Neutral Citation: [2014] IEHC 217

THE HIGH COURT

[2013 No. 6355 P]

BETWEEN

MICHAEL O'SULLIVAN

PLAINTIFF

AND

CANADA LIFE ASSURANCE [IRELAND] LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Ryan delivered on the 1st April, 2014.

1. Introduction

Under rules contained in S.I. No. 716/2003- Occupational Pension Schemes and Personal Retirement Savings Accounts (Overseas Transfer Payments) Regulations 2003, a Personal Retirement Savings Account contributor may transfer the fund to an overseas arrangement. This case concerns the meaning and application of the rules.

The plaintiff is the holder of a Personal Retirement Savings Account with the defendant. He opened the PRSA on 1st February, 2013 and the account had a value of €116,069.46 on the 13th February, 2013. On 30th May, 2013 he instructed the defendant to transfer his PRSA to a fund in Malta. The defendant sought the approval of the Revenue Commissioners who said in a letter dated 7th June 2013 that it was a matter for the PRSA provider to decide whether a transfer to an overseas arrangement was permissible under the Regulations and that the transfer was for *bona fide* reasons. The defendant cited the contents of the Revenue letter in its reply of the 14th June to the plaintiff's solicitors and said that the transfer was being refused on the grounds that he neither resides nor is employed in the country to which he is seeking to transfer the fund. The plaintiff issued a motion seeking a mandatory interlocutory injunction to compel the defendant to make the transfer.

By agreement, the trial of the interlocutory application was treated as the trial of the action. The Revenue Commissioners made submissions on the interpretation of the transfer rules.

2. The Affidavits and Arguments

Mr. O'Sullivan, the plaintiff, by affidavit dated 8th July, 2013, avers that he has complied with the defendant's application process and completed a Revenue Declaration. He has *bona fide* reasons for wanting to transfer the funds, which do not involve wishing to evade any revenue or tax liabilities in Ireland. The defendant is not entitled to restrict him from moving his monies and its doing so is a breach of the free movement of capital within the European Union.

Mr. Donal Hennigan, Operations Director of the defendant, in a replying affidavit of the 25th July, says that the defendant has some issues with the proposed transfer of the plaintiffs PRSA to Momentum Pensions Malta Limited. It is not satisfied that the retirement benefits offered are "relevant benefits" within the meaning of s. 770 of the Taxes Consolidation Act 1997 ("TCA"). There is also an issue with the *bona fides* of the transaction. The defendant also argues that Mr. O'Sullivan is bound by the policy conditions of his PRSA which include:-

> "Only *bona fide* transfers are acceptable. The use of certain transfer arrangements relating to PRSAs, to circumvent Revenue rules on the tax treatment of retirement benefits (e.g. transfer payments to the UK and back again to Ireland) are not permissible. A PRSA contributor who directs the PRSA provider to make a payment to, or transfer assets to, an arrangement for the provision of retirement benefits outside the State (i.e. an overseas arrangement) under the provisions of the Occupational Pensions Schemes and Personal Retirement Savings Accounts (Overseas Transfer Payments) Regulations 2003 (S.I. No. 716 of 2003) must, prior to any transfer, sign a declaration to the effect that the transfer conforms to the requirements of the regulations and Revenue pension rules, is for bona fide reasons and is not primarily for the purpose of circumventing pension tax legislation and Revenue rules."

Mr. Hennigan says that under Irish pension law a transfer from a PRSA to an overseas provider can only be made where the overseas provider can provide "relevant benefits" which is defined under s. 770 (1) of the TCA as "any pension, lump sum, gratuity or other like benefit -

> (a) given or to be given on retirement or on death or in anticipation of retirement or, in connection with past service, after retirement or death, or
>
> (b) to be given on or in anticipation of or in connection with any change in the nature of the service of the employee in question".

He says that the defendant informed the plaintiff that there had to be a *bona fide* reason to allow the transfer to take place and that he "ought to prove residency and employment status in Malta". Mr. O'Sullivan queried this requirement, at which point the defendant referred the matter to the Revenue Commissioners seeking clarification as to whether the transfer could proceed. The Revenue Commissioners replied by letter of 7th June, 2013, stating that the transfer of the plaintiffs scheme overseas was a matter to be determined by the defendant, having regard to the provisions of the Occupational Pensions Schemes and Personal Retirement Savings Accounts (Overseas Transfer Payments) Regulations 2003 (S.I. No. 716 of 2003) and the requirement that the transfer be for a bona fide purpose. The defendant maintains that the plaintiff has not met the requirements of the Regulations of 2003 because he has not furnished 'further information' in respect of his application to transfer his PRSA to Momentum.

Mr. Hennigan notes that by two circulars issued to all PRSA providers in September 2009, and April 2012, the Revenue Commissioners warned that where an overseas transfer of a PRSA was made in contravention of the *bona fide* requirement as outlined by S.I. No. 716/2003, sections 787K(3) and (4) of the TCA would be invoked. In the circumstances, and having regard to the Revenue's power to

withdraw approval for PRSA products if there is a question as to the *bona fides* of a transaction, the defendant has no option but to question the nature of the transfer proposed by the plaintiff and ensure that reasonable enquiries are made to ensure it is compliant with the provisions of S.I. No. 716/2003. His argues that the PRSA provider may require any individual to provide employment and residency details in the State to which he proposes making the transfer. This is a mechanism that scheme providers such as the defendant can employ to verify that the proposed transfer meets the Revenue requirement of a *bona fide* transaction.

Ms Ursula Geraghty, solicitor for the plaintiff, by replying affidavit dated 29th July, 2013, rebuts this argument. She says that there is no statutory basis where provision of details in respect of residency or employment is a prerequisite for arranging an overseas transfer of a PRSA scheme. The plaintiff chose not to proceed with the transfer of his fund to Cyprus because of an unstable economic climate. He favours moving the fund to Malta for that same reason. He completed the overseas transfer declaration form as required and the defendant has not outlined any legislative basis under the TCA for their continued refusal to allow the transfer.

Ms. Geraghty argues that the defendant has based its refusal on the fact that the plaintiff is not resident and employed in Malta and not on any deficiency of information about the proposed recipient of the fund. Although the defendant requested clarifying information in relation to the suitability of the Maltese scheme on the 23rd July, 2013, it had refused the plaintiff's request on the grounds of residency and employment on the 14th June, 2013. Momentum has provided the necessary "relevant benefits" documentation to the defendant and the plaintiff has complied with the requirements of S.I. No. 716/2003. Mr. O'Sullivan is a chartered accountant by profession and is therefore aware of his tax obligations and the reasons stated by the plaintiff in his declaration to Revenue show it to be a *bona fide* transaction. Ms. Geraghty believes that the defendant is confusing the Revenue Commissioners' position in relation to occupational pension schemes, which require certain residency and employment criteria to be met, with the requirements relating to the transfer of PRSA funds, in which residency and employment status are not prerequisites. The Life Assurance industry in Ireland cannot impose any unlawful restrictions on parties wishing to transfer their PRSAs to overseas schemes.

Mr. Hennigan, in a supplemental replying affidavit of the 13th December, 2013, states that the plaintiff, by letter, revoked his instruction to transfer the PRSA to Momentum and instead instructed the defendant to transfer the PRSA to another scheme provider, Centaurus Retirement Benefit Scheme, also based in Malta, and submitted a further Revenue declaration form. The defendant sought information directly from Centaurus who replied by letter of the 6th December, 2013, on foot of which the defendant refused to make the transfer. It did so on the basis that it is not satisfied that Centaurus will provide "relevant benefits" pursuant to s. 770 of the TCA, which requires service as the employee of an employer in all cases. The defendant is not satisfied that the additional Revenue approval condition has been met by Centaurus and therefore allowing the transfer could breach Part 30 of the TCA. Mr. Hennigan does not imply any *mala fides* on the part of the plaintiff- his concern is only with compliance with Revenue law and procedures. The Revenue has not issued any guidance as to what constitutes a *bona fide* transfer so the defendant's position has been to act as an agent of the Revenue Commissioners in deciding whether a transfer abroad is permissible.

Mr Clive Slattery, Pension Consultant and former Principal Officer with the Revenue Commissioners, in an affidavit supporting the plaintiffs application, avers that he has reviewed the correspondence of the 29th November, 2013, from the defendant and the reply of the 6th December, 2013, from Centautus and based his report to the Court on his findings. He was asked to establish whether the Centaurus scheme provided "relevant benefits" and reached the following conclusions:

> (i) When a scheme member reaches normal retirement age (or ill-health results in early retirement), he becomes entitled to an annual annuity for the remainder of his life.
>
> (ii) Part, or all, of that annuity may be commuted for a lump sum. (Amount limited by Malta Financial Services Authority).
>
> (iii) On the death of the member, benefits are paid to the member's estate.

Mr. Slattery addresses the background to the "relevant benefits" requirement in S.I. No. 716/2003. He was involved in drafting the statutory instrument, the purpose of which was to provide an appropriate framework within which overseas transfers would be possible. The position prior to S.I. No. 716/2003 was that transfers could only be made to a country where a member was employed. This requirement was deleted insofar as it related to an employment in another EU Member State. Mr. Slattery says that where a member desires an overseas transfer to another EU member state, there is no requirement to be resident or employed there. The inclusion of "relevant benefits" was inserted to ensure that pension transfers from Ireland could only be made to another pension arrangement. Transferring an Irish pension product to an overseas saving product for example is not permissible because the potential benefits would differ.

Mr. Slattery states that s. 770 of the TCA is very clear in its meaning - relevant benefits are any pension, lump sum, gratuity or benefit paid on either death or retirement. The Centaurus Scheme provides benefits payable on either death or retirement of the member; therefore the requirement to provide "relevant benefits" has been met.

3. The Revenue Commissioners

Because the defendant was making the case that it was unable to accede to the plaintiff's instruction or request to transfer his PRSA because of Revenue requirements as to *bona fides* and the interpretation of S.I. No. 716/2003, at my suggestion the Revenue Commissioners were invited to participate in the argument as *amicus curiae* and they agreed to do so. They made helpful written observations which were amplified by counsel appearing for the Revenue, Ms. Grainne Clohessy S.C. The Revenue submitted that s. 770 TCA is a taxing statute and should be interpreted strictly, in accordance with *Inspector of Taxes v. Kiernan* [1981] I.R. 117; *McGrath v. McDermott* [1988] I.R. 258 and Kearns v. Dilleen [1997] 3 I.R. 287. In Chapter 1 TCA, the terms "occupational pension schemes" and "retirement benefits scheme" are used interchangeably. Chapter 1 predates the introduction of PRSAs and so they are legislated for in Chapter 2A of Part 30, TCA, inserted by s. 4(1)(d)(v) of the Pensions (Amendment) Act 2002.

The definition of "relevant benefits" is wide ranging and covers (with certain exceptions) any type of financial benefit given in connection with the termination of an employee's service with an employer. It includes the terms "employee", "service" and "employment". The definition of "service" also extends to other terms to include "retirement". Section 772(2) of the TCA provides:-

"The conditions referred to in subsection (1)(a) are-

> (a) that the scheme is bona fide established for the sole purpose of providing relevant benefits in respect of service as an employee.....
>
> (b) that the scheme is recognised by the employer and employees to whom it relates.....
>
> …

(d) that the employer is a contributor to the scheme."

It is therefore Revenue's position that, in the context of Chapter 1 of Part 30 TCA, which deals solely with occupational pension schemes, the term "relevant benefits" does have an employer/employee service requirement.

However, in this case the Court is being asked to interpret the term "relevant benefits" as contained in a non-taxing legislative measure and in a different context. While there is a requirement to interpret tax legislation strictly, there is scope for a more flexible approach where a regulation is not a tax regulation, such as occurs in this case. The Court, in the context of s. 770 TCA, can interpret "relevant benefits" in a way that reflects a more flexible approach than that given to taxing statutes. Such an interpretation is permitted by ss. 5 and 6 of the Interpretation Act 2005. It can be given a meaning which is not dependent on there being an employer I employee relationship in place. S.I. No. 716/2003 is directly referable to the Pensions Act 1990 and in particular, s. 194 outlines the procedure for PRSA transfers to overseas arrangements. Therefore to construe it as being only applicable in the context of an employer/employee relationship would be to exclude personal retirement savings accounts entered into by self-employed persons from the scope of the Regulations of 2003.

The *bona fide* condition was introduced in 2009 in a bid to stop PRSAs being used to facilitate 'artificial' transfers of occupational pension schemes outside of Ireland and back again. In 2012 the Revenue Commissioners were advised by the pensions industry that many requests for transfer of pension schemes overseas were in response to advertising by international scheme providers in Ireland. These schemes sometimes work by way of a "dual transfer" - an individual's pension fund is transferred to an overseas arrangement which meets the requirements of S.I. No. 716/2003, whereby it is then immediately transferred to another jurisdiction to allow for easier access to the funds.

The increase in overseas transfers raised concerns concerning the potential flight of pension funds out of the country, the risk to the pension holders and an undermining of the primary purpose of tax relief for pensions, *i.e.*, to encourage individuals to save for retirement. This supposes that pension funds are 'locked away' and not accessible until retirement. The Revenue, as part of the reforms under the 2012 circular, introduced the requirement to include a signed declaration that the transfer being sought was *bona fides*. It is the Revenue Commissioner's position that the inclusion of this declaration by the PRSA holder is not conclusive evidence of *bona fides*. The PRSA provider can still make further enquiries to assess the validity of the proposed transfer and is under no obligation to "blindly accept a signed declaration" as the only evidence.

4. The Regulations and Legislation
"S.I. No. 716/2003- Occupational Pensions Schemes and Personal Retirement Savings Accounts (Overseas Transfer Payments) Regulations, 2003.

Citation.

1. These Regulations may be cited as the Occupational Pension Schemes and Personal Retirement Savings Accounts (Overseas Transfer Payments) Regulations, 2003.

Definitions.
2. In these Regulations -

"Act" means the Pensions Act, 1990 ;

"overseas arrangement" means an arrangement for the provision of retirement benefits established outside the State;

"relevant benefits" has the meaning assigned to it in section 770 (1) of the Taxes Consolidation Act, 1997.

Overseas transfers.

3. (a) A member of a scheme who is entitled to a transfer payment under section 34 (2) of the Act, may direct the trustees of the scheme to apply the transfer payment in the making of a payment to an overseas arrangement, or

(b) a PRSA contributor who is entitled to transfer his PRSA assets under section 124 (2) of the Act may direct the PRSA provider to transfer those assets to an overseas arrangement, provided that:

(i) the trustees or PRSA provider have satisfied themselves that the retirement benefits to be provided under the overseas arrangement are relevant benefits by obtaining written confirmation to that effect from the trustees, custodians managers or administrators of an overseas arrangement to which the transfer is to be made, and

(ii) the trustees or PRSA provider have satisfied themselves that the overseas arrangement has been approved by an appropriate regulatory authority for the country concerned, and (iii) the trustees or PRSA provider have received from the member of the scheme or the PRSA contributor such information in such form as may for the time being be approved by the Pensions Board."

Section 124(2) of the Pensions Act 1990, as inserted by s. 3 of the Pensions (Amendment) Act 2002, provides:-

"Transfers of the kind referred to in subsection (1) may be made, in accordance with such conditions as may be prescribed, to any arrangement for the provision of retirement benefits established outside the State to the same extend that transfers are permitted from a scheme."

Section 770(1) of the Taxes Consolidation Act 1997 contains the definitions for Chapter 30 and provides that:

"*relevant benefits*" means any pension, lump sum, gratuity or other like benefit-

(a) given or to be given on retirement or on death or in anticipation of retirement or, in connection with past service, after retirement or death, or

(b) to be given on or in anticipation of or in connection with any change in the nature of the service of the employee in question,

but does not include any benefit which is to be afforded solely by reason of the death or disability of a person resulting from an accident arising out of or in the course of his or her office or employment and for no other reason;

"*service*" means service as an employee of the employer in question and other expressions, including "*retirement*", shall be construed accordingly;

Section 770(2) provides:

"Any reference in this Chapter to the provision of relevant benefits, or of a pension, for employees of an employer includes a reference to the provision of those benefits or that pension by means of a contract between the administrator or the employer and a third person."

See also s. 772(2) of the TCA, quoted above.

5. Revenue Circulars
The Revenue Commissioners issued a circular dated 11th September, 2009, in response to concerns that PRSA schemes were being used to circumvent Revenue rules on tax liabilities for retirement benefits. Specific areas of interest were:-

(i) Payments transferred between the UK and Ireland;

(ii) Accessing retirement benefits before retirement;

(iii) Using schemes for investments prohibited in Ireland; and

(iv) Provision of ARF options to individuals who would not qualify under Irish legislation.

The Revenue introduced a new 'approval condition' to be applied to all PRSA products. The condition was imposed pursuant to s.787K(2) TCA and stated that PRSA products the subject of transfer arrangements under S.I. No. 716/2003 would only be facilitated if they were *bona fide*.

Any transfer which was intended to circumvent Part 30 of the TCA would be a contravention of Revenue rules. The Revenue proposed that if they became aware that a non *bona fide* transfer had been made they would invoke the new provisions of the TCA and the PRSA would be deemed to have contravened the approval condition until the contrary was demonstrated to the satisfaction of the Revenue Commissioners.

A second Revenue circular dated 19th April, 2012, expressed the same concerns as the first circular. It was made clear that a transfer payment to an overseas provider, the purpose of which was to circumvent Part 30 of the TCA, would contravene the approval condition. For extra security, under the 2012 circular. Revenue applied another 'additional approval condition' to all existing and future schemes.

The additional approval condition stated:-

"A member of an occupational pensions scheme or a PRSA contributor who directs the trustees of the scheme or the PRSA provider to make a payment to, or transfer assets to, an arrangement for the provision of retirement benefits outside the State (i.e. an overseas arrangement) under the provisions of the Occupational Pensions Scheme and Personal Retirement Savings Accounts (Overseas Transfer Payments) Regulations 2003 (S.I. No. 716 of 2003) shall, prior to any transfer, sign a declaration, in such form to be determined by the Revenue Commissioners, to the effect that the transfer conforms to the requirements of the regulations and Revenue pension rules, is for bona fide reasons and is not primarily for the purpose of circumventing pension tax legislation and Revenue rules."

Pension scheme trustees were required to sign and return a declaration form to Revenue in respect of any overseas transfer. If a transfer occurred in breach of the conditions, the Revenue proposed invoking ss. 772(5) and s. 787K (3) & (4) of the TCA. These provisions are as follows:

Section 772(5):-

"Where in the opinion of the Revenue Commissioners the facts concerning any scheme or its administration cease to warrant the continuance of their approval of the scheme, they may at any time, by notice in writing to the administrator, withdraw their approval on such grounds, and from such date, as may be specified in the notice."

Section 787K(3):-

"Where, having regard to the provisions of this Chapter, the Revenue Commissioners are, at any time, of the opinion that approval of a product under section 94 of the Pensions Act, 1990, ought to be withdrawn they shall give notice in writing to the Pensions Board of that opinion and such a notice shall specify the grounds on which they formed that opinion."

Section 787K (4):-

"Where approval of a product is withdrawn pursuant to section 97 of the Pensions Act, 1990 , there shall be made such assessments or amendment of assessments as may be appropriate for the purpose of withdrawing any relief given under this Chapter consequent on the grant of the approval.

6. Discussion
The plaintiffs request to transfer his fund to an overseas arrangement in another EU state is governed by regulations in S.I. No. 716/2003, which also applies to occupational pensions. Two conditions or provisos that are specified in the regulations have to be

considered in this case. They are (A) a requirement that the transaction should be *bona fide* and (B) that the receiving fund provides "relevant benefits" as defined in section 770 (1) of the Taxes Consolidation Act 1997. The defendant's argument was that it did not want to be in breach of the regulations or of the relevant Revenue circulars, which latter particularly applied to condition (A).

It is of course true that if the defendant can put up an obstacle to transferring the pension fund to Malta, the plaintiff will be obliged to keep his money in Ireland so the defendant company has an interest in opposing what the client wants to do.

On the issue of *bona fides*, the question is whether the pension provider has to perform an evaluation of the reasons for the transfer of funds and, if so, what is the nature or limit of the enquiry? The Revenue observed that submission of the signed declaration form to illustrate that the transfer is *bona fide* is not necessarily proof of its validity. It is open to the PRSA provider to make further enquiries to assess the lawfulness of a proposed transfer and it is under no obligation to accept a signed declaration as the only evidence of legitimacy.

The Revenue Commissioners state that it is incumbent upon the PRSA provider to use its best endeavours to ensure that in respect of a PRSA contributor, the signed declaration is what it appears to be. If there are any circumstances of which the PRSA provider is aware, or if the declaration does not make sense because of some other information the PRSA provider has, (*i.e.*, information on file about certain schemes), then the PRSA cannot accept a signed declaration and ignore the other information or evidence that it has or is aware of.

This does not arise here. The defendant has made no claim that it is aware of some other information which would preclude the plaintiff's application. Obviously, the plaintiff has formally complied with the Revenue circular. The question is whether the defendant has to evaluate the information the plaintiff provided on the form that he submitted. My answer is no- the company does not have to investigate the circumstances. A fund manager in the position of Canada Life in this case is not obliged to conduct an independent examination and evaluation of the motives of the fund owner. There was no reason for the defendant to suspect that the plaintiff intended any breach of the Regulations or of his obligations under taxation legislation. The mere fact that he wanted to transfer this PRSA to another EU member state was not an indicator of any suspicious circumstance.

I do not think that the defendant is under an obligation to engage in an investigation of the motives of the plaintiff. Provided there is nothing in the facts of the case as presented to the company to give rise to suspicion as to the *bona fides* of the transaction, the defendant company is free to implement the wishes of the owner of the fund. Having said that, I am not sure that it is possible to lay down a general rule. Everything depends on the circumstances of the particular case. It is sufficient to say that in this case there appears to be no basis for questioning the motives of the applicant and that his declaration in the approved form is therefore sufficient. The defendant company does not have any reason to be uneasy and is not required to verify the factual circumstances behind the application or to make some general exploration of the applicant's motives. This condition is not accordingly a legitimate ground of refusal.

The central issue in the case concerns condition (B). As is clear from the recitation of the dealings between the parties described above, the defendant maintains that the plaintiff cannot transfer the fund because he is not resident and employed in the country where the receiving body is located.

In respect of the Centaurus application, the defendant received a Revenue declaration form and a letter from Centaurus confirming that (1) the plaintiff is self employed tax accountant; (2) the scheme is operated as a defined contribution retirement benefit scheme within the provisions of the Maltese Special Funds (Regulation) Act and is registered as a personal retirement scheme with the MFSA; (3) the benefits are payable only on retirement or death; (4) the relevant benefits of the scheme are as follows:

(i) Benefits are to be taken between ages 50 and 70;

(ii) Maximum lump sum is 30%;

(iii) 70% of fund has to be used to provide income for life;

(iv) Benefits are payable to spouse on death of member;

(v) No loan can be secured against the fund; and

(vi) The scheme is regulated by MFSA and audited by KPMG.

The plaintiff relies on these features that are typical of a retirement scheme to support his argument and the affidavit of Mr. Slattery is confirmatory of that point.

It is to be remembered that the transfer regulations apply to occupational pensions as well as PRSAs. The proviso refers to "relevant benefits" as defined in section 770 (1) of the TCA. PRSAs were not covered by that legislation and the definition in question did not have them in contemplation because they were not invented at the time. The Chapter of the Act was dealing with benefits in pensions on retirement from employment. The expression as defined applies to an occupational pension. This is a point made by Canada Life with which the Revenue Commissioners are in agreement as a matter of interpretation of the statutory definition. The provisions of s.772 TCA afford confirmation of the connection with employment.

It follows if this analysis is correct that the proviso in the Regulations of 2003 applying to both occupational pensions and personal retirement savings accounts requires that the benefit should be occupational in nature. However, PRSAs are not related to employment; they can be taken out regardless of employment status. Many, if not most of them, are not connected with employment and so cannot comply with this definition. Construing the measure in this way would mean that regulations, whose title and purpose is to permit the transfer of PRSAs as well as occupational pensions, contain a condition that by the nature of PRSAs they, or many of them, cannot fulfil. It would also mean that transferrable PRSAs were required to fulfil a condition that they did not have to satisfy at home.

Case law makes clear that taxing statutes must be construed strictly. Another principle of interpretation is that statutory words must be given their plain meaning and a court cannot rewrite legislation so as to mean something different from what it says. The same rules apply to statutory instruments including the strict rule as to interpretation in the case of regulations dealing with tax. The statutory instrument in this case is not a taxing measure and neither is the definition of relevant benefits in s. 770(1) TCA in its application to transferring PRSAs.

A court may depart from the literal construction of an enactment and adopt in its place a teleological or purposive approach, where that more faithfully reflects the true legislative intention gathered from the measure as a whole. Yet another principle that is used in construing legislation is that a meaning that gives effect to the provision is preferred to one that renders it inoperative.

Important rules of statutory interpretation and construction are now available to the Court in sections 5 and 6 of the Interpretation Act 2005 which are as follows:-

> 5(1). "In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction) -
>
> (a) that is obscure or ambiguous, or
>
> (b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of-
>
> (i) in the case of an Act to which *paragraph (a)* of the definition of "Act" in section 2 (1) relates, the Oireachtas, or
>
> (ii) in the case of an Act to which *paragraph (b)* of that definition relates, the parliament concerned,
>
> the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole.
>
> (2) In construing a provision of a statutory instrument (other than a provision that relates to the imposition of a penal or other sanction) -
>
> (a) that is obscure or ambiguous, or
>
> (b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of the instrument as a whole in the context of the enactment (including the Act) under which it was made,
>
> the provision shall be given a construction that reflects the plain intention of the maker of the instrument where that intention can be ascertained from the instrument as a whole in the context of that enactment.
>
> 6. In construing a provision of any Act or statutory instrument, a court may make allowances for any changes in the law, social conditions, technology, the meaning of words used in that Act or statutory instrument and other relevant matters, which have occurred since the date of the passing of that Act or the making of that statutory instrument, but only in so far as its text, purpose and context permit."

Is it therefore legitimate to interpret S.I. No. 716/2003 as referring to PRSAs without an employment component? The plaintiff submits that S.I. No. 716/2003 is clearly intended to apply to PRSAs and a proper and reasonable interpretation of its terms is that there cannot be a requirement of an employment connection. His case, and the Revenue argument agrees, is that applying the meaning proposed by Canada Life results in the opposite of what the statutory instrument manifestly intends to do, namely, to enable the owner of a PRSA to transfer it to an overseas fund manager. The Revenue agree that that *is* possible, notwithstanding the usual strict approach to interpreting tax legislation because this is a permissive statutory instrument and not tax legislation and also having regard to the provisions of sections 5 and 6 of the Interpretation Act 2005, as outlined above.

The concept of relevant benefits in s.770 (1) TCA and neighbouring sections is associated with employment. That is to be expected. Chapter 30 of the TCA 1997, deals with occupational pensions. But even on a strict literal interpretation, it appears that the definition of relevant benefits is disjunctive and the first phrase, referring to "*any pension, lump sum, gratuity or other like benefit*" that is "*given or to be given on retirement or on death or in anticipation of retirement"* taken alone and without considering its meaning amplified by context and purpose, does not confine the benefits to employment. Moreover, the employment connection is expressly stated in the provisions where that is required so it would appear that the drafters did not consider that the definition necessarily included that relationship.

A PRSA does not require that the beneficial owner should have an employment connection with the fund manager, unlike an occupational pension scheme. It makes sense for there to be a proviso concerning an employment connection in the case of an occupational pension scheme but not for a PRSA and the intention of the statutory instrument seems to me to be clear, that is, to facilitate the transfer of each of two kinds of fund to an overseas manager. I do not think that the proviso as to relevant benefits was ever intended to cover personal retirement savings accounts because such funds- most of them perhaps and certainly many of them -would not, or could not, comply.

It seems to me that the purpose of S.I. No. 716/2003 is clear and should not be frustrated by a narrow or literal reading. Although the connection with employment is clear in the case of an occupational pension in the context of Chapter 30 of the TCA, it does not follow that the same requirement applies to PRSAs. It would defeat the intention of the measure to adopt that interpretation. It would actually fail to make any actual distinction between the two kinds of fund. The Court has to approach the matter on the basis that the intention of the Regulations of 2003 should, if possible, be effected by applying rules of interpretation and construction.

It seems to me that S.I. No. 716/2003 can legitimately and should be given a purposive interpretation so as to permit the transfer sought by the plaintiff. The Regulations are intended to allow people like the plaintiff to do what he wants to do. The Interpretation Act, 2005 permits an approach in accordance with the true intention of the legislation and the regulations.

7. Conclusion

My conclusion, accordingly, is that the transfer regulations do not require that the plaintiff be resident or employed in the destination country in order to move his fund.