drafted by reference to nationality

92. Mr Peretz's second proposition was that provisions of national law could constitute obstacles to freedom of movement even though the provisions in question were not drafted by reference to nationality if they in fact had the same effect: see *Barnard, The Substantive Law of the EU – The Four Freedoms* (6th edn, 2019) at p 241.

93. As an illustration of the principle he referred me to *O'Flynn v Adjudication Officer* (Case C-237/94) [1996] 3 CMLR 103 (***"O'Flynn"***). Mr O'Flynn was an Irish national who lived in the UK where he had worked as an employee and was now retired. His son died, and Mr O'Flynn had him buried in Ireland. Under UK regulations, Mr O'Flynn would have qualified for a funeral payment from the social fund but for the fact that it was a requirement for such a payment that the funeral take place in the UK. It was common ground that such a funeral payment was a "social advantage" within the meaning of Art 7(2) of Regulation 1612/68 of the Council on freedom of movement for workers, which provided that a worker who was a national of one Member State might not in another Member State be treated differently from national workers by reason of his nationality, and should enjoy the same social and tax advantages as national workers. The UK regulations were held by the ECJ to be indirectly discriminatory even though they said nothing about the nationality of the applicant: see at [18] where the ECJ said that conditions imposed by national law must be regarded as indirectly discriminatory where, although applicable irrespective of nationality:

> "they affect essentially migrant workers… can be more easily satisfied by national workers than by migrant workers… or where there is a risk that they may operate to the particular detriment of migrant workers."

94. Two other points appear from the case. First, the UK had argued that to establish discrimination it was necessary to have solid evidence, generally of a statistical nature, that the proportion of nationals of other Member States who satisfy the requirement is substantially lower than the proportion of nationals of the host Member State (see at p 110). Neither Advocate General Lenz nor the Court accepted this, the former saying at [16] that the decisive question was whether it was more probable for nationals of other Member States than for nationals of the UK that they or their relatives would be buried in another Member State, and the Court saying at [21] that it was not necessary to find that the provision in question did in practice affect a substantially higher proportion of migrant workers: it was sufficient that it was liable to have such an effect.

95. Second, it had been argued by the UK that it was not obvious that the UK regulations on funeral payments had in fact had any inhibiting effect. Again this was not accepted by either Advocate General Lenz or the Court. The former said at [31]:

> "I must also address the United Kingdom's argument that it is not evident that the provision in question has any inhibiting effect on freedom of movement or social integration. That is probably based on the consideration that a migrant worker who, as in the present case, moves from one Member State to another in order to work there is presumably not guided in that decision by whether, in the event of the death of a relative, he will receive a benefit which will enable him to have the funeral take place in his country of origin. In my opinion, however, that is not relevant either. In my Opinion in *Bosman* I explained that the freedom of movement for workers protected by Article 48 – for the implementation of which Regulation 1612/68 too serves – is not restricted to a prohibition of discrimination on grounds of nationality, but must also be understood as a prohibition of restrictions of freedom of movement. That does not mean, however, that only such cases of discrimination are covered which also restrict freedom of movement. Article 7(2) of Regulation 1612/68 thus lays down, quite generally, that foreign workers are to enjoy the same social advantages as workers of the Member State concerned."

And the Court said at [21]:

> "Further, the reasons why a migrant worker chooses to make use of his freedom of movement within the Community are not to be taken into account in assessing whether a national provision is discriminatory. The possibility of exercising so fundamental a freedom as the freedom of movement of persons cannot be limited by such considerations, which are purely subjective."

96. Ms Rhee accepted that provisions of national law that were indirectly discriminatory could constitute restrictions on the freedom of movement. But she denied that every indirectly discriminatory provision had this effect. This is a point which I return to below.

No need for actual deterrent effect

97. Mr Peretz's third proposition was that there was a low bar to what counts as a restriction on the freedom of movement. As illustrated by *O'Flynn* it is not necessary to show that a measure has an actual deterrent effect; it is enough to show that it is liable to have such an effect. And if there is such a restriction it is no answer to say that the person in question could have taken steps to avoid it, if doing so would require him to do anything more than complete an administrative formality: see for example *Commission v Denmark* where it was always open to institutions to open an establishment in Denmark, but there would be costs in doing so.

98. Ms Rhee accepted that in *O'Flynn* the court found that it was not necessary for the impugned provision to have had any actual deterrent effect: see the remarks of the Advocate General (cited in paragraph 95 above) to the effect that migrant workers such as Mr O'Flynn presumably do not take into account the availability of funeral payments when deciding to exercise their freedom of movement. But she pointed out that this decision was based on Art 7(2) of Regulation 1612/68 of the Council on freedom of movement for workers within the Community, which expressly provided that:

> "He [a worker who is a national of a Member State] shall enjoy the same social and tax advantages as national workers."

(This has now been re-enacted, in the identical words, as Art 7(2) of Regulation 492/2011 of the European Parliament and of the Council on freedom of movement for workers within the Union.) *O'Flynn* was therefore a case about workers, and discrimination in the employment context, and she fully accepted that in such a context the motives of workers for moving to the UK were irrelevant (and also that statistical evidence was not necessary).

99. But she submitted that unlike Art 45, which contained in Art 45(2) an express reference to the abolition of discrimination, Art 49 is framed in terms of the prohibition on restrictions on the freedom of establishment. Discrimination could not, she said, simply be equated with a restriction. In the case of a provision of national law said to constitute such a restriction it was necessary to examine whether it did or did not have a deterrent effect: see *Commission v Denmark* where (as set out at paragraph 90 above) the ECJ carefully considered to what extent the relevant provisions of Danish law had a deterrent or dissuasive effect on the exercise of each of the relevant rights (freedom of movement for workers, freedom of establishment and freedom to provide services).

100. In the present case she said that it had not been shown that there was any deterrent effect. There was no reason to suppose that the provisions of the UK insolvency regime had actually deterred Mr McNamara from relocating to the UK – on the contrary the likelihood was that he exercised his right of establishment precisely in order to take advantage of them.

101. But it went beyond Mr McNamara's personal reasons for moving. It was not shown, nor was there any reason to think, that the UK provisions had a tendency to deter the exercise of the freedom of movement rights. She referred me to Council Regulation 1346/2000 on insolvency proceedings (**"the 2000 Insolvency Regulation"**). The 2000 Insolvency Regulation has subsequently been replaced but is applicable to Mr McNamara's bankruptcy. Recital (4) is as follows:

> "It is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping)."

That she submitted was a key policy concern underpinning the Regulation.

102. Art 3(1) of the Regulation confers jurisdiction to open (main) insolvency proceedings on the courts of the Member State where the debtor has his COMI. By Art 3(2) courts of another Member State may open (territorial) insolvency proceedings only if the debtor possesses an establishment in that Member State, and the effects of those proceedings are restricted to the assets there.

103. Art 4, headed "Law applicable" provides, so far as relevant, as follows:

> "1 Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the 'State of the opening of proceedings'.

> 2 The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular:
>
> …
>
> (b) the assets which form part of the estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings"

104. Ms Rhee said that three things flow from that. First, the 2000 Insolvency Regulation expressly allowed the law of the relevant Member State to determine which assets did or did not form part of the estate; second, it implicitly recognised that there might be different approaches in different Member States to the question which assets formed part of the estate; and third, a person becoming bankrupt in a particular Member State had to take the insolvency regime provided for by the laws of that Member State as a whole: he could not pick and choose which bits he liked and which he did not.

105. She pointed out that no evidence had been adduced before me as to what the position was in Ireland where a bankrupt had rights under pension arrangements, and no positive case had been advanced that in such a case the rights of a bankrupt under an exempt approved scheme would be exempted from vesting in his estate. The Court had no information as to whether, or under what conditions, the pension rights of an individual subject to insolvency proceedings in different Member States across the Union would be protected from his creditors. Nor indeed was any evidence adduced before me as to other respects in which the bankruptcy law of Ireland might differ from that of the UK. But someone like Mr McNamara who voluntarily moved his COMI to the UK and then became bankrupt became subject to the UK bankruptcy laws as a whole, and unless it could be shown that those provisions as a whole were less beneficial than the Irish bankruptcy laws as a whole, it could not be shown that the UK provisions had any deterrent effect, or were liable to dissuade Irish nationals from exercising their rights to move to the UK and establish themselves here. What Mr McNamara was trying to do was to cherrypick the parts of UK insolvency law he did like (such as the very short period of 1 year for discharge), and rewrite the ones he did not like. That was not permissible.

106. I accept that it has not been shown that the provisions of ss. 11 and 12 WRPA 1999 have a tendency to deter the exercise of individuals' freedom of movement. For most people the prospect of bankruptcy, at the stage at which they are considering moving to the UK, is presumably remote, whether they be workers or self-employed. But even for those like Mr McNamara where the likelihood is that the prospects of bankruptcy were anything but remote at the time he moved to London, it cannot be said that ss. 11 and 12 have a tendency to deter without examining whether the UK insolvency provisions taken as a whole are more or less advantageous to the bankrupt. Since neither side showed any interest in adducing evidence as to the position on bankruptcy in Ireland, that has not been shown.

Need for tendency to deter?

107. The next question is whether it is necessary to show that the provision in question is liable to have a deterrent effect. Mr Peretz said this was unnecessary, and it was erroneous to suggest that what was required was a comparison between the position of

a migrant worker in the host state (here the UK) and his home state (here Ireland). That was irrelevant which was why no evidence had been adduced on behalf of Mr McNamara on it. What was relevant was the comparison between the position of a migrant worker in the host state (such as Mr McNamara in the UK) and the position of nationals of the host state (here UK nationals). Unless there was equal treatment, there was discrimination, and unless such discrimination was objectively justified – something that the Joint Trustees had not here suggested – that was a breach of the individual's rights.

108. For that Mr Peretz relied on his next proposition which was that the right to retain one's pension rights on bankruptcy was a *"social advantage"*, and that by virtue of Art 49 TFEU and Art 24 CRD, the self-employed were entitled to equal treatment in relation to social advantages just as much as workers were.

109. Mr Peretz submitted that the concept of social advantage was widely defined in EU law: see *Barnard* (op cit) at p 255. Professor Barnard there cites from *Criminal Proceedings against Even* Case C-207/78 [1979] ECR 2019 where at [22] the ECJ defined social advantages broadly to include all benefits:

> "which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and the extension of which to workers who are nationals of other Member States therefore seems suitable to facilitate their mobility within the [Union]."

That was said in the context of the freedom of movement of workers where Art 7(2) of Regulation 1612/68 (cited at paragraph 98 above) expressly provided for migrant workers to enjoy the same social advantages as national workers.

110. There is no direct equivalent in respect of the right of establishment applicable to the self-employed. But the CRD applies to the self-employed (see paragraphs 84-6 above), and Art 24 confers a right to equal treatment with nationals of the host Member State *"within the scope of the Treaty"*. Indeed, although I was not referred to it, this seems to me no more than is said in Art 18 TFEU itself which, so far as material, provides:

> "Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."

111. So the question is whether the preservation of pension rights on bankruptcy is within the scope of the Treaties, and specifically within the scope of Art 49. Mr Peretz said that the right of equal treatment conferred by Art 24(1) of the CRD includes social advantages: see *Barnard* (op cit) at p 271 where she says:

> "The principle of equal treatment also applies in respect of the enjoyment of various general facilities necessary to pursue self-employed activity – i.e., the enjoyment of social advantages, to use the term found in Article 7(2) of the Workers' Regulation 492/2011. While the original Establishment Directive did not contain any equivalent provision to Article 7(2), the Court has used Article 49 TFEU to achieve the same result (a position now supported by Article 24(1) CRD)."

112. Ms Rhee said that she did not quarrel with that statement, but drew attention to the fact that what Professor Barnard referred to was *"facilities necessary to pursue self-employed activity"*. A good example of such a case could be found in the decision in *Steinhauser v City of Biarritz* Case C-197/84 [1986] 1 CMLR 53 where Mr Steinhauser, a German artist practising in Biarritz, wished to rent a *crampotte*, a shed formerly used by fishermen, to exhibit his artworks, but was refused because he was not French. The ECJ held that that was a breach of what was then Art 52 (now Art 49 TFEU), saying at [16]:

> "It should also be emphasised that the freedom of establishment provided for by the Article relates not only to taking up an activity as a self-employed person but also the pursuit of that activity in the wide sense. The renting of premises for professional use is necessary for the pursuit of the professional activity and therefore comes within the ambit of Article 52 of the EEC Treaty."

113. Mr Peretz said that the prohibition on discrimination did not need to be linked to self-employment or the right of self-establishment, and referred me to *Commission v Italy* Case C-63/86 [1988] ECR 29. There a Belgian national who pursued activities as a self-employed person in Italy complained of a provision in Italian law under which reduced-rate mortgages were only available to Italian nationals. The ECJ said at [13]-[15]:

> "13 Those two Articles [Arts 52 and 59, now Arts 49 and 56 TFEU] are thus intended to secure the benefit of national treatment for a national of a member-State who wishes to pursue an activity as a self-employed person in another member-State and they prohibit all discrimination on grounds of nationality resulting from national or regional legislation and preventing the taking up or pursuit of such an activity.
>
> 14 As is apparent from the general programmes which were adopted by the Council on 18 December 1961 and which, as the Court has pointed out on numerous occasions, provide useful guidance with a view to the implementation of the provisions of the Treaty relating to the right of establishment and the freedom to provide services, the aforesaid prohibition is concerned not solely with the specific rules on the pursuit of occupational activities but also with the rules relating to the various general facilities which are of assistance in the pursuit of those activities. Among the examples mentioned in the two programmes are the right to purchase, exploit and transfer real and personal property and the right to obtain loans and in particular to have access to the various forms of credit.
>
> 15 For a natural person the pursuit of an occupation does not presuppose solely the possibility of access to premises from which the occupation can be pursued, if necessary by borrowing the amount needed to purchase them, but also the possibility of obtaining housing. It follows that restrictions contained in the housing legislation applicable to the place where the occupation is pursued are liable to constitute an obstacle to that pursuit."

I do not think that goes as far as Mr Peretz suggested: the ECJ does not say that obtaining reduced rate mortgages has no connection with the pursuit of self-employment. What it says is that the prohibition on discrimination is not limited to specific rules on the pursuit of occupational activities but also with other matters that can impact on the pursuit of such an occupation, of which access to housing is one.

114. In my judgment therefore the critical question is whether the exclusion of pension rights on bankruptcy is something that can impact on the right of establishment, or is otherwise within the scope of Art 49 TFEU.

115. Mr Peretz referred me to Council Directive 98/49/EC on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community, as showing that it was assumed that equal treatment of pension rights for both employed and self-employed persons fell within the scope of freedom of movement: see recital (1), referring to one of the fundamental freedoms being the free movement of persons, recital (8) to the effect that freedom of movement for persons is not confined to employed persons but extends to the self-employed, and recital (10) as follows:

> "Whereas, in order to enable the right of free movement to be exercised effectively, workers and others holding entitlement should have certain guarantees for equal treatment regarding the preservation of their vested pension rights deriving from supplementary pension schemes;"

This objective was given effect to by Art 4 as follows:

> "**Equality of treatment as regards preservation of pension rights**
>
> Member States shall take the necessary measures to ensure that the preservation of vested pension rights for members of a supplementary pension scheme in respect of whom contributions are no longer being made to that scheme as a consequence of their moving from one Member State to another, to the same extent as for members in respect of whom contributions are no longer being made but who remain within the same Member State. This Article shall also apply to other persons holding entitlement under the rules of the supplementary pension scheme in question."

116. As can be seen, the effect of this provision was to ensure that a migrant worker who moved from his home state to another should not be discriminated against as compared with those who remained in his home state, and it was not suggested that it had any direct application to the facts of the present case. Mr Peretz however relied on this as an illustration of the fact that preservation of pension rights could be regarded as falling within the scope of the right of free movement. I do not however regard this as determinative: it is obvious that it might have a deterrent effect on migrant workers if by moving to another Member State they would lose their pension rights in their home country. The present question is a rather different one.

117. I have not found this an entirely easy question, nor one that is really answered by the materials I have been shown. On the one hand provisions as to the effect of insolvency on accrued pension rights are not, in the language of *Commission v Italy*, something that *"prevent[s] the taking up or pursuit of"* self-employed activity, or *"rules relating to the various general facilities which are of assistance in the pursuit of those activities"*, or *"restrictions ... liable to constitute an obstacle to that pursuit"*. Indeed for reasons already given in the present case the prospect of insolvency probably contributed to Mr McNamara's decision to exercise his right of establishment in the UK. On the other hand, one of the features of self-employment is that it often involves the self-employed person incurring personal liability in connection with his business activity, and hence it can as a general rule be said that the risk of personal insolvency is connected with the right of establishment.

118. Neither counsel suggested that I should make a reference to the Court of Justice (**"CJEU"**). But I have reminded myself of the guidance on when it is appropriate to do so. I can take the law from a decision of my own in *Shields and Sons Partnership v HMRC* [2016] UKUT 0142 (TCC) at [35] where I said as follows:

> "The principles governing a reference to the Court of Justice are well settled. They can be summarised as follows (which I have adapted, with gratitude, from the decision of the Upper Tribunal (Judge Roger Berner) in *Capernwray Missionary Fellowship of Torchbearers v HMRC* [2015] UKUT 0368 (TCC)):
>
> (1) The power to make a reference is derived from Article 267 of the Treaty on the Functioning of the European Union, which provides that the Court of Justice has jurisdiction to give preliminary rulings on interpretation of Directives, and that:
>
> > "Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon … "
>
> (2) There is a distinction between the question whether a decision on EU law is critical to the decision of the court or tribunal, which is a jurisdictional criterion, and matters of discretion. So even where a tribunal considers it necessary to obtain a decision on a question of law to enable it to give judgment, it retains a limited discretion to decline to make a reference in certain cases: *HMRC v Bridport and West Dorset Golf Club Ltd* [2012] UKUT 272 (TCC) at [33] per Proudman J.
>
> (3) The principles have been encapsulated in the well-known passage from the judgment of Sir Thomas Bingham MR in *R v International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd ex parte Else (1982) Ltd and another* [1993] QB 534, at 545:
>
> > "… I understand the correct approach in principle of a national court (other than a final court of appeal) to be quite clear: if the facts have been found and the Community law issue is critical to the court's final decision, the appropriate course is ordinarily to refer the issue to the Court of Justice unless the national court can with complete confidence resolve the issue itself. In considering whether it can with complete confidence resolve the issue itself the national court must be fully mindful of the differences between national and Community legislation, of the pitfalls which face a national court venturing into what may be an unfamiliar field, of the need for uniform interpretation throughout the Community and of the great advantages enjoyed by the Court of Justice in construing Community instruments. If the national court has any real doubt, it should ordinarily refer."
>
> (4) Sir Thomas Bingham referred, among other cases, to *CILFIT Srl v Ministro della Sanità* (C-283/81) where the Court of Justice recognised at [13ff] that no purpose might be served by the making of a reference where the question raised is materially identical to one that has already been the subject of a preliminary ruling in a similar case, or where previous decisions of the Court had already dealt with the point of law in question, even though the questions at issue are not strictly identical. The national court or tribunal may also take the view that the correct application of EU law is so obvious (*acte clair*) as to

> leave no scope for any reasonable doubt as to the manner in which the question is to be resolved; but in reaching such a view (and in so doing, refraining from submitting the question to the Court of Justice and taking upon itself the responsibility for resolving it) the national court or tribunal must have regard to the particular characteristics of EU law and the particular difficulties of its interpretation, which are summarised by Sir Thomas Bingham in *ex parte Else*. In particular, courts and tribunals should exercise great caution in relying on the doctrine of *acte clair* (*Bridport* at [33]), and in taking the view that the meaning of the English language version of an EU instrument is clear (*Henn and Darby v DPP* [1981] AC 850 at 906B per Lord Diplock).
>
> (5) In *The Littlewoods Organisation plc & others v Customs & Excise Commissioners* [2001] EWCA Civ 1542 the Court of Appeal said at [117] that:
>
> > "a measure of self-restraint is required on the part of national courts, if the Court of Justice is not to become overwhelmed"
>
> and drew attention to the remarks of Advocate General Jacobs in *Wiener SI GmbH v Hauptzollamt Emmerich* (C-338/95), where he urged self-restraint on national courts, in particular in cases where there was an established body of case law that might readily be transposed to the facts of the case, or where the question turned on a narrow point considered in the light of a very specific set of facts and the ruling was one that was unlikely to have any application beyond the particular case. It is worth noting however that the Court of Justice in *Wiener* did not follow the approach of the Advocate General (who had suggested that the Court should refer the case back to the referring court to determine the case itself), but proceeded to answer the question before it."

119. In the present case the answer to the question whether the impact of insolvency on pension rights is within the scope of Art 49 is self-evidently a matter of EU law and is in my judgment critical to the decision of this Court and hence the jurisdictional criterion is therefore satisfied.

120. Nor do I consider that I can with complete confidence resolve the issue myself; nor do I consider that the answer is *acte clair*. Nor is this a case where there is an established body of case law that can easily be transposed to the facts of the case, or one where the question turns on a very narrow point dependent on a specific set of facts, where the ruling is unlikely to have any application beyond this case.

121. In those circumstances I have decided that it is appropriate to make a reference to the CJEU to seek a preliminary ruling on this question.

122. My understanding is that the CJEU welcomes national courts that refer preliminary questions to it giving their own views on the question referred. I will therefore express my provisional view, subject of course to the answer that the CJEU gives to the question to be referred. This is that Mr Peretz is right and that the impact of insolvency on the accrued pension rights of a person exercising the right of establishment as a self-employed person in another Member State is sufficiently closely connected with that activity (even if, as in this case, the insolvency does not arise from that activity but from previous activities in his home state) to be within the scope of Art 49.

123. If that is right, then I think it follows that there has not been equal treatment. A UK

national who becomes bankrupt is very likely to find, even if he takes no particular steps in this regard, that his accrued pension rights are protected on bankruptcy by the operation of s. 11 WRPA 1999, because the vast majority of pension rights in the UK are held under pension schemes registered with HMRC under s. 153 FA 2004 because of the tax advantages that can be thereby secured. Nationals of other EU Member States are far more likely to have accrued pension rights in schemes that are not registered.

124. Ms Rhee said that, whatever the position with employees, for a self-employed person to comply with the requirements of the 2006 Regulations and register their overseas pension scheme as a qualifying overseas pension scheme was not an onerous administrative requirement. I accept that it is likely that Mr McNamara could in fact have asked the trustees of the Simcoe Scheme to do this and that it would not have been difficult for them to do so, nor is there any particular reason to think that the trustees would have refused. I infer that the reason that this was not done was not because it was difficult or onerous, but because by the time he established himself in the UK it was thought that he had drawn all his benefits from the Simcoe Scheme anyway so there was no need to take any further steps. But one cannot assume that those moving to the UK to establish themselves as self-employed will always, or even usually, either be in a position to procure that the pension schemes in their home state in which they have accrued rights should take the necessary steps to register as a qualifying overseas pension scheme, or that it would occur to them to try to do so.

125. In those circumstances I consider that the provisions of ss. 11 and 12 WRPA 1999 and the 2002 Regulations, under which the full protection of s. 11 WRPA 1999 is only available to those with rights under approved pension arrangements, although not expressly drafted by reference to nationality, are liable to affect a substantially higher proportion of nationals of other Member States exercising their right of establishment in the UK. If therefore the impact of bankruptcy on accrued pension rights is within the scope of Art 49, they constitute discrimination in enjoyment of a social advantage which is prohibited by Art 49 TFEU and Art 24 CRD.

Remedy – conforming interpretation

126. I heard argument on the appropriate remedy if there were unlawful discrimination, and despite the fact that the decision on that will have to await the answer to the reference, it is convenient to record the position now so that it does not have to be revisited.

127. Mr Peretz said that if his argument were well-founded, the appropriate course would be for the Court to interpret s. 11 WRPA 1999 in such a way to eliminate the discrimination. He referred to Table C in the Appendix to the opinion of Lord Steyn in *Ghaidan v Godin-Mendoza* [2004] UKHL 30 which showed the variety of cases where courts had read down legislation as illustrative of the width of the Court's power to adopt a conforming interpretation, in that case in compliance with the obligation in s. 3(1) of the Human Rights Act 1998 to interpret legislation in a way compatible with the European Convention on Human Rights, but in the present case in compliance with the obligation to interpret national law in such a way as to conform with EU law (under s. 2(4) of the European Communities Act 1972 or the well-known *Marleasing* obligation (*Marleasing SA v La Comercial Internacional de Alimentación SA* Case C-106/89 [1993] BCC 421)).

128. The fact that the two exercises are similar, and the width of the Court's powers in this respect, is illustrated by *Vodafone 2 v Revenue and Customs Commissioners* [2009] EWCA Civ 46 (***"Vodafone 2"***). Here taxation provisions known as the controlled foreign companies (or CFC) provisions had been held by the ECJ to be a restriction on the freedom of establishment, and the question was whether the legislation could be interpreted so as to conform with EU law. It was common ground that if it could not be so interpreted, it would have to be disapplied. At [37]-[38] Sir Andrew Morritt C cited a number of principles put forward by counsel for HMRC which counsel for the taxpayer did not dissent from, as follows:

> "In summary, the obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far-reaching. In particular: (a) it is not constrained by conventional rules of construction (per Lord Oliver of Aylmerton in the *Pickstone* case, at p 126B); (b) it does not require ambiguity in the legislative language (per Lord Oliver in the *Pickstone* case, at p 126B and per Lord Nicholls of Birkenhead in *Ghaidan's* case, at para 32); (c) it is not an exercise in semantics or linguistics (per Lord Nicholls in *Ghaidan's* case, at paras 31 and 35; per Lord Steyn, at paras 48–49; per Lord Rodger of Earlsferry, at paras 110–115); (d) it permits departure from the strict and literal application of the words which the legislature has elected to use (per Lord Oliver in the *Litster* case, at p 577A; per Lord Nicholls in *Ghaidan's* case, at para 31); (e) it permits the implication of words necessary to comply with Community law obligations (per Lord Templeman in the *Pickstone* case, at pp 120H -121A; per Lord Oliver in the *Litster* case, at p 577A); and (f) the precise form of the words to be implied does not matter (per Lord Keith of Kinkel in the *Pickstone* case, at p 112D; per Lord Rodger in *Ghaidan's* case, at para 122; per Arden LJ in the *IDT Card Services* case, at para 114)"

and:

> "The only constraints on the broad and far-reaching nature of the interpretative obligation are that: (a) the meaning should 'go with the grain of the legislation' and be 'compatible with the underlying thrust of the legislation being construed': see per Lord Nicholls in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, para 33; Dyson LJ in *Revenue and Customs Comrs v EB Central Services Ltd* [2008] STC 2209, para 81. An interpretation should not be adopted which is inconsistent with a fundamental or cardinal feature of the legislation since this would cross the boundary between interpretation and amendment (see per Lord Nicholls, at para 33, Lord Rodger, at paras 110–113 in *Ghaidan's* case; per Arden LJ in *R (IDT Card Services Ireland Ltd) v Customs and Excise Comrs* [2006] STC 1252, paras 82 and 113); and (b) the exercise of the interpretative obligation cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate: see the *Ghaidan* case, per Lord Nicholls, at para 33; per Lord Rodger, at para 115; per Arden LJ in the *IDT Card Services* case, at para 113."

129. Longmore LJ at [70] summarised the principles himself as follows:

> "In the human rights context it has been said that the boundary between interpretation and legislation will have been crossed if it is proposed to give a statute a meaning which departs substantially from a fundamental feature of the Act (see *In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291, para 40, per Lord Nicholls of Birkenhead), if the proposed meaning would remove the "core and essence" or "the pith and substance" of the Act or if it would insert something

> inconsistent with one of the Act's "cardinal principles": *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, paras 111 and 114, per Lord Rodger of Earlsferry. Nor can the process of interpretation create a wholly different scheme from any scheme provided by the Act: per Lord Rodger of Earlsferry at para 110."

130. In the event the Court found that a conforming interpretation, consisting of adding another exception to the CFC provisions to those already provided for, was possible: see at [44] per Morritt C and [70] per Longmore LJ.

131. In the present case Mr Peretz said that a conforming interpretation could be applied to WRPA 1999 in a number of ways. The simplest was perhaps to read s. 11(2)(a) WRPA 1999 as if it also extended to a pension scheme approved by or registered with the tax authorities of another Member State; alternatively one could read reg 2(1)(c) of the 2002 Regulations as if that paragraph extended to such a scheme. In reply he said that he was perfectly content to confine this to schemes that were *"recognised for tax purposes"* within the meaning of reg 2(3) of the 2006 Regulations and hence complied with all three conditions there set out (see paragraph 55 above).

132. In either case Mr McNamara's pension rights under the Simcoe Scheme (assuming he still has any) would fall to be rights under an approved pension arrangement for the purposes of s. 11 WRPA 1999, and the preliminary issue would be answered yes.

133. Ms Rhee said that that went against the grain of the legislation, and there was no warrant for adding in extra words. But it seems to me that this does not undermine the thrust of the legislation, nor is it inconsistent with a fundamental feature of it. On the contrary it is in line with the purpose of the legislation, which is to ensure that pension rights are fully protected only when they arise under arrangements approved or registered with or recognised by the relevant tax authorities in the country in which they are established. I also consider that the adoption of a conforming interpretation by the creation of an appropriate addition to the legislation is warranted by what the Court of Appeal did in *Vodafone 2*. If therefore there is unlawful discrimination, I agree with Mr Peretz that the appropriate remedy is to read s. 11(2)(a) WRPA 1999 as if it included the words:

> "or is a pension scheme established in a Member State of the EU other than the UK and is "recognised for tax purposes" within the meaning of reg 2(3) of The Pension Schemes (Categories of Country and Requirements for Overseas Pension Schemes and Recognised Overseas Pension Schemes) Regulations 2006, SI 2006/206."

Draft order for reference

134. I will invite the parties to agree a draft order and schedule specifying the precise question(s) to be asked of the CJEU, and otherwise satisfying the Court's requirements for a reference.

135. If the parties are able to agree the terms of the draft order and schedule they should be lodged for the approval of the Court. If they are unable to agree, the matter should be re-listed for further argument.