Neutral Citation Number: **[2017] EWCA Civ 200**

Case No: A3/2015/3998

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, CHANCERY DIVISION
Mrs Justice Asplin DBE
HC2014/001502

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 March 2017

Before :

LADY JUSTICE GLOSTER
(VICE PRESIDENT OF THE COURT OF APPEAL, CIVIL DIVISION)
LORD JUSTICE LEWISON
and
LORD JUSTICE HENDERSON

- -

Between :

FDR LIMITED	**Appellant**
- and -	
(1) CAROL DUTTON	**Respondents**
(2) DAVID LAWRENCE	
(3) TY MILLER	
(4) PETER MOTLEY	
(5) KEITH ROWLING	

- -

MR PAUL NEWMAN Q.C. & MR SIMON ATKINSON (instructed by **Ashurst LLP**) for the **Appellant**

MR KEITH ROWLEY Q.C. & MR DANIEL BURTON (instructed by **Dentons UKMEA LLP**) for the **Respondents**

Hearing date : 23 February 2017

- -

Judgment Approved

Lord Justice Lewison:

1. Until 1991, when the rules were changed, pensioners entitled to pensions under the FDR pension scheme were entitled to annual increases in their pensions of 3 per cent compound. Since 1991, when new rules were adopted, the rate of increase has been changed. The issue on this appeal from Asplin J is how the new rules and the old rules interact. Her judgment is at [2015] EWHC 2946 (Ch), [2015] Pens LR 569.

2. The old rules provided in rule 16 (e):

> "A pension payable under these Rules shall … be increased at each anniversary of the date of its institution by 3 per cent compound. For this purpose the date of its institution shall be regarded as the date on which a pension became payable to the Member under the Scheme or the date of the Member's death if earlier."

3. The definitive deed contained, as is usual, a power of amendment exercisable by the trustees with the employer's consent. The members did not have to be consulted. It was subject to a proviso in the following terms:

> "Provided always that no such alteration or addition shall (1) operate so as to affect in any way prejudicially (a) any pension already being paid in accordance with the Rules of this Deed at the date such alteration or addition takes effect or (b) any rights or interests which shall have accrued to each prospective beneficiary in respect of pension benefits secured under the Scheme up to the date on which such alteration or addition takes effect."

4. The old rules were amended by a deed of amendment dated 20 June 1991. It purported to delete the old rule entirely and substitute:

> "The amount of a pension payable under these Rules at each anniversary of the date of its institution of that pension falling on or after 1 January 1991 shall… be increased by the lesser of 5% of that amount or such percentage of that amount as represents any increase in the Government's Index of Retail Prices since the immediately preceding anniversary date. For this purpose the date of its institution shall be regarded as the date on which a pension became payable to the Member under the Scheme or the date of the Member's death, if earlier."

5. The lesser of 5% and the increase in RPI has been referred to as "5% LPI". It is clear from the terms of the new rule that no differentiation was made between pension entitlement which accrued before and pension entitlement which accrued on or after 20 June 1991. It is also clear that the new rule was expressed to operate retrospectively.

6. It is common ground that an employee's entitlement to pension for a period of pensionable service accrues at the end of that period of service. So for periods of

pensionable service before 20 June 1991 deferred members had accrued rights which were protected by the proviso. For periods of pensionable service before 20 June 1991 those accrued rights included a right to an annual increase of pensions in payment of 3 per cent compound. For those members of the scheme who carried on accruing pension after 20 June 1991, the new rules apply to periods of pensionable service falling after the change in the rules. Some members will, therefore, be entitled to a pension calculated partly by reference to periods of pensionable service falling before 20 June 1991 and partly by reference to periods of pensionable service falling on or after that date.

7. The question is how the new rules apply in relation to benefits accrued before 20 June 1991. Three approaches have been canvassed: the first two by the trustees of the scheme and the third by the employer. In descending order of cost to the scheme they are:

   i) The trustees' Annual Approach. This requires the pre 20 June 1991 element of a pension in any given year to be increased on each anniversary of the commencement of the pension by the greater of (a) 3% per annum and (b) 5% LPI.

   ii) The trustees' Alternative Approach. This requires the annual increase to be the higher of (a) the value of the pre 20 June 1991 element of the member's pension as at the date of retirement to be increased year on year by 3% per annum compound, up to and including the year in which the increase is to take effect; and (b) the value of that element of the member's pension paid in the year immediately prior to the increase taking effect increased by 5% LPI.

   iii) The employers' Modified Cumulative Approach. This requires two separate calculations of a member's entitlement. The first calculates the value of that element of the member's pension retrospectively as from the date of retirement increased year on year by 3% per annum compound up to and including the year in which the increase is to take effect. The second calculates the value of that element of the member's pension retrospectively as from the date of retirement increased year on year by 5% LPI compound up to and including the year in which the increase is to take effect, subject to a floor of 0% to avoid the effects of any negative retail prices increase. The relevant element of the pension payable in any given year is the higher of the two calculations.

8. The judge held that the entitlement of a member with pre-June 1991 service was a blend of the old rule and the new rule. Both the old rule and the new rule required the pension to be increased annually. The Annual Approach did that, and reflected the natural meaning of the words. She was satisfied that that result was workable and practical. Accordingly she held that the Annual Approach was the correct one. Since that produces the most expensive result for the scheme (which is already in deficit) it is not surprising that the employer wished to appeal.

9. The essential difference between the rival positions is that the trustees' two methods require the increase in the pension to be calculated year on year (i.e. annually) by applying the appropriate percentage increase to the amount which was in fact paid by way of pension in the previous year. The employer's method requires an annual retrospective calculation over the whole of the period during which the pension has

been in payment to see which of the old rule and the new rule would produce the higher result.

10. The strength of the employer's position, presented by Mr Newman QC, is that the Annual Approach gives a pensioner more than she would have been entitled to if the old rules had remained in force; and also more than she would have been entitled to by virtue of the new rules which were intended to supersede the old rules. The proviso was simply intended to preserve a pensioner's entitlement under the old rules: not to give her the best of both worlds. That is what the Modified Cumulative Approach does.

11. The strength of the trustees' position, presented by Mr Rowley QC, is that the Annual Approach gives effect to the requirement in both sets of rules that the pension in payment be increased year on year by the amount specified in the rule in question.

12. Although the answer to the question raised on this appeal is in a sense a question of interpretation, it is an unusual one. In the usual case the court is called upon to interpret the words of an instrument which was intended by the parties to give effect to their bargain. The role of the court in that situation is to decide what the words mean. In the present case, however, it is clear that the trustees, in exercising the power of amendment conferred by the definitive deed, thought that the payment of future pensions would be regulated by the new rule irrespective of the date of service at which an entitlement to pension accrued. Certainly, the scheme was administered on that basis for many years after the new rule came into effect. The problem here is a different one: the proviso to the power of amendment has the effect that the new rule cannot be given effect according to its terms.

13. The judge regarded the solution to the conundrum as lying in the interpretation of the old rule and the new rule as a blend. While I see the force of that approach, I do not agree with it. In my judgment the answer to the conundrum lies in the proviso and what it would have been understood to protect. In answering that question I do not think that we can, in any conventional sense, look for the presumed intention of the parties to the amendment. The intention of the trustees and the employer is clear. They wanted to do away with the old rule completely and bring in the new. The question is the extent to which the proviso frustrates that intention. Accordingly I am not impressed by arguments based on the supposed administrative ease or difficulty in giving effect to the rival interpretations of the proviso which have as their underlying premise that we are attempting to put ourselves in the position of the relevant parties in 1991. Moreover, whichever method is the right one it depends on the application of an algebraic formula, which is not conceptually difficult to understand, and uses mathematical techniques which have been known for centuries. For the same reason I do not find it profitable to speculate on how the trustees might have exercised the power of amendment if, contrary to the facts, they had appreciated that the proviso prevented them to some extent from doing what they purported to do.

14. To the question: what was the right that a pensioner enjoyed under the old rule which is protected by the proviso, Mr Rowley answers: the right to an annual increase in the pension of 3 per cent compound. The calculation must be carried out individually and separately for each year in which the pension is paid. That is as much a part of a pensioner's accrued right as the accrual rate at which the pension is earned. It is not, as Mr Newman submitted, a mere matter of mechanics. Any method of calculation

must reflect that entitlement. If a method of calculation might result in an annual increase being less than 3 per cent it must be one that is prohibited by the proviso. In one sense that is obviously true: it is what the old rule provided. But does that answer the question: what would the purpose of the proviso have been understood to be? Mr Newman, naturally enough, gives a different answer. The purpose of the proviso was to ensure that the pensioner would receive a pension which, in any given year, was not less than the pension she would have received if that pension had been increased by 3% compound since the date when it began to be paid.

15. This is a very short point which is incapable of much elaboration. The terms of the proviso are such that any change in the rules must not prejudicially affect any pension in payment or any accrued pension rights. How would a pension in payment be prejudicially affected? In my judgment by the pensioner receiving less money in her pocket than she would have done but for the change in the rules. Likewise, in my judgment, a pensioner's accrued right would be prejudicially affected if, when the pension came on stream, she received less money in her pocket than she would have done if the change had not been made. Although it is true, as Mr Rowley submitted, that the rate of increase in pension under the old rules is as much a part of a pensioner's substantive pension right as the base figure to which it is applied, it is not the whole right. The right is not a right to a 3 per cent annual increase in the abstract, but a right to a 3 per cent increase applied to a figure which has itself been increased by 3 per cent and not by any higher figure. This description of the right is inherent in expressing the right as a right to an increase of "3 per cent compound". What is compounded is the rate of increase of 3 per cent: in other words the same 3 per cent increase is repetitively applied. To conclude thus is indeed to accept Mr Rowley's insistence that the base pension and the percentage increase are integral parts of a pensioner's entitlement. To decouple the percentage increase from the figure to which that increase is to be applied creates a new right: it does not preserve an old right. But the right that has been preserved by the proviso is in my judgment the old right and not some amalgam of the old and the new.

16. The Modified Cumulative Approach preserves that right; and enables a pensioner to take the benefits of the new rule if, in any given year, it produces a better outcome for her. It also does least interference to the integrity of the modified scheme: see *Foster Wheeler Ltd v Hanley* [2009] EWCA Civ 651, [2009] Pens LR 229 at [33] and [34]. In short, in my judgment Mr Newman is right.

17. I would allow the appeal.

Lord Justice Henderson:

18. I agree.

Lady Justice Gloster, Vice President of the Court of Appeal, Civil Division:

19. I also agree.