



7 November 2018

PRESS SUMMARY

Barnardo's (Appellant) v Buckinghamshire and others (Respondents) [2018] UKSC 55
On appeal from [2016] EWCA Civ 1064

JUSTICES: Lady Hale (President), Lord Wilson, Lord Sumption, Lord Hodge, Lord Briggs

BACKGROUND TO THE APPEAL

There is a recognised need for private pension schemes to provide some form of indexation of pensions to protect the value of members' pensions against price inflation. To this end, Barnardo's adopted a pension scheme which provides for pensions in the course of payment to be increased "by the prescribed rate", which is defined as "an increase at the rate of the lesser of:- (a) 5%, and (b) the percentage rise in the Retail Prices Index (if any) over the year ending on the previous 31 December".

The definition of Retail Prices Index lies at the heart of the dispute:

"Retail Prices Index' means the General Index of Retail Prices published by the Department of Employment or any replacement adopted by the Trustees without prejudicing Approval. Where an amount is to be increased 'in line with the Retail Prices Index' over a period, the increase as a percentage of the original amount will be equal to the percentage increase between the figures in the Retail Prices Index published immediately prior to dates when the period began and ended, with an appropriate restatement of the later figure if the Retail Prices Index has been replaced or re-based during the period" (the "Definition").

The critical clause in the Definition is "or any replacement adopted by the Trustees without prejudicing Approval". Barnardo's argues that this clause empowers the trustees to adopt another index which they consider a more suitable measure of price inflation (such as the Consumer Prices Index (the "CPI")), regardless of whether or not the Retail Price Index ("RPI") continues to be published. Representatives of members of the scheme, who are concerned that the adoption of the CPI as the index would over time reduce benefits which they receive from the scheme, argue that the clause does not empower the trustees to depart from the RPI for the purposes of the indexation if the RPI continues to be published. The trustees adopt a neutral stance.

The trustees sought a ruling on the meaning of the Definition. The High Court held that, on a proper construction, the Definition did not empower the trustees to adopt an index other than the RPI unless the RPI had been discontinued as an officially published index and replaced. Barnardo's appealed this decision. The Court of Appeal by majority (Lewison and McFarlane LLJ, Vos LJ dissenting) dismissed the appeal. Barnardo's appealed to the Supreme Court.

JUDGMENT

The Supreme Court unanimously dismisses the appeal. Lord Hodge gives the sole judgment with which the other Justices agree.

REASONS FOR THE JUDGMENT

In deciding which interpretative tools will best assist in ascertaining the meaning of a contract or trust, and the weight to be given to each of the relevant interpretative tools, English courts must have regard to the nature and circumstances of the particular instrument [13].

A pension scheme has several distinctive characteristics which are relevant to the court's selection of the appropriate interpretative tools. First, it is a formal legal document which has been prepared by skilled and specialist legal draftsmen. Secondly, unlike many commercial contracts, it is not the product of commercial negotiation between parties who may have conflicting interests and who may conclude their agreement under considerable pressure of time. Thirdly, it is an instrument which is designed to operate in the long term, defining people's rights long after the economic and other circumstances, which existed at the time when it was signed, may have ceased to exist. Fourthly, the scheme confers important rights on parties, the members of the pension scheme, who were not parties to the instrument and who may have joined the scheme many years after it was initiated. Fifthly, members of a pension scheme may not have easy access to expert legal advice or be able readily to ascertain the circumstances which existed when the scheme was established [14].

In light of these characteristics, it is appropriate for the Court to give weight to textual analysis, by concentrating on the words which the draftsman has chosen to use and by attaching less weight to the background factual matrix than might be appropriate in certain commercial contracts [15]. However, the emphasis on textual analysis as an interpretative tool does not derogate from the need both to avoid undue technicality and to have regard to the practical consequences of any construction. Such an analysis does not involve literalism but includes a purposive construction when that is appropriate [16].

The Court is persuaded that the correct interpretation of the first sentence of the Definition is that RPI means "the RPI or any index that replaces the RPI and is adopted by the trustees" [19]. The Court reaches this view for the following eight reasons.

First, the draftsman chose to use the word "replacement" which does not naturally suggest the selection of an alternative to an option which remains available. It is, nonetheless, capable of bearing that meaning, and one must look to the context for guidance [20]. Secondly, the word order and grammatical construction of the phrase "a replacement adopted by the trustees" suggest that the RPI must first be replaced and that the trustees adopt the replacement. [21]. Thirdly, the existence of a discretion on the part of the trustees and the requirement that the adoption should not prejudice the approval of the Commissioners of Inland Revenue ("CIR") do not militate against this view [22]. Fourthly, consistency within the rules of the scheme as a whole, and indeed within the Definition itself, would suggest that it is the relevant official authority and not the trustees who are to effect the replacement in the first sentence of the Definition [23]. Fifthly, the CIR guidance on approval of schemes does not assist because the draftsman has not chosen to use wording similar to that guidance in the Definition [25]. Sixthly, the superseded rules do not assist in interpreting the Definition [26]. Seventhly, a provision which provides for the circumstance of the official replacement of a cost of living index does not lack a rational purpose [27]. Eighthly, while the requirement of indexation by reference to the RPI imposes obligations on Barnardo's and contributes to the pension deficit at a time when many see the CPI as a more reliable index for the cost of living, the Court must construe the rules of the scheme without any preconceptions as to whether a construction should favour the sponsoring employer or the members [28].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>