IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Ch. 1997-S-No.3269

Royal Courts of Justice

BEFORE: **MR JUSTICE NEUBERGER**

BETWEEN:

SOUTH WEST TRAINS LIMITED

Plaintiff

-and-

(1) PAUL WIGHTMAN
(2) JULIE WIGHTMAN
(3) RAILWAYS PENSION TRUSTEE COMPANY LIMITED
(4) DEREK SCOTT
(5) KEITH VICTOR WALKER
(6) DAVID EDWARD ALLEN
(7) DAVID JOHN McCLOUD
(8) SHAUN TERENCE WILLIAM BRADY
(9) ALAN McKNESPIEY
(10) DAVID BUTLER

Defendants

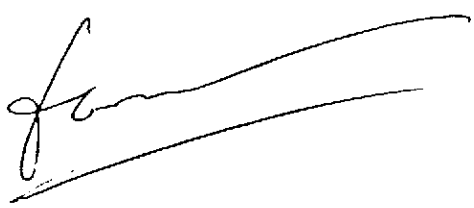
Mr Nicholas Warren QC and Mr Michael Tennet (instructed by Messrs. Kennedys and Messrs. Sacker & Partners) appeared on behalf of the Plaintiff.

Mr Terence Etherton QC, Mr Paul Newman and Professor R V Upex (instructed by Messrs. Thompsons) appeared on behalf of the 1st and 2nd Defendants.

Mr Brian Green QC and Mr Jonathan Evans (instructed by Messrs. Freshfields and Messrs. Baker & McKenzie) appeared on behalf of the 3rd to 9th Defendants.

Mr Christopher Nugee (instructed by Messrs. Rowe & Maw) appeared on behalf of the 10th Defendant

I direct pursuant to RSC Ord. 68 rule. 1 that no official shorthand note shall be taken of the judgment and that copies of this version as handed down may be treated as authentic.



The Hon Mr Justice Neuberger Dated: 18th December 1997

MR JUSTICE NEUBERGER:

INTRODUCTION

Background

These proceedings arise out of the privatisation of British Rail, and raise points of some interest relating to pensions and employment law.

Before British Rail was privatised, the majority of its employees were contributories to, and members of, its main pension scheme, the British Rail Pension Scheme ("the BRPS"). As part of the privatisation process, a new pension scheme for the whole railway industry was established, namely the Railways Pension Scheme (" the RPS"), pursuant to Schedule 11 to the Railways Act 1993 ("Schedule 11" and "the 1993 Act" respectively). This empowered the Secretary of State to establish the RPS by delegated legislation, and to make regulations governing the transfer of members assets and liabilities from the BRPS to the RPS. On 31st May 1994 the RPS was established by the Railways Pension Scheme Order 1994. The Trustee of the RPS is and has at all times been the Railways Pension Trustee Company Limited ("The Trustee") the third defendant in

these proceedings. It has delegated the day to day administration of the RPS to a wholly owned subsidiary, Railway Pensions Management Limited ("Pensions Management"). On the same day, the Railway Pensions (Protection and Designation of Schemes) Order 1994 ("the 1994 Order") came into force. It sets out in some detail pension safeguards for existing railway employees under the 1993 Act.

The Schedule to the Railways Pension Scheme Order 1994 sets out provisions governing the RPS. The RPS was at its inception divided into three sections, of which the only relevant section for the purpose of these proceedings is the BR Shared Cost Section ("the BR Shared Cost Section"). On 1st October 1994 the Railways Pensions (Transfer and Miscellaneous Provisions) Order 1994 effectively transferred all members, assets and liabilities of the BRPS as at 30th September 1994 to the appropriate Sections of the RPS. As it was anticipated that the privatisation of British Rail would involve selling or franchising individual railway businesses, Clause 3 of the RPS provided that the owner of each such individual railway business could establish a new shared cost section with rules which were laid down in Appendix 2 to the Railways Pension Scheme Order 1994. Any such shared cost section, once established,

operates effectively as a wholly separate and self-contained pension scheme.

South West Trains Limited ("SWT"), the plaintiff in these proceedings, was incorporated on 1st April 1995 as a wholly owned subsidiary of the British Railways Board ("the Board"), and on the same date the Board's South West Trains operating unit was transferred to SWT under Section 85 of the 1993 Act. The staff of that operating unit transferred to SWT, under the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 1981, on their existing employment terms and conditions. On 4th February 1996, the whole of the issued share capital in SWT was sold to Stagecoach Holdings PLC, who at the same time were granted a franchise to operate a passenger railway over the relevant geographical area (i.e. to the south and west of London) pursuant to Sections 23 to 31 of the 1993 Act.

The SWT Shared Cost Section ("the Section") of the RPS was established for the employees of SWT on 2nd February 1996; on the same date, a transfer of an appropriate proportion of the assets of the BR Shared Cost Section was made to the Section, calculated in accordance with the

provisions of the Railway Pensions (Transfer and Miscellaneous Provisions) Order 1994.

Clause 4 of the RPS envisaged that a Pensions Committee, consisting of equal numbers of representatives of employer and employees, would be established for each employer's share cost section, and such a committee was set up in relation to the Section in early November 1996 ("the Pensions Committee"). The first members of the Pensions Committee were the fourth to ninth defendants (inclusive) in these proceedings, three being SWT's nominees and three being nominees of the employees. One of the latter, the eighth defendant, Mr Brady, is a train driver, and a member of ASLE & F ("ASLEF") the trades union of which most of the train drivers are members.

The first defendant, Mr Wightman, is also a train driver and a member of ASLEF; he was an employee of the Board and a member of the BRPS as at 30th September 1994, and he is now an employee of SWT and a member of the Section. The second defendant, Mrs Wightman, is his wife.

As at 30th June 1997, there were 3,536 active members of the SWT section, of whom 675 were drivers, 175 were revenue protection

inspectors, and 237 were fleet engineering staff. The remaining 2,449 members fell into other categories of employment.

The Provisions of the Pension Schemes

Clause 13 of the BRPS provided, and Rule 5A of the Section provides, for pensions to employees to be paid in accordance with the same formula. That formula is:

> "The annual pension for each year of Pensionable Service... shall be either:
>
> (I) 1/60th of Final Average Pay less 1/40th of Final Average Basic State Pension;
>
> or
>
> (ii) 1/120th of Final Average Pay,
>
> whichever is the greater."

"Final Average Pay" is effectively defined by reference to the "Pay" which the employee receives in his last year of service (subject to the stipulation that if his Pay is reduced from one year to the next, that reduction is effectively ignored). "Pay" is defined, so far as relevant, as meaning, in the case of an employee "who is remunerated at a fixed rate of pay per annum, that rate of pay".

Each pension scheme also contained provisions for contributions from employee and employer; in each case, the employee's contribution is to be two-thirds that of the employer. At all relevant times the contributions for all employees have been five per cent of pensionable pay (less one and a half times basic state pension), so that the employer's contributions have at all relevant times been seven and a half per cent of pensionable pay (subject to such deduction) in relation to each employee. These contributions would be substantially higher were it not for the fact that (subject to the outcome of these proceedings) the Section has a substantial surplus.

The BRPS conferred, and the RPS confers, upon the Trustee a wide power to change any of the trusts and powers of the relevant pension scheme or, in the case of the RPS, any of the rules of any Section. These powers of

alteration (Clause 46 of the BRPS and Clause 13 of the RPS) expressly contemplate the power of amendment being exercised retrospectively. However, there are express restrictions on the exercise of the power of amendment, and those restrictions are contained in Clause 13C of the RPS (which mirror the restrictions contained in Clause 46(2) of the BRPS, save that there are one or two further restrictions on the power of amendment in the RPS).

The Restructuring

Once it had obtained its franchise, SWT set about re-negotiating the terms and conditions of employment ("restructuring") for certain categories of staff, starting with the drivers. The issues in this case relate to the three categories of employee I have mentioned. For the moment, however, I shall restrict my consideration to the drivers as they are the largest category and the other two do not throw up any further points. The object of the restructuring, as put forward by SWT, was fourfold, namely:

1. To provide free time away from work so that drivers would not have to volunteer for work on their rest days;

2. To ensure the drivers would not have to rely on allowances, bonuses, expenses and overtime ("allowances") to earn a reasonable salary;

3. To provide a regular salary commensurate with the drivers' responsibilities;

4. To implement a more flexible operating system.

The negotiations for restructuring were carried out in a Joint Working Group, which had six representatives, three from SWT and three from ASLEF. The drivers were kept in touch with the course of the negotiations from time to time by means of the pamphlet, "DRI Update".

The effect of the restructuring proposals on pay was as follows. As at 31st May 1994, a driver's salary was, in round terms, £11,000 per year; the extra amount received by way of allowances obviously varied from driver to driver, but was on average about £11,000 per annum. By the end of 1996, shortly before the restructuring for drivers was implemented, a driver's salary was £11,950 per year; while the extra amount received by way of allowances remained, on average about £11,000 per annum. The

restructuring proposals involved each driver receiving a salary of £25,000 per annum with no significant allowances. Before restructuring, there had been regional allowances, which varied from region to region: they were unaffected by the restructuring.

I turn then to the effects of the restructuring proposals on pensions. As I have mentioned, under the terms both of the BRPS, and of the RPS, pensions were calculated by reference to the number of years the employee had served in pensionable service and his final salary. Accordingly, just before restructuring, a driver's pension would have been based on his salary of £11,950 per annum (subject to such increases as he might obtain prior to retirement) and not on his total average remuneration of £22,950 per annum. The proposals agreed by the Joint Working Group as part of the restructuring with regard to pensions were as follows. In relation to years of service up to restructuring, a driver's Pay was to be treated as being £11,950 per annum. In relation to years of service following restructuring, a driver's Pay was to be treated, neither as £11,950 per annum nor as £25,000 per annum, but as £18,000 per annum. This was a figure arrived at partly by the give and take of negotiations, and partly by consideration of what the Section could reasonably afford. Accordingly, a driver, who had 10 years service up to restructuring, and

anticipated 20 years service after restructuring, would have one third of his pension calculated by reference to salary of £11,950 per annum and two thirds of his pension calculated by a reference to a salary of £18,000 per annum. So far as contributions to the pension scheme were concerned, just before restructuring, a driver's contribution would have been based on his salary of £11,950 per annum; subsequent to restructuring, his contribution was based on a notional salary of £18,000 per annum, and not on his new total salary of £25,000 per annum.

By October 1996, the restructuring proposals ("the proposals") had been agreed on by the Joint Working Group. They were acceptable to SWT, and, in a letter dated 11th October 1996 written to SWT, Mr L D Adams, the General Secretary of ASLEF, wrote saying:

> "I am pleased to advise that the proposals are acceptable to my Executive Committee.
>
> I would be grateful if arrangements could now be made for a referendum of our members to be held to seek approval for the proposals. The referendum should make it clear that the Executive

Committee and our negotiating team jointly recommend acceptance of the proposal."

A package of documents was then sent to each of the drivers. The package contained:

1. A letter signed on behalf of SWT and ASLEF referring to the other enclosed documents, advising the drivers to read them, and recommending the proposals;

2. A ballot paper on which the driver could either accept or reject the proposals;

3. A document called "Restructuring Information" signed on behalf of SWT, ASLEF, and the Joint Working Group, containing details of the restructuring package;

4. A pamphlet called "Driver Terms & Conditions: Questions & Answers".

The result of the referendum was declared on 20th November 1996: the drivers voted in favour of the proposals by a majority of almost three to two.

The restructuring proposals were accordingly put into effect from 19th January 1997, so that from that date the drivers have each been paid a salary of £25,000 per year and have been paying pension contributions based on only £18,000 of the £25,000, and rostering has been effected pursuant to the restructuring proposals.

The Proposed Deed

Clause 13B of the RPS permits amendments (including retrospective amendments) to be made to any "trusts, powers and provisions of the Rules" of any Section which the relevant employer (in this case SWT) and the relevant Pensions Committee request, "unless the Trustee considers that in all the circumstances a change would be improper or that it would not be in the best interests of the members and beneficiaries of the Section". Neither SWT nor the Trustee anticipated there would be any problem about amending the Rules of the RPS to reflect what, on their view, had been agreed between SWT and the drivers. However, it proved

impossible to implement an amendment to the RPS itself, because one of the privatised companies, Railtrack PLC, refused to agree the amendment (apparently taking the view that the provisions of the 1994 Order would or might invalidate the amendment, one of the points now taken by Mr Terence Etherton QC, on behalf of Mr and Mrs Wightman in this case). Accordingly, it was necessary to consider an amendment to the Rules governing the trusts of the Section, rather than of the whole of the RPS.

There was some delay in putting an appropriate Deed of Amendment before the Pensions Committee, and SWT became concerned that the proposals would be implemented before a Deed amending the Rules of the Section had been executed. In December 1996, SWT sought confirmation from Pensions Management that they could implement the proposals before the Rules of the Section had been amended, and they received such confirmation from a Mrs Hood of Pensions Management.

After 19th January 1997, the date upon which the proposals had been implemented, a draft Deed reflecting the understanding of SWT and the Trustee as to the effect of what they understood to be the agreement between SWT and the drivers with regard to pensions was put before the Pensions Committee. Mr Brady, who, it will be remembered, was a

member of the Pensions Committee and also a member of ASLEF, objected to the Deed being executed on the ground that it appeared to worsen the position of the drivers so far as pensions were concerned. He then took legal advice, and maintained the position that it was inappropriate to execute the proposed Deed. This has precipitated these proceedings in which SWT primarily seek a declaration that the drivers are debarred from obtaining pensions at a higher rate than those contained in the proposals, and consequential relief, including an authorisation for the Trustee to execute a Deed amending the Rules of the Section appropriately and a declaration that the Pensions Committee ought to request the Trustee to execute such a Deed. There are also claims for certain alternative relief if SWT fails in establishing its primary case.

Since then, the terms of the proposed Deed have been amended by the solicitor of the Trustee. On behalf of the Trustee and the Pensions Committee, Mr Brian Green QC, has put before the court the proposed Deed ("the Deed") which the Trustee and the Pensions Committee are prepared, indeed, as I understand it, wishes, to execute, and which SWT are keen that the Trustee and the Pensions Committee should execute. It is common ground, as I understand it, that the Deed does indeed reflect the

enforceable agreement (if there was one) between SWT and the drivers, as embodied in the proposals.

THE CONTENTIONS

SWT contends that, primarily as a matter of contract, but in the alternative pursuant to equitable doctrines, the drivers (and their dependants) are effectively bound to accept that their pensions are to be calculated and paid in accordance with the proposals. SWT contends that there is a binding and enforceable agreement between SWT and the drivers (the "binding pensions agreement") to the effect that each of the drivers will, on retirement, be entitled to claim a pension based on the following formula, and on no higher basis:

1. In respect of years of service up to 19th January 1997, the pension will be calculated on the basis of pay at the rate of £11,950 per annum, subject to such increases as from time to time may be negotiated between SWT and ASLEF on behalf of the drivers ("£11,950 subject to increase");

2. In respect of years of service after 19th January 1997, pension will be calculated on the basis of the aggregate of the aforesaid £11,950 subject to increase and £6,050 per annum, subject to such increases as from time to time may be negotiated between SWT and ASLEF on behalf of the drivers ("£6,050 subject to increase"); but

3. There will be no pension payable in respect of the balance of the driver's pay, currently £7,000 per annum.

SWT accepts that, as at present drafted, it is at least arguable that the terms of the RPS and of the Section do not reflect this binding pensions agreement, and, accordingly, it seeks a declaration that the Rules governing the Section can be amended so as to reflect, and indeed, if necessary, to give effect to, the proposals. In making this application, SWT is supported by the Trustee, and also by Mr Butler, a senior conductor employed by SWT, who is one of the 2,449 employees who is not a driver, a Revenue Protection Inspector or a member of fleet staff. He has been added as a defendant to represent these other employees, whose concern arises from the fact that, if SWT were to fail in these proceedings, there would be a substantial deficit in the assets of the Section.

Mr and Mrs Wightman, who respectively represent the drivers and the dependants of the drivers, contend that, on retirement, the drivers will each be entitled to claim a pension based on their final pay, being £25,000 per annum subject to such increases from time to time as may be negotiated between SWT and ASLEF on behalf of the drivers ("£25,000 subject to increase"), because their "final average pay" will be £25,000 subject to increase, and the effect of Rule 5A(2) of the Section cannot and should not be amended. In answer to the contention that the agreement of the Joint Working Group to the proposals, the approval by ASLEF of the proposals, and the referendum result endorsing the proposals, means that there is a binding pensions agreement enforceable against all the drivers so that they cannot claim a pension based on a salary of £25,000 subject to increase, the drivers argue as follows:

1. The agreement, approval, and endorsement of the proposals do not, as a matter of common law, operate as a contractually binding pensions arrangement between each driver and SWT;

2. Even if there is such a contractually binding agreement, it would not, as a matter of common law, prevent the drivers, once

they retire, from claiming a pension from the Trustee based on the whole of the pay (i.e. £25,000 subject to increase) which the driver receives during his last year of employment;

3. If those two arguments are wrong, so that there would otherwise be a binding pensions agreement which could be enforced against the drivers on retirement by SWT, then that agreement is void and unenforceable against drivers employed by the Board on 31st May 1994 in light of the 1994 Order;

4. In any event, so far as pension rights attributable to years of employment before execution of the Deed are concerned, the agreement has now become unenforceable due to the provisions of Section 67 of the Pensions Act 1995 ("Section 67" and "the 1995 Act" respectively).

SWT (supported by the Trustee and by Mr Butler) take issue with the drivers on each of these four arguments. Further, SWT (again supported by the Trustee and Mr Butler) contend that if the drivers would otherwise be justified in alleging no enforceable contract in common law and/or in relying on the provisions of the 1994 Order and/or Section 67, they have

lost the right to do so on the grounds of estoppel or good faith, or, alternatively, that they are under an implied obligation to execute such documents as they may be reasonably be required to execute, in order to discharge the protection which would otherwise be afforded to them by the 1994 Order and/or Section 67. This, accordingly, gives rise to a composite fifth argument.

Although, on the face of it, the appropriate sequence in which to take the arguments might appear to be that in which I have set them out, it seems to me that it is in fact better to take the third and fourth arguments first, and then turn to the first and second arguments and finally consider the fifth argument, if necessary. The reason for this is that the resolution of the first and second arguments could turn on whether or not the contract alleged by SWT involved the drivers giving up rights accorded to them by the 1994 Order and/or Section 67. In agreement with Mr Etherton, it appears to me that it is easier for the drivers to argue that there was no concluded or enforceable contract if the alleged contract would prima facie fall foul of the 1994 Order and/or Section 67, particularly if the drivers were unaware of their rights under the provisions (in the case of the 1994 Order, because, on the evidence on behalf of the drivers, it is suggested that they were unaware, and, in the case of Section 67, because they would almost

inevitably have been unaware of it, because it did not come into force until April 1997).

In these circumstances, I propose to address the following questions in turn:

1. On the assumption that, as a matter of common law, there was a binding pensions agreement which would otherwise be fully enforceable by SWT against the drivers, would that agreement fall foul of the 1994 Order in relation to drivers who were employed by the Board on 31st May 1994?

2. Assuming that there would otherwise be such a binding pensions agreement, is any aspect of it invalidated by Section 67?

3. Is there in fact a binding pension agreement between each driver and SWT?

4. If there is such a binding pensions agreement, (a) can it be enforced, and (b) can the Section be varied so as to reflect that agreement?

5. If the answer to any of the above questions is in the affirmative, can the drivers' case nonetheless be defeated on grounds of estoppel, good faith or obligation to co-operate?

THE FIRST QUESTION: THE 1994 ORDER

This question raises a point of some importance to many people who are and were on 31st May 1994, employed in the railways industry, and not just to the drivers, revenue protection inspectors and members of the fleet engineering staff employed SWT. As I understand it, SWT is in negotiation, or contemplating negotiations, with the view to restructuring the remuneration and working arrangements of other groups of employees. Further, I presume that a similar problem may arise with regard to many, indeed possibly all, of the other privatised railway companies and their employees.

In order to understand and consider the arguments which have been raised in relation to the 1994 Order, it is necessary to consider various provisions in Schedule 11, as well as in the 1994 Order. In this judgment, all

references to paragraphs are to paragraphs in Schedule 11, and all references to Articles are to Articles in the 1994 Order.

Schedule 11

The 1993 Act was enacted on 5th November 1993. I only need to consider the provisions of Schedule 11. Paragraph 2 provides as follows:

> "(1) The Secretary of State may by order provide for the establishment administration and management of one or more occupational pension schemes for the provision of pensions and other benefits for or in respect of eligible persons.
>
> (2) Without prejudice to the generality of sub-paragraph (1) above, an order under that sub-paragraph may make provision with respect to-
>
> ....
>
> (d) the amendment of the scheme;

....

(3) Any occupational pension scheme established under this paragraph shall be treated for all purposes as if it were a pension scheme established under an irrevocable trust."

A pension scheme set up under paragraph 2 is defined as a "new scheme" by paragraph 1(2). The RPS is, thus, a new scheme. BRPS is an "existing scheme". Paragraph 3 provides as follows:

"(1) The Secretary of State may by order amend -

(a) the trust deed of any existing scheme;

(b) the rules of any such scheme;

....

and any reference in this Schedule to amending an existing scheme accordingly includes a reference to amending such trust deed [or] rules...

....

(3) An order under this paragraph shall not make any amendment to a scheme -

....

(c) which would to any extent deprive a member of the scheme of pension rights which accrued to him under the scheme before the coming into force of the amendment;

...."

That date is 31st May 1994.

Paragraph 5 defines "protected person" as follows:

"(a) any person who immediately before the passing of this Act -

(1) is an employee of the Board or of a subsidiary of the Board; and

(2) is participating in an existing scheme;

...."

Almost all of the drivers currently employed by SWT are "protected persons" as they were employed by the Board prior to 31st May 1994.

Paragraph 6 is headed "The Powers of Protection" and contains the following relevant provisions:

"(1) The Secretary of State may by order make provision for the purpose of protecting the interests of protected persons in respect of their pension rights.

(2) Without prejudice to the generality of sub-paragraph (1) above, an order under that sub-paragraph may make provision for the purpose of securing -

(a) that the relevant pension rights of protected persons are no less favourable as a result of -

(i) any amendment of an occupational pension scheme,

(ii) any transfer of pension rights, or

(iii) any winding up of an occupational pension scheme, in whole or in part,

than they would have been apart from the amendment, transfer or winding up, as the case may be;

...

(3) For the purposes of this paragraph, the "Relevant Pension Rights" for a protected person are so much of his pension rights as consist of or otherwise represent -

(a) in the case of a person who is a protected person by virtue of paragraph (a)... of paragraph 5 above, any pension

rights which, immediately before the passing of this Act, he had under the existing scheme mentioned in the paragraph in question;

(b) in the case of a person who is a protected person by virtue of paragraph 5 (a) ... above, any pension rights which he acquires, or has acquired, by virtue of his participation in an occupational pension scheme during the protected period in his case;

...

(4) For the purposes of sub-paragraph (3) above, "the protected period" means -

(a) in the case of a person who is a protected person by virtue of sub-paragraph (a) of paragraph 5 above, the period beginning with the passing of this Act and ending with whichever of the following events first occurs, that is to say -

(i) the continuity of the person's period of employment is broken; or

(ii) he voluntarily withdraws from an occupational pension scheme;

....

(5) in determining a person's relevant pension rights for the purposes of this paragraph, where the rules of a pension scheme make provision requiring pension rights which have accrued to a person to be enhanced in consequence of increases in remuneration after the accrual of the pension rights, that provision and any enhancement resulting from it, shall be treated, so far as relating to any enhancement in consequence of increases and remuneration after the passing of this Act, as pension rights accruing at the time of the increase in remuneration in question.

..."

The 1994 Order

Article 1(2) contains certain definitions, including that of "Designated Scheme" which includes the BRPS. Paragraph (b) of the definition says this:

> "Any reference to the relevant pension rights of the person in question under such a scheme is a reference to the relevant pension rights to which that person is entitled when this Order comes into force (whether that scheme is subsequently amended or not)."

The 1994 Order came into force on 31st May 1994.

The expressions "protected employee" and "relevant pension rights" are given the same meaning as they have in Schedule 11.

Part II of the 1994 Order comprises Articles 2 to 10.

Article 4, which is headed "Obligation to provide a Scheme", provides as follows:

"(1) Any person who employs a protected employee shall provide an occupational pension scheme in which that employee may participate and to which the transfer value in respect of his relevant pension rights which he has acquired, other than any relevant pension rights acquired on the death of a protected person, may be transferred.

(2) An occupational pension scheme which is provided in accordance with paragraph (1) shall include provision under which -

(a) a protected employee may acquire -

(i) relevant pension rights in respect of any transfer value paid to that scheme, which are no less favourable than his relevant pension rights in the scheme from which he is transferring in respect of which that transfer value has been paid; and

(ii) relevant pension rights in respect of any participation by that employee in that scheme which are no less favourable

than the relevant pension rights which he had under his designated scheme.

....

(3) For the purposes of this Article, and Articles 5 and 6, in making any determination as to whether any relevant pensions rights in an occupational pension scheme are more or less favourable than any such rights in the designated pension scheme of the protected person in question ... regard shall be had to the provisions of the schemes as a whole and the circumstances and manner in which that designated scheme permitted ... increases in contributions or reductions in accrued or accruing benefits.

Article 6 is headed "Scheme Amendments, Transfer and Winding Up" and is in the following terms, so far as relevant:

"(1) Any amendment of an occupational pension scheme which would otherwise have the effect of making the relevant pension rights of a protected person less favourable than the relevant

pension rights in his designated scheme shall have no effect in relation to those rights.

...

(5) The trustees of a scheme to which a transfer value is paid in accordance with this Order shall provide, to or in respect of the person for whom it was paid, relevant pension rights which -

(a) as respects such rights which accrued up to the date of the transfer, are no less favourable than the relevant pension rights which were the relevant pension rights of the protected person in question immediately before his transfer under the scheme from which he was transferred; and

(b) as respects the accrual of relevant pension rights after that date, are no less favourable than the relevant pension rights which he had under his designated scheme.

...."

Article 7 is headed "Contributions" and includes the following terms:

> "(5) The trustees of any occupational pension scheme, or any section of such a scheme, in which there are relevant pension rights shall not exercise any of their powers so as to -
>
> (a) increase any contributions which are payable to that scheme or section by a protected employee; nor
>
> (b) reduce any benefits which are payable in respect of any protected person;
>
> [Subject to an immaterial exception]."

Article 12 in Part IV of the 1994 Order provides as follows:

> "(1) Subject to the following provisions of this Article -
>
> (a) a protected person may elect that Part II of this Order shall not have effect with respect to him or his surviving dependants by giving written notice of his election to the

trustees of the scheme in which he has relevant pension rights;

(b) a person with the right to continue to participate in the Joint Industry Scheme under Article 11 may elect that Part III of this Order shall not have effect with respect to him by giving written notice of his election to the trustees of the Joint Industry Scheme.

(2) Where a notice of election is given to trustees of an occupational pension scheme under paragraph (1) -

(a) by a protected person, Part II of this Order shall cease to have effect in relation to any of his rights as such a person to the extent that those rights are specified in that notice;

....

(5) A notice of election ... may be withdrawn ... before the expiry of 30 days from which the notice was given ... ."

Discussion: the main point

On behalf of the drivers, Mr Etherton contended that the amendment contained in the Deed reflecting the alleged binding pensions agreement would fall foul of Article 6(1), and would therefore be of no effect. His argument proceeds as follows. Each driver who was employed by the Board is "a protected person", and his "relevant pension rights in his designated scheme" are the pension rights, as defined in paragraph 6(3), which, as at 31st May 1994, he had under the BRPS. As at 31st May 1994 under the BRPS he had the right to have his pension assessed at a figure fixed by reference to his years of service as a driver and the whole of his "Final Average Pay", which effectively means the whole of his Pay in his final year of service. In other words his pension was to be based on the whole of his final year's salary. The amendment effected by the Deed would result in his pension being based only on a proportion of that salary: accordingly it would fall foul of Article 6(1). In other words, the effect of the proposed amendment, so far as years of service before restructuring are concerned, would be to fix a driver's pension by reference to his previous Pay of £11,950 subject to increase, and not his actual Pay of £25,000 subject to increase; and, so far as years of service after restructuring are concerned, it would be to fix his pension on the basis of

£18,000 subject to increase, rather than his actual Pay of £25,000 subject to increase. In these circumstances, he contends that each protected driver's 'relevant pension rights' under the RPS, if it were made the subject of the proposed amendment would become "less favourable" than that driver's "relevant pension rights" under the BRPS.

It appears to me that this argument falls foul of practical common sense. The combined effect of Article 6(1) and paragraph 6(2) and (3) is to require one to compare the pension rights, which a protected person will have immediately after a proposed amendment to the new scheme, with the pension rights which he had on 31st May 1994 under the old scheme. As at 31st May 1994, each driver had a right to a pension at a figure based on his period of service and his pay, which was then £11,000 subject to increase and not on his allowances which were an average of £11,000 per annum. The effect of the proposed amendment would be, at least on the face of it:

(1) to retain those pension rights so far as pension is assessed by reference to the period of service before restructuring, as the pension will be based on £11,950 subject to increase which, in

January 1997 terms, is similar to £11,000 subject to increase in May 1994; and

(2) to improve those pension rights substantially so far as any period of service after restructuring is concerned, because the pension will be calculated on the basis of £18,000 subject to increase (rather than £11,000 or £11,950 per annum subject to increase).

However, while practical common sense should not be ignored, the correctness of the argument must ultimately turn on the construction of the 1994 Order, and Schedule 11 under which it was made.

Mr Etherton contended that, on the proper construction of Schedule 11 and of the Order, it is not permissible to look at the matter in this (as I see it, practical) way: one has to confine oneself substantially to the terms of the two pension schemes, and not to figures outside the scheme. I do not consider that is correct. Before turning to the detailed consideration of the provision of Schedule 11 and the 1994 Order, it is illuminating to consider the way in which the Deed has in fact been drafted. The Deed distinguishes between "basic pay" (£11,950 per annum as at present) and

the balance of the total pay (being £13,050 per annum as at present) of which part (namely £6,050 per annum as at present) is "Restructuring Premium". Accordingly, under the BRPS, a driver's pension was calculated by reference only to his "Pay", both in respect of past and future years of service, whereas, under the RPS as amended, his pension would be calculated by reference to "Basic Pay", for past service but is calculated by reference to the aggregate of "Basic Pay" and "Restructuring Premium" in respect of the period after restructuring.

One could only compare a pension based on "Basic Pay" and "Restructuring Premium" in the RPS as amended, with a pension based on "Pay" under the BRPS by going outside the terms of the two schemes and looking at the figures. That is inevitable once the terms, definitions and/or basis of assessment of the new scheme are different from those of the old scheme. Either any such amendment is impermissible in principle under Article 6(1), which seems unlikely, or one must, contrary to Mr Etherton's submissions, look at the figures.

To much the same effect, Mr Christopher Nugee, on behalf of Mr Butler, raised the question as to how one could see if an amendment fell foul of Article 6(1) if, for instance, it involved replacing Rule 5A(2)(i) of the

Section with '1/75th of Final Average Pay': one would have to consider whether that was "less favourable" than the present "1/60th of Final Average Pay less 1/40th of Final Average Basic State Pension". In order to do that one would inevitably have to go outside the four corners of the Deed to discover the level of state pension. Mr Etherton, to my mind quite rightly, accepted that such an amendment would be permissible if it could be shown to be "no less favourable". So too, if the Trustee decided to change an income provision in the RPS (mirroring the BRPS) to a combination of a capital payment and reduced income. If that is right, it seems to me that it must be unexceptionable to look outside the four corners of the BRPS, and of the RPS as amended, in order to discover, on the figures, whether the drivers' relevant pension rights under the RPS, as amended, would be "less favourable" than their relevant pension rights under the BRPS as at 31st May 1994.

Turning to the provision of Schedule 11 and the 1994 Order, I consider that, as a matter of construction, Mr Etherton is not correct in contending that the terms of Schedule 11 and the 1994 Order prevent one from looking outside the terms of the two schemes in order to see if one is "less favourable" than the other. In its desire to protect pension rights of employees of the Board on privatisation, the legislature is likely, in my

view, to have been concerned to protect practical rights sounding in money, as opposed to more hypothetical legal or conceptual rights. It seems to me that clear words would be required before the court should be persuaded that, when deciding whether a person's pension rights are "less favourable" than before, it should be confined to comparing differing provisions in different pension schemes, rather than looking at the differences between the financial results under the two schemes. The fact that "relevant pension rights" are intended to be judged in financial, rather than conceptual, terms appears to me to be supported by Article 6(3), which, it will be recalled, is concerned with the transfer of relevant pension rights. Article 6(3) is making what Mr Green called a "value comparison", and it seems to me that one would expect, in those circumstances, Article 6(1), concerned as it is with amendment, to involve the same sort of considerations when effecting a comparison.

Mr Etherton argued that two other provisions in the 1994 Order supported his case. The first is Article 4(3), which is the only provision which gives specific guidance as to how one should determine whether relevant pension rights in a new scheme (whether amended or not) "are more or less favourable than any such rights" in the previous scheme. He contended that the requirement to have regard to "the provisions of the

schemes as a whole" is a clear indication that one should not go outside the four corners of the two schemes. I do not agree. First, the fact that a statute requires one to have regard to a specific factor does not mean that one should not have regard to any other factors: if that had been the intention of the legislature, one would have expected to see the word "only" in Article 4(3). Secondly, the argument begs the question, which is whether, when assessing the relative favourableness of schemes, one can look at the actual resultant figures or whether one is restricted to conceptual legal rights. Thirdly, the purpose of Article 4(3), as I see it, is to emphasise that all the differences are to be taken together: thus, if a number of new amendments are proposed in a single Deed of Amendment to the Section, one would, in considering whether the effect of the Deed was to render the relevant pension rights of any protected employee less favourable than they were under the BRPS, have to look at all the proposed amendments together, and not consider each one separately.

The second provision upon which Mr Etherton relied was paragraph 6(5) which gives guidance as to how one is to determine a person's relevant pension rights for the purposes of paragraph 6. Paragraph 6(5), Mr Etherton pointed out, states that "that provision" (i.e. the provision in the scheme requiring pension rights to be enhanced in consequence of

increases in remuneration) is to be treated as part of "the relevant pension rights". It seems to me that this argument is circular: the fact that the provision itself is taken into account does not alter the fact that one has to compare "the relevant pension rights" of an employee as at 31st May 1994 under the old scheme with those he would have under the new scheme if it were amended. There is nothing in paragraph 6(5) to indicate that the legislature intended the reference to "that provision" to be a reference to the provision without regard to its actual financial implications.

Mr Etherton contended that, if he were not right, it would lead to substantial difficulties because the argument against him overlooked the fact that, whether under the BRPS, the Section in its present form, or the Section as amended, pension is not linked to the present level of pay, but to the final pay, of each employee. He suggested that it is impossible to assess what increases would have been enjoyed by each driver until his retirement, had he continued to be paid under the previous system as at 31st May 1994 (the driver would have no doubt expected annual increases in the £11,000 per annum but also in his allowances) and it is equally impossible to know what increases in the future will be enjoyed by drivers on the three elements in their current salary (namely the £11,950 per annum, which would govern both accrued and accruing pension rights, the

£6,050 per annum, which would only govern accruing pension rights, and the £7,000 per annum which would carry no pension rights).

The point can be appreciated more clearly if one imagines the restructuring proposals being put forward in, say, 2010: had the old system been maintained until then, the driver's regular pay may be £25,000 a year and their average allowances £20,000 a year. How, asked Mr Etherton rhetorically, is one to compare the hypothetical 2010 restructuring proposals of a new fixed salary of, say, £50,000 per annum (of which, say, £40,000 is pensionable) with the pension arrangements as at 31st May 1994 if SWT's approach is correct? There would be no such problem, he said, if his approach were correct.

In these circumstances, Mr Etherton argued, it must be right to compare like with like. This he said, involves taking the driver's pay as being £25,000 per annum both as at 31st May 1994 and as at the date the amendment to the Section is being proposed.

Although these arguments are not without force and were attractively advanced, I have come to the conclusion that they should be rejected. When assessing "relevant pension rights", it is clear that one looks both at

accrued and accruing pension rights: see, in particular, the definition of "pension rights" in paragraph 1(2). However, one should not assume that an employee will receive any future increases in pay as of right. As Mr Green and Mr Nugee pointed out, although any employee will expect a pay increase in most, indeed possibly all, years, he does not have a "right" to such an increase. Secondly, as Mr Green contended, the provisions of Article 6(3), albeit in a slightly different context, appear to distinguish between the "relevant pension rights" in (a), and, in (b), any increase in the value of such rights attributable to any increase in earnings which "would have been expected". In other words, Article 6(3) seems to confirm the view that "relevant pension rights" do not include any built-in assumption of a right to any increase in pay over the years.

Mr Etherton embraced that contention, and argued that, in those circumstances, it is far more realistic to treat salary for the purpose of pension both under the BRPS and under the Section as being £25,000 per annum. If that is not right, then it would mean that there was nothing to prevent the Section being amended, at least so far as the drivers are concerned, by stipulating that their pension should be based on a fixed figure of £11,950, or even £11,000 per year, irrespective of any subsequent increases, because that would not be less favourable than "the

relevant pension rights", interpreted as Mr Green would interpret them, under the BRPS as at 31st May 1994. I do not consider that that argument is valid. It confuses two concepts. While the drivers have no right to an increase in salary generally or under the pension schemes in particular, this does not alter the fact that, if and to the extent that an increase in salary is agreed and given, the drivers have a right, whether under the BRPS or the RPS to have that increase in salary reflected in their pension. An alteration to the RPS such as that canvassed by Mr Etherton (namely that a driver's pension should be linked to a fixed figure of £11,950 per annum) would not infringe Article 6(1) because it would deprive the drivers of a right to an increase in pay, because he has and had no such right, least of all under any pension scheme; however, it would infringe Article 6(1) in that it would deprive the driver of a right which he would have had under the BRPS, namely a right to a concomitant increase in his pension in the event of his being accorded an increase in salary.

There is another route by which the same result can be arrived at. The question of any increase in pay can be approached by reference to the way in which actuaries would treat it. If the basis for assessing pensions which applied before restructuring were in place, an actuary would assume an appropriate rate of growth (normally 2% per annum above the rate of

inflation) in the annual rate of Pay (£11,000 a year on 31st May 1984, £11,950 a year at restructuring). In relation to the position after restructuring, I can see no reason why the identical rate of growth should not be applied to the two pension-related components of the restructured pay (i.e. the £11,950 and the £6,050). That appears to be supported by the evidence provided in this case by the actuaries to the RPS, Watson Wyatt. It would also seem to be inherent in the provisions of the railways privatisation pensions legislation. The Railway Pensions (Transfer and Miscellaneous Provisions) Order 1994, was made, like the 1994 Order, under Schedule 11. Paragraph 14 of that Order sets out the actuarial assumptions to be made when valuing the BRPS, the RPS and the various different Sections of the RPS. That pay will increase at the rate of 6.5% per annum, which is 2% per annum above the then rate of inflation, is to be assumed under paragraph 14(b).

One can put what amounts to essentially the same point in a slightly different way. As at 31st May 1994, the drivers had the right to a pension based on Pay of £11,000 per annum; whatever expectation they might have had, they had no right in law to any increase in that Pay during the remainder of their employment with SWT; however, they did have the right to have the benefit of any increases in Pay enjoyed after 31st May

1994 taken into account when assessing their pension. If one then goes forward to the end of 1996, the drivers have been accorded two increases in their level of Pay since 31st May 1994, so that it has increased to £11,950 per annum. The increase in Pay from £11,000 per annum to £11,950 per annum is something (if and when accorded) which the drivers would have anticipated, as at 31st May 1994, being taken into account as a matter of right when assessing their pensions, in light of the terms of the BRPS. On that analysis, the equivalent of the driver's Pay of £11,000 subject to increase at 31st March 1994, for the purpose of determining the position, as at 19th January 1997, is £11,950 subject to increase. Accordingly, the question which has to be asked, pursuant to Article 6(1), is whether a pension under the terms of the binding pension agreement, which are to be embodied in the proposed Deed, will be "less favourable" than a pension assessed for accrued and for accruing purposes on £11,950 per annum subject to increase. As Mr Nugee said, if that is the right question, it answers itself.

It seems to me that this analysis also coincides with practical reality. If the drivers were being paid, say, £11,950 per annum salary and an average of £11,000 per annum in respect of allowances, then, when they came to negotiate an increase in their total pay, it would be a matter for the

negotiators (that is, in practice, the representatives from their union and the representatives of management) to apportion any such increase between the salary element (which would be pensionable in respect of past years and future years) and the allowances element (which would not be pensionable at all). If the Deed is executed, it would become a matter of negotiation as to how any increase in total pay is apportioned between the £11,950 (referable to pensions in respect of past and future years of service) the £6,050 (pensionable in respect of future years of service) and the £7,000 (not pensionable). As I see it, the important point is that whether one is looking at the position before or after restructuring, it is a matter of negotiation between the employer and the employee as to how any increase is treated for the purpose of pensionable Pay - i.e. how it is apportioned between pensionable and non-pensionable elements of the drivers' total pay. Accordingly, so far as the reality of the situation so far as inter-relationship of increases in total pay and increases in pension are concerned, the position of the drivers is the same before and after restructuring: in each case it remains a matter of negotiation.

Quite apart from these points, Mr Etherton's approach does not appear to me to involve comparing like with like. To treat a driver as earning fixed pensionable Pay of £25,000 a year on 31st March 1994 is artificial,

whereas treating his earnings on this basis as at 19th January 1997 accords with reality: comparing the real position on one date with the same, but wholly artificial, position on another date is not to compare like with like. It is, I accept, necessary to adjust the position on one date, to reflect the passage of time and the effect of inflation, if one is to compare it in any consistent way a financial position at one date with that of another. However treating agreed increases in pay since the earlier date as retrospectively part of the rights on that date, appears to me a more satisfactory way of effecting the comparison, especially where there is a right to take into account the increases once they have been accorded.

Discussion: other points

Mr Nicholas Warren QC for SWT, not only advanced the above argument, which I have accepted, but he raised an additional argument which I should mention. He pointed out that the BRPS contained, in Rule 46, a power of retrospective amendment as does the Section in Rule 13.

Accordingly, he contended that it is wrong to regard any of the employees' pension rights as entrenched as at 31st May 1994, because they were at all times defeasible pursuant to this power of amendment. Of course, he does

not suggest that the power of amendment is exerciseable at whim or on any unreasonable basis. The BRPS (like the Section) is a trust, and the Trustee has a duty to act in accordance with the duties of a trustee. So far as the Board under the BRPS, and SWT under the Section, are concerned, he accepted that they would be under a duty not to exercise any rights "so as seriously to damage the relationship of confidence between the employer and the employees" in accordance with the principle laid down by Sir Nicolas Browne-Wilkinson V-C in *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 1 WLR 589. On the facts of this case (as I am assuming them to be at the moment) he contended that, if the Board had agreed the restructuring with the drivers on precisely the same terms as had been agreed by SWT, the power of amendment under Rule 46 of the BRPS could have been invoked to amend the scheme accordingly. Accordingly, he argued, there is an additional reason for rejecting Mr Etherton's case on the 1994 Order.

In the light of the conclusion I have reached, it is not necessary to consider this further argument of Mr Warren. Nor is it necessary to consider a further argument raised by Mr Nugee, which was to the following effect. Given that a driver's pension is calculated by reference to his Pay, whether under the BRPS or under the Section, it must follow that the amount of

that pension turns upon what SWT, as employer, and the driver, as employee, agree themselves in their contract of employment (as amended from time to time) is the driver's Pay. Thus, before restructuring, SWT and the drivers agreed that the Pay was £11,000, whereas the average driver in practice received a total annual remuneration of about twice that sum. Thus, Mr Nugee argued, even if Mr Etherton's arguments as to the effect of the 1994 Order is correct, the restructuring proposals do not fall foul of it. All that has happened is that SWT and the drivers have effectively redefined the meaning of "Pay", as they are entitled to do as between employer and employee. Accordingly, he said, the restructuring involves no change to the terms of RPS; because of that, there is no breach of Article 6(1). The redefined meaning of "Pay" is £11,950 subject to increase for accrued pension up to 19th January 1997 and £18,000 subject to increase for accruing pension thereafter. That effectively agreed redefinition between employer and employee determines how the driver's pension is to be assessed under the RPS, and would have done so under the BRPS.

I do not need to decide these two points because I accept the arguments of SWT, the Trustee, and Mr Butler on the first point I have considered. Each of these two further points has its attractions and problems.

Although they were fully argued, I do not propose to decide them, as all four parties are anxious that I do not determine points which need not be decided.

Conclusion

In all the circumstances, therefore, I have reached the conclusion that the drivers are not correct in their argument that any binding pensions agreement, or any attempt to enforce such agreement, as alleged by SWT would be void by virtue of the provisions of Article 6(1) or any other provision of the 1994 Order.

THE SECOND QUESTION: SECTION 67

Legislative Material

Section 67 provides as follows:

> "(1) This section applies to any power conferred on any person by an occupational pension scheme ... to modify the scheme.

(2) The power cannot be exercised on any occasion in a manner which would or might affect any entitlement, or accrued right, of any member of the scheme acquired before the power is exercised unless the requirements under sub-section (3) are satisfied.

(3) Those requirements are that, in respect of the exercise of the power in that manner on that occasion -

(a) the Trustees have satisfied themselves that -

(i) ... , or

(ii) the requirements for consent are met in respect of that member ... .

(4) in sub-section (3) -

(a) ...

(b) "the consent requirements" means prescribed requirements for the purpose of obtaining the consent of

members of a scheme to be exercised in the power to which that section applies."

Although the language is not entirely happy, it seems clear that "the consent requirements" in Section 67(4)(b) is a reference to "the requirements of consent" in Section 67(3)(a)(ii). I must also refer to Section 124(2) of the 1995 Act which states that, for the purposes of various sections, including Section 67:

"(a) The accrued rights of a member of an occupational pension scheme at any time are the rights which have accrued to or in respect of him at that time to future benefits under the scheme, and

(b) At any time when the pensionable service of a member of an occupational pension scheme is continuing, his accrued rights are to be determined as if he had opted, immediately before that time, to terminate that service."

The Occupational Pension Schemes (Modification of Schemes) Regulations 1996 ("the 1996 Regulations") were made under, inter alia, Section 67(4). Article 4 of the 1996 Regulations provides as follows:

"For the purposes of Section 67(4)(b)... the prescribed requirement is that the consent of the member of the scheme to the proposed exercise of the power to modify be in writing."

Discussion

The contention of the drivers is that, under the Section as currently drafted, they are entitled to accrued pension rights based on the number of years they have served and their current salary of £25,000 subject to increase and that the Deed would alter this: so far as their accrued rights are concerned, their pension would be based on part of their salary, namely on £11,950 subject to increase (or £18,000 subject to increase since 19th January 1997). While Section 67 would not, Mr Etherton conceded, prevent the Section being amended so as to give effect to any agreement (if there is one) in respect of pension rights based on future years of service, he argued that it serves to prevent any amendment to the Rules of the Section which would reduce pension rights in respect of past years' service.

Mr Warren, Mr Green and Mr Nugee all contend that none of the drivers have or at any time have had "any entitlement or accrued right" to a pension based on £25,000 subject to increase: just before restructuring their entitlement was to a pension based on a salary of £11,950 subject to increase, and, since restructuring, their entitlement or accrued right is to a pension based on £11,950 subject to increase, in respect of years of service up to restructuring, and £18,000 subject to increase, in respect of years of service thereafter. Accordingly, they argued, there is nothing in Section 67, which would now prevent the trustees from executing the Deed.

I agree with that argument. I am, at the moment, proceeding on the assumption that there is a binding pensions agreement enforceable by SWT against each of the drivers, whereby the drivers' pensions will be calculated on the basis of pensionable Pay of £11,950 subject to increase, for each year of service up to restructuring, and £18,000 subject to increase, for each year of service thereafter. To put it another way, I am proceeding on the assumption that, once he retires, any driver who seeks to recover from the Trustee a pension on any more generous basis (and in particular on the basis of the whole of his final salary, namely £25,000 subject to increase) either cannot seek a pension on that basis or can be

prevented from seeking a pension on that basis by SWT. On that assumption, it appears to me that, as a matter of ordinary language, and subject to there being anything to the contrary in the express provisions or policy of the 1995 Act, the drivers do not currently have "any entitlement or accrued right" to claim a pension on a more favourable basis than that which was agreed with SWT. If, as a matter of law and fact, a person can be prevented from doing something by a third party who has a direct and substantial interest in such prevention, and there is no policy reason as to why that third party should be restrained from exercising his right and every practical reason for thinking that he will exercise it, then it would seem to me to follow that one should assess the person's position on the assumption that the third party will indeed exercise his right. I see nothing in Section 124(2) of the 1995 Act to call that conclusion into question.

However, Mr Etherton argued that this conclusion is tantamount to concluding that it is open to persons, such as the drivers, who were intended to be protected by Section 67, to contract out of their rights under that section. I do not agree. The important factor in the present case is that the agreement upon which SWT relies was entered into before Section 67 came into force (namely 6th April 1997: see Pensions Act 1995 (Commencement No 10) Order 1997). In my judgment, there is nothing in

the policy of Section 67 to indicate that an agreement, entered into before Section 67 came into force, but which would otherwise be binding, should not be effective and enforceable merely because it does not comply with "the consent requirements". To conclude that such an agreement would not be enforceable would be undesirable for three reasons, which can, in a sense, be said to be different aspects of a single broader ground. First, such a conclusion would involve giving Section 67 a genuinely retrospective effect, namely to invalidate a contractually binding arrangement already in existence. There is nothing in the Section to indicate that Parliament intended it to have such an effect: clear words or clear policy reasons would be required to justify such a result. Secondly, it would have the curious result that, while the binding pension agreement would have been perfectly valid, and, indeed, enforceable as between SWT the drivers and the Trustee, between the date it was bindingly agreed and 6th April 1997, after that date it would become void and unenforceable. Thirdly, such a construction would impute to the legislature an intention that, while parties would be able to contract out of their Section 67 rights after the Section came into force, by satisfying "the consent requirements", they would be unable to do so before the Section came into force, because they might not be able to discover what "the consent requirements" would be.

Of course, there are statutory provisions which, either as a matter of express language or by virtue of other considerations, lead one to the conclusion that their effect is to render void otherwise valid agreements entered into before the statutory provision comes into force. However, I see no reason, either as a matter of language or as a matter of policy, to give Section 67 such an effect. Expressions such as "entitlement" and "accrued right" suggest a right or bundle of rights as at a specific date, but not a date earlier than the date on which the provision in which those words are found comes into force. Furthermore, the fact that it is possible for any person intended to be protected by Section 67, to contract out of the protection, and to do so comparatively easily (i.e. pursuant to Article 4 of the 1996 Regulations), tends to support, to my mind, the proposition that it should not be given retrospective effect.

In these circumstances, I reject the drivers' contention that any aspect of the binding pensions agreement would fall foul of Section 67.

THE THIRD QUESTION: A BINDING CONTRACT

It is SWT's contention that the agreement reached by the Joint Working Group, which was approved by ASLEF, and endorsed by the ballot, is contractually binding as between SWT and each of the drivers, and that one of the terms of this contractually binding arrangement was that drivers pensions would be calculated on the basis of their salaries having been £11,950 subject to increase in respect of the period of service up to restructuring, and £18,000 subject to increase in respect of the period after restructuring. In this connection, SWT rely on Clauses 14 and 16 of the employment contract under which each of the drivers was and is employed. They provide as follows:

> "14. PENSIONS AND PENSION SCHEMES
>
> You will be entered into the South West Trains section of the Railways Pension Scheme on the date you enter this employment... pension entitlement for members of the Railways Pension Scheme accrue in accordance with the rules of the Scheme which are available on request. If you join the Railways Pension Scheme you will be bound by the rules of the Scheme *from time to time in force*

in respect of your employment. On becoming a member of the Railways Pension Scheme you will be bound by the rules of the Scheme *from time to time in force* and you will make such contributions as are laid down in the rules.

...

16. INCORPORATION OF TRADES UNION AGREEMENTS

Your contract of employment is subject to certain terms and conditions as may be settled from time to time in relation to employees [SWT] in your grade or category *under agreed collective bargaining procedures* established with a recognised Trade Union. In the event of any conflict between this contract document and any Trade Union agreement this document will prevail. ..."

(Emphasis supplied).

It is clear that the restructuring proposals agreed by the Joint Working Group included the terms as to pensions which SWT alleges, and that this

was made clear to the drivers in the "Restructuring Information" document and in the "Questions and Answers" pamphlet supplied to drivers with their ballot papers, and signed on behalf of SWT and ASLEF. Thus, in the Restructuring Information document, there is the following paragraph:

"2.9 PENSIONABLE PAY

The increased salary the drivers will receive will result in significantly enhanced pension entitlements.

The key points relating to the pensions are:

- of the final salary, £18,000 per annum will be pensionable.

- £11,950 is pensionable for service up until restructuring implementation, with a further £6,050 being additionally pensionable for service after the date of implementation.

- the applicable pensionable regional allowances will continue to apply."

This was equally clearly set out in the "Questions and Answers" pamphlet, together with an explanation as to why the £18,000 pensionable salary only applied to the period of employment after restructuring, and not to that before restructuring. The explanation was:

> "The pension fund simply cannot afford this. Many drivers have been paying into the fund for a number of years a contribution rate designed to pay a pension based on pensionable pay of around £11,950 plus Regional Allowances. If the £18,000 pensionable pay was to be backdated for all service, there would simply be insufficient assets in the fund to pay enhanced benefits. Hence the decision to protect the basic pensionable pay and to top up pension for future years service in line with higher contributions."

In these circumstances, Mr Warren, on behalf of SWT, contended that the new arrangement with regard to pensions was agreed by collective bargaining, albeit subject to a favourable ballot result, and once that favourable ballot result was obtained, there was an agreement which became binding on each driver by virtue of Clause 16 of his employment contract.

Mr Etherton put forward two arguments as to why this was not correct. The first was that alterations to pension rights, particularly when they involved alterations to the Pension Scheme, were not matters which were appropriate to be decided by collective bargaining so as to be binding contractually as between individual drivers and SWT. His second argument was that, even if there would otherwise have been a binding agreement, it is effectively overridden by the last sentence I have quoted from Clause 16 of each driver's employment contract.

So far as the first contention is concerned, Mr Etherton accepted that if an employment contract contains a provision such as Clause 16, it will in principle have effect (see *National Coal Board v Galley* [1955] 1 WLR 16). However, he said that even in the case of an employment contract with as wide a provision as the first sentence as Clause 16 of the drivers' contracts in the present case, there are certain matters which might be agreed between the Union and the Management in collective bargaining negotiations which are nonetheless inapt to be treated as contractually binding on each employee. Thus, in *National Coal Board v National Union of Mineworkers* [1986] ICR 736, Scott J at 773C described as "sound":

"A distinction between terms of a collective agreement which are of their nature apt to become enforceable terms of an individual's contract of employment and terms which are of their nature inapt to become enforceable by individuals. Terms of collective agreements fixing rates of pay, or hours of work, would obviously fall into the first category. Terms which deal with the procedure to be followed by an employer before dismissing an employee would also fall into the first category. But conciliation agreements setting up machinery designed to resolve by discussions between employer's representatives and union representatives, or by arbitorial proceedings, questions arising within the industry, fall ... firmly in the second category" (see at 772C-D).

In my judgment, all aspects of the restructuring proposals which were satisfactorily negotiated by the Joint Working Group and agreed by SWT and ASLEF thereafter, including the re-negotiated pension rights, fall within the first category identified in that passage; in other words, the re-negotiated basis for fixing the levels of pensions and pension contribution is just as apt as the re-negotiated basis for the payment of salary, to be agreed in collective bargaining so as to bind the employer and the

employee contractually on an individual basis. It seems to me that, in relation to the basis of pension and pension contribution, that conclusion is supported not merely by common sense, but also by high judicial authority. In *Parry v Cleaver* [1970] AC 1 at 16A-D, Lord Reid said this:

> "What, then, is the nature of a contributory pension? Is it in reality a form of insurance or is it something quite different? Take a simple case where a man and his employer have agreed that he should have a wage of £20 per week ... and that between them they will put aside £4 per week. It cannot matter whether an insurance policy is taken out for the man and the £4 per week is paid in premiums, or whether the £4 is paid into the employer's pension fund. And it cannot matter whether the man's nominal wage is £21 per week so that, of the £4, £1 comes from his "wage" and £3 comes from the employer, or the man's nominal wage is £23 per week so that, of the £4, £3 comes from his "wage" and £1 comes from the employer. ... His employer is willing to pay £24 per week to obtain his services, and it seems to me that he ought to be regarded as having earned that sum per week. The products of the sums paid into the pension fund are in fact delayed remuneration for his current work. That is why pensions are regarded as earned income."

To much the same effect, Nicholls LJ said in *Mihlenstedt v Barclays Bank International Limited* [1989] IRLR 522 at paragraph 64:

> "[T]his is a case in which the plaintiff's status as a member [of the pension scheme] springs from her contract of employment with the bank. The bank holds out this pension scheme to its staff as a valuable part of the staff's overall remuneration package."

My conclusion on this point receives support from a Procedure Agreement agreed made between the Board and ASLEF (as well as other unions representing employees of the Board) in 1992. As amended in 1994, that Procedure Agreement identifies certain matters which were envisaged as being the subject of "negotiation" through the Railway Joint Council, and other issues which were seen to be the subject matter of "consultation". The latter category includes matters such as discipline, travel concessions, welfare and general medical standards. The former category includes general pay awards and general allowances, which in my judgment would include pension contributions and pension entitlements.

As to Mr Etherton's second point, in my judgment it involves giving the second sentence of Clause 16 of the drivers' employment contracts much too wide an effect. A consistent application of Clause 16, as interpreted by Mr Etherton, would mean that any negotiated agreement through collective bargaining as to increase in pay would not be contractually binding on SWT or on any employer, because the employment contract specifically states what the initial rate of pay is to be: if Mr Etherton is right, there would be a "conflict" between "this contract document", which identifies the initial rate of pay, and "any Trade Union agreement" which agreed a higher rate of pay. Indeed, the argument that SWT and its employees would not be contractually bound by any negotiated settlement with regard to pay is actually stronger than the argument which Mr Etherton puts forward here: at least Clause 14 envisages there being variations from time to time to the rules of the pension scheme and the rate of pension contributions, whereas there does not appear to be any express reference in the employment contract to the possibility of the level of pay varying.

Accordingly, while I accept that, as a matter of literal language, Mr Etherton's second point on this issue has force, I cannot accede to it. It appears to me that the sentence in Clause 16 upon which he relies must be

given a narrower meaning than that for which he contends. To my mind, it is intended to refer to "Trade Union agreements" which were in existence at the date of the employment contract, and which conflicted with it. This construction receives a little indirect support from the last part of Clause 16 which I have not quoted, and which immediately follows the sentence upon which Mr Etherton relies; it is in these terms:

> "A list of titles of collective agreements which directly affect the terms and conditions of your employment is attached.... ."

Because of the long history of collective negotiations, it is quite conceivable that the Board may have been concerned that there were earlier collective bargaining agreements which had been overlooked, but which conflicted with the terms of the employment contract. It was to such collective bargaining agreements that the sentence upon which Mr Etherton relies is directed.

Accordingly, I conclude that there was agreement binding on each of the drivers, such as that for SWT contends (with the support of the Trustee and Mr Butler).

THE FOURTH POINT: THE ENFORCEABILITY OF ANY CONTRACT

Given my conclusion that there is a binding pensions agreement between SWT and each of the drivers, the fourth question which has to be considered is whether that agreement results in the drivers being unable to claim a pension calculated on the basis of the total number of their years of service and the whole of their final salary (i.e. £25,000 subject to increase) or indeed any other basis more favourable than the aggregate of:

1. Part of their pension calculated on the basis of their years of service up to restructuring at £11,950 subject to increase; and

2. The remainder of their pension being calculated on their years of service after restructuring and £18,000 subject to increase.

On behalf of SWT, Mr Warren contends that it is implicit in the binding pensions agreement between SWT and each of the drivers that the drivers will not claim pensions at a higher level than that agreed, and that, were the drivers to seek to claim a higher pension, SWT could obtain an injunction restraining them from doing so.

In my judgment, that contention is well founded. In *Snelling v John G Snelling Limited* [1973] 1 QB 87, the plaintiff and the defendants were directors of, and shareholders in, a company which owed each of them substantial sums. They fell out, and eventually agreed to compromise their differences on terms that, if any of them voluntarily resigned as a director of the company, he would forfeit all monies due to him from the company. Thereafter, the plaintiff voluntarily resigned as a director, and sued the company for the monies due to him. Ormrod J held that it was a "necessary implication" in the agreement between the plaintiff and the defendants "that the plaintiff will not sue the company" (see at 98D). It appears to me that, but for the provisions of Section 41 of the Supreme Court of Judicature (Consolidation) Act 1925 ("Section 41"), the judge would have ordered, at the suit of the defendants, an injunction restraining the plaintiff from pursuing his action. Section 41, so far as relevant, provided:

> "No cause or proceeding at any time pending in the High Court or Court of Appeal shall be restrained by prohibition or injunction... ."

In those circumstances, the course adopted by Ormrod J was simply to dismiss the plaintiff's claim. The problem he had with Section 41 no longer applies: it has been repealed, and its replacement, Section 37 of the Supreme Court of Judicature Act 1981, has no such prohibition.

In the present case, I consider that it must be implicit in the contract between SWT and the drivers that the drivers would not seek from the Trustee the payment of a pension on a more generous basis than that agreed with SWT: otherwise, one very clear and obviously important aspect of the contract embodied in the restructuring proposals agreed between them would be rendered wholly nugatory. SWT's interest in its employees' pension being paid on a certain basis, as opposed to a higher basis, is direct and obvious. The greater the assets of the Section, the lower the contributions of the employer and the employee, and, accordingly, if higher pensions are to be paid, for instance, to drivers, there will be less money in the Section, and the contributions of other employees and of SWT will be correspondingly larger. Quite apart from this, I would have thought there would be a powerful argument open to other employees (such as Mr Butler) that SWT was under a duty to them to restrain the drivers from seeking a pension on a basis higher than that payable under the binding pensions agreement. While the other employees were not, of

course, parties to that agreement, they would obviously suffer substantially and unfairly in terms of large increases in their contributions and (arguably) reduced pensions if it were not enforced. Given the width of the duty on SWT as discussed in *Imperial Group*, it seems to me that there must be a powerful case for saying that it would not merely be self-interest, but also duty to other employees, which would motivate SWT in enforcing the binding pensions agreement against the drivers.

There was some argument before me as to whether this term was express, implied, or implicit. It is not express, in the sense that there is nothing in the documentation (which I have held to be contractual) whereby it is said in terms by the drivers, or by ASLEF on their behalf, that they will not claim a pension on a more generous basis than that which has been agreed under the binding pensions agreement or part of the agreed restructuring proposals. However, it seems to me that to say that SWT's case involves implying a term is almost the same as saying that, if an employer agrees to employ someone at £10 per hour, there is no express term to the effect that the employee is debarred from claiming something more for his work, because the word "only" is not included after the reference to £10 per hour. On the basis that SWT's case involves relying on something other than an express term, there is no difficulty in implying the term, whether

on the basis that the term is so obvious it goes without saying, or on the basis that the contract simply will not work without implying the term.

Mr Warren and Mr Nugee, on behalf of SWT and Mr Butler respectively, suggested that the term might be implicit rather than implied. I am rather doubtful about that distinction, both as a matter of language and as a matter of concept. If the term is not express, then it must be implied, but I accept, reflecting what Lord Wilberforce said in *Liverpool City Council v Irwin* [1977] AC 239 at 254A, that there is something of "a continuous spectrum" when it comes to implied terms. Further, it appears to me that there are different tests for implying terms, and that an implied term need only satisfy one of those tests. There is "the officious bystander" test; there is the test of business efficacy; there is the test of obviousness. These various tests overlap, and frequently amount to much the same thing. However, despite statements in some text books to the contrary (see e.g. Treitel on the Law of Contract, 9th Edition, at page 187) they are separate tests, and a term will normally be implied provided that it satisfies one of them (see the observations of Steyn J in *The Damodar General T J Park* [1986] 2 Lloyds LR at 70 to 71 and in *Associated Japanese Bank (International) Limited v Crèdit du Nord SA* [1989] 1 WLR 255 at 263, and of Gatehouse J in *Ashmore v Corporation of Lloyd's (No 2)* [1992] 2

Lloyds LR 620 at 627. This view seems to accord with what is said in Chitty on Contracts, 27th Edition, at para 13-004.).

It may be that the suggested difference between an implicit term and an implied term is that the former expression is to be applied to a term which is at the more obvious end of the sub-spectrum of obviousness (if such a sub-spectrum exists). If that is correct, then I would accept the submission not merely that there is a term such as that which SWT wishes to imply, but that it is implicit.

The above discussion proceeds on the assumption that any implied term of the sort relied on by SWT arises as a matter of fact in the individual case. However, I consider that Mr Warren was probably also right in contending that the term he is seeking to imply arises as a matter of law. He relied on the principle embodied in *Mackay v Dick* (1886) 6 App Case 251 at 263 to the effect that it is implied into every contract a term that neither party will do anything to frustrate performance of the contract as well. Although this doctrine should not be applied blindly (e.g. *Mona Oil Equipment & Supply Co Ltd v Rhodesia Railways Ltd* [1949] 2 All ER 1014), I see no reason why it cannot be properly invoked in the instant case by SWT to prevent

any drivers seeking a pension assessed on a more generous basis than that embodied in the binding pensions agreement.

It is, in my judgment, well arguable that, as a result of the contract between SWT and the drivers, it is not merely a matter of SWT being able to enforce the binding pensions agreement by enjoining the drivers from claiming a pension at a higher rate than that agreed between SWT and the drivers. It seems to me that, even without the intervention of SWT, it may well be that the Trustee could refuse to pay the drivers a pension at a higher rate than that agreed with SWT. There are three possible ways of arriving at that conclusion.

First, the Trustee might well be able to argue that any claim brought against it by a driver for a pension in excess of that calculated in accordance with the binding pensions agreement with SWT should be dismissed as an abuse of the process of the court or on some similar ground, even without the intervention of SWT. Such a contention derives some support from the decision of the Court of Appeal in *Hirachand Punamchand v Temple* [1911] 2 KB 330. In that case, the father of a debtor paid only a proportion of the debt to the creditor on the basis that this payment was made in full and final settlement of the whole debt. A

claim brought by the creditor against the debtor for the alleged balance of the debt failed. At 339, Fletcher Moulton LJ said this:

> "The effect of such an agreement between a creditor and a third party with regard to the debt is to render it impossible for the creditor afterwards to pursue the debtor for it. The way in which this is worked out in law may be that it would be an abuse of a process of the Court to allow the creditor under such circumstances to sue, or it may be, and I prefer that view, that there is an extinction of the debt; but, whichever way it is put, it comes to the same thing... the creditor cannot maintain an action for the balance."

It is fair to say that the possibility of the claim being struck out as an abuse was not decided in terms by him, and was not even considered in the judgments of Vaughan Williams or Farwell LJJ. However, all three members of the Court of Appeal agreed that, even though the father was not a party to the action, the claim should be dismissed.

Secondly, as Mr Green pointed out, any claim brought by a driver for a pension over and above that which the Trustee was prepared to pay would be brought by a beneficiary under a Trust. He referred to the following

un-controversial statement of the law in *Underhill and Hayton* in "Law Relating to Trusts and Trustees" (15th Edition) at page 91:

> "For there to be a valid trust there must be a beneficiary or cestui que trust (corporate or human) in whose favour performance of the trust may be decreed... ."

Given that there is a valid and enforceable contract between SWT and the drivers (who contribute to the scheme) as to the level of pension which the drivers will enjoy, it may well be that the Trustee could successfully say that there is no basis upon which the drivers can demand a pension from the Trustee on any more favourable basis.

Thirdly, there is Mr Nugee's contention (which I have already mentioned) that, in any event, in order to decide what pension to pay to a driver under the Section, the Trustee would have to look at the driver's contract of employment to see what his pay was for the purpose of assessing his pension. His pension, whether under the BRPS or under the Section, would be calculated by reference to his Final Average Pay, which, to simplify it a little, means the level of Pay during his last year of employment (unless he received higher pay in an earlier year). His level of

Pay will ultimately be a matter of contract between him and his employer. Accordingly, if he and his employer have agreed that, for the purposes of assessing his pension, his pay is to be treated as being £11,950 a year or £18,000 a year rather than the full £25,000 a year, then that is the pay for the purposes of the Trust Deed. That a contract of this sort would effectively bind the Trustee could be said to have been assumed in *Icarus (Hertford) Limited v Driscoll* [1990] PLR 1 and *Engineering Training Authority v The Pensions Ombudsman* [1996] PLR 409.

Whether any or all of these three arguments are correct need not be decided, because it seems clear to me that, for the reasons I have given above, SWT can, would and probably should enforce the binding pensions agreement made with the drivers by restraining any driver claiming a pension on a more generous basis than that agreed under that binding pensions agreement.

I shall deal with the fifth question, before turning to the Deed.

THE FIFTH QUESTION: ESTOPPEL ETC.

In light of my rejection of the drivers' contentions on the first four questions the fifth question does not arise. In fact, what I have called "the fifth question" raises a number of different issues, which I shall briefly summarise.

First, Mr Warren contended that, if there was no binding pensions agreement, then the drivers are nonetheless to be treated as if there were, on the basis of estoppel. Mr Warren relied on the fact that, since 19th January 1997, the drivers have accepted the benefit of the restructuring proposals (higher salary, all of it fixed, and working the re-rostering) and have paid their pension contributions in respect of £18,000, and not £25,000, per annum. It was made clear to the drivers, when the restructuring proposals were put to them for ballot, that the offer was made on an express "all or nothing" basis. Accordingly, he argued that there is an estoppel by convention which is enforceable against them: see *Amalgamated Investment & Property Limited v Texas Commerce International Bank* [1982] QB 84 and *Icarus*.

Alternatively, SWT relied on the assurance given them by Mrs Hood in December 1996, upon which they proceeded. It is right to say that I can see substantial difficulties in the way of SWT's case, if it needed to rely on Mrs Hood's assurance on its own. It is not easy to see how the drivers would be bound by the estoppel, and, in any event, bearing in mind that Mrs Hood was not, at least on the face of it, a particularly senior employee of Pensions Management, one might question the reasonableness of SWT relying on what she said.

So far as enforcement of any agreement (or any arrangement binding on the drivers by estoppel) is concerned, SWT argued that, in addition to their case based on implied terms, they were entitled to rely upon the duty of the drivers to act, "in good faith" as against their employer, SWT (see *Imperial* and *Mihlenstedt*). That principle, Mr Warren contended, required the drivers to restrict any claim for a pension from the Section to a level which accorded with the binding pensions agreement.

Both in relation to the third and fourth question, but also in relation to the second question, Mr Warren further argued that, with effect from 19th January 1997 (or shortly thereafter) the terms of the Section should in any event be treated as amended pursuant to the well-known principle that

equity looks on as done which ought to have been done (see Snell's Equity, 29th Edition, at page 40).

If SWT's arguments had failed on the first issue or on the second question, Mr Warren also contended that implementation of the binding pensions agreement, and the execution of the Deed, would nonetheless not be prevented either by the 1994 Order or by Section 67. He said that the effect of the binding pensions agreement was that the drivers either had contracted out of (or estopped themselves from claiming) the protection afforded to them by those statutory provisions, or, alternatively, by virtue of their duty of co-operation, they were bound to execute (and not to withdraw) notice of election under Article 12 and/or a consent under Article 4 of the 1996 Regulations. This raises difficult, and potentially important, points relating to the extent to which employees can contract out of, or commit themselves to contract out of, the rights given to them under the 1994 Order and/or Section 67 (particularly where, as may well be the case here, the employees did not know, or were not fully aware of, the rights granted to them). In support of his contention that the drivers could not contract, or estop themselves, out of their statutory rights, Mr Etherton referred to a number of cases, including *Johnson v Moreton*

[1980] AC 37; in answer, Mr Warren referred to *Elsden v Pick* [1980] 1 WLR 898.

As I have mentioned, all counsel in the case did not want me to answer more questions than were necessary in order to deal with the issues before me. In any event, it appears to me that this judgment will be long enough without dealing with issues which are, on the basis of my conclusions, unnecessary to consider, and, in light of the arguments I have heard, in many instances not straightforward.

THE PROPOSED DEED OF AMENDMENT

In light of my answers to the first four questions, I now turn to consider whether the Trustee should be permitted to execute the proposed Deed amending the terms of the Section. When considering the first question, I described the general thrust of the proposed Deed. Having been helpfully guided through the Deed by Mr Green, it appears to me to reflect precisely what has been agreed between SWT and the drivers. Mr Warren, Mr Etherton, and Mr Nugee have helpfully indicated that they have no criticism to make of the Deed (subject, of course, to the arguments he has put forward, in Mr Etherton's case). As I have mentioned, Clause 13 of

the RPS permit the Trustee to "change any of the Trusts powers and provisions of the [RPS]... and of the Rules of any Section", and specifically permits any amendment to have retrospective effect. The Deed would of course have retrospective effect to the date upon which the restructuring agreement took effect, 19th January 1997. It has not been suggested that its execution would be a breach of any of the terms of the RPS (including the Section), would have been a breach of the BRPS, or would in any way constitute a breach of the Trustee's fiduciary duties or other obligations, always assuming that my conclusion on the four questions which I have been considering are correct. Nor, on that assumption, has it been suggested that either SWT or the Pensions Committee (whose decision on this point satisfies the requirements of a quorate majority vote irrespective of whether Mr Brady supported that course) would be acting unlawfully in requesting the Trustee to execute the Deed.

In those circumstances, in light of my conclusions on those four questions, it appears to follow that the Trustee may, indeed should, execute the Deed. It might be said to be one thing for SWT to have the right to injunct drivers claiming from the Trustee a pension on a more generous basis than that agreed with SWT, and quite another for the Trustee to execute the Deed.

SWT can (in law), would (out of self interest), and probably should (out of duty to its other employees), injunct any driver seeking the payment of a pension on a more generous basis than that agreed with SWT, and given, indeed, that it is well arguable that the Trustee could refuse to pay a pension on such a basis in any event, it appears to me that it is obviously sensible to permit, indeed to support, the execution of the Deed in order to regularise the position. The Deed's execution will, in truth, be no more than an administrative, or tidying up, act, which makes the position clear for the future. I derive support for this view from the robust approach of the Court of Appeal in *Temple* at 339 to 340 and 341 to 342, and of Ormrod J in *Snelling* at 99F-G.

THE OTHER CATEGORIES OF EMPLOYEES

I have not so far dealt with the Revenue Protection Inspectors and Fleet Engineering Staff, in respect of whose pension rights SWT seek the same relief as it seeks against the drivers. Their pension rights also derive from the BRPS and the Section, and are protected by Schedule 11 and the 1994 Order.

Revenue Protection Inspectors and Fleet Engineering Staff

The Revenue Protection Inspectors ("the Inspectors") were all employed under contracts which included a term incorporating collective bargain agreements, substantially in the same terms as Clause 16 of the drivers' contracts. Their unions, the RMT and TSSA, were parties to the Procedure Agreement with SWT.

SWT wished to restructure the basis of pay and working systems of the Inspectors, in substantially the same way as the drivers, and the negotiations for this restructuring were conducted through a committee consisting of representatives of SWT, and representatives of the RMT and TSSA. It is common ground on the evidence that agreement as to the restructuring terms was reached between all members of this committee, that it was contained in a memorandum dated 31st January 1997 and that it involved agreement as to a new, significantly increased, basic salary, namely £15,600 per annum with effect from restructuring (anticipated as taking place in April 1997) rising to £16,000 per annum from 10th November 1997. The memorandum states as follows:

"For pension purposes, the increase in salary under restructuring will be a restructuring premium and as such will be subject to future pension provision only."

It is common ground that this statement represented what was agreed in the committee. As with the drivers, the agreement of the relevant unions was dependant on a majority of the relevant employees voting in favour of the restructuring proposals in a ballot, and the result of the ballot (both for the Inspectors who were members of the RMT and for those who were members of TSSA) was in favour of the proposals. The restructuring agreement was then formally contained in a document signed by SWT, the RMT and TSSA, and, in Clause 6.4, this agreement contained the same provision that I have just quoted above. It was also enshrined in the "Terms and Conditions", also published in 1997 by SWT, relating to the basis upon which the Inspectors were employed.

Since 30th March 1997, all the Inspectors have worked to these new terms and conditions, and have been remunerated in accordance with them.

It appears to me that the issues raised in relation to the Inspectors are precisely the same as those which apply to the drivers, save that there is no

issue so far as accruing (as opposed to accrued) pensions are concerned in the case of the Inspectors, because the whole of their pay is pensionable, so far as future years of service are concerned. For the reasons I have already given in relation to the drivers, it appears to me that there is a binding and enforceable agreement between RMT and each of the Inspectors, and that it does not fall foul of the 1994 Order or Section 67.

The Fleet Engineering Staff

Before restructuring, the Fleet Engineering Staff ("the Staff") were employed, like the drivers, on contracts, which contained a provision similar to Clause 16 of the drivers' contracts. SWT put forward proposals for restructuring the basis of pay and working of the staff in spring 1996. Initially, there were negotiations between SWT and the RMT, the union of which the Staff were members, in relation to the proposals, but those broke down by the end of 1996. SWT then decided to negotiate with members of the Staff on a depot by depot basis. The undisputed evidence sworn on behalf of SWT is that it was explained to the Staff during the negotiations that the increase in basic pay included in their restructuring agreement would only be taken into account in relation to pension which was attributable to service after restructuring, and that it would not be

taken into account in relation to accrued pension. This was also stated in the proposed standard form contract sent to each member of Staff, well before any terms were bindingly agreed. This draft stated in Clause 17.5:

> "With effect from the commencement of this Agreement (but not retrospectively) your pensionable pay will be calculated by reference to your basic hourly rate of pay based on the minimum hours payable in your Scheme hours... ."

A substantial majority of the Staff at two depots were in favour of these restructuring proposals, and they individually signed new contracts of employment containing a provision in the form of Clause 17.5 which I have quoted. Thereafter, the Staff at these two depots all received pay at the new rate, and worked according to the new hours, in accordance with the restructuring agreement. It is right to add that, in relation to Staff at other depots, negotiations with the RMT have been resurrected.

The position with regard to the Staff who signed such new contracts raises no new issues. Indeed, it raises fewer issues than that with regard to the Inspectors, because, not only is there no question of part of their remuneration being prospectively non-pensionable; there can also be no

issue with regard to whether or not there is a binding contract because each relevant member of the Staff has executed a new contract embodying the restructuring proposals. In these circumstances, my conclusion with regard to the Staff is the same as my conclusion for the drivers.

OUTSTANDING MATTERS

Dependants

It will be recalled that Mrs Wightman was joined as second plaintiff; this was in order to represent all the dependants of the drivers. I have not dealt with the provisions of the BRPS, the RPS, Schedule 11, or the 1994 Order relating to dependants of employees, but, as one would expect, they are all concerned to give or protect pension rights not merely of employees, but also of their dependants. Mr Etherton has accepted that any conclusions which I reach on the four questions which I have determined apply equally to the driver's dependants as they do to drivers, and accordingly it is unnecessary to consider that aspect further.

The position of the drivers if their case is right

Standing back, it strikes me that the conclusion I have reached accords with the broad merits of the matter as well as with the wider financial realities. If Mr Etherton's arguments were correct, there would have been conferred on the drivers a wholly unintentional windfall. A driver who had 25 years service before restructuring, and anticipated another ten years of employment would, before restructuring, have been paid a total of about £24,000 per annum, and would have expected his pension to be assessed on the basis of 35 years service and pay of £11,950 per annum (subject to such increases as he might negotiate during his last ten years). After restructuring, he would have the benefit of a salary which was both increased and guaranteed, at £25,000 per annum; although he would have been paying his pension contributions over the past 25 years on the basis of a salary which was currently £11,950 per annum, he would have the very substantial benefit of his pension in respect of those 25 years being based on a salary of £25,000 per annum; in relation to his next ten years, he would be paying a pension contribution based on a notional salary of £18,000 per annum, but would have his pension calculated on the basis of £25,000 per annum.

All this in the context of a restructuring agreement made on his behalf whose terms were made clear to him and manifestly did not intend to accord him such a windfall. To put the point another way, it seems to me that, if Mr Etherton is right, the effect of the 1994 Order would be not so much to protect a driver against "less favourable" pension rights, and the effect of Section 67 would not be so much as to prevent interference with any "entitlement or accrued rights" of a driver: the effect of the 1994 Order and Section 67 would be to bestow a wholly un-covenanted windfall on the drivers.

Financial consequences if the drivers' case is right

So far as the position of the Section is concerned, the figures are equally striking. At the moment (and on the assumption that my conclusions are right) the Section has a surplus of around £10.8m. If the arguments of the drivers, Inspectors and Staff are correct, then the Section goes into a substantial deficit of about £36.4m. At the moment, thanks to the existence of the surplus, SWT employees are paying a pension contribution equal to 5% of their respective salaries, and SWT's contribution is equal to 7.5% of such balance. If, however, the arguments I have rejected succeed, employees' contributions will have to increase to

over 13.5% (and SWT's contribution will have to increase to over 20.25%). Quite apart from explaining Mr Butler's involvement in these proceedings, these figures are an equally, if not more, dramatic way of explaining the unattractive nature of the drivers' case, and, indeed, demonstrating why, in the "Questions and Answers" distributed to the drivers together with their ballot papers, it was explained that the Section simply could not afford to pay them pensions on the basis which they are now claiming.

Having dwelt a little on the financial implications should the drivers succeed, it is only fair to make the following two points. First, it has been stated on behalf of the drivers that, were they to succeed in these proceedings, they would by no means be certain to insist on their strict legal rights. Having identified the legal position, they would regard it as a basis for bona fide negotiations with SWT. Secondly, as all counsel agreed, this case has to be decided on the basis of the law, and not on the basis of the financial implications.

Concluding observations

In these circumstances, it appears to me that SWT is entitled to substantially all the relief it seeks (other than the claims sought in the alternative). No doubt counsel can agree an appropriate Minute of Order to reflect my conclusion.

Before parting with this case, there are two points, which I wish to make. These proceedings have, to my mind, demonstrated the value of skeleton arguments as well as the great importance of oral argument. The skeleton arguments provided by all parties before and during the hearing helped identify the issues of law and relevant facts, as each party saw them: that saved a lot of time and avoided much wasted effort. It was only through oral argument that the issues became fully refined and satisfactorily identified and properly considered. In my experience, in this sort of complex case, there is no better way (indeed, possibly, no other way) of really testing arguments than submitting them to the test of debate in open court. I respectfully echo the observation of Megarry J in *Cordell v Second Clanfield Properties Ltd* [1969] 2 Ch. 9 at 16F to 17B where he referred to the "purifying ordeal of skilled argument" and said that

"Argued law is tough law" as it involves exposing "views to the testing and refining process of argument".

Secondly, I should like to thank all eight counsel involved for their clear and helpful written and oral arguments which made for a stimulating hearing and provided great assistance in, what for me at least, was a difficult case.