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Case No: BR-2012-004866

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

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

Royal Courts of Justice
Strand, London WC2A 2LL

Date: 15 February 2022

Before :

LORD JUSTICE NUGEE

- -

Between :

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

- and -

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

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

Deok Jooh Rhee QC (instructed by **Eversheds Sutherland (International) LLP**) for the **Joint Trustees in Bankruptcy**

Hearing date: 16 December 2021

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Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10.30am on 15 February 2022 by circulation to the parties or their representatives by email and by release to BAILII and the National Archives.

Lord Justice Nugee:

Introduction

1. This judgment is supplemental to a judgment (**"the Main Judgment"**) handed down by me on 23 January 2020 at [2020] EWHC 98 (Ch) on the hearing of a preliminary issue in these proceedings. I will assume that any reader of this judgment will have access to the Main Judgment, and I will adopt the same abbreviations as I did there.

2. As there appears, Mr McNamara, an Irish citizen, was made bankrupt in England (on his own petition). Prior to his bankruptcy he had been a property developer in Ireland. The proceedings concern the impact of his bankruptcy on any rights that he might still have under an Irish pension scheme, the Simcoe Scheme. The Simcoe Scheme held a unit-linked retirement policy issued by Irish Life and this was claimed by his Joint Trustees in Bankruptcy for the bankruptcy estate. Mr McNamara however contended that any rights he had under the Simcoe Scheme should be excluded from his bankruptcy on the basis that this was required by EU law, and specifically by Art 49 TFEU. This issue was argued before me as a preliminary issue on agreed facts. I decided that the question whether the impact of insolvency on pension rights was within the scope of Art 49 TFEU was not *acte clair*, and that it was appropriate to make a reference to the CJEU to seek a preliminary ruling on this question: see the Main Judgment at [119]-[121].

3. Two questions were thereafter formulated by the parties, and scheduled to an order for reference made by me which was sealed on 30 March 2020. I give the text of them below but in effect they asked whether the relevant English provisions for exclusion from bankruptcy of the bankrupt's pension rights (namely s. 11 WRPA 1999, supplemented by various regulations) were compatible with EU law.

4. The request for a preliminary ruling was accepted by the CJEU on 17 June 2020. (The UK had ceased to be a Member State of the EU on 1 February 2020, but, as explained in more detail below, the CJEU continued to have jurisdiction to give preliminary rulings on requests from UK courts made during the transition period, which ended on 31 December 2020). The CJEU handed down judgment on 11 November 2021 under the name *BJ and OV*[1] *v Mrs M & others* (Case C-168/20) EU:C:2021:907. Again I refer in more detail to the judgment (**"the CJEU Judgment"**) below, but in summary the Court decided that Art 49 TFEU precluded a provision of the law of a Member State which made the automatic exclusion of pension rights from bankruptcy dependent on a requirement that the pension scheme be tax approved in that Member State, unless such a provision were justified in the public interest. In other words, the CJEU accepted that the relevant English provisions did constitute a restriction on freedom of establishment, and would therefore be contrary to EU law unless justifiable.

5. I had in the Main Judgment expressed my own (provisional) view that the impact of insolvency on the accrued pension rights of a person exercising the right of self-establishment as a self-employed person was within the scope of Art 49 TFEU; that there had not been equal treatment between UK nationals and nationals of another Member State; and that the relevant English provisions therefore constituted

[1] *ie* the Joint Trustees; I was not told why they have been anonymised as BJ and OV.

discrimination in the enjoyment of a social advantage prohibited by Art 49 TFEU and Art 24 CRD: see the Main Judgment at [122] to [125]. I had also heard argument on the appropriate remedy if there were unlawful discrimination and went on to consider that question to avoid it having to be revisited. I concluded that it would be appropriate to read down s. 11(2)(a) WRPA 1999 so that it included an exclusion of pension rights under a scheme established in another Member State which was "recognised for tax purposes" within the meaning of reg 2(3) of The Pension Schemes (Categories of Country and Requirements for Overseas Pension Schemes and Recognised Overseas Pension Schemes) Regulations 2006, SI 2006/206: see the Main Judgment at [126] to [133]. Since the Simcoe Scheme was (or very probably was) recognised for tax purposes within that meaning, the preliminary issue would therefore be answered "Yes", that is that Mr McNamara's rights under the Simcoe Scheme would be excluded from his bankruptcy.

6. In the light of the CJEU's answer to the questions referred, Mr McNamara's solicitors invited the Joint Trustees to agree to an order disposing of the preliminary issue in his favour, Mr McNamara's position being that there is nothing of any substance left to argue about: the CJEU had made it clear that the relevant UK provisions were *prima facie* discriminatory and hence unlawful unless justified, and since justification had never been raised as an issue in these proceedings, it followed that the preliminary issue should be answered in his favour without more. This was the contention advanced before me by Mr George Peretz QC, who appeared with Mr John Briggs for Mr McNamara.

7. The Joint Trustees' position is very different. Their position is that the CJEU in its judgment made it clear that the relevant provisions were only unlawful if they could not be justified and that it was for the referring court to ascertain whether there was any justification. Directions should therefore now be given to enable the question of justification to be determined. This was the contention advanced before me by Ms Deok Joo Rhee QC for the Joint Trustees.

8. The essential question for me to determine therefore is whether I should proceed to answer the preliminary issue in Mr McNamara's favour without more, on the basis that justification is not an issue raised in these proceedings; or whether I should give directions to enable the issue of justification to be tried.

9. In my judgment the submissions of Mr Peretz are to be preferred, for the reasons I give below. I will therefore make an order answering the preliminary issue in Mr McNamara's favour.

Procedural history – (i) up to the Order for reference

10. It is helpful to set out some of the procedural history, which starts with Mr McNamara being made bankrupt on his own petition on 2 November 2012.

11. By application notice under the Insolvency Act 1986 dated 1 November 2018 the Joint Trustees sought a declaration that all beneficial rights and interest in the pension policy issued by Irish Life vested in them as Mr McNamara's trustees in bankruptcy. The policy was held by the trustees of the Simcoe Scheme and the Joint Trustees' claim was based on the contention that the beneficial interest in the policy remained with Mr McNamara as a member of the Simcoe Scheme at the time of his bankruptcy.

There was in fact a dispute about this and the Joint Trustees had an alternative claim to the effect that if he had divested himself of his interest in the policy before his bankruptcy then this constituted a transaction at an undervalue and should be set aside, but it is not necessary to refer to this further as the preliminary issue proceeded on the assumption most favourable to the Joint Trustees, that is that Mr McNamara still retained pension rights under the Simcoe Scheme at the time of his bankruptcy. The respondents to the Joint Trustees' application were Mrs McNamara and Marine House as trustees of the Simcoe Scheme, and Irish Life itself.

12. By application notice dated 29 March 2019 Mr McNamara applied to be joined to the proceedings and sought relief under a number of heads, including, by paragraph (b), a declaration that all his rights and interest, if any, in the policy were excluded from the bankruptcy estate by virtue of, among other provisions, Art 49 TFEU. The application notice set out, in brief, the grounds on which he claimed to be entitled to this relief. It is worth setting out the relevant ground in full as it identifies the EU law arguments that would be deployed by Mr McNamara:

> "The definition of "approved pension arrangement" in section 11(1)(a) of the 1999 Act [*ie* WRPA 1999] as meaning a pension scheme registered under section 153 of the 2004 Act [*ie* FA 2004] infringes EU law in that the different treatment of pension schemes registered under section 153 of the 2004 Act and equivalent pension schemes based in other Member States amounts to unequal treatment and/or a hindrance to free movement rights within the scope of Articles 21, 45 and/or 49 of the Treaty [on] the Functioning of the EU ("TFEU") and other provisions of EU secondary legislation such as Article 24 of Directive 2004/38 and Article 7(2) of Regulation 492/2011 which prohibit national measures which hinder or deter a national of a Member State from leaving his country of origin in order to exercise his right of free movement within the EU or which subject such nationals to unequal treatment compared to home state nationals. In the present case, failure to treat Irish pension schemes such as the Simcoe Pension Scheme, registered in Ireland under Irish legislation equivalent to section 153 of the 2004 Act, as being "approved pension arrangements" registered in the United Kingdom under that section for the purposes of section 11 of the 1999 Act would hinder or deter Irish nationals who are beneficiaries of such pension schemes from working in, providing services in, or establishing themselves in the United Kingdom, and would also amount to unequal treatment compared to UK nationals who are beneficiaries of UK pension schemes registered under section 153."

This therefore identified that Mr McNamara's argument was that s. 11 WRPA 1999 was contrary to EU law, among other things because by failing to accord the same treatment to Irish pension schemes such as the Simcoe Scheme as that given to UK pension schemes registered under s. 153 FA 2004, it amounted to unequal treatment of nationals of other Member States compared with UK nationals.

13. Mr McNamara's application came before ICCJ Mullen and by his Order dated 18 June 2019 he ordered that Mr McNamara be joined and that what was called his paragraph (b) point be tried as a preliminary issue. The preliminary issue (as later slightly amended) was formulated as follows:

> "Whether by virtue of Articles 21, 45 and/or 49, 50 or 56 of the Treaty on the Functioning of the EU and/or Article 24 of Parliament and Council Directive 2004/38/EC and/or Article 7(2) of Parliament and Council Regulation 492/2011/EU, the pension rights of the bankrupt Michael Bernard McNamara under the Simcoe Industries Limited Retirement Pension Plan held with Irish Life Assurance plc (having policy no. 80001007) and approved by the Revenue Commissioners in Ireland for the purposes of Part 30, Chapter 1 of the Irish Consolidation Act 1997 (as evidenced by a letter dated 28 October 2009 from the Revenue Commissioners in Ireland) at the commencement of the bankruptcy are to be treated for the purposes of section 11(1) and (2)(a) of the Welfare Reform and Pensions Act as [*rights under*] an "approved pension arrangement" and hence excluded by that statutory provision from his bankruptcy estate."

(See the Main Judgment at [4] for the slight variations in the text from that ordered by ICCJ Mullen, none of which is significant).

14. ICCJ Mullen also gave directions for the trial of the preliminary issue. This included a direction that it be decided on the basis of agreed and assumed facts which were set out in the Annex to his Order. There was one fact which was at that stage in dispute – whether Mr McNamara had been an employee of Simcoe or not – and the Order made provision for evidence to be filed on that question, but in the event that too was agreed. The agreed and assumed facts need not be set out here: they can be found in the Main Judgment (supplemented by some undisputed facts drawn from the documents in evidence) at [7] to [18]. These facts are all concerned with Mr McNamara's individual circumstances. None of them concerns what might be called policy questions, that is why s. 11 WRPA 1999 gives a privileged protection to pension schemes registered under s. 153 FA 2004. Nor was there any provision made by ICCJ Mullen's Order for evidence to be adduced on these matters, or indeed for any evidence at all other than on the one narrow issue of fact that was then in dispute. This is not surprising as there was no suggestion at that stage that s. 11 WRPA 1999, even if discriminatory against nationals of other Member States, might nevertheless not be unlawful because it could be justified. Justification was simply not raised as an issue.

15. That is confirmed by the skeleton arguments for the preliminary issue. ICCJ Mullen by his Order directed sequential skeletons, with Mr McNamara's being filed and served not less than 21 days, the Joint Trustees' not less than 14 days, and any skeleton in reply from Mr McNamara not less than 7 days before the hearing. As explained by Mr Peretz in his skeleton argument on behalf of Mr McNamara, this direction was made because there had been no pleadings as such and it was therefore considered prudent that sequential skeletons be served in good time before the hearing so as to guard against one or other party being taken by surprise.

16. Mr Peretz's skeleton, dated 11 October 2019, made the point among other things that Mr McNamara's contention was that the Joint Trustees' reading of s. 11 WRPA 1999 was incompatible with EU law as being discriminatory. It also referred to the position of the Insolvency Service (namely, to summarise it, that EU citizens who had rights under pension schemes recognised in their home countries should benefit from having them protected in order to ensure parity of treatment – see the Main Judgment at [68] to [78] where this is all set out in detail) and said that this indicated that the UK

Government did not contend that there was any reason of public policy that could provide objective justification for the discrimination on grounds of nationality inherent in the Joint Trustees' reading of the provisions in question. The same point was repeated towards the end of the skeleton.

17. Ms Rhee's skeleton in answer on behalf of the Joint Trustees dated 21 October 2019 said nothing about justification of any discrimination. It made a number of points but the thrust of it was that s. 11 WRPA 1999 did not restrict Mr McNamara's freedom of establishment, not least because it was open to Mr McNamara to arrange for the registration of the Simcoe Scheme with HMRC under s. 153 FA 2004.

18. Mr Peretz served a skeleton in reply dated 28 October 2019. This stated (at paragraph 17):

> "Nor do the Trustees seek to argue that any restriction of discrimination would be objectively justified. That is unsurprising given the position of the Government as set out by the Insolvency Service (a position taken despite the fact that the Government itself will frequently be a major creditor, and so lose out when assets of the bankrupt are protected against his insolvency)."

19. I heard the preliminary issue on 5 and 6 November 2019. My recollection, consistently with what is set out in the skeletons, is that it was never suggested on behalf of the Joint Trustees that if, contrary to their submissions, the relevant provisions were discriminatory, they might nevertheless be capable of being objectively justified. Indeed in the Main Judgment at [107] I recorded one of Mr Peretz's submissions as follows:

> "What was relevant was the comparison between the position of a migrant worker in the host state (such as Mr McNamara in the UK) and the position of nationals of the host state (here UK nationals). Unless there was equal treatment, there was discrimination, and unless such discrimination was objectively justified – something that the Joint Trustees had not here suggested – that was a breach of the individual's rights."

Apart from that passing reference, I said nothing in the Main Judgment about any potential justification. That was not perhaps surprising in the circumstances I have referred to; in the current hearing Ms Rhee confirmed that justification was not argued before me in the November 2019 hearing as such (although she said that some of the points that might be relevant to justification were in fact canvassed before me).

20. As already explained I handed down the Main Judgment on 23 January 2020 and concluded that it was appropriate to make a reference to the CJEU to seek a preliminary ruling; and an Order for reference was in due course settled and sealed on 30 March 2020. The questions, agreed by counsel and approved by me, that were included in the Order for reference were as follows:

> **(1) Where a national of a Member State has exercised his rights under Articles 21, 49 TFEU and the Citizens' Rights Directive (Parliament and Council Directive 2004/38/EC) by moving to or establishing himself in the United Kingdom, is it compatible with those provisions for section 11 WRPA 1999 to make exclusion from bankruptcy of**

pension rights in a pension scheme, including those established and tax approved in another Member State, dependent on the pension scheme being, at the time of the bankruptcy, registered under s 153 FA 2004 or prescribed by regulation 2 of the 2002 Regulations and thus tax approved in the United Kingdom ?

(2) In answering Question (1), is it relevant or necessary:

(a) to determine whether the individual moved to the United Kingdom in order, primarily, to declare his bankruptcy in the United Kingdom?

(b) to take into account (i) the protections which may be available to the bankrupt in respect of unapproved pension schemes under s 12 WRPA 1999 and (ii) the possibility for the trustees in bankruptcy to recover sums in respect of approved pension arrangements?

(c) to take into account the requirements to which pension schemes registered and tax approved in the United Kingdom are subject?

Procedural history – (ii) proceedings before the CJEU

21. The reference before the CJEU proceeded on the basis of written observations only. There was no Advocate General's Opinion and no oral hearing. The only observations submitted were from Mr McNamara, the Joint Trustees, and the European Commission.

22. Mr McNamara's observations, dated 25 September 2020, contained a very brief reference to objective justification, simply stating that no such justification had been advanced by the Joint Trustees and that any such justification would be implausible given the public position of the relevant UK public authority (that is the Insolvency Service).

23. The Joint Trustees' observations, dated 2 October 2020, for the first time did advance an argument on justification. This was in one paragraph in which it was submitted that any restriction (*ie* on the freedom of establishment conferred by Art 49 TFEU) or indirect discrimination was objectively justified by the need to control how a bankrupt's pension rights are to be balanced with the interests of creditors and the related need for fiscal supervision for these purposes; and that the way in which ss. 11 and 12 WPRA 1999 pursue that aim was proportionate.

24. The Commission's observations were dated 28 September 2020. These contained a rather more extended discussion of justification, albeit prefaced by the comment that the issue of justification had not been raised as a discrete issue by the referring court, nor did it seem to have received much attention in the national proceedings. But the Commission set out a number of observations "in order to provide the full picture in relation to the Union rules applicable to the case at hand". These suggested that the purpose of the legislation might be described as pursuing a social objective in securing for the bankrupt a certain level of pension rights that was intended to allow him an income on which to live; but even assuming that was confirmed, the referring

court still had to verify that the provision in question was appropriate for ensuring the attainment of that objective in a consistent and systematic manner and did not go beyond what was necessary to that effect. The Commission's view was that limiting the protection to approved schemes "appears to go beyond what is necessary"; and it concluded that it was for the referring court to ascertain, in the light of those considerations, the precise objective of the national authorities in relation to the measures in question and to assess whether those measures were appropriate and did not go beyond what was necessary.

The CJEU Judgment

25. The CJEU Judgment was, as I have referred to, handed down on 11 November 2021. Having set out the relevant provisions of EU and national law, an account of the main proceedings, and the text of the questions referred, the Court first decided (at [60] to [73]) that it was only necessary and appropriate to consider the questions in the light of Art 49 TFEU, and not by reference to Art 21 TFEU or the Citizens' Right Directive.

26. Under the heading "Whether there is a restriction on the freedom of establishment" the Court then (at [74] to [105]) considered that question. The Court identified that the protection given to approved pension schemes by s. 11 WRPA 1999 was more favourable than that given to unapproved pension schemes by s. 12 WRPA 1999, and then set out some principles derived from its decided cases, including (i) that any measure of national law which hinders nationals of other Member States in their pursuit of activities as self-employed persons by treating nationals of other Member States differently from nationals of the country concerned is prohibited by Art 49 TFEU [80]; (ii) that this includes covert as well as overt discrimination [81]; and (iii) that a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect workers who are nationals of other Member States more than national workers, and if there is a consequent risk that it will place the worker from a different Member State at a particular disadvantage "unless it is objectively justified and proportionate to the aim pursued" [82].

27. In the light of these principles the Court concluded at [87]:

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

(I have added the emphasis here and in the other citations from the judgment below).

28. It then referred to a number of matters which I had referred to in the Main Judgment, namely (i) that most UK self-employed workers would have their pension rights

protected by s. 11 WRPA 1999 because their pension schemes would be registered under s. 153 FA 2004 [88]; (ii) that most self-employed migrant workers would have their pension rights in schemes established outside the UK which would not in general be approved for tax purposes in the UK, and, having regard to the fact "**which is for the referring court to ascertain"** that an application for approval cannot be made after bankruptcy, would therefore only be afforded the much more limited protection in s. 12 WRPA 1999 [89]; (iii) that registration of overseas pensions schemes under s. 153 FA 2004 is in principle possible but would bring with it a number of disadvantages [91]; and (iv) that although it would not be particularly onerous for an overseas pension scheme to fulfil the requirements to be approved as a qualifying pension scheme, there is usually little reason for an administrator to take the necessary steps unless payment of contributions is planned on behalf of members who have moved to the UK [92].

29. The Court continued at [93]:

> "In those circumstances the Court finds that Section 11 of the WRPA 1999, in so far as it makes, in principle, the full and automatic exclusion of pension rights from a bankruptcy estate dependent on the pension scheme in which those rights accrued obtaining prior approval for tax purposes, including those schemes established and tax approved in the home Member State of the EU citizen concerned prior to his or her move to the United Kingdom on a permanent basis, as in the case at issue in the main proceedings, is precluded by the rule of equal treatment laid down in Article 49 TFEU and, therefore, amounts to a restriction on the freedom of establishment, which is prohibited by that article, unless justified within the meaning of EU law."

The Court then proceeded to examine, and reject, the particular arguments to the contrary put forward by the Joint Trustees.

30. The next section of the judgment is again headed "Whether there is a restriction on freedom of establishment" but I accept the suggestion by Ms Rhee that this may be a mistake as the Court in this section ([106] to [123]) in fact addresses the question of justification. At [106] the Court repeated its conclusion at [93] that there was a restriction on the freedom of establishment:

> "which is prohibited by that article [*ie* Art 49 TFEU], unless such a restriction is justified within the meaning of EU law, **which must therefore be examined**."

At [107] to [109] it reiterated some propositions from settled case law, namely (i) that a restriction on a fundamental freedom guaranteed by TFEU may be permitted only if the national measure in question "meets an overriding reason relating to the public interest, that it is appropriate to ensure that the objective it pursues is achieved and that it does not go beyond what it necessary to achieve it" [107]; (ii) that a provision such as s. 11 WPRA 1999 that is indirectly discriminatory is valid only if it is "objectively justified and proportionate to the aim pursued" [108]; and (iii) that since whether a restriction is objectively justified requires examining whether it is possibly justified by an overriding reason in the public interest, both questions in practice have to be examined together [109].

31. Under the sub-heading "Whether there is an overriding reason relating to the public interest capable of justifying the restriction on the freedom of establishment" the Court then examines this question. At [110] it refers to the fact that the UK Government had not made any written submissions in the case, and that fact, together with the position of the Insolvency Service, suggested, as maintained by Mr McNamara, that the Insolvency Service did not consider that the unequal treatment could be justified by an overriding public interest. At [111] to [112] it identifies as a potential overriding reason relating to the public interest that suggested by the Commission, namely the social policy objective of ensuring that a bankrupt retains pension rights up to a certain level so that he or she has an appropriate income and thereby does not become a burden on the State; and at [113] concludes this part of the judgment:

> "Whilst such an overriding reason relating to the public interest, **subject to verification by the referring court**, may be valid, it may require further clarification with regard to the specific objective of Section 11 of the WRPA 1999 of aiming to ensure a fair balance between appropriate protection for the interests of the bankrupt and the protection of the financial interests of the bankrupt's creditors in satisfying, at least in part, their claims against the bankruptcy estate."

32. But, as the Court reiterates at [114] to [115], it is not enough that there is a potential overriding reason relating to the public interest; the restriction must also be capable of attaining that objective, and not go beyond what it necessary to attain it. Under the sub-heading "Whether the restriction on the freedom of establishment is proportional" the Court examines this question at some length.

33. At [116] the Court says:

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

34. At [117] the Court makes the point that if the intention was only to exclude pension arrangements that were regulated on a statutory footing, the requirement was liable to go beyond what was necessary if it excluded arrangements that were regulated, albeit potentially in a different manner, in other Member States.

35. At [118] the Court continues:

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

36. At [119] to [120] the Court makes the point that the requirement for approval of a tax scheme in order to limit and monitor tax advantages appears to have no connection with the same requirement for non-tax related (insolvency) purposes. It continues at [121]:

> "In addition, if, and it is **for the referring court to ascertain**, the purpose of that requirement for tax approval was to ensure that the pension arrangement under which the bankrupt has accrued rights is an arrangement that is subject to some form of publicly accessible registration, so that those rights do not improperly escape the reach of the bankrupt's creditors, that provision would go beyond what is necessary if it were confirmed that, as the Commission maintains, UK bankruptcy law provided, at the time of the opening of the bankruptcy proceedings, that the bankrupt was required to disclose to his trustee in bankruptcy all his assets including any pension rights he may have in an overseas pension arrangement."

37. At [122] the Court says that if, as the Joint Trustees maintained, the purpose of requiring approval in the UK of a foreign pension scheme previously approved in another Member State was to enable the UK tax authorities to verify whether the foreign scheme had actually been approved "such a requirement would be likely to go beyond what is necessary". If the foreign tax authorities confirmed that the foreign tax scheme was approved, that ought to be enough.

38. Finally, at [123] the Court said:

> "Lastly, the restriction constituted by Section 11 of the WRPA 1999 would also appear to be disproportionate if, which it is also **for the referring court to ascertain**, it is the case that the requirement of tax approval must imperatively be fulfilled at the latest by the time of the declaration of bankruptcy, thus precluding a bankrupt from applying for approval of the overseas pension scheme at issue after that date in order to be able to be afforded the exclusion under that provision of the rights under that scheme from the bankruptcy estate."

39. The Court then expresses its conclusions at [124] in terms identical to its formal ruling (or *dispositif*), in which it answers the questions referred as follows:

> **Article 49 TFEU must be interpreted as precluding a provision of the law of a Member State which makes, in principle, the full and automatic exclusion from the bankruptcy estate of pension rights accrued under a pension scheme dependent on the requirement that, at the time of the bankruptcy, the pension scheme concerned be tax approved in that Member State, where that requirement is imposed in a situation where an EU citizen, who had, prior to becoming bankrupt, exercised his right of free movement by moving permanently to that Member State for the purposes of pursuing a self-employed economic activity there, has pension rights accrued under a pension scheme established and tax approved in his home Member State, unless the restriction on freedom of establishment constituted by that national provision is justified in so far as it furthers an overriding reason relating to the public interest, is appropriate to ensure that the objective it pursues is achieved and does**

not go beyond what is necessary to achieve that objective.

Submissions for the Joint Trustees

40. In these circumstances Ms Rhee's submissions for the Joint Trustees were that the CJEU had held that s. 11 WRPA 1999 amounts to a restriction of the freedom of establishment under ART 49 TFEU unless it is justified; that that is explained by the CJEU as requiring that it (1) furthers an overriding reason in relating to the public interest, (2) is appropriate to ensure that the objective it pursues is achieved, and (3) does not go beyond what is necessary to achieve that objective; and hence that each of these matters is for this Court now to determine in accordance with the CJEU judgment. It is, she submitted, simply not open to this Court now to dispose of the matter without determining the question as to the compatibility of s. 11 WRPA 1999 in accordance with the preliminary ruling given by the CJEU, and such a determination will necessarily involve considering and deciding the question of justification within the parameters laid down by the CJEU.

41. These submissions raise the question of the relationship between the CJEU and a national court such as this Court. So far as the UK is concerned, this will not now have any continuing relevance to future cases due to the withdrawal of the UK from the EU, but, as already referred to, that does not affect the position in the present case which was referred to the CJEU before the end of the transition period. There was no dispute about this, but for completeness the relevant provisions are as follows:

    (1) Art 86(2) of the Withdrawal Agreement entered into on 12 November 2019 (the full title of which is "Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community"), which provided that the CJEU should continue to have jurisdiction to give preliminary rulings on requests from courts and tribunals of the UK before the end of the transition period (which ended on 31 December 2020);

    (2) Art 89(1) of the Withdrawal Agreement, which provides that judgments and orders of the CJEU handed down before the end of the transition period, or (as in the present case) handed down after the end of the transition period in proceedings referred to in Art 86 "shall have binding force in their entirety on and in the United Kingdom"; and

    (3) s. 7A of the European Union (Withdrawal) Act 2018, which gives effect to the Withdrawal Agreement in domestic law, and which provides that any rights, powers, liabilities, obligations and restrictions created or arising by or under the Withdrawal Agreement or any remedies and procedures provided for by or under it are to be recognised and available in domestic law and enforced, allowed and followed accordingly.

42. There is no doubt therefore that the CJEU Judgment is binding on this Court for what it decides. The question is whether that requires this Court to consider and rule on the question of justification.

43. I do not consider that it does. The CJEU has jurisdiction, by Art 267 TFEU, "to give preliminary rulings concerning … the interpretation of the Treaties". The function of

the Court is therefore to "to decide … question[s] of law" and "the ruling is binding on the national court as to the interpretation of the community provisions and acts in question": *Arsenal Football Club plc v Reed* [2003] EWCA Civ 96 (***"Arsenal"***) at [25], citing *Benedetti v Munari* (Case C-52/76). But the relationship between the CJEU and a national court in proceedings on a preliminary reference is "co-operative rather than hierarchical in nature" and a reference is "not in any sense an appeal": *Wyatt and Dashwood, European Union Law* (6th edn) at p 216. It is for the CJEU to interpret EU law, but it does not rule on the application of the law as so interpreted to the facts. These are matters "within the exclusive jurisdiction of the national court"; hence "questions should be couched in terms which pose a general question of EU law rather than the concrete issue as it falls to be decided in the instant case" (*ibid*). The CJEU does sometimes give a "steer" on the facts, but strictly speaking the national court is not bound by such a steer and it is the national court alone that must find the facts: *Arsenal* at [25].

44. That may (as in *Arsenal* itself, where the Court of Appeal disagreed with Laddie J) sometimes give rise to argument as to quite where the line is to be drawn between the CJEU's interpretation of the law (which is binding on national courts) and its guidance on the facts (which is not), but in the present case I do not think there is any difficulty. The CJEU's statement of the law is found in its formal ruling which is the operative part of the judgment. Since this is couched in terms of a general statement of the law in answer to the questions referred (themselves correctly couched in terms which pose general questions of law) it is entirely unsurprising that the CJEU should have been careful to say that Art 49 TFEU precludes a provision such as s. 11 WRPA 1999:

> "unless the restriction on freedom of establishment constituted by that national provision is justified in so far as it furthers an overriding reason relating to the public interest, is appropriate to ensure that the objective it pursues is achieved and does not go beyond what is necessary to achieve that objective"

If the CJEU had not included that qualification, its statement of the law would have been incomplete and wrong. The rulings that it gives are not only for the benefit of the parties in the case before it but can be relied on by other courts throughout the EU which are "entitled to treat the ruling of the Court of Justice as authoritative and as thereby obviating the need for the same points to be referred to the Court again": *Wyatt and Dashwood* at p 228. But whether the restriction constituted by s. 11 WRPA can in fact be justified is a matter of fact. As such this question falls within the province of the national court.

45. Ms Rhee referred to the repeated statements in the CJEU Judgment that various aspects of justification are "for the referring court to ascertain" and the like. She suggested that these expressions, and their equivalents in the French text ("il incombe à la juridiction de renvoi de vérifier" and "il appartiendra à la juridiction de renvoi d'apprécier" – which I understand to mean respectively "it is incumbent on", and "it will be a matter for", the referring court) connoted an obligation on this Court to apply the law as laid down by the CJEU to the facts, and hence required this Court to proceed to consider the issue of justification.

46. I do not accept this submission. As set out above, the relationship between the

national court and the CJEU is not hierarchical; nor is a reference in any sense an appeal. The CJEU does not therefore sit as an appellate court giving directions to a lower court, and save for giving definitive rulings on the law, the CJEU has no power to tell the national court what to do. When therefore the CJEU in its judgment says that certain matters are for the referring court to ascertain, that is not a direction or instruction to the referring court; it is rather, as Mr Peretz put it, an abnegation. The CJEU is making it clear that these matters, being matters of fact, are not issues for it to decide, but issues for the national court. The purport of such statements, as he said, is not "the national court must do these things and we are ordering it to do so" but "this is not our job as the Court of Justice to do; it is the national court's job."

47. Once seen in this light, it can be seen that the only part of the CJEU's judgment that is binding on this Court is the ruling to the effect that a provision such as s. 11 WRPA 1999 is a restriction that is precluded by Art 49 TFEU unless justified. That means that although the CJEU gave quite extended consideration to the question of justification, no doubt in response to the Commission's observations, that does not constitute a binding instruction that the national court must consider justification. And I accept Mr Peretz's suggestion that when at [106] the CJEU referred to the question of justification as something that "must therefore be examined" (paragraph 30 above), it did not mean that the national court had to examine it; it meant that it was appropriate for the CJEU itself to examine it, as it then proceeded to do at some length (the French text here is "ce qu'il convient, partant, d'examiner", which I understand to have the flavour of "which it is therefore appropriate to examine"). The relevant part of the CJEU Judgment does just this, explaining by reference to settled case-law what is required to establish justification, and containing a number of helpful observations on the facts, as well as pointing to certain matters that the CJEU saw as presenting potential difficulties in establishing justification. In doing this I accept that the CJEU was not thereby directing this Court that it was obliged to consider justification.

48. Nor of course does the CJEU tell national courts *how* to resolve issues. It is common ground that one of the well-settled principles of EU law is that of procedural autonomy. This principle is that it is for the Member States to ensure the legal protection which individuals derive from the direct effect of EU law; and that in the absence of EU rules governing a matter, 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 the direct effect of EU law: see eg *Peterbroeck v Belgium* (Case C-312/93) at [12]. That is subject to the principles of equivalence and effectiveness, namely that the rules must not be less favourable than those governing similar domestic actions, nor render the exercise of rights conferred by EU law virtually impossible or excessively difficult; but it is not suggested in the present case that there has been any infringement of either the principle of equivalence or that of effectiveness.

49. The practical effect of all this, it seems to me, is much simpler than might at first appear. The CJEU has answered the questions referred by this Court. In doing so it has explained, in its role as ultimate interpreter of EU law, what the relevant principles of EU law are. Its ruling on the law is binding on this Court. But it is a matter for this Court how those principles apply in this particular case. And it is a

matter for this Court, applying its ordinary procedural rules, to determine which questions are either already in issue in these proceedings, or if not already in issue should be permitted to be brought in. Those ordinary procedural rules are the CPR and in particular the overriding objective in CPR r 1.1. As Mr Peretz submitted, the CJEU does not require – and indeed could not require – this Court to consider a defence of justification if, in the exercise of its procedural autonomy and having regard to its own rules and procedure (a matter in which the CJEU has neither expertise nor competence), this Court considers it inappropriate to permit it now to be run.

Is justification already in issue in these proceedings?

50. Logically the next question therefore is whether justification has already been raised as an issue in these proceedings.

51. I can answer this very shortly as it was not really disputed. It seems entirely plain to me that justification had not been raised as an issue in these proceedings at the time of my hearing the preliminary issue in November 2019. As appears above, the procedural framework is that of an ordinary application brought by the Joint Trustees under the Insolvency Act 1986, in which Mr McNamara successfully applied to be joined and to have his EU point tried as a preliminary issue. Although it is open to the Court in such applications to direct the parties to plead statements of case, this was not done in the present case (the facts or assumed facts being almost entirely agreed) and the preliminary issue proceeded without pleadings.

52. In those circumstances skeleton arguments were directed to be served sequentially and in good time before the hearing precisely in order to prevent either side being taken by surprise (paragraph 15 above). Justification was not however raised as an issue – or even as a potential issue – by the Joint Trustees either in their skeleton or in argument at the hearing (paragraphs 17 and 19 above). That is why I said nothing about it in the Main Judgment.

53. I add two footnotes. First, I accept Mr Peretz's submission that the burden of proof on justification lies on the person asserting it. That is what one would expect as a matter of principle (on the basis that the party which asserts something must prove it), and is supported by *Barnard, The Substantive Law of the EU, The Four Freedoms* (6th edn, 2019) at p 510 where Professor Barnard says that the burden of proof is on the defending state, citing *Commission v Italy (private security activities)* (Case C-465/05) at [76]. Ms Rhee suggested at one stage that it was in the light of that not for the Joint Trustees to raise justification, but I do not think that can be right. No doubt, as Mr Peretz said, in most cases where the issue comes up it will be in the context of a public law challenge to the lawfulness of some legislation or other measure and Government or some other agency of the state will be seeking to defend the provision in question. But the present case is a dispute between two private parties, Mr McNamara and the Joint Trustees, and if the issue of justification was to be considered at all, it seems obvious to me that it was for the Joint Trustees to raise it. Mr McNamara was not going to do so; and the Joint Trustees could scarcely expect the Court to consider it unless someone raised it. It is trite law that our system of civil litigation is adversarial not inquisitorial, and the Court's role is to determine the issues the parties have raised before it, not to start considering other issues of its own

accord.[2] Unless therefore justification was raised by the Joint Trustees as an issue for trial, the Court would have had no reason to consider it, nor indeed would it have been appropriate for it to do so.

54. The other footnote is that the Joint Trustees did make (brief) reference to the question of justification in their written observations to the CJEU (paragraph 23 above). But that cannot I think by itself, any more than the Commission's observations on justification or what the CJEU itself said in its judgment about it, amount to the raising of the issue before this Court. What questions are in issue in these proceedings is a matter for this Court to be decided by its own procedural rules; and steps taken, whether by one of the parties or by others, in the proceedings on the reference cannot by themselves affect the question. This is quite apart from the point made by Mr Peretz that in the absence of any opportunity for Mr McNamara to respond to the Joint Trustees' written observations either in writing or at an oral hearing, it would be quite unfair for him to be affected by the Joint Trustees having raised justification before the CJEU without him being able to object.

55. It seems to me therefore that until the present hearing the question of justification has not been raised as an issue in these proceedings.

Would it be an abuse for the Joint Trustees now to raise justification?

56. One of the points taken by Mr Peretz in his skeleton argument was that the so-called rule in *Henderson v Henderson* (1843) 3 Hare 100 is capable of applying not only to successive sets of proceedings but also to separate stages in the same litigation: see *Civil Procedure 2021 (the White Book)* §3.4.5 citing *Seele Austria GmbH v Tokio Marine* [2009] EWHC 255 (TCC) (***"Seele"***) per Coulson J. That led to Ms Rhee submitting that there was nothing remotely abusive in the Joint Trustees' position that the Court should now consider the issue of justification, nor could they be said to be oppressing or harassing Mr McNamara, which is the usual hallmark of *Henderson v Henderson* abuse (see *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1).

57. I agree with Ms Rhee that this is not a case of *Henderson v Henderson* abuse. The principle in *Henderson v Henderson* is one of a number of principles which are covered by the portmanteau term *res judicata*: see *Virgin Atlantic Airways Ltd v Zodiac Seats (UK) Ltd* [2013] UKSC 46 (***"Virgin Atlantic"***) at [17] per Lord Sumption JSC.[3] These are disparate principles but they share the feature that they are all concerned with the effects of a court having already adjudicated some issue. A judgment may preclude a party from bringing a second action raising the same cause of action, or re-litigating a particular decided issue (cause of action or issue estoppel); it may preclude further damages being claimed for the same cause of action; or cause a merger of the cause of action in the judgment; or – and this is the distinctive feature of *Henderson v Henderson* abuse – it may render it abusive for a party not only to litigate an issue that has already been litigated but an issue that has not previously been litigated, if it could and should have been raised in earlier proceedings. But as shown by the citation in *Virgin Atlantic* at [18] from the judgment of Wigram V-C in

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[2] See for example *Satyam Enterprises Ltd v Burton* [2021] EWCA Civ 287 at [36]-[38] where I recently had to consider this principle.

[3] Not in fact cited to me but the most recent relevant consideration of the principle by the Supreme Court.

Henderson v Henderson, the foundation of the principle is that it applies where "a given matter has become the subject of litigation in, **and adjudication by**, a court of competent jurisdiction." I agree with Ms Rhee that the principle does not arise if there has not been a previous adjudication, and nothing in *Seele* suggests that it does. In that case there had been a trial on liability before Field J and he had given judgment on it. The question was whether in doing so he had decided a particular point or not. That was the context in which Coulson J held in summary that it would be oppressive for the defendant to be vexed again with an issue "on which it has already been successful": see at [108].

58. In the present case by contrast I have not yet given final judgment on the preliminary issue. As Ms Rhee submitted, my decision in the Main Judgment was simply a decision to refer questions to the CJEU. That was necessarily not a final adjudication of anything because that would have to await the answers to the questions referred. In those circumstances I consider that Ms Rhee is right that the question of *Henderson v Henderson* abuse simply does not arise.

Can the Joint Trustees now raise justification?

59. But that does not mean that the Joint Trustees can simply now raise any issues that they want to. This would be obvious if there had been directions for the parties' cases to be formally pleaded in statements of case. If the Joint Trustees had pleaded points of defence to Mr McNamara's EU point, and had failed to plead justification, they would have needed permission to amend to raise the issue. In fact there were no directions for pleading, because the preliminary issue was tried on agreed and assumed facts, but ICCJ Mullen directed sequential skeletons precisely so that the parties would not be taken by surprise at the hearing.

60. The hearing proceeded on that basis. And it is relevant to note that the hearing before me in November 2019 was not designed as an initial hearing of the issue, to be resumed later: it was *the* hearing of the issue. Neither side had in fact asked me to make a reference so although that was always a possibility (it being a matter for the Court not the parties whether a reference was desirable), the parties had no reason to expect that the hearing would be anything other than the final hearing of the issue, and until they received the draft of the Main Judgment, no reason to think otherwise. Unsurprisingly therefore they did not treat the hearing as a trial run, or dress rehearsal, or reserve any points for later: they argued the points they wished to argue, and did so fully.

61. In those circumstances I consider that the Joint Trustees need the permission of the Court to raise a new issue now. In effect the position is that the Joint Trustees are seeking to raise a new point between the conclusion of the hearing and judgment being entered. I see that as no different in principle from any other case where a party, having had a hearing, asks the Court to receive further argument before judgment is entered. The Court has undoubted jurisdiction to re-open a case before it has pronounced judgment on it (and indeed, as confirmed by the Court of Appeal in *re Barrell Enterprises* [1973] 1 WLR 19, even after it has formally handed down judgment so long as no order has been drawn up and perfected), but the Court is not obliged to do so. The fact that in the present case, because of the reference procedure, there has been an unusually long time between the hearing of the preliminary issue and judgment being finalised does not to my mind change the principle. It is exactly

the same as if, having reserved judgment, I had come to the conclusion that a reference was not in fact necessary, and had circulated a draft judgment concluding that s. 11 WRPA imposed a restriction contrary to Art 49 TFEU unless justified. That would not have enabled the Joint Trustees at that stage to raise justification as an issue without the permission of the Court.

62. What then are the principles on which the Court will permit a party to raise new arguments between the conclusion of the hearing and judgment being finally pronounced and entered? Neither party squarely addressed me on this question, Mr Peretz, apart from his reference to *Henderson v Henderson* abuse, simply putting the matter on the basis of the overriding objective, and Ms Rhee largely concentrating her submissions on the proposition that the Joint Trustees were not acting abusively. But to my mind the most relevant principle is that while the Court has jurisdiction to re-open a case after a hearing has been concluded, it is not a procedure to be encouraged. If I can be forgiven for quoting from a decision of my own where I had to consider the principles, in *R (Veolia ES Landfill Ltd) v HMRC* [2016] EWHC 1880 (Admin) at [226] I said this:

> "…the circulation of a draft judgment is not however intended to provide an opportunity for the unsuccessful party to re-open or re-argue the case, or to repeat submissions made at the hearing, or to deploy fresh ones: [*R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2010] EWCA Civ 158] at [4]. *A fortiori*, the circulation of a draft judgment is not intended to provide an opportunity for the unsuccessful party to change his case, or adduce new evidence. It is not in the interests of efficient case management for a litigant, having seen from a draft judgment in detail why he has lost (or is about to lose), to be permitted to try and make good any gaps that the judge has found in his case by new evidence or argument. The trial is the opportunity for a litigant to put forward his case and the evidence he relies on; trial is not, and should not be allowed to become, an iterative process. That is not to say that there may not be circumstances where fresh evidence can be admitted after trial (and even after judgment has been handed down), but such applications are rare and not to be encouraged: see *Charlesworth v Relay Roads* [2000] 1 WLR 230."

63. Adapting that to the present case, it was the hearing in November 2019 that was the opportunity for the parties to put forward their cases and the evidence they relied on. That, as Mr Peretz accepted, does not preclude the Court from permitting a new case with fresh evidence to be run now, but that is not a procedure to be encouraged, and it will be a rare case where it will be appropriate and in accordance with the overriding objective to permit it.

64. In the present case the factors that seem to me to point firmly against permitting the Joint Trustees now to run a new case on justification are largely those identified by Mr Peretz. It would require a wholly new inquiry, of some factual complexity. It would certainly require the Joint Trustees to approach Government for an explanation of the policy reasons behind the legislation (presumably at least DWP who Ms Rhee told me is the custodian of the relevant legislation, but quite possibly also other Government bodies such as the Insolvency Service and HMRC). It is not a short point of law but would require a substantial further hearing with evidence (including no doubt significant disclosure and quite possibly oral evidence). It is possible that

Government would itself wish to intervene, on one side or the other. There would inevitably be substantial further costs involved, and, because of the need for a further hearing, greater costs than if the point had been raised first time round. If, which is by no means unrealistic, it were thought inappropriate for me to hear it, it would be necessary to educate another judge into a technical and complex case.

65. Mr Peretz also submitted that the Joint Trustees must have taken a deliberate decision not to run justification as a defence first time round; I do not think it necessary to reach any conclusion on that, but what can certainly be said is that there is nothing in the CJEU Judgment which has changed the law on justification. As Ms Rhee herself submitted, the fact that justification can be raised as a defence in cases like this is well established in the EU jurisprudence – see the examples she cited of *Krah v Universität Wien* (Case C-703/17) and *Fussl Modestraße Mayr GmbH v SevenOne Media GmbH* (Case C-555/19) – and there is nothing in the CJEU Judgment which departs from settled law. This is not a case therefore where there has been an unexpected development in the law between the conclusion of the hearing and judgment. It is a case where the Joint Trustees have had second thoughts about how they wish to put their case.

66. Ms Rhee placed some reliance on the fact that until the hearing in November 2019 the focus of the argument was on whether it was unlawful to require a scheme to have been registered under s. 153 FA 2004 in order for the scheme to be an "approved pension arrangement" under s. 11(2)(a) WRPA 1999. Neither party's skeleton arguments adverted to the alternative possibility of a foreign scheme being an "approved pension arrangement" under s. 11(2)(h) WRPA 1999 by virtue of being a qualifying overseas pension scheme: see the Main Judgment at [52]-[61]. Ms Rhee said, and although I do not recollect this, I have no reason to doubt it, that this possibility was only advanced in the course of, and considered at, the hearing itself in response to questions from myself about it. She suggested therefore that this was a new point, not raised by Mr McNamara, that the Joint Trustees could not have addressed before the hearing.

67. I do not however see that this makes any difference to the analysis. Mr McNamara's position was that s. 11 discriminated unlawfully against nationals of other Member States, because of the requirement for schemes to be registered under s. 153 FA 2004. It was always open to the Joint Trustees to answer such a case by saying that even if schemes such as the Simcoe Scheme either could not, or in practice would not, register under s. 153 FA 2004, there was nothing to stop them being qualifying overseas pension schemes, and *that* requirement was either not discriminatory or, if it were, was justified. If, as appears, they had failed to anticipate the point themselves, they could have asked for an adjournment at the hearing to address the question of justification, which might or might not have been granted. I do not however see that having failed to take the point at the hearing they can now rely on these facts to justify re-opening the case after the hearing is concluded.

68. That is sufficient to explain why in my judgment the requirements of the overriding objective lead to the conclusion that the Joint Trustees should not now be permitted to run a justification defence.

69. Mr Peretz also suggested that the point was in any event unlikely to succeed. In the light of the conclusion I have come to, I do not need to, nor do I think I should, place

any particular weight on this point (and Mr Peretz himself said he was only making it lightly) as anything other than a superficial view would require detailed consideration of what are quite intricate points, and that has neither been done nor is something that I think appropriate for me to embark on in a hearing like this. What can be said however is that Mr Peretz was able to point to a number of matters. First there is the view of the Insolvency Service as expressed in its Technical Manual that arrangements should generally be made to exclude the pension rights of EU nationals under schemes approved for tax purposes in other Member States "in order to ensure parity of treatment" (see the Main Judgment at [70]). Second there was the fact that the UK Government chose not to submit any observations to the CJEU. Mr Peretz said that all references are copied to every Member State and the Member State from which the reference comes commonly does submit observations. That may be so, but it may also be that even though the UK retained the right to participate in references from the UK made during the transition period, the UK Government's attitude to so participating has changed since the UK ceased to be a Member State. In those circumstances I doubt anything much can be read into this, but it does nevertheless mean that it is at the lowest unclear whether the UK Government would in fact support a case of justification. Third, the CJEU itself in its judgment pointed to a number of apparent difficulties in a justification defence in the present case, albeit that was without the benefit of much adverse argument. Taken overall I accept that it is far from obvious that the Joint Trustees would succeed in a defence of justification, but I do not think I should go any further than that, and as I have said, I do not place any particular weight on that.

70. Nevertheless for the reasons I have given I conclude that it would not be right to permit the Joint Trustees now to advance a defence of justification.

Should Government be given an opportunity to intervene?

71. Subject to two further points, that is enough to dispose of this application. The CJEU Judgment establishes that s. 11 WRPA 1999 is incompatible with Art 49 TFEU unless it can be justified, and if I decline to permit the Joint Trustees to advance justification as a defence, it follows that s. 11 WRPA 1999 is unlawful. I heard full argument at the hearing in November 2019 as to what the consequence of such a finding would be, and came to a decision on the point in the Main Judgment precisely in order to avoid the necessity for further argument (see paragraph 5 above). My conclusion was that s. 11 WRPA 1999 should be "read down" by adding at the end of s. 11(2)(a):

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

See the Main Judgment at [133].

72. The first of the two further points is whether before giving a final judgment to that effect Government should be given an opportunity to intervene. Ms Rhee submitted that it was appropriate to give the DWP, as custodian of the relevant legislation, an opportunity to address the Court before the legislation was read down in this way.

73. This was a point which I was concerned about at the hearing. But I am persuaded that there is nothing in it. Ms Rhee submitted that a declaration that s. 11 WRPA should be read down in that way would be a declaration *erga omnes* (that is one which binds the whole world). If that was indeed the effect of such a declaration then I would see the force of the submission that Government, as the promoter and custodian of the legislation, should be at least given the opportunity to make its position known, either by way of evidence or by way of being permitted to intervene and make submissions, before the Court took such a step.

74. But I have been shown nothing to suggest that this would be the effect of such a declaration (nor indeed does Mr Peretz ask for a formal declaration as such). Where a Court reads down UK legislation in order to ensure that it conforms with EU law (under the well-known *Marleasing* obligation), it is in principle conducting an exercise in statutory interpretation, albeit of an unusual type. As such I see no reason in principle why the decision of this Court on the question is any more binding than any other decision of the Court on a question of statutory interpretation. That means it is binding on the parties (as a matter of *res judicata*), but is not binding on those who are not parties (or privies) to the litigation.

75. It of course also has status as a precedent, but it will have the same status for this purpose as any other decision of the High Court. The traditional formulation is that although not strictly binding as a precedent a decision of the High Court on a point of law will usually be followed by another High Court Judge unless the latter is convinced it is wrong. But although the interpretation of a statute is of course a question of law, the question whether a conforming interpretation should be adopted is a rather unusual question, as it depends among other things on whether the provision is justifiable and that in turn depends on a number of other questions: does it further an overriding reason relating to the public interest? is it appropriate to ensure that the objective it pursues is achieved? and does it go beyond what is necessary to achieve that objective? These are really factual questions or at any rate informed by the facts. If I decide the present case on the basis that it is too late for these questions to be raised, I agree with Mr Peretz that that would not preclude any other person, including Government if it so wished, from seeking to argue in any future case that the restrictions in s. 11 WRPA 1999 were in fact justified on the basis of an overriding public interest; and if such justification were made out, that would self-evidently be sufficient reason for the Court to decline to follow my decision in the present case.

76. I do not therefore consider that it is necessary to give Government an opportunity to intervene in the case before proceeding to read down s. 11 WRPA 1999 in the way that I have indicated that I will. That interpretation will bind the parties but not in practice Government or anyone else.

The status of the Simcoe Scheme

77. The final point is one that was adverted to in further written submissions sent by Ms Rhee on behalf of the Joint Trustees after the present hearing had concluded. There was no direction for such further submissions and the transcript shows that it was not something canvassed at the hearing, and I think the Court should properly have been asked for permission rather than the submissions being sent unsolicited. This is for much the same reasons as I have referred to above, namely that parties are

expected to deploy all their arguments at a hearing and not supplement them with further thoughts afterwards. By CPR r 1.3 the parties are required to help the Court to further the overriding objective, and by CPR r 1.1(2)(e) one of the facets of the overriding objective is allotting to a case an appropriate share of the Court's resources while taking into account the need to allot resources to other cases (and by CPR r 1.1(2)(b) another is dealing with a case in such a way as to save expense), and I do not think parties therefore have an unfettered right to file further submissions after a hearing is over. If they consider they have not done full justice to their case they should I think therefore ask the Court for permission to file further submissions, explaining why it is necessary.

78. But I will address the point on its merits. The way in which I propose to read down s. 11 WRPA 1999 is by adding at the end a reference to schemes that are "recognised for tax purposes" within the meaning of reg 2(3) of the 2006 Regulations (see paragraph 71 above). At the hearing in November 2019 Mr Peretz said he was perfectly content with that (see the Main Judgment at [131]). In the present hearing he submitted that the appropriate Order on that basis was one that answered the preliminary issue in his favour by declaring that Mr McNamara's rights and interest, if any, in the pension policy are excluded from the bankruptcy estate.

79. This necessarily assumes that the Simcoe Scheme is a scheme that satisfies the requirements to be "recognised for tax purposes". There are three such requirements: see the Main Judgment at [55]. I there concluded that it was probable that the Simcoe Scheme met these requirements. Ms Rhee's point is that there is an evidential gap: the agreed facts on which the preliminary issue was heard included the fact that by letter dated 28 October 2009 the Simcoe Scheme was informed that it had been approved by the Irish Revenue Commissioners and would be treated as an exempt approved scheme for the purposes of the Irish legislation (TCA 1997) with effect from 30 August 2009. But Ms Rhee said that that did not necessarily mean that it remained approved thereafter.

80. I see the point but if the point was going to be taken I think that it should have been taken at the hearing in November 2019. Mr McNamara's skeleton for that hearing put forward the argument that s. 11 WRPA 1999 had to be read as extending to the Simcoe Scheme "as a pension scheme registered in Ireland". Despite the reference to registration (probably technically inaccurate, the correct term being approval) this was plainly a reference to its status as an exempt approved scheme. If the Joint Trustees were going to suggest that the evidence was insufficient to establish that status at the relevant time, that was their opportunity to do so. In truth therefore this is another point that they are trying to raise at a late stage. Quite apart from that, in the absence of any suggestion that exempt approval had been lost, I think the Court would have been entitled to presume, on the basis of the presumption of continuity, that that status continued; and Mr McNamara has in response to the Joint Trustees' post-hearing submissions in fact now obtained e-mail confirmation from the trustees of the Simcoe Scheme that the exemption remains in place. That is also post-hearing evidence but in the circumstances I propose to admit it. In those circumstances I do not think there is anything in the point.

81. In the Main Judgment at [56] I concluded that all three requirements were met for the Simcoe Scheme to be recognised for tax purposes. I have already effectively addressed condition 3 which is that the scheme be approved by the tax authorities in

the country in which it is established. Condition 1 is that the scheme is open to persons in the country in which the scheme is established. I thought that was plainly satisfied and Ms Rhee has not suggested the contrary. Condition 2 is satisfied if, among other things, the scheme is established in a country where there is a system of taxation of personal income under which tax relief (including exemption from tax) is available in respect of pensions, and all or most of the benefits paid by the scheme to members who are not in serious ill-health are subject to taxation. Again I thought, from my reading of the TCA 1997, that that was satisfied as well, and the contrary has not been suggested.

82. In those circumstances I do not think that there is any reason to give the Joint Trustees any further opportunity to investigate the position. They have had nearly two years from the Main Judgment to check whether there was any reason to challenge the views I had expressed, and apart from the point belatedly taken about the possibility that exempt approval had been lost, have suggested no other reason to doubt my conclusion.

83. For the sake of completeness I should say that on re-reading the Main Judgment, it occurred to me that it might have been preferable to say that s. 11 WRPA 1999 extended to an "overseas pension scheme" (within the meaning of s. 150(7) FA 2004) established in a Member State of the EU rather than simply one that was "recognised for tax purposes". This would import two further requirements, one that it was a "pension scheme" as defined by s. 150(1) FA 2004, and the other that it satisfied the requirements of reg 2(2) of the 2006 Regulations. But in practical terms it would make no difference as the Simcoe Scheme is plainly a pension scheme as defined, and I have no real doubt that it also satisfied the requirements of reg 2(2).

Conclusion

84. In those circumstances I do not think there is any good reason to put off making the order requested by Mr McNamara. On the basis that s. 11 is to be read down as I suggested in the Main Judgment, I will declare that all rights and interest of Mr McNamara, if any, in the policy held by the Simcoe Scheme are excluded from the bankruptcy estate. This is of course without prejudice to any question whether any contributions to the scheme were excessive contributions and if so whether it is still open to the Joint Trustees to do anything about it, something which is not before me and which I have not been asked to consider.

85. I will give the parties an opportunity to address me on costs and any other consequential issues although it may assist if I say that my present view, subject to any such submissions, is that the Joint Trustees should pay the costs of Mr McNamara and the other respondents on the standard basis. I am not currently persuaded that this is a case where any part of the costs should be paid on the indemnity basis.

86. I am very grateful to counsel for their most helpful submissions.