

**THE HIGH COURT****[2013 No. 91 J.R.]****BETWEEN****MAURICE SCRAGGS****APPLICANT****AND****PENSIONS BOARD****RESPONDENT****AND**

**HEATHER McSHARRY, TOM CONSIDINE, DAVID KEANE, HELEN NOLAN, LIAM ROSS, PADRAIG CONNOLLY, PATRICK GAYNOR,  
MAIREAD KELLEHER, PATRICK O'SULLIVAN, THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND AND CENTRAL  
PENSIONS ADMINISTRATION LIMITED**

**NOTICE PARTIES****JUDGMENT of Mr. Justice Hogan delivered on the 19th November, 2013**

1. The applicant is a former employee of the Bank of Ireland who took voluntary redundancy in March, 2002. He thus became a deferred member of the Bank's staff pension fund. The present judicial review proceedings concern a complaint which he made to the Pensions Board following the introduction of what is commonly described as the pensions levy which was provided by the Finance (No.2) Act 2011 ("the 2011 Act").

2. Section 4 of the 2011 Act accordingly effected this change by inserting a new s. 125B of the Stamp Duties Consolidation Act 1999 ("the 1999 Act"). Section 125B of the 1999 Act provides for the payment of a "stamp duty of an amount equal to 0.6% of the chargeable amount" in respect of the years from 2011 to 2014. The chargeable amount is based upon the value of the assets of the scheme as at 30th June for each of the three years in question. Section 125B(5) provides that a "chargeable person" shall:

"for the purposes of payment of the duty be entitled to dispose of or appropriate such assets of the scheme as are required to meet the amount of the duty so payable."

3. "Chargeable person" is defined by s. 125B(1) in relation to a pension scheme of this kind, as meaning "the trustees or other persons having the management of the assets of the scheme." Section 125B(6) provides that where a chargeable person disposes of or appropriates an asset of the scheme in accordance with s. 125B(5)(a) then no action "shall lie against the chargeable person in any Court by reason of such disposal or appropriation".

4. Section 125B(12) further provides as follows:

"Notwithstanding any provision of any enactment (including this Act), or any rule of law, or anything contained in the rules of a scheme, being a scheme approved by the Commissioners, or the terms and conditions of any contract, being a contract approved by the Commissioners, if under this section-

(a) a chargeable person who is an insurer pays an amount to the Commissioners in respect of the duty in relation to a contract of assurance, the amount shall be deemed to be a necessary disbursement from the pension fund of the insurer and the insurer may adjust accordingly any current or prospective benefits or guarantees under the contract, and any such adjustment of benefits or guarantees by the insurer shall not result in the contract ceasing to be a contract approved by the Commissioners, and

(b) a chargeable person who is an administrator pays an amount to the Commissioners in respect of the duty in relation to the assets of a scheme, or where an amount in respect of the duty in relation to the assets of a scheme has been paid to the Commissioners by any other chargeable person, the aggregate of the amount of duty paid by the administrator and the other chargeable person shall be deemed to be a necessary disbursement from those assets, and the benefits payable currently or prospectively to any member under the scheme may accordingly be adjusted by the trustees, but the diminution in value of those benefits shall not exceed the amount disbursed from the assets attributable at the valuation date to the scheme's liabilities in respect of that member, and any such adjustment of benefits by the trustees shall not result in the scheme ceasing to be a scheme approved by the Commissioners."

5. It is accepted that the payment of this levy for 2011 and 2012 involved the payment by the administrators of the Bank of Ireland staff pension scheme of the sum of €35.5m. to the Revenue Commissioners. The real question, therefore, is on whom this very considerable burden should fall. It appears that following discussions between the Bank and as the Trustees of the Scheme that the Bank was not willing to absorb the costs involved the payment of this levy (or, more accurately, a stamp duty).

6. Following these discussions the Trustees elected to exercise the powers expressly conferred upon them by s. 125B(12) to reduce the benefits payable to members of the Scheme in order to fund the cost of the levy in this fashion. The trustees notified all members of the Scheme (including Mr. Scraggs) of this decision by circular letter circulated in July, 2012. The effect of this decision was that members' benefits would be reduced by just over 1%.

7. Mr. Scraggs was understandably disappointed that his pension payment would be reduced in this fashion. Yet it must be observed that the Trustees found themselves in a difficult position. The Trust Scheme itself was in deficit, albeit perhaps not by a large

amount. The Bank was trading in a very difficult trading environment where it had faced very significant trading losses and impairment charges by reason of the collapse in the property market and the introduction of the bank guarantee in September, 2008.

8. In the end the Bank agreed to create a charge in the sum of €250m. over its own resources in respect of any shortfall in respect of the assets of the scheme. This charge would be acted upon by the trustees in the event that the scheme had to be wound up prior to the shortfall having been made good by the Bank. The trustees had stated further in the circular letter of July 2012, *inter alia*, that:

"Before reaching a decision, the Trustees met with senior representatives of the Bank, who stated that, in their view, the Pensions Levy is a tax introduced by the State and, as such, should be covered by members....."

9. Following receipt of this circular letter Mr. Scraggs engaged in detailed correspondence with the trustees and the Bank and, thereafter, the Pensions Board. The Bank replied on 4th October, 2012, stated that the pension levy was a tax which had been imposed by way of legislation enacted by the Oireachtas "on the assets of private pension funds and...does not require an employer to pay the levy or otherwise compensate members for the levy".

10. Mr. Scraggs then took up this theme in correspondence with the Pensions Board. By letter dated 19th December, 2012 Ms. Deirdre Kelly replied on behalf of the Chief Executive, Brendan Kennedy saying:

"Nothing in the matter that you have set out leads us to form a view that the trustees may have contravened the Pensions Act. This is not to comment in any respect on possible grounds you or any other member may have for a civil claim or a complaint to the Pensions Ombudsman.

The payment of the pensions levy and the powers of trustees to reduce benefits as a consequence are set out in taxation legislation. These matters do not fall within the remit of the Pensions Board and we have no powers in this area."

11. Mr. Scraggs wrote a further detailed letter to the Board on 24th December, 2012. He maintained that the trustees:

"must continue to get in all necessary funding from the Bank to maintain solvency – including funding to replenish the diminution of the Scheme's assets in consequence of the payment of pensions levy. It follows that the trustees can lawfully exercise the power of pension reduction only for the benefit of the Scheme and its members and for no other purpose or motive."

12. The Board responded on 4th January, 2013, saying in effect that it had nothing to add to earlier correspondence. The present proceedings were accordingly commenced by the applicant. He contends, in effect, that the Board failed properly to investigate his complaint and ought to have commenced an investigation using its powers under s. 18 of the Pensions Act 1990 ("the 1990 Act").

13. In his replying affidavit sworn on behalf of the Board, the Chief Executive, Mr. Kennedy, has averred that the Board would not propose to commence such an investigation without good grounds for doing so. He pointed out that such an approach protects individuals and bodies given the onerous nature of such powers. The Board must naturally conserve its scarce resources and apply them to investigations which would appear to be warranted. In these circumstances, the Board felt justified in not exercising its discretionary powers to commence an investigation of the kind contemplated by the Act.

#### **The Pension Board's investigative functions**

14. It is plain from any review of the 1990 Act that the powers therein contained are directed towards those cases where serious wrong-doing may be suspected. Thus, s. 18(1) provides that the Board may appoint authorised officers:

"to inspect or investigate on its behalf –

(a) the state and conduct of a scheme or trust RAC,

(b) the state of a PRSA product, or

(c) the activities of a registered administrator in that capacity."

15. The specific powers given to the authorised officers and which are enumerated by the section are similar to those conferred on such officers by other regulatory legislation. Thus, for example, s. 18(3) empowers the authorised officer to enter the business premises of any employer, trustee or agent, make inquiries as to whether any provision of the Act has been complied with and inspect and take away business records. The authorised officer may be accompanied by a member of An Garda Síochána "when performing any powers conferred on an authorised person by this Act" (s. 18(4C)). The Board is further empowered to prepare a report in respect of any such investigation (s. 18(8)) and the publication of such a report is absolutely privileged (s. 18(9)).

16. It will thus be seen that the invocation of the s. 18 powers is predicated on the surmise that there may be either serious wrong-doing in the administration of the scheme or that further investigation is necessary to ascertain matters such as unauthorised payments or doubtful investment practices or potential deficits which have not hitherto been disclosed.

17. These powers are amplified by the right of the Board to apply to this Court for orders in respect of the operation of any scheme. The Board may accordingly apply pursuant to s. 63A(1)(a) for an order suspending a trustee of the scheme "pending completion of an investigation by or on behalf of the Board into the state and conduct of the scheme."

18. The Board is likewise empowered to apply to this Court pursuant to s. 90(1) of the 1990 Act for an injunction where the Court is satisfied that:

"there is a reasonable likelihood that a particular person will do any act which constitutes a misuse or misappropriation of any of the resources of a scheme or trust RAC and that such misuse or misappropriation is likely to jeopardise the rights and interests under the scheme or trust RAC of the members of the scheme or trust RAC, the Court may grant an injunction restraining him from doing so."

19. All of this serves to give a flavour of the context of the nature of the regulatory oversight which is overseen by the Board in respect of the operation of such schemes. These powers are, of course, discretionary in nature. It is clear from the case-law that any decision-maker called upon to exercise a judgment in relation to such powers must do so in a manner which is *bona fide*, not

unreasonable and is factually sustainable: see, e.g., *The State (Lynch) v. Cooney* [1982] I.R. 337, 361 *per* O'Higgins C.J. and *Mallak v. Minister for Justice* [2012] IESC 59 *per* Fennelly J.

20. In the present case the Pension Board's *bona fides* are not in question. So far as the other two features of the *Lynch* test are concerned, it must be recalled that at worst the trustees made an error of judgment in electing to exercise their powers under s. 125B(12) of the 1999 Act (as amended) to reduce the benefits instead of requiring the Bank qua employer to make good the deficit following the imposition of the levy. In expressing this opinion, I do not mean to imply that the trustees in fact erred in the manner in which they exercised their statutory powers, since on this question I express no view whatever. It is merely to say that taken at its highest, the plaintiff's complaint can at most be that the trustees objectively erred in law in the manner in which they exercised their statutory powers.

21. Yet on no view could this complaint be one which properly comes within the purview of the investigative powers of the Board. There is nothing here to suggest that anything would be gained by appointing an authorised officer under s. 18(1) of the 1990 Act or that the trustees behaved inappropriately or that there are grounds on which the Board might apply to this Court pursuant to s. 90(1) for an injunction. One might say that even if Mr. Scraggs fundamental complaint was well founded, this would, at most, justify appropriate private law litigation which called into question the manner in which the trustees exercised their judgment to invoke the s. 125B(12) powers.

22. But even if a court of chancery found against the trustees on this point – and I again stress that I offer no view on this issue – it would simply mean that they had erred in law on what might be thought to be a difficult and novel point on which different legal advisers, accountants and pensions specialists might reasonably differ.

23. In these circumstances, a finding that the Board's decision not to invoke its statutory powers under the 1990 Act cannot be said to be factually unsustainable or unreasonable. The Board has plainly explained the criteria which it applied in considering the applicant's case. It considered that the trustees had no case to answer in respect of a breach of the requirements of the 1990 Act and I cannot say that this was factually inaccurate or that the Board did not have sound reasons for exercising its statutory discretion in the manner in which it did.

### **Conclusions**

24. It follows, therefore, that if Mr. Scraggs is correct in his fundamental contention, this can be established only in appropriate private law litigation in which the trustees are the defendant. For present purposes, I can find no basis on which it might reasonably be said that the Board was remiss in not commencing its statutory investigative powers.

25. For these reasons, I find myself obliged to dismiss the applicant's application for *mandamus* against the Board.