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Case No: HC-2017-001399

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

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

Date: 26<sup>th</sup> October 2018

**Before:**

**MR JUSTICE MORGAN**

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**Between:**

**LLOYDS BANKING GROUP PENSIONS  
TRUSTEES LIMITED  
- and -**

**Claimant**

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

**Defendants**

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**Andrew Simmonds QC and Edward Sawyer (instructed by Allen & Overy LLP) for the  
Claimant**

**Keith Rowley QC, John Cavanagh QC and Andrew Mold (instructed by Herbert Smith  
Freehills LLP) for the First and Second Defendants**

**Andrew Short QC and Nicholas Hill (instructed by Walkers Solicitors) for the Third to  
Fifth Defendants**

**Holly Stout (instructed by Government Legal Department) for the Sixth and Seventh  
Defendants**

Hearing dates: 5, 6, 9-13, 16-18 July 2018  
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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 MORGAN

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**MR JUSTICE MORGAN:**

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## PART I: INTRODUCTORY MATTERS

### *Introduction*

1. Between 6 April 1978 and 5 April 1997, the legislation as to state pensions in the United Kingdom included provisions as to a state earnings related pension. In particular, the legislation created a State Earnings Related Pension Scheme or “SERPS”. The detailed provisions relating to SERPS, in particular in relation to retirement age, resulted in inequalities in the treatment of men and women. These inequalities were not unlawful under EU law or domestic law nor did they infringe anyone’s human rights.
2. It was possible to contract out of the benefits provided by SERPS. In particular, it was possible to make alternative arrangements to SERPS with the result that the liability to pay National Insurance contributions was reduced. It was possible to contract out of SERPS by making alternative arrangements which provided for guaranteed minimum pensions or “GMPs”. GMPs were calculated in broadly the same manner as SERPS benefits but they were not identical to those benefits. The legislative provisions as to GMPs were complicated but they created a number of inherent inequalities between men and women. It was possible to introduce provisions to remove these inequalities but, generally speaking, corrective action of that kind was not taken.
3. The result of the above was, and is, that there are very many occupational pension schemes which involved contracting out of SERPS and which fully comply with the legislation as to GMPs but which created inequalities in relation to the benefits available to male and female members of those schemes. This case concerns three large schemes where that is the situation.
4. On 17 May 1990, the European Court of Justice (the “ECJ” which, where appropriate should be read as referring also to the Court of Justice of the European Union) gave its decision in Barber v Guardian Royal Exchange Assurance Group (C-262/88) [1991] 1 QB 344. That decision made it clear that there was an obligation to treat men and women equally in relation to benefits under an occupational pension scheme. In general terms, it was said that the entitlement to equal treatment arose from the date of that decision.
5. Because the decision in Barber took effect from 17 May 1990 and because the legislative provisions as to SERPS and GMPs only governed the position up to 5 April 1997, the issues in this case relate to the position between 17 May 1990 and 5 April 1997 only.
6. In the present case, a number of female members of some of the pension schemes with which this case is concerned took action to enforce what they said were their rights to equality of treatment in relation to pension benefits. In response to that action, the trustee of the three pension schemes with which this case is concerned has brought these proceedings to obtain the ruling of the court on a number of issues which have been identified. In summary, the principal issues are:
  - (1) is there an obligation to equalise benefits?
  - (2) if so, what method should be adopted in order to equalise benefits?

- (3) for what period in the past can a member claim in respect of previously underpaid benefits?
- (4) what should be done in relation to benefits which have been transferred into, and out of, the relevant schemes?
7. In the years since 1990, there has been considerable debate within the pensions industry as to some or all of these issues. The issues which I am now asked to determine arise in relation to many other occupational pension schemes. If there is an obligation to equalise benefits by one or other of the methods contended for, there will be a substantial cost involved. The amount of that cost depends upon the method of equalisation which is adopted. In the present case, there are four basic methods which are put forward for consideration. These methods have been referred to as methods A, B, C and D and methods A, C and D have been further sub-divided into alternatives. There is a considerable difference in the costs of giving effect to these methods. Ignoring administration costs, the order of magnitude of the various costs is: method A costs £300 million, method B costs £135 million and method C costs £100 million. Method D involves a two-stage process and the first of those stages adopts one of methods A or B or C. The cost of method D depends on which method is adopted at the first stage. If method D adopts method C at the first stage, the cost involved will be the same as the cost of method C, £100 million. The court's answers to the questions raised in this case are likely to apply widely in relation to other schemes so that the total costs involved for all such schemes will be many times these figures.
8. The Government has an interest of its own in the court's answers to the questions raised in this case. The Secretary of State for Work and Pensions and the Her Majesty's Treasury have been joined as parties to these proceedings and took part in the argument on the issues. They want to know the court's answers to the questions arising before they consider what action should be taken by the Government.
9. I am told that there are many in the pensions industry who are watching this litigation as they are likely to be affected by its outcome. They wish to have definitive rulings which will settle the long running debate on these issues. Certainly, the implications of the decision reach far beyond the immediate parties. The evidence in this case has been very detailed and thorough. The issues have been very extensively argued. In other circumstances, it might have been desirable to give a shorter judgment and to avoid recitation of matters on which there was no dispute between the immediate parties and which were therefore well known to them. However, in view of the wider interest in this judgment on the issues which arise, I have decided to set out the background and the facts and the submissions of the parties in greater detail even though that means the judgment is longer than it otherwise would have been.

#### *The parties*

10. In due course, I will provide detail as to the three schemes which are involved in this case. At present it is sufficient to refer to them as "the No. 1 Scheme", "the No. 2 Scheme" and "the HBOS Scheme" (each a "Scheme" and together "the Schemes").
11. The Claimant is the current trustee of the Schemes ("the Trustee"). Immediately prior to 31 March 2016, Lloyds Bank Pension Trust (No. 1) Limited was the trustee of the

No. 1 Scheme, Lloyds Bank Pension Trust (No. 2) Limited was the trustee of the No. 2 Scheme, and HBOS Final Salary Trust Limited was the trustee of the HBOS Scheme. On 31 March 2016, the former trustees were removed as trustee of the Schemes and the Claimant was appointed as the sole trustee of the Schemes.

12. The Schemes provide retirement and other benefits for and in respect of individuals who work or have worked for companies in what is now the Lloyds Banking Group, the well-known banking and financial services group of companies. The First Defendant is a subsidiary of Lloyds Banking Group plc and was incorporated on 20 April 1865. It is the present Principal Employer of the No. 1 Scheme and the No. 2 Scheme. The Second Defendant is also a subsidiary of Lloyds Banking Group plc. It has been the Principal Employer of the HBOS Scheme since it started and remains the Principal Employer of the HBOS Scheme. There are a number of other participating employers in the Schemes. The First Defendant, Second Defendant and the participating employers, employ the active members of the Schemes and are responsible for funding the Schemes.
13. The Third Defendant is a female member of the No. 1 Scheme. She is a pensioner member who retired from pensionable service in 2016 at age 55. The Fourth Defendant is a female member of the No. 2 Scheme. She is a deferred member who left pensionable service in 2016 at age 49. The Fifth Defendant is a female member of the HBOS Scheme. She is a pensioner member who left pensionable service in 2013 at age 62.
14. The Secretary of State for Work and Pensions and Her Majesty's Treasury applied to be joined as parties to these proceedings. Her Majesty's Treasury told the court that the issues raised by these proceedings had significant implications for public service pension policy and public spending. On 25 May 2018, the Chancellor of the High Court ordered that the Secretary of State for Work and Pensions and Her Majesty's Treasury be joined as parties to these proceedings and directions were given as to their participation before and at the trial. I will refer to the Secretary of State and the Treasury together as "the Crown".

#### *Representation orders*

15. The Claimant seeks representation orders under rule 19.7(2) of the Civil Procedure Rules to ensure that all persons interested in the Schemes are bound by the resolution of the issues in these proceedings. The parties have agreed a detailed draft representation order dealing with the Issues individually. The draft order lists the issues in Column 1 and then, in Column 2, lists the answers contended for by the interests represented by the First and Second Defendants and, in Column 3, lists the answers contended for by the interests represented by the Third, Fourth and Fifth Defendants. The draft order then provides that:
  - a) the First Defendant be appointed to represent all present, future and former employers and present, future and former beneficiaries of the No. 1 Scheme and the No. 2 Scheme (and those claiming under them) in whose interests it would be for the answers to the Issues to be those set out in Column 2;
  - b) the Second Defendant be appointed on the same terms as in (a) but in respect of the HBOS Scheme;

- c) the Third Defendant be appointed to represent all present, future and former beneficiaries of the No. 1 Scheme (and those claiming under them) in whose interests it would be for the answers to the issues be those set out in Column 3;
  - d) the Fourth Defendant be appointed on the same terms as in (c) but in respect of the No. 2 Scheme; and
  - e) the Fifth Defendant be appointed on the same terms as in (c) but in respect of the HBOS Scheme.
16. In summary, the answers in Column 2 were that there was no obligation to equalise and, if there were such an obligation, the methods of equalisation contended for were Method D1, alternatively Method C, and, in relation to back payments, the relevant period should be as short as possible and the interest payable should be the lowest possible. In summary, the answers in Column 3 were that there was an obligation to equalise and that the methods of equalisation contended for were Method A, alternatively Method B, and, in relation to back payments, the relevant period should be as long as possible and the interest payable should be as high as possible.
17. The draft representation order also dealt with Issue 13 (which I describe below) which raises questions as to whether the Trustee was under a continuing obligation in relation to transfers out of the Schemes. The draft order provided for the Third, Fourth and Fifth Defendants to represent persons in whose interests it was to contend that the Trustee was under a continuing obligation of that kind. Of course, it would not be in the interests of the Third, Fourth and Fifth Defendants themselves so to contend. When I raised this difficulty, it was accepted that the answer which the Third, Fourth and Fifth Defendants would contend for would not be of benefit to those Defendants but it was said that in view of the funding levels of the Schemes, such an answer would not do any real harm to those Defendants. It was also said that it is often the case that representation orders are made where the representative defendant puts forward arguments which are not in that defendant's own interests. As will be seen later in this judgment, it was agreed that I should not deal with Issue 13 at this stage. It was envisaged that the parties would give further thought to the appropriate way to deal with the many detailed points arising in relation to Issue 13. In those circumstances, the representation order which I will make at this stage will not include Issue 13 as one of the Issues which is the subject of that order. As and when Issue 13 falls to be considered by the court, an appropriate representation order dealing with Issue 13 alone can be made.
18. Accordingly, if Issue 13 is removed from the list of Issues in Column I of the draft representation order, I will make the order as agreed by the parties.
19. At the hearing, the parties referred to the representative beneficiaries, the Third to Fifth Defendants, somewhat inelegantly, as "the RBs". For consistency, I will adopt that abbreviation.

### *Procedural background*

20. On 23 July 2016, Walkers Solicitors, on behalf of their clients Affinity (formerly known as Lloyds Trade Union), the Third and Fourth Defendants, and another complainant, Ms



Noone, wrote to the Claimant and the First Defendant to commence the early conciliation process under ACAS. The 23 July 2016 letter contended that in almost all cases under the No. 1 Scheme and the No. 2 Scheme, the increases applied under those Schemes' rules to the Excess element of the pension were directly discriminatory on the grounds of sex, to the detriment of female members, and were a breach of the equality rule under section 67 of the Equality Act 2010. The letter noted that if a settlement of the claims could not be reached, Walkers would bring claims on behalf of those individuals in the Employment Tribunal. In essence, Walkers' July 2016 letter concerned a particular element of the much wider issues which fall to be considered in this case (which have been referred to as issues as to GMP equalisation).

21. On 23 September 2016, Walkers issued a claim in the Employment Tribunal on behalf of the Third Defendant only (no claim has been brought in the Employment Tribunal by the Fourth Defendant). The Third Defendant's claim was against the Claimant and the First Defendant and related to the No. 1 Scheme.
22. The Claimant was concerned that it would not be appropriate for one element of the wider issues as to GMP equalisation to be considered in isolation, by the Employment Tribunal. This was particularly so because any decision would only relate to certain individuals within the No. 1 Scheme and the No. 2 Scheme, thus leaving this issue and all other GMP equalisation issues unresolved for the majority of members of the Schemes, and would leave the Claimant with a number of unanswered questions as to whether GMP equalisation was required and, if so, how such equalisation should be implemented in practice. Given these concerns, the Claimant considered that the complicated and far reaching GMP equalisation questions should be addressed by the High Court by way of a Part 8 Claim, rather than by the Employment Tribunal.
23. By order of the Employment Tribunal dated 22 March 2017, the Third Defendant's Employment Tribunal claim against the Claimant and First Defendant was, by agreement between the parties, stayed indefinitely to allow the matters arising in that Employment Tribunal claim to form part of this High Court action and be determined by the High Court.
24. Although the Third Defendant's claim is the only claim that has been filed at the Employment Tribunal, I was told that there are a further 1900 potential claimants from the No. 1 and the No. 2 Schemes who were intending to commence proceedings before the Employment Tribunal raising the same or similar issues to the Third Defendant. No proceedings have been issued by any of those 1900 potential claimants as the subject matter of their complaints is likely to be addressed in the present proceedings.
25. The stayed and proposed Employment Tribunal claims relate to the No. 1 Scheme and the No. 2 Scheme, but not the HBOS Scheme. The Claimant considers that the same issues arise for the HBOS Scheme, so it has joined the Fifth Defendant as a representative member of the HBOS Scheme. The Fifth Defendant has agreed to act as a representative member and has also instructed Walkers as solicitors.

*A summary of the problem*

26. A convenient description of the problem, which now needs to be addressed, is given in a consultation paper published by the Department for Work and Pensions in November 2016:

“3.10 The GMP is the minimum pension that a scheme that was contracted out of the Additional State Pension between 6 April 1978 and 5 April 1997 has to provide to its members. GMP rules were abolished for post 5 April 1997 contracted out service. However past accruals remain subject to them and a scheme must still provide a pension at least as good as the GMP for any time a person was a member of that scheme, up to and including 5 April 1997.

3.11 Legislation requires GMPs to be determined on an unequal basis: under the Pension Schemes Act 1993 (“PSA93”), a woman’s GMP accrues at a greater rate than that of a man in recognition that a woman’s working life for State pension purposes was five years shorter than that of a man. As a result, where a woman and a man have an identical work history, the woman’s overall GMP will be greater than that of the man.

3.12 As a woman is also entitled to receive her GMP at an earlier age (age 60) than a man is entitled to receive his (age 65), further differences can arise for a GMP in payment. This is through the operation of the revaluation provisions of PSA93 applicable up to this GMP pension age and of the indexation provisions of PSA93 after GMP pension age. Whilst the rates of revaluation or indexation do not differ on the basis of sex, a woman will be entitled to indexation in periods during which a man is entitled to revaluation, due to the differing GMP pension ages, and the rate of indexation differs from the rate of revaluation.

3.13 The requirement that GMPs are calculated and paid on an unequal basis flows through to result in an inequality of the overall scheme pension in payment. This is compounded by the requirements for preservation, revaluation and anti-franking legislation in PSA93 that benefits above GMP (“excess benefits”) be determined with reference to this unequal GMP and the fact that revaluation and indexation provided on the excess benefit can and usually differs to that on the GMP element (depending on the legislation and the rules of the scheme).

3.14 As a result, it can become far from clear which sex receives the greater total scheme benefit. It is also possible for the position to change over the course of a lifetime so that an individual who is advantaged on the basis of sex when the GMP

is first paid becomes disadvantaged later. In other words, which sex is advantaged may fluctuate over the course of a lifetime.”

27. As referred to in paragraph 3.13 of the above quotation, one of the key problems facing the Schemes is that the unequal GMPs can cause other non-GMP benefits to be unequal. GMPs are generally only a part of the total pension payable to a member, so the member’s total pension can be viewed as having a GMP element and an excess above GMP (“the Excess”). Even if the total pension accrued by a man and a woman is equal, if their GMPs are (as a result of the GMP legislation) unequal, the Excess will be correspondingly unequal. This difference can result in the pensions payable becoming unequal for equivalent men and women, because (for example) the GMP element and the Excess element are increased at different rates during periods of deferment (i.e. between the member leaving the scheme and retiring) and when in payment. There are in fact a number of complicated ways in which unequal GMPs can cause overall benefits to be unequal as between men and women.
28. GMPs are a product of legislation. The requirement to provide GMPs, the ages from which GMPs become payable, the revaluation and increases applicable to GMPs, are all determined by the Government and set out in legislation. Therefore, to equalise GMPs themselves would require an amendment to the existing legislation. As trustees cannot amend legislation, if trustees of pension schemes determine that GMPs create inequality between male and female members and they have an obligation to remedy that discrimination, they will need to amend other scheme benefits in order to equalise for the effect of unequal GMPs. As such, reference to the “equalisation of GMPs” is actually a reference to the need to adjust other scheme benefits in order to compensate for the effect of unequal GMPs in order to remedy any inequalities arising out of GMP legislation in respect of contracted-out employment between 17 May 1990 and 5 April 1997.
29. Given these inequalities, the first main question that arises in the present claim is whether, by reason of the sex equality obligations arising under European and domestic law, the Claimant is obliged to adjust non-GMP benefits payable under the Schemes in order that the total benefits received by male and female members with equivalent age, service and earnings histories are equal.
30. If so, the second main question is how to equalise those benefits, and in particular whether there is a single correct method, or different permissible methods and if so which should be adopted.
31. These issues have created uncertainties in the occupational pensions industry in this country for many years. Although the precise effect of unequal GMPs on men and women under the Schemes will be a function of the particular rules of the Schemes and characteristics of the membership, the essential questions raised by this claim are likely to be the same for the very many contracted-out defined benefit occupational pension schemes that provide GMPs. These questions are financially significant ones for the industry and scheme members. In a letter from the Occupational Pension Schemes Joint Working Group to the then Pensions Minister, Steve Webb MP, dated 12 April 2012, in response to the DWP’s consultation paper, Draft Occupational Pension Schemes and

Pension Protection Fund (Equality) (Amendment) Regulations 2012, it was estimated by that working group that:

“implementing [GMP] equalisation programmes for all private sector contracted out schemes on a basis of equalising actuarial values would add in the region of £13 billion to pension scheme liabilities, and could absorb up to £300 million in implementation costs”.

In response to the same consultation, the Pensions Management Institute estimated the GMP equalisation costs to be “in the region of £10-20 billion ...”.

32. Since the 1990s, various views have been expressed by commentators and governmental and other public bodies on the questions raised by the present claim, but there has to date been no definitive ruling from the Courts to answer them, and no legislative solution has been imposed by the Government.
33. Before turning to the relevant provisions of the Schemes in the present case, it is necessary to describe the position in relation to SERPS, the legislation relating to GMPs and the effect of that legislation.

## **PART II: SERPS and GMPs**

### *SERPS*

34. The State Earnings Related Pension Scheme was established with effect from 6 April 1978 by the Social Security Pensions Act 1975 (“SSPA 1975”). SERPS remained in force during the period from 6 April 1978 to 5 April 1997, when a new system of salary-related contracting out was introduced.
35. SERPS is now provided for under Part II of the Social Security Contributions and Benefits Act 1992 (“SSCBA 1992”). Section 44 of SSCBA 1992 provides for Category A retirement pensions. Section 44(3) provides that a Category A retirement pension shall consist of:
  - (1) a basic pension payable at a weekly rate; and
  - (2) an additional pension payable where there are one or more surpluses in the pensioner's earnings factors for the relevant years or where the pensioner has one or more units of additional pension.

Thus, section 44(3) provides for an additional pension (“AP”) as a part of the state Category A pension.

36. For the purposes of section 44(3)(b), “earnings factors” are defined in section 44(6) and section 21(5). In summary, earnings that ‘count’ are earnings between the lower and upper earnings limit on which Class 1, 2 or 3 National Insurance Contributions have been paid. When determining entitlement to state pension, “earnings factors” for every year save the last full year before a claimant reaches state pension age are revalued in line with the rise in average earnings over the period. The Secretary of State must review

the general level of earnings in each tax year and if earnings factors for any previous tax year have not maintained their value in relation to the general level of earnings the Secretary of State must make an order for the purpose of securing that earnings factors maintain their value in relation to the general level of earnings obtaining in Great Britain: Social Security Administration Act 1992 (2SSAA 1992”), section 148(3).

37. The conditions for entitlement to a basic pension under SERPS are that:

- (1) the claimant has reached pensionable age in the period to which the scheme applies, pensionable age being 60 for women and 65 for men: SSCBA 1992, sections 44(1)(a) and 122(1) as originally enacted. For women retiring before 6 April 2016 under SERPS, their State Pension age would range from 60 to 63; and
- (2) the relevant contribution conditions are satisfied: SSCBA 1992, sections 44(1)(b), 20(1)(f) and 22 and schedule 3, para 5; in summary, the claimant has to have paid (or been credited with) Class 1, 2 or 3 National Insurance Contributions on earnings between the lower and upper earnings limits for at least nine-tenths of his or her working life; “working life” is from age 16 to retirement or death if earlier: see SSCBA 1992, schedule 3, para 5(8).

38. To be entitled to an AP, the earner must (in summary) earn above a minimum qualifying level: SSCBA 1992 sections 44(5)-(8). How much AP someone receives (or, rather, would receive if they were not a member of a contracted-out occupational pension scheme) is then calculated in accordance with section 45 of the SSCBA 1992. Section 45 is set out below, but essentially depends on:

- (1) in how many years the earner paid Class 1, 2 or 3 National Insurance Contributions;
- (2) earnings;
- (3) whether the earner topped up their basic State Pension with Class 3A contributions so as to be entitled to ‘additional units’ of pension under SSCBA 1992, section 14A (this was only possible between 12 October 2015 and 5 April 2017); and
- (4) the date the earner reaches state pension age.

39. Section 45 of the SSCBA 1992 provides:

**“45.- The additional pension in a Category A retirement pension.**

- (1) The weekly rate of the additional pension in a Category A retirement pension in any case where the pensioner attained pensionable age in a tax year before 6th April 1999 shall be the sum of the following— (a) in relation to any surpluses in the pensioner's earnings factors, the weekly equivalent of 1 1/4 per cent. of the adjusted amount of the surpluses mentioned in section

44(3)(b) above; and (b) if the pensioner has one or more units of additional pension, a specified amount for each of those units.

(2) The weekly rate of the additional pension in a Category A retirement pension in any case where the pensioner attained pensionable age in a tax year after 5th April 1999 shall be the sum of the following— (a) in relation to any surpluses in the pensioner's earnings factors for the tax years in the period beginning with 1978-79 and ending with 1987-88, the weekly equivalent of  $25/N$  per cent. of the adjusted amount of those surpluses; and (b) in relation to any surpluses in the pensioner's earnings factors in a tax year after 1987-88 but before the first appointed year, the weekly equivalent of the relevant percentage of the adjusted amount of those surpluses; and (c) in relation to any tax years falling within subsection (3A) below, the weekly equivalent of the amount calculated in accordance with Schedule 4A to this Act; and (d) in relation to the flat rate introduction year and subsequent tax years, the weekly equivalent of the amount calculated in accordance with Schedule 4B to this Act; and (e) if the pensioner has one or more units of additional pension, a specified amount for each of those units. (2A) For the purposes of subsections (1)(b) and (2)(e) the “specified amount” is an amount to be specified by the Secretary of State in regulations.

(3) In subsection (2)(b) above, “relevant percentage” means — (a)  $20/N$  per cent., where the pensioner attained pensionable age in 2009-10 or any subsequent tax year; (b)  $(20 + X)/N$  per cent., where the pensioner attained pensionable age in a tax year falling within the period commencing with 1999-2000 and ending with 2008-9.

(3A) The following tax years fall within this subsection— (a) the first appointed year; (b) subsequent tax years before the flat rate introduction year.

(4) In this section— (a)  $X = 0.5$  for each tax year by which the tax year in which the pensioner attained pensionable age precedes 2009-10; and (b)  $N$  = the number of tax years in the pensioner's working life which fall after 5th April 1978; but paragraph (b) above is subject, in particular, to subsection (5) and, where applicable, section 46 below.

(5) Regulations may direct that in prescribed cases or classes of cases any tax year shall be disregarded for the purpose of calculating  $N$  under subsection (4)(b) above, if it is a tax year after 5th April 1978 in which the pensioner— (a) was credited with contributions or earnings under this Act by virtue of regulations under section 22(5) above, or (b) was precluded from

regular employment by responsibilities at home, or (c) in prescribed circumstances, would have been treated as falling within paragraph (a) or (b) above, but not so as to reduce the number of years below 20.

(6) For the purposes of subsections (1) and (2) above, the weekly equivalent of any amount shall be calculated by dividing that amount by 52 and rounding the result to the nearest whole penny, taking any 1/2p as nearest to the next whole penny.

(7) Where the amount falling to be rounded under subsection (6) above is a sum less than 1/2p, the amount calculated under that subsection shall be taken to be zero, notwithstanding any other provision of this Act or the Administration Act.

(8) The sums which are the weekly rate of the additional pension in a Category A retirement pension are subject to alteration by orders made by the Secretary of State under section 150 of the Administration Act.”

40. Because the factors “X” and “N” in s 45(2) and (3) are defined in s 45(4) by reference to pensionable age and working life, respectively, and because a man’s pensionable age under the SERPS scheme was higher, and his working life consequently longer, APs differ as between men and women.
41. The Report of the Pension Law Reform Committee, CM 2342-I, presented to Parliament on 30 September 1993, contains a helpful summary of how SERPS was calculated. This report is usually referred to as the “Goode Report” and it was prepared at the request of the Secretary of State for Social Security in 1992-93 in the wake of the Maxwell affair. The relevant summary is as follows:

“2.5.19 ... Entitlement is based on earnings between the LEL [lower earnings limit] and the UEL [upper earnings limit], which are recorded each year. At retirement age, the relevant earnings for each year are revalued in line with the growth of average earnings. The pension payable is calculated in two stages. The total revalued amount is first divided by the number of years in the individual's working life since 6 April 1978. The result is then multiplied by a percentage which for a person reaching state pension age before 6 April 1999 is 25 per cent, and for a person reaching that age after 5 April 2009 is twenty per cent, with a sliding scale for the intervening years. For those retiring before 1999, SERPS is effectively the equivalent of a scheme accruing at n/80 for the twenty-year period since 1978, (though of revalued average, rather than final earnings). When the transition is complete, the effective accrual rate will drop to as little as n/245 for a man with a 49-year working life. As for basic pension, pensions in payment are indexed by retail prices.”

42. The inequalities in the state pension as between men and women are lawful under EU law. Council Directive 79/7/EEC, on the progressive implementation of the principle of equal treatment for men and women in matters of social security, provided an exception at Article 7(1)(a) for “the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits”. By Article 7(2) of that Directive, Member States are required periodically to examine matters excluded under Article 7(1) in order to ascertain, in the light of social developments in the matter concerned, whether there is justification for maintaining the exclusions concerned. EU legislation on the co-ordination of social security schemes (including state old-age pensions) as between Member States has otherwise been limited (in summary) to requiring Member States not to discriminate between their own nationals and nationals of other Member States and to co-ordinate provision so as to avoid over compensation of individuals who might otherwise qualify for social security provision in more than one Member State: see Council Regulation (EEC) 1408/71 on the application of social security schemes to employed persons and their families moving within the Community, now replaced with Council Regulation (EC) No. 883/2004.
43. Further, the inequalities in the state pension as between men and women are lawful under domestic law because, by virtue of section 191 of, and schedule 22 to, the Equality Act 2010 (“EA 2010”) discrimination in the exercise of a public function (under section 29(6)) is permitted where it is required by an enactment (as is the case in relation to all aspects of state pension). There is no such exception available for discrimination within Part 5 of the EA 2010 (relating to work), i.e. this is not a defence available to the employers or the trustee in relation to the occupational pension schemes with which this case is concerned.
44. Finally, the inequalities in the state pension as between men and women are lawful under the Human Rights Act 1998, Article 14 of the European Convention on Human Rights (“ECHR”) and the jurisprudence of the European Court of Human Rights (“ECtHR”) because, in summary, the ECtHR has accepted that historic differences in the position of men and women justified treating them differently and that, although social conditions have now changed, the UK’s gradual transition to pension equality (with the state pension ages for men and women due to equalise for the first time in November 2018 at 65) is objectively reasonable and justified. In this respect the principally relevant authorities are Stec v UK (65731/01) (2006) 43 EHRR 47 and Walker v UK (37212/02) [2008] STC 786.
45. The position under European human rights law was described by the Grand Chamber in Stec as follows:
- “61. Differential pensionable ages were first introduced for men and women in the United Kingdom in 1940, well before the Convention had come into existence, although the disparity persists to the present day (see paragraph 32 above). It would appear that the difference in treatment was adopted in order to mitigate financial inequality and hardship arising out of the woman’s traditional unpaid role of caring for the family in the home rather than earning money in the workplace. At their origin,



therefore, the differential pensionable ages were intended to correct “factual inequalities” between men and women and appear therefore to have been objectively justified under Article 14 (see paragraph 51 above).

62. It follows that the difference in pensionable ages continued to be justified until such time that social conditions had changed so that women were no longer substantially prejudiced because of a shorter working life. This change, must, by its very nature, have been gradual, and it would be difficult or impossible to pinpoint any particular moment when the unfairness to men caused by differential pensionable ages began to outweigh the need to correct the disadvantaged position of women. Certain indications are available to the Court. Thus, in the 1993 White Paper, the Government asserted that the number of women in paid employment had increased significantly, so that whereas in 1967 only 37% of employees were women, the proportion had increased to 50% in 1992. In addition, various reforms to the way in which pension entitlement was assessed had been introduced in 1977 and 1978, to the benefit of women who spent long periods out of paid employment. As of 1986, it was unlawful for an employer to have different retirement ages for men and women (see paragraph 33 above).

63. According to the information before the Court, the Government made a first, concrete, move towards establishing the same pensionable age for both sexes with the publication of the Green Paper in December 1991. It would, no doubt, be possible to argue that this step could, or should, have been made earlier. However, as the Court has observed, the development of parity in the working lives of men and women has been a gradual process, and one which the national authorities are better placed to assess (see paragraph 52 above). Moreover, it is significant that many of the other Contracting States still maintain a difference in the ages at which men and women become eligible for the State retirement pension (see paragraph 37 above). Within the European Union, this position is recognised by the exception contained in the Directive (see paragraph 38 ...).

64. In the light of the original justification for the measure as correcting financial inequality between the sexes, the slowly evolving nature of the change in women’s working lives, and in the absence of a common standard amongst the Contracting States (see Petrovic, cited above, §§ 36-43), the Court finds that the United Kingdom cannot be criticised for not having started earlier on the road towards a single pensionable age. 65. Having once begun the move towards equality, moreover, the Court does not consider it unreasonable of the Government to carry out a thorough process of consultation and review, nor can Parliament

be condemned for deciding in 1995 to introduce the reform slowly and in stages. Given the extremely far-reaching and serious implications, for women and for the economy in general, these are matters which clearly fall within the State's margin of appreciation."

### *Contracting out of SERPS*

46. The Goode Report provides a useful overview of the position in relation to contracting out of SERPS:

#### **"Contracting out of SERPS**

##### **The concept of contracting out**

2.3.26 Instead of receiving the benefits provided by SERPS, an option may be exercised to pay reduced national insurance contributions, on condition that alternative arrangements are made either to receive benefits broadly equivalent to SERPS or to pay minimum contributions related to the cost of providing such benefits. The option may be made on behalf of an entire scheme and all those who choose to be members of it, it may be made by an individual through a personal pension arrangement. This process is known as contracting out, and the regulation of the alternative benefits provided by contracted-out schemes is one of the main driving forces behind social security legislation.

2.3.27 Before the passage of the 1986 Social Security Act, it was possible to contract out only if the occupational scheme provided a GMP. The reduction in the rate of national insurance contributions given to employers and employees who were members of such schemes, known as the contracted-out rebate, was set at a level based on the cost to those schemes of providing GMPs. Schemes which contract out on this basis are known as contracted-out salary related schemes (COSRS). The effect of this was that money purchase schemes could contract out only if the employer was prepared to offer an earnings-related underpin which was at least as good as the GMP.

2.3.28 Since 1988, it has been possible to contract out directly on a money purchase basis. ... [Note: a scheme contracted out on a money purchase was known as a COMPS. The present claim is only concerned with COSRS. COMPS were not required to provide GMPs.]

2.3.29 Over 30,000 schemes are presently contracted out, of which some 13,500 are COSRS and the remainder COMPS. ..."

## *GMPs*

47. GMPs are part of the former system of contracting out of SERPS. By way of overview:
- (1) employers who provided occupational pension schemes were permitted to “contract out” of SERPS so long as a minimum level of benefits was guaranteed under the occupational pension scheme; in return, the employer and its employees paid a lower level of National Insurance contributions;
  - (2) from 6 April 1978 to 5 April 1997, contracting out of SERPS was permitted if the occupational pension scheme provided GMPs;
  - (3) from 6 April 1997, contracting out on a GMP basis was replaced by a new system of salary related contracting out known as the “reference scheme test”; this new system does not give rise to any GMP equalisation issues and is not relevant to the present claim; the “reference scheme test” did not involve GMPs but a scheme quality test (under which the retirement age was equal at 65 for men and women: s 12B(3)(a) of the Pension Schemes Act 1993 (“PSA 1993”) as in force from 6 April 1997;
  - (4) from 6 April 2002, SERPS was itself replaced by the State Second Pension (“S2P”);
  - (5) salary related contracting out was finally abolished with effect from 6 April 2016 by the Pensions Act 2014; this Act also replaced the two-tier basic State pension and S2P with a new flat-rate payment (the “single-tier pension”) for those reaching State pension age on or after 6 April 2016; however, accrued GMPs were left intact;
  - (6) from 1988 until 2012, there was another system of contracting out known as contracting out on a “money purchase” basis, but this did not involve GMPs and is irrelevant to the present claim.
48. Although the SERPS and GMP benefits are essentially similar, they are not identical. As explained in the Goode Report at para 2.3.34:

“GMPs are calculated in broadly the same manner as the SERPS benefits they replace. The effect of revaluing a preserved GMP for an early leaver cannot precisely mirror what the SERPS benefit would have been, since the latter is calculated over the individual's whole working life. Schemes are required to index the GMP after it has come into payment only by growth in prices up to a maximum of three per cent. These two effects taken together mean that the initial level of GMP is not the same as the equivalent SERPS pension would have been, and that after retirement if prices grow more quickly than three per cent a year, the two will steadily diverge. In these circumstances, the member will be paid both the GMP from the scheme and any shortfall between this and his or her SERPS entitlement directly from the National Insurance Fund. Statutory increases in the value of

GMP rights may not be offset against the overall level of benefits from the scheme.”

49. Where a member is entitled to a GMP, a deduction is made from his SERPS pension: see now section 46 PSA 1993.

*GMPs: the legislation*

50. The SSPA 1975 which introduced SERPS with effect from the tax year, 1978-1979 also first introduced the GMP legislation (Part III, sections 26-52) with effect from 6 April 1978. These provisions of the SSPA 1975 were supported by various pieces of secondary legislation.
51. The GMP legislation in the SSPA 1975 remained in place (as amended from time to time) until 7 February 1994 when it was consolidated into the PSA 1993. The main piece of secondary legislation under the PSA 1993 relating to GMPs was the Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172 (the “CO Regs 1996”).
52. The PSA 1993 and the CO Regs 1996 remain in force. However, with the abolition of salary related contracting out with effect from 6 April 2016 pursuant to the Pensions Act 2014, significant parts of the GMP legislation were repealed, but subject to savings to preserve existing GMP rights.
53. The Occupational Pension Schemes (Schemes that were Contracted-out) (No 2) Regulations 2015, SI 2015/1677 govern the administration of GMP rights from 6 April 2016 onwards and restate many of the previous rules. Other saving provisions appear in the Pensions Act 2014 (Savings) Order 2015, SI 2015/1502 and other secondary legislation.
54. The PSA 1993 set out the requirements (derived from similar provisions in the SSPA 1975) that had to be complied with for employment under an occupational pension scheme to be contracted out of SERPS.
55. In order for employment to be contracted out, the employer had to obtain a contracting out certificate, which could only be issued if the scheme met various requirements. In summary, for salary related contracting out, the legislation required that the scheme rules provide for the payment of a GMP, being a guaranteed minimum level of pension, to a member in contracted out employment (an “earner”). The earner’s GMP must come into payment at the pensionable age of 65 for men and 60 for women. After the earner’s death, a spouse’s pension must be provided. The GMP must be “revalued” at statutory rates between the member ceasing to be in contracted out employment and his/her retirement date. From retirement, the GMP must be increased in payment at statutory rates.
56. The basic structure of the GMP legislation is as follows (omitting reference to contracting out on a money purchase basis):-
- (1) by s 7B(2) PSA 1993 (in its current form)

“(2) An occupational pension scheme was “contracted-out” at a time if, at that time, there was in force a certificate under section 7 (as it then had effect) stating that the employment of an earner in employed earner's employment was contracted-out employment by reference to the scheme. ...

(4) An occupational pension scheme was a “salary related contracted-out scheme” at a time if, at that time, the scheme was contracted-out by virtue of satisfying section 9(2) (as it then had effect).”

- (2) in order for the employment of an “earner” to be contracted out, it was necessary for the employer to obtain a contracting out certificate from the Occupational Pensions Board stating that the employment of the earner was contracted out by reference to an occupational pension scheme (s 7 PSA 1993);
- (3) the employment of an earner was “contracted out employment” (on a salary related basis) if his service qualified him for “a guaranteed minimum pension provided by an occupational pension scheme” and a contracting out certificate was in force (section 8(1) PSA 1993);
- (4) a “guaranteed minimum pension” was originally defined in section 8(2) PSA 1993 as:

“any pension which is provided by an occupational pension scheme in accordance with the requirements of sections 13 and 17 to the extent to which its weekly rate is equal to the earner's or, as the case may be, the earner's widow's or widower's guaranteed minimum as determined for the purposes of those sections respectively”:-

- (5) a “guaranteed minimum pension” is now defined in very similar terms in section 8(2) PSA 1993 (as amended) as:

“any pension which is provided by a scheme that was a salary related contracted-out scheme, in accordance with the requirements of sections 13 and 17 to the extent to which its weekly rate is equal to the earner's or, as the case may be, the earner's widow's, widower's, surviving same sex spouse's or surviving civil partner's guaranteed minimum as determined for the purposes of those sections respectively”:-

- (6) in order to be contracted out on a salary related basis, the occupational pension scheme had to satisfy section 9(2) PSA 1993 in its then form; this stipulated that the scheme had to comply with the provisions of sections 13-24 PSA 1993 and various prescribed requirements;
- (7) the requirements of sections 13-24 PSA 1993 included minimum pensions for earners (sections 13-14), revaluation (section 16) and minimum pensions for

survivors (section 17); these points are of particular relevance for present purposes.

57. Minimum pensions for earners are dealt with in sections 13-14 PSA 1993. In particular, sections 13(1) and (3) PSA 1993 provided (and still provide):

“(1) Subject to the provisions of this Part, the scheme must –

(a) provide for the earner to be entitled to a pension under the scheme if he attains pensionable age; and

(b) contain a rule to the effect that the weekly rate of the pension will be not less than his guaranteed minimum (if any) under sections 14 to 16. ...

(3) Subject to subsection (4) [postponement of GMPs], the scheme must provide for the pension to commence on the date on which the earner attains pensionable age and to continue for his life.”

58. “Pensionable age” is defined in section 181(1) PSA 1993. This is a discriminatory definition and is at the root of the GMP equalisation problem. The definition stated (and still states) that pensionable age:

“so far as any provisions (other than sections 46 to 48) relate to guaranteed minimum pensions, means the age of 65 in the case of a man and the age of 60 in the case of a woman ...”.

59. Thus, sections 13 and 181 taken together require the scheme to provide that the GMP will be paid at age 65 for a man and 60 for a woman.

60. The formula for calculating the GMP was (and is) set out in section 14 PSA 1993 which defined the “guaranteed minimum”. Basically, the effect of the section 14 formula is that a member’s GMP is a career-average benefit, based on a percentage of earnings for each tax year from 6 April 1978 to 5 April 1997, revalued in accordance with national average earnings. The GMP takes account of earnings between the lower and upper earnings limits on which primary Class 1 National Insurance Contributions have been paid.

61. In its current form, section 14 provides:

“(1) An earner has a guaranteed minimum in relation to the pension provided by a scheme that was a salary related contracted-out scheme if in any tax week in a relevant year –

(a) earnings were paid to or for the earner's benefit in respect of employment which was contracted-out by reference to the scheme; and

(b) those earnings were in excess of the lower earnings limit for that tax week (or the prescribed equivalent if the earner was paid otherwise than weekly).

(2) Subject to section 15(1) [postponement of GMPs], the guaranteed minimum shall be the weekly equivalent of an amount equal to the appropriate percentage of the total of the earner's earnings factors for the relevant years, so far as derived from excess earnings mentioned in subsection (1)(b) upon which primary Class 1 contributions have been paid or treated as paid.

...

(5) In subsection (2) the "appropriate percentage" means –

(a) in respect of the earner's earnings factors for any tax year not later than the tax year 1987-88 –

(i) if the earner was not more than 20 years under pensionable age on 6th April 1978, 1.25 per cent.;

(ii) in any other case  $25/N$  per cent.;

(b) in respect of the earner's earnings factors for the tax year 1988-89 and for subsequent tax years –

(i) if the earner was not more than 20 years under pensionable age on 6th April 1978, 1 per cent.;

(ii) in any other case  $20/N$  per cent.;

where  $N$  is the number of years in the earner's working life (assuming he will attain pensionable age) which fall after 5th April 1978.

...

(7) For the purposes of subsection (2) the weekly equivalent of the amount there mentioned shall be calculated by dividing that amount by 52.

(8) In this section "relevant year" means any tax year in the earner's working life (not being earlier than the tax year 1978-79 or later than the tax year ending immediately before the principal appointed day [which was 6 April 1997])."

62. Section 14 referred to "earnings factors" which are defined in section 181(1) PSA 1993 by reference to sections 22-23 SCBA 1992. The effect is that the "earnings factors" used for GMP purposes are earnings between the member's lower earnings limit and upper earnings limit.

63. As is apparent from section 14(5)(a) and (b) above, the basis of GMP accrual changed from the 1988-89 tax year onwards and became less favourable. This lower level of GMP accrual is referred to by those involved in the pensions industry as “post-88 GMP”. The GMP which accrued during the period relevant to the present case (17 May 1990 to 5 April 1997) was all post-88 GMP. Therefore, it is the formula for post-88 GMP that is material.
64. The effect of the complicated section 14 formula for post-88 GMP is discussed further below. It creates inequalities between men and women, meaning that a comparable male and female earner will have different GMPs at a given age.
65. Minimum pensions for survivors are dealt with by section 17 PSA 1993. By that section, the scheme must provide that if the earner dies, leaving a widow, widower or surviving civil partner (a “Survivor”), the Survivor will be entitled to a GMP under the scheme. Broadly speaking, the Survivor’s GMP must be half that of the earner. For widowers and surviving civil partners or surviving same sex spouses, this only applies to the earner’s post-88 GMP.
66. GMP revaluation is dealt with by section 16 PSA 1993. This section provides that, for the purposes of section 14(2), the earner’s earnings factor shall be revalued in accordance with section 148 SSAA 1992. This latter section provides for revaluation in accordance with national average earnings.
67. However, sections 16(2)-(3) PSA 1993 provide that if the earner ceases to be in pensionable service (e.g. he leaves employment), the scheme may provide alternative forms of revaluation. The precise forms of revaluation allowed under sections 16(2)-(3) (and predecessor provisions under the SSPA 1975) have changed over the years. In very broad summary, schemes have been permitted to opt for:
- (1) revaluation in accordance with section 148 of the SAA 1992: see section 16(1) PSA 1993;
  - (2) fixed rate revaluation: see section 16(2) PSA 1993 and regulation 62 of the CO Regs 1996 and regulation 24 of The Occupational Pension Schemes (Schemes that were contracted-out) (No. 2) Regulations 2015 (2015/1677); the fixed rate depends on when the earner left service; the rate ranges from 3.5% to 8.5% pa compound;
  - (3) limited rate revaluation: see section 16(3) PSA 1993 in its pre-6 April 1997 form; this provided for revaluation for pre-6 April 1997 leavers in accordance with the lesser of (i) 5% compound for each year after leaving service and (ii) national average earnings growth.
68. The significance of this for the GMP equalisation problem is that the above statutory rates of GMP revaluation for a leaver are typically higher than those applicable to the Excess under the scheme’s rules.
69. Increases to GMPs in payment are dealt with by section 109 PSA 1993. By this section, all post-88 GMPs must be increased each year by at least the lesser of (i) 3% pa and (ii) the increase in the general level of prices as specified in an order by the Secretary of



State. Before 2011, the Secretary of State measured price inflation by the Retail Prices Index, but since 6 April 2011 the Consumer Prices Index has been used. Accordingly, the rate of pension increase applicable to post-88 GMPs in payment has since 2011 been CPI capped at 3%.

70. The significance of this for the GMP equalisation problem is that the section 109 rate will for many schemes be lower than the rate of increase applicable to the Excess under the scheme rules.
71. There is no requirement for the scheme to provide increases on pre-88 GMP once in payment. In effect, the State provides increases on the pre-88 GMP element.
72. The GMP rules provide for late retirement but not for early retirement. GMPs cannot be taken early, i.e. before the pensionable age of 65 for men and 60 for women. However, the scheme can provide for payment of GMPs to be postponed beyond pensionable age as set out in sections 13(4)-(5) PSA 1993. Where payment of a GMP is postponed, it must be increased at the rate specified in section 15 PSA 1993.
73. The PSA 1993 contains some highly complicated provisions applicable to GMPs known as the “anti-franking” provisions: sections 87-92 PSA 1993. The anti-franking provisions apply to earners who left employment on or after 1 January 1985. The provisions were first introduced into the SSPA 1975 on that date by the Health and Social Security Act 1984, inserting sections 41A-41E SSPA 1975. The provisions are supplemented by the Contracting-out (Protection of Pensions) Regulations 1991, SI 1991/166.
74. The principal anti-franking provisions are in Part IV PSA 1993 which is entitled “Protection for Early Leavers”. As the title suggests, the provisions of this Part aim to protect members who leave pensionable service early, before reaching retirement age. In summary:
  - (1) the basic purpose of the anti-franking provisions is to ensure that where the earner leaves pensionable service before his GMP commences, he gets the full benefit of the revaluation on his GMP as well as the Excess;
  - (2) the provisions are intended to prevent the Excess being used to offset the revaluation on the GMP, i.e. to stop the Excess being “franked” by GMP revaluation;
  - (3) the provisions operate by applying a statutory minimum which the pension must exceed; the provisions are to be applied when the GMP commences (65/60 for men/women);
  - (4) the Goode Report gives a useful summary of the rationale for the anti-franking provisions:

“4.18.61 The anti-franking requirements came into effect from 1 January 1985. They were needed because scheme members in a contracted-out earnings related scheme effectively accrue rights to two benefits: the GMP, and the benefits accrued under the

scheme rules, within which the GMP rights are subsumed. These two benefits are treated differently for the purposes of preservation and revaluation of accrued rights. The GMP element must be revalued in one of a number of ways laid down in legislation. The preservation requirements for the overall pension are less advantageous to the member than those for the GMP. Where the overall rights exceed the GMP rights, it would be possible for the increases to the GMP to be absorbed within the overall ceiling on the individual's scheme benefits. In effect, the individual would lose the advantage of the GMP revaluation requirements. Under the anti-franking requirements such practices are forbidden, and the full effect of the GMP revaluation must be given as an addition to the overall scheme benefits.”

75. In a little more detail:

- (1) the anti-franking test applies if, broadly, (a) there is an interval between the earner ceasing to be in pensionable service (the “cessation date”) and the date the GMP commences (at age 65/60 but subject to the possibility of postponement under section 13(4) PSA 1993), (b) there was an Excess at the cessation date, and (c) the GMP has increased between the cessation date and GMP commencement date (which it will do through GMP revaluation if the interval is long enough and GMP could also increase after GMP pensionable age through postponement): section 87(1) PSA 1993;
- (2) the test applies “at any time when that pension is required to be paid” (section 87(3)); this means at the GMP commencement date (65/60) since the test can only be engaged once the commencement date has been reached;
- (3) the test requires that the pension shall be not less than the amount specified in section 87(3); in general, the minimum level is the “relevant aggregate” (section 87(3)(b));
- (4) the “relevant aggregate” is composed of four elements: sections 87(4) and 88-90; these are technical provisions which defy easy explanation but broadly, the elements are (a) the pension accrued at the cessation date, (b) GMP revaluation between the cessation date and the GMP commencement date, (c) other benefits accrued in the scheme after the cessation date, and (d) an uplift on the Excess accrued at the cessation date; the net effect is to ensure that the earner receives the benefit of GMP revaluation on top of the Excess.

76. For present purposes, what matters is that the anti-franking test applies at different ages for men and women, i.e. 65/60, and results in different levels of uplift, having regard to the extra years of GMP revaluation for a male member at 65.

#### *Other rules applicable to GMPs*

77. GMPs were and are subject to many other rules and requirements as set out in Part III PSA 1993, the CO Regs 1996 and elsewhere. For example, there were restrictions on

amending the scheme (section 37 PSA 1993 as in force at the material time), there was preferential treatment of GMPs on scheme winding up (section 73(3)(c) of the Pensions Act 1995 (“PA 1995”) as in force at the material time (modified by regulation 3 of the Occupational Pension Schemes (Winding Up) Regulations 1996) and section 23 PSA 1993 as still in force), there were and still are restrictions on transfers of GMP liabilities out of the scheme (section 20 PSA 1993 as still in force), there was and still is a prohibition on assigning or charging GMPs (section 159 PSA 1993 as still in force), and many other rules besides.

78. The PSA 1993 also contains provisions permitting GMPs to be converted into non-GMP benefits of equal actuarial value: sections 24A-24H PSA 1993. These provisions are considered in more detail below when considering what was referred to as “Method D2”.

*GMP inequalities between men and women*

79. The GMP legislation described above creates a number of inherent inequalities between men and women, so that the GMPs of comparable men and women with the same earnings, service and employment history will be different at a given age.
80. The two key causes of the inequality are:
- (1) the different GMP pensionable ages of 65 and 60 for men and women;
  - (2) the formula for calculating post-88 GMP.
81. The first of these is self-explanatory. A woman is entitled to her GMP earlier than a man.
82. As for the second, by way of repetition, the formula for calculating GMP is contained in section 14 PSA 1993, which is set out above. In summary, the formula involves revalued middle band earnings for the tax years from 6 April 1978 to 5 April 1997 multiplied by the “appropriate percentage”. For post-88 GMP (relevant to the present claim), the “appropriate percentage” is defined in s 14(5)(b) as:
- “(i) if the earner was not more than 20 years under pensionable age [i.e. 65/60] on 6th April 1978, 1 per cent.;
  - (ii) in any other case 20/N per cent.;
- where N is the number of years in the earner's working life (assuming he will attain pensionable age) which fall after 5th April 1978.”
83. “Working life” is defined in s 181(1) as (until 2005, this definition was contained in schedule 3 para 5(8) SSCBA 1992):
- “... the period beginning with the tax year in which the person attains the age of 16 and ending with –

(a) the tax year before the one in which the person attains the age of 65 in the case of a man or 60 in the case of a woman, or

(b) if earlier, the tax year before the one in which the person dies.”

84. The effect of all this is that for men born before 6 April 1933 and women born before 6 April 1938, the “appropriate percentage” for post-88 GMP is 1%. So the formula is equal for comparable individuals born before 6 April 1933 (who would have been 57+ when the Barber window opened in 1990).
85. But for men born on and after 6 April 1933 and women born on and after 6 April 1938, the “appropriate percentage” for post-88 GMP is  $20/N\%$ . This creates inequality, because N is linked (via the definition of “working life”) to the unequal GMP age of 65/60, so the value of N will be 5 less for a woman compared to a man of the same age (with a sliding scale for men and women born from 6 April 1934 and 5 April 1938). It follows that  $20/N\%$  will be a higher percentage for a woman than a comparable man.
86. Therefore, save in some exceptional cases, the post-88 GMP accrues more quickly for a woman than a man, so that a woman will have a higher GMP at a given age than a comparable man.
87. The rationale and effect of the difference were explained by Rimer J in Marsh & McLennan v Pensions Ombudsman [2001] IRLR 505 at [13]-[14] as follows:

“13. ... The divisor [N] will therefore be smaller for a woman than for a man, and the corresponding percentage [i.e. the “appropriate percentage”] will be greater, but having regard to the differing lengths of their respective working lives the overall object and effect are that the GMP of a person working to the statutory pensionable age with a full service record of contracted-out employment is calculated by reference to the same percentage of earnings whatever the sex of that person. At the end of their respective working lives, again with a full service record of contracted-out employment, the percentage will still be the same, although the man who retires at 65 will have a higher GMP than a woman who retired at 60, but only because he has worked an extra five years and will therefore have more earnings to which the appropriate percentage will apply. In order to achieve this result, and bearing in mind the shorter working life of the woman, the woman's accrual rate is necessarily slightly higher than the man's.

14. The result of this formula is that the GMPs of a man and a woman retiring at their respective pensionable ages of 65 and 60 will, assuming their working history to be otherwise similar, be non-discriminatory. However, their GMPs will or may become discriminatory if one or other or both of them leave the scheme before those respective ages, for example by taking early retirement, becoming redundant or moving to another employer.

If, for example, both leave the scheme at 55 they will, by reason of their different rates of accrual, have accrued different GMPs.”

*Effect of the different GMPs*

88. The significance of comparable men and women having different GMPs is, as mentioned, that different rates of increase apply to the GMP and Excess elements of the total pension.
89. Expanding on this, most defined benefit schemes will provide for total pensions to accrue at a more generous level than the GMP, traditionally at the rate of 1/60 or 1/80 of final salary for each year of pensionable service. The total accrued pension will therefore generally exceed the GMP (i.e. the total pension will have a GMP and an Excess element). As a result of the Barber ruling, for pensionable service from 17 May 1990, all schemes must ensure that the total pension accrues on a non-discriminatory basis for men and women, with an equal accrual rate and an equal normal retirement date. Thus, at the date of leaving pensionable service, the total accrued pension of a comparable man and woman will (for benefits earned from 17 May 1990) be the same. The problem arises when the equal total pensions are increased subsequent to the date of leaving.
90. Although the total pension is equal, the woman will have the higher GMP (and a correspondingly lower Excess) compared to the man, due to the statutory GMP inequalities explained above. Because of the different rates of revaluation that typically apply to the GMP and the Excess, different revaluation increases will be received by the man and woman whilst they are “deferred members” up to retirement age. Typically, the deferred female member will receive a higher rate of revaluation on a larger part of her pension (the higher GMP element) than the comparable man (who has a correspondingly higher Excess element to which a lower rate of revaluation usually applies under the scheme’s rules).
91. Once the pension has commenced to be paid, the position tends to reverse, with the GMP attracting a lower rate of pension increase under statute than usually applies to the Excess under the scheme’s rules. This tends to favour the man, who will receive a higher rate of pension increases on his higher Excess element.
92. Thus, in many schemes, a female deferred member is advantaged compared to an equivalent male deferred member when the pension is revalued up to retirement age, but once the pension is in payment the man tends to start catching her up and can eventually “overtake” her in terms of relative advantage.
93. Whether this actually happens depends on many variable factors and exactly what the scheme’s rules prescribe for revaluation and pension increases on the Excess. Amongst other things, the overall effect is sensitive to inflation. To take a simple example, the statutory rate of pension increase for GMP is now CPI capped at 3% (s 109 PSA 1993: see above), and suppose that the rate applicable to the Excess under the scheme’s rules is CPI capped at 5%. If the actual rate of CPI is 4%, the unequal GMPs make a difference to the rates of increase received, but if CPI is 1% they make no difference.

94. The problem with unequal increases can then be compounded by the anti-franking test (which aims to protect the value of GMP revaluation) applying at different ages for men and women. The anti-franking test applies 5 years later for men (at 65), at which point there is more male GMP revaluation to protect, and this can result in an uplift in the male pension at 65 not received by the woman.

### **PART III: THE SCHEMES**

#### *The Schemes – an introduction*

95. Each of the Schemes is an occupational pension scheme established to provide pension benefits for employees of the various employers that have participated in the Schemes (or former schemes which have merged into the Schemes). In his witness statement of 12 May 2017, Mr Baines, the chairman of the Trustee's board said that the Schemes together had over 270,000 members, the majority of whom were female, of whom approximately 230,000 were thought to be affected by the issues raised in this claim. However, in a later witness statement of 18 June 2018, Mr Baines stated that the number of members had fallen to around 255,000 as a result of high levels of transfers out of the Schemes.
96. The Schemes all provide final salary pension benefits and money purchase pension benefits. The type and level of pension benefits that a member is entitled to under each of the three schemes depends largely on when the member joined the relevant scheme (or former scheme) and the section of the relevant scheme (or former scheme) that they joined.
97. All the Schemes are closed to new members. The Main Section of the No. 1 Scheme, the No. 2 Scheme and the HBOS Scheme all remain open to future accrual, but the Pension Investment Plan Section ("PIP Section") of the No. 1 Scheme was closed to future accrual with effect from 31 July 2011.
98. Pensionable pay caps were introduced by contractual agreements between companies in the Lloyds Banking Group and the relevant members of the Schemes from 2010 onwards.
99. In the following paragraphs, I will refer to some of the history of the structure of the Schemes. The following paragraphs are not intended as a comprehensive summary of the Schemes' complicated history and many different benefit structures. As will be seen, each Scheme is the product of many mergers and amalgamations over the years, and there are consequently numerous different sections with different benefit structures in each Scheme.

#### *Lloyds No. 1 Scheme*

100. The No. 1 Scheme was established with effect from 12 February 1931. It was then called the Lloyds Bank Limited Men's Contributory Pension Fund. It became the Lloyds Bank Pension Scheme on 1 July 1983 when the assets and liabilities of the Lloyds Bank Women's Retirement Benefits Scheme were transferred to the Lloyds Bank Men's Retirement Benefits Scheme. The No. 1 Scheme was renamed the Lloyds TSB Group

Pension Scheme No. 1 from 28 June 1999 and from 23 September 2013 it was renamed the Lloyds Bank Pension Scheme No. 1.

101. The No. 1 Scheme is a registered pension scheme under the Finance Act 2004 and is a hybrid scheme which provides both final salary and money purchase benefits.
102. The current No. 1 Scheme is the result of a number of other schemes being merged into the No. 1 Scheme over the years. Broadly, until 1996, the No. 1 Scheme provided final salary benefits to all members and was non-sectionalised. Four sets of special rules applied to the existing four different categories of members at the time (and therefore all of the assets were pooled together and could be used to meet the liabilities of each category of members). The No. 1 Scheme was closed to new members on 1 January 1996. Employees joining the No. 1 Scheme after that date were provided with money purchase benefits (but with a final salary underpin) through the PIP Section.
103. From 1 August 2011, the vehicle for providing money purchase benefits under the No. 1 Scheme was changed to the Your Tomorrow Section of the Main Section, rather than the PIP Section. Members in the PIP Section were treated as leaving pensionable service under the PIP Section on 31 July 2011 and became entitled to a deferred pension under the PIP Section on that date. The Your Tomorrow Section benefits are payable in accordance with the provisions of Special Rules H.
104. The No. 1 Scheme was sectionalised with effect from 1 May 2012 and is split into 2 sections: the Main Section and the PIP Section. The assets and liabilities of the No. 1 Scheme were divided between these two sections with effect from this date. Both the final salary sections of the Main Section, and the PIP Section were contracted-out on a salary-related basis, whereas the Your Tomorrow Section is contracted-in.

#### *Lloyds No. 1 Scheme – Main Section*

105. The Main Section applies to members who entered Service before 1 January 1996 (or after that date if directed by the Principal Employer). The benefits provided under the Main Section vary depending on which set of Special Rules apply to the member in question but are, with the exception of Special Rules H, final salary benefits. The different Special Rules are summarised below:

- i) Special Rules B - the Main Final Salary Section (Post 1974 joiners)

Broadly, this section provides final salary benefits to all pre 1 January 1996 Members who are not covered by one of the other sections/Special Rules.

- ii) Special Rules C - Lewis's Scheme Members

These rules provide final salary benefits to Members who joined the No. 1 Scheme on 1 July 1989 and were formerly members of the Lewis's Bank Staff Pension Scheme.

- iii) Special Rules D - Pre-1974 joiners

These rules apply to Members who joined the No. 1 Scheme or the Lloyds Bank Women's Retirement Benefits Scheme before 1 July 1974.

iv) Special Rules E - LBI Members

These rules apply to Members who joined the No. 1 Scheme on 1 July 1989 and were formerly members of the LBI Pension Scheme.

v) Special Rules F - C&G Members

These apply to Members who joined the No. 1 Scheme on 1 June 2001 and who were members of the Cheltenham & Gloucester Plc Pension Fund immediately before joining the No. 1 Scheme.

vi) Special Rules G - Factors Members

These rules apply to members of the Lloyds Bank Factors Pension Scheme immediately before joining the No. 1 Scheme.

vii) Special Rules H - Your Tomorrow Section

These rules govern a money purchase section within the No. 1 Scheme established with effect from 1 August 2011. The rules apply to Members who were entitled to benefits under the PIP Section before 1 August 2011 and in respect of pensionable service on or after the Effective Date. [The Effective Date depends on a number of circumstances.]

viii) Lloyds TSB Asset Finance Divisions

On 21 May 2012 the assets and liabilities of the Lloyd TSB Asset Finance Division Pension Scheme were transferred to the No. 1 Scheme. The transferring assets were allocated to the Main Section of the No. 1 Scheme and benefits for transferring members are provided under the Main Section of the No. 1 Scheme.

*Lloyds No. 1 Scheme – PIP Section*

106. The benefits payable under the PIP Section (Pension Investment Plan) are governed by Special Rules A. This section provides money purchase benefits for members who joined the Scheme on or after 1 January 1996 and before the Effective Date. The PIP Section was contracted-out on a final salary basis. For pensionable service before 6 April 1997, the effect of this was that the PIP Section contained an underpin equal to the member's guaranteed minimum pension.

*Lloyds No. 2 Scheme*

107. The No. 2 Scheme was set up with effect from 5 November 1976. It was previously known as the Trustee Savings Bank 1976 Pension Scheme and from 21 May 1983, the TSB Group Pension Scheme. It is now known as the Lloyds Bank Pension Scheme No. 2. It has been closed to new members since 30 June 2010.
108. Broadly, until 1 January 1998, the No. 2 Scheme provided final salary benefits. Employees joining the No. 2 Scheme after that date were provided with money purchase benefits (but with a final salary underpin) through the Pension Investment Plan Section ("the No. 2 PIP Section"). The No. 2 PIP section was contracted-out on a salary related basis.



109. The No. 2 Scheme is a registered pension scheme under the Finance Act 2004 and provides final salary benefits. The final salary section was contracted-out on a salary related basis.

110. The rules of the No. 2 Scheme are divided into various sections:

i) Section B - TSB Division

This is applicable to a TSB Member who (i) was either admitted to membership of the No. 2 Scheme before 31 December 1991; or (ii) admitted to membership of the No. 2 Scheme on or after that date pursuant to the rules.

ii) Section C - Senior Executive Division

This section applies to a person who has become an SE Member pursuant to Rule 18.

iii) Section D - Hill Samuel Division

This applies to a person who has become a HS Member pursuant to Rule 22 or 49.

iv) Section E - Swan National Division

This section is applicable to a person who (i) is admitted to membership pursuant to Rule 34; or (ii) (subject to the other conditions) was an employee of the Swan National Companies on 1 April 1990.

v) Section F - UDT Closed Section

This applies to a person who was an employee on 1 April 1990 and who was, prior to that date, a member of the UDT Scheme.

*HBOS Scheme*

111. The HBOS Scheme (of which the full name is the HBOS Final Salary Pension Scheme) was set up with effect from 15 May 2006 and is a registered pension scheme under the Finance Act 2004 and is designed for tax approval in certain overseas jurisdictions as well.

112. The retirement benefits for employees in the HBOS Group were provided under a number of different final salary pension schemes:

- a) the Bank of Scotland 1976 Pension Scheme (originally known as the Bank of Scotland Staff Pension Fund) established by a trust deed dated 30 June 1936;
- b) the Birmingham Midshires Pension Scheme established by an interim trust deed dated 9 December 1958;

- c) the Clerical Medical Staff Superannuation Fund (originally known as the Clerical, Medical and General Staff Superannuation Fund) established by a definitive trust deed and rules dated 1 January 1958; and
- d) the Halifax Retirement Fund (originally known as the Halifax Building Society Staff Retirement Fund (1974)) established by an interim trust deed dated 21 November 1973.

together “the HBOS Former Schemes”.

- 113. The HBOS Former Schemes all merged in 2006 into the HBOS Scheme, which was created specifically to receive those transfers.
- 114. The Clerical Medical International Staff Pension Scheme (originally known as the CMI Staff Pension Plan) established by a trust deed dated 22 December 1992 later merged into the HBOS Scheme in January 2008 (also a HBOS Former Scheme).
- 115. The HBOS Scheme has been closed to new members since 1 July 2006. The only benefit entitlement in the HBOS Scheme is final salary, except in respect of money purchase additional voluntary contributions.
- 116. The HBOS Scheme was contracted-out on a salary related basis.
- 117. Benefits for service prior to 1 July 2006 are calculated in accordance with the rules of the HBOS Former Schemes that transferred into the HBOS Scheme with some modification set out in the HBOS Scheme rules. Benefits accrued in respect of periods of pensionable service on and after 1 July 2006 are in accordance with the HBOS Scheme rules.

*Some key features of the Schemes*

- 118. Until his retirement, Mr Mitchell of Willis Towers Watson was the scheme actuary for the Schemes. I will refer to him as “the scheme actuary” notwithstanding his retirement.
- 119. The scheme actuary for the Schemes has prepared a table which lists the largest sections of the Schemes (measured by the quantum of each section’s liability to pay benefits to members) that are affected by the issues raised in this claim. This table (as edited by me for presentation purposes) is attached as Appendix A to this judgment. The table summarises the earliest date pensions are payable unreduced together with the pension increases and rates of revaluation in deferment that are applied to GMPs and the Excess under each of those sections. Turning specifically to the rates of pension increases and revaluation, as is common in many schemes, the statutory rates of GMP revaluation in deferment and the rate of GMP increases differ from the rates applied to the Excess under the Schemes’ rules.
- 120. In some sections, the Schemes adopt administrative practices going beyond the provisions of the Schemes which are generally expected to be more favourable to members than provided for under the rules/applicable legislation. The table incorporates these practices and those practices have been taken into account in the costs of GMP equalisation which have been estimated by the scheme actuary.

121. Given the many different provisions governing the numerous different sections of the Schemes (and sub-groups of members within some sections), overlaid by administrative practices, it can be seen that the benefit structure of the Schemes is very complicated. However, the parties assured me that, for the purpose of the present proceedings, it was not necessary for me to ascertain all the details of the structure or to resolve any points arising on it. I was told that the Schemes' benefit structures contains features which give rise to the kind of GMP equalisation problems that affect many defined benefit occupational pension schemes. In particular, as is apparent from the table in Appendix A, different increase provisions are applied under the Schemes for increases to the GMP and the Excess both in deferment and whilst pensions are in payment. This is a major contributing factor to inequalities that can arise under the Schemes as a result of unequal GMPs.

*Comments on the table in Appendix A*

122. I make the following comments on the table in Appendix A

- (1) the rates of increase are the same for men and women so there is no discrimination on the face of things;
- (2) however, the rates of increase to pensions in payment differ for GMP and Excess (rows 3 and 4) and the rates of revaluation in deferment differ for GMP and Excess (rows 5 and 6); in the HBOS Scheme, some of these rates are discretionary rather than written into the rules;
- (3) to an extent, the Schemes follow the typical pattern of revaluation rates being higher for GMP than the Excess, and vice versa for pensions in payment. However, the Schemes contain a number of bespoke provisions that reduce the effect of the usual GMP-driven inequalities that arise. These include, for example: (a) underpins applicable under the rules to GMP pension increases, which help reduce the difference between increases to GMP and Excess in payment; (b) Excess pension increases for most members of the No 2 Scheme that are calculated using CPI, which is the same inflation measure as used for statutory GMP increases (albeit with different caps), which again helps reduce the difference, at least in a low inflation environment.

123. Under the rules of the Schemes, the normal retirement date is in many cases at age 60. In these cases:

- (1) normal retirement pensions are payable to both men and women in accordance with the rules of the Schemes from age 60 but GMP pensionable age remains 65 and 60 in accordance with section 181 PSA 1993;
- (2) for a woman, part of the pension paid from age 60 will be GMP (as she has reached her statutory GMP pensionable age) and the rest Excess; the total pension will be increased in payment thereafter at the rates of pension increase applicable to the GMP and to the Excess;
- (3) for a man, a normal retirement pension from age 60 will be all non-GMP until age 65 when part of the total pension will be treated as GMP; this means that

from age 60 to 65, the whole pension is increased in payment at the rate applicable to the Excess, and from 65 it will be increased at the rates applicable to the GMP and to the Excess (plus receiving any anti-franking uplift that applies at 65);

- (4) for some sections, the normal retirement age is 62 or 63 rather than 60; the position here is the same as in the preceding sub-paras, substituting 62 or 63 for 60; in such a case, the female GMP will be postponed for 2/3 years from 60 to 62/63, and therefore increased pursuant to section 15 PSA 1993 during those 2/3 years; the statutory rate is likely to be different from the revaluation rate applicable to the Excess in a typical scheme; (I will later refer to certain worked examples in Appendix B to this judgment; these worked examples are for a DB member with a normal retirement age of 62).

### *The effect of unequal GMPs on the Schemes*

124. At the outset, it should be noted that the total pensions under the Schemes accrue on a non-discriminatory basis between men and women in accordance with the Barber decision. As it happens, the largest of the Schemes, the No 1 Scheme, was the subject of one of the earliest domestic judgments on pension equalisation, Lloyds Bank Pension Trust v Lloyds Bank [1996] Pens LR 263. In that case, Rimer J held that, in order to equalise benefits under the pre-1974 joiners' section, the benefits of the disadvantaged class had to be levelled up to the benefits of the advantaged class due to an unusual restriction on the terms of the No 1 Scheme's amendment power which prevented benefits being levelled down for the future.
125. As explained above, the Schemes are affected by GMP-driven inequalities. In common with most other contracted out salary related schemes, comparable male and female defined benefit members' total pensions under the Schemes will grow unequally. This is essentially because of the different rates of increase applicable to the GMP and Excess, which are themselves different in amount for men and women due to the statutory GMP inequalities. The inequality arises even though the rules appear to apply the same rates of increase to men and women.
126. The scheme actuary has prepared detailed projections for a range of DB members illustrating the inequalities that affect the growth of the total pension from normal retirement age onwards. The projections show the annual rate of pension at 5-year intervals, so that the unequal growth can be seen.
127. As is apparent from the projections:
- (1) in many cases the female member is disadvantaged compared to a comparable male member, though in some cases it is the male who is disadvantaged;
  - (2) there are also examples where the advantage switches from one sex to another after the pension has been in payment for some time;
  - (3) the amount of the advantage/disadvantage is relatively small compared to the total pension.

128. The scheme actuary's projections demonstrate the difficulties of ascertaining whether a comparable man or woman is disadvantaged by GMP inequalities:
- (1) the results of the projections are dependent on the assumptions used, in particular regarding inflation; the inequality can reverse or disappear if different inflation assumptions are used;
  - (2) the outcome can be dependent on member choices, such as whether to leave service early which can favour females (insofar as GMP revaluation in deferment is more favourable than revaluation of the Excess under the rules); likewise, the outcome is affected by discretionary practices where increases are discretionary (as in some sections of the HBOS Scheme).
129. The GMP-driven inequalities affecting the Schemes are a reflection of generic problems that affect contracted out salary related schemes generally. They are exactly the same GMP equalisation problems that the Government has identified as affecting the pensions industry in the DWP consultation paper of November 2016. There is nothing special or particular about the Schemes and the position is likely to be broadly the same for other schemes.

#### *Other rules of the Schemes*

130. I will refer later in this judgment to the express sex equality rules which exist in some of the Schemes and, similarly, I will refer to the express powers of amendment provided for by the rules of the Schemes.

### **PART IV: THE ISSUES**

#### *The issues*

131. The parties initially put forward 13 issues (some of which contained sub-issues) for determination by the court. Prior to the hearing, the issues which had been numbered Issues 3, 4, 9 and 10 ceased to be issues put forward for determination. I will now set out the remaining issues which I was asked to decide. I will retain the original numbering.
132. Issue 1: Where male and female Scheme members with equivalent age, service and earnings histories would have accrued unequal GMP in respect of service in the Barber window, and, if necessary, an appropriate actual opposite sex comparator is available, is the Claimant, as trustee of each of the Schemes, obliged (whether by virtue of Art 157 TFEU, ss 67-68 EA 2010, ss 62-63 PA 1995, the Express Equality Rules, or otherwise) to adjust benefits payable under each of the Schemes in excess of the GMP in order that the total benefits received by male and female members with equivalent age, service and earnings histories are equal?
133. Issue 2(a); Is it lawful to pay unequal total benefits under the Schemes where the inequality is the effect of the differences between the GMPs of males and females with equivalent age, service and earnings histories, on the ground that GMPs are a substitute for a State pension (SERPS or the ASP) and are not "pay" within Article 157 TFEU?

134. Issue 2(b) Is it lawful to pay unequal total benefits under the Schemes where the inequality is the effect of the differences between the GMPs of males and females with equivalent age, service and earnings histories, on the ground that there is an objective difference between the position of males and females arising from the GMP legislation (see by analogy Roberts v Birds Eye Walls [1994] ICR 338)
135. Issue 2(c) Is it lawful to pay unequal total benefits under the Schemes where the inequality is the effect of the differences between the GMPs of males and females with equivalent age, service and earnings histories, on the ground that the defence of material factor under section 69 EA 2010 applies?
136. Issue 5: In principle, (a) is there a single correct method to equalise for the effect of unequal GMPs and if so what is it, or (b) is there a choice between permissible methods?
137. Issue 6: If the answer to Issue 5 is that there is no single correct method but a choice between permissible methods, should the court accept a surrender of the Trustee's discretion as to which method to implement (namely the discretion under whichever is applicable of: the relevant Scheme's amendment power, ss 67-68 EA 2010 or the Express Equality Rules)?
138. Issue 7: If the court should accept a surrender of discretion and is willing to do so, which one of the following methods of equalisation should be adopted:
- (1) Method A (in one of its variants identified in the agreed specification);
  - (2) Method B;
  - (3) Method C (either variant C1 or C2);
  - (4) Method D (either variant D1 or D2, and either implemented (i) at a single conversion date for all members or (ii) for each member at the point of retirement, transfer out or death and following any exercise of benefit options).
139. Issue 8: If there is not to be a surrender of discretion, is each of the following methods a lawful and effective method of equalisation that the Trustee acting lawfully and properly could adopt:
- (1) Method A (in one of its variants identified in the agreed specification);
  - (2) Method B;
  - (3) Method C1 or C2;
  - (4) Method D (either variant D1 or D2, and either implemented (i) at a single conversion date for all members or (ii) for each member at the point of retirement, transfer out or death and following any exercise of benefit options).
140. Issue 11: To the extent that members have in the past been paid lower benefits than would have been paid had one of the equalisation methods been implemented from 17 May 1990:

- (1) Is the Claimant as trustee obliged to make back-payments to the member?
  - (2) If so, should back payments be made (i) going back 6 years (and if so, 6 years before what date), (ii) going back to 17 May 1990, or (iii) going back to some other date?
  - (3) Should interest be added to the back-payments, and if so at what rate?
  - (4) Should the calculation of cumulative benefits under Method C and Method D take into account only those back payments as allowed for under (2)-(3) above?
141. Issue 12: If the required or chosen method of equalisation is one of Methods A to D, should a different method be adopted for those members for whom the estimated cost of calculating and implementing Methods A to D is the same as or greater than the projected additional benefits to which the members would be entitled as a result of equalisation? If so, (a) what should that different method be, and (b) how is the Trustee to ascertain the members to which that method should be applied?
142. Issue 13: If the Claimant as trustee is under an obligation to equalise for the effect of unequal GMPs, then in principle:
- (1) Does the Claimant's obligation apply to benefits accrued in other schemes during the Barber window which have been transferred in to any of the Schemes?
  - (2) Leaving aside the effect of any contractual obligation that may have been undertaken in relation to particular transfers out of the Schemes, does the Claimant's obligation apply in relation to benefits accrued in any of the Schemes during the Barber window which have been transferred out of the Schemes, and if so what does that obligation require?
  - (3) If the answer to Issue 13(2) is that such an obligation applies, is that "in principle" obligation discharged (and thus not enforceable by relevant Scheme members) either
    - (i) under s 99 PSA 1993 and/or by reason of s 73(2) and (4) PSA 1993?
    - (ii) under transfer out provisions in the relevant Scheme rules?
143. The parties had originally put forward Issues 3 and 4 which raised questions as to the possible need to find an actual comparator for the purpose of assessing whether there was unequal treatment. The parties have agreed that if there is an obligation to equalise benefits, it is not necessary for a member to identify an actual comparator for that purpose. The Banks have agreed with the Trustee that they will amend the rules of the Schemes to give effect to this confirmation.
144. Issues 6 and 7, as drafted, raised questions as to whether the court would accept a surrender of the Trustee's discretion as to the method of equalisation to be adopted and, if the court did accept a surrender of discretion, questions as to which method of equalisation ought to be adopted by the court. Initially, the Trustee argued that the court should accept a surrender of its discretion. In response to this invitation from the

Trustee, the Banks and the RBs stated that the court's reaction was a matter for it and not for them. However, the parties did not agree on the principles and the practice which I should apply when considering an invitation from a trustee to accept a surrender of its discretion. As the case proceeded, it emerged that most (if not all) of the points being argued in relation to Issues 5 to 8 involved matters of legal principle on which the court should rule and in the light of those rulings, the extent of the Trustee's discretion was comparatively limited. It was then agreed that I should rule on the matters of legal principle which had been argued and not (at any rate, not at this stage) accept a surrender by the Trustee of its discretion in relation to any such remaining discretionary matters. Issues 5 to 8 were not redrafted to reflect this position but they can be addressed on the basis that they essentially ask the court to answer questions of legal principle which arise in relation to the availability of Methods A to D.

145. The original Issue 9 asked whether the Trustee was obliged to consider other methods of equalisation apart from Methods A to D. It is now agreed that the court should confine itself to considering Methods A to D and need not discuss other possible methods.
146. The original Issue 10 asked whether, if there was an obligation to equalise benefits, the Trustee had power to give effect to the chosen method of equalisation. The parties have agreed that the Trustee has such power.
147. As regards Issue 12, it was agreed in the course of the hearing that I should not discuss that issue but, in the light of my decision on the other issues, the parties should consider what course to adopt in relation to that issue whereby the issue might not subsequently need to be determined by the court.
148. Finally, as regards Issue 13, although I heard argument in relation to that issue, it was in the end agreed that I should not deal with Issue 13 in this judgment and that this issue would need to be considered separately at a further hearing. Although, I need not decide Issues 12 and 13 at this stage, I will make further explanatory comments on them towards the end of this judgment.
149. In the remainder of this judgment, I will discuss and determine the Issues as follows:
  - (1) Issues 1 and 2 as to any obligation to equalise benefits;
  - (2) Issues 5 to 8 as to the possible methods of equalisation; and
  - (3) Issue 11 as to underpayment in the past.

## **PART V: ISSUES 1 AND 2**

### *Issues 1 and 2*

150. For convenience, I will set out Issues 1 and 2 again and indicate the position of the Banks, the RBs and the Crown in relation to these issues.
151. Issue 1: Where male and female Scheme members with equivalent age, service and earnings histories would have accrued unequal GMP in respect of service in the Barber window, and, if necessary, an appropriate actual opposite sex comparator is available,



is the Claimant, as trustee of each of the Schemes, obliged (whether by virtue of Art 157 TFEU, ss 67-68 EA 2010, ss 62-63 PA 1995, the Express Equality Rules, or otherwise) to adjust benefits payable under each of the Schemes in excess of the GMP in order that the total benefits received by male and female members with equivalent age, service and earnings histories are equal?

152. In relation to Issue 1, the Banks say that the trustee is not obliged to adjust benefits in the way described in Issue 1. The RBs say that the trustee is obliged to adjust benefits in the way described in Issue 1.
153. Issue 2(a): Is it lawful to pay unequal total benefits under the Schemes where the inequality is the effect of the differences between the GMPs of males and females with equivalent age, service and earnings histories, on the ground that GMPs are a substitute for a State pension (SERPS or the ASP) and are not “pay” within Article 157 TFEU?
154. In relation to Issue 2(a), the Banks say that it is lawful to pay unequal total benefits under the Schemes on the ground that GMPs are not “pay” within Article 157. The RBs and the Crown contend that this is not lawful and the GMPs are “pay” under Article 157.
155. Issue 2(b): Is it lawful to pay unequal total benefits under the Schemes where the inequality is the effect of the differences between the GMPs of males and females with equivalent age, service and earnings histories, on the ground that (b) there is an objective difference between the position of males and females arising from the GMP legislation (see by analogy Birds Eye Walls v Roberts[1994] ICR 336)?
156. In relation to Issue 2 (b), the Banks say that it is lawful to pay unequal total benefits under the Schemes on the ground that there is an objective difference between the position of males and females arising from the GMP legislation. The RBs argue the contrary.
157. Issue 2(c): Is it lawful to pay unequal total benefits under the Schemes where the inequality is the effect of the differences between the GMPs of males and females with equivalent age, service and earnings histories, on the ground that (c) the defence of material factor under section 69 EA 2010 applies?
158. In relation to issue 2(c), the Banks say that it is lawful to pay unequal total benefits under the Schemes on the ground that the defence of material factor under section 69 EA 2010 applies. The RBs argue the contrary.
159. Issues 1 and 2 were argued by Mr Cavanagh QC on behalf of the Banks, Mr Short QC on behalf of the RBs and Ms Stout on behalf of the Crown. The arguments were very thorough and comprehensive and involved reference to a large number of legislative provisions and the citation and analysis of a considerable body of authority. As will be seen, the points which are ultimately decisive are in the final analysis quite short points, certainly as compared with the comprehensive nature of the argument. In other circumstances, I might have preferred to have proceeded straight to the essential reasoning which supports the answers I have arrived at in relation to Issues 1 and 2. However, I was repeatedly reminded during the hearing that there are many in the pensions industry who are watching this case and the Government has itself suspended

its consultation processes into what should be done until this case has been decided. In these circumstances, I have decided to set out the relevant material at length and to refer in detail to the submissions of the parties although that course will result in a lengthier judgment than is strictly necessary to explain my reasoning.

*The EU legislation relevant to Issues 1 and 2*

160. Article 156 of the Treaty on the Functioning of the European Union (“TFEU”) provides that the Commission is to encourage cooperation between Member States in all social policy fields including in matters relating to employment and social security. Article 157(1) and (2) provides:

“1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

2. For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

(b) that pay for work at time rates shall be the same for the same job.”

161. Article 157(1) and (2) is in the same terms as the relevant article in earlier treaties, namely the predecessor provision in Article 141 of the Treaty of Amsterdam and, before that, Article 119 of the Treaty of Rome. Many of the cases which were cited to me refer to these earlier articles. Article 157(1) and (2) have the same effect as these earlier Articles. In my citations from the cases which have considered the relevant Articles, I have not altered the references to the earlier Articles 119 and 141 to the current Article 157 as I consider that one can simply proceed on the basis that there is no difference between the effect of the three Articles. It was common ground that Article 157 has direct effect in this jurisdiction.

162. From 1975, Article 119 of the Treaty of Rome was supplemented by Council Directive 75/117/EEC (the “Equal Pay Directive”), which facilitated the practical application of the principle of equal pay but did not extend its scope or effect. The Directive provided:

“The principle of equal pay for men and women outlined in article 119 of the Treaty, hereinafter called “principle of equal pay”, means for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.”

163. The Equal Pay Directive has since been replaced by the recast Equal Treatment Directive, 2006/54/EC (the “recast Directive”). The recast Directive brought together provisions in relation to equal pay (formerly in the Equal Pay Directive), equal treatment in relation to working conditions (formerly in Directive 86/378/EEC), the burden of proof in sex discrimination cases (formerly in Directive 97/80/EC) and Directive 86/378/EEC on the implementation of equal treatment for men and women in occupational social security schemes. Directive 86/378/EEC required Member States to ensure that the provisions of occupational pension schemes that were contrary to the principle of equal treatment were revised by 1 January 1993 (subject to the possibility of deferring the application of the principle in relation to pension ages, survivors’ pensions and some actuarial factors). It was made otiose by the decision in Barber, which brought the benefits of occupational pension schemes within the scope of Article 157.
164. Article 4 of the recast Directive prohibits discrimination in the matter of pay in the following terms:
- “For the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated.”
165. Article 5 of the recast Directive provides that, without prejudice to Article 4:
- “... there shall be no direct or indirect discrimination on grounds of sex in occupational social security schemes, in particular as regards:
- (a) the scope of such schemes and the conditions of access to them;
- (b) the obligation to contribute and the calculation of contributions;
- (c) the calculation of benefits ... ”.
166. Article 5 of the recast Directive uses the phrase “occupational social security schemes” which was defined by Article 2 as being:
- “schemes not governed by Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security whose purpose is to provide workers ... in an undertaking or group of undertakings, area of economic activity, occupational sector or group of sectors with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional.”

167. The definition of “occupational social security schemes” referred to Council Directive 79/7/EEC. That Directive related to the progressive implementation of the principle of equal treatment for men and women in matters of social security. Article 3 of the Directive described the matters to which it applied as follows:

“1. This Directive shall apply to:

(a) statutory schemes which provide protection against the following risks:

- sickness,
- invalidity,
- old age,
- accidents at work and occupational diseases,
- unemployment;

(b) social assistance, in so far as it is intended to supplement or replace the schemes referred to in (a).”

168. Article 7(1)(a) of Directive 79/7/EEC provided:

“1. This Directive shall be without prejudice to the right of Member States to exclude from its scope:

(a) the determination of pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences thereof for other benefits;

... ”

169. As noted earlier in this judgment, the UK relies on Article 7(1)(a) of Directive 79/7/EEC as justifying the unequal treatment of men and women in the state pension system.

*The domestic legislation relevant to Issues 1 and 2*

170. In this jurisdiction, provision for equal pay was first made in the Equal Pay Act 1970 (the “EPA”). It adopted a contractual model (in contrast to the model found in other areas of discrimination law, whereby unlawful discrimination is a statutory tort) inserting a term into contracts of employment to provide for a right to equal pay: see section 1(2). This became the equality clause: see section 1(1). In broad terms, the equality clause took effect by modifying contractual terms of women employed on equal work with men in the same employment so that they were no less favourable than the equivalent terms of the men’s contracts, unless there was a non-discriminatory reason for the difference.

171. As originally enacted, the EPA excluded pension rights (i.e. “terms and conditions related to retirement, marriage or death or to any provision made in connection with retirement, marriage or death”): see section 6 as enacted.
172. Although the EPA had predated the UK’s membership of the EC, it was relied upon to discharge the UK’s obligations under Article 157 and the Equal Pay Directive.
173. When the EPA was substantially recast by the Sex Discrimination Act 1975, which came into effect on 29 December 1975, the exclusion of pension rights was modified so that the equality clause did apply in respect of the equal access requirements, which had been introduced by Part IV of the SSPA 195, but not otherwise (i.e. not in relation to benefits).
174. Further provision was required following the landmark decision of the ECJ in Barber, which made clear that discrimination in the benefits of (and not just access to) occupational pension schemes was contrary to Article 157. This was made in the equal treatment provisions in sections 62 – 66 of the PA 1995. These provisions were modelled on (and were to be construed as one with) the EPA. They inserted an Equal Treatment Rule (“ETR”) into the rules of occupational pension schemes. The ETR has now been replaced by the Sex Equality Rule (“SER”) under section 67 of the EA 2010.
175. The core of the ETR, as set out in the PA 1995, was as follows:

**“ 62 The equal treatment rule**

(1) An occupational pension scheme which does not contain an equal treatment rule shall be treated as including one.

(2) An equal treatment rule is a rule which relates to the terms on which –

(a) persons become members of the scheme, and

(b) members of the scheme are treated.

(3) Subject to subsection (6), an equal treatment rule has the effect that where-

(a) a woman is employed on like work with a man in the same employment,

(b) a woman is employed on work rated as equivalent with that of a man in the same employment, or

(c) a woman is employed on work ... of equal value to that of a man in the same employment,

but (apart from the rule) any of the terms referred to in subsection (2) is or becomes less favourable to the woman than it is to the man, the term shall be treated as so modified as not to be less favourable.

(4) An equal treatment rule does not operate in relation to any difference as between a woman and a man in the operation of any of the terms referred to in subsection (2) if the trustees or managers of the scheme prove that the difference is genuinely due to a material factor which-

(a) is not the difference of sex ... ”

176. By section 63(6), the ETR was treated as having effect in relation to terms on which the members of a scheme were treated (i.e. not rights of access) only in relation to service from 17 May 1990, giving effect to the temporal limitation in Barber (which is referred to later in this judgment).
177. Section 64 (supplemented by the Occupational Pension Schemes (Equal Treatment) Regulations 1995) provided for various exceptions to the ETR, permitting differences in the pension received by men and women where the difference resulted from:
- (1) a man receiving a larger sum than a woman to take account of the fact that he had not reached State pension age (“SPA”) and so is not yet entitled to receive a basic state pension, whereas he would have reached SPA and been so entitled if he were a woman (referred to as a “bridging pension”);
  - (2) indexation of benefits under a salary-related contracted-out scheme where the pension of one person (‘A’) may be increased at a rate greater than that applicable to a person of the other sex (‘B’) provided the difference does not exceed the amount by which increases to the State additional pension of B exceed the increases to the State additional pension of A;
  - (3) arising from the use of sex-specific actuarial factors in certain circumstances identified in the regulations (e.g. in the factors used when commuting periodical pension for a lump sum).
178. Section 65 of the PA 1995 allowed the trustee of an occupational pension scheme to make alterations to the scheme to secure conformity with the ETR or to overcome complexities or problems otherwise involved in altering the scheme for that purpose.
179. These provisions were replaced by the EA 2010 (supplemented by the Equality Act 2010 (Sex Equality Rule) (Exceptions) Regulations 2010) with effect from 1 October 2010. They are (for present purposes) in much the same form as the provisions of the PA 1995. The provisions of the EA 2010 of principal relevance are sections 67-69. Section 67 provides for a sex equality rule in these terms:

**“67 Sex equality rule**

- (1) If an occupational pension scheme does not include a sex equality rule, it is to be treated as including one.
- (2) A sex equality rule is a provision that has the following effect—

(a) if a relevant term is less favourable to A than it is to B, the term is modified so as not to be less favourable;

(b) if a term confers a relevant discretion capable of being exercised in a way that would be less favourable to A than to B, the term is modified so as to prevent the exercise of the discretion in that way.

(3) A term is relevant if it is—

(a) a term on which persons become members of the scheme, or

(b) a term on which members of the scheme are treated.

(4) A discretion is relevant if its exercise in relation to the scheme is capable of affecting—

(a) the way in which persons become members of the scheme, or

(b) the way in which members of the scheme are treated.

(5) The reference in subsection (3)(b) to a term on which members of a scheme are treated includes a reference to the term as it has effect for the benefit of dependants of members.

(6) The reference in subsection (4)(b) to the way in which members of a scheme are treated includes a reference to the way in which they are treated as the scheme has effect for the benefit of dependants of members.

(7) If the effect of a relevant matter on a person (A) differs according to the effect it has on a person of the same sex as A, according to whether A is married, in a civil partnership, or for some other reason due to A's family status, a comparison for the purposes of this section of the effect of that matter on persons of the opposite sex must be with a person of the opposite sex to A who is in the same position as A and in particular—

(a) where A is married to someone of the opposite sex, A is to be compared to a person of the opposite sex to A (“B”) where B is married to someone of the opposite sex to B;

(b) where A is married to someone of the same sex as A or is in a civil partnership, A is to be compared to B where B is married to someone of the same sex as B or is in a civil partnership.

(8) A relevant matter is—

(a) a relevant term;

(b) a term conferring a relevant discretion;

(c) the exercise of a relevant discretion in relation to an occupational pension scheme.

(9) This section, so far as relating to the terms on which persons become members of an occupational pension scheme, does not have effect in relation to pensionable service before 8 April 1976.

(10) This section, so far as relating to the terms on which members of an occupational pension scheme are treated, does not have effect in relation to pensionable service before 17 May 1990.”

180. Section 68 permits consequential alterations to an occupational pension scheme and provides:

**“68 Sex equality rule: consequential alteration of schemes**

(1) This section applies if the trustees or managers of an occupational pension scheme do not have power to make sex equality alterations to the scheme.

(2) This section also applies if the trustees or managers of an occupational pension scheme have power to make sex equality alterations to the scheme but the procedure for doing so—

(a) is liable to be unduly complex or protracted, or

(b) involves obtaining consents which cannot be obtained or which can be obtained only with undue delay or difficulty.

(3) The trustees or managers may by resolution make sex equality alterations to the scheme.

(4) Sex equality alterations may have effect in relation to a period before the date on which they are made.

(5) Sex equality alterations to an occupational pension scheme are such alterations to the scheme as may be required to secure conformity with a sex equality rule.”

181. Section 69(4) provides for the possibility that the sex equality rule might not apply in relation to a difference between a man and a woman if the difference is because of a material factor which is not the difference of sex. Section 69 provides:

**“69 Defence of material factor**

(1) The sex equality clause in A's terms has no effect in relation to a difference between A's terms and B's terms if the responsible person shows that the difference is because of a material factor reliance on which—



(a) does not involve treating A less favourably because of A's sex than the responsible person treats B, and

(b) if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim.

(2) A factor is within this subsection if A shows that, as a result of the factor, A and persons of the same sex doing work equal to A's are put at a particular disadvantage when compared with persons of the opposite sex doing work equal to A's.

(3) For the purposes of subsection (1), the long-term objective of reducing inequality between men's and women's terms of work is always to be regarded as a legitimate aim.

(4) A sex equality rule has no effect in relation to a difference between A and B in the effect of a relevant matter if the trustees or managers of the scheme in question show that the difference is because of a material factor which is not the difference of sex.

(5) "*Relevant matter*" has the meaning given in section 67.

(6) For the purposes of this section, a factor is not material unless it is a material difference between A's case and B's."

#### *Express sex equality rules*

182. As noted above, s 67(1) EA 2010 provides for a "sex equality rule" to be treated as included in the rules but only "[i]f an occupational pension scheme does not include a sex equality rule". A "sex equality rule" is defined in s 67(2) EA 2010 as a provision that has the following effect:

"(a) if a relevant term is less favourable to A than it is to B, the term is modified so as not to be less favourable; (b) if a term confers a relevant discretion capable of being exercised in a way that would be less favourable to A than to B, the term is modified so as to prevent the exercise of the discretion in that way."

183. The No 1 Scheme already contains rules which may qualify as "sex equality rules" under section 67(1) EA 2010. The current rules of the largest DB section of the No 1 Scheme (for post-1974 joiners) provide at Special Rule B12 (so far as relevant):

"B12. Calculation of benefits and contributions

In spite of anything else in these Special Rules, benefits and contributions will always be calculated and paid in a way which is consistent with the requirements of: (i) Article 141 of the Treaty of Rome and section 62 of the Pensions Act 1995 ... ."

184. Identical or similar rules appear in the provisions governing other defined benefit sections of the No 1 Scheme e.g. at Special Rules C12 (the rule mentions the Barber

judgment), D12 (in the same terms as Special Rule C12), E12 (in the same terms as Special Rule B12) and F13 (in the same terms as Special Rule C12).

185. There are no equivalent express rules in the No 2 Scheme or the HBOS Scheme. Therefore, the “sex equality rule” in s 67 EA 2010 would apply in those Schemes (and also in the No 1 Scheme if the express rules mentioned above do not qualify as “sex equality rules”).

*Powers to modify the Schemes*

186. If the Trustee is under an obligation to equalise benefits to take account of unequal GMPs, the question arises as to what powers the Trustee has to give effect to such obligation.
187. As noted above, section 68 EA 2010 confers power on the trustee of an occupational pension scheme to make “sex equality alterations”, but only if they do not already have such power or the process for exercising the power is impractical: section 68(1)-(2) EA 2010.
188. The Schemes do already contain powers of alteration and augmentation which might be used to adjust benefits, but they are not exercisable unilaterally by the Trustee; for example, there are powers of amendment in the No. 1 Scheme rules at General Rule 19.1, the No 2 Scheme rules at rule 78 and the HBOS Scheme rules at rule 26.
189. If the relevant Principal Employer agrees to an amendment or augmentation, there is no difficulty. If the Principal Employer declines to agree, then in principle the power in section 68 EA 2010 ought to be available.

*Case law relevant to Issues 1 and 2*

190. The early ECJ case of Defrenne (No 1), Defrenne v Belgian State (C-80/70) [1971] ECR 445) established that state retirement pensions do not provide “pay” within Article 157. That case concerned a state retirement pension, but one which was specifically for certain categories of workers, in particular civil aviation aircrews, and which was funded by employers’ and employees’ contributions. The Court said at [7]-[13]:

“7. Although consideration in the nature of social security benefits is not therefore in principle alien to the concept of pay, there cannot be brought within this concept, as defined in Article 119, social security schemes or benefits, in particular retirement pensions, directly governed by legislation, without any element of agreement within the undertaking or the occupational branch concerned, which are obligatorily applicable to general categories of workers.

8. These schemes assure for the workers the benefit of a legal scheme, the financing of which workers, employers and possibly the public authorities contribute in a measure determined less by the employment relationship between the employer and the worker than by considerations of social policy.

9. Accordingly the part due from the employers in the financing of such schemes does not constitute a direct or indirect payment to the worker.

10. Moreover, the worker will normally receive benefits legally prescribed not by reason of the employer's contribution but solely because the worker fulfils the legal conditions for the grant of benefits.

11. These are likewise characteristics of special schemes which, within the framework of the general system of social security established by legislation, relate in particular to certain categories of workers.

12. It must therefore be found that situations involving discrimination resulting from the application of such a system are not subject to the requirements of Article 119 of the Treaty.

13. It follows from the above that a retirement pension established within the framework of a social security scheme laid down by legislation does not constitute consideration which the worker receives indirectly in respect of his employment from his employer within the meaning of the second paragraph of Article 119.”

191. In relation to occupational pensions, the leading authority on Article 157 is Barber v Guardian Royal Exchange Assurance Group (C-262/88) [1991] 1 QB 344, where the judgment of the ECJ was delivered on 17 May 1990. That case concerned a contracted-out pension scheme with differential retirement ages for men and women (62 and 57 respectively). The ECJ held that benefits under such a scheme were “pay” for the purposes of Article 119 (now Article 157) because the employee received those benefits by reason of the employment relationship. Such benefits did not cease to be “pay” just because they were required to be paid by statute or because they were a substitute for benefits under the statutory scheme.

192. The ECJ considered the meaning of “pay” for the purposes of Article 119 at [10]-[20]. It gave the concept a broad meaning, holding that sums paid to an employee by the employer (albeit indirectly) in respect of, or by reason of, his employment were pay. It rejected the notion that they ceased to be pay because the employer was required to pay those sums by statute. It said:

“[12] ... the concept of pay, within the meaning of the second paragraph of article 119, comprises any other consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his employment from his employer ... ..

[16] ... a redundancy payment made by the employer ... cannot cease to constitute a form of pay on the sole ground that, rather

than deriving from the contract of employment, it is a statutory or ex gratia, payment.

[17] In the case of statutory redundancy payments it must be borne in mind that, as the court held in its judgment of 8 April 1976 in [Defrenne II], ... para 40, article 119 of the Treaty also applies to discrimination arising directly from legislative provisions. This means that benefits provided for by law may come within the concept of pay for the purposes of that provision.

[18] ... the fact that a benefit is in the nature of pay cannot be called in question where the worker is entitled to receive the benefit in question from his employer by reason of the existence of the employment relationship.”

193. The central issue was whether, given the previous case law of the ECJ, a contracted-out pension scheme was to be treated as providing pay within Article 119 (now Article 157) or as a social security scheme within Article 118 (now Article 156). Having identified the substance of the question, the ECJ dealt with the status of such pension schemes at [21]-[30]. The Court determined that such schemes fell within the scope of Article 157. It said at [25]-[30]:

“[25] ... first of all ... the schemes in question are the result either of an agreement between workers and employers or of a unilateral decision taken by the employer. They are wholly financed by the employer or by both the employer and the workers without any contribution being made by the public authorities in any circumstances. Accordingly, such schemes form part of the consideration offered to workers by the employer.

[26] Secondly, such schemes are not compulsorily applicable to general categories of workers. On the contrary, they apply only to workers employed by certain undertakings, with the result that affiliation to those schemes derives of necessity from the employment relationship with a given employer. Furthermore, even if the schemes in question are established in conformity with national legislation and consequently satisfy the conditions laid down by it for recognition as contracted-out schemes, they are governed by their own rules.

[27] Thirdly, ... even if the contributions paid to those schemes and the benefits which they provide are in part a substitute for those of the general statutory scheme, that fact cannot preclude the application of article 119. It is apparent from the documents before the court that occupational schemes such as that referred to in this case may grant to their members benefits greater than those which would be paid by the statutory scheme, with the result that their economic function is similar to that of the supplementary schemes which exist in certain member states,

where affiliation and contribution to the statutory scheme is compulsory and no derogation is allowed. In its judgment of 13 May 1986 in Bilka-Kaufhaus G.m.b.H. v. Weber von Hartz (Case 170/84) [1987] I.C.R. 110, the court held that the benefits awarded under a supplementary pension scheme fell within the concept of pay, within the meaning of article 119.

[28] It must therefore be concluded that, unlike the benefits awarded by national statutory social security schemes, a pension paid under a contracted out scheme constitutes consideration paid by the employer to the worker in respect of his employment and consequently falls within the scope of article 119 of the Treaty.

...

[30] The answer to the second question submitted by the Court of Appeal must therefore be that a pension paid under a contracted-out private occupational scheme falls within the scope of article 119 of the Treaty.”

194. The ECJ went on to consider whether it was contrary to Article 119 for men and women to be subject to different age conditions for the receipt of benefits under such schemes. Again, it emphasised the wide scope of the Article. It said:

“[32] ... article 119 prohibits any discrimination with regard to pay as between men and women, whatever the system which gives rise to such inequality. Accordingly, it is contrary to article 119 to impose an age condition which differs according to sex in respect of pensions paid under a contracted-out scheme, even if the difference between the pensionable age for men and that for women is based on the one provided for by the national statutory scheme.”

195. The ECJ clarified the effect of Barber in a series of judgments given on 28 September 1994 in the cases of Ten Oever (C-109/91) [1995] ICR 74, Coloroll Pension Trustees Ltd v Russell (C-200/91) [1995] ICR 179, Neath v Hugh Steeper Ltd (C-152/91) [1995] ICR 158, and Moroni v Collo GmbH (C-110/91) [1995] ICR 137 as well as Bestuur van het Algemeen Burgerlijk Pensioenfonds v Beune (C-7/93) [1995] 3 CMLR 30 and others.
196. In Ten Oever ([9]-[11], page 425) the ECJ reiterated the broad approach to the meaning of “pay” taken in Barber. Although it noted (following Defrenne (No. 1) (80/70) [1971] 1 CMLR 494) that the concept of pay did not cover social security schemes, this was a reference to obligatory retirement pension schemes which are directly governed by legislation and which are funded on a basis determined by considerations of social policy rather than the employment relationship. As a result, the scheme under consideration (the rules of which derived from agreement between both sides of industry and which was not funded from the public purse, although it had been made compulsory at the request of the social partners) fell within the scope of Article 119.

197. The same approach was taken in Moroni ([14]-[20]), where the ECJ noted that “the scope of the principles stated in the Barber judgment cannot be regarded as being limited to contracted-out occupational schemes and that those principles also apply to supplementary schemes”. The Court went on to reject the notion that the supplementary scheme in question was excluded from Article 119 because it was “closely and directly interlocked” with the statutory scheme. This was because “the national provision referred to has no effect on the discriminatory character of the reduction in question which arises only from the contractual provisions of the occupational scheme in question ...”
198. In Coloroll [1995] 2 C.M.L.R. 357 at page 439, the ECJ dealt with a number of schemes operated by the Coloroll group. With one exception, these were contracted-out schemes, see at [11]. The ECJ:
- (1) applied the same reasoning as in Ten Oever to hold that Article 119 applied to a survivor’s pension because that pension “was vested in the survivor by reason of the employment relationship between the employer and the survivor’s spouse and was paid to the survivor by reason of the spouse’s employment”, see [18];
  - (2) held that the principles laid down in the Barber judgment applied to non contracted-out occupational schemes as well as contracted-out schemes, see [63]-[71];
  - (3) held that Article 119 applied to all benefits payable to an employee irrespective of whether the scheme is contributory or non-contributory. Whether contributions are payable by the employer or the employees had no bearing on the concept of pay when applied to occupational pensions, which must conform to the principle of equal treatment in their entirety, whatever the source of their funding, see [88].

The Court continued:

“[89] This is so here a fortiori since the documents show that, as a matter of accounting, once the employer’s and the employees’ contributions have been paid into the scheme, they are managed as a single fund and it is no longer possible to distinguish them.”

199. In Beune, the ECJ considered the pension rights of Dutch civil servants arising under a statutory pension scheme for civil servants (the “ABPW”) where the pension benefits received were directly determined by statute. The case arose from the interaction between the general pension scheme (the “AOW”) and the ABPW. To obviate overlapping of the two schemes, a deduction was made from the ABPW to reflect rights under the AOW. As married women accrued limited rights under the AOW before 1986, the deduction made from their benefits under the ABPW was lower than that made from the benefits of married men. The claim was brought by Mr Beune (a married man) on the basis that his ABPW pension was lower than it would have been had he been a married woman. The benefits under the ABPW fell within the scope of Article 119. The ECJ held that:

- (1) the fact that the ABPW was directly governed by statute did not exclude it from the scope of Article 119 given Defrenne (No. 1) and Barber, see [26]-[27];
  - (2) the need to ensure the uniform application of the Treaty throughout the Community meant that the application of Article 119 could not depend upon whether the unequal treatment arose from legislation or a collective agreement, see [28]-[29];
  - (3) as Barber had held (and Ten Oever had confirmed) “ schemes such as private occupational contracted-out schemes, resulting either from negotiation between employees and employers or from a unilateral decision taken by the employer ... without any contribution being made by the public authorities in any circumstances, form part of the consideration offered to employees by the employer”. Even if the contributions paid to those schemes and the benefits they provide are in part a substitute for those of the general statutory scheme, that fact cannot preclude the application of Article 119”, see [30];
  - (4) “Benefits awarded under an occupational scheme which, partly or entirely, take the place of the benefits paid by a statutory social security scheme may fall within the scope of Article 119”, see [37];
  - (5) agreement between employers and employees is not essential for the application of Article 119, see [33];
  - (6) funding arrangements are not determinative of the application of Article 119, see [38]-[40];
  - (7) “the only possible decisive criterion is whether the pension is paid to the worker by reason of the employment relationship between him and his former employer”, see [43];
  - (8) although the employment criterion is not exclusive (because pensions paid by statutory social security schemes may reflect, wholly or in part, pay in respect of work but fall outside Article 119) a scheme established by a national legislature would still fall within the scope of Article 119: “[45] ...if the pension concerns only a particular category of workers, if it is directly related to the period of service and if its amount is calculated by reference to the civil servant’s last salary. The pension paid by the public employer is therefore entirely comparable to that paid by a private employer to his former employees.”
200. Pensions calculated by reference to the period of service and salary have repeatedly and consistently been treated as within the scope of Article 119 since Beune. For examples, see Dimosia Epicheirisi Ilektrismoyd (DEI) v Evthimios Evrenopoulos (C-147/95) [1997] 2 CMLR 407 at [21], Griesmar v Ministre De L’Economie, Des Finances Et De L’Industrie and another (Case C-366/99) [2003] 3 C.M.L.R. 5 at [30], Pirkko Niemi (C-135/00) [2002] Pens LR 459 at [47] and Maruko v Versorgungsanstalt Der Deutschen Buhnen C-267/06 [2008] 2 CMLR 32 at [48].
201. The decisiveness of the employment criterion has also repeatedly been emphasised by the Court. In Pirkko Niemi the Court considered the Finnish statutory employment

pension scheme, which was a compulsory scheme covering all work in both the public and private sector. The amount of pension depended upon the individual's employment history: i.e. the duration of employment and the salary received. Consistently with the Judgment in Beune, the Court held that:

- (1) the fact that a scheme is determined directly by statute is not in itself sufficient to exclude such a scheme from the scope of Article 119, see [41];
- (2) the applicability of Article 119 is in no way conditional upon a pension being supplementary to a benefit provided by a statutory social security scheme, see [42];
- (3) “the Court has held that a decisive criterion is the link between the employment relationship and the retirement benefit, and has not regarded the structural elements of a system of pension benefits as playing a decisive role” see [44]-[45];
- (4) although that criterion cannot be regarded as exclusive, considerations of social policy, etc cannot prevail “if the pension concerns only a particular category of workers, if it is directly related to the period of service completed and if its amount is calculated by reference to the public servant's last salary. The pension paid by the public employer is in that case entirely comparable to that paid by a private employer to his former employees ...” see [47]; and
- (5) “...Article 119 ... prohibits any discrimination with regard to pay as between men and women, whatever may be the system which gives rise to such inequality ..., see [53].

202. This analysis from Beune and Pirkko Niemi was adopted in the Recitals to the recast Directive, which state:

(13) In its judgment [in Barber], the Court of Justice determined that all forms of occupational pension constitute an element of pay within the meaning of Article 141 of the Treaty.

(14) Although the concept of pay within the meaning of Article 141 of the Treaty does not encompass social security benefits, it is now clearly established that a pension scheme for public servants falls within the scope of the principle of equal pay if the benefits payable under the scheme are paid to the worker by reason of his/her employment relationship with the public employer, notwithstanding the fact that such scheme forms part of a general statutory scheme. According to the judgments of the Court of Justice in [Beune] and [Pirkko Niemi] that condition will be satisfied if the pension scheme concerns a particular category of workers and its benefits are directly related to the period of service and calculated by reference to the public servant's final salary. For reasons of clarity, it is therefore appropriate to make specific provision to that effect.”



203. The effect of Barber and some of the later ECJ cases was summarised by the Court of Appeal in Trustee Solutions v Dubery [2008] ICR 101, at [2]-[3], as follows:

“2. The [issue in Dubery] arises by reason of the impact of art 141 EC (formerly art 119 of the EC Treaty) of the amended Treaty of Rome, as interpreted by the European Court of Justice (the ECJ) in a series of decisions commencing with Barber v Guardian Royal Exchange Assurance Group Case C-262/88 [1990] 2 All ER 660, [1990] ECR I-1889, on schemes which differentiated between male and female members for the normal retirement date (NRD). Until Barber's decision given by the ECJ on 17 May 1990 British schemes usually mirrored the different ages at which state pensions were payable, namely 65 for males and 60 for females. Article 141 requires that male and female workers should receive equal pay for equal work or work of equal value. In Barber's case the ECJ held that pensions are pay and must be equal for both men and women. Accordingly, schemes which provide for unequal retirement ages as between men and women are unlawful.

3. In further decisions, most notably Coloroll Pension Trustees Ltd v Russell Case C200/91 [1995] All ER (EC) 23, [1995] ICR 179, the ECJ decided further points arising out of Barber's case and in particular that:

(1) for pensionable service prior to 17 May 1990 it was not unlawful for pension benefits to be provided at different NRDs for men and women;

(2) a scheme could be amended so as to equalise benefits up or down, for example to make the NRD for both men and women at age 60 or 65; and

(3) for pensionable service between 17 May and the date of any such amendment (a period known in the pensions industry as the Barber window or corridor) men were entitled to be treated as if their NRD was the same as the NRD for women.

Thus in the usual form of scheme men were to be treated as having their NRD at age 60, but only in respect of benefits accruing from pensionable service in the Barber window.”

204. Thus the “Barber window” opened for pensionable service from 17 May 1990 until closed by effective measures to equalise the benefits of men and women (for future pensionable service only). Whilst the window is left open, the disadvantaged sex is entitled to have its benefits levelled up to those of the advantaged sex. Benefits can only be levelled down (and for the future only) when the window is closed by effective equalisation.

205. This is of relevance in the present case because, if the inequalities under the Schemes arising from the GMP legislation are caught by Article 157 and the decision in Barber, the Barber window opened for benefits accrued from 17 May 1990 and remained open whilst GMPs continued to accrue up to 5 April 1997, so all pensionable service between those dates is affected.
206. The effect of the Barber window was described by the Court of Appeal in Safeway v Newton [2018] Pens LR 2, at [36]-[40], where the Court recorded the following uncontentious submissions of counsel with which it “broadly agree[d]”:

... 38. Secondly, employers and pension trustees may take effective measures available to them under domestic law (including the terms and rules of the relevant Scheme) to implement Article 119 [now Art 157] by levelling down, that is reducing the rights of the advantaged class to those of the disadvantaged class, with respect to future pensionable service (i.e. service undertaken after the taking of those effective measures). But in relation to the period from the opening of the Barber window until the taking of those effective measures (generally described as the closing of the Barber window) employers and trustees will be required to confer the same rights upon the disadvantaged class as those enjoyed by the advantaged class: see the Fischer case, in particular at paragraphs 33 to 37 of the Judgment, the Coloroll case at paragraphs 32 to 36 of the Judgment and the Smith case at paragraph 17 of the Judgment.

39. Thirdly, the benchmark for ascertaining, during the period when the Barber window is open, the rights of the advantaged class is to be found by reference to the trust deed and rules of the relevant scheme, because that provides the sole and exclusive system or frame or point of reference for the purposes of achieving equal treatment. The origins of this principle in the EU authorities are well summarised by Warren J in paragraphs 35 to 41 of the judgment under appeal, by reference to Razzouk v Commission of the European Communities (Cases 75/82) [1984] 3 CMLR 470, The Netherlands v Federatie Nederlandse Vakbeweging (Case 71/85)... [1987] 3 CMLR 767 and Nimz v Freie und Hansestadt Hamburg (Case C-184/89) ...[1992] 3 CMLR 699.

40. Fourthly, the objective of Article 119 during the period when the Barber window is open is concerned with levelling up the rights of the disadvantaged class to those enjoyed by the advantaged class, but not with giving either the advantaged class more generous rights than they previously enjoyed, still less giving the disadvantaged class more generous rights than previously enjoyed by the advantaged class. This is, [counsel] submits (and we agree), the effect of the second and third principles described above. It also reflects what may be described

as a principle of minimum interference with domestic rights, where a directly applicable EU right is to be applied, as explained by Arden LJ in Foster Wheeler v Hanley [2009] EWCA Civ 651, at paragraph 33:

‘Accordingly, the court should, where possible, give effect to Barber rights by adhering to the provisions of the relevant scheme where it is possible to do so in preference to some other approach. If some departure is required, it should in general, so far as practicable, represent the minimum interference with the scheme provisions.’”

207. In relation to Issues 2(b) and 2(c), I was referred to Roberts v Birds Eye Walls Ltd Case C-132/92 [1994] ICR 338 which was heavily relied upon by the Banks. This case was concerned with bridging pensions for those who had taken ill-health retirement. In particular, a rule in a pension scheme had the effect that the ill-health pensions for women between the ages of 60-65 were lower than the pensions for men at the same age, because women qualified for the state pension at age 60, whereas men only qualified for the state pension at age 65. The amount of the state pension was deducted from the bridging pension. This applied whether or not the individual actually qualified for the state pension. Mrs Roberts did not qualify for the state pension, because she had chosen not to pay the full NIC contributions (although she did qualify for an equivalent state widow’s pension).
208. The question referred to the ECJ by the Court of Appeal was not specific to ill-health pensions but asked more generally whether it was a breach of Article 119 to operate a discretionary occupational pension scheme whereby the same total retirement pension (occupational and state in the aggregate) was calculated for the employees and there was deducted from that total that part of the state retirement pension in respect of which contributions were paid by the employer and the ex-employee, and the employer pays directly to the employee that reduced amount, the objective being to equalise the total retirement pension for male and female ex-employees alike.
209. It was accepted in Roberts that the bridging pension was “pay” within Article 119. It was also clear that the amount of bridging pension was different for women and men. Nonetheless, Advocate General Van Gerven and the court took the view that there was no infringement of Article 119. It is not easy to spell out of the opinion of the Advocate General and the judgment of the court what their reasons were for this conclusion. The Advocate General’s opinion contains an interesting discussion of the sometimes elusive difference between direct and indirect discrimination and whether it is ever possible to justify direct discrimination. At [15]-[18] of his opinion, the Advocate General discusses whether in that case there was an objective justification for the discrimination. He stated at [16] that he was strongly swayed by the argument for the employer that the object and effect of the relevant conduct was to produce equality by removing an earlier inequality and so that such conduct was justified. He referred at [17] to the conduct of the employer being to eliminate inequality.
210. The central part of the reasoning of the court in Roberts appears to be in [20]-[23] of its judgment which is in these terms:

“[20] Accordingly, although until the age of 60 the financial position of a woman taking early retirement on grounds of ill health is comparable to that of a man in the same situation, neither of them as yet entitled to payment of the State pension, that is no longer the case between the ages of 60 and 65 since that is when women, unlike men, start drawing that pension. That difference as regards the objective premise, which necessarily entails that the amount of the bridging pension is not the same for men and women, cannot be considered discriminatory.

[21] What is more, given the purpose of the bridging pension, to maintain the amount for women at the same level as that which obtained before they received the State pension would give rise to unequal treatment to the detriment of men who do not receive the State pension until the age of 65.

[22] Furthermore, it is common ground that as from the age of 65 the bridging pension for men is also reduced by the amount of the State pension to which they are entitled. ...

[23] It must therefore be held that the mechanism for calculating the bridging pension is neutral, which confirms the absence of any discrimination.”

211. The Banks point to the statement in [20] of the Court’s judgment which might suggest that the men and women were not in a comparable situation because of the “objective premise” that they received different amounts of state pension. The RBs and the Crown point to the reasoning in [21] of the court’s judgment which points out that the alternative of paying men and women different amounts of bridging pension was to pay them the same amount of bridging pension but such treatment would give rise to unequal treatment and would not therefore produce equality. Further, the court held that there was no discrimination by considering the overall effect of what was done which was said to be “neutral” between men and women.
212. Roberts was considered by Neuberger J in Trustees of Uppingham School Retirement Benefits Scheme for Non-Teaching Staff v Shillcock [2002] Pens LR 229. In that case, there was a connection between the occupational scheme and the state scheme in the sense that employees did not qualify for membership of the occupational scheme unless they earned an annual salary in excess of the lower earnings limit for Class I National Insurance contributions. Neuberger J held that there was no relevant difference in treatment of men and women. However, he went on consider whether any relevant difference in treatment was objectively justified. In that context he discussed the topic of the interrelationship between the occupational pension scheme and the state scheme. In that regard he said at [54]:

“54 In relation to the interrelationship of Article 141 and the integration of occupational pension schemes with the State pension scheme, I should mention two decisions of the ECJ. In Case C-132/92, Roberts v. Birds Eye Walls Ltd [1994] ICR 338, it was held that certain higher, “bridging”, pension payments to

men were justifiable as their aim and effect, in general terms, was to equalise pensions between men and women for a period, once the State pension was taken into account. To my mind, this clearly establishes that integration with the State scheme can provide objective justification for even a discriminatory policy, but that does not, of course, mean it always will do so. By contrast, in Beune, the ECJ held that Article 141 was infringed, where different treatment between men and women under an occupational pension scheme was sought to be justified by reference to their respective differential treatment under the State scheme. Although, at first sight, these two decisions may appear hard to reconcile, I believe that they are consistent. The facts of Beune are complicated, but the infringement arose, in essence, because there was no equal treatment between married men and married women, whether one looked at their respective occupational pension rights alone, or at the combination of their respective occupational pension rights and their rights under the State scheme. In other words, unlike in Birds Eye, the discrimination policy in Beune was unlawful, because the occupational pension rights did not achieve, and did not seek to achieve, equality between married men and married women, either taking those rights on their own or taking them together with their State pension rights.”

213. The Banks also heavily relied on Hlozek v Roche Austria GmbH (-19/02) [2005] 1 CMLR 28. Hlozek concerned a payment that was made to redundant employees, called a bridging allowance. This was paid to employees who were 10 years (or less than 10 years) away from their state pension ages. As the state pension age in Austria for men and women, respectively, was 65 and 60, this meant that women received the bridging allowance from the age of 50 and men from the age of 55. Mr Hlozek was aged 54 when he was made redundant and he made an equal pay claim on the basis that if he had been a woman of the same age he would have received the bridging allowance. It was held that the bridging allowance was “pay” for the purposes of Article 141 (now Article 157).
214. Both Advocate General Kokott and the court considered the earlier decision in Roberts. However, they differed as to how Roberts applied to the particular circumstances in Hlozek. At [85], the Advocate General said that the arrangements in Roberts were intended to produce a result which was equal overall whereas in Hlozek the arrangements which had been challenged did not have that effect. She held that the arrangements infringed Article 141.
215. The court disagreed with the conclusion of the Advocate General. It referred to Roberts in footnote 76 to [44] where it regarded Roberts as an authority for the proposition that the principle of non-discrimination presupposed that men and women were in identical or comparable situations. At [45], the court referred to submissions made to it to the effect that it was not the purpose or the effect of the different rules to produce discrimination. That submission was accepted by the court at [48] and at [49] it was said that the arrangements which had been challenged were a “neutral mechanism”.

216. The decisions in Roberts and Hlozek need to be read in the light of the later decision in Case Pensionsversicherungsanstalt v Kleist (C-356/09) (judgment of Second Chamber, 18 November 2010). Kleist concerned discriminatory protection from dismissal which reflected the statutory difference in pension ages, i.e. female workers could be dismissed at 60, but male workers not until 65. In Kleist, the Advocate General said at [38]-[42]:

“38. The referring court and the Pensionsversicherungsanstalt emphasise that, having regard to this employment policy objective, the situation of female employees like Dr Kleist who have reached the age of 60 is not comparable to that of male colleagues who are the same age as, unlike male employees, the female employees have already reached the statutory normal pensionable age and they therefore benefit from social security cover resulting from their right to a pension in the event of losing their job.

39. At first glance, it could be tempting to follow this line of argument and to conclude that, merely because a right to a pension exists, there is a decisive material difference which excludes any comparability between male and female employees.

40. It is even possible to find case-law in which the Court appears to take such a position. Thus, in Burton, Birds Eye Walls and Hlozek the Court held it lawful to link certain social benefits granted by employers to a pensionable age that differs for men and women.

41. However, it appears to me that these judgments dealt with isolated cases and cannot in any event be applied more generally. Thus, the bridging payments in Burton and Birds Eye Walls served to cover employees' loss of income where they took early retirement for operational or health reasons. In Hlozek the bridging allowance was specifically aimed at financially cushioning a special risk of long-term unemployment, a risk which was statistically proven to arise for men and women at different ages and was particularly high as the statutory retirement age drew closer. In the present case however, so far as is apparent from the documents in the case, there are no indications of there being such a specific risk.

42. Quite apart from the specific features of each case, I consider that it would also be an error for reasons of principle to permit employers to differentiate between male and female employees according to the statutory normal pensionable age that is respectively applicable. Such an approach would lead to the differences between men and women in relation to the statutory normal pensionable age that still exist extending to other areas – here to the area of dismissal. Generalising the differences within the framework of statutory social security systems would,

however, be contrary to the Court's settled case-law, according to which the exception that still exists to the principle of equal treatment in relation to the pensionable age under statutory pension schemes (Article 7(1)(a) of Directive 79/7) is to be interpreted strictly."

217. In its judgment in Kleist, the court said at [35]-[39]:

"35. In the case in the main proceedings, the rules establishing the difference in treatment at issue are designed to govern the circumstances in which employees can lose their job.

36 In the context of that case, contrary to the position in the cases which gave rise to the judgments in Case C-132/92 Roberts [1993] ECR I-5579 (paragraph 20) and in Hlozek (paragraph 48), the advantage accorded to female workers of being able to claim a retirement pension from an age five years younger than that set for male workers is not directly connected with the object of the rules establishing a difference in treatment.

37 That advantage cannot place female workers in a specific situation vis-à-vis male workers, as men and women are in identical situations so far as concerns the conditions governing termination of employment (see, to this effect, Case 151/84 Roberts [1986] ECR 703, paragraph 36).

38 Furthermore, as is apparent from the order for reference, the circumstance referred to in paragraph 33 of the present judgment results from the fact that the Republic of Austria wished to establish, in accordance with the exception laid down in Article 7(1)(a) of Directive 79/7 to the principle of equal treatment, a regime prescribing a different statutory pensionable age for men and women in order to compensate for the disadvantage suffered by women socially, in relation to the family and economically.

39 The Court has repeatedly held that, given the fundamental importance of the principle of equal treatment, the exception to the prohibition of discrimination on grounds of sex, provided for in that provision, must be interpreted strictly, so as to be applicable only to the determination of pensionable age for the purposes of granting old-age and retirement pensions and to the possible consequences thereof for other social security benefits (see, to this effect, Marshall, paragraph 36; Case C-207/04 Vergani [2005] ECR I-7453, paragraph 33; and Case C-423/04 Richards [2006] ECR I-3585, paragraph 36)."

*Issues 1 and 2: submissions for the Banks*

218. Mr Cavanagh QC submitted that there is no duty to equalise for the effect of GMPs. He accepted that his argument was a complex one which it was not easy to summarise but he put forward the following steps to the conclusion for which he contended:

- (1) The key question is whether the treatment at issue comes within the scope of Art 157. Art 157 has direct effect in UK law.
- (2) In general, there is no doubt that pensions are 'pay' for the purposes of Art 157, and this is so whether or not they are a substitute, in whole or in part, for the state pension scheme. The mere fact that a pension is a substitute for the state pension scheme does not mean that it falls outside the scope of Art 157.
- (3) On the other hand, pensions that are part of the state social security scheme are not 'pay' and are not within the scope of Art 157.
- (4) The question in the present case concerns which side of the line the treatment at issue falls upon.
- (5) Although GMPs are not identical in every respect to SERPS or the AP, their function is undoubtedly to fulfil the role of the earnings-related element of the state pension. They are an alternative way of delivering the earnings-related part of the state pension to a large part of the working population, for the mutual benefit of the state, employers and scheme members. They are part of the state social security pensions framework, and are integrated into the state scheme.
- (6) The difference in treatment between men and women in relation to SERPS and the AP is not in breach of Art 157, in particular, or EU law in general.
- (7) It would, therefore, be illogical for EU law to permit different treatment between the sexes in relation to SERPS and the AP, but not to permit different treatment which results from the legislative provisions relating to the equivalent to SERPS that is delivered via private occupational pension schemes.
- (8) EU law does not require such an illogical conclusion.
- (9) In considering whether the treatment at issue is within or outside the scope of Art 157, it is necessary to focus upon the factor which gives rise to the disparity at issue.
- (10) In the present case, that factor is the direct result of legislation and is a function of the integration with the state pension scheme. The difference in treatment exists because GMPs fulfil the role of the earnings-related part of the state pension.
- (11) That is what sets this case apart from an ordinary occupational pensions scheme case: the aspects of GMPs which lead to differential treatment between men and women are the direct results of legislation which provides for the integration of GMPs as part of the state social security pension framework.



- (12) Whilst the case law of the ECJ/Court of Justice of the European Union has not dealt directly with the circumstances under consideration, the case law suggests that the treatment at issue in the present case is outside the scope of Art 157.
  - (13) If, as in cases such as Barber and Beune, the treatment at issue in the present case had nothing to do with the fact that GMPs are providing part of the state pension entitlements, then the treatment would come within Art 157, and would be unlawful. However, this case is different because the rules under challenge are the result of state legislative choices in relation to the state pension framework.
  - (14) It follows that the treatment at issue is not within the scope of Art 157.
  - (15) It follows in turn that either GMPs are not ‘pay’ for these purposes, or the difference in the position of men and women arising from the GMP legislation means that the difference in treatment is not unlawful for the purposes of Art 157 (either because the position of men and women is not comparable or because there is a ‘material factor’ defence).
  - (16) If the above reasoning is correct, so that the treatment at issue does not fall within Art 157, then the treatment will also be outside the scope of domestic equality legislation (the PA 1995 and, now, the EA 2010) as the domestic legislation is intended to implement Art 157 into domestic law. The domestic legislation covers the same ground, no more and no less.
  - (17) Again, if the above reasoning is correct, the treatment at issue is not in breach of the occupational pension provisions of the Equal Treatment Directive, as the relevant provisions of the Directive are designed simply to replicate the legal protection given by Art 157, once again, no more and no less.
219. Mr Cavanagh sought to analyse the many decisions of the ECJ dealing with the question of “pay” for the purposes of Article 157. In addition to Barber and the cases which came after it, he referred to two cases which were decided before Barber. The first of these was Liefting v. Academisch Ziekenhuis Bij de Universiteit Van Amsterdam (Case C-23/83) [1984] 3 CMLR 702. The facts in Liefting are somewhat complex. In summary, the facts were that public sector employer in the Netherlands paid the employees’ contributions for the purposes of the state pension scheme to the state on behalf of its employees. One of the issues in that case was whether such a payment by an employer amounted to pay for the purposes of Article 119. Both the Advocate General Sir Gordon Slynn and the Court answered that question in the affirmative. Although the court said that that would not normally be the legal position, the court explained that it reached that result in that case because the sums in question were included in the calculation of the employee’s gross salary and the amount of the gross salary directly determined the calculation of other salary related benefits: see the judgment of the court at [12]-[13]. It is difficult to see how anything in that decision is of assistance to Mr Cavanagh’s argument. However, he sought to analyse the case so that it supported one of his arguments which was that a payment by the employer could be pay for some purposes and not for other purposes. He said that a particular payment could have a chameleon character so that it changed its character depending on the purpose behind the question as to whether it constituted pay. This is a novel argument and it derives no support from

the decision in Leifting (or any other authority, for that matter). In that case, as in all of the other cases, the question is whether the particular payment in the particular circumstances has the character of pay. That question is given a single answer. In any particular case, the payment is either pay or it is not.

220. It is helpful to refer to what was said in Lieifting by Sir Gordon Slynn at page 707. He stated follows:

“The fact that a scheme is statutory is not, in my view, the conclusive test. Legislation may be used for different purposes. If it defines rights and obligations under a social security scheme for all workers, or for groups of workers who are not in any sense 'employed by' the State, it is no doubt based on 'considerations of social policy' rather than on an employment relationship. On the other hand, if by the same machinery, legislation, rules are adopted in respect of those 'employed by' the State, those rules may be an expression of social policy, or they may equally spring from and govern the employment relationship. It is true that the latter may indeed at the same time reflect a State's ideas of social policy, but that factor cannot in my view take away their essential characteristic as rules governing the employment relationship. If it were otherwise, civil servants could not rely upon the principle of equal pay for equal work contained in Article 119, and there seems to be nothing in that Article 119 or in the case law of the Court to justify such a result. The relevant question is thus whether what is done is done by the State essentially as an employer.”

221. The second case which was decided before Barber on which Mr Cavanagh specifically relied was (C-192/85) Newstead v Department of Transport and HM Treasury [1988] 1 CMLR 219. That was a case in which the differential treatment between men and women could be traced back to the statutory rules relating to contracting-out. The case was referred by the Fifth Chamber for a decision of the Full Court and there were two opinions from Advocate General Darmon. The ECJ held that the complaint fell outside the scope of Art 119.
222. Newstead was a sex discrimination claim by a man who was a member of the Principal Civil Service Pension Scheme. The scheme deducted 1.5% of salary from all male civil servants' salaries as a contribution towards a widow's pension fund but no such deduction was made from female civil servants' salaries. These contributions meant that men were left with lower net pay than women. In his first opinion, Advocate General Darmon stated that the reason why men had to contribute towards a widow's pension, but women did not have to contribute towards a widower's pension, was because this was required by the legislative framework in order for the scheme to be contracted-out: see section 36 of the SSPA 1975.
223. In his Second Opinion, Advocate General Darmon stressed that the question whether a case came within Art 119 depended on the 'legal basis on which the difference [between

the sexes] was made'. In other words, it is necessary to have regard to the factor which gives rise to the disparity at issue. He said at [7]:

“Admittedly, as regards pay Mr. Newstead was treated differently from his female colleagues and he was understandably offended by the fact. But neither Worringham nor Liefting supports the inference that any treatment which differs according to sex and affects gross or net pay automatically justifies the direct application of Article 119, without any regard for the legal basis on which the difference was made. I consider that such an interpretation exceeds the scope of the judgments delivered in those cases. It would, moreover, conflict with the division of powers imposed by the EEC Treaty and clearly enunciated in Defrenne III.”

224. The court held that this claim was outside the scope of Article 119. In its judgment, at [3], the court stated that the scheme was “a substitute for the earnings-related part of the State pension system”.

225. At [13]-[15] of its judgment, the court said:

“13. As the United Kingdom and the Commission rightly pointed out, however, the difference between the net pay of men and women in the case before the Employment Appeal Tribunal is the result of the fact that only men are required to belong to the widows' pension fund and thus have a deduction made from their salary as a contribution to the fund.

14. It must therefore be concluded that the factor which gives rise to the disparity at issue is neither a benefit paid to workers nor a contribution paid by the employer to a pension scheme on behalf of the employee, which might be regarded as “consideration ... which the worker receives, directly or indirectly” as referred to in Article 119.

15. The disparity at issue is in fact the result of the deduction of a contribution to an occupational pension scheme. That scheme contains some provisions which are more favourable than the statutory scheme of general application and is a substitute for the latter. Such a contribution must therefore, like a contribution to a statutory social security scheme, be considered to fall within the scope of Article 118 of the Treaty, not of Article 119.”

226. The court distinguished the earlier decision in Liefting on the ground that in that case (but not in Newstead) the amount of the gross pay determined the calculation of other salary related benefits and was therefore a component of the employee's pay.

227. In relation to Issues 2(b) and 2(c), Mr Cavanagh relied on Roberts and Hlozek. He suggested that the present case was a fortiori Roberts, in two respects. First, GMPs were not ‘pay’ for the purposes of Art 157, in the context of complaints such as the present. Second, the connection between the treatment of men and women and the state social security pension scheme in the present case was very much closer to, and of a different quality than, the connection between the treatment complained of in Roberts and the state pension scheme. In Roberts, the occupational pension scheme had chosen to take account of state pensions when calculating the occupational pension. There were no legislative rules that required this to happen. In the present case, the treatment at issue relates to rules imposed by legislation which are a by-product of the integration of GMPs with the state earnings-related pension.
228. It was then submitted that, by parity of reasoning with Roberts, a comparison between a member of the present schemes and his/her opposite sex comparator is not a comparison of like with like, in respect of the differences resulting from GMPs. The ‘objective premise’ is different, as the financial position of a woman is not comparable to that of a man in the same situation, and so there is no less favourable treatment to engage Article 157. Further or alternatively, again by parity of reasoning with Roberts, the treatment is objectively justified.
229. At the end of his argument, Mr Cavanagh helpfully summarised his submissions as to why the inequality in the benefits under the Schemes did not bring the case within Article 157 nor involve a breach of European or domestic law, as follows:
- (1) GMPs are ‘a retirement pension established within the framework of a social security scheme laid down by legislation’ (Defrenne (No 1));
  - (2) GMPs are part of ‘the financing of statutory social security systems’ (Liefting);
  - (3) GMPs are part of the state pension framework. They are integrated into the state scheme. They are a method of delivering the earnings-related part of the state pension to a large part of the working population which is mutually beneficial to the state, employers and scheme members;
  - (4) The factors which give rise to the disparity at issue are laid down in legislation and are a direct consequence of the integration of GMPs with the state pension scheme. The difference in treatment exists because GMPs fulfil the role of the earnings-related part of the state pension scheme;
  - (5) The rules relating to GMPs, and, in particular, to the rates of increase in deferment and payment which give rise to the difference in treatment between the sexes, are set down by Government in statutory instruments. They are not the result of agreement between employers and employees or their representatives;
  - (6) The rates of increase that the present schemes are required to apply to GMPs are not determined by the employment relationship between the Banks and the members, but by considerations of social policy; the change in 2011, pursuant to which escalation for GMPs has been determined by reference to CPI rather than RPI (subject to a cap at 3%) is a good example of this; this change was made, as

a matter of Government policy, by means of GMP Increase Orders, made pursuant to s 109 PSA 93:-

- (7) The minor differences between GMPs, on the one hand, and SERPS/ASPs, on the other, are immaterial. They should not be allowed to conceal the central truth that GMPs were the legislature's chosen mode of delivery for the earnings-related part of the state pension:-
  - (8) There are two parallel legal routes to this outcome as described in the next two sub-paragraphs:-
  - (9) The first route to the outcome: GMPs are not 'pay' for the purposes of Art 157, when the difference in treatment at issue arises from the legislative rules relating to GMPs and the contracted-out nature of the pension scheme (notwithstanding that, in relation to other types of claim, the whole of a contracted-out occupational pension is 'pay'): this is the approach suggested by cases such as Defrenne (No 1) and Liefting, and is reflected in Issue 2(a);
  - (10) The second route to the outcome: there is no breach of Art 157 because there is an objective difference between the position of males and females arising from the GMP legislation, so that (a) they are not in a comparable position and so a difference in treatment cannot be discriminatory; and/or (b) the difference in treatment is objectively justified: this is the approach suggested by Roberts v Birds Eye Walls and Hlozek, and is reflected in Issues 2(b) and 2(c), respectively;
  - (11) The line of authority represented by Defrenne (No 1), on the one hand, and Roberts, on the other, are not in conflict with each other. Rather, they complement each other and serve to reinforce the conclusion that it is clear that the treatment under consideration in these proceedings is outside the scope of Art 157;
  - (12) The arguments advanced on behalf of the Banks in relation to liability are limited in their scope. The Banks do not submit that benefits under contracted-out pension schemes are not 'pay' for most purposes. It is clear that they are. But not for the purposes of the treatment under consideration in these proceedings.
230. Mr Cavanagh further submitted that whatever answer was arrived at in relation to the scope of Article 157, the same answer was appropriate as to the scope of the ETR under the PA 1995 and the SER under the EA 2010. He submitted that because the relevant domestic statutory provisions were introduced to give effect to Article 157 and its predecessors, the domestic provisions should be construed so as to have the same scope as Article 157. He cited authorities as to the Marleasing principle, that is, the duty of the court to construe domestic legislation, which had been enacted to give effect to the United Kingdom's obligations under European law, in a way which conformed to those obligations, so far as it was possible to do so: see for example Alemo-Herron v Parkwood Leisure Ltd [2011] ICR 920 (SC) at [20]. However, he accepted that it was open to a Member State to enact a provision which was wider in its application than the European provision if it wished to do so and it clearly provided for that result; see, for

example, what was said by Lord Mackay of Clashfern LC in Hayward v Cammell Laird Shipbuilders Ltd (No 2) [1988] AC 894 at 903B.

231. Finally, as to Issues 2(b) and 2(c), the different circumstances of men and women which were relevant for Issue 2(b) were a “material factor” for the purposes of Issue 2(c).

*Issues 1 and 2: submission for the RBs*

232. Mr Short QC summarised his reliance on the various decisions of the ECJ, as follows:

- (1) Barber and the subsequent cases expressly state that benefits paid under contracted-out occupational pension schemes are pay for the purposes of Article 157 (see for example Barber);
- (2) even if the level of benefits is determined by statute (see Pirkko Niemi) or the benefits are a substitute for state benefits, this will not preclude the application of Article 157 (see Defrenne II, Barber, Ten Oever, Beune);
- (3) the only possible decisive criterion as to whether a sum is pay within the meaning of Article 157 is whether the sum is paid by reason of the employment relationship. That criterion will be satisfied “if the pension scheme concerns a particular category of workers and its benefits are directly related to the period of service and calculated by reference to the worker’s final salary” (see Barber, Beune and Pirkko Niemi and the recast Directive);

233. As to the nature of GMP, Mr Short submitted:

- (1) GMP is simply a minimum level of benefit that must be paid in return for the Banks and the members paying reduced National Insurance contributions;
- (2) GMP is not a separate pension;
- (3) GMP, as a minimum level of benefit, is not a state benefit nor is it to be treated as a state benefit;
- (4) the differences in benefits paid from the Schemes to men and women with identical work histories do not arise automatically or necessarily from the differences in their GMPs. The differences arise because the Scheme rules adopted by the Trustee and the Banks treat GMP differently to non GMP;
- (5) in any event it is, of course, the inequality in total benefits paid that is in issue in these proceedings. That disparity is not an automatic or inevitable consequence of the differentials between male and female GMP. The disparity occurs primarily because the Schemes provide different rates of revaluation and/or indexation for GMP and non GMP, as appears from the table in Appendix A to this judgment;
- (6) where the “better” rate was not required by statute, it was the Banks’ (and Trustee’s) choice to provide that better rate. Even where the better rate was required by statute (as with the impact of anti-franking), the Banks have always

been entitled to make up any shortfall in total benefits. They were not forbidden from doing so by statute.

234. Mr Short relied on two domestic cases which commented on the nature of GMPs. The first of these cases was Marsh & McLennan Companies UK Ltd v Pensions Ombudsman [2001] IRLR 505, where Rimer J said at [83]:

“I agree with [counsel] that the better analysis of GMPs is that they are in the nature of calculation factors rather than pensions themselves or discrete elements of the scheme pension. The scheme pension is one indivisible pension. No doubt an element of it can be regarded as satisfying the minimum benchmark represented by the GMP, but I regard it as incorrect to regard the scheme pension as comprising two elements made up of a GMP and the excess above it.”

235. The second of these cases was Houldsworth v Bridge Trustees [2010] ICR 921 where the court was dealing with a money purchase benefit called “MoneyMatch” which had a defined benefit underpin benefit, namely the members’ GMP. Mummery LJ said at [157]:

“GMPs are notionally satisfied from a money purchase pot. They are not in themselves pension or discrete parts of it. They are a notional pension corresponding to what would be paid under the SERPS. The function of GMP is to identify the minimum below which the pension calculated “by reference to” contribution payments by or in respect of members may not fall: see Marsh & McLennan Cos UK Ltd v Pensions Ombudsman [2001] Pen LR 51 ... .”

236. The RBs also submitted that quite apart from the meaning of “pay” for the purposes of Article 157, equalisation of benefits was required by the express terms of section 67 EA 2010. It was perfectly possible to construe that section so that it had a wider scope in the present context than the scope of Article 157. On the face of it, the ordinary meaning of section 67 applied in this case to require equalisation of benefits.

237. As to Mr Cavanagh’s reliance on Roberts and Hlozek for the purposes of Issue 2(b), Mr Short submitted that these cases were to be distinguished. He said:

- (1) the treatment in those cases was intended to, and did, remedy an inequality or particular disadvantage that would otherwise be experienced by one sex and not the other; and the men and women were not otherwise in comparable circumstances.
- (2) in Roberts, women (but not men) could benefit from a state pension from age 60 to 64;
- (3) in Hlozek, women (but not men) were at particular risk of unemployment from age 50 – 54;

- (4) in contrast, the treatment in the present case is not intended to and does not remedy any inequality; rather, it introduces, exacerbates and/or perpetuates inequality in the total benefits paid under the Schemes by increasing GMP and excess at different rates and applying different revaluation arrangements to men and women; as a result, the benefits paid to men and women in respect of work carried out from 17 May 1990 are different;
- (5) in no sense are the arrangements in the present case a “neutral mechanism”, as the ECJ put it in Hlozek at [49], referring to Roberts at [23];
- (6) the mere fact that the GMP legislation treats men differently to women (so that the difference is a proxy for the difference in sex) does not, in itself, mean that they are not in comparable situations for the purposes of Article 157. See for example Beune, Pirkko Niemi and even Barber itself: it is inconceivable that the unequal benefits caused by the differing retirement ages in Barber would have been lawful if the Scheme had provided that Normal Retirement Date was “two-years before State Pension Age” rather than 63 for men and 58 for women;
- (7) it was clear in Roberts and Hlozek why men and woman of the same age were in materially different positions; that is not so in the present case; if a man and woman with identical work histories each retire at 60, they are entitled to expect to receive the same amount of deferred pay from their employer in respect of their employment; the fact that their employer agreed to provide pensions of at least a set minimum level in return for reductions in National Insurance contributions does not explain why their total pensions should be different.

238. Mr Short submitted that the arguments as to whether the differences between men and women in relation to GMP was a material factor (for the purposes of Issue 2(c)) were essentially the same as the arguments as to whether the circumstances were different (for the purposes of Issue 2(b)).

*Issues 1 and 2: submissions for the Crown*

239. Ms Stout made submissions in support of the answers to Issues 1 and 2 which were put forward by the RBs. Much of the detail of her submissions covered the same material as was covered by Mr Short and I need not set out that material or those submissions again. However, Ms Stout made a number of further submissions which included the following:

- (1) Article 7(1)(a) of Directive 79/7/EEC is concerned with social security benefits not with pay (and pay includes a pension payable under an occupational pension scheme);
- (2) Article 7(1)(a) is to be interpreted strictly: see Vergani v Agenzia Delle Entrate Case C-207/04 [2006] 1 CMLR 5, see the judgment of the court at [33]; and also Pensionsversicherungsanstalt v Kleist Case C-365/09, judgment of the court at [39];
- (3) Article 7(2) requires a Member State to keep a matter within Article 7(1) under review; the United Kingdom has done so in relation to state pension age;



- (4) The Crown does not rely on Article 7(1)(a) in relation to the legislation as to GMPs as GMPs are not social security benefits;
- (5) the Banks are similarly not able to rely on Article 7(1)(a) to justify the unequal treatment as regards the benefits payable under the schemes;
- (6) the United Kingdom has enacted legislation which requires pensions to be equal: see the ETR under the PA 1995 and the SER under the EA 2010; it relies on this legislation and not on Article 7(1)(a) in relation to its legislation in relation to GMPs;
- (7) when considering whether a benefit has the character of “pay” for the purposes of Article 157, the person ultimately responsible for paying the benefit is crucial; Article 157 refers to the benefit coming from the employer; compare Vergani, the judgment of the court at [23]-[24];
- (8) in the present case, the employer is responsible for paying the benefits under the Schemes; the employer does not receive a subsidy from the state towards those benefits; the state does not pay GMPs to members of the Schemes;
- (9) the Bank’s argument in this case is a re-run of the failed argument in Barber; the Scheme in Barber was a contracted out scheme subject to the legislation as to GMPs; the court rejected the argument that the benefits under the Scheme amounted to social security benefits or were a substitute for a part of the state retirement pension;
- (10) in Newstead, the court considered that contracted out occupational pension schemes were social security schemes: see the judgment at [15], [18] and [21]; based on Newstead, the UK government argued in Barber that the occupational pension scheme in that case was a substitute for social security benefits and was not within Article 119; that argument was rejected; the reasoning in Newstead cannot survive the decision in Barber; it is also relevant to note that the court in Barber rejected the argument that a sum due as statutory minimum redundancy payment was outside the scope of “pay”;
- (11) as regards Issues 2(b) and 2(c), generally speaking men and women are in comparable situations as regards pension entitlement; a difference in sex is not a material difference for this purpose; the legislation as to GMPs does make a distinction between men and women but this distinction is not a new difference between men and women as it is just a proxy for the difference in sex: see James v Eastleigh BC [1990] AC 751; Essop v Home Office [2017] ICR 640 at [17] and the judgment of the court in Kleist at [31];
- (12) the decisions in Roberts and Hlozek create a narrow exception in the context of there being historic differences in state pension ages for men and women; the exception provides that it is permissible to treat men and women unequally with a view to them ending up with equal benefits overall; the differences between men and women are not relevant where there is no intention to equalise their position overall;

- (13) this narrow reading of Roberts and Hlozek is explained in Kleist; see the opinion of Advocate General Kokott at [38]-[43] and the judgment of the court at [35]-[39];
- (14) if necessary, depending on what was decided as to the meaning of “pay” in Article 157, the SER in section 67 of the EA 2010, dealing with occupational pension schemes, could be wider in its operation than Article 157.

*Issues 1 and 2: discussion and conclusions*

- 240. Out of deference to the industry of Mr Cavanagh, I have set out his submissions at some length. Another reason for recording those submissions in detail in this judgment is so that others in the pensions industry can be fully informed as to how it was argued that there was no obligation to equalise benefits in this case. Although Mr Cavanagh’s submissions were presented with great ability, I am not persuaded by them. Indeed, I find the combined submissions of Mr Short and Ms Stout to be cogent and entirely supported by a substantial body of authority and I accept their conclusions. Having set out the submissions made by Mr Short and Ms Stout in detail, I can now express my own reasoning more shortly.
- 241. It is appropriate to answer the specific questions raised by Issues 2 (a), (b) and (c) before answering the general question raised by Issue 1. I will therefore start with Issue 2(a) which asks whether GMPs are not “pay” within Article 157 on the ground that they are a substitute for the additional state pension under SERPS.
- 242. There is now a considerable amount of guidance from the Court of Justice as to the meaning of “pay” for the purposes of Article 157. For present purposes, that guidance can be found in the decision in Barber itself and then in the many cases which have followed it. For present purposes, the decisions in Barber and in the later cases, in particular Beune, are consistent and clear and can be applied in this case.
- 243. For the reasons given by Mr Short and Ms Stout, which I have set out above, the totality of the benefits paid to members under these occupational pension schemes have the character of pay for the purposes of Article 157. At one time, I thought that the argument on behalf of the Banks would be that GMPs were one element within the totality of the benefits payable under the Schemes and that the GMP element was not pay although the remainder of the benefits were pay. However, Mr Cavanagh did not put forward that argument. If he had put it forward I would not have accepted it but I would instead have taken the same approach as did Rimer J in Marsh & McLennan Companies UK Ltd v Pensions Ombudsman [2001] IR LR 505 at [83] where he explained that GMPs are in the nature of calculation factors rather than pensions themselves or discrete elements of a pension.
- 244. Mr Cavanagh accepted that for most purposes (indeed perhaps for all purposes except for the purpose of Issues 1 and 2) the totality of the benefits under the Schemes were pay. For that reason, I do not feel that it is necessary for me to work my way through the criteria laid down in Barber and Beune and apply them to the facts of this case. That exercise has been carried out by Mr Short and Ms Stout as described above and I agree with their submissions on that point. However, I do wish to address the specific

submissions made by Mr Cavanagh in an attempt to avoid that conclusion in the present context.

245. Mr Cavanagh developed an argument that benefits could have a chameleon character so that they were pay for some purposes and not for others and he then submitted that, in the present context, the benefits were not pay. The argument seemed to be that the degree of integration with SERPS, a statutory scheme providing social security benefits, meant that the benefits should be regarded as a substitute for social security benefits and should therefore be regarded as social security benefits within Article 156 rather than Article 157 and, further, the subject of Article 7(1)(a) of Directive 79/7/EEC.
246. I am not persuaded that the concept of pay for the purposes of Article 157 allows one to adopt an approach which treats the same benefits as being pay for some purposes and not pay for other purposes. Such an approach has not been identified in any earlier case. Although Mr Cavanagh developed his submission by reference to Lieifting, there is nothing in that decision to support his entirely novel submission. All of the cases, including Lieifting, approached the question by applying the established principles as to the character of pay and asking whether, on the particular facts of the particular case, the benefit in question was pay. The fact that the decision in one case was different from the decision in another case was because the court held that the facts of the cases were different not because any particular case involved a conclusion that the benefit was pay for some purposes and not for other purposes.
247. In any case, I do not see anything about the context of this case which would allow me to hold that benefits which would normally be regarded as pay should exceptionally not be regarded as pay. The context of this case is identical to the context in Barber and the many cases which followed it in holding that benefits under occupational pension schemes amounted to pay.
248. Mr Cavanagh relied on Newstead in support of his conclusion that because the benefits under the schemes were a substitute for the additional state pension under SERPS they did not amount to pay but they amounted to some form of social security benefit. There certainly are statements in Newstead which Mr Cavanagh can point to which suggest that approach. But Newstead was decided before Barber and it is clear from the detailed reasoning in Barber, fortified by the many cases which have repeated that reasoning, that the fact that the benefits under the schemes, or part of those benefits, can be regarded as a substitute for benefits under a state retirement pension scheme is simply not a reason for holding that the benefits are not pay.
249. Mr Cavanagh suggested that Newstead had never been overruled and was still good law. He pointed out that the Advocate General in Barber had distinguished Newstead and did not say that it was wrong and that the court in Barber made no reference to it. However, I note that Advocate General Van Gerven in his opinion in Ten Oever said at [48]:

“ ... I consider it to be of decisive importance that in *Barber v. Guardian Royal Exchange Assurance (Case C-262/88)* [1990] I.C.R. 616 the court expressly went back on the view it had taken in *Newstead* that the supplementary pension concerned did not fall under article 119 but under article 118: in *Barber*, at pp. 670,

673, para. 30 and point 2 of the operative part, the court ruled that “a pension paid under a contracted-out private occupational scheme falls within the scope of article 119 of the Treaty.” ”

250. I consider that I should apply the case law as to the meaning of pay in Article 157 from Barber onwards. In that way, I derive no assistance from Newstead for the purpose of deciding this case.
251. In so far as Mr Cavanagh stressed the statutory origin of the provisions as to GMPs, that point does not help him. As explained by Advocate General Slynn in Liefting, the fact that a particular provision originates in a statutory provision is not a conclusive matter. Indeed, in the light of the many cases which came after Liefting where there was a close connection between the benefit paid and statutory provisions, it can now be seen that the fact that the benefit had a statutory origin is not of any great weight. Instead of focussing on the link between the benefit and some statutory provision, one should instead apply the criteria now clearly stated in Barber and Beune for the purpose of determining whether the benefit is pay.
252. Mr Cavanagh did not go so far as to say that the inequality in the benefits paid under the scheme was justified because the schemes were obliged by statute to pay unequal benefits. If he had so submitted, I would not have agreed with him. The Schemes are obliged to conform to the legislation relating to GMPs. GMPs are minimum levels for benefits. There is no obligation which requires Schemes to pay unequal GMPs so as to prevent schemes paying equal benefits overall. Indeed, if the United Kingdom had obliged schemes to pay unequal benefits (which it has not), even that would not be a justification for providing unequal benefits which distinguished between the position of men and women.
253. Accordingly, I hold that the relevant benefits payable under the Schemes amount to “pay” for the purposes of Article 157.
254. This conclusion makes it unnecessary to consider whether paying unequal benefits in this case would separately be a breach of section 67 of EA 2010, even if I had held that the relevant benefits were not “pay” within Article 157. I have set out section 67 earlier in this judgment. The schemes in question are occupational pension schemes within that section. The terms of the Scheme which concern GMPs and/or which result in unequal benefits being payable are terms which are less favourable to one sex or the other. Section 67 does not use the word “pay” so that term does not have to be construed in the context of section 67. Accordingly, on the literal wording of section 67 it can be strongly argued that the payment of unequal benefits under the Schemes is unlawful under that section, whatever the position is in relation to Article 157. Although section 67 implements Article 157 and so must be construed, if possible, to give effect to Article 157 there is no reason why section 67 cannot be construed to be more extensive in its scope than the scope of Article 157. However, in view of my conclusion that the relevant benefits are pay within Article 157, I will not enter into any further discussion as to the scope of section 67 and that question is better considered in a case where it needs to be decided.

255. Accordingly, I will answer Issue 2(a) by holding that it is not open to the Trustee to say that it is lawful to pay the unequal benefits in this case on the ground that the relevant benefits are not “pay” within Article 157.
256. I will now consider Issues 2(b) and 2(c) which I can take together. Issue 2(b) refers to a possible objective difference between the position of males and females arising from the GMP legislation and Issue 2(c) refers to the defence of material factor under section 69 EA 2010. Section 69(6) states that a factor is not material unless it is a material difference between A’s case and B’s case. Accordingly, both issues involve an investigation into whether there is a material objective difference which is the reason for, and a justification for, the difference in treatment. Indeed, the parties relied on the same submissions in relation to both of these issues.
257. Different treatment on the ground of sex is prohibited discrimination. The difference in sex is not an objective difference which justifies different treatment. If there is some other suggested objective difference but the suggested difference is just another way of expressing the difference in sex, then the suggested objective difference cannot be relied upon as a justification for discrimination. In truth, in such a case, the substance of the matter is that there is prohibited discrimination on the ground of sex. The position was described by Baroness Hale of Richmond in Essop v Home Office [2017] ICR 640 at [17] in these terms:
- “James v Eastleigh Borough Council also shows that, even if the protected characteristic is not the overt criterion, there will still be direct discrimination if the criterion used (in that case retirement age) exactly corresponds with a protected characteristic (in that case sex) and is thus a proxy for it.”
258. It will be remembered that in James v Eastleigh BC [1990] 2 AC 751 the local authority offered free admission to a leisure centre to people who had reached state pension age. As women (at that time) reached state pension age at 60 and men at 65, the different treatment as to who received free admission was based on a criterion which involved direct discrimination on the ground of sex and the different treatment was therefore on the ground of sex.
259. In the present case, the benefits under the Schemes are not equal for men and women. The reason for that is that the Schemes give effect to the statutory provisions as to GMP. The provisions as to GMP are not equal for men and women so that they when they are given effect, without some correcting process of equalisation, the resulting benefits are unequal.
260. The RBs, supported by the Crown, submit that it cannot be said that the reason of the difference in treatment is a reason which is not the difference in sex. They say that the use of the legislation as to GMPs, without corrective equalisation of benefits, is the use of a criterion which is a proxy for the difference in sex. The criterion used exactly corresponds with the difference in sex. Accordingly, it is argued that the different treatment of men and women for the purpose of GMPs is not an objective difference between men and women other than sex but is in substance a difference in treatment on the ground of sex. I accept that submission which is also supported by the opinion of Advocate General Kokott in Kleist at [43].

261. This state of affairs gives rise to another question. If men and women are treated unequally under a lawful statutory scheme and then unequal benefits are paid to them under an occupational pension scheme which benefits are designed to produce, and have the effect of producing, an equal result overall, is the payment of unequal benefits under the occupational pension scheme lawful or unlawful? One can certainly see that, as a matter of policy, the taking of steps to correct pre-existing inequality and to produce overall equality should be regarded as welcome and not unlawful. This question potentially arises in the present case. In a case where the effect of the GMP legislation is to produce unequal treatment for men and women, if the schemes were then to make payments (which are themselves unequal as between men and women) in order to produce an overall equal result, would that attempt at equalisation be lawful or unlawful? To give an example, if in a particular year the effect of the GMP legislation and the rules of the scheme produce the result that a woman is £100 better off than a man and the scheme then pays £100 to the man to produce an overall equal result, could the woman complain that she is being treated unequally because she was not given £100 when the man was?
262. The problem identified in the last paragraph was the problem which arose in Roberts. The answer given by the ECJ in that case was that if the unequal treatment was for the purpose of producing, and had the effect of producing, an overall equal result then the unequal treatment was lawful. The reason given by the ECJ was that before the unequal treatment which was the subject of the complaint, there was a pre-existing inequality and that represented an objective difference in treatment which meant it was lawful to treat men and women unequally where the purpose and effect of the unequal treatment was to produce an overall equal result. It is difficult to think that the ECJ in Roberts would have used the same reasoning to hold that it was lawful to treat men and women unequally in a way which continued the pre-existing unequal treatment or which otherwise produced an unequal result. This understanding of the reasoning in Roberts is consistent with the explanation of that decision given in Shillcock at [54].
263. Although the facts in Hlozek were less straightforward than those in Roberts, the essential reasoning in both cases appears to be similar. In Kleist, the ECJ has taken a restrictive view of the decisions in Roberts and Hlozek.
264. The answer to Issue 2(b) therefore depends on whether it is appropriate to treat this case as:
- (1) one where there is unequal treatment of men and women by reason of the application of the GMP rules which are a proxy for the difference in sex; or
  - (2) one where the unequal treatment of men and women is justified because men and women are in objectively different circumstances because they are treated differently under the GMP rules.
265. I consider that the answer to the issue is the first of the two stated above. It is not possible to adopt the second answer save in a case like Roberts or Hlozek where the difference in treatment which is complained of has as its purpose and effect the equalisation of earlier unequal treatment. That cannot be said in the present case.

266. Accordingly, I will answer Issue 2(b) by holding that it is not open to the Trustee to say that it is lawful to pay the unequal benefits in this case on the ground that there is an objective difference between the position of males and females arising from the GMP legislation.
267. For the same reasons as applied in relation to Issue 2(b), I would similarly answer Issue 2(c) by holding that it is not open to the Trustee to say that it is lawful to pay the unequal benefits in this case on the ground that the defence of material factor under section 69 EA 2010 applied.
268. Having answered Issues 2(a), 2(b) and 2(c), it can now be seen that the answer to Issue 1 must be that, in the circumstances described in Issue 1, the Trustee is obliged to adjust the benefits payable under the Schemes in excess of the GMP in order that the total benefits received by male and female members with equivalent age, service and earnings histories are equal.

## **PART VI: ISSUES 5 TO 8**

### *Issues 5 to 8: the methods to be used for equalisation*

269. These issues relate to the method or methods which are legally permissible to be adopted for the purpose of equalising benefits under the Schemes so as to comply with the obligations imposed by Article 157 and section 67 of the EA 2010.
270. Before addressing the issues which have been raised as to the method of equalisation which is to be adopted, I need to describe the methods which have been identified by the parties. Between them, the parties have identified a number of different methods which I am asked to consider. These methods were referred to as methods A1, A2, A3, B, C1, C2, D1 and D2. The parties have helpfully agreed a detailed document which summarises and seeks to explain these methods and they have agreed on worked examples based on certain identified assumptions. Rather than attempt to summarise this document further, I have appended it as Appendix B to this judgment.
271. Before discussing the issues of principle to which these various methods give rise, I ought to make further comments on the various methods which I am asked to consider. In this particular case, I am considering these methods for the purpose of selecting a method of equalisation which can be used for the Schemes with which this case is concerned. However, my discussion of the issues arising and how the methods operate is not specific to these Schemes and the points which I will make would appear to apply to many other occupational pensions schemes where the legislative provisions as to GMP have resulted in unequal treatment of men and women and where there is an obligation to equalise benefits.
272. The various methods were considered from the viewpoint of the continuing operation of a pension scheme. I was not asked to consider equalisation methods that have been implemented in circumstances different from the present, such as in the case of the Pension Protection Fund (recognising that the circumstances within which the PPF operates differ from those relevant in the present case).

273. GMPs are statutory benefits and accordingly GMPs themselves cannot be amended or equalised. When GMP equalisation is referred to, this is a process whereby overall benefits are adjusted to remove the inequality caused by GMPs.
274. Two methods (Methods B and D) have formed the basis of consultation documents issued by the DWP on GMP equalisation, and one (method C) represents an approach which addresses some of the perceived drawbacks of method B. The four methods have been chosen because they represent a range of options between (a) identifying each inequality in isolation and giving members the better alternative and (b) offsetting all advantages and disadvantages in order to arrive at a net position.
275. The approach taken by the various methods can be summarised as follows:
- (1) method A: equalise each unequal aspect separately;
  - (2) method B: provide better of male or female comparator pensions each year;
  - (3) method C: provide better of male or female comparator pensions each year, subject to accumulated offsetting;
  - (4) method D: complete one-off actuarial equivalence.
276. For each method, a distinction needs to be drawn between the treatment of benefits that have yet to be put into payment and those where payments have already been made (such as for pensioners). In the case of the former, a course of action can be agreed and implemented to deal with GMP inequalities in advance of pension payments starting from a future date. In the case of the latter, inequalities in theory can be dealt with in a similar manner, although this is subject to practical considerations as to the treatment of past (unequal) payments. One area where different treatment may be required for past payments arises from the likely lack of sufficiently accurate data needed to analyse historical inequalities in a fully detailed manner.
277. The problem with the appropriate approach to past payments arises because the information required to administer a pension put into payment does not extend to the level of detail needed to identify how that pension would have been calculated at the outset and how it would have evolved had the member been of the opposite sex. However, administration records for pensioners will typically include GMP data, from which the GMP applicable to an analogous member of the opposite sex can be estimated. This enables an estimate to be made of the impact of pension increases being unequal due to the impact of GMPs, but no more than that. This is only part of the total picture for pensioners who retired from deferred status as it will ignore the impact of anti-franking. This omission could tilt the calculation either way, where a methodology offsets advantage and disadvantage depending on circumstances – i.e. a calculation based only on pension increase inequality could overstate or understate the actual total impact.
278. In principle, all of methods A, B and C are applicable to past payments, and each is impacted to a similar extent by data availability issues. The relative advantages and disadvantages of each method would apply similarly to past payments as to future payments.



279. The parties have agreed the document which I have attached as Appendix B to this judgment. Appendix B contains an agreed summary of the various methods and also contains worked examples of each method on the basis of certain assumptions. Appendix B ought to be self-explanatory. However, I will add some further comments on the methods.
280. Method A takes each aspect of the pension calculation separately and adjusts to remove any inequality on an aspect-by-aspect approach. I have already described how inequalities arise as a result of the legislative provisions as to GMP. There are three main matters which contribute to, or produce, inequality:
- (1) the level of pension required at the scheme's Normal Retirement Age ("NRA") (typically, an issue in the case of deferred pensioners who left service before NRA);
  - (2) the rate at which pensions increase once in payment;
  - (3) the requirement for a pension payable to a male to observe minimum requirements upon the male pensioner attaining age 65, and to recognise the GMP in pension increase awards from that age.
281. The differences in (1) and (2) could favour either sex. A typical outcome would be for (1) to favour females, and (2) to favour males. Aspect (3) can only favour males in terms of a step up, where this applies, but from that point will tend to reduce the typical gain made by a male through pension increases, because the recognition of a male's GMP from age 65 will tend to bring the treatment of pension increases closer to a female's than had been the case prior to that age.
282. Adopting method A would result in the following anticipated typical approach:
- (1) the pension at NRA for males retiring from deferred pensioner status would be increased to equate it to the pension payable to a corresponding female;
  - (2) from NRA onwards, the pension payable to both a male and a female would increase by the greater amount that would have been awarded on a male or female basis;
  - (3) at age 65, any increase that would have applied to the pension payable to a male would also be applied to the corresponding pension payable to a female;
  - (4) from age 65 onwards, the pension would increase by the greater amount that would have been awarded on a male or female basis.
283. Under this approach, two notional records (one assuming treatment as a male, one as a female) would be required to be maintained for each affected member, so that every year each of these treatments can be compared and the more generous applied to the member (requiring a third, actual record also to be maintained). This record keeping requirement would affect potentially all members with GMPs arising in the equalisation period of 17 May 1990 to 5 April 1997. This is because one cannot predict in advance how the comparisons will be affected by experience (e.g. inflation and pension

increases). Unless record keeping was very wide ranging, it is possible that members could be deemed out of scope, only for this to be proved incorrect at a later date.

284. Method B is based on year-by-year calculations of the pension the member would receive under existing provisions and the pension they would have been receiving had they been of the opposite sex (all else being equal). The greater of the two calculations would then form the basis of the payment to the member. Unlike method A, no attempt is made to take each differing element of the respective male and female calculations and to give the more generous treatment on an element by element approach. Instead, each element of difference is consolidated into a single calculation entirely on the male approach and a single calculation entirely on the female approach. Hence, this method provides for some offsetting of the individual better-of-two-approaches elements within method A, so should result in an equal or lower cost than method A. It also requires two member records to be kept (in addition to the actual record) for members affected by unequal GMPs, due to the possibility that the comparison may switch from one sex being treated more generously to the other.
285. Method C is a variant of method B. It varies from method B in that, if the comparison changes from favouring one sex to the other, the less generous calculation starts to be paid until accumulated gains prior to the change are exceeded by the divergence in payments after the change. Method C is identical to method B if the pension received by incorporating the GMP requirements applicable to one sex is higher at all ages than that by incorporating the GMP requirements applicable to the other. Method C therefore gives rise to the same or a lower cost than method B, and again requires the maintenance of two additional member records for each affected individual. The question of whether interest needs to be allowed for in the consideration of previous payments needs to be considered.
286. Method D involves actuarial valuation. If method D is adopted, an actuarial valuation will be carried out as regards the future right to benefits of the male and female comparators. As regards the time before method D is adopted, a pensioner may be entitled to back payments and the amount of those back payments will have to be computed using one of the other methods, A or B or C, as the case may be. Method D has been subdivided into method D1 and method D2 but these two methods are, in a number of important respects, quite different from each other.
287. Method D1 is described in Appendix B and that description will not be repeated here. Method D1 was also helpfully described in a report prepared by Aon Hewitt for the Banks. Aon Hewitt prepared an illustration of how method D1 might operate based on certain assumptions. I stress that these assumptions are not the same as the assumptions which were made by the scheme actuary and used for the worked examples in Appendix B but it is still useful to refer to the Aon Hewitt illustration in so far as it demonstrates how method D1 will work in a particular case. The Aon Hewitt illustration is set out below:

Age	Unequalised Female		Unequalised Male		Equalised Female		Equalised Male	
	Annual Pension	Aggregate payments	Annual Pension	Aggregate payments	Annual Pension	Aggregate payments	Annual Pension	Aggregate payments
60	2,100	2,100	1,900	1,900	2,179	2,179	1,900	1,900
61	2,161	4,261	1,957	3,857	2,240	4,419	1,957	3,857

62	2,223	6,483	2,016	5,873	2,302	6,721	2,016	5,873
63	2,287	8,770	2,076	7,949	2,366	9,087	2,076	7,949
64	2,353	11,123	2,138	10,087	2,432	11,519	2,138	10,087
65	2,421	13,543	2,697	12,785	2,500	14,019	2,697	12,785
66	2,490	16,034	2,775	15,559	2,570	16,589	2,775	15,559
67	2,562	18,596	2,855	18,414	2,641	19,230	2,855	18,414
68	2,636	21,232	2,937	21,351	2,715	21,945	2,937	21,351
69	2,712	23,944	3,021	24,372	2,791	24,737	3,021	24,372
70	2,790	26,734	3,108	27,480	2,870	27,606	3,108	27,480
<b>Actuarial value</b>	<b>42,829</b>		<b>45,603</b>		<b>45,603</b>		<b>45,603</b>	

288. As this illustration shows, there is an actuarial valuation of the benefits of the unequalised female; the figure is £42,829. Then there is an actuarial valuation of the benefits of the unequalised male; the figure is £45,603. The figure for the unequalised male is higher than the figure for the unequalised female. Method D1 then involves a step to produce equalisation in actuarial terms. That step is to give the female increased benefits which will have an actuarial value of £45,603. There is no need to alter the benefits for the male and so the unequalised male and the equalised male are the same; both therefore have the same actuarial value of £45,603. The way in which the female's benefits are enhanced is shown in the above illustration. She gets an extra annual sum of £79; some of the figures for that annual sum are £80 but that is the result of rounding. A simple way to understand this illustration is to say that the female is given an extra capital sum of £2,774 (£45,603 - £42,829) with which she buys an annuity of £79. One could vary the illustration so that the notional annuity was not a fixed sum but was, for example, index linked. It can be seen from the above illustration of method D1 that although both male and female pensions are equalised to have the same actuarial value, the annual payments differ.
289. Method D2 is described in Appendix B and, again, I will not repeat that description here. Appendix B also contains an illustration of method D2. The actuarial value of the equalised benefits are the same for both male and female pensioners. Also, unlike method D1, both the male and female pensioner receive the same annual sums. However, the profile of the benefits payable under method D2 is quite different from the profile of the benefits payable under the Schemes on an unequalised basis. Indeed, as the illustration in Appendix B shows, in the early years of the illustration both male and female pensioners receive lower sums than before.
290. Method D does not require the maintenance of more than one member record, as the value of any adjustment required to achieve equalisation would be identified and used to enhance pensions where necessary as a one-off exercise either immediately or at the point current non-pensioners decide to retire. The amount (and presence) of any enhancement will depend on the actuarial assumptions selected, so changing the assumptions will result in different outcomes for affected members.
291. The scheme actuary was not aware of other GMP equalisation projects that have used any of methods A, B or C. Method B was put forward by the DWP in its consultation paper: "Consultation on the Draft Occupational Pension Schemes and Pension

Protection Fund (Equality) (Amendment) Regulations 2012” of January 2012. In general, industry comment on this proposal was that it was overly generous.

292. A version of method D was put forward by the DWP in a subsequent consultation document: “Occupational pension schemes draft regulations, occupational pensions legislation subject to review and a proposed methodology for equalising pensions for the effect of GMPs”, published on 28 November 2016. The DWP consultation document linked their proposed approach to the related subject of GMP conversion. This is the process for converting GMP benefits into non-GMP benefits of equal actuarial value, which has existed for several years, but seldom if ever utilised. I was told that this was because of uncertainties in relation to the equalisation question. The DWP consultation recognised that GMPs represent a complex legacy arrangement with overhead costs of administration and communication, reflecting a state pension system that has long been superseded, and it recognised the advantages of converting GMP benefits into a format that is easier to administer and communicate. This DWP consultation proposed a specific approach to setting the actuarial assumptions required to undertake an equalisation project using a version of method D.
293. The scheme actuary understood that equalisation projects have been completed using a version or versions of method D, mainly or exclusively in the context of pension schemes entering buy-out transactions. These could be considered to be a special case, as in a buy-out the liability to pay benefits is transferred from the scheme to an insurer acting as a third party. In those circumstances the commercial imperative to achieve risk transfer in the buy-out will outweigh the risks of the equalisation approach subsequently being deemed inadequate (and insurers can charge for this residual risk). A form of method D has been adopted in the context of preparing pension schemes for buy-out transactions as a comparison between the actuarial value of the benefits that would be applicable under the treatment relevant to either sex, with the impact of all advantages and disadvantages being netted off against each other. At the hearing, this was referred to as method D with full consolidation.
294. It may be that the above description adequately describes the operation of the various methods. However, in addition to this material, the scheme actuary provided me with calculations showing the impact of methods A, B and C on a year-by-year basis. For the sake of completeness, I will summarise those calculations. To avoid confusion, I ought to record that the assumptions used in these calculations are not the same as the assumptions used in the worked examples in Appendix B.
295. Two versions of method C were used. For illustrative purposes, one (C1) did not consider interest in determining the extent to which gains to date should offset paying the higher of the two alternative pensions in the future. The other (C2) allowed for interest on the gains, at a rate of 3% per annum. The inputs and conclusions used were strictly illustrative and were to some extent artificial in order to draw out the impacts of the different methods. In particular, to illustrate the potential for a male step up at age 65 the example used the statutory minimum treatment of the male pension at age 60, of not allowing for GMP revaluation at all to that date. In practice, the significant sections of the Schemes which I am considering use a more generous treatment, and the impact of the anti-franking provisions for a male at age 65 (and the extent to which the female

benefit exceeds that for the male at age 60) would be less for the Schemes than in the illustrative example.

296. The illustration took the case of a female member, who left service at age 50, entitled to a pension from age 60. Her pension at date of exit was £5,000 per annum of which £4,000 pa was GMP and £1,000 pa was non-GMP. If she were treated as a male, GMP would be £3,600 pa and non-GMP £1,400 pa. Increases prior to retirement were taken to be 4% pa on non-GMP and 7% pa on GMP, subject to the points set out below. The female's pension at age 60 amounted to £8,834 per annum (as a result of £5,000 increased by 4% pa on the non-GMP element and at 7% on the GMP element). From that age her GMP increased at 3% pa and the non-GMP at 5% pa. The male's pension at 60 amounted to £5,672 per annum, as in this example only the £1,400 non-GMP was subject to revaluation to age 60 for a male. From that age, the entire pension increased at 5% pa until age 65 as it remained all non-GMP. At that age, the 7% pa increased on the GMP need to be recognised, and the pension increased to £11,355 pa. From that age onwards, the GMP increased at 3% pa and the non-GMP at 5% pa. In each case, the projected increase above the female's current entitlement was shown at each future age. For comparison purposes, the projected increase against the notional male comparator was also shown.
297. Under method A, the higher (female) pension was put into payment at age 60. Each year, the higher pension increase awarded under each approach was awarded. This was the female approach until age 64. At age 65, the pension was increased by £4,460 pa, equal to the step up at that age that would be applicable to a male (£11,355 pa - £6,895 pa). From that age onwards the greater of the increase awarded on the male and female approaches was awarded. From age 65, method A gave rise to a substantially higher pension for the female and the notional male than either's original entitlement. This was a consequence of recognising the anti-franking step up applicable to males for the female as well. Method A would give rise to this effect in any case where the anti-franking step up applied to the analogous male.
298. Under method B, the higher (female) pension was put into payment at age 60. Between ages 60 and 65, the higher (female's) pension was paid. From age 65, the position changed from the female calculation being the higher, to the male calculation being greater. From then on the comparison continued as the higher of the pension at each age (ie the notional male's) being paid. Method B gave rise to a higher pension for the female and the notional male than the original entitlements (but not both at the same age), and to a lesser extent than method A.
299. Under method C1, the higher female pension is put into payment at age 60. Between ages 60 and 65, the higher pension was paid, as per method B. The impact of this was to pay £15,379 more to the individual over that 5 year period than would have been the case had the member been a male. From age 65 payments continued in line with the (now lower) female calculation until such time as the accumulated "shortfall" compared to the male calculation after age 65 exceeds the accumulated "overpayments" of £15,379 prior to age 65. Method C1 gave rise to the (lower) female calculation being put into payment until age 78. This would result in no action being taken in respect of the female member until that age, and a higher pension being put into payment for the notional male member between ages 60 and 65 (offset by a lower pension from age 65 onwards,

until the male level of pension starts again from age 79). Method C1 could be said to reduce the male pension between ages 65 and 79 albeit by no more than the accumulated gain the male has enjoyed as a result of being treated as a female between ages 60 and 65. The female's pension was increased to that applicable to the analogous male after age 78, recognising that the advantage she has received up to age 65 has by age 78 been cancelled by subsequent payments at a lower level than the male would have received. Method C2 gave rise to the (higher) female calculation being put into payment between ages 60 and 65 and the (lower) female calculation being put into payment from age 65 until age 82. This would result in no action being taken in respect of the female member until that age, and a higher pension being put into payment for the notional male member between ages 60 and 65 (offset by a lower pension from age 65 onwards, until the male level of pension starts again from age 82). Method C2 could also be said to reduce the male pension between ages 65 and 82 albeit by no more than the accumulated gain the male has enjoyed as a result of being treated as a female between ages 60 and 65. The female's pension is increased to that applicable to the analogous male after age 82. The age at which the benefit switched back to the (higher) male pension being paid is later under method C2, recognising that advantages and disadvantages in earlier years have more value when interest is allowed for to reflect the time value of money. In other words under method C2 the advantage of the position between ages 60 and 65 was deemed to support a longer period during which the lower pension is paid after that age.

300. The scheme actuary calculated the actuarial cost of each approach for the female member and the notional male alternative, using a discount rate of 3% per annum, chosen to be the same as the interest applied under method C2. This could be thought of as the application of Method D to each of the other three methods.
  - (1) method A: cost for female - £92,004; cost for notional male alternative - £75,598;
  - (2) method B: cost for female - £31,165; cost for notional male alternative - £14,759;
  - (3) method C1: cost for female - £20,143; cost for notional male alternative - £3,737;
  - (4) method C2: cost for female - £16,406; cost for notional male alternative - £ NIL;
301. The actuarial values of the unequalised female and male benefits are £387,226 and £403,632 respectively. The difference between these amounts to £16,406, and hence represents the cost of method D with full consolidation. Method D with full consolidation hence gives the same cost as method C2 (where discount rate and the allowance for interest on accumulated differences are the same).
302. In summary, four methods of addressing the unequal benefits that arise from GMP provisions have been considered. Each contains scope for nuances and variations. Three of these (A, B and C) require a year-by-year comparison of the benefits that would be payable to each of a male and female member with otherwise identical circumstances, with differing treatments and degrees of generosity between the methods in terms of how differences are addressed. The fourth method (D) does not require a year-by-year comparison and so involves less administration. Instead, the actuarial value of future payments required to provide equalisation under the chosen approach is calculated. A particular form of this actuarial approach has been used in the context of buy-out transactions.

*Issues 5 to 8 reviewed*

303. I will not set out again at this point the full text of issues 5 to 8 and 12. Those issues were drafted by reference to whether the court would accept a surrender of the discretion of the Trustee in relation to the selection of a permissible method of equalisation. As the argument developed, it became clear that there were distinct legal issues which separated the parties. I would describe those issues as being:
- (1) is it obligatory to adopt a “term by term” approach in the way contended for by the RBs?
  - (2) how is the “term by term” approach to be applied?
  - (3) what is meant by “the principle of minimum interference” in this context?
  - (4) what is required in the present case by the principle of minimum interference?
  - (5) how do the provisions of sections 24A to 24H PSA 1993 operate?
  - (6) in the light of the answers to the foregoing, which of the identified methods are legally permissible?
304. It was agreed at the hearing that I should determine these issues. In the light of the rulings provided in relation to these issues, the Trustee expected to be able to make its decision as to how to act so that this was no longer a case in which the Trustee asked the court to accept a surrender of its discretion.

*The term by term approach*

305. I have explained how a number of matters, operating in tandem, produce the result that benefits for men and women are not equal. The RBs contend that in order to equalise benefits it is necessary to adopt a “term by term” approach. They say that this is legally required by European law for the purposes of Article 157 and by English law for the purposes of section 67 of the EA 2010. What is required, the RBs say, is that one identifies the separate terms of the occupational pension scheme which, operating together, produce an inequality in benefits. Once one has identified the separate terms, it is necessary to make an adjustment so that each term, as adjusted, produces equality. When one has made that adjustment to each term separately, one will produce an equal result overall.
306. The RBs say that the only method which adopts a term by term approach in an appropriate way is method A3. In Appendix B, there is an illustration of how method A3 works in a particular case. In the first line of the illustration, men and women receive the same benefits which are the higher of the benefits to which one of them is entitled. This means that the man’s benefits are increased and the woman’s benefits are not increased but her total benefits are the same as the man’s. However, on later lines of the illustration, both the man and the woman receive increases. Thus, the use of method A3 does not produce the result that the total benefits of the disadvantaged sex are levelled up to that of the advantaged sex but instead both the advantaged sex and the disadvantaged sex receive increases in their benefits. The RBs say that the court should

not be concerned about that consequence of the use of method A3 and submit that it is a recognised consequence of adopting a term by term approach and the authorities have expressly required a term by term approach even in the knowledge that such an approach goes beyond levelling up the position if considered overall.

307. The Banks, supported by the Crown, submit that what European law and English law require is equalisation of the total benefits payable under the Schemes. Method A3 does result in men and women receiving equal benefits and it is accepted that it does produce equalisation. However, they submit that the law does not require the adoption of Method A3 and the other methods B, C1, C2, D1 and D2 also in their different ways produce equal benefits. Because the other methods also produce equalisation, the Trustee is not able to adopt Method A3 because that would infringe the principle of minimum interference, which I describe later in this judgment.
308. Thus, the dispute between the parties in relation to the “term by term” approach is whether that approach requires the adoption of method A3 so that no other method satisfies the term by term approach.
309. It seems to me that a number of questions need to be considered:
- (1) what is required by European law as to equalisation of benefits?
  - (2) how is that requirement to be applied in this case?
  - (3) what is required by English law in relation to equalisation of benefits?
  - (4) how is that requirement to be applied in this case?
310. Before turning to the decisions of the ECJ relied upon by the parties, it is worth referring again to the terms of Article 157 and to Article 1 of the Equal Pay Directive, 75/117/EEC. Article 157(1) refers to “the principle of equal pay for male and female workers for equal work or work of equal value”. Article 157(2) refers to “pay” as meaning “the ordinary basic or minimum wage or salary and any other consideration” and then refers to two examples which require equal treatment, namely, piece rates for the same work and rates based on time.
311. Article 1 of the Equal Pay Directive provided:

“Article 1

The principle of equal pay for men and women outlined in Article 119 of the Treaty, hereinafter called "principle of equal pay", means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex **with regard to all aspects and conditions of remuneration.**

In particular, where a job classification system is used for determining pay, it must be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.” (emphasis added)



312. In the recast Directive, it is relevant to refer to Articles 4 and 5. Article 4 requires the elimination of discrimination on grounds of sex “with regard to all aspects and conditions of remuneration”. Article 5 prohibits discrimination as regards “the calculation of benefits”.
313. These provisions make it clear that there must be no discrimination as regards any aspect or condition of remuneration but they do not spell out what must be done to avoid such discrimination where it would otherwise occur so that the result will be that men and women are treated equally.
314. In relation to the requirements of European law, the parties relied on Barber and Jämställdhetsombudsmannen v Örebro Läns Landsting (C-236/98) [2001] ICR 249 to which I will now refer.
315. In Barber, the unequal treatment of men and women was shown by the following facts set out in the report of the Judge Rapporteur (at page 351):

“The Guardian paid Mr. Barber a sum consisting of the cash benefits provided for in the severance terms and an amount equal to the statutory redundancy payment. He thus received a gross cash payment of £14,438 which, after deduction of income tax, has produced a net figure of £11,378. In addition, an ex gratia tax-free payment of £7,219 was made to him on 7 January 1981, making a total net sum of £18,597. As he had not attained the age of 55 at the time of his dismissal, Mr. Barber did not receive an immediate pension but was granted under the pension scheme a deferred pension payable as from 30 September 1990 and amounting to £5,165 per annum.

It is not disputed that a woman aged 52 in the same position as Mr. Barber would have been entitled to an immediate pension plus the statutory redundancy payment. It is also agreed that the value of such compensation would have been greater than the total payments received by Mr. Barber.”

316. One of the questions referred to the ECJ in Barber was question 3 which was in these terms (at page 352):

“ (3) Is the principle of equal pay referred to in article 119 and the Equal Pay Directive infringed in the circumstances of the present case if (a) a man and a woman of the same age are made compulsorily redundant in the same circumstances and, in connection with that redundancy, the woman receives an immediate private pension but the man receives only a deferred private pension; or (b) the total value of the benefits received by the woman is greater than the total value of the benefits received by the man?”

317. In his opinion, Advocate General Van Gerven said (at page 387):

“Question 3(b)

45. I would remind the court that the Guardian's severance terms accord redundant employees who are not entitled to an immediate pension a higher terminal payment. The parties to the main proceedings are agreed, however, that the value of an immediate pension - the actuarial value as I understand it - is greater than the amount of the higher terminal payment. In question 3(b) the Court of Appeal wishes to ascertain whether discrimination contrary to Community law exists where the total value of the benefits received by a redundant female employee is greater than the total value of the benefits received by a male employee.

46. In so far as the question relates to the difference established in the total amount of benefits for men and women of the same age it can be answered in the same manner as in paragraph 44 above.

However, the question raises an additional problem, in so far as it suggests that, in the event of article 119 being applicable, the principle of equal pay contained therein is not infringed provided that the total value of the benefits is the same, even though it is made up of components which differ according to sex but are mutually compensating.

In my view the principle of equal pay implies equality at the level of each component of remuneration. If it were otherwise, the enforceability of that principle by the courts would be seriously jeopardized. The courts would then have to evaluate and compare the most diverse advantages which employers confer on their employees. That may call for a complex factual analysis which would not guarantee the equality of total pay as effectively as the equality of each component separately, which is easier to verify.

I therefore suggest supplementing the answer given to the previous question as follows: the principle of equal pay implies equality at the level of each component of remuneration.”

318. There was a footnote to the penultimate paragraph of the quoted text which stated:

“The approach of the British courts is the same. In Hayward v. Cammell Laird Shipbuilders Ltd. (No. 2) [1988] A.C. 894, the House of Lords considered that article 1 of Directive 75/117 cannot be understood as meaning that, where pay as a whole is the same for men and women, it is of no importance that some components of that pay discriminate in favour of women provided that this is compensated for by equally discriminatory pay components in favour of men.”

319. In its judgment at [31]-[35], the court ruled (so far as is now material):

**“The third and fifth questions**

31 Secondly, the Court of Appeal wishes to ascertain, in substance, whether equal pay must be ensured at the level of each element of remuneration or only on the basis of a comprehensive assessment of the consideration paid to workers.

32 ...

33. As regards the second of those questions, it is appropriate to refer to the judgments of 30 June 1988 in *Commission v. France* (Case 318/86) [1988] E.C.R. 3559, 3582, para. 27, and of 17 October 1989 in *Handels-og Kontorfunktionaerernes Forbund i Danmark v. Dansk Arbejdsgiverforening* (Case 109/88) [1991] I.C.R. 75, 80, para. 12, in which the court emphasised the fundamental importance of transparency and, in particular, of the possibility of a review by the national courts, in order to prevent and, if necessary, eliminate any discrimination based on sex.

34. With regard to the means of verifying compliance with the principle of equal pay, it must be stated that if the national courts were under an obligation to make an assessment and a comparison of all the various types of consideration granted, according to the circumstances, to men and women, judicial review would be difficult and the effectiveness of article 119 would be diminished as a result. It follows that genuine transparency, permitting an effective review, is assured only if the principle of equal pay applies to each of the elements of remuneration granted to men or women.

35. The answer to the third and fifth questions submitted by the Court of Appeal must therefore be that it is contrary to article 119 of the Treaty for a man made compulsorily redundant to be entitled to claim only a deferred pension payable at the normal pensionable age when a woman in the same position is entitled to an immediate retirement pension as a result of the application of an age condition that varies according to sex in the same way as is provided for by the national statutory pension scheme. The application of the principle of equal pay must be ensured in respect of each element of remuneration and not only on the basis of a comprehensive assessment of the consideration paid to workers.”

320. In Jämställdhetsombudsmannen v Örebro Läns Landsting, the basic monthly salary of midwives employed at a hospital in Sweden was less than that of clinical technicians employed there, but, because the midwives worked on a shift system and at nights and weekends and other unsocial times, they had a 38 or 34-hour, rather than a 40-hour, working week and were entitled to an inconvenient hours supplement in addition to their basic pay. The technicians, who worked normal working hours from Monday to Friday, had a 40-hour working week and no pay supplement. In proceedings in which it was

claimed that two female midwives were discriminated against by their receiving lower basic pay than a male clinical technician for work of equal value, one of the issues was whether, for the purposes of the equal pay provisions in article 119 and the Equal Pay Directive, there were to be taken into account, in comparing the pay of different groups of persons, an inconvenient hours supplement received by one group only and the value of a relatively reduced working week worked by that group. The ECJ held that, although it had pecuniary consequences, the midwives' reduced working time was in the nature of working conditions rather than pay, and accordingly did not fall within article 119 of the EC Treaty and the Equal Pay Directive; but that such a reduction might constitute an objective reason unrelated to discrimination on the ground of sex justifying any difference in pay found by the national court *prima facie* to constitute indirect discrimination. The court further held that the midwives' inconvenient hours supplement, constituting as it did compensation to the worker for the disruption and inconvenience caused by working unsocial hours, was a form of pay to which the worker was entitled in respect of his employment, and therefore came within article 119 of the EC Treaty and Directive 75/117; but that, as the supplement varied from month to month, it was difficult to make a meaningful comparison between a midwife's salary and supplementary allowance, taken together, and the basic salary of the comparator group; and that, accordingly, in order to ensure greater transparency and guarantee compliance with the requirement of effectiveness underlying Directive 75/117, the comparison for the purposes of article 119 and the Directive should be made between the midwives' basic salary, leaving out of account the inconvenient hours supplement, and the like salary of clinical technicians.

321. In his opinion, Advocate General Jacobs said at [30-[35]:

“30 I concur with the Finnish Government's view that it is not possible to lay down an unvarying rule that different elements of pay either should or should not be taken into account in making a pay comparison. However, whereas the Finnish Government submits that the rule will vary depending on factors arising out of the assessment of equal value, I consider that it is rather the nature of the pay structure at issue which will determine how equal pay is to be assessed.

31 Treating each element of remuneration independently for the purpose of an equal pay comparison will in general be the only proper way to ensure equality. It is moreover the only way to achieve transparency and ensure effective judicial review: as the court confirmed in *Handels- og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss (Case 109/88) [1991] ICR 74, 79, para 12*, and repeated in *Barber [1990] ICR 616, 671, para 34*, a lack of transparency would prevent any form of supervision by the national courts. Thus as a general proposition I consider that, in accordance with the statement of the court in *Barber*, the principle of equal pay should apply to each of the elements of remuneration granted to men and women.

32 Where, however, for historical or other reasons the pay structures are complex, so that individual elements or the bases on which they are granted are difficult or impossible to disentangle, it may be both unrealistic and unprofitable to look at individual components of the pay package in isolation. Moreover, to do so may lead to discrimination against the other sex. In such cases a global assessment may be the only valid—or even feasible—method, pending a restructuring of the system. It is doubtless such circumstances which the court had in mind when it stated in *Specialarbejderforbundet i Danmark v Dansk Industri, acting for Royal Copenhagen A/S (Case C-400/93) [1996] ICR 51* that some pay systems were so structured that only a “global assessment” could be made in considering whether there was a breach of article 119 : see p 69, para 18 and p 74, para 43.

33 That does not mean, however, that one element in the overall package can necessarily be set off against another. Thus in *Barber* itself, in which men who had been made redundant were entitled to an immediate pension if they had attained the age of 55 whereas women who had been made redundant were entitled to an immediate pension if they had attained the age of 50, it is understandable that the court regarded it as inappropriate to seek to offset discriminatory pension rights by taking into account possible differences in redundancy payments.

34 What then is the position here? It will be recalled (see paragraph 16 above) that a woman employee establishes a prima facie case of infringement of the principle of equal pay for work of equal value by showing, first, that she is part of a group of predominantly female employees performing work of equal value to that performed by a group of predominantly male employees and, secondly, that the first group receives lower remuneration than the comparator group. It is then, however, open to the employer to displace that presumption by showing that the difference in pay is based on objectively justified factors unrelated to any discrimination on grounds of sex.

35 In this case it is possible to separate the midwives' basic salary from the supplement and hence to compare the basic salary with that of the comparator. In my view, the correct approach to this and similar cases is to accept that the group receiving lower basic pay, in the present case the midwives, is paid less, so that the second question set out above, namely whether the pay of the two groups is unequal, is regarded as receiving an affirmative answer. I would add that that approach would in this and similar cases ensure greater transparency: the fact that the supplement varies from month to month depending on the time and the day the relevant shifts were worked would make it difficult to make a

sensible comparison of, on the one hand, a midwife's aggregate salary and supplement and, on the other hand, the comparator's basic salary.

...

39 It is accordingly my view that, where the pay structure is such that it is in principle possible to extract and compare individual strands, that is what should be done, with the employer preserving the possibility of disproving that inequality on that basis is due to sex. Where however the pay structure is less penetrable, a global assessment will be all that is possible. It is for the national court to determine whether it is possible in a given case to make an item-for-item comparison or whether a global assessment is all that is feasible.”

322. In its judgment, the court dealt with the question more briefly than did the Advocate General and it said at [43]-[45]:

“43 With regard to the method to be adopted, in making such a comparison, for verifying compliance with the principle of equal pay, the Court of Justice has already held that if the national courts were under an obligation to make an assessment and a comparison of all the various types of consideration granted, according to the circumstances, to men and women, judicial review would be difficult and the effectiveness of article 119 would be diminished as a result. It follows that genuine transparency, permitting effective review, is assured only if the principle of equal pay applies to each of the elements of remuneration granted to men or women: *Barber [1990] ICR 616, 671*, para 34.

44 In this case, therefore, in order to ensure greater transparency and guarantee compliance with the requirement of effectiveness underlying Directive 75/117, the midwives' monthly basic salary should be compared with the like salary of clinical technicians.

45 The fact that the inconvenient hours supplement varies from month to month according to the part of the day during which the hours in question were worked makes it difficult to make a meaningful comparison between, on the one hand, a midwife's salary and supplementary allowance, taken together, and, on the other hand, the basic salary of the comparator group.”

323. I derive the following principles and/or guidance from these two decisions of the ECJ:
- (1) it is not possible to lay down an unvarying rule that different elements of pay either should or should not be taken into account in making a pay comparison;
  - (2) the nature of the pay structure will determine how equal pay is to be assessed;

- (3) the exercise which is carried out must be designed to produce equality;
  - (4) the exercise which is carried out must achieve transparency;
  - (5) the exercise which is carried out must ensure effective judicial review;
  - (6) in general, treating each element of remuneration independently for the purpose of an equal pay comparison will be the only proper way to produce equality, achieve transparency and ensure effective judicial review;
  - (7) there will be cases where the general rule will not apply; these cases include those where the pay structures are complex so that a separate comparison of the elements of remuneration is difficult or impossible or unrealistic or unprofitable;
  - (8) other cases where the general rule will not apply is where its application might lead to discrimination against the other sex.
324. As regards English law, the relevant provisions of the PA 1995 and the EA 2010 followed a contractual model by calling for the identification of the terms of the schemes which resulted in discrimination on the ground of sex and leading to a modification of those terms so that the discrimination was removed. It is sufficient to refer to the terms of the EA 2010 which I have set out earlier in this judgment.
325. By virtue of section 61 of the EA 2010, a scheme must be taken to include a non-discrimination rule and the provisions of the scheme have effect subject to such a rule. Section 62 refers to the trustee making non-discrimination alterations to the scheme. Section 66 provides that if the terms of the relevant person's work do not include a sex equality clause, they are treated as including one and if a term is comparatively less favourable to a person it is modified so as not to be less favourable. By section 67, if an occupational pension scheme does not include a sex equality rule, it is to be treated as including one and if a relevant term is comparatively less favourable to a person, the term is modified so as not to be less favourable. Section 68 provides for consequential modifications to the terms of the scheme.
326. The leading English case in this area is Hayward v Cammell Laird Shipbuilders Ltd (No 2) [1988] AC 894. In that case, Ms Hayward was employed at a shipyard canteen as a cook and was classified as unskilled for the purposes of pay. She claimed under section 1(2)(c) of the EPA 1970 that she was doing work of equal value to male comparators who were shipyard workers paid at the higher rate for skilled tradesmen in the yard. Following an evaluation by an independent expert under section 2A(1)(b) of the EPA 1970, an industrial tribunal held that the applicant's work was of equal value to that of the men. A question arose as to what modification ought to be made to her contract of employment. She contended that it was sufficient to compare her basic pay and overtime rates with that of the male comparators. The employer contended that there should be a comparison of the overall effect of all terms and conditions of her employment. The House of Lords held that section 1(2) of the EPA 1970 should be construed as referring to the specific term or terms of the contract of which complaint had been made notwithstanding that, when looked at as a whole, the complainant's contract may have been no less favourable than the comparators because she was entitled to other benefits to which they were not entitled. The expression "term" was to be given its natural

meaning as a distinct provision or part of the contract which had sufficient content for it to be compared with a similar provision or part in other contracts; and that, accordingly, the applicant's contract contained a term as to her basic pay in respect of which she was entitled to relief under the section and the case would be remitted to the industrial tribunal for determination. It was also said that Article 1 of the Equal Pay Directive was to be construed as being consistent with the effect of section 1(2) of the EPA 1970 and that the case would have been decided similarly under European law.

327. In Hayward, at 901 B-D, Lord Mackay of Clashfern LC said:

“It appears to me that it would be natural to compare the appellant's basic salary as set out in her contract with the basic salary determined under the men's contract. I think it would be natural to treat the provision relating to basic pay as a term in each of the contracts.

However, one has to take account of the hours to be worked in order to earn this money and I think this consideration points to the importance of the provision in question being one which is capable of being compared from the point of view of the benefit it confers with a corresponding provision in another contract to see whether or not it is more beneficial than that provision. Accordingly, I am of opinion that the natural application of the word "term" to this contract is that it applies for example, to the basic pay, and that the appropriate comparison is with the hourly rate of basic pay.”

328. Lord Mackay also referred to Article 1 of the Equal Pay Directive and said at 903G:

“In my opinion the terms of article 1 are consistent with the appellant's submission. When elimination of all discrimination on grounds of sex is to be applied to all aspects and conditions of remuneration I consider this requires each of these aspects to be considered and discrimination existing in any aspect to be eliminated irrespective of the other aspects. It does not appear to me to be a natural reading of article 1 to say that if the remuneration as a whole provides the same result for a man and a woman it does not matter that some aspects of the remuneration discriminate in favour of the woman so long as there are corresponding discriminations in other aspects in favour of the man.”

329. The other members of the House of Lords agreed with the speech of Lord Mackay. Lord Goff delivered a separate speech. He thought that the natural and ordinary meaning of the section was in favour of Ms Hayward. In relation to the argument for the employer, he said at 907 C-E:

“ ... it imposes upon the word "term" a meaning which I myself do not regard as its natural or ordinary meaning. If a contract contains provisions relating to (1) basic pay, (2) benefits in kind



such as the use of a car, (3) cash bonuses, and (4) sickness benefits, it would never occur to me to lump all these together as one "term" of the contract, simply because they can all together be considered as providing for the total "remuneration" for the services to be performed under the contract. In truth, these would include a number of different terms; and in my opinion it does unacceptable violence to the words of the statute to construe the word "term" in sub-paragraph (ii) as embracing collectively all these different terms."

330. Lord Goff added at 908A-B:

"You look at the two contracts: you ask yourself the common sense question - is there in each contract a term of a similar kind, i.e. a term making a comparable provision for the same subject matter, if there is, then you compare the two, and if, on that comparison, the term of the woman's contract proves to be less favourable than the term of the man's contract, then the term in the woman's contract is to be treated as modified so as to make it not less favourable."

331. Lord Goff recognised that construction of the section adopted by the House of Lords could lead to "mutual enhancement or leap frogging" in a case where the separate terms of the man's contract and the woman's contract were both upgraded to bring them into line with each other. This was a concern that had weighed heavily with the lower courts or tribunals in Hayward. Lord Goff offered two answers to this concern. First, it might be open to the employer to justify the different treatment in a particular respect by saying that the difference in treatment was genuinely due to a material factor namely the existence of another term in the contract which also provided for different treatment. It was suggested that such a defence might have been available under section 1(3) of the EPA 1970 which operated in a similar way to section 69 of the EA 2010. The second answer to the concern was that if the House of Lords' decision did not accord with the true intention of Parliament, then the appropriate course was for Parliament to amend the legislation. In the event, Parliament has not intervened to reverse the effect of Hayward.

332. The decision in Hayward has not been doubted in any later case. There are later cases which illustrate how that decision has been applied. These are Degnan v Redcar and Cleveland BC [2005] IRLR 179 (EAT) and [2005] IRLR 615 (CA), Brownbill v St Helens & Knowsley Hospitals NHS Trust [2010] ICR 1383 (EAT) and [2012] ICR 68 (CA) and McNeil v HMRC [2018] IRLR 398 (EAT).

333. The facts in Degnan were complex and called for an evaluation as to whether certain provisions should be considered separately or whether their effect should be aggregated to some extent. The claimants were women employed as a cleaner, a supervisory cleaner, a supervisory assistant in schools, and a home help in the local authority's social services department. They brought equal pay claims comparing their work to that of gardeners, refuse workers and drivers, and road workers. All the male comparators were employed on work rated as equivalent and received the same basic hourly rate as the

applicants. However, gardeners also received a fixed bonus of 40%, refuse workers and drivers received a 36% bonus and an attendance allowance of between £33.81 and £34.88 per week, and road workers received a fixed bonus of 33% and an attendance allowance of between £13.91 and £14.61 per week. The employment tribunal held that the terms relating to basic pay and to the bonus payments related to the same subject matter, but that the terms of the attendance allowance were separate. As a result, each of the claimants was entitled to compare herself with the relevant male worker most advantageous to her for the purpose of the bonus element of his pay, and with the most advantageous comparator for the purpose of the attendance allowance. Thus, one particular claimant was entitled to the gardeners' term as to bonus, which resulted in a 40% increase, and she was also entitled to the refuse workers' attendance allowance, at the rate of £33.81 per week. As a result, she would receive more total remuneration than any of the male comparators. The decision as to as to bonus payments was not challenged on appeal to the EAT but the decision on attendance allowances was challenged. The EAT held that that the employment tribunal was wrong to hold that the provision as to attendance allowances related to a different subject matter. Instead the correct view was that the provision as to attendance allowances formed part of the same subject matter as the hourly rate and the bonus. The EAT defined the relevant term of the contract, for the purpose of an equal pay comparison, as the monetary payment an employee receives for the performance of the contract during normal working hours. All monetary payments received by male comparators for normal working hours should be aggregated and divided by the number of hours in the working week, to give an hourly rate. That hourly rate should be compared with the woman's hourly rate; if it was greater, the woman's hourly rate should be increased to eliminate the difference. On that basis, the attendance allowance related to the same subject matter as basic hourly pay and a fixed bonus and was "an element of a distinct part of the contract and not itself a distinct part". It was part of the monetary payment for performance of the contract, by attending at work and working during normal working hours. The Court of Appeal agreed with the EAT. In his judgement, Maurice Kay LJ (with whom the two the other members of the court agreed) said that section 1 of the EPA 1970 and Hayward required classification in relation to the provisions of the contract and that the EAT's classification was realistic based on careful analysis. He also said that the decision would have the desirable result of equalisation rather than the upward movement of the women's rate of monetary pay to a level higher than that of any single male comparator.

334. Degnan was distinguished in the later case of Brownbill where it was explained by Maurice Kay LJ (at [20]) as a case where the men's terms "had features of artificiality and historical anomaly which tended to disguise the reality". Brownbill involved a straightforward application of the decision in Hayward. Health service employees of the appellant trust who were employed on shift work received enhanced payments when they worked nights, weekends and bank holidays as part of their normal contracted hours. The enhanced payments for those working in jobs occupied predominantly by women, who included the claimants, were at a lower rate than those working in jobs predominantly occupied by men. The claimants brought claims under section 1(2)(b) and (c) of the Equal Pay Act 1970, contending that they were engaged on work rated as equivalent or of equal value to that of comparable male employees and, while they received more in basic pay than the comparators, the term in their contracts relating to unsocial hours was less favourable than the corresponding term in the comparators' contracts. The Court of Appeal upheld the decision of the EAT holding that that the

focus under section 1(2) of the Equal Pay Act 1970 was on equality of terms, not equality of total pay received. Once the employment judge had found that there were terms in the claimants' contracts and in the comparators' contracts relating to enhanced payments for unsocial hours that were distinct provisions with sufficient content to make it possible to compare the benefits conferred by each provision, he ought to have proceeded to make a comparison between them to determine whether the term in the claimants' contracts was less favourable than the term in the comparators' contracts and the claims were remitted to the employment tribunal for determination. The Court of Appeal held that the decision in Hayward was to the same effect as the decisions of the ECJ, including Barber and Jämställdhetsombudsmannen v Örebro Läns Landsting. The Court of Appeal referred to the concern over mutual enhancement or leap frogging which had been discussed in Hayward and noted that there had not been any move to amend the legislation in that respect.

335. I was also referred to McNeil v HMRC [2018] IRLR 398 for the statements by Simler J, the President of the EAT, at [53]-[54] where she said:

“53 As already indicated, the term relied on by the claimants is that which entitles them and their comparators to basic pay. There is no definition of the word 'term' in the EA 2010. In *Hayward v Cammell Laird Shipbuilders Ltd* [1988] IRLR 257 (which concerned different terms relating to both basic pay and the calculation of overtime), Lord Mackay of Clashfern LC addressed the meaning of 'term' in the context of the predecessor section in the Equal Pay Act 1970, at 900G as follows:

'I am of the opinion that the natural meaning of the word “term” in this context is a distinct provision or part of the contract which has sufficient content to make it possible to compare it from the point of view of the benefits it confers with similar provision or part in another contract.'

As Lord Goff in the same case made clear, where the contract makes discrete provision for basic pay, bonus, and other benefits, those discrete provisions cannot be lumped together as one term of the contract merely because they provide for total remuneration. The emphasis must be on the reality of the contractual provisions in the circumstances of the particular case, and it will be a question of fact in each case whether a discrete term exists for these purposes. It is not permissible to seek to offset one more favourable term against another less favourable one. A term by term analysis is required, as illustrated by *Brownbill v St Helens and Knowsley Hospitals NHS Trust* [2011] EWCA Civ 903, [2011] IRLR 815 (CA).

54 I agree with (counsel for the employer) that s 66 EA 2010 dictates that just as an employer cannot lump together or engage in an overall comparison of different terms, a claimant in an equal pay claim cannot subdivide a single term into two or more parts

in order to complain about one part only. A term by term analysis is required in equal pay cases. There is no distinct provision or part of the claimants' contracts providing for 'variable pay' above the minimum point in each relevant grade and none is relied on by (counsel for the employee). The reality of the contractual pay provisions in this case is that they are indivisible into sub-terms and to the extent that average pay is considered, average total pay is the only relevant consideration.”

336. I derive the following principles and/or guidance from these authorities:

- (1) the position in English law is the same as the position in European law;
- (2) the court must adopt a term by term approach when carrying out a comparison in an equal pay case;
- (3) the terms to be compared should be identified on what it is natural to compare for the statutory purpose of an equal pay comparison;
- (4) the choice as to what is to be compared is a common sense question;
- (5) it may be necessary to carry out a careful analysis of the relevant provisions to assist in answering the question as to what is to be compared;
- (6) the classification of the relevant provisions should be realistic;
- (7) it may sometimes be appropriate to ask whether a provision is an element of a distinct part of the contract rather than itself being a distinct part;
- (8) just as it is wrong to lump together or engage in an overall comparison of different terms, it is also wrong to subdivide a single term into two or more parts in order to complain about one part only.

337. I will now seek to apply the above principles and/or guidance to the circumstances of the present case. The question is whether method A3 is the only method which gives effect to those principles or guidance (because it is the only method which properly gives effect to a term by term approach) or whether the other methods are permissible if one properly applies those principles and guidance. Put another way, the question is whether the term by term approach is satisfied by holding that the relevant term is to be classified as the amount of pension payable or whether that approach requires the court to treat the various features of the GMP legislation, operating together with the provisions of the schemes, as being separate terms which must be equalised separately. The particular matters which the RBs say are separate terms are the terms as to revaluation of the pensions, the terms as to indexing of the pensions and the terms as to anti-franking.

338. It can be seen from the above statements of the principles of European law and of domestic law (which principles are essentially the same and ought to produce the same result in any particular case) that the present question will often involve a matter of evaluation. It is also important to remember that the question is being asked for a

particular purpose in a practical context and does not involve a wholly theoretical exercise. The purpose is to produce the result of equal treatment in a way which is transparent and will ensure effective judicial review. In some cases, it will be straightforward to identify what should be done to produce equal treatment. If a man and a woman receive different hourly rates for the same work, then the disadvantaged sex must receive the same hourly rate as the advantaged sex. But other cases will not be so straightforward. The pay structure or the benefits structure may be complex so that a separate comparison of different factors which contribute to the overall result as to pay or benefits is difficult or is unrealistic or unprofitable.

339. Applying the principles of European law and domestic law, I consider that:

- (1) methods other than method A3 produce equality of treatment;
- (2) methods other than method A3 achieve transparency and ensure effective judicial review;
- (3) the benefits structure of the Schemes is undeniably complex;
- (4) the matters which are put forward by the RBs as distinct terms or distinct benefits are, in truth, calculation factors which take effect in combination, and not always in a predictable way, to produce the overall result which is an unequal result;
- (5) it is unrealistic and unprofitable to compare the individual calculation factors rather than to compare the overall result;
- (6) ultimately, one has to decide on what side of the line to place the individual calculation factors; does one say they are separate terms or does one say that they are only the means of calculating the overall benefit, which is the relevant term in the present context;
- (7) as a matter of evaluation, having regard to the complexity of the structure of the Schemes and having regard to the purpose of carrying out this evaluation, the relevant term is the overall benefit and not the individual calculation factors;
- (8) the result is that method A3 is not the only available method which produces equality of treatment.

*The principle of minimum interference*

340. The Banks submitted that if it were the case that there was more than one method which produced equality of benefits then the Trustee was obliged to choose the method which produced minimum interference with the rights of any party. When applying that principle, the Banks submitted that as they funded the provision of benefits under the Schemes, the choice of a method which was more expensive than an alternative available method would infringe the principle of minimum interference.

341. The RBs did not deny the existence of a principle of minimum interference but, of course, they submitted that there was only one method (A3) which was permissible as

a method of equalising benefits so that the question of a choice between methods did not arise.

342. The Crown submitted that the principle of minimum interference only applied in a case where the court was ordering a trustee to provide equal benefits and that was not the present case. As to that, if I find that there is more than one method available which will produce equal benefits, then I will have to decide as between the Banks and the Trustee whether the Banks are right that the Trustee is obliged to choose a method which involves minimum interference with the rights of others (in particular the rights of the Banks) so that the Trustee is not entitled to choose an alternative method.
343. It is not suggested that there is any express rule in the Schemes which is directly material to the present issue. I therefore need to consider the effect of section 68 of the EA 2010. Section 68(1) applies if the trustee of an occupational pension scheme does not have power to make sex equality alterations to the scheme or where such alterations are liable to be unduly complex or protracted or would involve delay or difficulty in obtaining consents. Where section 68 applies, the trustee has power to make sex equality alterations. These are defined to be “such alterations to the scheme as may be **required** to secure conformity with a sex equality rule” (emphasis added): see section 68(3) and (5). Thus, where the trustee is under an obligation to comply with a sex equality rule, it is able to alter the scheme to the extent that the alteration is “required” for that purpose. Thus, it is necessary to ask what the trustee is “required” to do. It can make an alteration which is required but it is not entitled to alter the scheme to do something which it wishes to do but which it is not required to do.
344. This approach is supported by more general considerations. I will consider the obligation to equalise benefits from the point of view of both the Banks as employers and the Trustee. If the obligation to equalise is on the Banks, then they must be able to choose how to perform their obligations (providing they do not in some other way infringe the rights of others). They can choose to go beyond the minimum which is required but if they instead provide only the minimum which is required, then they will have performed their obligation and no more is required of them.
345. If the matter is viewed from the perspective of there being an obligation on the trustee, then because there is an obligation on the Trustee, there is a correlative entitlement to perform that obligation. However, the entitlement would not go beyond what is required to perform the obligation. Just because the Trustee must equalise benefits, it does not follow that the Trustee has an entirely free hand as to how to exercise that entitlement. It must be the case that the Trustee’s power to equalise benefits is limited by the extent of the obligation and it is not entitled to choose to provide more than the members are entitled to by way of equalisation of benefits.
346. I was referred to three cases which were said to establish a principle of minimum interference.
347. In Besttrustees v Stuart [2001] Pens LR 283, there was a reference at [57] to minimum interference by the courts, although there is room for argument as to precisely what point was being made. In the event, the reference to minimum interference in Besttrustees v Stuart was considered to be helpful in Foster Wheeler Ltd v Hanley [2010] ICR 374, where the question of minimum interference was considered in detail.

348. It suffices to provide a brief summary of the facts of Foster Wheeler. The scheme initially provided for unequal benefits as it provided for a normal retirement date of 60 for women and 65 for men. Following the decision in Barber, the rules were changed from 16 August 1993 to level down so that the normal retirement date for both men and women was 65. At that point, there were rules providing for a member to take early retirement. The early retirement rules were changed, so as to become more restrictive, with effect from 30 April 2003. A question arose as to the position of a member who wished to take early retirement between 60 and 65. The parties identified three possible responses to that question. All three answers, or options, produced a result whereby men and women were treated equally. The judge selected option 1 which was the most expensive of the three options. The employers appealed to the Court of Appeal which allowed the appeal and selected option 2.
349. Arden LJ explained the principle to be applied by the court in choosing which option to adopt. She said at [33]-[35]:

“33 In my judgment, the approach in Bestrustees v Stuart [2001] Pen LR 283 represents in general the principled approach for reasons which Neuberger J gives, and provides the guiding principles in this situation. Accordingly, the court should, where possible, give effect to Barber rights by adhering to the provisions of the relevant scheme where it is possible to do so in preference to some other approach. If some departure is required, it should in general, so far as practicable, represent the minimum interference with the scheme provisions. This approach is not limited to the situation where members have been led to believe that a provision will be used in a certain way or a stated aim of a provision has been only imperfectly achieved (as in Bestrustees v Stuart itself). As the judge in this case recognised, it is a principle of more general application.

34 However, in determining what “minimum interference” is, regard must in my judgment be had to substance as well as form. Accordingly the court should consider not just the extent of any textual amendment required to the rules of the scheme to enable effect to be given to Barber rights, but also the substantive effect of the amendment so adopted. In this case, the implementation of the rights of members with mixed NRDs on the judge's approach involved taking away the company's right to give or withhold its consent to early retirement, or to give its consent on terms. Likewise his solution ended up giving those entitled to Barber rights far more than they were entitled to under European law: they acquired the right to non-reduced benefits on early retirement in respect of pension entitlement accrued outside the Barber window. Those factors cannot be ignored. The only effect of European law on benefits is to impose a NRD of 60 for pension entitlements accrued during the Barber window. The scheme should in general only be treated as amended to the extent necessary to make those rights effective. This principle of

minimum interference with the scheme's provisions should be applied on the basis that minimum interference takes account of the substance and not simply the form of any notional amendment to the rules.

35 It follows from the approach of minimum interference that the court has to compare possible options and consider in relation to any particular option whether the Barber rights can be given effect in some other way involving less interference with the rights of any party, again determining the substance and not just the form of the interference. Whether a particular solution is appropriate in any given case will depend on the circumstances of the pension scheme in question.”

350. Lloyd LJ referred to the ruling of the ECJ in Coloroll to the effect that employers and trustees were bound to provide for equal benefits for men and women and were, in particular, obliged (if it were necessary) to apply to the national courts to amend the rules of the scheme accordingly. He then referred to the provisions in sections 62 to 65 of the PA 1995 which were the predecessors of the relevant sections in the EA 2010. In particular, section 65 of the PA 1995 was the predecessor of section 68 of the EA 2010 which allowed a trustee to make alterations to the rules of the scheme which were “required” to comply with the requirement as to equal benefits. In relation to this legislation, Lloyd LJ said at [50]:

“Domestic legislation has been introduced to cover the point, but it does not circumscribe any more narrowly the range of choice open to the employer and the trustees in making the necessary modifications. Accordingly it is fair to regard the employer and the trustees as having a reasonable margin of discretion in this respect.”

351. Lloyd LJ then added at [54]:

“How the imbalance is to be redressed, or is to be regarded as having been redressed, in any given case may depend on the particular rules of the scheme. However, in principle, it seems to me that Neuberger J's approach in Besttrustees v Stuart [2001] Pen LR 283 that “minimum interference by the courts is desirable” is undoubtedly correct (see the passage quoted by Arden LJ, at para 30 above), and minimum effect, here, refers to the extent of the substantive effect rather than to the extent of the drafting exercise. The corrective effect of article 141 EC, as applied in the Barber and Coloroll cases, is to ensure equality of benefits as between male and female employees and scheme members, to the extent required by the two cases, but not anything more than that. Minimum change might require extensive amendments to the drafting of the rules, whereas fewer textual changes might result in a greater substantive alteration. I agree with Arden LJ that the minimum alteration required should



start with the modifications made already by way of equalisation for the future, in 1993, and should proceed from there but making no greater additional alteration to the scheme than is necessary to achieve full conformity with Community law as declared in article 141 EC, the Barber and Coloroll cases.”

352. As to the possible need for the court to be involved in deciding any dispute as to how alterations to the scheme were to be made, Lloyd LJ said at [77]:

“In principle the necessary modifications ought to be agreed between the trustees and the employer and given effect by an amendment under the power in the trust deed, though clearly section 65 of the Pensions Act 1995 gives the trustees a reserve power to act on their own if the agreement of the employer cannot be obtained. If problems arise that cannot be resolved otherwise, then clearly the trustees, the employer or one or more beneficiaries can apply to the court, as in the present case. I hope that this will be necessary only in rare cases.”

353. The third member of the court (David Richards J) agreed with the reasons in both judgments.
354. There would appear to be a difference between the judgments of Arden LJ and Lloyd LJ as regards the possible relevance of the extent of the textual amendments involved in the various options. Arden LJ regarded the form of the amendment as a matter to be considered when applying the principle of minimum interference: see at [33]-[34]. Lloyd LJ considered that the principle of minimum interference concerned the substantive effect of the amendment rather than the extent of the drafting exercise: see at [54]. This point has not so far arisen in this case and I need not express any concluded view about it but I can indicate that I am more attracted by the approach of Lloyd LJ.
355. The principle of minimum interference was referred to again in Safeway Ltd v Newton [2018] Pens LR 2. In that case, the trustee had a power of amendment permitting amendments to be made retrospectively to the date of any prior announcement of the intended amendment. Following the decision in Barber, the trustee had made an announcement in 1991 that it would level down benefits by adopting a normal retirement date of 65 for all members with effect from 1 December 1991. That announcement was acted upon save that the trustee did not immediately thereafter take the formal steps needed to alter the rules of the scheme to give effect to the announcement. The judge held that the rules required any amendment to be by deed so that the announcement in 1991 did not itself make an effective amendment to the rules. The trustee eventually amended the rules by deed on 2 May 1996. The deed purported to amend the rules by levelling down the normal retirement date from the date stated in the announcement, 1 December 1991. The judge at first instance held that the power could not be exercised to level down benefits retrospectively. The Court of Appeal upheld the judge’s decision that the 1991 announcement did not itself effect an amendment to the rules and it referred to the ECJ the question whether it was consistent with the case law of the ECJ, in particular Smith v Avdel Systems Ltd (Case C-408/92)

[1995] ICR 596, for a retrospective power of amendment to be used to amend the rules to provide for retrospective levelling down.

356. The Court of Appeal reasoned that, in the period 1 December 1991 to 2 May 1996, women had only a defeasible right in domestic law to benefits based on a normal retirement date of 60 since for the whole of that period there was in place an announcement to increase their normal pension age to age 65, capable of being implemented by the retrospective application of the power of amendment at any date thereafter and it was *de facto* implemented, with women members being treated as having a normal pension age of 65 in respect of pensionable service from December 1991. The High Court's conclusion that levelling up was required under art.119 between 1 December 1991 and 2 May 1996 appeared to produce a result which gave both the advantaged and disadvantaged classes better pension rights than those of the advantaged class during the relevant period: women's rights were improved from a defeasible to an indefeasible right to a normal pension age of 60; and men's rights were improved both by reducing their normal pension age from 65 to 60 and making those rights indefeasible. The judgment of the court was given by Lord Briggs of Westbourne who said at [40]:

“Fourthly, the objective of art.119 during the period when the Barber window is open is concerned with levelling up the rights of the disadvantaged class to those enjoyed by the advantaged class, but not with giving either the advantaged class more generous rights than they previously enjoyed, still less giving the disadvantaged class more generous rights than previously enjoyed by the advantaged class. This is, Mr Green submits (and we agree), the effect of the second and third principles described above. It also reflects what may be described as a principle of minimum interference with domestic rights, where a directly applicable EU right is to be applied, as explained by Arden LJ in Foster Wheeler v Hanley [2009] EWCA Civ 651, at [33]:

“Accordingly, the court should, where possible, give effect to Barber rights by adhering to the provisions of the relevant scheme where it is possible to do so in preference to some other approach. If some departure is required, it should in general, so far as practicable, represent the minimum interference with the scheme provisions.” ”

357. In summary, so far as the substance of the matter is concerned, it is now clearly established that the principle of minimum interference requires the court to compare possible options and to consider in relation to any particular option whether the obligation to provide equal benefits can be complied with in some other way involving less interference with the rights of any party.

#### *The operation of sections 24A to 24H of PSA 1993*

358. The PSA 1993 provides for the possibility of “GMP conversion” which is defined to mean “amendment of the scheme in relation to an earner so that it no longer contains the guaranteed minimum pension rules”: see section 24A(1)(b) of the PSA 1993. The

relevant provisions are contained in sections 24A to 24H of the PSA 1993 as inserted by the Pensions Act 2007, section 14(3). Sections 24A to 24H of the PSA 1993 are in these terms:

**“24A Conversion of guaranteed minimum pension into other benefits: introduction**

In this section and sections 24B to 24H–

(a) the rules specified in sections 13(1)(a) and (b) and 17(1) are referred to as the “*guaranteed minimum pension rules*”,

(b) “*GMP conversion*” means amendment of the scheme in relation to an earner so that it no longer contains the guaranteed minimum pension rules,

(c) a “*GMP-converted scheme*” is a scheme which has been subject to GMP conversion,

(d) “*the conversion date*” means the date on which that amendment takes effect,

(e) “*the pre-conversion benefits*” means the benefits provided under the scheme immediately before the conversion date (disregarding money purchase benefits),

(f) “*the post-conversion benefits*” means the benefits which are provided under the converted scheme (disregarding money purchase benefits),

(g) “*the converted scheme*” means the scheme as it has effect immediately after conversion, and

(h) “*the trustees*” in relation to a scheme means the trustees, managers or other persons responsible under the scheme for effecting amendments of it.

**24B The conversion conditions**

(1) This section specifies the conditions referred to in sections 13(1A) and 17(1A) (for exemption from the requirement to guarantee a minimum pension).

(2) Condition 1 is that the post-conversion benefits must be actuarially at least equivalent to the pre-conversion benefits.

(3) Condition 2 is that if the earner was entitled immediately before the conversion date to the payment of a pension under the scheme, the converted scheme does not provide for a reduction of, or have the effect of reducing, the amount of that pension immediately after conversion.

(4) Condition 3 is that the post-conversion benefits must not include money purchase benefits, apart from any money purchase benefits provided under the scheme immediately before the conversion date.

(5) Condition 4 is that the converted scheme provides survivors' benefits in accordance with section 24D in such circumstances, and during such periods, as are prescribed by regulations.

(6) Condition 5 is that the procedural requirements of section 24E have been complied with.

(7) In applying these conditions to a scheme in respect of an earner—

(a) it is immaterial whether or not on the conversion date the scheme was also converted in respect of other earners, and

(b) it is immaterial (except for Condition 2) whether or not on the conversion date the earner was entitled to the payment of a pension under the scheme.

#### **24C Actuarial equivalence**

Regulations may make provision for determining actuarial equivalence for the purpose of Condition 1 of section 24B.

#### **24D Survivors' benefits**

(1) This section specifies the benefits mentioned in Condition 4 of section 24B.

(2) The first benefit is that if the earner dies is a man married to a woman or a woman married to a woman in a relevant gender change case, and the earner dies (whether before or after attaining normal pension age) leaving a widow, she is entitled to a pension of at least half the value of the pension to which the earner would have been entitled by reference to employment during the period—

(a) beginning with 6th April 1978, and

(b) ending with 5th April 1997.

(3) The second benefit is that if the earner is a married woman (other than in a relevant gender change case), a man married to a man, or a civil partner, and the earner dies (whether before or after attaining normal pension age) leaving a widower or surviving civil partner, he or she is entitled to a pension of at least half the value of the pension to which the earner would have been entitled by reference to employment during the period—

(a) beginning with 6th April 1988, and

(b) ending with 5th April 1997.

(4) In relation to an earner who is a woman, a reference in this section to a relevant gender change case is a reference to a case where—

(a) the earner is a woman by virtue of a full gender recognition certificate having been issued under the Gender Recognition Act 2004, and

(b) the marriage of the earner and her widow (that ends with the earner's death) subsisted before the time when the certificate was issued.

(5) This section is subject to regulations under section 38A.

#### **24E Procedural requirements**

(1) This section specifies the procedural requirements that must be complied with in order to satisfy Condition 5 of section 24B.

(2) The employer in relation to the scheme must consent to the GMP conversion in advance.

(3) The trustees must take all reasonable steps to—

(a) consult the earner in advance, and

(b) notify all members, and survivors, affected by the GMP conversion before, or as soon as is reasonably practicable after, the conversion date.

(4) The Commissioners for Her Majesty's Revenue and Customs must be notified on or before the conversion date—

(a) that the GMP conversion will occur or has occurred, and

(b) that it affects the earner.

#### **24F Transfer out**

(1) Regulations may prescribe—

(a) restrictions on the transfer of the earner's accrued rights under a GMP-converted scheme;

(b) conditions which must be complied with on the transfer of the earner's accrued rights under a GMP-converted scheme.

(2) Section 20(2) and (5) shall apply to regulations under this section.

(3) Where a member of a non-GMP-converted scheme makes an application under section 95(1), the trustees may with his consent adjust any cash equivalent so as to reflect rights that would have accrued if the scheme had been subject to GMP conversion in accordance with Conditions 1 to 4 of section 24B.

#### **24G Powers to amend schemes**

(1) The trustees of an occupational pension scheme may by resolution modify it so as to effect GMP conversion (whether in relation to present earners, pensioners or survivors) in accordance with the conditions in section 24B.

(2) The subsisting rights provisions within the meaning of section 67 of the Pensions Act 1995 (c. 26) shall not apply to a power conferred by an occupational pension scheme to modify the scheme in so far as the power enables GMP conversion in accordance with the conditions in section 24B.

(3) Where a scheme is amended to effect GMP conversion the trustees may include other amendments which they think are necessary or desirable as a consequence of, or to facilitate, the GMP conversion.

(4) Where an occupational pension scheme is being wound up, the trustees may, before the winding up is completed, adjust rights under the scheme so as to reflect what would have happened if the scheme had been subject to GMP conversion in accordance with Conditions 1 to 4 of section 24B.

(5) In the application of section 24E by virtue of subsection (1) above, a reference to the earner includes a reference to a pensioner or survivor whose pension is subjected to GMP conversion.

#### **24H Enforcement of GMP conversion conditions**

(1) If the Regulatory Authority thinks that the conditions of section 24B have not been satisfied in relation to an amendment, modification or adjustment effected in accordance with any of sections 13(1A), 17(1A), 24F and 24G, the Regulatory Authority may make an order declaring the amendment, modification or adjustment void—

(a) in respect of a specified person or class of person,

(b) to a specified extent, and

(c) as from a specified time.

(2) Where the Regulatory Authority makes an order under subsection (1) it may—

(a) require the trustees of the scheme concerned to take specified steps;

(b) declare that specified action of the trustees shall not be treated as a contravention of the scheme if it would not have been a contravention if the order under subsection (1) had not been made.

(3) An order may be made under subsection (1) before or after the amendment, modification or adjustment takes effect.

(4) If the Regulatory Authority thinks that the process of effecting a GMP conversion of a scheme has been commenced and that a relevant condition of section 24B is not being complied with, or may not be complied with, the Regulatory Authority may by order—

(a) prohibit the taking of further steps in the GMP conversion (whether generally or in relation to specified steps), and

(b) require the trustees of the scheme to take specified steps before resuming the process of GMP conversion.

(5) Section 10 of the Pensions Act 1995 (civil penalties) shall apply to a trustee who has failed to take all reasonable steps to secure compliance with the conditions of section 24B in relation to an amendment, modification or adjustment effected in accordance with any of sections 13(1A), 17(1A), 24F and 24G.”

359. Section 14 of the Pensions Act 2007 also amended sections 13 and 17 of the PSA 1993 so that the requirements of those sections as to minimum pensions for earners (section 13) and minimum pensions for widows and widowers (section 17) could be omitted by a GMP conversion scheme where the conversion conditions in section 24B of the PSA 1993 were satisfied: see sections 13(1A) and 17(1A), as amended.
360. The relevant regulation as to actuarial equivalence for the purposes of condition 1 is section 24B is regulation 27 of the Occupational Pension Schemes (Schemes that were Contracted-out) (No 2) Regulations 2015.
361. At the outset, it must be noted that there can be no GMP conversion under these statutory provisions without the consent of the employer in advance: see section 24E(2). In the present case, the employers have not consented to GMP conversion pursuant to these provisions but they have not altogether ruled out the possibility that they might give such consent in the future..
362. I heard argument as to the potential operation of these provisions and whether they could be used in relation to the schemes with which this case is concerned (if the consent of

the employer were to be forthcoming). In particular, I heard submissions from Mr Simmonds QC on behalf of the Trustees and from Ms Stout on behalf of the Crown.

363. Mr Simmonds submitted that there were deficiencies in the statutory provisions which meant that they could not be operated successfully in relation to the schemes in the present case. Ms Stout submitted the opposite. At the end of the hearing, Ms Stout invited me not to rule on the points which had been argued as to the operation of these provisions, particularly if I were minded to accept Mr Simmonds' submissions. She submitted that as the employers in the present case did not consent to GMP conversion pursuant to these provisions, it would not be necessary for me to deal with the arguments which had been raised as to their possible operation in other cases. She also stressed that any decision to the effect that there were deficiencies in the statutory provisions would have implications for other cases and might prove to be unfortunate. Notwithstanding this stance on behalf of the Crown, Mr Simmonds invited me to rule on the points which had been argued. He stressed that these points had been fully argued. If the employers were to change their minds about consenting to GMP conversion then it would be relevant to the parties in this case to know whether the statutory provisions operated satisfactorily. He also stated that when the Crown had intervened in this case it had been understood that the parties would make submissions as to the operation of these provisions and the parties had done so.
364. In view of the fact that the issues arising as to sections 24A to 24H of the PSA 1993 were fully argued before me and that it is possible that the court's decision on those issues would be of assistance to the parties and also of assistance to others in the pensions industry who would be interested in the outcome of this case, I will deal with the points which have been argued.
365. The suggested difficulty with the operation of the statutory provisions is said to be that they permit GMP conversion in relation to earners (and following the death of the earner, in relation to survivors) but they do not permit GMP conversion in relation to persons who are survivors at the time of the conversion. The Crown submits that this difficulty does not arise and that GMP conversion is possible under the statutory provisions in relation to both earners and persons who are survivors at the time of the conversion.
366. Mr Simmonds put forward two points which he said could be considered to be helpful to the Crown's argument. His first point was that the power to amend a scheme is conferred by section 24G; he submitted that the references to amendments in section 13(1A) (dealing with earners) and in section 17(1A) (dealing with survivors) did not create independent powers to amend but were cross references to the statutory provisions in sections 24A to 24H. Section 24G states that the power to amend a scheme may be used to effect GMP conversion "whether in relation to present earners, pensioners or survivors". That suggests that the power can be used where the beneficiaries under the scheme include persons who are survivors at the time of conversion. It was submitted that the wording of section 24G(1) counteracted the impression which might have been given by the definition of "GMP conversion" in section 24A(1)(b), referring to "earner" alone without a reference to survivors.



367. The second point which might be said to support the Crown's argument was that section 24G(5) provides that for the purposes of section 24E (dealing with procedural requirements) a reference to "an earner" includes a reference to a pensioner or survivor whose pension is subjected to GMP conversion. Section 24E refers to "earner" in two places, i.e. in section 24E(3)(a) where it requires consultation with the earner in advance of conversion and in section 24E(4) which requires notice to Her Majesty's Revenue and Customs that conversion will affect the earner. In the light of section 24G(5), it would seem that both of these references to "the earner" are to be taken to include survivors. Accordingly, section 24E(3)(a) requires consultation with survivors in advance of conversion. However, the language of the two sub-paragraphs of section 24E(3) deals with survivors in different ways; section 24E(3)(b) expressly refers to survivors whereas section 24(3)(a) only refers to earners (but subject to the operation of section 24G(5)).
368. Mr Simmonds then made two points which he said were unhelpful to the argument for the Crown. The first of these was based on section 24B(3) which laid down Condition 2. Condition 2 as there expressed was a safeguard for an earner but there was no equivalent or similar safeguard for a person who was a survivor at the time of the conversion. Further, the extended definition of "earner" in section 24G(5) did not apply to section 24B. Whilst on section 24B, Mr Simmonds suggested that section 24B(7) appeared to focus on the position of earners and survivors were not mentioned.
369. Mr Simmonds's second point which he said was unhelpful to the Crown was based on condition 4 which referred to section 24D. He submitted that section 24D presupposed that the persons who would be subject to GMP conversion would all be earners at the time of the conversion.
370. Then Mr Simmonds commented that there were three points which did not carry matters any further forward. These were:
- (1) the fact that "guaranteed minimum pension rules" was defined in section 24A(1)(a) to refer to the rules in sections 13 and 17 and section 17 dealt with survivors;
  - (2) the argument that "in relation to" an earner (in section 24A(1)(b)) could be read so as to include the rights of a survivor which would be "in relation to" an earner;
  - (3) references to Hansard where there was a discussion of the amendment of section 17 (by introducing section 17(1A)).
371. Ms Stout made the following points in favour of a construction that would allow GMP conversion in relation to persons who were survivors at the time of conversion:
- (1) the relevant provisions contain many references to the position of survivors;
  - (2) the reference in section 24B(1)(b) "in relation to an earner" does not restrict the power so as to exclude persons who are survivors at the time of conversion because section 24B(1)(b) refers to the scheme following conversion no longer containing "the guaranteed minimum person rules" and this phrase is defined to include the rules specified in section 17, dealing with survivors;

- (3) a survivor's pension is "in relation to an earner"; there is no independent entitlement to a survivor's pension and see also section 8(2) which explains the relationship between the survivor's pension and the position of an earner;
- (4) section 24B(1)(b) is in a definition section, whereas the power to amend is conferred by section 24G which makes it clear that the power applies to enable conversion in relation to "present earners, pensioners or survivors";
- (5) section 24E(3) read together with section 24G(5) requires consultation with survivors before conversion;
- (6) the purpose of the provisions would be advanced by the Crown's interpretation but not by the rival interpretation;
- (7) the fact that condition 2 in section 24B does not provide a safeguard for survivors will not necessarily create a practical problem but even if it did that would not justify reading the statutory provisions in such a way that made it impossible to convert a pension of a person who is a survivor at the time of conversion;
- (8) Ms Stout also relied on a statement in Hansard as to the amendment which was made to section 17 of the PSA 1993.

372. Having set out the arguments in relation to the operation of the statutory provisions, I can now say that I am persuaded that those provisions do enable GMP conversion in relation to persons who are survivors at the time of conversion. The principal reasons for this conclusion are as follows:

- (1) the GMP rules apply to both earners and survivors;
- (2) it would have been well understood at the time these provisions were enacted that there would be many schemes where the beneficiaries included a number of present survivors;
- (3) there is no obvious reason why Parliament would have wished to permit GMP conversion for earners but not for persons who were survivors at the time of conversion; indeed, the opposite is likely to be that case, in that Parliament would have wished to have GMP conversion for all persons receiving pensions under the scheme;
- (4) the power to convert is conferred by section 24G in terms which readily appear to permit conversion in relation to persons who are survivors at the time of the conversion;
- (5) the interpretation put forward by the Crown advances the apparent purpose of the provisions and the rival interpretation does not;
- (6) although there may be questions arising as to the operation of the provisions in relation to persons who are survivors at the time of conversion, there is no question which, if answered in a particular way, would make it impossible to

have conversion in relation to persons who are survivors at the time of conversion;

- (7) any difficulties in interpreting section 24B(7) would not seem to be sufficient to justify reading the provisions so that they do not apply to persons who are survivors at the time of conversion;
- (8) the fact that Condition 2 appears only to apply to the pensions of earners is not a sufficient reason to read the provisions so that they do not apply to persons who are survivors at the time of conversion.

373. In the light of my conclusion as to the operation of sections 24A to 24H of the PSA 1993, I do not think that it is necessary to consider the argument based on Hansard.

*The methods appraised in the light of the above*

374. I must now appraise methods A to D in the light of the rulings I have given above.

375. The RBs contend that there is no issue arising as to minimum interference with the rights of others because the only method so far identified which properly gives effect to the obligation to equalise benefits is method A3. This submission was based on Mr Short's contention as to what is involved in a term by term approach. I have not accepted that contention. It follows that A3 is not necessarily the only method which results in an equalisation of benefits. This means that there is a very real question as to how the principle of minimum interference applies in this case.

376. Mr Short accepts that if he is wrong about his term by term argument then method B also equalises benefits (I will consider methods C and D separately later). On that basis, there are two methods (at least) of equalising benefits, namely methods A and B. Applying the principle of minimum interference in this case, it is immediately apparent that method A3 is inconsistent with that principle. Method A3 is significantly more expensive for the Banks to fund than method B. The principle of minimum interference means that the Trustee is not required to adopt A3 and is therefore not entitled, as against the Banks, to do so. Although not much attention was paid to methods A1 and A2 as distinct from method A3, the same reasoning applies to them also.

377. It follows that method A3 is not a permissible method of equalising benefits in this case, at any rate without the consent of the Banks. It is clear that the Banks do not consent to the adoption of method A3.

378. It is convenient next to consider method B and method C1. I have already described what is involved in these methods and there is a further description of that in the agreed document at Appendix B to this judgment. To recap, method B is based on year-by-year calculations of the pension the member would receive under existing provisions and the pension they would receive had they been of the opposite sex (all else being equal). The greater of the two calculations would then form the basis of the payment to the member. Method C1 is a variant of method B. It differs from method B in that, if the comparison changes from favouring one sex to the other, the less generous calculation starts to be paid until accumulated gains prior to the change are exceeded by the divergence in payments after the change. Method C1 is identical to method B if the pension received

by incorporating the GMP requirements applicable to one sex is higher at all ages than that by incorporating the GMP requirements applicable to the other. Method C1 therefore gives rise to the same or, potentially, a lower cost than method B.

379. The difference between method B and method C1 is revealed by comparing the illustrations of these two methods in Appendix B. Up to age 75, the woman receives the pension she is entitled to under the relevant scheme and the man's pension is levelled up to that of the woman. At age 76, the woman is entitled to £6,500 under the terms of the scheme but the man is entitled to £6,504 under the terms of the scheme. Ignoring what had happened in earlier years, it might be said that the man should receive £6,504 and the woman's pension of £6,500 should be levelled up to £6,504 to provide for equality of benefits. That is indeed what happens with method B. However, method C1 does not ignore what happened in earlier years. Instead, method C1 notes that up to age 75, the man has received an accumulated amount of £285 over what he was otherwise entitled to under the terms of the scheme (ignoring the term which required equalisation). This £285 is treated as an advance payment on account of the sums due to be paid to the man from age 75 onwards. As the woman is due to receive £6,500 at age 76, part of the £285 is set against the £6,504 to reduce the man's pension but not so that it is reduced below £6,500. Thus, the man receives £6,500 and because the man does not receive £6,504, the woman's pension is not increased from £6,500 to £6,504 either. Both receive £6,500. The accumulated £285, or what remains of it, is set off in the same way in later years so that all the way up to age 86, the man and the woman receive the same amount, which happens to be the sum to which the woman is entitled under the scheme. If the total sums received by the man are accumulated at any point in time, the result of equalisation is that the man will at all such times have received an accumulated amount which is at least as much as his entitlement under the scheme (absent the sex equality rule). In the illustration, the woman receives the sums she is entitled to under the scheme until age 87 when the equality rule means that her payment is increased to equal that of the man.
380. Accordingly, method C1 provides for equal treatment of men and women. The next question therefore is whether there is a reason why it is not a permissible method to adopt in this case. Could it be argued that method C1 offends the principle of minimum interference, applying the principle from the standpoint of the beneficiary? Taking the illustration in Appendix B, could it be said that method C1 interferes impermissibly with the rights of the male beneficiary when, at age 76, his annual pension is reduced from £6,504 to £6,500? The same question applies to the annual pension received by the male beneficiary in each year thereafter up to age 86. I consider that what matters is that if the matter is assessed at any point during the time that a pension is in payment and if one has regard to all of the payments made to the man up to that point, the position is that the man has not only received equal treatment to a woman but he has also received not less than he would have been otherwise entitled under the scheme. Accordingly, I conclude that method C1 does not infringe the principle of minimum interference considered from the standpoint of the beneficiary and is a permissible method to give effect to the requirement for equal treatment.
381. I now need to consider the refinement of method C1 which is involved in method C2. To recap, the difference between method C1 and C2 is that method C2 allows for interest from the date of payment to the date of calculation when comparing the values of

accumulated gain prior to the advantage switching from one sex to the other and the values of the loss since that switch. Put shortly, C2 seeks to quantify the value of having a sum of money at an earlier point in time as compared with having the same sum of money at a later point in time.

382. If I am right in my conclusion in relation to method C1, I consider that the logic of the position is that when assessing the accumulated amount to be available to be set off against later payments, it is appropriate to factor in the time-value of money. The receipt of a sum of £X in year 1 is more valuable than the receipt of a sum of £X in year 25. The difference in value can properly be expressed by adding an appropriate rate of interest to the £X received at the earlier point of time. However, for the purposes of the calculation, the rate of interest which is used should be conservative. It should reflect the benefit to the pensioner of having a sum of money earlier than otherwise. I see no basis for adopting the rate of investment return actually earned or expected to be earned on the trust assets.
383. The parties made detailed submissions to me as to the rate of interest which was appropriate to be paid by the Trustee to a beneficiary in relation to payments which had been wrongly withheld in the past. I will deal with that topic in detail later in this judgment. As I later explain, the appropriate rate of interest on back payments should be 1% over base rate from time to time. That rate is the rate which I consider to be appropriate in this case to compensate the beneficiary for being kept out of money to which he was entitled. It is not inevitable that the rate of interest to be used for the purpose of method C2 should be the same as this rate. However, the purpose of adding interest into the calculation used for method C2 is to require the pensioner to give credit for the benefit to him of having had a sum of money earlier than otherwise. This suggests to me that the rate of interest to be used to identify the value to the pensioner of having a sum of money early should be broadly similar to the rate of interest used to compensate the pensioner from being kept out of this money. In the end, I do not see a good reason for choosing a different rate of interest for the purposes of method C2 from that chosen in relation to the obligation to make good previous underpayments. Accordingly, the rate of interest to be used for the purpose of method C2 will be 1% over base rate (simple interest). It is accepted that the rate of interest should be fixed each year by reference to base rate from time to time.
384. I will next consider method D1. To recap, method D1 involves an actuarial valuation of the benefits of the unequalised male and of the unequalised female and results in the disadvantaged sex, assessed from the actuarial perspective, receiving the actuarial valuation attributable to the advantaged sex.
385. The Banks support the use of method D1. They say, correctly, that the assessment of actuarial equivalence is commonplace in the pensions industry for a whole range of purposes. The Banks are attracted by the idea that method D1 involves a one-off calculation which will deal with the issue of inequality from the date which is chosen for the assessment onwards although they acknowledge that method D1 does not deal with the period prior to the date which is chosen as the date of assessment. They say that, because the calculation is one-off and does not involve a comparison being made every year while a pension is in payment, method D1 involves much less administration and, eventually, will involve less cost.

386. The RBs submitted that method D1 did not achieve equality of treatment as its use did not result in comparable pensioners receiving the same annual sums. They also submitted that method D1 infringed the principle of minimum interference, judged from the standpoint of a beneficiary. As I am clear that the RBs are correct in this second submission, I will not decide whether the obligation to treat members equally is achieved by a method which provides for actuarial equivalence of treatment but where the annual payments are unequal.
387. As regards the principle of minimum interference, the RBs submit that method D1 involves an impermissible interference with their rights. They say that their rights under the scheme are to receive the pension payments to which they are entitled under the scheme together with any further payment needed to ensure that they are treated no less favourably than a pensioner of the other sex. The scheme provides for pension payments to be made during the life of the pensioner and of any survivor. The scheme provides for the payments to respond to inflation from time to time. This means that if a pensioner or a survivor live longer than some actuarial prediction, they will be entitled to receive a pension in accordance with the scheme levelled up, if appropriate, to ensure equal treatment between men and women. Further, the pension payable will respond to the actual level of inflation. The RBs submit that method D1 substitutes for the pensioner's and the survivor's actual entitlement an entitlement based on actuarial assumptions. Only in the case of a coincidence will those assumptions be the same as the actual circumstances which come about. If method D1 is adopted, the pensioner and the survivor will receive pension payments based on assumptions rather than pension payments by reference to the actual circumstances.
388. As I have explained, a simple way to understand the effect of method D1 is to say that it involves the assessment of a capital sum to reflect the fact that a beneficiary is not being treated equally to a beneficiary of the opposite sex and the capital sum is then converted into an annuity to be added to the unequal pension payable under the terms of the scheme.
389. The RBs also pointed out that method D1 might involve making assumptions about the choices a member will make as to retirement age or the date of leaving active service or as to taking a commuted payment. These choices can have a significant impact on the actuarial calculation. The RBs say that members should not have an actuarial equivalence imposed on them on the basis of assumptions as to their choices which might be different from their actual wishes. I can see that it might be possible to avoid making assumptions about member's choices by waiting until the member makes his actual choices and then carrying out an actuarial calculation which reflects those choices but that approach to method D1 will involve greater complication as compared with adopting a single date and making common assumptions for all members.
390. I accept the submissions of the RBs as to how method D1 involves an interference with their rights. I agree that method D1 does interfere with the rights of a beneficiary to receive the payments due under the scheme levelled up to remove inequality of treatment. Accordingly, as there is another permissible way in which equality of treatment can be provided (i.e. method C2), and method C2 does not interfere with the rights of pensioners, it follows that method D1 infringes the principle of minimum interference, judged from the standpoint of pensioners.

391. I will next consider method D2. This method involves the use of the power in sections 24A to 24H of PSA 1993 to modify the Schemes to effect GMP conversion. I have considered the operation of those sections earlier in this judgment. I have held that these provisions are workable to permit GMP conversion not only in relation to earners but also in relation to persons who are survivors at the time of the conversion. However, section 24E(2) provides that the Trustee may only exercise this power if the employer under the scheme consents to the GMP conversion in advance. In the present case, the Banks do not at present consent. The result at present therefore is that the Trustee is not able to modify the Schemes to effect GMP conversion under the statutory provisions. This means that method D2 cannot be used in this case at the present time.
392. Although the above conclusion disposes of the possibility that method D2 can be used in this case at present, I will comment on a further submission made by the RBs. They drew attention to the illustration of method D2 in Appendix B and submitted that the result of method D2 was that there was a substantial departure, adverse or potentially adverse to pensioners, from their rights under the Schemes. It was then submitted that the result was that method D2 did not provide equality of treatment. That submission confuses two different concepts. First, there is the concept of equality of treatment. Then there is the concept of minimum interference with rights. The requirement of equality is imposed by Article 157 and by section 67 of EA 2010. If there is equal treatment, then those requirements are met. There is a separate question as to the method of achieving equality which might be chosen by the Trustee and imposed on the employers and the members. In the absence of sections 24A to 24H of PSA 1993, that question would be determined by applying the principle of minimum interference with rights. However, in a case which comes within those sections, those sections confer the power to adopt method D2, whether or not the method interferes with the rights of others. In other words, the interference is authorised by statute. This point can be illustrated by an example. If the Trustee first amended the Schemes by using method C2 and thereby provided equal benefits in a way which I have held is permissible, the Trustee could thereafter use the power to convert given by sections 24A to 24H of PSA 1993 (providing the consent of the employers was obtained). That would produce a result similar to method D2, whereby all members are treated equally on the basis of actuarial equivalence. That result would be permitted by the statutory provisions and would not infringe Article 157 or section 67 EA 2010.
393. The result of the above is that method A3, promoted by the RBs, infringes the principle of minimum interference, judged from the standpoint of the Banks and method D1, promoted by the Banks, infringes the principle of minimum interference, judged from the standpoint of the beneficiaries. If one rules out method A3 and method D1 on those grounds, that leaves methods B and C for consideration. Method C is somewhat less costly than method B and method C2 is somewhat less costly than method C1. In those circumstances, applying the principle of minimum interference again, the Banks are entitled to say that the Trustee must adopt method C2 and may not adopt method C1 or method B.
394. In addition to the considerations to which I have referred which have led me to the above conclusions, there was discussion as to the administrative burdens, and the resulting cost, involved in the various methods. Consideration was also given to the need to explain matters to beneficiaries and it was pointed out that some of the methods would

be easier to explain and would be more readily understandable by beneficiaries than other methods. Those considerations do not lead me to change the conclusions I have reached in relation to methods A3 and D1 and it is not said that I should reject method C2 and prefer method C1 or method B for these reasons. Accordingly, my conclusion remains that the Banks are entitled to say that the Trustee must adopt method C2.

## **PART VII: ISSUE 11**

### *Issue 11(a) and (b)*

395. Issue 11 is in these terms: “To the extent that members have in the past been paid lower benefits than would have been paid had one of the equalisation methods been implemented from 17 May 1990:
- (1) Is the Claimant as trustee obliged to make back-payments to the member?
  - (2) If so, should back payments be made (i) going back 6 years (and if so, 6 years before what date), (ii) going back to 17 May 1990, or (iii) going back to some other date?
  - (3) Should interest be added to the back-payments, and if so at what rate?
  - (4) Should the calculation of cumulative benefits under Method C and Method D take into account only those back payments as allowed for under (b)-(c) above?”
396. As to Issue 11 (a), it is accepted that the Trustee is obliged to make back-payments to members.
397. As to Issue 11(b), the parties did not agree about the period of time which was relevant for the purpose of calculating the amount of back-payments, although no one argued that the period of time went back before 17 May 1990. The RBs contended that the Trustee was obliged to make good any underpayments of pension during the period that a member had been entitled to receive a pension and there was no limitation as to time in relation to a claim for back-payments. The Banks contended that there were limitations as to time on a claim for back payments and that those limitations were provided for in various rules of the various schemes and, in any event, there was a statutory limitation period imposed by section 134 of EA 2010. The parties began their submissions by referring to section 134 of EA 2010 but, in the course of submissions, it emerged that the right way to approach the matter was first to consider the rules of the Schemes, then to consider section 92(5) of PSA 1993 and then to consider section 134 of EA 2010.
398. Accordingly, I will begin by considering the rules of the Schemes. In their written submissions, the parties identified certain rules to illustrate the range of rules which were relevant to the present issue. I heard oral submissions in relation to these examples and I was not asked to consider any other examples as to the rules of the other Schemes.
399. The Banks identified three rules for the purposes of their submissions. These were rule 62.9 of the Lloyds Bank Pension Scheme No 2 Rules dated 21 December 1995, rule 9.5 of Part III (Capital Bank Section Specific Rules) of the Rules of the legacy Bank of



Scotland 1976 Pension Scheme and rule 24.1 of Part IV (Bank of Wales Section Specific Rules) of the Rules of the legacy Bank of Scotland 1976 Pension Scheme. The RBs also identified three rules, namely, rule 62.9 of the Lloyds Bank Pension Scheme No 2 Rules dated 21 December 1995 (already identified by the Banks), rule 16.3 of the HBOS Final Salary Pension Scheme (“the HBOS FSPS”) and rule 8.2 of the Lloyds Bank No 1 scheme.

400. For convenience, I will refer to these rules as follows:

- (1) “Rule 1” is rule 62.9 of the Lloyds Bank Pension Scheme No. 2 Rules dated 21 December 1995;
- (2) “Rule 2” is rule 9.5 of Part III (Capital Bank Section Specific Rules) of the Rules of the legacy Bank of Scotland 1976 Pension Scheme;
- (3) “Rule 3” is rule 24.1 of Part IV (Bank of Wales Section Specific Rules) of the Rules of the legacy Bank of Scotland 1976 Pension Scheme;
- (4) “Rule 4” is rule 16.3 of the HBOS FSPS;
- (5) “Rule 5” is rule 8.2 of the Lloyds Bank No 1 scheme.

401. Somewhat curiously, the skeleton arguments quoted parts only of the relevant rules and I was not taken in the course of argument to the documents which set out the full text of the relevant rules. I expressed concern about this but I was still invited simply to construe the extracts from the rules which had been set out in the skeleton arguments. Notwithstanding this, I have since the hearing located the full text of the relevant rules and I have taken account of the full text when seeking to arrive at the correct interpretation of the rule.

402. Rule 1 provides:

“62.9 Failure to claim benefit

No beneficiary shall be entitled to claim any instalment of pension or other benefit to which he is entitled under the Scheme more than 6 years after that instalment has fallen due for payment.”

403. Rule 2 provides:

“9.5 Forfeiture of unclaimed benefits

Any sum which may have become due to a Member or other person entitled to benefit under the Rules shall be forfeited if it has not been claimed during a period of at least six years from the date upon which that sum became due, but, if the sum formed one payment of a pension or annuity the right to such pension or annuity shall not thereby be extinguished.”

404. Rule 3 provides:

“24 Unclaimed benefits

24.1 If any pension or benefit or any instalment remains unpaid to and unclaimed by the person to whom it is payable for a period of six years from the date it became payable, then the entitlement to it shall be extinguished and it shall be retained by the Trustees in the Fund.

24.2 Any unclaimed AVC Interest shall be held by the Trustees on trust for the AVC Member or his estate as the case may be.”

[An AVC was an Additional Voluntary Contribution paid by a Member under Rules 19 or 20 of these Rules. An AVC Interest was the interest in the Fund which a Member had in respect of his AVCs.]

405. Rule 4 provides:

“16.3 Benefits not assignable

Benefits under the Scheme are subject to restrictions imposed by Sections 91 to 93 of the Pensions Act 1995 (assignment and forfeiture, etc). These restrictions are intended generally to ensure that benefits are paid only to the person entitled under these Rules, rather than to any other person. The restrictions prevent benefits from being assigned, commuted, surrendered, charged, or forfeited, except in specified circumstances.

However, there are exceptions to the restrictions imposed by Section 91 to 93. To the extent permitted by those exceptions:

...

16.3.4 the Trustees will forfeit any benefit if the person entitled to the benefit does not claim it within six-years of the date on which it becomes due.”

406. Rule 5 provides:

“8.2 Assignment, forfeiture, etc

Benefits under the Scheme are subject to restrictions imposed by Sections 91 to 93 of the Pensions Act 1995 (assignment and forfeiture, etc). These restrictions are intended generally to ensure that benefits are paid only to the person entitled under these Rules, rather than to any other person. The restrictions prevent benefits from being assigned, commuted, surrendered, charged, or forfeited, except in specified circumstances.

However, there are exceptions to the restrictions imposed by Sections 91 to 93. To the extent permitted by those exceptions:

...

8.2.5 the Trustee may also reduce a person's benefits, or decide that a person's benefits will be forfeited, in any other circumstances allowed by sections 91 and 92 of the Pensions Act 1995.

However, General Rules 8.2.1 and 8.2.4 do not apply to GMPs, and this General Rule 8.2 does not apply to any lump sum or instalment of pension that falls due for payment before the benefit otherwise ceases to be payable."

407. Before dealing with these rules individually, I will refer to the submissions made by the RBs as to the operation of these rules. The RBs submitted that the various rules all dealt with circumstances where no pension had been claimed and the rules did not apply to a case where a pension had been claimed and paid but the full amount of the pensioner's entitlement was not paid to him. The RBs also submitted that the rules provided for the trustees to have a discretion as to what to do in a case which came within the relevant rule.
408. I will now consider the correct construction of these five rules. Rule 1 is not confined to a case where the pension has not been claimed and nothing has been paid. Rule 1 specifically refers to any instalment of pension. Accordingly, Rule 1 applies in a case like the present where the trustees have made payments in relation to pension entitlement but have underpaid the beneficiary. In such a case, Rule 1 provides that the beneficiary is not entitled to claim the amount of the arrears more than six years after those arrears accrued and ought to have been paid. As the beneficiary is not entitled to claim those arrears, the trustees are not bound to pay the beneficiary those arrears and any payment of those arrears would be a voluntary payment by the trustees. I was not specifically addressed on whether other rules of this Scheme allow the trustees to make ex gratia payments but Rule 1 does not allow an ex gratia payment in a case which comes within Rule 1.
409. Rule 2 is not confined to a case where the pension has not been claimed and nothing has been paid. Rule 2 refers to "any sum which may have become due" and also refers to a case where the sum formed "one payment of a pension or annuity". Accordingly, Rule 2 applies in a case like the present where the trustees have made payments in relation to pension entitlement but have underpaid the beneficiary. In such a case, Rule 2 provides that the unpaid sum shall be forfeited if it is not claimed within six years after it accrued and ought to have been paid. As the unpaid sum is forfeited in such a case, the beneficiary is not entitled to claim that sum, the trustees are not bound to pay the beneficiary that sum and any payment of that sum would be a voluntary payment by the trustees. I was not specifically addressed on whether other rules of this Scheme allow the trustees to make ex gratia payments but Rule 2 does not allow an ex gratia payment in a case which comes within Rule 2.

410. Although the language of Rule 3 is different from that of Rules 1 and 2, it operates in the same way as those rules.
411. Again, although the language of Rule 4 is different from that of Rules 1 and 2, I consider that it operates in the same way as those rules.
412. Rule 5 operates in a different way from Rules 1 to 4. Rule 5 gives the trustees a discretion (it uses the word “may”) to decide that a person’s benefits will be forfeited in any circumstance which comes within sections 91 and 92 of the Pensions Act 1995.
413. It is next necessary to consider sections 91 to 93 of the Pensions Act 1995 (in particular, section 92), first because Rules 1 to 3 are subject to its terms and, secondly, Rules 4 and 5 expressly refers to those sections.
414. Section 92 of the Pensions Act 1995 provides, so far as relevant:

“92.- Forfeiture, etc.

(1) Subject to the provisions of this section and section 93, an entitlement to a pension under an occupational pension scheme or a right to a future pension under such a scheme cannot be forfeited.

...

(5) Subsection (1) does not prevent forfeiture by reference to a failure by any person to make a claim for pension—

(a) where the forfeiture is in reliance on any enactment relating to the limitation of actions, or

(b) where the claim is not made within six years of the date on which the pension becomes due.

...

(7) In this section and section 93, references to forfeiture include any manner of deprivation or suspension.”

415. Section 94(2) of the Pensions Act 1995 provides that in sections 91 to 93, “pension” in relation to an occupational pension scheme “includes any benefit under the scheme and any part of a pension and any payment by way of pension”.
416. I will deal with the effect of section 92 in relation to Rules 1 to 4 and then discuss the position in relation to Rule 5. Rule 1 does not refer to “forfeiture” of the right to the unpaid arrears. However, section 92(7) defines “forfeiture” for the purposes of section 92 to extend to “any manner of deprivation” of a pension and I will assume for present purposes (the contrary was not argued) that Rule 1 provides for a “forfeiture” within the meaning of section 92 after six-years. Rules 2 and 4 do refer to forfeiting the arrears and those Rules are subject to section 92. Rule 3 refers to the entitlement to pension being “extinguished” and that would seem to come within the definition of “forfeiture” for the

purposes of section 92. Accordingly, Rules 1 to 4 will not be effective unless they come within section 92(5).

417. As to section 92(5), the RBs submitted that the references to making a claim dealt only with making a claim to a pension and did not extend to a case of making a claim to be paid arrears of payments where the pension was in payment but the payments had been wrongly calculated and underpayments were made. Section 92(5) refers to “a claim for pension” but “pension” is defined by section 94(2) to include any part of a pension or any payment by way of pension. Thus, where a beneficiary’s payments are wrongly calculated and he is underpaid, and the beneficiary does not make a claim in relation to the underpayments, that would be a case where the beneficiary had not made a claim for a payment by way of pension within section 92(5) and a rule which provided for forfeiture after six-years would be a valid rule for the purposes of section 92. As indicated above, I consider that Rules 1 to 4 do provide for a forfeiture of the right to the arrears if they are not claimed for six years after becoming due and, accordingly, Rules 1 to 4 are valid for the purposes of section 92.
418. As to Rule 5, on my interpretation of section 92, the trustees are given a discretion by Rule 5 whether to forfeit a beneficiary’s right to be paid arrears of payment if those arrears have not been claimed within six years of the date on which the arrears became due. Rule 5 will only be valid if it complies with section 92(5), but Rule 5 does comply with section 92(5) in the same way as Rules 1 to 4 comply.
419. Mr Rowley QC on behalf of the Banks accepted that the reference to “a claim” in these Rules and in section 92(5) was not restricted to a case where the claim was made by the issue of legal proceedings claiming payment of the arrears. I was not asked to make findings as to the date of any possible claim in these cases which would stop time running under these Rules and/or under section 92(5) of the Pensions Act 1995.
420. As explained, the Trustee does not have a discretion under Rules 1 to 4 to make payments to the member for the period which is more than six years before any relevant claim. However, in a case governed by Rule 5, the Trustee does have a discretion. I will mention later in this judgment submissions as to what a trustee should do where it is able to assert a limitation defence under the general law against a claim by a beneficiary but, at this point, I will consider how the Trustee should go about the exercise of the Rule 5 discretion leaving out of account any question of a limitation defence under the general law. In the case now being considered, where the Trustee is given a discretion to pay or to withhold a back payment in relation to a period which is more than six years before the back payment was claimed, the general rules as to the exercise of a trustee’s discretion apply. A trustee must have regard to all relevant considerations and no irrelevant considerations and must make a decision which is rational and not perverse.
421. Apart from the position under the various rules of the Schemes, it was argued that the Trustee had a limitation defence to a claim for back payments. Reliance was placed on sections 133 and 134 of the EA 2010.
422. Section 133 of the EA 2010 deals with the remedies available where there has been a breach of an equality rule or equality clause with respect to rights under an occupational pension scheme. So far as the remedy of an order that arrears of benefit or damages (or any other amount) be paid to the complainant, the court or employment tribunal must

not make such an order unless the case comes within section 134: see section 133(2) and (3). By section 134, the court or employment tribunal may order that arrears of benefit or damages (or any other amount) be paid but not in respect of a time before six years before the proceedings were commenced.

423. The RBs accept that section 134, if it takes effect in accordance with its terms, gives the Trustee a limitation defence so that it cannot be ordered by a court or tribunal to make good back payments in relation to a time which is more than six years before proceedings were commenced. However, Mr Short for the RBs contends that section 134 is ineffective because it infringes the European principle of equivalence.
424. To make good his submission, Mr Short has to establish two propositions. The first proposition is that a claim by a member of a pension trust for arrears of payment to which he was entitled under a pension trust is a claim by a beneficiary under a trust to recover from the trustee trust property in the possession of the trustee within section 21(1)(b) of the Limitation Act 1980 so that there is no limitation period imposed by the 1980 Act in respect of such a claim. The second proposition is that the provision in section 134 of the EA 2010, which imposes a six-year limitation period on such a claim, where the claim is based on a breach of an equality rule, infringes the European law principle of equivalence which requires a claim to a remedy for breach of a right conferred by European law to be treated in no less favourable a way than a similar domestic claim would be treated.
425. The Banks (supported by the Crown) challenged both of these propositions. They said that a claim by a beneficiary against a trustee of a pension trust for arrears of payments due under the terms of a pension trust was not within section 21(1)(b) of the 1980 but was a claim for breach of trust within section 21(3) of the 1980 Act to which a six-year limitation period applied. Secondly, even if such a claim was not subject to a limitation period under the 1980 Act, the six-year limitation period imposed in this case by section 134 of the EA 2010 did not infringe the European law principle of equivalence.
426. Limitation Act 1980 section 21 provides so far as material:
- “21.- Time limit for actions in respect of trust property.
- (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—**
- (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
- (b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use.**
- ...
- (3) Subject to the preceding provisions of this section, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of

limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six-years from the date on which the right of action accrued.

For the purposes of this subsection, the right of action shall not be treated as having accrued to any beneficiary entitled to a future interest in the trust property until the interest fell into possession.

... ” (emphasis added)

427. Mr Short for the RBs submits that the three Schemes in this case created trusts of the assets held by the Trustee which were so held for the purpose of paying the benefits provided for in the Schemes. He further submits that if a beneficiary has not been paid the full amount of the benefits due to him or her under the Scheme (which incorporated a sex equality rule) and the Trustee is in possession of sufficient trust assets to make good the previous under payments, then a claim by a beneficiary for an order that the Trustee pay the amount previously withheld is a claim to recover trust property in the possession of the Trustee. Accordingly, he submits that the case is governed by section 21(1)(b) of the 1980 Act.
428. Mr Rowley for the Banks submits that such a claim is not within section 21(1)(b) but is simply a claim for a breach of trust which is subject to a limitation period of six-years pursuant to section 21(3) of the 1980 Act. He further submits that:
- (1) a member who has been underpaid does not have a proprietary claim to any specific asset in the possession of the trustee and a claim for arrears of underpayments is not a claim to recover trust property;
  - (2) if a scheme is in deficit, as many often are, then the trustee may not have any assets with which to meet the claim for arrears of payment (other than the trustee’s ability to call upon the employer to fund the obligation).
429. Section 21 of the 1980 Act contains “much-litigated provisions”: see First Subsea Ltd v Balltec Ltd [2018] Ch 25 at [1]. However, neither side was able to show me a case which was directly in point on the present issue.
430. The background to section 21 of the 1980 Act and the legislative history of the provision, involving section 8 of the Trustee Act 1888 and section 19 of the Limitation Act 1939, were explained in Williams v Central Bank of Nigeria [2014] AC 1189 at [12]-[14], [20]-[22] and [24]-[25]. Before the Trustee Act 1888, a trustee did not have a limitation defence to a claim by a beneficiary for breach of trust. The possession of trust assets by the trustee was considered to be the possession of the beneficiary. If a trustee was in possession of trust assets and did not execute the terms of the trust in relation to those assets, he had no defence based on limitation to a claim by the beneficiary requiring him to perform his trust: see Hovenden v Lord Annesley (1806) 2 Sch & Lef 607 at 633-634. Although in some cases a trustee could defend a claim by a beneficiary for breach of trust by relying on the equitable doctrine of laches, no such defence was available where the trustee remained in possession of the trust fund and was called upon by a beneficiary to perform the trust in relation to that fund: see Mills v Drewitt (1855) 20 Beavan 632.

431. The legal position of a trustee was altered by section 8 of the Trustee Act 1888 which provided the trustee with a limitation defence in relation to some claims. That position was largely re-enacted in section 19 of the Limitation Act 1939 and then in section 21 of the 1980 Act with some changes of language. Under these provisions, a trustee can in some circumstances plead a defence of limitation to a claim by a beneficiary for a breach of trust. However, a defence of limitation is not available in relation to all claims by a beneficiary against a trustee. One case where such a defence is not available is where the trustee was a party or a privy to a fraud. Another case is where the trustee had converted trust property to his use. Mr Rowley cited Thorne v Heard [1894] 1 Ch 599 and [1895] AC 495 and Re Timmis, Nixon v Smith [1902] 1 Ch 176 which discuss cases like these. At times, the submission seemed to be that because the trustees in the present case were not guilty of any fraud and had not converted trust property to their use, section 21(1)(b) did not apply. But that submission ignores the language of section 21(1)(b) which includes the simple case where a beneficiary seeks to recover from the trustee property in the possession of the trustee. The reason why there is no limitation period in relation to such a case is that the trustee is in possession of the trust property on behalf of the beneficiaries: see First Subsea Ltd v Balltec Ltd [2018] Ch 25 at [57].
432. The authorities on section 8 of the Trustee Act 1888 make it clear that the time for determining whether there is trust property in the possession of the trust is at the date of the claim: see Thorne v Heard [1894] 1 Ch 599 at 606.
433. Section 21 of the 1980 Act applies to certain causes of action only. The cause of action which is said to be relevant in this case is an action “to recover from the trustee trust property ... in the possession of the trustee”. In How v Earl Winterton [1896] 2 Ch 626, the claimant complained that a trustee had underpaid her the amount of an annuity under a will trust and she claimed an account. At 632, Kekewich J said that the claim was an action “to recover trust property”. In Burnden Holdings (UK) Ltd v Fielding [2017] 1 WLR 39 (Court of Appeal) and [2018] 2 WLR 885 (Supreme Court), the claim was by a company against a director for breach of fiduciary duty in converting the property of the company to the use of the director. It was explained that, for the purposes of section 21 of the 1980 Act, the position was to be analysed as if the director was a trustee holding trust property for the benefit of the company. The company claimed equitable compensation for the breach of fiduciary duty. In the Court of Appeal, at [38], David Richards LJ (with whom the other members of the court agreed) held that the claim to equitable compensation was a claim to recover trust property. That conclusion was not challenged in the Supreme Court: see per Lord Briggs at [13].
434. I consider that, in a case where the trustee has retained the assets which are subject to the trust and out of which the trustee is obliged to make the payment to the beneficiary, prima facie section 21(1)(b) does apply to a claim of the kind envisaged and so there is no limitation period under the 1980 Act in relation to such a claim.
435. I will now refer to the two specific submissions made by Mr Rowley. He submitted that the claim by the beneficiary is not a proprietary claim. He may or may not be right about that but it does not matter. The authorities to which I have referred as to the nature of the cause of action which is a claim “to recover trust property” support the conclusion that a claim by a beneficiary in the present case to receive late payment of arrears of sums to be paid by the trustee out of trust property is a claim within section 21(1)(b).



436. Mr Rowley referred to the possibility that a scheme might be in deficit. When a scheme is said to be in deficit what is normally referred to is a situation where the amount of the present and future liabilities of the scheme, as actuarially assessed at the present time, exceeds the present value of the assets of the scheme. That is not an assessment which is required by section 21(1)(b) of the 1980 Act. What section 21(1)(b) requires is that the trustee is in possession of trust property when the claim is issued. I understand that that is the current position in relation to all of the trusts in this case.
437. The result is that a claim by a beneficiary of the kind being considered in this case is not subject to the six-year limitation period permitted by section 21(3) of the 1980 Act because such a claim comes within the exception created by section 21(1)(b) of the 1980 Act.
438. Accordingly, I accept the first proposition advanced by Mr Short in order to challenge the efficacy of the six-year limitation period pursuant to section 134 of the EA 2010. I therefore need to examine his second proposition. In view of the fact that there is no limitation period imposed by the 1980 Act on a claim by a beneficiary under a pension trust to be paid arrears of payments due to him under the trust, does section 134 of the EA 2010 infringe the European law principle of equivalence?
439. In relation to the principle of equivalence, the parties cited to me certain authorities which included the decision of the Court of Justice in Levez v T H Jennings Ltd (Harlow Pools) Ltd (C-326/96) [1999] ICR 521, the subsequent decision of the EAT in that case, [2000] ICR 58, and the decisions of the Court of Appeal and the Supreme Court in Totel Ltd v Revenue and Customs Commissioners [2017] 1 WLR 2313 and [2018] 1 WLR 4053.
440. The Court of Justice in Levez is authority for the following propositions:
- (1) it is for the domestic legal system of each member state to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law;
  - (2) it is compatible with Community law for national rules to prescribe, in the interests of legal certainty, reasonable limitation periods for bringing proceedings; normally, reasonable limitation periods do not infringe the principle of effectiveness as it cannot be said that this makes the exercise of rights conferred by Community law either virtually impossible or excessively difficult, even though the expiry of such limitation periods entails by definition the rejection, wholly or in part, of the action brought;
  - (3) the rules laid down by the domestic legal system must not be less favourable than those governing similar domestic actions (the principle of equivalence);
  - (4) it is for the national courts to ascertain whether the procedural rules intended to ensure that the rights derived by individuals from Community law are safeguarded under national law comply with the principle of equivalence;

- (5) the Court of Justice can provide the national court with guidance as to the interpretation of Community law, which may be of use to it in undertaking such an assessment;
- (6) the principle of equivalence requires that the rule at issue be applied without distinction, whether the infringement alleged is of Community law or national law, where the purpose and cause of action are similar;
- (7) the principle is not to be interpreted as requiring member states to extend their most favourable rules to all actions brought in the relevant area of law;
- (8) in order to determine whether the principle of equivalence has been complied with in a particular case, the national court must consider both the purpose and the essential characteristics of allegedly similar domestic actions;
- (9) whenever it falls to be determined whether a procedural rule of national law is less favourable than those governing similar domestic actions, the national court must take into account the role played by that provision in the procedure as a whole, as well as the operation and any special features of that procedure before the different national courts.

441. Levez involved a claim by a woman for equal pay in reliance on Article 119 of the EC Treaty and the Equal Pay Directive (75/117/EEC). Section 2(5) of the Equal Pay Act 1970 imposed a two-year limitation period on such a claim. Other claims for money due to an employee under a contract of employment, for example, claims for unlawful deduction of wages or for unlawful discrimination on the grounds of race or disability were subject to a six-year limitation period. In Levez, the EAT held that those other claims were legitimate comparators for the equal pay claim with the result that the two-year limitation period for equal pay claims infringed the principle of equivalence. The EAT directed itself (at [19]) that the juridical basis for the actual claim and the alleged comparator must be essentially the same. It further stated at [20] that an equal pay claim was essentially a claim for breach of the contract of employment where the relevant term (as to equal pay) had been imposed on the parties by statute; in that way, such a claim was like other claims for breach of contract.

442. In the Supreme Court in Totef, Lord Briggs (with whom the other Supreme Court Justices agreed) said:

- (1) the question whether any proposed domestic claim was a true comparator with an EU law claim was context-specific (at [9]);
- (2) the court must focus on the purpose and essential characteristics of allegedly similar claims (at [10]);
- (3) it was wrong to address the question of similarity at too high a level of generality (at [12] and [28]).

443. Lord Briggs also discussed “the Proviso” that a Member State was not obliged to extend its most favourable rules, governing recovery under national law, to all actions for

repayment of charges or dues levied in breach of Community law and he said at [45]-[46]:

“45 First, the Proviso should not be regarded as some free-standing rule, separate from the principle of equivalence. Rather it is part of the Court of Justice's expression of the principle of equivalence itself, directed to explaining the standard of treatment which that principle imposes upon member states when providing procedures for the vindication of rights based in EU law. What is required is that the procedure should be broadly as favourable as that available for truly comparable domestic claims, rather than the very best available.

46 Secondly, the Proviso is, like the principle of equivalence of which it forms part, best understood in the light of its purpose.”

444. In seeking to apply the principle of equivalence in this case, it is necessary to identify a similar comparator or similar comparators (if there are any) to the claim which derives from Community law.
445. The RBs submit that the relevant comparator is a claim by a beneficiary under a pension trust to be paid arrears of monies due to him where he has not been paid the full amount which was due to him because the trustee has misconstrued or misapplied the rules of the scheme or where the amount of the payment has been wrongly calculated for any reason. In such a case, I have already agreed with the submission of the RBs that such a claim is not subject to a limitation period under the 1980 Act.
446. At the hearing, the Banks (supported by the Crown) submitted that the relevant comparators were a claim for a breach of contract (subject to a six-year limitation period) or an action by a beneficiary in respect of any breach of trust (in respect of which section 21(3) of the 1980 Act imposed a six-year limitation period). However, following the decision of the Supreme Court in Totel (which came after the hearing in the present case) the Banks acknowledged that a claim for breach of contract may be too far removed in terms of context, purpose and essential characteristic, to be a true comparator. The Banks continued to submit that even if a claim which came within section 21(1)(b) was a possible comparator, the “no most favourable treatment proviso” meant that the claim in the present case could be made subject to a six-year limitation period and did not have to be treated in the same way as claims under section 21(1)(b).
447. I prefer the arguments for the RBs. In the present context, having regard to the purpose of the various claims which have been identified and their essential characteristics and bearing in mind Lord Briggs’ explanation as to the operation of the no most favourable treatment proviso, I hold that the relevant comparator is a claim by a beneficiary under a pension trust for arrears of payments when he has been underpaid for whatever reason. Given that such a claim is, by reason of section 21(1)(b) of the 1980 Act, not subject to a limitation period, it infringes the European principle of equivalence for section 134 of EA 2010 to impose a six-year limitation period on the type of claim being considered in the present case.

448. The result of the foregoing is that the position in relation to back payments is governed by the rules of the Schemes but there is no limitation period in respect of claims to back payments under the Limitation Act 1980 and section 134 of EA 2010 is not effective to impose a limitation period of six years. Accordingly, the position is governed only by the rules of the Schemes and I have already explained how those rules operate.
449. On the assumption that section 134 was effective, the parties had made submissions as to whether the Trustee ought to, or ought not to, rely on the limitation defence provided by section 134 to refuse to pay arrears of payments which had accrued due more than six years before the commencement of proceedings to recover those arrears. I note that the six year period for the recovery of arrears in accordance with the rules of the Schemes and the six year period for the purposes of section 134 may well be different periods as it is likely that the date of the claim, for the purposes of the rules, will be before the date of the commencement of proceedings, for the purposes of section 134.
450. The Banks submitted that the Trustee was obliged to rely on the limitation defence as against the beneficiaries and the RBs submitted that the Trustee was obliged to pay the arrears and not rely on the limitation defence. In particular, I heard competing submissions as to what principles emerged from the decisions in Re Thomson's Mortgage Trusts, Thomson v Bruty [1920] 1 Ch 508, Young v Clarey [1948] Ch 191, C&M Matthews Ltd v Marsden Building Society [1951] Ch 758 and the Australian case of Incorporated Trustees of the Australian Clergy Provident Fund v Perpetual Executors and Trustees Association of Australia Ltd [1957] VR 390. These cases concerned the nature of the statutory trust imposed by section 105 of the Law of Property Act 1925 (or its predecessor or its Australian equivalent). The actual issues determined in those cases are therefore not in point. However, the RBs relied upon the alternative reasoning in the first of these cases at pages 514 to 515. At that part of the judgment, Eve J held that a trustee of a fund was not entitled in the execution of the trusts to withhold from a beneficiary a part of the fund where the title of the beneficiary was not extinguished even though the right of the beneficiary to recover that part of the fund by bringing an action might be statute barred.
451. In view of my conclusion that section 134 is not effective in relation to the claims now being considered, I do not consider that it is appropriate for me to consider this point further. However, I will make two comments. What Eve J said about the duty of a trustee to execute the trusts of a fund is entirely in accordance with the position, as I have held, in relation to section 21(1)(b), where the trustee does not have a limitation defence where the beneficiary seeks to recover assets in the possession of the trustee. The second comment is that if statute expressly gives to a trustee a limitation defence to a claim by a beneficiary, it is a little strange to think that the trustee is acting in breach of trust by relying on the statutory defence.
452. I can now give my answer to Issue 11(b). The position is governed by the rules of the Schemes. Where Rules 1 to 4 apply, a beneficiary is entitled to claim arrears of payment only for the period of six years before its claim to be paid those arrears. Where Rule 5 applies, a beneficiary is entitled to claim arrears of payment for the period of six years before its claim to be paid those arrears and the Trustee has a discretion to pay to the beneficiary arrears which accrued before the commencement of that period of six years.

*Issue 11(c) and the rate of interest*

453. The parties agree that when the Trustee pays to a beneficiary the arrears of pension which are due to the beneficiary in accordance with this judgment the Trustee should add to the arrears a sum by way of interest in relation to the period during which each instalment was due and unpaid. It was not suggested that the underpayment should only bear interest for part of that period because, for example, there had been delay on the part of a beneficiary in claiming the arrears of payment. I agree with the trustee that it is right to acknowledge that it ought to pay interest on the arrears. The rules of equity provide for such interest to be paid in an ordinary case. The beneficiary would not need to rely on the statutory jurisdiction under section 35A of the Senior Courts Act 1981 or section 69 of the County Courts Act 1984. It will be remembered that those statutory powers do not apply where the principal sum which is due is paid before the proceedings are issued: see President of India v La Pintada Compania [1985] AC 104. The same position would appear to apply to a claim brought in an employment tribunal under section 134 of EA 2010: see the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996.
454. The parties disagree as to the rate of interest to be applied and whether the interest should be simple or compound. The RBs say that interest should be at the rate of 2% above base and should be compounded monthly or annually. The RBs add that if section 134 of EA 2010 “is treated as being applicable” then the interest paid should be simple interest at 8%. The Banks say that interest should be simple interest at base rate. However, the Banks went on to say that if I did award interest at base rate (rather than any higher rate), they would not strenuously oppose an award of compound interest. This was presumably because, in the last six years or so, interest at base rate has been at a low level where the difference between simple interest and compound interest may not be very great.
455. The Banks submit that a court or tribunal would award interest to compensate the beneficiary for being kept out of its money. The RBs did not appear to disagree with this approach. The RBs did not submit that interest should be awarded as damages to reflect the actual loss suffered by a particular beneficiary. Nor did the RBs submit that interest should be awarded to require the trustee to account to the beneficiary for any gain made by the Trustee as a result of the retention of the monies due in the past.
456. As to the approach which a court would adopt to the award of interest, I was shown a number of authorities dealing with the approach of the court in a commercial case. I was referred in particular to Sycamore Bidco Ltd v Breslin [2013] EWHC 174 (Ch) and to Challinor v Bellis [2013] EWHC 620 (Ch) where a number of earlier cases were discussed. However, the present case is not a commercial case. These two cases were cited to the Court of Appeal in Carrasco v Johnson [2018] EWCA Civ 87. That was a case of a personal loan and was treated as not being a commercial case. Although this case was not cited to me, it contains a useful summary of the relevant principles. At [17] and [27], Hamblen LJ said:

“17 The guidance to be derived from these cases includes the following:

(1) Interest is awarded to compensate claimants for being kept out of money which ought to have been paid to them rather than as compensation for damage done or to deprive defendants of profit they may have made from the use of the money.

(2) This is a question to be approached broadly. The court will consider the position of persons with the claimants' general attributes, but will not have regard to claimants' particular attributes or any special position in which they may have been.

(3) In relation to commercial claimants the general presumption will be that they would have borrowed less and so the court will have regard to the rate at which persons with the general attributes of the claimant could have borrowed. This is likely to be a percentage over base rate and may be higher for small businesses than for first class borrowers.

(4) In relation to personal injury claimants the general presumption will be that the appropriate rate of interest is the investment rate.

(5) Many claimants will not fall clearly into a category of those who would have borrowed or those who would have put money on deposit and a fair rate for them may often fall somewhere between those two rates.

...

27 The Appellant's arguments in this case highlight the importance of the principle that the court does not inquire into the detailed financial position of the claimant, but looks only at general or class attributes. To examine properly, for example, the claimant's financial position throughout the relevant period; the borrowing carried out by her, when and on what terms; whether and how she needed so to borrow; the uses to which she might otherwise have put the money and the financial consequences of so doing; the extent to which any of these matters were known or in the reasonable contemplation of the Respondent etc. would have required a mini or indeed major trial, consumed significant time and expense and may well not have resulted in definitive answers. The broad approach which the court adopts is fair, practical and proportionate."

457. In that light of that guidance, I was (rightly) not given any evidence as to the financial position of any individual beneficiaries. I was also not given any evidence which would help me identify the general or typical circumstances of the beneficiaries who had been underpaid pension in this case. I was therefore not given evidence as to what such typical beneficiaries would have done if they had been paid the full amount of the pension when it was due. So far as I can tell from the illustrations which were provided to me, the amount of the underpayments were relatively modest and would not have made a major

difference to the lives of the pensioners over the years. There was no evidence which would enable me to find that the underpayments led to a typical pensioner borrowing money at overdraft rates of interest. It is possible that a typical pensioner might have saved more money (at very modest rates of interest) if the full payments had been made but it is more likely still that a typical pensioner would have spent the further sums which he ought to have received.

458. Mr Rowley cited Lewin on Trusts (19<sup>th</sup> ed) at paras. 39-059 to 39-062 which provides support for an award of interest as simple interest at base rate. Para. 39-060 cites Bartlett v Barclays Bank Trust Co Ltd [1980] Ch 515 and Re Duckwari plc (No. 2) [1999] Ch 268 which I have considered. Mr Rowley also referred to the position where there is a complaint to the Pensions Ombudsman which results in a direction that a payment is made to a pensioner in respect of a benefit which ought to have been paid earlier. In such a case, section 151A of PSA 1993 provides that the Pensions Ombudsman may require the payment of interest “at the prescribed rate”. This rate is prescribed by regulation 6 of the Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996 as being base rate.
459. Mr Short referred me to section 134 of EA 2010 which provides for a case where a claim is brought before a court or an employment tribunal for breach of an equality clause in an occupational pension scheme. That is the section which provided, inter alia, that an award of arrears was restricted to the period of six years before the proceedings were commenced. I have held that the limitation to six years infringes the principle of equivalence in a case where the trustee is in possession of trust property out of which to pay the arrears. I am not clear whether Mr Short’s case was that if I reached that conclusion then he could not rely on section 134 in any way. I do not take that view. Although the part of section 134 which provides for a limitation on recovery to a period of six years is not effective, the remainder of section 134 would seem to me to continue to apply. Accordingly, if there were an application to an employment tribunal under section 134 and the tribunal made an award in relation to arrears of payment, then the tribunal could award interest under the Regulations (made under section 139 of the EA 2010) which apply for the purposes of a claim before an employment tribunal. Those Regulations are the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 which although they were made before the enactment of EA 2010 continue to apply, pursuant to the Equality Act 2010 (Commencement No 4, savings, Consequential, Transitional, Transitory and Incidental Provisions and Revocation) Order 2010. The 1996 Regulations were amended by the Employment Tribunals (Interest on Awards in Discrimination Cases) (Amendment) Regulations 2013. In summary, the relevant Regulations provide for interest at 8% (the rate under the Judgments Act 1838) and also provide that where the arrears accrue evenly over a period, one can simplify the calculation by taking the whole of the arrears as accruing due at the mid-point of the period. It was not argued that these Regulations give the employment tribunal a discretion to award interest at a lower rate although the employment tribunal would appear to have power to decline to award any interest. It was not suggested that the Trustee could invite the tribunal to decline to make a formal award of interest at 8% in a case where the Trustee undertook to pay interest at a lower rate. The Regulations do not apply to proceedings under section 134 of EA 2010 brought before a court, rather than the employment tribunal.

460. The rate of 8% which can be awarded by an employment tribunal under sections 134 and 139 of EA 2010 is obviously much higher than the rate which would be awarded by a court in a case like the present. Similarly, the rate of 8% is much higher than would be awarded under the equitable rules as to interest. It may be that Mr Short's provisional reliance on section 134 is to be taken as saying that if a pensioner is entitled to more than six years arrears of payment, then the arrears should bear compound interest at 2% above base rate but if the pensioner was restricted to six years arrears of payment by reason of section 134, then the interest would be simple interest at 8%. I agree with Mr Short to the extent that it would seem to be unfair to disregard the limitation in section 134 to the period of six years but yet adopt the rate of 8% which was only envisaged as applying if the period of interest involved arrears of up to six years before the proceedings were commenced. But more generally, it has been recognised that a rate of interest of 8% in recent years and at the present time is quite inappropriate when a court is asked to fix a rate to compensate a claimant for being kept out of his money: see Novoship (UK) Ltd v Mikhailyuk [2015] QB 499. Whatever might be said as to the policy of awarding interest at 8% following judgment, it seems to me to be wholly inappropriate to use a rate of 8% in this case for a period of six years before the commencement of proceedings and from the commencement of proceedings until payment.
461. I can now express my conclusions. I consider that the equitable result is that interest should be paid at 1% above base rate. If base rate had been a significantly higher rate, then I would not have gone above base rate. However, since base rate has been historically low in recent years, I reach the conclusion that such a low rate of interest is inadequate to compensate the pensioners for being kept out of their money. Conversely because the amounts of the arrears are likely to be modest in an individual case, I am not persuaded to award more than 1% above base rate.
462. It is still the normal practice of the court to award simple rather than compound interest. An award of interest by an employment tribunal in accordance with section 139 of EA 2010 and the Regulations is also simple interest. The rules of equity would also lead to an award of simple interest in a case like the present: see Lewin on Trusts at para. 39-062. I recognise that in Sempra Metals Ltd v Inland Revenue Commissioners [2008] 1 AC 561, the House of Lords stated that awards of simple interest did not do full justice to a person who ought to be compensated but the normal practice remains as I have described. I will follow that practice and award simple interest.
463. My decision as to the award of interest in equity is not altered by the possibility that an employment tribunal might be constrained to award interest at a different rate in a case where the arrears had not been paid before any such proceedings were brought.

*Issue 11(d)*

464. The answer must be that the calculation of cumulative benefits should take into account only those back-payments which are made.



## PART VII: ISSUES 12 AND 13

### *Issue 12*

465. Issue 12 is in these terms: “If the required or chosen method of equalisation is one of Methods A to D, should a different method be adopted for those members for whom the estimated cost of calculating and implementing Methods A to D is the same as or greater than the projected additional benefits to which the members would be entitled as a result of equalisation? If so, (a) what should that different method be, and (b) how is the Trustee to ascertain the members to which that method should be applied?”
466. At the end of the hearing, Mr Simmonds on behalf of the Trustees invited me not to discuss and determine this issue at this stage. Instead, he invited me to give judgment on the other issues as to the choice of Methods A to D and to give the parties an opportunity to consider that judgment. It was suggested that it might emerge that it was not necessary to obtain a ruling from the court on Issue 12 and if it were necessary it would be more appropriate to seek that ruling and to make submissions in the light of my judgment on the other issues as to Methods A to D. The other parties concurred in those suggestions on behalf of the Trustees and accordingly I will postpone my discussion and decision in relation to Issue 12.

### *Issue 13*

467. Issue 13 is in these terms: “If the Claimant as Trustee is under an obligation to equalise for the effect of unequal GMPs, then in principle:
- (1) Does the Claimant's obligation apply to benefits accrued in other schemes during the Barber window which have been transferred in to any of the Schemes?
  - (2) Leaving aside the effect of any contractual obligation that may have been undertaken in relation to particular transfers out of the Schemes, does the Claimant's obligation apply in relation to benefits accrued in any of the Schemes during the Barber window which have been transferred out of the Schemes, and if so what does that obligation require?
  - (3) If the answer to Issue 13(b) is yes, is that such an obligation applies, is that “in principle” obligation discharged (and thus not enforceable by relevant Scheme members) either
    - (i) under s 99 PSA 1993 and/or by reason of s 73(2) and (4) PSA 1993?
    - (ii) under transfer out provisions in the relevant Scheme rules?”
468. It is agreed that the answer to Issue 13 (a) is “yes”.
469. As regards Issues 13(b) and (c), it was proposed that the rival arguments would be put forward by the Banks and by the RBs. In that way, the Banks would contend for the answer “no” in relation to Issue 13(b) and, if Issue 13(c) fell to be decided, for the answer “yes” in relation to Issue 13(c). I had no difficulty with that proposal as it was in the Banks’ interests to contend for those answers. As to the RBs, it was proposed that

they would contend for the opposite answers and they would submit that there was an obligation on the schemes to contact the transferee schemes and to make good any deficiency in the payment which had been made in the past on the occasion of earlier transfers. These arguments on behalf of the RBs were not in their interests as they are current members of the Schemes. At the outset, because those arguments were not in the interests of the RBs, I was concerned about the suggestion that the RBs should represent all persons in whose interest it might be to put forward such submissions. Counsel for all parties sought to reassure me on this head by pointing out that it is often appropriate in relation to pension disputes to identify representative parties who will argue the opposing cases even if, on various points of detail, it is not in the interest of the representative to put forward a particular case.

470. In the event, I heard extensive submissions in relation to Issues 13(b) and 13(c) from Mr Rowley on behalf of the Banks and then from Mr Short on behalf of the RBs. Mr Rowley addressed Issue 13(b) on the basis that the source of the alleged obligation was said by the RBs to be a short passage in the judgment of the Court of Justice in Coloroll Pension Trustees Ltd v Russell (C-200/91) [1995] ICR 179 at [97]. Indeed, Mr Rowley's skeleton argument on Issue 13(b) dealt with that issue in less than half a page and Mr Short's skeleton argument on Issue 13(b) was also brief. However, in the course of Mr Short's argument, it emerged that he wished to contend that the alleged obligations on the part of a transferring scheme were not just based on European law principles and he wished to rely for that purpose on domestic statutory provisions and regulations. Further, the arguments as to Issue 13(c) would require a detailed consideration of domestic statutory provisions and regulations and general principles of English law. When considering the domestic provisions, it became clear that the arguments advanced were of general application and potentially of great significance to cases where there had been an underpayment or an overpayment by a transferor scheme to a transferee scheme and which did not involve any question of equalisation. It also seemed to me that some of the points I was being asked to rule on would depend on the particular facts of individual cases and it might be undesirable to deal with the arguments at a high level of generality and without regard to specific facts. Further, a judgment which considered all of the points which would need to be considered in relation to the extended arguments in relation to Issues 13(b) and (c) would considerably delay the time at which a comprehensive judgment on all of the issues would be available to the parties.
471. In the course of argument, I expressed to the parties the concerns I had in relation to Issues 13(b) and (c) and the result was that Mr Simmonds on behalf of the Trustees invited me to stand over further argument on those issues and to proceed to a judgment on the other issues. Following that judgment, the parties could consider the best way to proceed in relation to Issues 13(b) and (c) and how to address some or all of the concerns which had emerged. The other parties supported that request by Mr Simmonds and, accordingly, that is the course which I will adopt.

## PART IX: CONCLUSIONS

### *A summary*

472. In summary, my conclusions are as follows:

- (1) The Trustee is under a duty to amend the Schemes in order to equalise benefits for men and women so as to alter the result which is at present produced in relation to GMPs;
- (2) The Trustee is not obliged to adopt method A3 which was argued to be the only method available;
- (3) The Trustee is not entitled to adopt method A (in particular, method A3) because that method infringes the principle of minimum interference judged from the standpoint of the Banks;
- (4) The Trustee is not entitled to adopt method D1 because that method infringes the principle of minimum interference judged from the standpoint of the beneficiaries;
- (5) Method D2 is not at present available to be adopted as the Banks have not consented as required by section 24E(2) PSA 1993. However, in principle, it is a lawful method to which the Banks could consent and the GMP conversion legislation used in Method D2 does enable conversion of survivor's benefits;
- (6) Methods B, C1 and C2 all provide for equivalence in relation to benefits but the Banks can require the Trustee to adopt method C2 by relying on the principle of minimum interference, judged from the standpoint of the Banks;
- (7) The rate of interest to be used for method C2 should be 1% over base rate simple interest;
- (8) Beneficiaries are entitled to receive arrears of payments due to them;
- (9) The period for which beneficiaries are entitled to receive arrears of payments is governed by the rules of the Schemes which deal with the period of time more than six years before a claim for payment of arrears; I was shown five examples of rules of the Schemes; four of those examples provide for the beneficiaries not to be entitled to arrears in relation to that period; the fifth example gives the Trustee a discretion in relation to that period;
- (10) The rules of the Schemes are not contrary to section 92(5) of the PA 1995;
- (11) By virtue of section 21(1)(b) of the Limitation Act 1980 there is no relevant limitation period in relation to proceedings to recover arrears;
- (12) Section 134 EA 2010 is not effective in relation to proceedings by beneficiaries to recover arrears of payments where the Trustee is in possession of trust assets, as section 134 offends the principle of equivalence in such a case;

(13) In equity, arrears of payments should bear simple interest at 1% over base rate.

## APPENDIX A

*This Appendix highlights the provisions of the Schemes that could give rise to unequal payments arising from GMPs. These provisions relate to benefits accrued after 17 May 1990 and prior to 6 April 1997 and where reference is made to a total pension in the table below, this refers only to benefits accrued during this period. For ease of reference, this Appendix only looks at the provisions of the Schemes contained in the most recent Trust Deeds and Rules, and any subsequent amendments. It is possible that the benefits for certain members are governed by previous Trust Deeds and Rules which contain different provisions.*

- 1.1 For each Scheme, there is a summary of the scheme provisions that are relevant to this Appendix, in that these provisions have an impact on potential or actual inequalities arising from GMPs, and hence might impact on the cost of correcting such inequalities.
- 1.2 Given the size and complexity of the arrangements, this analysis does not cover every member of each Scheme, but includes all major categories and sub-categories of member, except where the liabilities covered are very small. For this purpose the Appendix uses a materiality limit of 1% of scheme liabilities. In order to identify the relative importance of the different sections and subsections, the percentage of the total scheme liability (as at 30 June 2014, the date of the most recent actuarial valuations of the schemes) represented by each category is stated. This gives a realistic indication of the relative size and importance of each section, and the percentages are not expected to be noticeably different at a more recent date.
- 1.3 The position in relation to discretionary pension increases is relevant to the inequalities arising from GMP provisions. This is an issue for the HBOS Scheme, where for some sections (in particular BOS, Capital Bank and Birmingham Midshires) there is a longstanding practice of discretionary increases being awarded by the sponsor. With the agreement of the sponsor, allowance for these to continue has been included in funding valuations and transfer values. This can only be done by taking a view on the future level of those increases – in practice awards by the sponsor are not bound by this allowance. The position in relation to the No. 1 Scheme and the No. 2 Schemes is different, in that some administrative practices are in place which provide benefits which are generally in excess of those set out in scheme rules. There are some relatively minor aspects of the HBOS scheme where this is also the case. Except where stated costs in this report reflect the assumption that these discretions and practices will continue.
- 1.4 The No. 1 Scheme PIP Section provides DC benefits subject to a DB underpin, including in relation to accrual from 1 January 1996, and hence would be within scope for an exercise to mitigate the impact of GMPs on the No 1 Scheme. Given the very short period of relevant accrual this has been excluded from further consideration in this report on grounds of materiality.
- 1.5 It should be noted that where a maximum increase is stated (e.g. in some of the statutory descriptions) the maximum will tend to apply on an annual basis in payment and over the entire period of deferment in terms of revaluation prior to payment. In other words, where an increase in payment is subject to a maximum of 5%, no single increase will exceed this level. In deferment, a single revaluation in excess of 5%

would not be capped, provided the average revaluation over the whole deferment period did not exceed 5% per annum. Scheme-specific minimum revaluation provisions will depend on wording of the rules, and these are capped on an annual basis in the case of the No. 1 Scheme and the No. 2 Schemes. References to CPI in statutory increases reflects the forward-looking position. In the past, RPI was used as the relevant inflation measure until 2011, and this is reflected in the entitlements considered in this report.

	LBPS No. 1 Main Scheme					
	Standard Section Post 31/10/83 joiners	Standard Section Post 1974 - Pre 1/11/83 joiners	Standard Section Pre 1974 joiners	Standard Section LBI members	AFD Section Standard	C&G Section All members excl small subsections
Approximate percentage of total liability	33%	31%	25%	3%	3%	4%
Age from which unreduced pension is payable at member's option	60	60	60 (55 in some cases) <sup>(1)</sup>	60 (55 in <sup>(2)</sup> some cases)	60	60/63/65 depending on sub-section
Non-GMP increases in payment (noting where discretionary <sup>(3)</sup> in the case of the HBOS FSPS) – assuming GMP does not technically 'exist' until GMP Payment Age <sup>(4)</sup>	RPI max 5%	RPI max 5% but subject to an underpin of RPI max 4% on total pension (including GMP)	RPI max 5% but subject to an underpin of RPI max 4% on total pension (including GMP)	RPI max 5%	Fixed 3% pa	RPI max 5%
GMP increases in payment (from GMP Payment Age)	Statutory (CPI max 3%)	Statutory but subject to an underpin of RPI max 4% on all GMP from retirement	Statutory but subject to an underpin of RPI max 4% on all GMP from retirement	Statutory (CPI max 3%)	Fixed 3% pa	Statutory (CPI max 3%)
Non-GMP revaluation in deferment	Lesser of 4% compound or annual RPI. We understand that the administrative practice <sup>(5)</sup> is to apply RPI max 5%. Increases of less than 2% can be carried over to the following year at the Trustee's discretion. We are not aware of this discretion having been exercised.				Statutory revaluation of CPI max 5% but with 'overall' min 3% pa increases for some members <sup>(7)</sup>	Statutory (CPI max 5%)
GMP revaluation in deferment	Fixed <sup>(6)</sup> rate – although admin practice is to revalue whole deferred pension to NRA with non GMP revaluation as an underpin.				Fixed rate	Fixed rate
Approach to anti-franking test at age 60/65 for females/males	The administrative practice is that the pension in payment immediately before age 60/65 (females/males) is compared to the pension at exit with statutory revaluation on the excess over GMP between date of exit and NRA plus the GMP revaluation between date of exit and 60/65 (females/males).					

	LBPS No. 2		
	Standard Section Pre 21/5/83 joiners	Standard Section Post 20/5/83 joiners	Hill Samuel Section Pre 1/7/92 joiners
Approximate percentage of total liability	48%	45%	6%
Age from which unreduced pension is payable at member's option	60	60	60/65 depending on sub-section <sup>(8)</sup>
Non-GMP increases in payment (noting where discretionary <sup>(3)</sup> in the case of the HBOS FSPS) – assuming GMP does not technically 'exist' until GMP Payment Age <sup>(4)</sup>	CPI no max	CPI max 5%	Fixed 3%
GMP increases in payment (from GMP Payment Age)	Statutory (CPI max 3%)	Statutory (CPI max 3%)	Statutory (CPI max 3%)
Non-GMP revaluation in deferment	CPI no max	CPI max 5%	CPI max 5%
GMP revaluation in deferment	Fixed rate – although admin practice is to revalue whole deferred pension to NRA with non GMP revaluation as an underpin.		
Approach to anti-franking test at age 60/65 for females/males	The administrative practice is that the pension in payment immediately before age 60/65 (females/males) is compared to the pension at exit with statutory revaluation on the excess over GMP between date of exit and NRA plus the GMP revaluation between date of exit and 60/65 (females/males).		



	HBOS FSPS				
	Birmingham Midshires	Capital Bank	Clerical Medical	Halifax	Bank of Scotland
Approximate percentage of total liability	2%	8%	7%	51%	30%
Age from which unreduced pension is payable at member's option	60	First day of the month following the members' 60 <sup>th</sup> birthday.	60	62 (60 for some members)	65/60/55 depending on sub-section <sup>(9)</sup>
Non-GMP increases in payment (noting where discretionary <sup>(3)</sup> in the case of the HBOS FSPS) – assuming GMP does not technically 'exist' until GMP Payment Age <sup>(4)</sup>	Guaranteed: Nil Discretionary: CPI max 5% <sup>(10)</sup>	Guaranteed: 3% pa Discretionary: CPI min 3% max 5% <sup>(11), (10)</sup>	Guaranteed: RPI min 3% max 5%	Guaranteed: RPI min 3% max 5%	Guaranteed: Nil Discretionary: CPI max 5% <sup>(10)</sup>
GMP increases in payment (from GMP Payment Age)	Statutory CPI max 3% Discretionary: CPI max 5% <sup>(10)</sup>	Statutory (CPI Max 3%)	Statutory (CPI max 3%)	Statutory (CPI max 3%)	Statutory (CPI max 3%)
Non-GMP revaluation in deferment	Statutory (CPI max 5%)	Statutory (CPI max 5%)	Pre 1/5/94 leavers: Fixed 5% <sup>(12)</sup> Post 30/4/94 leavers: CPI max 5%	Statutory (CPI max 5%)	Statutory (CPI max 5%)
GMP revaluation in deferment	Pre 6/4/97 leavers: Limited Post 5/4/97 - pre 1/7/06 leavers: Fixed rate Post 30/6/06 leavers: National Average Earnings	Pre 1/7/06 leavers: Fixed Post 30/6/06 leavers: National Average Earnings	Pre 6/4/06 leavers: Fixed Post 5/4/06 leavers: National Average Earnings <sup>(13)</sup>	Pre 6/4/96 leavers: Limited rate on scheme GMP, full rate on transferred-in GMP Post 5/4/96 leavers: National Average Earnings Some historic sections differ to this (eg pre 6/4/96 Leeds and Southdown leavers get fixed rate)	Pre 1/7/06 leavers: Fixed Post 30/6/06 Leavers: National Average Earnings
Approach to anti-franking test at age 60/65 for females/males	GMP revaluation is reflected at NRA, including where this is lower than GMP payment age, which will tend to result in a pension exceeding statutory requirements being put into payment from that age. The administrative practice is that the pension in payment immediately before age 60/65 (females/males) is compared to the GMP to be put into payment. If the GMP is greater than the pension in payment, a step up would be calculated. Formal anti-franking minimum tests are not undertaken. This is expected to affect very few if any members.				

## Notes

- (1) Our understanding is that equalisation provisions result in age 55 being used for all members. This has been reflected in costings provided in this report.
- (2) Our understanding is that equalisation provisions have been applied where necessary for male members. This has been reflected in costings provided in this report.

- (3) For the purposes of this report, except where noted otherwise, it is assumed that discretionary practices will continue.
- (4) Prior to GMP payment age the entire pension is increased at the rate applicable to the non-GMP element.
- (5) For the purposes of this report this administration practice has been assumed to continue at a level which is more generous than that required by the rules.
- (6) Fixed revaluation rates depend on date of exit from the scheme and are set out below.
- (7) This is an administrative practice applying to some members.
- (8) Our understanding is that age 60 is used to reflect equalisation provisions. This has been reflected in costings provided in this report.
- (9) Due to equalisation provisions, we understand references to age 65 do not apply in practice. This has been reflected in costings provided in this report.
- (10) Level funded at actuarial valuation.
- (11) Rules provide for 3% minimum only to apply in cases of early retirement. Administration practices is to apply this to all pensioners.
- (12) Administrative practice more generous than rules.
- (13) Administrative practice (rules state fixed).

Date of leaving scheme	Fixed rate of revaluation (%pa)
6 April 1988 – 5 April 1993	7.5
6 April 1993 – 5 April 1997	7.0
6 April 1997 – 5 April 2002	6.25
6 April 2002 – 5 April 2007	4.5
6 April 2007 – 5 April 2012	4.0
6 April 2012 – 5 April 2017	4.75
6 April 2017 -	3.5

## Summary

The important points to take from these summaries are set out below.

- 1.6 For the No. 1 Scheme, the rule that provides for an underpin on pension increases for pre 1 November 1983 joiners will tend to reduce the impact of unequal pension increases arising from unequal GMPs. This underpin is more likely to bite in an environment where inflation is low, and/or not subject to significant variability. In these circumstances the 4% cap on the underpin has less relevance. In this scenario, the non-GMP is subject to RPI increases under both formulae and under the underpin the post 88 GMP is also subject to RPI increases (likely to be higher than the CPI-linked increases required by statute).
- 1.7 The similar provision that applies in the No. 1 Scheme in terms of revaluation of GMP and non-GMP will tend to reduce the incidence of unequal pensions being paid at NRA following exit from pensionable service. This underpin is more likely to take effect for recent leavers from pensionable service, for whom fixed rate GMP revaluation is likely to be lower.
- 1.8 For the No. 2 Scheme, pension increases for most members being subject to CPI should result in relatively low levels of inequality arising from pension increases. For example, if CPI is experienced at less than 3%, there is no difference between pension increases on GMP and on non-GMP.
- 1.9 The underpin on the increases in deferment is less likely to apply on the No. 2 Scheme than on the No. 1 Scheme, because being based on the CPI inflation measure (which is expected to be lower than RPI) it is less generous, and in many cases not expected to exceed the impact of the statutory revaluation on the GMP. The impact of this is that females in the No. 2 Scheme who leave to become deferred pensioners are more likely to be advantaged in terms of the pension payable at age 60 than are females in the No. 1 Scheme.
- 1.10 The HBOS Scheme exhibits a wide range of provisions for GMP revaluation in deferment and non-GMP increases in payment. Female members of the Clerical Medical and Halifax sections are almost certain to receive less generous pension increases than males, as the maximum GMP increase is 3% and the minimum non-GMP increase is 3%. In the Halifax section this is likely to be offset by the (relatively generous) treatment of GMPs for females, to the extent that members retire at that section's NRA of 62 from deferred pensioner status. This arises because of the statutory requirements that surround GMPs coming into payment after GMP payment age (60 for a female) – essentially providing a late retirement uplift for a woman retiring after her GMP age that would not apply to a male retiring at age 62 (ie before his GMP payment age of 65).

- 1.11 The wide range of GMP revaluation rates in the HBOS Scheme will result in a wide range of potential outcomes in terms of inequalities. The treatment of GMP revaluation for males who leave pensionable service is relatively generous in the HBOS Scheme and this will tend to reduce gains that females would otherwise experience.
- 1.12 The HBOS Scheme contains some sections that provide for discretionary increases on the non-GMP element of pensions. The impact of this will be to favour males, as the current practice limits the increase on the non-GMP to 5%, whereas the increase on the GMP is limited to 3% (both being based on CPI). If no discretionary increases were made, females would benefit, as increases would only be awarded on the GMP (which is higher for females and recognised from age 60 rather than age 65), although a step-up for males would be more likely from age 65. The discretionary practice of paying increases on the GMP equal to those on the non-GMP in the Birmingham Midshires section will result in no inequality arising from pension increases in that section.
- 1.13 A scheme provision that tends to reduce the scope for one aspect to be unequal, may result in the overall net inequality being larger than would otherwise be the case. For example, in a section where females who have been deferred pensioners are expected to have higher pensions from NRA, having no differentiation on pension increases will leave males disadvantaged. If the usual position of pension increases favouring males was present, this would in a sense compensate for the advantage to females at the point of retirement. This issue is relevant to the subsequent discussion on Methods and costs of equalisation.

In conclusion, the overall impact of addressing inequalities arising from GMPs is expected to be lower (as a percentage of total liabilities) for these schemes than for many others, although the absolute sizes of the schemes could still result in significant costs in £ terms. The widely differing provisions between the schemes (and between sections within each scheme) is expected to give rise to differing issues on a scheme-by-scheme (and section-by-section) basis.

## APPENDIX B

### GMP Equalisation – agreed summary of methods

Method	Description
A1	<p>At the age the pension comes into payment, pay higher of male's and corresponding female's total pension (likely to be female's in the case of a deferred pensioner). In payment, compare the amount of the total increase payable to the (unequalised) male and female and pay the higher each year. Recognise and award (regardless of the member's sex) any increase payable under the (unequalised) male's calculation at age 65 due to the anti-franking provisions.</p> <p><i>Note:</i> The attached example illustrates a higher pension being paid than the unequalised approach applicable to either sex.</p>
A2	<p>At the age the pension comes into payment, pay the higher (usually female's) GMP plus the higher (usually male's) non-GMP. In payment, calculate the increased (unequalised) GMP and (unequalised) non-GMP for each sex, and take the higher calculation for each component. At age 65 compare the (unequalised) GMP and (unequalised) non-GMP elements and take the higher calculation for each component.</p> <p><i>Note:</i> At age 65 it is possible that the male's calculation will apply to both components and that a large increase at age 65 will not be exhibited by this version of Method A. In some circumstances a decrease may apply from age 65 as shown in the attached example. Following such a decrease the benefit would remain higher than the unequalised approach applicable to either sex.</p>
A3	<p>As Method A1 at the age the pension comes into payment. In payment, compare the amount of the total increase each year payable to the male and female and pay the higher. Once the pension is put into payment and immediately after each subsequent increase, view any uplift that is added as a consequence of equalisation as an increase in the non-GMP element. This means that at the following pension increase exercise, the pension increase is calculated by applying the increase percentage applicable to the GMP and non-GMP respectively, recognising that the previous year's equalisation uplift is non-GMP, and then, if necessary, adding another equalisation uplift. At age 65, (1) recognise the male GMP at age 65 and deduct it from the male non-GMP; and (2) recognise and award (regardless of the member's sex) any increase payable under the male's calculation at age 65 due to the anti-franking provisions. Continue to calculate increases as before, including any previous equalisation uplifts as non-GMP.</p>
B	Higher of unequalised male and analogous female benefit paid each year.

*Note:* In some cases a member has the higher (unequalised) benefit in every year, in which case there would be no change to that member's benefit. In other cases (such as the attached example), at times when the payment to a member of the opposite sex would be higher, the member's benefit would be increased to this level. There would be no adjustment to recognise times where the payment to the member is higher than that which would have been payable to a member of the opposite sex.

- C1 In payment, pay the annual pension that would result in the accumulated pension paid to date being equal to the higher of the accumulated pension payable to either an unequalised male or female.
- For many members, this would result in identical annual pension payments as under Method B because the same unequalised sex always receives the higher pension each year. In these cases, equalising the accumulated payments amounts to the same as paying the higher annual pension each year.
- The difference to Method B arises in respect of those members where the higher annual pension switches from one sex to the other over time.
- Where the higher calculation switches from one sex to the other, the lower of the two calculations is thereafter paid until such time as the accumulated excess prior to the switch equals the accumulated loss after the switch, after which the higher of the male and female benefits is paid each year. If the advantage switches again a similar process is followed. Interest to reflect the time value of money is ignored.
- C2 As Method C1 except that interest from date of payment to date of calculation is allowed for in the comparison of the values of accumulated gain prior to the switch and loss since the switch.
- Note:* As the attached example indicates, Method C2 will tend to defer the point at which the benefit switches back from those payable to the member who is initially advantaged.
- D1 Identify whether the actuarial value of the member's unequalised benefits is less than the actuarial value of the unequalised benefits that would apply to a member of the opposite sex. If this is the case, an additional benefit (probably in the form of an additional pension) equal in actuarial value to the excess is provided to the member. (Referred to as Method D in the WTW Report dated 25 April 2017.)
- D2 As Method D1 except that instead of providing an additional pension, a pension which converts GMP structures into an alternative format (for example in line with non-GMP benefits) and is of equal actuarial value to the larger of the compared values is then put into payment. To convert GMP to non-GMP benefits, GMP conversion legislation would have to be used.

*Note:* As the attached example highlights, where GMP is being converted into a benefit structure which attracts higher pension increases, the theoretical position would be a reduction in the immediate pension (expected to be compensated by a higher pension in later years of payment). Method D2 is consistent with the method on which the DWP consulted in 2016 (save that there may be differences in the detail of implementation which have not presently been identified).

For Methods D1 and D2, the actuarial value of benefits is calculated as the discounted cash flows payable to the member and to a surviving dependant entitled to benefits. The comparison could either be carried out (i) at a single conversion date for all members or (ii) for each member at the point of retirement, transfer out or death.

## GMP Equalisation – Worked examples

The following examples provide an illustration of the various equalisation methods.

### Illustrations of the impact of the various alternative Methods

The data underpinning these projections relates to a female member of the HRF Section of the HBOS Final Salary Pension Scheme, who left service at age 41 with a pension entitlement of £2,293 per annum relating to the period from 17 May 1990 to 5 April 1997, payable from the Section's Normal Retirement Age of 62. The split of this pension (and the analogous split that would have applied had she been a male) is set out below.

	Actual benefit as female (£pa)	Alternative benefit as male (£pa)
<b>GMP</b>	520	467
<b>Non-GMP</b>	1,773	1,826
<b>Total pension</b>	2,293	2,293

The illustrations use the following assumed increases. Where historical information existed at the time the original projections were prepared (e.g. in relation to historic rates of inflation) this information has been incorporated.

	After leaving service but before retirement (% pa)	After retirement (% pa)
<b>GMP</b>	4.1	2.06
<b>Non-GMP</b>	2.6	3.85

A rate of interest of 3% pa has been assumed in the calculations for Method C2. Also, the examples assume the member dies aged 92 following the pension increase received when aged 91. Thus the examples have considered payments received over a 30 year period (from age 62 and ignoring any subsequent payments to contingent spouses and/or dependants) and assumed a discount rate of 4% pa when considering the actuarial values under Methods D1 and D2.

There are some important stages to these projections, as set out below:

#### Actual entitlement at age 62 (reflecting status as a female)

GMP increased by 29.6% plus 7 increases of 4.1%, (giving a total GMP of £892 pa at 60),<sup>1</sup> plus an increase (calculated as 19.6%) to reflect payment being deferred past GMP payment

<sup>1</sup> Increases up to the GMP pensionable age of 60 have been calculated as follows. The member's pension was subject to 7 further increases up to age 60 when the calculations were performed, and the accumulated GMP revaluation at the time of calculation was 29.6% based on the rates of revaluation that actually applied to the member; the further 7 increases were applied at the assumed rate of 4.1% pa to cover the future revaluation period up to age 60. The other increases up to 60/62 mentioned in the following paragraphs have been calculated in a similar manner.



age by two-years (giving a total GMP of £1,067 pa at 62) plus non-GMP increased by 25% plus 10 increases of 2.6% (£2,866 pa), giving a total unequalised female pension of £3,933 pa at age 62.

### **Alternative entitlement at age 62 (reflecting the way the Scheme treats male members)**

GMP increased by 29.6% plus 10 increases of 4.1% (£904 pa at 62) plus non-GMP increased by 25% plus 10 increases of 2.6% (£2,951 pa) giving a total unequalised male pension of £3,855 pa at age 62. Until age 65, all of this pension is treated as non-GMP under the unequalised calculation applicable to a male.

### **Application of the anti-franking test at age 65 to the calculations as a male**

The statutory minimum pension payable (as a male) from age 65 is made up of two parts, namely the statutory GMP calculated at the male's GMP Payment Age of 65 and the non-GMP increased up to the Scheme's NRA of 62. The first part is the male's GMP increased by 29.6% plus 12 increases of 4.1% (£979 pa). The second part is the male's non-GMP increased by 25% plus 10 increases at 2.6% (£2,951 pa) giving a total minimum pension of £3,930 pa.

The minimum pension payable to a male at 62 under the preservation legislation would be the GMP at the date of leaving service (£467 pa) plus the non-GMP with increases over the period between the date of leaving service and age 62 (in this case £1,826 pa increased by 25% plus 10 increases of 2.6% or £2,951 pa) giving a total of £3,418 pa. The maximum step up at 65 for a male would therefore be the amount needed to increase this to the minimum of £3,930 pa (an increase of £512 pa). In the following examples this is referred to as the anti-franking minimum, reflecting the statutory (anti-franking) tests that apply at GMP payment ages. An increase of this amount would be applied only if (i) the scheme put the minimum required by the preservation legislation into payment at age 62 and (ii) there were no increases in payment after age 62. The HBOS Final Salary Pension Scheme provides more generous treatment than the statutory minima in both of these areas.

### **Further Notes**

1. Statutory and rule provisions affect the number of increases applied in deferment. The number of increases on the non-GMP and GMP over a specific period may not equate, and may not be the same as the difference between age at leaving service and retirement age. In this example, 18 increases are taken to apply over the period between leaving service and age 60, with a further 5 to age 65.
2. In the examples, the individual in question was born on 12 February. Pension increases are typically granted with effect from the April payment each year, meaning that increases apply shortly after the individual's birthday. This is reflected in the projections which show the pension applying from a certain age generally being that which would come into payment in the April following attainment of that age. The "At retirement" row shows the position at retirement on the member's 62<sup>nd</sup> birthday in February; the next row "62" shows the position at the first April increase after the 62<sup>nd</sup> birthday and so on for each annual April increase thereafter. Where an adjustment is included to reflect anti-franking provisions, this is incorporated as an adjustment from

the actual 65<sup>th</sup> birthday – referred to as age “65(a)”, with the annual increase assumed to apply just after the 65<sup>th</sup> birthday being referred to as age “65(b)”.

3. Actual pension increases are awarded on a pro-rata basis on non-GMP at the first such increase, but for illustration purposes in these projections this nuance has been set aside and it has been assumed that the non-GMP will receive a full increase from the April after the February in which retirement occurs at age 62. This is the same approach as followed for the generalised methodology adapted for the WTW Report dated 25 April 2017. The practical effect of recognising a partial first increase on the non-GMP would be to defer the age at which the projected advantage switches from the female member to the male analogue and this would obscure some of the detail around the impact of the different Methods.
4. Some of the figures in the following tables have been rounded, creating some minor arithmetic discrepancies.

## Method A1

Age	Female GMP	Female non-GMP	Female Total	Male GMP	Male non-GMP	Male Total	Method A1
At retirement	1,067	2,866	3,933	-	3,855	3,855	3,933
62	1,089	2,976	4,066	-	4,004	4,004	4,082
63	1,112	3,091	4,203	-	4,158	4,158	4,236
64	1,135	3,210	4,345	-	4,318	4,318	4,396
65(a)	1,135	3,210	4,345	979	3,339	4,318	4,396
65(b)	1,158	3,334	4,492	999	3,467	4,467	4,545
66	1,182	3,462	4,644	1,020	3,601	4,621	4,699
67	1,206	3,595	4,801	1,041	3,739	4,781	4,858
68	1,231	3,734	4,965	1,062	3,883	4,946	5,024
69	1,256	3,877	5,134	1,084	4,033	5,117	5,195
70	1,282	4,027	5,309	1,107	4,188	5,295	5,373
71	1,309	4,182	5,490	1,130	4,349	5,479	5,557
72	1,336	4,343	5,678	1,153	4,517	5,670	5,748
73	1,363	4,510	5,873	1,177	4,691	5,867	5,945
74	1,391	4,684	6,075	1,201	4,871	6,072	6,150
75	1,420	4,864	6,284	1,225	5,059	6,284	6,362
76	1,449	5,051	6,500	1,251	5,254	6,504	6,582
77	1,479	5,246	6,725	1,276	5,456	6,733	6,810
78	1,509	5,448	6,957	1,303	5,666	6,969	7,047
79	1,540	5,657	7,198	1,330	5,884	7,214	7,292
80	1,572	5,875	7,447	1,357	6,111	7,468	7,546
81	1,605	6,101	7,706	1,385	6,346	7,731	7,809
82	1,638	6,336	7,974	1,414	6,590	8,004	8,082
83	1,671	6,580	8,252	1,443	6,844	8,287	8,365
84	1,706	6,833	8,539	1,472	7,108	8,580	8,658
85	1,741	7,097	8,838	1,503	7,381	8,884	8,962
86	1,777	7,370	9,147	1,534	7,665	9,199	9,277
87	1,813	7,654	9,467	1,565	7,961	9,526	9,604
88	1,851	7,948	9,799	1,597	8,267	9,864	9,942
89	1,889	8,254	10,143	1,630	8,585	10,216	10,294

Age	Female GMP	Female non-GMP	Female Total	Male GMP	Male non- GMP	Male Total	Method A1
90	1,928	8,572	10,500	1,664	8,916	10,580	10,658
91	1,968	8,902	10,870	1,698	9,259	10,957	11,035

## Explanatory notes on Method A1

Upon the member's retirement at age 62 in February, the higher of the two calculations (unequalised male and female entitlements) is put into payment. This is the female calculation of £3,933 pa.

Each year, the pension increase is calculated as the higher of two amounts, namely the increase that would have applied to the unequalised male and female entitlements. At the first increase (taken to be at the April just after age 62), the comparators are:

Male – an increase of 3.85% on the whole pension, as all of the pension is assumed to be non-GMP, providing an increase of £148.42 pa.

Female – an increase of 2.06% on the GMP element only (£22.00) and an increase of 3.85% on the non-GMP of £2,866 pa (£110.34) to provide a total increase of £132.34 pa.

The male approach applies, and the pension is increased to £4,081 pa.

At the April just over one year after retirement the comparators would be:

Male – an increase of 3.85% on the non-GMP (equal to the entire unequalised pension £4,004 pa) or £154.15 pa.

Female – an increase of 3.85% on the non-GMP of £2,976 pa (i.e. £114.58 pa) plus an increase of 2.06% on the GMP of £1,089 pa (£22.43 pa) or £137.01 pa.

On this basis, the increase applicable to the male applies and the pension becomes  $£4,081 + £154 = £4,235$  pa.

At age 65 (i.e. the 65<sup>th</sup> birthday in February, shown as “65(a)” in the table), the GMP is recognised for the purposes of the male's calculation. At that age the (unequalised) benefit payable to the male is the total pension at 62 of £3,855 increased by three increases of 3.85% or £4,318 pa. This exceeds the minimum pension under anti-franking of £3,930 so the unequalised male calculation is not subject to any adjustment for anti-franking. The unequalised male pension remains at £4,318 pa, and is now split into a GMP of £979 pa and a non-GMP of £3,339 pa.

At the increase from the April just after age 65 (shown as “65(b)” in the table), the pension increase comparators are:

Male – an increase of 3.85% on the non-GMP of £3,339 (£128.55 pa) plus an increase of 2.06% on the GMP of £979 pa (£20.17 pa) or £148.72 pa.

Female – an increase of 3.85% on the non-GMP of £3,210 pa (i.e. £123.59 pa) plus an increase of 2.06% on the GMP of £1,135 pa (£23.38 pa) or £146.97 pa.

On this basis, the increase applicable to the male applies and the pension becomes  $£4,396 + £149 = £4,545$  pa.

The same process is repeated for each annual April increase thereafter.

## Method A2

Age	Female GMP	Female non-GMP	Female Total	Male GMP	Male non-GMP	Male Total	Method A2
At retirement	1,067	2,866	3,933	-	3,855	3,855	4,923
62	1,089	2,976	4,066	-	4,004	4,004	5,093
63	1,112	3,091	4,203	-	4,158	4,158	5,270
64	1,135	3,210	4,345	-	4,318	4,318	5,453
65(a)	1,135	3,210	4,345	979	3,339	4,318	4,473
65(b)	1,158	3,334	4,492	999	3,467	4,467	4,625
66	1,182	3,462	4,644	1,020	3,601	4,621	4,783
67	1,206	3,595	4,801	1,041	3,739	4,781	4,946
68	1,231	3,734	4,965	1,062	3,883	4,946	5,114
69	1,256	3,877	5,134	1,084	4,033	5,117	5,289
70	1,282	4,027	5,309	1,107	4,188	5,295	5,470
71	1,309	4,182	5,490	1,130	4,349	5,479	5,658
72	1,336	4,343	5,678	1,153	4,517	5,670	5,853
73	1,363	4,510	5,873	1,177	4,691	5,867	6,054
74	1,391	4,684	6,075	1,201	4,871	6,072	6,263
75	1,420	4,864	6,284	1,225	5,059	6,284	6,479
76	1,449	5,051	6,500	1,251	5,254	6,504	6,703
77	1,479	5,246	6,725	1,276	5,456	6,733	6,935
78	1,509	5,448	6,957	1,303	5,666	6,969	7,175
79	1,540	5,657	7,198	1,330	5,884	7,214	7,425
80	1,572	5,875	7,447	1,357	6,111	7,468	7,683
81	1,605	6,101	7,706	1,385	6,346	7,731	7,951
82	1,638	6,336	7,974	1,414	6,590	8,004	8,228
83	1,671	6,580	8,252	1,443	6,844	8,287	8,515
84	1,706	6,833	8,539	1,472	7,108	8,580	8,813
85	1,741	7,097	8,838	1,503	7,381	8,884	9,122
86	1,777	7,370	9,147	1,534	7,665	9,199	9,442
87	1,813	7,654	9,467	1,565	7,961	9,526	9,774
88	1,851	7,948	9,799	1,597	8,267	9,864	10,118
89	1,889	8,254	10,143	1,630	8,585	10,216	10,474

Age	Female GMP	Female non-GMP	Female Total	Male GMP	Male non- GMP	Male Total	Method A2
90	1,928	8,572	10,500	1,664	8,916	10,580	10,844
91	1,968	8,902	10,870	1,698	9,259	10,957	11,227

## Explanatory notes on Method A2

At age 62 two separate comparisons are made. The first is between the non-GMPs at age 62 (for this purpose treating the entire male pension as non-GMP). The respective comparators are £2,866 pa (female) and £3,855 pa (male), so £3,855 pa is recorded as the non-GMP entitlement. The second compares the GMP elements at age 62 of zero (male) and £1,067 pa (female), so £1,067 pa is recorded as the GMP element, giving a total pension of £4,923 pa.

Up to age 65, these comparisons are performed again annually. Because the male non-GMP will always exceed that of the female, and male GMP is zero up to age 65, this means that the calculation is taken as the female GMP plus the male non-GMP (equal to the entire male pension). For example the pension payable from the April after attaining age 64 is the male non-GMP (i.e. the entire pension) at age 62 increased by three increases of 3.85% (£4,318 pa) plus the female's GMP at 62 increased by three increases of 2.06% (£1,134 pa\*) giving a total pension payable from that April of £5,452 pa\*.

At actual age 65 (denoted "65(a)"), for the male version, the same comparison is made as for Method A1. The male entitlement remains at £4,318 pa, split £979 pa GMP and £3,339 pa non-GMP. At this point the higher GMP is that payable to the female (£1,135 pa compared to £979 pa payable to the male) and the higher non-GMP is that payable to the male (£3,339 compared to £3,210 payable to the female) so the total pension reduces to £1,135 pa plus £3,339 pa, giving a total pension of £4,474 pa\*. This is higher than the unequalised male and female comparators.

At the pension increase awarded from the April just after age 65 (denoted "65(b)") two comparisons are again made. The first is between the non-GMPs (£3,210 pa increased by 3.85% (£3,334 pa) for the female and £3,339 pa increased by 3.85% (£3,468 pa\*) for the male), giving £3,468 pa\* for this part of the comparison. The second is between the female GMP (£1,135 pa) increased by 2.06% (£1,158) and the male GMP (£979 pa) increased by 2.06% (£999) giving £1,158. The total pension is then £3,468 pa plus £1,158 pa, giving a total pension of £4,626 pa\*.

The same process is repeated for each annual April increase thereafter.

*\* Note – These figures are shown rounded up or down to the next whole number in the table.*



## Method A3

Age	Female GMP	Female non-GMP	Female Total	Female Equalised non-GMP*	Male GMP	Male non-GMP	Male Total	Male Equalised non-GMP*	Method A3
At retirement	1,067	2,866	3,933	2,866	-	3,855	3,855	3,933	3,933
62	1,089	2,976	4,066	2,996	-	4,004	4,004	4,085	4,085
63	1,112	3,091	4,203	3,130	-	4,158	4,158	4,242	4,242
64	1,135	3,210	4,345	3,271	-	4,318	4,318	4,405	4,405
65(a)	1,135	3,210	4,345	3,271	979	3,339	4,318	3,426	4,405
65(b)	1,158	3,334	4,492	3,400	999	3,467	4,467	3,558	4,557
66	1,182	3,462	4,644	3,533	1,020	3,601	4,621	3,695	4,715
67	1,206	3,595	4,801	3,672	1,041	3,739	4,781	3,837	4,878
68	1,231	3,734	4,965	3,816	1,062	3,883	4,946	3,985	5,047
69	1,256	3,877	5,134	3,966	1,084	4,033	5,117	4,138	5,223
70	1,282	4,027	5,309	4,122	1,107	4,188	5,295	4,298	5,404
71	1,309	4,182	5,490	4,284	1,130	4,349	5,479	4,463	5,593
72	1,336	4,343	5,678	4,452	1,153	4,517	5,670	4,635	5,788
73	1,363	4,510	5,873	4,627	1,177	4,691	5,867	4,813	5,990
74	1,391	4,684	6,075	4,808	1,201	4,871	6,072	4,999	6,200
75	1,420	4,864	6,284	4,997	1,225	5,059	6,284	5,191	6,417
76	1,449	5,051	6,500	5,193	1,251	5,254	6,504	5,391	6,642
77	1,479	5,246	6,725	5,396	1,276	5,456	6,733	5,599	6,875
78	1,509	5,448	6,957	5,608	1,303	5,666	6,969	5,814	7,117
79	1,540	5,657	7,198	5,827	1,330	5,884	7,214	6,038	7,368
80	1,572	5,875	7,447	6,055	1,357	6,111	7,468	6,271	7,628
81	1,605	6,101	7,706	6,292	1,385	6,346	7,731	6,512	7,897
82	1,638	6,336	7,974	6,538	1,414	6,590	8,004	6,783	8,176
83	1,671	6,580	8,252	6,794	1,443	6,844	8,287	7,023	8,466
84	1,706	6,833	8,539	7,060	1,472	7,108	8,580	7,293	8,766
85	1,741	7,097	8,838	7,336	1,503	7,381	8,884	7,574	9,077
86	1,777	7,370	9,147	7,623	1,534	7,665	9,199	7,866	9,399
87	1,813	7,654	9,467	7,920	1,565	7,961	9,526	8,169	9,734
88	1,851	7,948	9,799	8,230	1,597	8,267	9,864	8,483	10,081

Age	Female GMP	Female non-GMP	Female Total	Female Equalised non-GMP*	Male GMP	Male non-GMP	Male Total	Male Equalised non-GMP*	Method A3
89	1,889	8,254	10,143	8,551	1,630	8,585	10,216	8,810	10,440
90	1,928	8,572	10,500	8,885	1,664	8,916	10,580	9,149	10,813
91	1,968	8,902	10,870	9,232	1,698	9,259	10,957	9,501	11,199

\*This is the equalised non-GMP amount based on the Method A3 pension at that age

### Explanatory notes on Method A3

At age 62, the higher of the two calculations is put into payment. This is the female calculation of £3,933 pa, and is the same as Method A1.

After the pension is put into payment and for the purposes of the first pension increase (at the April just after age 62):

The equalised pension of £3,933 pa is considered to be all non-GMP in the case of the male comparator, and made up of £1,067 pa GMP and £2,866 pa non-GMP for the female.

The pension is then increased to the greater of (i) £3,933 pa increased by 3.85% (£4,085) on the male approach and (ii) the sum of £1,067 pa increased by 2.06% (£1,089 pa) plus £2,866 increased by 3.85% (£2,976 pa) or £4,065 on the female basis.

This results in the pension increasing to £4,085 pa for both sexes.

At the next pension increase, in the April after attaining age 63, the equalised pension of £4,085 pa is considered to be all non-GMP in the case of the male comparator and made up of £1,089 pa GMP and £2,996 pa non-GMP for the female. A similar comparison is then undertaken as for the previous year.

The practical impact of this is to grant a 3.85% annual increase on the pension of £3,933 pa put into payment at age 62. Following the pension increase awarded just after age 64 the pension in payment would therefore be £3,933 pa increased by three increases of 3.85%, or £4,405 pa. In the case of the female this would be viewed as split £1,134 pa\* GMP and £3,271 pa non-GMP.

At age 65, (denoted as 65(a) in the table), the GMP of £979 is recognised for the male comparator whose non-GMP is reduced by that amount to £3,426. In this example, there is no anti-franking adjustment. The higher total pension of £4,405 continues in payment.

At the subsequent pension increase (from the April just after age 65 (denoted as 65(b) in the table)):

The pension is then increased by the greater of (i) the female comparator of GMP of £1,135 pa increased by 2.06%, plus non-GMP of £3,271 pa increased by 3.85%, giving a total of £4,554 pa and (ii) the male comparator of GMP of £979 pa increased by 2.06%, plus equalised non-GMP of £3,426 pa increased by 3.85%, giving a total of (£999 + £3,558) £4,557 pa.

In this case the male calculation exceeds the female comparator of £4,554 so the figure of £4,557 pa would be put into payment for both sexes.

The female comparator is then considered to be £1,158 pa GMP and £3,399 pa\* non-GMP.

The same process is repeated for each annual April increase thereafter.

*\* Note – These figures are shown rounded up or down to the next whole number in the table.*

**Method B**

Age	Female GMP	Female non-GMP	Female Total	Male GMP	Male non-GMP	Male Total	Method B
At retirement	1,067	2,866	3,933	-	3,855	3,855	3,933
62	1,089	2,976	4,066	-	4,004	4,004	4,066
63	1,112	3,091	4,203	-	4,158	4,158	4,203
64	1,135	3,210	4,345	-	4,318	4,318	4,345
65(a)	1,135	3,210	4,345	979	3,339	4,318	4,345
65(b)	1,158	3,334	4,492	999	3,467	4,467	4,492
66	1,182	3,462	4,644	1,020	3,601	4,621	4,644
67	1,206	3,595	4,801	1,041	3,739	4,781	4,801
68	1,231	3,734	4,965	1,062	3,883	4,946	4,965
69	1,256	3,877	5,134	1,084	4,033	5,117	5,134
70	1,282	4,027	5,309	1,107	4,188	5,295	5,309
71	1,309	4,182	5,490	1,130	4,349	5,479	5,490
72	1,336	4,343	5,678	1,153	4,517	5,670	5,678
73	1,363	4,510	5,873	1,177	4,691	5,867	5,873
74	1,391	4,684	6,075	1,201	4,871	6,072	6,075
75	1,420	4,864	6,284	1,225	5,059	6,284	6,284
76	1,449	5,051	6,500	1,251	5,254	6,504	6,504
77	1,479	5,246	6,725	1,276	5,456	6,733	6,733
78	1,509	5,448	6,957	1,303	5,666	6,969	6,969
79	1,540	5,657	7,198	1,330	5,884	7,214	7,214
80	1,572	5,875	7,447	1,357	6,111	7,468	7,468
81	1,605	6,101	7,706	1,385	6,346	7,731	7,731
82	1,638	6,336	7,974	1,414	6,590	8,004	8,004
83	1,671	6,580	8,252	1,443	6,844	8,287	8,287
84	1,706	6,833	8,539	1,472	7,108	8,580	8,580
85	1,741	7,097	8,838	1,503	7,381	8,884	8,884
86	1,777	7,370	9,147	1,534	7,665	9,199	9,199
87	1,813	7,654	9,467	1,565	7,961	9,526	9,526
88	1,851	7,948	9,799	1,597	8,267	9,864	9,864
89	1,889	8,254	10,143	1,630	8,585	10,216	10,216

Age	Female GMP	Female non-GMP	Female Total	Male GMP	Male non-GMP	Male Total	Method B
90	1,928	8,572	10,500	1,664	8,916	10,580	10,580
91	1,968	8,902	10,870	1,698	9,259	10,957	10,957

### **Explanatory notes on Method B**

Under Method B, the higher of the two calculations is put into payment. Up to the pension increase awarded just after age 75, this is the female benefit, and the male benefit from this point onwards.

## Method C1

Age	Female GMP	Female non-GMP	Female Total	Male GMP	Male non-GMP	Male Total	Difference (F-M)	Accumulated difference (F-M)	Method C1
At retirement	1,067	2,866	3,933	-	3,855	3,855	78	-	3,933
62	1,089	2,976	4,066	-	4,004	4,004	62	6	4,066
63	1,112	3,091	4,203	-	4,158	4,158	45	68	4,203
64	1,135	3,210	4,345	-	4,318	4,318	27	113	4,345
65(a)	1,135	3,210	4,345	979	3,339	4,318	27	137	4,345
65(b)	1,158	3,334	4,492	999	3,467	4,467	25	140	4,492
66	1,182	3,462	4,644	1,020	3,601	4,621	23	164	4,644
67	1,206	3,595	4,801	1,041	3,739	4,781	20	187	4,801
68	1,231	3,734	4,965	1,062	3,883	4,946	19	208	4,965
69	1,256	3,877	5,134	1,084	4,033	5,117	17	227	5,134
70	1,282	4,027	5,309	1,107	4,188	5,295	14	243	5,309
71	1,309	4,182	5,490	1,130	4,349	5,479	11	257	5,490
72	1,336	4,343	5,678	1,153	4,517	5,670	8	269	5,678
73	1,363	4,510	5,873	1,177	4,691	5,867	6	277	5,873
74	1,391	4,684	6,075	1,201	4,871	6,072	3	283	6,075
75	1,420	4,864	6,284	1,225	5,059	6,284	0	285	6,284
76	1,449	5,051	6,500	1,251	5,254	6,504	(4)	285	6,500
77	1,479	5,246	6,725	1,276	5,456	6,733	(8)	280	6,725
78	1,509	5,448	6,957	1,303	5,666	6,969	(12)	272	6,957
79	1,540	5,657	7,198	1,330	5,884	7,214	(16)	261	7,198
80	1,572	5,875	7,447	1,357	6,111	7,468	(21)	245	7,447
81	1,605	6,101	7,706	1,385	6,346	7,731	(25)	224	7,706
82	1,638	6,336	7,974	1,414	6,590	8,004	(30)	199	7,974
83	1,671	6,580	8,252	1,443	6,844	8,287	(35)	169	8,252
84	1,706	6,833	8,539	1,472	7,108	8,580	(41)	134	8,539
85	1,741	7,097	8,838	1,503	7,381	8,884	(46)	93	8,838
86	1,777	7,370	9,147	1,534	7,665	9,199	(52)	47	9,147
87	1,813	7,654	9,467	1,565	7,961	9,526	(59)	(6)	9,526
88	1,851	7,948	9,799	1,597	8,267	9,864	(65)	(64)	9,864
89	1,889	8,254	10,143	1,630	8,585	10,216	(73)	(130)	10,216

Age	Female GMP	Female non-GMP	Female Total	Male GMP	Male non-GMP	Male Total	Difference (F-M)	Accumulated difference (F-M)	Method C1
90	1,928	8,572	10,500	1,664	8,916	10,580	(80)	(202)	10,580
91	1,968	8,902	10,870	1,698	9,259	10,957	(87)	(282)	10,957

### Explanatory notes on Method C1

Method C1 differs to Method B in those cases where the higher calculation switches from one sex to the other. Where such a switch occurs, the lower of the two calculations is thereafter paid until such time as the accumulated excess prior to the switch equals the accumulated loss after the switch, after which the higher of the male and female benefits is paid each year.

Applying this to the example, the female pension is higher than the male pension up to age 75 (and exactly equal at the April increase immediately after age 75), so the female calculation applies to both sexes up to that point. The switch of advantage from female to male occurs at the April increase after age 76, and the lower female calculation continues to be applied to both sexes until the accumulated excess (in the female's favour) prior to the switch equals the accumulated loss (for the female) after the switch. By the April pension increase awarded soon after attainment of age 87, the advantage received by the female member up to the April after age 75 has been extinguished by receipt of payments on the female calculation approach from that point that are lower than those that would have been received by the analogous male member. From the pension increase after age 87, the (higher) payments that the male would have received are paid.

If the advantage switches again, a similar process is followed, but this does not occur in the example shown.

In calculating the accumulated excess and loss before and after the switch(es), the time value of money is ignored under Method C1.



## Method C2

Age	Female GMP	Female non-GMP	Female Total	Male GMP	Male non-GMP	Male Total	Difference (F-M)	Accumulated difference (F-M) with 3% interest	Method C2
At retirement	1,067	2,866	3,933	-	3,855	3,855	78	-	3,933
62	1,089	2,976	4,066	-	4,004	4,004	62	6	4,066
63	1,112	3,091	4,203	-	4,158	4,158	45	69	4,203
64	1,135	3,210	4,345	-	4,318	4,318	27	117	4,345
65(a)	1,135	3,210	4,345	979	3,339	4,318	27	145	4,345
65(b)	1,158	3,334	4,492	999	3,467	4,467	25	147	4,492
66	1,182	3,462	4,644	1,020	3,601	4,621	23	177	4,644
67	1,206	3,595	4,801	1,041	3,739	4,781	20	205	4,801
68	1,231	3,734	4,965	1,062	3,883	4,946	19	233	4,965
69	1,256	3,877	5,134	1,084	4,033	5,117	17	258	5,134
70	1,282	4,027	5,309	1,107	4,188	5,295	14	283	5,309
71	1,309	4,182	5,490	1,130	4,349	5,479	11	306	5,490
72	1,336	4,343	5,678	1,153	4,517	5,670	8	326	5,678
73	1,363	4,510	5,873	1,177	4,691	5,867	6	345	5,873
74	1,391	4,684	6,075	1,201	4,871	6,072	3	361	6,075
75	1,420	4,864	6,284	1,225	5,059	6,284	0	374	6,284
76	1,449	5,051	6,500	1,251	5,254	6,504	(4)	385	6,500
77	1,479	5,246	6,725	1,276	5,456	6,733	(8)	392	6,725
78	1,509	5,448	6,957	1,303	5,666	6,969	(12)	396	6,957
79	1,540	5,657	7,198	1,330	5,884	7,214	(16)	395	7,198
80	1,572	5,875	7,447	1,357	6,111	7,468	(21)	391	7,447
81	1,605	6,101	7,706	1,385	6,346	7,731	(25)	382	7,706
82	1,638	6,336	7,974	1,414	6,590	8,004	(30)	368	7,974
83	1,671	6,580	8,252	1,443	6,844	8,287	(35)	349	8,252
84	1,706	6,833	8,539	1,472	7,108	8,580	(41)	323	8,539
85	1,741	7,097	8,838	1,503	7,381	8,884	(46)	292	8,838
86	1,777	7,370	9,147	1,534	7,665	9,199	(52)	254	9,147
87	1,813	7,654	9,467	1,565	7,961	9,526	(59)	208	9,467
88	1,851	7,948	9,799	1,597	8,267	9,864	(65)	155	9,799

Age	Female GMP	Female non-GMP	Female Total	Male GMP	Male non-GMP	Male Total	Difference (F-M)	Accumulated difference (F-M) with 3% interest	Method C2
89	1,889	8,254	10,143	1,630	8,585	10,216	(73)	93	10,143
90	1,928	8,572	10,500	1,664	8,916	10,580	(80)	22	10,500
91	1,968	8,902	10,870	1,698	9,259	10,957	(87)	(58)	10,957

### Explanatory notes on Method C2

Method C2 is as Method C1 except that interest is allowed for when comparing accumulated gains and losses in the case of a switch in calculation from one sex to the other. Compared to C1, the effect of C2 is (after the initial switch) to defer the age from which the payments switch back to the higher of the two calculations.

In the example, the effect of C2 is to defer the switch back from the female approach to the male approach from the April after the member's 87<sup>th</sup> birthday to the April after the member's 91<sup>st</sup> birthday.

## **Method D1**

The actuarial values of the unequalised female and male benefits are almost identical at £109,979 and £109,981 respectively. The estimated value of the female's benefits is lower than the comparator male, and hence an additional benefit would (in theory) be payable to the member. In practice the additional benefit would be trivial in size given the closeness of the actuarial values (an increase of about 5 pence per annum).

If the male value were to exceed the female value by £10,000, the female's non-GMP would need to be increased by £335.81 pa in order to achieve equalisation under Method D1. In this hypothetical example, the comparison of actuarial values is carried out when the member's pension crystallises, that is, when it comes into payment upon retirement at age 62 (i.e. using option (ii) identified at the foot of page 2 of this document).

In principle, under option (ii) benefits would be calculated using known facts at the date of benefit crystallisation (e.g. actual inflation increases up to the crystallisation event) but on the basis of actuarial assumptions as to the future. Under option (i), the comparison would be performed at the single date used for all Scheme members, which might require additional assumptions to be made (e.g. if the member's benefits have not yet crystallised, inflationary increases up to retirement age would need to be assumed).

**Method D2 (illustration of a possible outcome)**

Age	Female GMP	Female non-GMP	Female Total	Male GMP	Male non-GMP	Male Total	Method D2
At retirement	1,067	2,866	3,933	-	3,855	3,855	3,693
62	1,089	2,976	4,066	-	4,004	4,004	3,835
63	1,112	3,091	4,203	-	4,158	4,158	3,983
64	1,135	3,210	4,345	-	4,318	4,318	4,136
65(a)	1,135	3,210	4,345	979	3,339	4,318	4,136
65(b)	1,158	3,334	4,492	999	3,467	4,467	4,296
66	1,182	3,462	4,644	1,020	3,601	4,621	4,461
67	1,206	3,595	4,801	1,041	3,739	4,781	4,633
68	1,231	3,734	4,965	1,062	3,883	4,946	4,811
69	1,256	3,877	5,134	1,084	4,033	5,117	4,996
70	1,282	4,027	5,309	1,107	4,188	5,295	5,189
71	1,309	4,182	5,490	1,130	4,349	5,479	5,389
72	1,336	4,343	5,678	1,153	4,517	5,670	5,596
73	1,363	4,510	5,873	1,177	4,691	5,867	5,812
74	1,391	4,684	6,075	1,201	4,871	6,072	6,035
75	1,420	4,864	6,284	1,225	5,059	6,284	6,268
76	1,449	5,051	6,500	1,251	5,254	6,504	6,509
77	1,479	5,246	6,725	1,276	5,456	6,733	6,759
78	1,509	5,448	6,957	1,303	5,666	6,969	7,020
79	1,540	5,657	7,198	1,330	5,884	7,214	7,290
80	1,572	5,875	7,447	1,357	6,111	7,468	7,571
81	1,605	6,101	7,706	1,385	6,346	7,731	7,862
82	1,638	6,336	7,974	1,414	6,590	8,004	8,165
83	1,671	6,580	8,252	1,443	6,844	8,287	8,479
84	1,706	6,833	8,539	1,472	7,108	8,580	8,806
85	1,741	7,097	8,838	1,503	7,381	8,884	9,145
86	1,777	7,370	9,147	1,534	7,665	9,199	9,497
87	1,813	7,654	9,467	1,565	7,961	9,526	9,862
88	1,851	7,948	9,799	1,597	8,267	9,864	10,242
89	1,889	8,254	10,143	1,630	8,585	10,216	10,636

Age	Female GMP	Female non-GMP	Female Total	Male GMP	Male non- GMP	Male Total	Method D2
90	1,928	8,572	10,500	1,664	8,916	10,580	11,046
91	1,968	8,902	10,870	1,698	9,259	10,957	11,471

## **Explanatory notes on Method D2**

The actuarial values of the unequalised female and male benefits are £109,979 and £109,981 respectively. The estimated value of the female's benefits is lower than the comparator male, and hence a pension which ignores GMP structures, but is of equal value to the male comparator member's unequalised benefits would be put into payment. The illustrated pension assumes non-GMP rates of increase in payment from retirement applicable to the whole pension. The new pension is lower than the current entitlement at younger ages, but exceeds it at higher ages. This arises due to the conversion of the scheme pension into one of equivalent value but with higher pension increases, with the post-conversion pension being higher than the original entitlement at older ages.

The example is an illustration of one possible outcome among many. The new pension could be structured in a different way (e.g. higher starting amount with lower increases) so long as its actuarial value is the same as the actuarial value of the higher of the unequalised male and female benefits.