

# BBS briefing note

## ***Foster Wheeler v. Hanley* – The Court of Appeal’s judgment**

On 8<sup>th</sup> July 2009, the Court of Appeal overturned the decision of the High Court in the *Foster Wheeler v. Hanley and Others* case. This is a landmark case in relation to pensions equalisation, which provides some guiding principles on how the Courts will interpret scheme rules to give effect to equalisation rights. This *BBS briefing note* considers the Court’s judgment.

### **BACKGROUND**

The judgment of the European Court of Justice in *Barber v. Guardian Royal Exchange* established that the requirement for men and women to be paid “equal pay for equal work” applied to occupational pension scheme benefits. This affected pension schemes in which men and women had different Normal Retirement Ages (NRAs), often age 60 for women and age 65 for men.

From 17th May 1990, the date of the Barber judgment, benefits had to be levelled up to those of the advantaged sex until the scheme rules could be amended to equalise the benefits, a period known as the “Barber window”. A levelling down of benefits was permitted from the equalisation date onward. As a result, many members of occupational pension schemes have accrued benefits with “mixed NRAs”, i.e. different NRAs for different periods of pensionable service.

### **THE FOSTER WHEELER CASE**

The Foster Wheeler case concerned how benefits should be paid to members who had accrued benefits with reference to NRAs of both 60 and 65 and chose to retire between those dates. Did such members have the right to take all their benefits at the age of 60 and, if so, should the benefits accrued with an NRA of 65 be reduced for early payment or paid in full?

The High Court decided that mixed NRA members wishing to retire between age 60 and 65 should take their benefits under the scheme’s early retirement rule. Under this rule, benefits could be taken from age 60 unreduced, subject to the Company’s consent. The Court held that the Company could not withhold consent as members were entitled to retire at age 60, at least in respect of service accrued in the Barber window. Company consent was therefore implied, allowing members with mixed NRAs to take all of their benefits from age 60, without any reduction to the benefits accrued with reference to an NRA of 65. The implication of this was a significant, unexpected increase in the deficit of the pension scheme and hence the employer chose to appeal.

### **THE COURT OF APPEAL**

The Court of Appeal overturned this decision.

The Court agreed that a member with benefits built up with reference to mixed NRAs was entitled to take all of his



## BBS briefing note (continued)

benefits from age 60. However, the Court of Appeal held that those benefits accrued with an NRA of 65 should be treated as deferred benefits. Under the scheme rule dealing with early retirement from deferred status, these benefits could still be paid from age 60, but subject to Company consent and a reduction for early payment. As a result, a single pension could be paid from age 60, with benefits accrued by reference to an NRA of 60 paid in full and benefits accrued by reference to an NRA of 65 reduced to take account of early payment.

In reaching its decision, the Court of Appeal was guided by the principle of “minimum interference”. The Court considered that, where a scheme has put in place a method of equalisation, the Courts should give effect to Barber rights by adhering to the scheme rules as far as possible. Any interference with the scheme’s provisions should be kept to a minimum, taking into account the substance as well as the form of any amendment.

It was held that the High Court decision did not comply with this principle. It gave mixed NRA members a windfall, which would need to be funded by the sponsoring employer and was potentially unfair to other members. The ruling removed the Company’s ability to control early retirements or impose reductions to benefits taken early, which had previously been possible through the granting of consent. The decision had also gone

beyond what was required by European law, i.e. the levelling up of benefits accrued in the Barber window to an NRA of 60. The substantive effect of the High Court’s decision therefore amounted to more than a minimum interference, whereas the Court of Appeal’s ruling avoided these consequences.

It is worth noting that the Court of Appeal also considered whether the benefits of mixed NRA members could be treated as two entirely separate pensions payable from the two different NRAs. This method was dismissed in this case as it would have required greater interference with the scheme rules than the approach adopted. However, it was not ruled out as a possible solution for other schemes.

### **BBS VIEW**

It should be remembered that the Court of Appeal’s judgment was based on the particular rules of the Foster Wheeler pension scheme. Nevertheless, the ruling is useful as it supports an equalisation method that has been implemented by many schemes. It also sets out how the Court will approach questions in relation to pensions equalisation in the future.

In light of the judgment, Trustees may wish to review the method of equalisation adopted in their particular scheme and BBS will be assisting its clients as necessary.

This BBS briefing note is based on BBS’s understanding of the law and is provided for information only. It should not be relied upon as a definitive statement of the law and detailed legal and financial advice should be obtained on the specific circumstances before proceeding.

