THE HIGH COURT

COMMERCIAL

RECORD NO. 2012/7254 P

BETWEEN:

JOHN P GREENE, MARCUS AUSTIN, GERALD BARRY, DAVID BEDDAR, DEIRDRE BRODIE, EDWARD A BROOKS, ANDREW PHILLIP BROWNE, PAT BUCKLEY, LES P BYRNE, BRIAN CASLEY, PATRICK CHAPLIN, NOEL CLIFFORD, JOHN CRONIN, THOMAS CULBERT, MARY CULLIGAN, DAN CULHANE, PAT CURRAN, DECLAN CUSACK, KIERAN CUSACK, JOHN AIDAN DALTON, MARGARET DALY, COLM DE BARRA, WILLIAM G DELANEY, CLINTON BRYAN DICKERSON, JOHN DOLAN, GERRY DONNELLAN, TOMMY DOYLE, JOHN L DUDLEY, PATRICK DESMOND EUSTACE, GERARD FAHY, CYRIL FINNUCANE, MARY FITZGIBBON, PAUL FITZGERALD, PETER G FITZGERALD, DAVID FRAHILL, PATRICK J GALLAGHER, BRIAN GREANEY, ANNE PATRICIA GRIFFIN, SHANE GRIFFIN, LIAM HALL, DENIS HARNETT, JOHN HEHIR, THOMAS GERARD HEHIR, JOHN HEALY, MARY HENNESSY, GER HICKEY, PATRICK GERARD HOGAN, TOM HOGAN, MICHAEL HOWE, MICHAEL HUNT, JOHN JAMES KELLY, MARIE KENNELLY, P J KENNEDY, PAUL KENNY, MICHAEL KENNY, EOIN KILKER, JOHN KILLEEN, KEVIN KINSELLA, MICHAEL LAFFIN, CATHERINE LEAHY, MICHAEL LIDDANE, ELWOOD KEVIN LYNCH, JIMMY LYONS, MARIAN E M MALONE, TOM MOLONEY, FINTAN A MOLONY, JOHN FRANCIS MULLEADY, SEAMUS MURRAY, PATRICK JOSEPH MURPHY, KIERAN JOSEPH MCAVINUE, JOHN MCCORMACK, ADRIAN MCEVOY, JIM MCGEE, PAT MCGRATH, MARY MCGUANE, JOHN MCINERNEY, ELIZABETH MCMAHON, ROSE MCMAHON, DAN MCNAMARA, JOHN MCNAMARA, PAUL MCNAMARA, GERALDINE NEYLON, MICHAEL NEYLON, PETER GEOFFREY NICHOLSON, MARY NOLAN MURPHY, JOHN NOLAN, DON NOLAN, MARGARET NOLAN, COLM O'BRIEN, BRENDAN O'BRIEN, GERALDINE O'BRIEN, MICHAEL O'CONNELL, MICHAEL O'CONNELL, TONY O'CONNELL, MOSSY O'CONNOR, RORY O'CONNOR, BRIAN O'DRISCOLL, DOMINICK O'DWYER, GERARD P O'GRADY, RAY O'HALLORAN, MARY O'LOUGHLIN, PEADAR O'LOUGHLIN, JIM O'MEARA, GERRY O'ROURKE, EILEEN O'ROURKE, PAT O'ROURKE, JOHN POMEROY, ALAN POWER, COLM J POWER, JOHN POWER, MICHAEL REA, SHIRLEY REA, PAT REGAN, TONY RYAN, BRENDAN SLATTERY, JAMES P SEXTON, RUTH STANLEY, PETER TALBOT, CHRISTOPHER TAYLOR, NOEL B TAYLOR, SHEILA TREACY, DONALD WALSHE, LIAM WALSHE, EAMONN WELSH,

And by Order

JOHN BOWLER, THERESA DARCY, MICHAEL MAGUIRE AND JOHN MCMAHON

Plaintiffs

- and -

DANNY COADY, SIOBHAN DUFFY, DANNY MURPHY, THOMAS O'BRIEN, GERARD O'SULLIVAN AND DERMOT TUITE

Defendants

Judgment of Mr Justice Charleton delivered on the 4th of February 2013

1.0 The plaintiffs are beneficiaries or potential beneficiaries of the pension fund of Element Six Limited at Shannon Industrial Estate in County Clare. The defendants are the trustees of that fund. The plaintiff beneficiaries claim damages against the defendant trustees for breach of trust in accepting, on 25th of November 2011, an offer of €23.1 million (plus €14 million outside that fund) from Element Six Limited, as the contributor of the pension fund, to close its liability to contribute from the end of 2011. Instead, the plaintiff beneficiaries claim that the defendant trustees should have made a contribution demand for €129.2 million, or more, to make up the funding deficit to the pension fund and that their failure to do so was a wilful default. The trustees divided equally on the issue: the three company nominees voting in favour and the three worker nominees voting against with the chairman Danny Coady exercising his casting vote in favour. That vote is alleged by the plaintiff beneficiaries to have been vitiated by conflict of interest, to have taken into account irrelevant matters, to have ignored relevant issues and to be a decision that no reasonable body of properly informed trustees could have taken. Of the six defendant trustees, three came from company management; Danny Coady, Siobhán Duffy and Dermot Tuite. They gave evidence in this action. Three others came from the operations side; Danny Murphy, Thomas O'Brien and Gerard O'Sullivan. They did not give evidence. Danny Coady, Siobhán Duffy, Gerard O'Sullivan and Dermot Tuite were at the time of the decision active members of the pension scheme, meaning eligible members of the payroll, while Danny Murphy had taken voluntary redundancy in 1993 as had Thomas O'Brien in 2008.

1.1 Pension funds have come under severe strain over the last seven years. With the national banking crisis of 2008 and the context of bank failures in the United States of America, the European Central Bank has set historically low rates of interest. A hidden subsidy from ordinary people to the poor performance of financial institutions is the paltry rate that any bank will now pay a depositor. Deposit rates depend largely on loan rates. Current loan rates are in contrast to what were predicted in business circles in 2006 to be interest rates for bank loans that would rise from already quite high levels. If an income on a fixed capital sum is sought through the banking sector, to now generate a return through a bank deposit equivalent to that of 2006 requires, perhaps, double or more. With the financial turmoil has also come a less certain return on business investments and the capital value of many pension funds has dropped. In addition, those buying into any annuity fund on retirement these days can expect to live for several years longer than their parents' generation.

1.2 The sixth element in the periodic table of elements is carbon; hence Element Six Limited as the name of the company which was the funder of this defined benefit pension scheme. The company is part of a worldwide multi-national conglomerate that deals in diamonds, including the De Beers companies in South Africa. The Shannon entity used to manufacture diamonds from other forms of carbon in high-pressure presses. The plant was started in 1961. At its height, in 1988, it employed over 1000 people. Since then employment has declined. In 2001 the equipment for manufacturing was moved by the group away from Ireland and other European locations to South Africa; presumably for reasons of cost. This was a big blow to the sustainability of the Shannon plant which was then left with administration and the finishing and distribution of raw industrial diamonds. In 2009, the head company in the group, Element Six Abrasives SA in Luxembourg, announced the closure of the Shannon plant. Apparently this must have been qualified since a plan of survival was quickly put together by the Shannon management. This involved about 300 redundancies and other savings amounting to some €30 million off operating costs. It resulted in the plant being saved. The group then publicly announced that it was in Shannon for sustainable employment into the long term. On the evidence, there are now some 359 employees of Element Six Limited in Shannon of whom about 270 are involved in factory work involving finishing raw industrial diamonds and coating and preparing these for various uses. The rest of the staff members are administrative, management and distribution workers.

1.3 Some employees of the Shannon plant gave evidence. They described it as a very pleasant place to work with good conditions and an uplifting sense of comradeship. Part of the remuneration package up to 2001 was a defined benefit scheme. That is the pension trust in issue here. A defined benefit scheme is one where people work on a promise that on retirement they will get a fixed percentage of their wages. This is in contrast to a defined contribution scheme, where each individual builds up a pot of money by contributions over their working life and it is that pot which is used to fund a pension on retirement; the amount dependent on the vagaries of the market. A defined benefit scheme can be seen, and was presented during this hearing by the plaintiff beneficiaries, as part of the ongoing remuneration of a worker, albeit deferred. From 2001 on, workers joining the Shannon plant could not join the defined benefit scheme. Instead they were entered into a defined contribution scheme. This fixes contributions by the employer as part of the remuneration package and by the employees out of wages towards the build up of an invested fund that can be used to buy a retirement annuity on the open market, or to otherwise encash the fund on payment of appropriate tax. The contributions here were 5% from wages and 5% from the employer. As markets go up and down, there is little certainty as to how well anyone's defined contribution fund will do, so there is no guaranteed income when they come to retire or when they die and their spouse inherits the benefit. People also retire at different ages from paid employment. With the redundancy package of 2009 tempting many people into finishing paid work early, many people are awaiting their 65th birthday, the current age for eligibility, before the benefit of their work flows as a pension. From 2009, even for employees in the Shannon plant from prior to 2001, the defined benefit fund was shut to future increases. Instead, such employees kept their defined benefit, as then earned, but could not add to their entitlements in that regard; being put as regards future gains in potential pension into the defined contribution scheme for as much as they would contribute from then until retirement.

1.4 On the defined benefit scheme, there are 173 active working members, 258 pensioners and 375 people who have retired under 65 but whose entitlement to their pension is deferred until age 65.

1.5 Pensions are regulated by the general law, by specific statutory provision and, inevitably also, by a trust deed.

The trust deed

2.0 Central to this litigation is the consolidating deed and rules governing the trust of 20th of May 1994. The deed traces its origins back to 21st of June 1961. It provides that the plan for defined benefit is to be administered in accordance with the deed and with the rules attached. The main purpose of the plan is to provide relevant benefits for directors and employees of the company and any associated employees who are admitted to membership in accordance with the rules. The plan was classified as a retirement benefits scheme as defined by section 14 of the Finance Act 1972 and is stated to be an occupational pension scheme as defined by section 2 (1) of the Pensions Act 1990, as amended. Under the deed, the trustees jointly and severally covenanted with the employer to manage and administer the plan, to comply with the provisions of the trust deed and rules, to keep confidence on the trust's business affairs save as provided for by law, to keep confidence in respect of members and beneficiaries and, on resignation, to execute such documents as are necessary to the functioning of the trust in accordance with decisions made by the trustees. The trustees' duties are set out in accordance with the Pensions Act 1990 and include receiving contributions, investing these properly, making arrangements for the payments of benefits, keeping records, registering the plan with the Pensions Board, complying with legislation and giving proper notices. The powers of the trustees are set out in paragraph 7. These include powers of delegation, to employ staff and experts, to engage assistance in life assurance, and "to decide all questions or matters of doubt arising under this Trust Deed or the Rules and every such decision… shall so far as the law permits be conclusive…" All quotes which follow remove inappropriate capital letters. Clauses 7 (v) and (vii) should be quoted in full as it enables the trustees with the following:

> (v) Power, in addition and without prejudice to all powers conferred upon the trustees by this Trust Deed and by law, to settle, compromise or submit to arbitration any claims, matters, disputes or differences arising out of the Plan or otherwise in connection therewith and which have not been disposed of under the provisions of sub-clause (iv) above, and to commence, carry on or defend proceedings relating in any way to the Plan or relating to any rights of the Members or others therein.
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> …
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> (vii) Power in relation to this Trust Deed and the Rules to rely upon the advice or opinion, whether or not obtained by them, of any lawyer, banker, broker, actuary, accountant, medical practitioner, assurance company or pension consultants of good repute or other professional person as the Trustees see fit and the Trustees shall not be responsible for any loss occasioned thereby. The cost of obtaining by the Trustees of any such advice opinion shall form part of the expenses incurred by the Trustees in connection with the Plan.

2.1 Clause 8 provides for meetings and for the chairman's casting vote to be decisive in the event of equality of ballot.

2.2 Central to this litigation has been the issue of conflict of interest. Therefore central to the resolution of this dispute is clause 9 of the trust deed:

> (i) No decision of the exercise of power by the Trustees shall be invalidated or questioned on the ground that the Trustees or, in the case of the Trustees or any of them being a body corporate, any Director of such body corporate, or any individual trustee or trustees had a direct or personal interest in the result of any such decision or in the exercise of any such power.
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> (ii) Any of the Trustees or any director of corporate trustee who is a Member may retain any benefits payable to him from the Plan for his own benefit absolutely and may participate in any discussion in respect of and vote on any resolution which affects or may affect any benefits payable to him from the Plan in any way whatsoever.

2.3 Any issue as to the remuneration of trustees or their expenses has not formed part of this case but it is provided for in clauses 11 and 12. An actuary may be appointed under clause 13. The covenants by the employer are set out in clause 14 and the termination of the liability by the employer to make payments is set out in clause 15. These are quoted in turn:

> 14. The Principal Employer hereby covenants and any Associated Employer shall, by Deed of Adherence, covenant jointly and severally with the Trustees and each of them:-

(a) to observe and perform such of the provisions of this Trust Deed and the Rules as are hereunder to be observed and performed by them;

(b) to pay to the Trustees upon the written demand of the Trustees such contributions as are payable under the rules subject to the provisions of Clause 15 hereof.

15. The Principal Employer or any of the Employers may at any time terminate its liability to contribute to the Fund by giving no less than one month's notice in writing to the trustees but without prejudice to its liability to pay any contributions or expenses which have become payable prior to the expiry of such notice or to pay any expenses which will arise in connection with the determination of the plan in accordance with Clause 23.

2.4 Clause 16 deals with investment and borrowing. Clause 17 deals with transfers from other schemes and 18 to other schemes. Clause 19 deals with assignments of benefit. The scheme may be terminated by notice, as set out above, or upon the winding up of what is called the associated employer or if an association between the principal employer and the associated employer ceases to be satisfactory, in which case there is a provision for the application of the relevant funds. The principal employer may be substituted under clause 21. Pursuant to clause 22, the plan may be determined upon "the termination by the principal employer of its liability"; by the "failure of the Principal Employer at any time to pay to the Trustees any sum or sums due under" the trust deed of the rules; by the trustees exercising a power of winding up under clause 21; by the trustees deciding to determine the plan following a deferral; through the expiry of the trust period less one year. Clause 22 (b) provides:

Upon the Fund being wound up the liability of each of the Employers and, where appropriate, the members to contribute thereto if not already terminated under paragraph (i) of sub-clause (a) of this Clause, shall terminate and the fund shall be held upon the trusts declared by Clause 23 hereof.

2.5 Pursuant to clause 23, on dissolution the trustees are to notify each of the members in writing and to apply a scheme of priorities. Other clauses in the deed provide for such things as receipts and payments, deduction of tax, assignments of benefits, amendment of the trust deed and referral to arbitration; which did not happen here. Clause 24 requires to be quoted in full because it is, along with the conflict of interest clause at 9, central to this litigation concerning, as it does, trustees' liability:

(a) The Trustees (and where the Trustees comprise of or include a corporate body, the officers and employees of any such body) shall not be responsible, chargeable or liable in any manner whatsoever including negligence for or in respect of:-

(i) any loss of, any depreciation or default upon any of the investments, shares, debentures, securities, stocks or policies or any other property in or upon which the monies and assets of the Fund or any part thereof may at any time be invested pursuant to the provisions hereof;

(ii) any delay which may occur from whatsoever cause in the investment of any monies belonging to the Fund;

(iii) the safety of any securities, documents of title or other investments relating to the Fund deposited by the Trustees for safe custody;

(iv) any payment or payments to any person or persons erroneously made or caused to be made by the Trustees;

(v) the exercise of any discretionary power vested in the Trustees by this Trust Deed and Rules or otherwise including any act or omission by any committee, agent, employee or delegate appointed by the Trustees; or

(vi) by reason of any other matter or thing;

PROVIDED ALWAYS that any of the Trustees and any officer or employee of a corporate trustee shall be liable for wilful default on his part but such liability shall not extend to the remaining Trustees.

(b) A trustee who is engaged in the business of providing a trusteeship service for payment shall be liable for negligence.

(c) The Trustees shall not be obliged to bring or defend any legal proceedings in relation to the Plan and shall not be chargeable for any breach of trust in any way in connection with any such omission.

2.6 The rules do not have to be referred to in detail. They provide for membership, contribution, the calculating of pensions and the date on which these are due and then such matters as people who go in and out of the scheme. Members can make additional voluntary contributions to secure better benefits but this has not been germane at the hearing. The liability of the employer to make contributions has been emphasised so the relevant rule at 3(b) should be quoted:

(i) Each Employer shall, from time to time, make such contribution to the Fund as shall be determined by the Appropriate Authority to be required, together with the contributions of the Members… To enable the trustees to provide the benefits of the Plan, PROVIDED THAT the Employer will at Normal Pension Date have borne not less than one-sixth of the total cost of the benefits being provided for each Member by all of the Employer's retirement benefits schemes.

(ii) The Employers' contributions shall be calculated on the basis agreed between the trustees and the principal employer and shall be subject to review at intervals of not more than five years.

(iii) Each Employer shall, in respect of any Member employed by it whose benefits are being augmented or who is receiving an additional benefit in accordance with rule 4(b), pay such contributions to the Fund, in addition to the contributions specified in paragraph (i) as shall be required in accordance with the provisions of Rule 4(b).

2.7 Reference has been made to adhering employers throughout the rules and in the trust deed. It is not necessary to consider any liability that might arise to the defendant trustees in that regard. The expert witnesses on behalf of plaintiff beneficiaries and on behalf of the defendant trustees have all agreed that some pension plans may involve a conglomeration or group of companies joining to provide pension benefits in respect of each of their respective set of employees but in circumstances where if one drops out through insolvency it may be possible under the terms of the trust deed to call in aid of the assets of another adhering company.

That does not arise here on the evidence available to the trustees as of 25th of November 2011 and at the hearing no adviser was saying that such a call was possible. In evidence, the expert on behalf of the plaintiff beneficiaries rightly conceded that any such prospect was remote. In any event, it is barely mentioned in the relevant documents and was not seen as a viable prospect.

Review of a decision of trustees
3.0 In making any decision as to the liability of trustees it is not for the court to be cleverer or better informed or more astute or more enquiring or better in its judgment than the trustees. The court must also avoid the temptation to listen to the evidence and to make its own conclusion as to what should have been done by the trustees on the date of the impugned decision. Naturally, the court will have gone into the matter in greater detail; the court will have the benefit of live evidence as opposed to the usual expert reports that are often the most trustees can expect; the court will have heard the merits and demerits of any decision argued out at length. Frequently, too, the court will have time to consider its decision, will be used through long experience to inevitably having to disappoint one side or the other and may have analytical experience beyond that of the majority of trustees. In probate cases, courts have often referred to the testator's armchair principle: that in construing a will the court should put itself into the same mindset as the deceased when drawing up the will. A similar approach is mandated in pension cases; but there the position of a trustee can often be far less comfortable. The hot seat of a trustee is where the court should place itself and on the basis of what the trustees knew or ought to have known and should look at the decision through the vision of the trustees informed by the same material and by the same relevant considerations that were properly to have been then considered. A measure of appreciation is by law to be applied. Trustees must take all relevant matters into account; trustees must exclude irrelevant matters; trustees must direct themselves properly in law and in interpreting the provisions of a trust deed and rules. Two of these three rules derive from the English decision in *Re Hastings-Bass* [1975] Ch 25 that were affirmed after a proper review of the authorities in *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005]1 WLR 3811. As such, they are no more than a restatement. According to Lloyd LJ, at 3847:

> Where trustees act under a discretion given to them by the terms of the trust, in circumstances in which they are free to decide whether or not to exercise that discretion, but the effect of the exercise is different from that which they intended, the court will interfere with their action if it is clear that they would not have acted as they did had they not failed to take into account considerations which they ought to have taken into account, or taken into account considerations which they ought not to have taken into account.

According to Keane, commenting on this case in *Equity and the Law of Trusts in the Republic of Ireland*, 2nd ed, (Dublin, 2011) at 10.49 - 10.50:

> There is also English authority on the question as to whether in the last mentioned cases the decision will only be set aside if it can be shown that the trustee would have acted differently had he taken into account the relevant matters or will even be set aside if he *might* have acted differently. In *Sieff v Fox*, Lloyd LJ, sitting as a first instance judge, held that where the trustees had chosen to exercise a discretion, but were mistaken as to the fiscal consequences, the court could set aside their decision on the ground that, if not mistaken, they would have exercised their discretion differently. The learned judge distinguished that situation from cases where the trustees were obliged to exercise discretion, as where they were trustees of a pensions trust, and it was sufficient to show that they *might* have decided differently. There is a dearth of Irish authority in this area, but it would seem reasonable that the threshold for intervention should be lower in cases such as pension trusts where the right to benefit has been hard earned.
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> There have also been English cases concerned with pension schemes in which the courts have upheld challenges to the exercise of the discretionary powers on the ground that no reasonable body of trustees could have arrived at the particular decision and it could accordingly be characterised as 'perverse'. This approach was influenced by the principles adopted in modern judicial review cases, and while its application in such cases may have been justifiable, it has to be remembered that public law concepts such as 'natural justice' or (in Ireland) 'fair procedures' are not necessarily applicable in private law contexts, such as trusts.

3.1 This is a case where once an offer was made by the company of a sum in full and final settlement of their obligations under the defined benefit scheme, the trustees had an option to serve a contribution demand but had no option but to make a decision. Vernon Holgate, a professional trustee, and the expert witness on behalf of the plaintiff beneficiaries, gave evidence that in England the test to be applied was that if the decision was one which no reasonable body of trustees could have made it was to be overturned. No argument was presented to differentiate a pension trust, where as in this case the plaintiffs have all worked for their benefits on a promise which is part of their remuneration package in employment, from any other kind of trusts such as that under a will. There is no warrant whereby a different test is to be applied in pension cases, as Keane suggests, which would effectively enable the court to substitute its own judgment for that of the trustees. Appreciating that counsels of perfection cannot be applied to the decisions of trustees, it seems appropriate that the principle that the court should put itself into the same chair as the trustees and arm itself with the same knowledge, should require that once trustees are shown to have acted honestly and in good faith after having taken account of all relevant considerations and excluded all the irrelevant considerations that only decisions which are properly to be characterised as being ones that no reasonable body of trustees could have made may in law be condemned. Nor is there any authority for claiming that a pension trust is to be differently reviewed to trusts set up by a family in favour of children or a charitable trust to benefit disadvantaged people. All of these kinds of trusts are important and all are subject to the same rules.

Relevance and weight
4.0 Once a consideration is relevant, it is a matter for the trustees as to how factors are to be weighed in the balance in the exercise of their discretion. A court in looking back at a decision might have given a particular factor more or less weight and a different body of trustees might have decided the balance of considerations somewhat differently. It can always be argued that a re-measurement of the importance of the elements leading to a decision might have resulted in a different outcome. It is easy to rebalance factors so that the result can be different. It is not the task of a court to do that. Once a consideration can truly be regarded as part of what should be weighed in the exercise of discretion, it is for the trustees to give as much weight or as little import to that factor as they see fit in the light of the information and advice available to them. In this regard, once the standard of interference is set at the test of perversity, shorthand for where the decision is identified as one which no reasonable body of trustees properly informed and considering the decision could have made, the court should not decide that too much or too little weight had been given to a particular factor unless this is, firstly, based on tenable evidence and not mere speculation and, secondly, the measure of appreciation inherent in the reasonableness test brings that decision outside those parameters. Whereas Keane has argued in the passage quoted above that a judicial review standard of reasonableness may not be appropriate since trusts are not subject to the other forms of scrutiny based on fair procedures and the right of, for instance, beneficiaries to be heard, it should also be remembered the trustees are selected for their level-headedness, sometimes for their expertise, are entitled to receive representations from beneficiaries and often, as in this trust deed, have the benefit of expert analysis paid for by the fund. It therefore seems relevant to quote the public law decision of McMenamin J in *Kildare County Council v An Bord Pleanála* [2006] IEHC 173, (Unreported, High Court, MacMenamin J, March 10th, 2006). At paragraphs 49 and 50, he emphasised that any question of weight, other than the perverse

inflation or deflation of a particular factor, was a question for the decision maker:

> The weight which ought to be attached to the objectives in the context of the Board's assessment of the proposed road development plan is a matter for the Board. Thus while relevance is a matter of law for the court weight is a matter of discretion for the decision maker. In *Tesco Stores Limited v. Secretary of State for the Environment* (1995) 1 WLR 759 Lord Keith stated:
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> > "It is for the courts if the matter is brought before them to decide what is a relevant consideration. If the decision maker wrongly takes the view that some consideration is not relevant, and therefore has no regard to it, the decision cannot stand and must be required to think again. But it is entirely for the decision maker to attribute to the relevant consideration such weight as he thinks fit, and the courts will not interfere unless he has acted unreasonably in the *Wednesbury* sense … regard must be had to (material consideration) … but the extent, if any, to which it should effect the decision is a matter entirely within the discretion of the decision maker".
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> In the same case Lord Hoffman commented
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> > "The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of proper judgment which is entirely a matter for the planning authority. Provided that the planning authority has regard to all material considerations, it is at liberty, (provided that it does not lapse into *Wednesbury* irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. The fact that the law regards something as a material consideration therefore, involves no view about the part, if any, which it should play in the decision making process. The distinction between whether something is a material consideration and the weight which it should be given is only one aspect of a fundamental principle of British planning law, namely that the courts are concerned only with the legality of the decision making process and not with the merits of the decision. If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the secretary of state".
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> (See also City of *Edinburgh Council v. Secretary of State for Scotland* [1998] 1 All ER 174; and *R. v. Director General of Telecommunications ex parte Cellcom Limited* [1999] COD105.)
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> Moreover I think that the language used by the applicant at paragraph 22 of its statement of grounds underlines an essential and fatal aspect to this part of the case. It asks the court to decide that the Respondent should have afforded more weight to one aspect of the statutory plan. This is precisely what the court should not be asked to do: the question of weighing evidence is only and solely a matter for the statutory decision making body. Were the position otherwise, the court would be making the determinations of facts and evidence which the legislature has consigned to a specialist statutory body. It would constitute the court as an appellate body therefore, as opposed to a reviewing tribunal.

4.1 This authority is directly relevant since as it is appropriate not to interfere save for decisions which are plainly unreasonable, it must remain within the ambit of the powers of trustees to weigh one factor more heavily and another less. To otherwise analyse a decision of trustees would be for the court to substitute its own judgment. This principle is inherent in the law relating to trusts. In *Edge v Pensions Ombudsman* [2000] Ch 602 where Chadwick LJ deprecated any approach, to decisions by the pensions ombudsman, that asked whether there was sufficient weight put on a particular factor to justify a decision. At 619, the correct principle is set out:

> He had asked himself whether, in the light of those matters, he thought the decision was "fair". The correct approach was to ask whether the matters were irrelevant; so that the trustees could be said to have acted irrationally or improperly in taking them into account. If the trustees were entitled to take these matters into account, then it was for the trustees – and not for the ombudsman – to decide what weight these matters should be given. In particular, it was for the trustees to decide whether the fact that pensioners were already adequately provided for by past increases in benefits and by index-linking was a sufficient grounds for excluding them from further benefits. The fact that the pensioners were already adequately provided for (which was not challenged) could not be dismissed as irrelevant. The trustees' decision to give weight to that fact could not be categorised as irrational or improper. Further, the trustees were bound to have regard to the fact that the employers' consent had to be obtained. But it was for them to decide how far the employers could be pressed in negotiation. It was not for the ombudsman to substitute his own judgment for that of the trustees on a matter of this kind.

4.2 Therefore, once a factor can be taken into account, unless the weight attached to that factor can be analysed as being outside the range of what any reasonable body of trustees would give to it, the decision of the trustees must stand.

Conflict of interest
5.0 Since trusts deal with other people's property and since trustees must be faithful to deal properly with trust funds, trustees owe to the trust, and thus to the beneficiaries, a duty of good faith and fidelity. Trustees are not entitled to put themselves into a situation of conflict of interest whereby they may be influenced by how they themselves may profit from any decision which the body of trustees may make. The classic statement of the rule comes from *Bray v Ford* [1896] AC 44. There a solicitor acted as the trustee of a school while at the same time charging for services as a solicitor. This resulted in a scandalous letter from a concerned individual to the board of governors upon which he sued for libel. The House of Lords, through the judgment of Lord Herschel, defined the duty of a trustee to avoid any conflict of interest in terms of 'lead us not into temptation' rather than 'deliver us from evil'. The advantage of the rule thus stated is that once a conflict of interest is shown to have been entered into by the trustees, this suffices to upset their decision and it is not necessary to show an actual breach of the duty of fidelity. At page 51 the matter was put thus:

> It is an inflexible rule of a Court of Equity that a person in a fiduciary position, such as the respondent's, is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and a duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule. But I am satisfied that it might be departed from in many cases, without any breach of morality, without any wrong being inflicted, and without any consciousness of wrong-doing.

5.1 The modern formulation of the rule is expressed, minus footnotes, in Snell's Equity, 32nd ed (London, 2010) at 7-018 thus:

> The rule applies even where the fiduciary's personal interest "possibly may conflict" with his duty, but only if a reasonable person "looking at the relevant circumstances would think that there was a real sensible possibility of conflict." Thus, if there is no non-fiduciary duty in the circumstances, there can be no conflict between duty and interest.

5.2 The Trustee Handbook issued by the Pensions Board warns trustees to be aware of conflict of interest. The valuable advice provided at page 50, minus headings, includes the following:

> Trustees appointed directly by the employer may include members of the board of the company or senior executives. Such persons may experience a conflict of interest between their duties to the company and their duty as trustees towards the scheme members - current employees, early leavers and pensioners. This could arise, for example, in situations where the company is experiencing financial difficulties and where consideration is being given to a proposal of a loan to the company or the action to be taken in relation to contributions owed to the scheme by the company.
>
> Conflict of interest may also arise in the case of trade union officials acting as trustees, where they could believe they are appointed to represent a particular faction or group. Professional pension consultants acting as trustees may experience a conflict of interest if remunerated by the employer.
>
> Trustees may also include members of the scheme. Such persons may experience conflict of interest in relation to the payment of benefits where the trustees have discretion in these matters under the trust deed and rules of the scheme.
>
> Conflict of interest should not necessarily prevent trustees acting in good faith in situations where trustees are conscious of a possible conflict of interest it may be necessary, before a decision is taken, to obtain legal, actuarial or other professional advice, as appropriate.

5.3 It is argued on behalf of the defendant trustees that the rule against conflict of interest may be overcome in three ways. Firstly, by informed consent; secondly, by the conflict of interest not arising from the action of the trustees but through the natural operation of the scheme upon which the trust was founded; and thirdly, through express provision in the trust deed.

5.4 As to informed consent, it is clear that a trustee may proceed to act in a situation where duties potentially conflict, or duty and interest conflicts, provided there is a fully informed consent from the principles. This does not require the disclosure of all information which is material to the transaction and the conflict, provided that the consenting party is aware of all material facts and is enabled to make a decision to retain the trustees notwithstanding; *Snell's Equity*, 7-038. In the course of argument, and in the course of the evidence of Vernon Holgate expert witness on behalf of the plaintiff beneficiaries, it arose as to how an issue of conflict would have been dealt with under the statutory regime in England and Wales. It is of little assistance to analyse that situation. The law there has been refined. It was clear, however, that with the rule as strict as that of conflict in a trustee, that some amelioration must be possible. In *re Drexel Burnham Lambert UK Pension Plan* [1995] 1 WLR 32, that issue came up at the end of the judgment of Lindsay J at page 43 where he said:

> I have heard no argument and I do not attempt to rule on the subject, identified by Vinelott J as difficult, of whether the general rule can be overcome by express provision in the trust deed, although I do note in *Bray v Ford* [1896] AC 44, 51, Lord Herschel, in a closely related point, included the words "unless otherwise expressly provided." But, even if the difficulties can be so overcome, there will be trust deeds which do not have such a provision and there will also be trust deeds which cannot be amended to include it. The position of conflict in the trustee beneficiaries of pension schemes is hardly conveniently left if it is only after going to court in each separate case that matters can safely proceed. Many lay men would see the fact that a man is both trustee and, as an employee, a beneficiary is not only not a bar but as a downright advantage to the man or woman in undertaking his or her important duties. The Report of the Pension Law Revision Committee, Chairman: Professor Roy Goode, vol. 1… recommends… that most schemes should have scheme members on the board of trustees and, at p. 20, recommendation 49, suggests that employers should be under a duty to give active member-trustees adequate paid time off to attend meetings. The report, at p. 268, paragraph 4.5.54 says:
>
>> "In the modern world, conflicts of interest cannot be avoided. They can, however, be managed. As long as trustees are aware of the potential for conflict and know what is required of them as trustees, they will be able to carry out their trustee duties to the best of their abilities."
>
> If the "managing" of conflicts is frequently to involve, as it has done here, argument before and a decision of the court, time and money will be spent on legal processes which many would, with some justice, think unnecessary and undesirable. When the legislature considers how far and on what terms to embody the report of Professor Goode and his colleagues into law or otherwise to reform the law in this area, I commend to it consideration of the creation of a clear exception to the so-called "general rule of equity" so that in appropriate cases the administration of pension trusts by trustee-beneficiaries might safely proceed without the expense and delay of proceedings.

5.5 Here in this trust deed, clause 9 is designed to overcome the strictures of conflict of interest. It is argued by the plaintiff beneficiaries that it does not apply; that it is designed for minor conflicts of interest and not for the major ones that arise on the facts of this case; that it is not designed for conflicts of duty; and that, purposively construed, no exemption can arise.

5.6 One matter is clear. On setting up a trust, the funder and the beneficiaries have an expectation that can never be departed from in law: that the trustees will pursue the aims of the trust honestly and in good faith. Clarity of conscience and ability to think both clearly and objectively is thus required on any decision that impacts on the management of the trust for the benefit of those for whom it was set up. No matter what is said in a trust deed, this fundamental obligation can never be departed from. If there exists probable evidence that a decision was taken out of, or influenced by, an improper motive, that is a breach of trust. An obvious example would be a deliberate scheme by trustees to bypass a proper investment in favour of a decision which assists their own financial or professional interests. While dishonesty is almost always required for such a result, it may be that it might stand alone; as where trustees conceal their own wrong rather than make an honest account of the trust business to the beneficiaries. What is inherent in the duty of trustees, no matter what exemption be provided in a trust deed, is that the trust should function. In the context of conflict of interest, an exemption may be provided under a trust deed, but the purpose of entering into the office of trustee is to fulfil the objects of the trust; and this cannot happen if a conflict of interest or duty is such as to paralyse or even influence any trustee so that he or she cannot rationally and objectivly approach and decide on a problem. Unlike the straightforward application, sometimes unfair because of its strictures, of the rule that a trustee must not in any sense be conflicted, to allege that a trustee was, notwithstanding exemption from the rule, unable to or did not function objectively and for the benefit of the trust is to take on the burden of proving that as a fact.

5.7 As to the argument that clause 9 is solely designed to exempt trustees from the strictures of being in a conflict of interest situation, this is contradicted by the manner in which conflicts of duty and of interest are generally treated as being on the same footing in the leading texts. The principle guarding against conflicts between interest and interest applies equally to clashes between duty and duty. The principle must be the same; otherwise the law would be illogical. *Snell*, minus footnotes, puts the matter thus at 7-036:

> A fiduciary who acts for two principal to whom he owes conflicting duties, without the informed consent of both, acts in breach of fiduciary duty.
>
> In many of the earlier cases regarding conflicts between inconsistent duties the fiduciary was a party to the impugned transaction, although in a representative capacity, so that the general principle prohibiting conflicts between duty and interest could be applied. The courts recognised that the concern about temptation where a fiduciary has a personal interest in a transaction also applies, in a moderated form, where a fiduciary is involved in the transaction on behalf of another party:
>
>> "if the principle be, that the Solicitor cannot buy for his own benefit, I agree, where he buys for another, the temptation to act wrong is less: yet, if you could not use the information he has for his own benefit, it is too delicate to hold, that the temptation to misuse that information for another person is so much weaker, that he should be at liberty to bid for another… That distinction is too thin to form a safe rule of justice."
>
> Over time, this concern led the courts to develop a separate principle, prohibiting a fiduciary from acting where there was a conflict between duties owed to multiple principles at once, even where the fiduciary was not a party to the transaction. Thus, modern fiduciary doctrine requires a fiduciary to avoid acting, but only where there is a conflict between duty and interest, but also where there is a conflict between duties owed to multiple principles.

5.8 Further, almost any conflict of interest can be analysed so as to turn out as a conflict of duty: the trustee owes a duty of care and fidelity to the trust but is a director of the company which funds the trust to which a similar duty is owed; the trustee must make a decision about benefits for the trust but the trustee is a delayed beneficiary on retirement and here she or he has a duty to provide for family members; the trustee sees an investment as objectively valuable but holds a directorship in the company that may receive the investment or is a shareholder whose shares may increase in value. In the latter example there is a conflict of interest if the trustee is a shareholder and a conflict of duty if the trustee is a director; in the second example, the trustee would owe a duty of protection and proper provision as a parent in a family; in the first example it might be part of the structure of a trust that the funder would have an interest in the proper financing of both the company and the trust. Conflicts of duty are to be equated to conflicts of interest as the duty does not arise without the interest and the genesis of the rule in the frailty of human nature requires that both are equally to be treated.

5.9 The defendant trustees also argue that the law excuses conflicts that arise from the inherent nature of the trust situation. This situation commonly arises in pension trusts. Employee or pensioner nominees, who will benefit ultimately in their pension from proper investment of the trust fund and employers representatives, who may in the context of their responsibility be tasked with saving expense to the company, can both be required to make decisions that simply cannot be avoided. There the rule cannot apply. Nor could it be said that every trust is required to respond to every situation of conflict by engaging in the expense of hiring professional trustees. While it may be said that the strict application of the rule against conflicted trustees making decisions can have unpalatable consequences, any exemption arising from the situation of trustees not being of their making must be sensibly applied. It is only if the conflict directly arises from the situation of the trust that any such exception can arise. Any conflict that comes from a trustee voluntarily assuming responsibilities outside those in the necessary contemplation of the terms of the trust deed and which conflict with the trustee's duty cannot give rise to exoneration. This exception, however, is well founded in law. In *Sargeant and Another v National Westminster Bank Plc and Another* (1991) 61 P & CR 518 a man owned three farms which he let to his children who farmed in partnership. On his death, he appointed his wife and children trustees and also left the residue of his estate to them for sale while at the same time providing that the trustees could buy any portion of his estate. On one of the children, Charles, dying intestate the other children exercised an option under the partnership deed to acquire his interest in the partnership. The executors of the estate of Charles claimed an entitlement to a one-third share of the vacant possession and claimed that the other children as trustees could not put themselves in a position where their interests and duties conflicted. While accepting that a conflict of interest arose, the Court of Appeal excused it, Nourse LJ stating at page 5 of the judgment:

> It cannot be doubted that the trustees have ever since been in a position where their interests as tenants *may* conflict with their duties as trustees in the estate of Charles. But the conclusive objection to the application of the absolute rule on which Mr Romer relies is that it is not they who have put themselves in that position. They have been put there mainly by the testator's grant of the tenancies and by the provision of his will and partly by contractual arrangements to which Charles himself is a party and of which his representatives cannot complain. The administrators cannot therefore complain of the trustees' continued assertion of the rights as tenants.

5.10 In *re Drexel Burnham Pension Lambert UK Pension Plan* [1995] 1 WLR 32 at 42 is sound authority towards the same common sense proposition. Snell puts the matter of fiduciary conflict as having few exceptions; at 7-019. One of these is fully informed consent; and this can be obtained at the outset from the creator of the fiduciary relationship, from the principal of the fiduciary and, on a special application, from the court. Where company directors are conflicted, their duty to the company may be exempted by other directors. Fundamentally, however, the obligation on trustees is to desist from acting while conflicted; though they are generally not obliged to make full disclosure and seek consent. Footnotes excluded, *Snell* continues:

> A fiduciary is not liable for breach of the fiduciary conflict rule where he exercises a contractual right which he held prior to entering into the fiduciary relationship. Similarly, a fiduciary is not liable for breach of fiduciary duty if the conflict was not of his making. These are best understood as situations where the person creating the fiduciary position implicitly consented to and authorised the existence of that conflict. If the settlor of the trust was unaware of the potentially conflicting interest, the trustee is banned by the fiduciary conflicts rule, as consent cannot be inferred in such a situation.

5.11 On the authorities, an exception to the rule against trustees acting in a situation of conflict arises where it is implicit in the nature of the trust that particular decisions in pursuit of the trust's business will also affect the trustees. For the exception to apply, however, the necessary exercise of the decision-making power of trustees notwithstanding conflict must be inevitable; the exception cannot apply if the trustees take on additional responsibilities outside those contemplated by the trust deed and it cannot apply if the trustee acts as a volunteer in providing paid services or in attempting to buy, or otherwise deal with, the trust fund property in any way that would not be expressly or by necessary implication envisaged on a proper interpretation of the deed.

5.12 *Snell* must surely also be correct in establishing this exception to fiduciary conflicts on the basis of consent. Such consent is clearly present where the trust deed sets up an exclusion from the fiduciary conflict rule in express terms. This can be understood as implicit consent and authorisation in advance that such conflicts as may arise are exempted by the trust deed. It is then a question of interpretation as to whether the scope of the clause covers the exemption in question. In which case, a trust deed must be interpreted in accordance with the recognised canons.

Interpretation
5.0 A most helpful case on the interpretation of pensions trusts is *Irish Pensions Trust Limited v Central Remedial Clinic* [2005] IEHC 87, [2006] 2 IR 126. There, Kelly J endorsed the general approach to the construction of pension schemes as set down by Millett J in *Re Courage Groups Pension Schemes* [1987] 1 WLR 495 at 505:

Before I consider this question, I should make some general observations on the approach which I conceive ought to be adopted by the court to the construction of the trust deed and rules of a pension scheme. First, there are no special rules of construction applicable to a pension scheme; nevertheless, its provisions should wherever possible be construed to give reasonable and practical effect to the scheme, bearing in mind that it has to be operated against a constantly-changing commercial background. It is important to avoid unduly fettering the power to amend the provisions of the scheme, thereby preventing the parties from making those changes which may be required by the exigencies of commercial life.

6.1 Kelly J also considered the judgment of Warner J in *Mettoy Pension Trustees Limited v Evans* [1990] 1 WLR 1587 at 1611:

> It would be inappropriate and indeed perverse to construe such documents so strictly as to undermine their effectiveness or their effectiveness for their purpose. I do not think that, in saying that, I am saying anything different from what was said by Lord Upjohn when in *Re Gulbenkian's Settlements* [1970] AC 508 at 552, he referred in the context of a private settlement to:
>
> 'The duty of the court by the exercise of its judicial knowledge and experience in the relevant matter, innate common sense and desire to make sense of the settlors' or parties' expressed intentions, however obscure and ambiguous the language that may have been used, to give a reasonable meaning to that language if it can do so without doing complete violence to it.'
>
> What the court has to do here is to perform that duty in the comparatively novel and different context of pension scheme trusts.

6.2 These key principles were endorsed by the Supreme Court in *Boliden Tara Mines Limited v Cosgrove and Others* [2010] IESC 62, (Unreported, Supreme Court, Hardiman J. *nem. diss*., 21st December, 2010). In *Armitage v Staveley Industries Plc*, [2005] EWCA Civ 792, the Vice-Chancellor on an analysis of the case law helpfully restated the principles to be used in the construction of pension scheme documentation thus at para. 29:

> (1) The words of the [documents] must be interpreted in light of the background;
>
> (2) The background includes the rules of [the pension scheme] and the fiscal limitations on pensions that can be paid without jeopardising the status of [the pension scheme] as an exempt approved scheme;
>
> (3) The interpretation must be one that is practical and purposive, rather than detached and literal;
>
> (4) If more than one interpretation is possible, the correct choice may depend on the practical consequences of choosing one interpretation rather than another;
>
> (5) If one would conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention that they plainly could not have had;
>
> (6) If detailed semantic and syntactical analysis of words in a contract leads to a conclusion that flouts business common sense, it must be made to yield to business common sense;
>
> (7) The ultimate question is what meaning would be conveyed to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the date of the contract.
>
> (8) The court must not construct from the background alone a contract that the parties did not make.
>
> (9) There are strict fetters on the ability of the court to imply further terms.
>
> (10) Whether a term is to be implied is to be determined as at the date of the contract.

6.3 The approach of this Court is guided accordingly.

Jurisdiction to rule on trustee decision
7.0 There is no doubt that the High Court has an inherent jurisdiction to aid trustees in situations of conflict which are not otherwise exempted, where the nature of the difficulty faced by the trustees is such as to impair their ability to function properly. This jurisdiction is mentioned in many cases; *Mettoy Pension Trustees Ltd v Evans* [1991] 2 All ER 513 at 548 sets many of these out. The jurisdiction existed in English law prior to Irish independence. Halsbury's Laws of England in the 1914 edition sets out at paragraph 364 of volume XXVIII that a court of equity may interfere in the management and administration of a trust:

> …where there is no trustee to carry it on (k), or where the trustee wrongfully declines to act (l), or is acting improperly (m), or where difficulties have arisen which cannot be removed without its assistance (n), or where the decision of the court on a doubtful question connected with the trust or on the proper administration thereof is sought by the trustee (o) or by the *cestui que trust* (p).

7.1 The jurisdiction is provided for in the Rules of the Superior Courts at Order 54, rule 1. This provides that trustees may apply on a special summons for relief under Order 3. In turn this provides for wide relief that includes: under rule 4 a "direction to… trustees to do or abstain from doing any particular act…"; under rule 2 the "determination of any question affecting the rights or interests of any person claiming to be… *cestui que trust* of any deed or instrument..."; and under rule 1 the "…administration of the trust of any deed or instrument save where there is a charge of wilful default or breach of trust." Any such application may be expensive and may thus be a waste of the money entrusted to the trustees. In the view of this Court such an application can properly be made where there appears to be no possible answer to an issue; where the trustees are hopelessly deadlocked with no provision for majority or otherwise; where the meaning of a trust deed cannot be reasonably ascertained by professional advice; where the trustees are conflicted with no exemption under the trust deed and there is no other means to act; or where the trustees are exempted under the trust deed from conflict but the nature of the conflict faced by them is such as that as a matter of fact it has undermined or impaired their ability to act. This is no more than a suggested list that is set out in the context of it being the duty of trustees to safeguard the trust property and not to heedlessly expend it on court applications.

7.2 There was some possibility in this case of the defendant trustees applying to the High Court to exercise its jurisdiction to guide their decision. The trustees did not consider applying until after their decision to accept the company's offer. Thereafter the issue mainly contemplated would have been whether their decision was possible under clause 9 of the trust deed. Here the argument is that the trustees ought to have applied because their conflicts of interest, their deadlocked state with three in favour of accepting the company's offer and three against, required an independent resolution. The trustees, then differently constituted, would have been aware of the possibility of a High Court application from issues that arose in 2008 and a brief mention of this jurisdiction in a legal opinion of the 8th May of that year. At the trustee meeting of 18th of November 2011, the representative of their legal advisor, Holmes O'Malley Sexton, according to the official minutes, noted that the trustees could seek directions from the High Court in relation to what actions they should take, e.g. does the employer have a liability to pay the deficit and do the trustees have a liability to seek payment of the deficit. This echoes an opinion of counsel dated 8th of November 2011 which discussed many questions, including the issue of conflict of interest, and then expressed this view:

> From our review of the authorities, there does not appear to be any reported Irish case in which it has been necessary for the court to decide whether trustees may rely on a provision in trust documentation that they may act, notwithstanding a conflict of interest. While it is likely that an Irish court would enforce a provision authorising the trustees to act notwithstanding a conflict of interest, it is open to the trustees to apply to the court for directions as to how a discretion should be exercised.

7.3 While this option was open to the trustees, to prove that a body of trustees was wrong not to exercise it must involve proof that a situation had arisen where they were required in discharge of their duty as trustees to apply to the High Court for directions. It cannot suffice merely that the jurisdiction was open to them. For liability to arise, the situation must be such that the trustees were unable properly to make the decision and therefore had, as a reasonable body of trustees, to have their responsibility exercised by a judge. Such a situation might arise where a conflict of interest though exonerated under the terms of a trust deed was such as, on a matter of fact and not of mere theory, to cripple or undermine the independent judgment of the trustees. Then, the trustees would be unable to fulfil their basic duty of care and fidelity to the trust because as a matter of honesty and good faith, they would be unable to lay aside their conflict of interest and exercise an independent judgment on the issue in question. In such circumstances a trustee decision might be set aside and the trustees should apply to the High Court.

7.4 This issue is therefore to be resolved on the question of whether the trustees were overwhelmed or influenced in the discharge of their duties and therefore had an obligation to make the decision in question through the jurisdiction of the High Court. In so far as any issue was merely very difficult to decide and where the trustees retained the ability to act in good faith and honestly, a failure to apply to the High Court cannot undermine the decision of trustees unless that failure was a decision which no reasonable body of trustees could have made. Certainly, in this case there is nothing to suggest that the legal advisors warned that such an application should have been made. Even still, trustees cannot hide behind legal or other advice because it is up to them to make decisions. Nothing in the papers or on the evidence, however, suggests that the option of applying to the High Court for directions as to how to deal with the company's offer was so clearly the right thing to do that to fail to take that course was a decision that no reasonable body of trustees would have made. Furthermore, it is arguable that in such a case it must be shown that the High Court would have decided the matter differently to the trustees.

Wilful default

8.0 Where an expression used in a document regulating trusts has an express meaning in the law of trusts, the use of that expression, the defendant trustees argue, implies that the settlor of the trust intended that meaning. Here the argument is over the meaning of what is 'wilful default' in clause 24 of the trust deed. Default by trustees can arise in many instances. The trustees may be slothful and thus fail to remove money from a failing investment; or may be neglectful of alternative and solid means of earning income for a trust; or may fail to engage in periodic analysis of the performance of funds; or may fail to report to the beneficiaries thus keeping them in ignorance of poor performance about which they might protest; or may fail to serve a contribution demand that would rightfully arise against the funder under the deed. The plaintiff beneficiaries, on the other hand, argue that any decision not to serve a contribution demand is a default and that since such a decision was exercised through the rational decision of the split vote weighted with the chairman in favour, a wilful default consequently arises. This is how their argument is put in written form:

> In all cases, the extent of the protection conferred on a trustee will depend on the precise terms of the relevant exemption clause. Thus, a clause - such as clause 24(c) of the Trust Deed - which excludes a breach of trust caused by 'wilful default' will deny protection to a trustee who deliberately commits a breach, even if he honestly believes that he is acting in the best interests of the beneficiaries. The recent… Supreme Court decision in *ICDL v European Computer Driving Licence Foundation Limited* [2012] IESC 55 confirms that it suffices for an act to be wilful that it is done deliberately. It is not necessary that it be committed with the intention to injure or that the person committing it knows that it is unlawful; see judgment of Fennelly J, paragraphs 124-129.
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> Each of the acts and omissions of the trustees at issue in these proceedings was undertaken deliberately and constitutes wilful default that is not exempted from liability under clause 24(a) of the Trust Deed.

8.1 This argument cannot be right. It is a no fault argument that cannot sit with a proper interpretation of the trust deed. For trustees to fail to invest funds on behalf of beneficiaries in an attractive and solid enterprise which will ensure a better return, or to fail to pull funds out of an enterprise which is declining, is on the ordinary meaning of the concept a default by trustees. Where it is proven that the trustees applied their minds to the issue and made a decision one way or the other then their action is undoubtedly wilful. But to join two words together and to argue that because the trustees have thought about an issue, have decided on a course of action that fails to do what the majority beneficiaries want amounts to wilful default of the obligations of the trustees cannot be right. That much is clear from the context of the trust deed in question and the express wording of clause 24 of the deed. As it says, a trustee "who is engaged in the business of providing a trusteeship service for payment shall be liable for negligence." This means failing to exercise the normal skill and care expected of a specialist professional trustee. Liability arises in that way for that person, but if the submission of the plaintiff beneficiaries is correct, merely failing to make a decision renders the trustees liable. What is missing from that submission is that it is clear that a lesser standard of conduct by non-professional trustees is to be tolerated; and all the trustees here are members of management or are workers for the company. Further, negligence is expressly excluded as against the trustees for "default upon any of the investments" or "any delay… in… investment" or "the exercise of any discretionary power" except that they "shall be liable for wilful default".

8.2 Even if the argument of the plaintiff beneficiaries was correct that wilful default simply means failing to do something, in this instance failing to serve a contribution demand, then any court must be driven back to the touchstone of trustee liability: is this wilful default one which no reasonable body of trustees would commit? It cannot be otherwise: a court is not entitled to review a trustee decision by substitution of that decision with its own view.

8.3 There is greater sense in analysing the phrase 'wilful default' in the context of the exclusion of negligence as a ground of liability for ordinary trustees, the inclusion of negligence for professional trustees and the use of a phrase common to trust deeds. In this regard, the decision of the Supreme Court in *ICDL v European Computer Driving Licence Foundation Limited* [2012] IESC 55, (Unreported, Supreme Court, November 14th, 2012) concerned that express phrase, but in the context of a contract where the phrase used was "wilful act" and liability was for such or for "gross negligence". The authorities cited in the majority judgment were from vendor and purchaser and workmen's compensation law at paragraphs 123-129. The Supreme Court was not defining this phrase as one of universal application, much less for trustees, and was analysing it within a particular context; which is not this context. The dissent of O'Donnell J is to be noted as the majority removing from the limitation clause what the parties intended. No comment on this is made.

8.4 The phrase 'wilful default' has a particular resonance in trustee law. The most recent cited case is *Spread Trustee Company Limited v Hutcheson and Others* [2011] UKPC 13, [2012] 1 All ER 251. This concerned a Guernsey statute that limited the degree to which exclusion clauses in trust deeds could limit the liability of trustees and that included in that case limitations on the liability of professional trustees. The Trusts (Guernsey) Law 1989 for the first time made statutory provision for Guernsey trusts. It provided by section 34(7): "Nothing in the terms of a trust shall relieve a trustee of liability for a breach of trust arising from his own fraud or wilful misconduct." Subsection (7) was amended by section 1(f) of the Trusts (Amendment) (Guernsey) Law 1990 by the addition of the words "or gross negligence" at the end. So no liability could be excluded under Guernsey law for the trustees acting fraudulently, through wilful misconduct or grossly negligently. Since that case centred on time scales, when the various provisions were passed into law was important, and on the question of gross negligence, it deals with other issues. The Privy Council, however, approved the earlier decision of the Court of Appeal in *Armitage v Nurse and Others* [1998] Ch 241. There, the trust deed excluded liability for any loss caused to the trust fund by the trustees, save loss occasioned through actual fraud. It was held that since contracting parties could exclude liability for gross negligence, such a wide exoneration of future conduct was also open to parties to a settlement. Millet LJ was of the view that perhaps trust deed exclusion clauses were too extensive and that where trustees were professional, a wide exclusion of liability was inconsistent with the ordinary test of negligence to which professional people were otherwise liable. In this trust deed, the exclusions operating on the trustees under clause 24 would not have applied had they been professionally engaged in that capacity. Quoting from a Law Commission paper on fiduciary duties to the effect that trustees cannot exclude themselves from liability for fraud, bad faith and wilful default, Millet LJ set this out as follows:

> In its consultation paper Fiduciary Duties and Regulatory Rules, A Summary (1992) (Law Com. No. 124), para. 3.3.41 the Law Commission states:
>
> "Beyond this, trustees and fiduciaries cannot exempt themselves from liability for fraud, bad faith and wilful default. It is not, however, clear whether the prohibition on exclusion of liability for 'fraud' in this context only prohibits the exclusion of common law fraud or extends to the much broader doctrine of equitable fraud. It is also not altogether clear whether the prohibition on the exclusion of liability for 'wilful default' also prohibits exclusion of liability for gross negligence although we incline to the view that it does."

8.5 Millet LJ made two comments on this passage, the first of which is germane to the meaning of liability for wilful default of trustees' responsibility:

> First, the expression "wilful default" is used in the cases in two senses. A trustee is said to be accountable on the footing of wilful default when he is accountable not only for money which he has in fact received but also for money which he could with reasonable diligence have received. It is sufficient that the trustee has been guilty of a want of ordinary prudence: see e.g. In *re Chapman*; *Cocks v. Chapman* [1896] 2 Ch. 763. In the context of a trustee exclusion clause, however, such as section 30 of the Trustee Act 1925, it means a deliberate breach of trust: In *re Vickery*; *Vickery v. Stephens* [1931] 1 Ch. 572. The decision has been criticised, but it is in line with earlier authority: see *Lewis v. Great Western Railway Co.* (1877) 3 Q.B.D. 195 ; In *re Trusts of Leeds City Brewery Ltd.'s Debenture Stock Trust Deed*; *Leeds City Brewery Ltd. v. Platts (Note)* [1925] Ch. 532 and In *re City Equitable Fire Insurance Co. Ltd.* [1925] Ch. 407. Nothing less than conscious and wilful misconduct is sufficient. The trustee must be "conscious that, in doing the act which is complained of or in omitting to do the act which it said he ought to have done, he is committing a breach of his duty, or is recklessly careless whether it is a breach of his duty or not:" see In *re Vickery* [1931] 1 Ch. 572, 583, per Maugham J.
>
> A trustee who is guilty of such conduct either consciously takes a risk that loss will result, or is recklessly indifferent whether it will or not. If the risk eventuates he is personally liable. But if he consciously takes the risk in good faith and with the best intentions, honestly believing that the risk is one which ought to be taken in the interests of the beneficiaries, there is no reason why he should not be protected by an exemption clause which excludes liability for wilful default.

8.6 For completion, it is also worth noting that fraud has a wider meaning in a trust deed than the definition of the tort of deceit or the general sense of the concept as deliberate dishonesty as used in criminal law. This makes up the second comment of Millet LJ:

> Secondly, the Law Commission was considering the position of fiduciaries as well as trustees, and in such a context it is sensible to consider the exclusion of liability for so-called equitable fraud. But it makes no sense in the present context. The nature of equitable fraud may be collected from the speech of Viscount Haldane L.C. in *Nocton v. Lord Ashburton* [1914] A.C. 932, 953 and *Snell's Equity*, 29th ed. (1990), pp. 550-551. It covers breach of fiduciary duty, undue influence, abuse of confidence, unconscionable bargains and frauds on powers. With the sole exception of the last, which is a technical doctrine in which the word "fraud" merely connotes excess of vires, it involves some dealing by the fiduciary with his principal and the risk that the fiduciary may have exploited his position to his own advantage. In *Earl of Aylesford*

v. Morris (1873) L.R. 8 Ch. App. 484, 490-491 Lord Selborne L.C. said: "Fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions;…."

8.7 Commenting on the facts in issue, the application of the principles enunciated is clarified by Millet LJ:

> A trustee exemption clause such as clause 15 of the settlement does not purport to exclude the liability of the fiduciary in such cases. Suppose, for example, that one of the respondents had purchased Paula's land at a proper price from his fellow trustees. The sale would be liable to be set aside. Clause 15 would not prevent this. This is not because the purchasing trustee would have been guilty of equitable fraud, but because by claiming to recover the trust property (or even equitable compensation) Paula would not be suing in respect of any "loss or damage" to the trust. Her right to recover the land would not depend on proof of loss or damage. Her claim would succeed even if the sale was at an overvalue; the purchasing trustee could never obtain more than a defeasible title from such a transaction. But clause 15 would be effective to exempt his fellow trustees from liability for making good any loss which the sale had occasioned to the trust estate so long as they had acted in good faith and in what they honestly believed was Paula's interests.
>
> Accordingly, much of the argument before us which disputes the ability of a trustee exemption clause to exclude liability for equitable fraud or unconscionable behaviour is misplaced. But it is unnecessary to explore this further, for no such conduct is pleaded. What is pleaded is, at the very lowest, culpable and probably gross negligence. So the question reduces itself to this: can a trustee exemption clause validly exclude liability for gross negligence?
>
> It is a bold submission that a clause taken from one standard precedent book and to the same effect as a clause found in another, included in a settlement drawn by Chancery counsel and approved by counsel acting for an infant settlor and by the court on her behalf, should be so repugnant to the trusts or contrary to public policy that it is liable to be set aside at her suit. But the submission has been made and we must consider it. In my judgment it is without foundation.
>
> There can be no question of the clause being repugnant to the trust. In *Wilkins v. Hogg* (1861) 31 L.J.Ch. 41, 42 Lord Westbury L.C. challenged counsel to cite a case where an indemnity clause protecting the trustee from his ordinary duty had been held so repugnant as to be rejected. Counsel was unable to do so. No such case has occurred in England or Scotland since.
>
> I accept the submission made on behalf of Paula that there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts. But I do not accept the further submission that these core obligations include the duties of skill and care, prudence and diligence. The duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts, but in my opinion it is sufficient.

8.8 This judgment was made following an analysis of the applicable authorities. For the trustees to be liable for wilful default, the plaintiff beneficiaries must show more than that a decision not to make a contribution demand was made wilfully, that is consciously, and that this was a default, which all decisions not to do something are: rather, liability arises only where that default can be truly characterised as a conscious breach of duty or a reckless breach of duty, in the sense of conscious awareness that is dismissed. If that is wrong and wilful default simply means a failure that is voluntary, then the judgment of Millet LJ confirms that for liability to be established that default must infringe the core duty of trustees to manage the trust honesty and in good faith for the benefit of the trustees. In which case, a court is thrown back on the question of whether any lack of good faith or dishonesty is proven; and, if it is not, then whether the default complained of was one which no body of trustees, armed with the knowledge of the trustees in issue at the time of the decision, could have made.

Honesty and good faith

9.0 No allegation has been made by the plaintiff beneficiaries that any of the defendant trustees acted dishonestly or did not proceed to discharge their duties in good faith. It is worth recording that, in four weeks of evidence, not the slightest evidence to support such a supposition arose. Hearing all of the evidence over four weeks and considering thousands of documents leads the Court to conclude that these trustees were conscious of their duties to the beneficiaries and did their very best to exercise those duties honestly and in good faith.

The Robins case

10.0 This may be considered briefly. All of the experts for the plaintiff beneficiaries and the defendant trustees were of the view that any issue affecting possible State liability to reimburse an insolvent fund on the insolvent liquidation of Element Six Limited was so remote as to not be required to be of serious influence to the trustees' decision. In *Robins and Others v Secretary of State for Work and Pensions* (Case C-270/05) [2007] ECR I-1053 the Court of Justice of the European Communities held that article 8 of Council Directive EEC/987/1980 of 20 October 1980 on the approximation of the laws of the member states relating to the protection of employees in the event of the insolvency of their employer, OJ L 283/23 28.10.1980 required certain protections that had not been transposed into English law. In this litigation it was argued that a 49% protection of the pension benefit was required by Irish law, as a minimum, and that the trustees should have considered making a demand that would have resulted in such a double insolvency secure in the knowledge that at least that minimum protection would have been set as a floor of rights under Irish legislation. The argument was enforced by the decision of the Court of Justice of the European Union in *Hogan and Others v Minister for Social and Family Affairs, Ireland and the Attorney General* (Case C-398/11) [2013] OJ C 171/6 15.06.2013. There the interpretation of article 8 of Directive EEC/987/1980 was that it was a requirement that an employee be entitled to receive on the insolvency of his or her employer at least half of the old-age benefits arising out of the accrued pension rights for which contributions have been paid under a supplementary occupational pension scheme and that Ireland had not correctly fulfilled that obligation. When these defendant trustees were making the decision in question, the *Hogan* case had yet to be decided. Perhaps, on its own, the *Robins* case might be considered by a professional lawyer to be sufficiently clear. But, in reality, the State was arguing yet another case to differentiate Ireland's position. Further, there are no figures indicating that the 50% threshold would have been breached in this case. Finally, the expert evidence cannot be disregarded. The result of this litigation has been the Social Welfare and Pensions (No 2) Bill which was published on 20th of November 2013. Under the terms of it, as Philip Shire, expert witness for the defendant trustees told the Court, no more money would have been available to the trustees on such a double insolvency. But, who knows? The issue is what the trustees ought to have considered and here the bulk of the evidence is one way against this issue being of any serious importance. It might also be commented here that no liability by other companies in the group to contribute to the pension has been shown to arise on insolvency.

A chronology

11.0 Thousands of pages of documents have been referred to the Court and there has been four weeks of a hearing; 14 very long days. In referring to what the Court considers the events necessary to an appropriate explanation of reasons, none of the material is being discounted or forgotten.

11.1 In 2008, it emerged that the defined benefit scheme had a funding deficit of approximately €100 million. By letter dated 10th of April 2008, the Pensions Board indicated that it was proposing to give a section 50 direction unless a funding proposal was received. On 23rd of October 2008, Willis, the actuaries on behalf of the scheme, certify that there was a deficit of €96.8 million. Negotiations were entered into with Element Six Limited. The contribution demand was made by the trustees of the company. The company denied that this power arose but made a funding proposal to last from 1st of April 2009 to 1st of July 2020 which was to pay the equivalent of €10.725 million per annum into the scheme. This was accepted by the trustees and approved by the Pensions Board in April 2009. Legal advice was taken in respect of the steps.

11.2 Within two years, however, the problem of the deficit returned. Among the ideas considered by the trustees were increasing the normal retirement age from 60 to 65; removing the fixed increase in payments to pensions which at that stage kicked in at 3% extra per annum every January; offering enhanced transfer values to members who elected to transfer their accrued assets to a defined contribution plan voluntarily; and offering enhanced employer contribution rates above 5% to those persons. At a meeting with the trustees on 23rd of June 2011, the company warned that it was "treading water as a whole and therefore Element Six did not see any merit in putting any more money into the defined benefit plan unless it proved to be sustainable in the long run were the underlying risks were reduced." Carmel Sexton had previously been a trustee but was chosen by the Shannon company to interact with the trustees. This has been much criticised. In evidence, however, there was no basis upon which her integrity could have been doubted. The choice by the company increased the suspicions of the plaintiff beneficiaries and no one is to blame for that but the company. She met with Danny Coady on 29th of June 2011 to discuss the way forward. These interactions continued with meetings in the preparation of presentations by a subgroup for the trustees. A preliminary draft of the Willis presentation was prepared by 21st of July 2011 and went through several iterations. In it Willis noted that the funding proposal was on track to satisfy the funding standard by 1st of July 2020. It soon became apparent, however, that the company was unwilling to continue contributing and fundamental strategy seems to have been "to de-risk the pension arrangement and to have more certainty." Danny Coady, as chairman of the trustees, began to seek legal advice from Holmes O'Malley Sexton. Counsel were later briefed and none of the advice given can be faulted. By August of that year it was clear that the funding proposal was off track. A letter of 25 August from Willis shows a clear projection of the issue. It became clear that the company would not pay the next tranche €10.725 million. On 6th of September 2011, the company wrote to the trustees summarising the current position and complaining about the change in legislation, about the pension levy and stating clearly that the current position was untenable:

> We also want to be very clear that unless we have an agreed route forward to address what we believe are fundamental issues for the scheme, the company is not prepared to contribute the next payment into the scheme of €10.7[25] million scheduled for January 2012.

11.3 Willis then made a further presentation on 7th of September 2011 as a follow-up to the presentation of 21st of July 2011. This was in the context of a meeting of the trustees with Willis and with the trustees' solicitors. The beneficiaries were informed of the issues by letter addressed to the members of 23rd of September 2011. On 6th of October 2011, Danny Coady, who has been criticised during the hearing for being "supine" wrote to the company requesting a meeting. This letter is not cast in milk and water language:

> The trustees are most concerned with the contents of these letters. We discussed the letters at the trustee meeting held on 7th September 2011. Given the import of the letters, we are of the view that they require further consideration and discussion by the trustees, however, as a preliminary point we would like to remind the company that it signed up to the funding proposal in February 2009 for the period from 1 April 2009 to 1 July 2020. The company's agreement to pay €10.725 million per year under the funding proposal was not contingent upon agreement with the trustees in relation to future matters pertaining to the scheme. The trustees are seeking confirmation from the company that its contribution of €10.725 million, required under the funding proposal for the year ended 31st December 2011, will be paid as required within 31 days of that date.

11.4 Unfortunately, and it seems without the authority of the ultimate board of directors of the group in Luxembourg, the Irish branch of the company began to stonewall in terms of ordinary interaction as a process of negotiation and instead adopted an attitude that was far from conducive to the solution of this problem. No regard was given to the commitment already made by the company. Everything was presented on the basis of take the offer that is there or you will lose your jobs and the company will be put into voluntary liquidation on an insolvent basis. On 7th of October 2011, the trustees had a meeting with the company. The proposal put to the trustees was that the company believed that "wind up was the only real option to resolve the pensions issue once and for all and gives the best flexibility to look after members in a fair and even handed way"; the company was prepared to make "a substantial contribution" of €35.4 million; that the operation and funding of the pension was "unsustainable and threatened the viability of the Shannon operation"; and that the site would be shut with a loss of 359 jobs. This would be, the company claimed, €13 million per annum in lost salaries and €12 million loss of annual purchases. It might be noted now that the company later increased its offer to €37.1 million and not through negotiation but by notice: given literally two hours before the crucial trustee meeting at which the ultimate decision was made. This was so despite the fact that the revision of the figures was apparently the result of a recalculation which uncovered some errors but which was discovered some two weeks before that meeting and was not notified to the trustees. Danny Coady wrote to the members of the scheme by letter dated 10th of October 2011 as to what the offer was: he said that Element Six "has indicated that action must be taken as the viability of the Shannon site is under threat and closure is a possibility." Holmes O'Malley Sexton advised that a time extension should be sought, as there was only a month to accept or reject the offer, and certification of the current deficit sought by the trustees from Willis. This was then estimated at €129.2 million. Naturally, the pensioners and those in the defined benefit scheme did not respond well. The anger of the members was clearly provoked by the approach of the company. It is difficult to see how this was anything other than predictable. The workers issued a media statement on 13th of October 2011. Willis made a further presentation to the trustees on 14th of October 2011. This included alternative proposals including a demand for the full minimum funding standard deficit.

11.5 The bind that the trustees were in can be discerned from the pros and cons of the proposal. In favour were the possibilities that: the trustees would be able to provide benefits as prescribed under the plan without reduction; the 3% annual pension increase would be covered; active and deferred members would get transfer values that would include allowances proposed retirement pension increases; it may enable the trustees to negotiate a larger lump sum contribution to the plan on winding it up; and the members may criticise the trustees if the demand was not invoiced. The downside of the demand was listed as: it might cause the company to become insolvent, resulting in the company being wound down; the Shannon plant might shut; the jobs of members would be lost; there would be a knock-on effect on the local economy; and that it was "not clear whether [the] demand will stick". By this stage the arbitrary deadline set by the company for acceptance by 24th of October was fast approaching. The threat to close was then explicitly made to the members of the scheme by the company by letter dated 17th of October 2011:

> In a worst case scenario, if the company were required to increase its contributions and/or pay the full deficit whether due to a change in legislation or otherwise, it would be forced to close the site leading to active members only receiving a proportion of their flat pension benefits and a loss of all jobs on the site.

11.6 By letter dated 17th of October 2011, Danny Coady sought information from the company. While some information was made available, absent from this process was any human interaction whereby, as Alan Broxson the pension expert on behalf of the defendant trustees properly indicated, both sides would sit down together with a view to sharing information and attempting to sort out the problem which they had in common. On 20th of October 2011, the ultimate board of directors of the corporate group was somehow inspired to write a letter threatening similar consequences to the Irish company. Curiously, this letter has been identified as having been signed by the two individuals who were behind the strategy as it was being played out in Shannon.

11.7 By undated letter, probably the 19th or 20th of October 2011, the company replied to the questions posed by Danny Coady on 17th of October. The company refused to transfer the entire amount of the offer into the defined benefit scheme, instead of splitting it between that scheme and the defined contribution scheme. The company further said that the "funding proposal is not and was never intended to be a contract – it is a statutorily required document that does not override the provisions of the trust deed and rules or impose contractually binding obligations." This is most unconvincing but this was designed so that the trustees would not see it that way. The threat to close the plant was reiterated, this time on the basis of an instruction from the ultimate board of directors of the group: "Without funding the company would be forced to look at a plan to close down the site with the loss of all jobs on the site. While this outcome would be dire, should the proposal succeed then we would be able to make this €35.4 million available to members to provide fair benefits and sustain the site into the future." Advice was then sought from counsel. This was to the effect that a contribution demand did not need to be made immediately but could be validly made within the four-week notice period under the trust deed. On 24th of October 2011, the company formally wrote to the trustees giving the relevant figures, again threatening to wind up the company and asking for "an indication within the next 18 days of the trustees' outline position on the proposal." On 24th of October 2011 formal notice was received from the Shannon company:

> In accordance with clause 15 of the definitive deed and rules dated 20 May 1994 (as amended) governing the plan, Element Six Limited hereby gives one month's notice to terminate its liability to contribute to the fund. The liability to contribute will therefore terminate on 24 November 2011.

11.8 On 27th of October 2011, three of the trustees met with counsel and solicitors and received detailed advice. This was to the effect that the trustees were legally entitled to make a demand for the entire deficit, something the company was denying even though the company knew that this was not true; that the trustees were obliged to pursue the recovery of the deficit, advice later nuanced; that there was no possibility of enforcing the debt on the parent company; and that further actuarial and insolvency advice should be sought. In all of this, it is actually very hard to see what the trustees were supposedly doing wrong.

11.9 The opinion of counsel was then received dated 8th of November 2011. This did not nor could it have provided definite answers and neither could it nor did it seek to tell the trustees what they ought to do in discharge of their responsibility. Counsel thought that there was "at least a stateable case that the trustees are entitled, and obliged, to demand the deficit as certified by the actuary" and that the funding proposal over the 11 years to 2020 was an "at least arguable" agreement to pay the deficit that was binding on the company. This was later said in the opinion to be "cogently arguable". Arising out of the relevant legal advice Danny Coady formed the view that there was a strong case to take the company to court either to meet the full deficit or alternatively to meet its commitments under the funding proposal. His email of 9th of November 2011 does not show any lack of gumption in communicating with his fellow trustees but it does show caution:

> However, from a commercial perspective, on the basis that the company have given notice that they will wind up the Shannon company if we pursue them for more than their offer, we should only take this course of action if having taken appropriate advice on the financial position of the Shannon company, we are sure that a liquidation of the company would yield more than the offer on the table. [Counsel has] also confirmed that it is only the Shannon company and that we can concern ourselves with – there is no recourse to the parent company. So the advice from Brian McEnery [of Howarth Bastow Charleton] is critical to how we proceed – in my view if in his opinion the company have significantly understated the value of the company in liquidation, then the first thing that we should do is ask the company to make up the shortfall between this value and their offer. If they refuse then we should proceed and force the liquidation, but if the financial opinion is that we are unlikely to get more from a liquidation than the company's offer, we should accept the offer.

11.10 From 15th of November 2011, advice started coming in from that source. Two days later the company was asked for an extension of time for response up to 9th of December 2011. On 18th of November, there was a further meeting of trustees which discussed the question of money being apparently siphoned out of the Irish company and into other companies in the group, a matter which was disputed by the Irish company. Assistance was given at the meeting from the trustees' solicitors, from Willis and from Howarth Bastow Charleton. It is clear from the evidence and from the documentation that the numbers in question were keenly considered. Approaches were made by the professional advisers to the company to seek an extension and to seek out whether there was any flexibility on the offer. Little hope was held out. To the credit of the Irish branch of the company, access was given to the liquidation specialists to the books of the company with a view to ascertaining values. That month, a summary of all the issues was prepared in concise and accurate form by Holmes O'Malley Sexton and this continued to be refined. By letter dated 21st of November 2011, the company queried whether Brian McEnery was exceeding his "mandate" in the analysis he was engaged in. By email dated 17th of November 2011, the company had already denied payments out of capital.

11.11 On 22nd of November 2011, another opinion was received from counsel regarding the issue of superannuation being ranked as a preferential debt on liquidation. Counsel were of the view that in the event that the trustees demanded the certified sum from the employer and this remained unpaid, then the sum demanded was a preferential debt. A qualifier was added which was that: "it should be noted that certainty would only be achieved if, and when, a liquidator brought directions application before the High Court…"

11.12 The trustees then met on 25th of November 2011 to make the decision as to whether to accept or to reject the company's offer. The trustees were given a full report from Howarth Bastow Charleton, part of which is quoted later, a presentation from Willis and a summary of the issues and opinions from Holmes O'Malley Sexton. It is impossible to fault any of the presentations that were made. All were considered, properly prepared and concisely laid out. These advisers left the meeting so that the trustees could make the decision in private. From the evidence, it is clear that there was a full review of the information in the relevant reports. This was indicated by debate, which in testimony was described as impassioned. The notes record:

> Having considered the company's proposal, the trustees voted to accept the company's proposal, subject to the legal framework being in a form agreeable to the trustees and their legal advisers, which framework would need to be received by the trustees by Monday 28th of November. The trustees agreed that they were unhappy with the treatment of the

> scheme by the company, with a threatening position adopted by the company and with the lack of opportunity given to the trustees to negotiate and engage in meaningful discussion.

11.13 The Court fully shares those concerns. The context requires amplification.

Pressure by the funding company

12.0 No opportunity was ever given to the trustees by Element Six Limited in Shannon to negotiate. The approach to this issue was never made to the trustees on the basis that there was a problem that needed to be solved and which might be furthered by discussion. The attitude of the Irish branch of the company was inappropriate and seems to have been entirely generated without the approval of the ultimate board of directors of Element Six SA in Luxembourg, the head company of the group. Someone within the executive in Shannon decided to adopt the position that under the trust deed a contribution demand could not be made. Yet documents indicate that the individuals in question knew that a contribution demand could be issued by the trustees but determined that this was going to be presented to the defendant trustees as legally untenable. This is how it was put: "The company would aggressively defend against any assertion that the trustees have a right to request a contribution demand". In evidence, this approach was described by Siobhán Duffy as shocking. No reasonable person could disagree. In addition, the full offer as authorised by the ultimate board of directors in Luxembourg was simply never on the table for negotiation. The Court was asked to accept in evidence that the €40 million sanction from that board was to include legal fees for the trustees and the company of €1.2 million each. That is improbable and is flatly contradicted by the relevant minutes. The Court was also asked to accept that fees of that magnitude were anticipated. There is no evidence that fees of this kind were to be anticipated. The Court was also asked to accept that there was no flexibility in even the sum set in the Luxembourg board minutes. That is improbable. There are two factors in addition. Firstly, the Court accepts the evidence of Carmel Sexton that in making up the offer, a later look at the figures indicated that an extra €1.7 million would be appropriate. Her evidence that this was discovered in mid-November is also accepted. The Court does not believe that it was her fault that this offer was not transmitted until a couple of hours before the trustee meeting on 25th of November 2011 and nor is it at all likely that the deliberate pressure exercised by the Irish company had its origin in, or was participated in by, her. Without her assent, the pressure was ratcheted up as the defendant trustees approached the crucial meeting for deciding on the offer. Two documents arrived shortly before that meeting. It is improbable that it was an accident that the offer incorporating the extra €1.7 million, and the Court wonders who in reality authorised this, was simply thought of and transmitted on the day of the meeting when it could have been sent up to two weeks earlier. If it had, there would have been time for the trustees to think: maybe there is the possibility of a better offer? At least, that kind of consideration may be reasonably inferred as what was probably behind this delay. That this was a slight of hand by someone in Shannon is partly a matter of logical inference but it also fits with the arrival of a second document. This came from a distinguished firm of solicitors who had not been briefed by the trustees. This firm purported to intermeddle in this delicate process by giving unsolicited advice to the trustees that the extra €14 million to the defined contribution scheme could be taken into account by the trustees of the defined benefit scheme. This was completely inappropriate behaviour. In the result, however, the evidence discloses that this did not influence the trustees one way or the other.

Later events

13.0 The Court is not persuaded by attempts in argument on behalf of the plaintiff beneficiaries to make later events evidence that some kind of clique had grown up among the trustees and that this was operative in terms of the decision. To reach any such decision is to ignore how decent people behave when under pressure and when isolated from consensus. It is natural for people in the aftermath of a traumatic decision, which this was, to communicate with those whom they believe are on their side. The whole process has wounded both plaintiffs and the trustees. People are having to wait for their pensions. People here are very hurt. They avoid each other even to the extent of shunning church services for dead colleagues and their families; which is a most unnatural situation in Ireland.

13.1 An application to the High Court was considered after the decision, and indeed partly drafted, and there has been much discussion as to that issue. This application certainly would have included a decision as to whether the exercise by the trustees of the discretion under clause 9 of the trust deed had been possible notwithstanding conflicts of interest and might have included other matters had court documents been eventually refined beyond what appears to have been basic instructions. An extension of time in that regard was granted by the company but was accompanied, and this is by now entirely predictable, by restrictions demanded by the company. On 1st of December 2011 the company wrote:

> The trustees have confirmed that they accepted the company's proposal. We would therefore like to make it very clear that in the event that the trustees now issue a contribution demand to the company, the company's proposal will immediately be withdrawn and will not be reinstated with the most likely outcome being the closure of the site. The company will also aggressively defend against any contribution demand. In these circumstances the trustees will then be in a position where the proposal they accepted as being in the best interests of their members will no longer be available.

13.2 In all of their actions the trustees acted reasonably. The idea of going to the High Court was eventually withdrawn and the trustees met on a number of occasions, including 9th of December 2011, to discuss what was going on. The matter was considered fully and entirely reasonably: any contrary allegation in the statement of claim in that regard is dismissed. One of the reasons for urgency was that, under the terms of the existing pension scheme, those who are already pensioners would receive a 3% increase come 1st of January 2012. This would decrease the amount of money available on the offer. On the issue of conflicts, it would not suit any one of the four trustees who were active members: but conflicts can be for and conflicts can be against. That is the way the decision was made.

The figures involved

14.0 Payments into the defined benefit plan to bring active members to the minimum funding standard were €9.2 million. Payments into the defined benefit plan to bring deferred members to minimum funding standard were €13.9 million. Total payments to the defined contribution scheme were therefore €23.1 million. Outside that scheme, there were payments into the defined contribution scheme, all of which would benefit those who were to receive benefits under the defined benefit scheme. These were: additional monies to provide enhanced benefits for actives to an amount of €8.1 million; additional monies to provide increases for low-paid pensioners in the sum of €2.5 million; a net present value of increased employer contributions to defined contributions scheme of 2.5% additionally on the 5% employer contribution capitalised at €2.5 million; additional payment to provide benefits for actives over 55 years to a value of €0.5 million; and additional monies to fund disability between 60-65 years in the sum of €0.4 million. These additional sums going to members of the defined benefit scheme through the defined contribution scheme amounted to a total of €14 million. The total offer was therefore €37.1 million of which only €23.1 million was within the defined benefit scheme but all of which would benefit the members of that scheme financially.

14.1 As has been seen, in 2009, the company made a funding proposal that an extra €10.725 million would be paid into the defined benefit scheme annually until 2020. These payments were made in January in respect of the previous year. 10 payments were left as of 25th of November 2011. That amounts to €107.25 million. The capitalised value of receiving money early is of course less than the full amount. Getting money years before it is due means that the money can be used. On the Willis calculations, depending on the discount factor, a matter of debate, the remaining sum was capitalised at between €65.9 million and €79 million. Willis certified that the minimum funding basis was €137.1 million. The deficit on a full buyout basis exceeded that figure; in fact the evidence was that it was over €200 million. For the entire group of companies, the profit levels over the three prior years had not much exceeded €35 million. The assets of the company on an insolvent liquidation would not cover, on any calculation, even close to the capitalised value of the funding proposal of 2009-2020. An issue arose as to whether the group multinationally might not fund the entire deficit of the Shannon company, given the commercial sensitivity a blow of the dimensions of an insolvent liquidation would strike at its creditworthiness. At the level of the ultimate board in Luxembourg, at least one doubt had been expressed as to this course. The trustees were not to know this, however. Further, notwithstanding all of the evidence and documentation at trial the Court cannot assess this as probable one way or the other. At a bare minimum, it was a definite risk.

14.2 In addition, there was the issue of whether the funding proposal at €10.75 million per annum constituted a contract, the breach of which would give rise to an entitlement to damages on the capitalised value mentioned above. The Court has listened carefully to the evidence on this matter and in particular has received particular guidance from Alan Broxson, expert witness on behalf of the defendant trustees. If the circumstances in which a funding proposal is made involve a definite offer by the funder to the trustees and a definite acceptance by them and if the sum to be paid is fixed over a period of years, then the ordinary rules of contract suggest that the solution to this issue is that over that period that agreed sum is what the funder must pay to the trustees on behalf of the beneficiaries. The answer to this is, however, capable of dispute. Pension funds go up and down. There are good years and bad years. The obligation of the funder under the trust deed to pay in accordance with its terms so as to allow a defined benefit to employees can be buoyed up and down with the rise and fall of the market. It will be more or less painful depending on profit levels of the funder and return on investments on the open market of funds invested by trustees. But while it is correct to characterise a defined benefit scheme as a kind of deferred income, whereby employees work at a particular level of remuneration knowing that on retirement they will receive a particular percentage remuneration up to a maximum level depending on how many years they work, nonetheless section 50 of the Pensions Act 1990 recognises the vagaries inherent in pension funding. It allows trustees to take measures to reduce the benefits payable under a scheme. Section 50 has gone through a number of iterations, but the version as of the latest amendment in June 2011 provides:

> (1) The Board may, by notice in writing, direct the trustees of a scheme to take such measures as may be necessary to reduce, in respect of members of the scheme then in relevant employment, the benefits which would be payable to or in respect of them from the scheme where—
>
> > (a) the trustees of the scheme fail to submit an actuarial funding certificate within the period specified in section 43, or
> >
> > (b) the actuarial funding certificate certifies that the scheme does not satisfy the funding standard and the trustees of the scheme have not submitted a funding proposal in accordance with section 49, or
> >
> > (c) the actuarial funding certificate certifies that the scheme does not satisfy the funding standard and the trustees of the scheme have submitted a funding proposal in accordance with section 49,
>
> (2) The reduction in benefits under subsection (1) shall-
>
> > (a) to the extent specified, override paragraph 2(2) of the Second Schedule and paragraph 4(b)(i)(I) of the Third Schedule, and
> >
> > (b) be such that in the opinion of the actuary concerned—
> >
> > (i) the scheme would satisfy the funding standard in accordance with section 44 immediately following the reduction, or
> >
> > (ii) in the case of a scheme referred to in subsection (1)(c), the scheme could reasonably be expected to satisfy the funding standard at the effective date of the next actuarial funding certificate or, where applicable, any later date specified under section 49(3).
>
> (3) Where the Board gives a direction under subsection (1), the trustees of the scheme shall—
>
> (a)
>
> > (i) take such measures as may be necessary to reduce, in respect of members of the scheme then in relevant employment, the benefits which would be payable to or in respect of them from the scheme such that the scheme would, in the opinion of the actuary concerned, satisfy the funding standard in accordance with section 44 immediately following the reduction [or in the case of a scheme where a funding proposal has been submitted to the Board pursuant to section 49, such that in the opinion of the actuary concerned the scheme could reasonably be expected to satisfy the funding standard at the effective date of the next actuarial funding certificate or, where applicable, any later date specified under section 49 (3), and
> >
> > (ii) notify the members of the scheme of the reduction in benefits within a period of 2 months, or such longer period as the Board considers appropriate,
>
> (b) within a further period of one month, submit to the Board-
>
> > (i) details of the reduction in benefits including copies of the notifications issued to members of the scheme, and
> >
> > (ii) an actuarial funding certificate certifying that –
> >
> > > (I) at the effective date, being the date of the reduction in benefits, the scheme satisfies the funding

> standard, or
>
> (II) in the case of a scheme where a funding proposal has been submitted to the Board pursuant to section 49, at the effective date of the next actuarial funding certificate or, where applicable, any later date specified under section 49 (3), the scheme could reasonably be expected to satisfy the funding standard.

14.3 While it may be said that the vagaries of the market and the possibility of resort to the Pensions Act to reduce benefits removes from a funding proposal the binding character of a contractual obligation if accepted, this Court does not agree. Where, in the knowledge of the alternative of reducing benefits, a funder makes a proposal for a definite period, and this is accepted, then this is an enforceable contract. The offer made here, as a funding proposal over 11 years, certainly put the deliverability of funds at the vagaries of the company's profit levels. As it turns out it could not, or would not, be met. But, in contract law how parties do in commercial terms after a bargain is made is irrelevant to the enforceability of the agreement, unless the contract terms provide otherwise. It is a matter of negotiation as to what scheme seems best to be offered and seems reasonable to be accepted as a binding offer. In practical terms, a funding proposal stretching over shorter periods than ten years would seem to accord more with what the variabilities of pension funding might suggest. From the point of view of the defendant trustees, the advice given by Holmes O'Malley Sexton was what had to be then considered. It was reasonable to advise that the funding proposal as accepted might not be seen by a court as a binding contract. In the absence of authority, no other advice could reasonably be given.

14.4 Then there was the issue of priorities. The trustees obtained legal advice on this. Endlessly parsed through the hearing, counsel were of the view that certainty as to the priority of the debt due on making a contribution demand, or on requiring the early payment of the 11 year funding proposal, would only "if, and when, a liquidator brought a directions application before the High Court querying whether any sum demanded by the trustees constituted a preferential or unsecured liability of the employer". In pursuit of a definite answer, Howarth Bastow Charleton had contacted the Department of Jobs, Enterprise and Innovation, the Pensions Board and the Office of Corporate Enforcement but no definite clarification was available. Again, the issue was not easy but the defendant trustees did their best. The Companies Act 1963 provides at section 285(2), as inserted by section 10 of the Companies (Amendment) Act 1982 in relation to preferential payments on a winding up:

> In a winding up there shall be paid in priority to all other debts –
>
> …
>
> (i) any payments due by the company pursuant to any scheme or arrangement for the provision of superannuation benefits to or in respect of employees of the company whether such payments are due in respect of the company's contributions to that scheme or under that arrangement or in respect of such contributions payable by the employees to the company under any such scheme or arrangement which have been deducted from the wages or salaries of employees.

14.5 The advice given to the defendant trustees was the best that could be obtained. The Court does not quarrel with it. Clarity in such a decision can only arise when the matter is fully argued. Crucial to any such decision is whether or not the sum is 'due'. Clearly, it can be argued that if a contribution demand is not made or there is no entitlement to make a contribution demand, then the sum is not due. Similarly, an argument can be made that what is liable to be paid is what is due in the year when a company goes into liquidation. The circumstances of this case are particular. Here, a contribution demand was made in 2008 and was compromised with the approval of the Pensions Board in April 2009. Taking the view that this was an offer made by the funder in full knowledge of the vagaries of the market in terms of achieving returns and accepted by the trustees with the same knowledge and to secure funding over an 11 year period, this constituted a contract breach if it occurred when the company announced that it was simply not going to pay the next €10.75 million due in January 2012. The capitalised value of that commitment was one which the trustees could have sued upon and since this was a sum due in respect of the company's contributions to that scheme, that sum would have had priority on an insolvent liquidation of the company. In reality, however, this is only the Court's best view in circumstances where the Court has had a wider breadth of evidence and the possibility of attempting to obtain the assistance of counsel in argument. Considering the matter from the point of view of the defendant trustees, this was yet another variable factor. In financial terms, they were entitled to consider it in that manner and the figures available are stark. The likely return on liquidation is set out in the final Howarth Bastow Charleton report on recovery that was delivered to the trustees before their decision to accept the company's offer and which may be tabulated as follows:

Proposal of Element Six and estimates of recovery	*Where the pension scheme is a preferential creditor*	*Where the pension scheme is an unsecured creditor*
Element Six proposal	€37m ($50.1m), of which €23.1m ($31.2m) goes into scheme	If accepted, there would be no liquidation, according to the company promise.
Howarth Bastow Charleton estimate	€42.5m ($57.4m)	€18.2m ($24.6m)
Element Six estimate: high	€38.4m ($51.9m)	€16.3m ($22m)
Element Six estimate: low	€25.6m ($34.6m)	€10.4m ($14m)

14.6 The figures are stark. No adviser can exercise a crystal ball and nor can a trustee. Variables abound. However the relevant figures are massaged, they give rise to no possibility of recovering the pension contribution demand in full, as certified by Willis, much less any higher sum mentioned during the hearing. A real risk was proposed to the trustees through the best advice then available, which advice was prudent and sensible, which was that making the contribution demand would have left the beneficiaries considerably worse off. Further, the sums potentially available are close to the offer of Element Six Limited.

14.7 The biggest variable was perhaps whether the extra €14 million could be taken into account as then, if it could be so considered by the trustees, the sum under consideration as what might be recovered on an insolvent liquidation would be much closer at €37.1 million to what the company was offering. This is considered below.

14.8 On the variability within the figures, it is worth quoting the summary from the final Howarth Bastow Charleton report:

> In summary, we believe the company in making an offer of $31.2 million towards the pension deficit is assuming that the trustees will conclude that this offer is more attractive than liquidating the company. Yet the company's own analysis, on their optimistic assumptions, would indicate that in excess of $51 million would flow to the pension scheme if the pension deficit is ranked as a preferential creditor. Surprisingly, even in the worst case scenario identified by the company in their

> own analysis, they indicate that an amount of circa $34.5 million would go towards the pension deficit if the deficit were ranked as a preferential creditor.
>
> The company seems to expect the trustees to assume the pension will receive an injection of $47.8 million (€35.4 million), however as highlighted by your legal adviser, only $31.2 million (€23.1 million) is to be paid into the pension scheme. Under the company's proposal the balance of $16.6 million is not for the benefit of the scheme at all.
>
> Our analysis of the likely liquidation scenario shows that our best estimate of the payments to the scheme on liquidation (assuming the pension deficit is a preferential creditor) is $57 million. As highlighted in the report, this is based on the anticipated future cash flows discounted to today's value of money. We believe we have chosen fairer assumptions in reaching this estimated outcome and indeed we have specifically excluded the value of any suitable increase in assets which might become available if previous transactions referred to in this report were to be successfully set aside.
>
> Overall, on the basis of the legal evidence you have secured, combined with our own judgement, we believe the company's offer to the scheme of $31.2 million (€23.1 million) is some $25 million (€18.5 million) or so lower than what one might anticipate on a liquidation.

14.9 It is to be noted that if the additional sum of €18.5 million is discounted by the ability of the trustees to take into account the offer to the defined contribution scheme to the benefit of those in the defined benefit scheme of €14 million the figures come very much closer. In addition, figures in relation to the alleged siphoning off from the funding company Element Six Limited in Shannon into other group companies need to be added to any potential final debate that the trustees might have. A caution needs to be entered here. There has been much evidence about payments by the company for no return. In effect, it is as if the Court is expected to decide whether Element Six Limited wrongfully depleted its assets. The Court cannot decide that. In constitutional terms, no court should stray into making decisions that are not absolutely necessary in respect of unrepresented individuals. Nor should a court in the absence of a properly debated dispute reach a decision on a controversy and this is so simply because, like an iceberg, only part of the facts will appear and even then only such slivers as the parties choose to highlight. Just as the law of evidence puts an end to the debate of collateral issues, a court should not be steered into a controversy that is not essential to deciding the central facts. Fundamentally, however, here the basic principle of reviewing trustee decisions needs reiteration: the issue is not how a court would have decided a matter, especially a court with more information and the benefit of argument from counsel, but how the matter ought reasonably to have been seen by a body of trustees.

14.10 The best information about this controversy comes from the final Howarth Bastow Charleton report. The most pertinent paragraph is as follows:

> The dramatic decrease in debtors in recent months has been mirrored in the cash balances held by the company which have decreased by in excess of 80% in the year to date.
>
> The extraction of these cash reserves from the company, through:
>
> • payments for the intellectual property ($54 million);
>
> • inter-group charges ($65 million [year to date] September 2011);
>
> • repayments of intercompany loans ($17.7 million [year to date] September 2011;
>
> • repayments of capital contributions ($68 million); and
>
> • payment of dividends ($19 million).
>
> have reduced cash balances to a level significantly lower than at any time since 2006. This in turn has a direct impact on the level of funds that would be available to creditors on liquidation. Undoubtedly were there to be in the words of the company an "adversarial" liquidator appointed then I believe the liquidator would seek to set aside some or all of the above transactions and thereby seek the recovery of assets (predominantly cash) for the company and by implication its creditors. We make this comment guardedly and without any agenda, as if the liquidator were to be appointed, then most probably due to the level of inter-company – and syndicated lender balances (who would most probably give their proxy to the company) the company's nominee of liquidator would most probably prevail. It is unlikely our firm would be the company's nominee.

14.11 Of the sums mentioned, there was considerable evidence as to some of these issues. Danny Coady and Carmel Sexton gave the most pertinent testimony about the intellectual property payment. Having paid a huge sum for this resource only a few years earlier, the relevant patents or other intellectual property was estimated by the company to be worth nothing on liquidation. The method of outsourcing work from the Shannon plant apparently involved the payment by off-site manufacturing suppliers for the use of the intellectual property and the Court was told that this was then reflected in price paid to them. In addition, apparently, the beneficial interest, but not the legal interest, in this intellectual property was bought by the company from some other company in the group, based in South Africa, but with no taxation liability to that vendor in respect of that gain. In European law, but only on the basis of the limited facts available, this makes no sense; *UsedSoft GmbH v Oracle International Corporation (Case C-128/11)* [2012] OJ C 194/8 2.7.2011. The trustees did not have the benefit of any intellectual property value analysis. They are not to be blamed for this. What seems to be the reality of modern international company groups is that assets are moved constantly from company to company. That most reliable text *Pennington's Company Law*, 7th Ed (London, 1995) at page 993 cites *Charterbridge Corporation Ltd v Lloyd's Bank Ltd* [1970] Ch 62 in support of the following assertion:

> [I]f a subsidiary company enters into a transaction, not for its own objects, but in order to assist its parent or holding company or a fellow subsidiary...the transaction may be a misuse of the power of its directors....This is not so, however, if the directors of the subsidiary act to promote or safeguard the common interests of the subsidiary and its holding company....

14.12 Forde in *Company Law*, 3rd Ed (Dublin, 1999) writing of the *Charterbridge* decision states at paragraph 14-47:

> In *Charterbridge*...the legal position was summarised as follows:...'The proper test [in such circumstances] must be whether an intelligent and honest man in the position of a director of the company concerned could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company'. Benefiting

an associated company or the entire group will often enure to the advantage of the company in question.

14.13 As to the repayment of the $17.7 million company loan, possibly this might be challenged in the lead up to a liquidation; and as this is what the company was threatening that is a possibility. But it is only that. The dividend issue depended on a close analysis of the company structure and its relationship to the company to which this was paid, Shannon Diamond Holdings, of which Danny Coady was a director. Inter-group charges were not particularly focused on in the hearings but the reality was that, since manufacturing of diamonds had been moved to South Africa in 2001, these were likely to be high. The capital contribution of $68 million was repaid, apparently without liability, but had come from another company in the group, most probably through the treasury holding company which makes or is used in almost all of these transactions. The matter can be much debated. The report does not state a level of risk that a liquidator, minded to challenge transactions signed off on as an appropriate use of corporate funds by an international firm of accountants, would be engaging should some of these transactions be challenged. What a trustee would reasonably ask would be: how likely is it that substantial sums would be recovered by the liquidator and so enhance the liquidation fund? Danny Coady, with the best knowledge of company activity among the trustees, was not optimistic; most particularly because of the accountancy sanction that the transactions had received. This view was not unreal or unreasonable and was clearly the view of the trustees in the way that they voted.

14.14 What appeared to the Court to be normal from the point of view of the trustees was that sums of money would be moved in and out of the company at the behest of the ultimate board of directors of the group in Luxembourg. Perhaps international firms of accountants regard this as normal. It can be correct for sums to move from related company to related company; but there must be a valid reason and every payment must be representative of value taking into account the directors of care and fidelity to their own company and how the interests of the group impact on that. Anyone doing accounts for a group of companies should remember, however, that each company is a distinct legal personality and that as a creation of law with distinct privileges, that whether linked to a group or not, is also subject to the fundamental rule that it cannot deplete its capital through transactions that do not provide value for money. A company does not have a legal capacity to throw away its money. Even within a group, each payment must be scrutinised by the board of directors, and by the accountants signing off on accounts, as a transaction that is economically justified in terms of the benefit to the company and the corporate benefit to the group as to the balance between what is being paid and what is returned for that remuneration. A dividend is the legitimate way for a company to make a distribution to its members. Over-payment for services or goods by a company to a related company can be a breach of directors' duties where the analysis of benefit to the company through the transaction and benefit to the group that supports the company is not shown. Directors in the exercise of their fiduciary capacity must not authorise payments that are not made for the benefit of the company within the context of a group of companies. These are merely indications: full analysis will await an appropriate case. The issue is as to how matters appeared to the trustees. So, how were the trustees to regard these still mysterious after much debate transactions?

14.15 The best estimate of recovery of some of these sums available to the Court was that of Jim Luby, the insolvency expert who gave evidence on behalf of the plaintiff trustees. Had he been liquidator of Element Six Limited, and achieving that result at a meeting of creditors would not be a foregone conclusion, he would have considered that there was material on which he could legitimately threaten litigation against the recipients of the payments. Without such a threat, there would be no chance of recovering funds. Where, obviously, the question of moving into the expense of actual litigation was involved, any party challenged might see advantage in delay perhaps up to the door of the court of trial and perhaps to final judgment. His best estimate was that there was perhaps a 50/50 chance of recovering €10 million or more for the benefit of the liquidation fund on the material available to him. That is a genuine and helpful observation. Nonetheless, this factor is but one of many that the trustees were entitled to consider. As can be seen, it might weigh the figures up in consequence of recovery and might weigh them down as to the costs and time involved in such litigation. The trustees did not have the benefit of Jim Luby's expert opinion at the time and the fact that they, as it turned out, gave little or no weight to the potential to recover further funds does not of itself give sufficient ground to challenge their decision.

14.16 Looked at reasonably, the trustees had much to lose and definite money to gain. This was the dilemma facing them. Possibly some yield might have come from challenging and then litigating the mysterious financial transactions by the Irish company; probably the debt to the pension fund could have been regarded as a priority on the liquidation of the company, but this was not certain; probably the funding proposal would have been regarded as a contract, but this was less certain; probably the company would have shut down with the loss of all the jobs in Ireland; possibly the estimates on liquidation were uncertain and could reasonably have been worse than the advisors to the trustees predicted; probably liquidation would have gone on for two years or more; definitely the company was making the direst possible threats and transmitting them in unambiguous form; and probably, whether the decision was one way or the other, the trustees were still going to be reviled.

Conflict as a matter of fact

15.0 The offer of an increase in employer contributions to the defined contribution scheme applied only to those members of that scheme who were also members of the defined benefit scheme. This meant those who had worked up to 2001, and thus were in the defined benefits scheme already, meaning people who had not joined the Shannon company from 2001 onwards when new recruits were put only into the defined contribution scheme and had no entitlement to the benefit scheme. Those in question are thus employees in the defined benefit scheme who had joined prior to 2001. Even these had been passed over in 2009 to the defined contribution scheme for every benefit gained thereafter while retaining such accrued rights as they had under the defined benefit scheme. Under the company's offer, for those joining from 2001 the defined contribution scheme was to remain the same. This was that each employee contributed 5% of wages to the future purchase of an annuity or encashment on retirement and the employer paid an equal sum. But for those who overlapped between the benefit scheme and the contribution scheme, the 5% of the employee wages as a contribution was to remain the same, but the 5% contribution from the employer was increased to 7.5%. The value of this was capitalised in the offer of the company at €2.5 million, being part of the extra €14 million. Thus, of the defendant trustees, Danny Coady, Siobhán Duffy, Gerard O'Sullivan and Dermot Tuite stood to gain. Dermot Tuite had health problems and was thus shortly to retire. Gerard O'Sullivan had been on disability leave but was nonetheless active in the scheme. Danny Coady was then, and also was at the time of the hearing, finance director of the advanced materials division of the Element Six Group. This is an international job that involves analysis and strategy but does not involve the preparation of financial statements. The Court has listened to all of the evidence on this matter and, having seen and heard the relevant witnesses in the proper context, sees no sign of this conflict having in any way influenced the trustees. A similar consideration applies to the question of the top up for actives that is included in the offer.

15.1 Those same four trustees were employed; thus standing to lose their jobs with the company should Element Six SA in Luxembourg carry out its threat to shut down the Shannon plant. All of them, in addition, were said to be likely to want to stay based in Shannon, as opposed to assuming a peripatetic existence around the globe in various De Beers companies and facilities. In practice, Dermot Tuite had been ill and was not planning, he said in evidence, to stay more than a year or so longer in employment. Danny Coady was already travelling extensively and his responsibilities in finance meant that it mattered little where he was based. To a lesser extent this also applied to Siobhán Duffy. Probably it mattered most to Gerard O'Sullivan. In fact, probably this element of convenience was very much a lesser consideration that can be disregarded in any analysis of this situation. The Court has listened to all of the evidence on this matter and having seen and heard the relevant witnesses in the proper context sees no sign of this conflict having influenced the trustees in any way. These conflicts so far were inherent in the issues in contemplation within the trust deed; and even had there been no exoneration through clause 9, the conflicts were both unavoidable and were contemplated as requiring to be decided by the trustees from the inception of the trust. A similar consideration applies to the decision to wind up the trust before 1st of January 2012. By doing this, these same four employees have lost the benefit of a 3% increase on retirement but it was contemplated by the trust deed that these kinds of decisions would need to be made by working trustees; in this case against their interest.

15.2 On 24th of November 2010, the board of Element Six Limited met at Shannon and decided to pay an interim dividend of $19 million. None of the trustees were involved in this decision. Dermot Tuite and Danny Coady are alleged to be implicated in this dividend and a conflict is said to arise because both were directors of the sole registered shareholder which was Shannon Diamond Holdings Limited. Ultimately, as a matter of plain reality, the sum would have been disbursed to that and other companies for the benefit of the group as a whole. The Court has given its view of that kind of practice above. The argument is that if the dividend had been sought back by the liquidator of Element Six Limited that they would have a conflict of duty. The Court has listened closely to all of the evidence and from what appeared in all of that and in the documents considers that this issue played no role in their decision as trustees.

15.3 An extraordinary general meeting of Element Six Limited was held on 10th of March in Shannon. Even though Danny Coady and Dermot Tuite were not directors of Element Six Limited, they were of Shannon Diamond Holdings Limited which was the shareholder of that company. Thus they attended. The issue was that the net assets of the company were less than half of the called up share capital and thus the meeting was required under section 40 of the Companies (Amendment) Act 1983. In evidence, the implication arose that the dividend, repayment of capital mentioned in the Howarth Bastow Charleton report to the trustees for 25th of November, and the repayment of the loan were germane to the issue and that the real solution was the closure of the pension fund. In contrast, there was every indication that the meeting was formal and that the reference in the minutes that there was "a plan in place to assess and improve the situation" was an overall group plan outside their competence to which they paid no or very little heed. There is no evidence that the plan was to close the pension fund. The Court believes the testimony of these witnesses on this issue.

15.4 Dermot Tuite and Danny Coady were also directors of Element Six Abrasives Treasury Limited and, as stated above, Shannon Diamond Holdings Limited, to which a repayment of €17 million had made in respect of a loan. The Court can see nothing wrong with the repayment of this loan regardless of what companies any of the trustees were directors. There is nothing to suggest that this loan was either improperly made or dishonestly repaid so as to avoid being thrust into the category of ordinary debt without priority on liquidation. The Court has listened to all of the evidence on this matter and having seen and heard the relevant witnesses in the proper context sees no sign of this conflict having influenced the trustees. Insofar as Danny Coady might ultimately benefit from an increase in the group's overall balance sheet, or Siobhán Duffy or Dermot Tuite, this played no part in the decision. The decision was all about what was available, what was possible and what stood to be lost. Nothing else.

15.5 Those are the conflicts. As a matter of fact, no conflict of interest or duty influenced the decision of any of the trustees much less undermined or overwhelmed their ability to act honestly and objectively in the interests of the beneficiaries and in good faith.

15.6 Were the trustees exonerated by the trust deed from acting where there was a conflict of interest? The argument by the plaintiff beneficiaries is that they are not. This argument does not survive analysis. It is always possible for a trust deed to provide in advance for exemption from anything except the core obligation of trustees to exercise fidelity to the objects of the trust for the ultimate good of the beneficiaries through acting honestly and objectively and in good faith. The Court has seen and heard from those trustees who voted in favour of accepting the company's offer. They presented as having entirely put aside any issue of conflict. They were not disabled in their capacity to act. At all times they considered the relevant material and were not influenced by any personal interest which they had. Instead, as a matter of objective assessment, the decisions which they took were untainted by conflict. The wording of the trust deed as to exemption from conflict admits of no distinction as between conflicts of interest and conflicts of duty. The law, as previously analysed in this judgment, does not admit of such a distinction; in any case any such hair-splitting would involve the ostensible recognition of a distinction without a difference. That is not attractive and it is not well founded in law. Also argued is the proposition that a trust deed may admit of exoneration from a minor conflict of interest but not from a major conflict of interest. This viewpoint was particularly central to the expert opinion of Vernon Holgate, expert witness for the plaintiff beneficiaries. As he said, however, no authority was available to support his view; save for England and Wales practice based on the express legislative requirements that arose when a conflict manifested itself.

15.7 A trust deed may exempt from major conflicts of interest as well as minor ones and it may exempt from conflicts of duty as well. It is a matter of construction. Fundamentally, the point made on the state of the law earlier might usefully be reiterated: the trustees can be allowed in the trust deed to overcome conflicts of interest. If they as a matter of fact do so, no decision of theirs can be challenged on that ground. If as a matter of fact, the conflicts of interest are such as to overcome or disable their ability to act in good faith independently for the good of the beneficiaries, then a trustee decision cannot stand; since that duty is the irreducible minimum that beneficiaries and funders are entitled to expect of the operation of a trust. In this regard, there is no authority, and there is no warrant either as a matter of logic, for the incorporation of some standard based perhaps upon principles of public law whereby a major conflict may give rise to a presumption that a conflict cannot be overcome or whereby objective conflict is to be a lesser standard that a trust deed can exonerate but major conflict is to be equated with subjective bias. No: there is either exoneration under the express words of the trust deed or there is not; and there is either evidence that the irreducible minimum duty of the trustees was compromised by a conflict or there is not. In this case there is exoneration and there is no evidence that the Court can accept that the trustees acted any way other then for the ultimate good of the beneficiaries as a whole.

Matters to be taken into account
16.0 Two main factors are argued that bring the decision of the defendant trustees outside their sphere of competence through including irrelevant factors in their decision. The first is the threat of the company to shut down the Element Six plant at Shannon, thereby rendering redundant some 359 employees of which some 173 people were active working members of the defined benefit scheme. The second is even more strongly argued and it is that of the offer from Element Six Limited to shut the defined benefit scheme that only €23.1 million could have been taken into account by the trustees and that their decision to also consider the additional €14 million that would benefit members of that scheme through the defined contribution scheme rendered the trustees' decision invalid. These are issues on which the Court has had expert evidence; from Vernon Holgate on behalf of the plaintiff beneficiaries and from Jim Luby more peripherally; and from Alan Broxson and more tangentially from Philip Shine looking at matters from the point of view of the defendant trustees. The Court is grateful for all of that evidence and much has been learned from it.

16.1 Fundamentally, on the issue of the threat by the company to close the plant should the offer not be accepted, the key evidence comes from the three trustees who gave evidence: Danny Coady, Siobhán Duffy and Dermot Tuite. It is clear that the threat to close the plant at Shannon must have motivated all of the trustees to some degree. Dermot Tuite knew the personality of the individual pushing this proposal; he did not give evidence at the trial, and he regarded him as serious and not a person to make empty threats. He considered that once a contribution demand was made that the company would be sent into liquidation. Siobhán Duffy regarded the threat to shut the plant as serious. She was aware that there were contingency plans in place and that the company could survive as a group without Shannon. Stocks of product, finished industrial diamonds being the core product, had been moved to other plants outside of Ireland for distribution so that customers would have not interruption in service. Danny Coady recalled how in 2001, the Shannon plant had suffered a serious blow when the high-pressure synthesis presses had been moved to South Africa from Ireland. Thus, as a bolt out of the blue, as he put it, manufacturing in Ireland had ceased and the Shannon plant was left with finishing the raw diamonds, like shaping and coating, and with administrative functions. He also recalled that in 2009, the executive behind the offer and the way it was put had announced the closure of the Shannon plant. Only through a management plan to reduce costs by €30 million, in large part through 300 redundancies, was it possible to save employment. While the fine words of the press statement of that time resonate as hollow in the light of the latter threat to shut the plant should the offer not be accepted, trustees have to deal with reality and not with public relations. At the meeting of 24th of October 2011, a company representative had presented a clear scenario on behalf of the company: accept or lose all employment. To all of the trustees, the only indication upon which any analysis was done, and the only real scenario facing them on the analysis of Howarth Bastow Charleton, of their legal advisors Holmes O'Malley Sexton, and of their actuaries Willis was an insolvent liquidation. Whereas documents later discovered from the ultimate head company in Luxembourg place a degree of doubt over that for reputation reasons, any such doubt was unknown to the trustees. Prudently, they could only reckon that had they made a contribution demand that the Shannon plant would be shut and its assets disposed of in an insolvent liquidation.

16.2 This is not a question of conflict of interest. Beneficiaries are not to be divorced from the reality of their lives as living breathing people with the needs of the real world. Perhaps the three company trustees jobs might probably be saved or relocated, as they told the Court, but the job of the trustees was to take into account the total benefit of any decision they would make, or the total detriment of such a decision, on the people whose interests they were trusted to shepherd. The needs of people include work and stability in both employment and residence. Giving some weight, therefore, to the reality of the threat to shut the plant would be appropriate. 173 people who were beneficiaries under the defined benefit scheme might, perhaps, have gained more money had the trustees called the company's bluff, putting the Court in a position to know if it was an empty threat or not, but had the company made another of its decisions akin to 2001 and 2009, those people would have the detriment of no employment, having probably to move home or commute further, and the funds towards the defined contribution scheme would have been cut off for the simple reason that a person cannot earn towards a pension or contribute to pension funding without earning money through a job.

16.3 Broadly, the expert evidence was of a sensible viewpoint. These are the answers of Vernon Holgate on this issue:

> Question: So, what degree of consideration can you therefore give to the threat of the company, if you're a trustee sitting there on 25th of November, that the Shannon plant will be shut and everyone will lose their jobs?
>
> Answer: It's just the loss of the – the implication behind that is that the company will cease to exist and therefore won't be able to pay any contributions at any time. So effectively you have got a winding up situation so that is a lose-lose. The company his gone, people have lost their jobs and importantly from the trustees' point of view they have lost their financial sponsor.
>
> Question: So do you regard that as a serious consideration then?
>
> Answer: Yes.
>
> Question: And which the trustees are entitled to take into account?
>
> Answer: You are, yes. Because the financial health of that business and its interests are something which you are linked to; it's a kind of partnership.

16.4 These are the answers of Alan Broxson on this issue:

> Question: But now look at it from the point of view of the trustees. The trustees' obligation is to benefit membership of the trust, and it may be said in legal submissions, I don't know yet, to benefit the membership of the trust only under the ambit of the trust deed. In other words what is the responsibility? Now the responsibility there is to the pension fund and not to anything else. So it's perfectly plain that if you lose your job you are more likely to be depressed, have no work, have a lower income, fight with your spouse, or whatever the case may be. Everybody knows that. So to what extent, if at all, are you entitled to take into account… the fact that the company are saying we are going to shut the plant and they seem to be serious about it?… So what is your view?
>
> Answer: There is a lot said about this. The obligation is to act in the best interests of the members, the best overall interest of the members… And what does that mean? Can it mean things outside the pension fund and, you know, we certainly agonise about this, but you rarely in a situation where the only determining factor for your decision is whether or not people lose or keep their jobs. But it would be a consideration, in my view, but the extent to which it is a consideration differs.
>
> Question: You see, it's pretty hard. If you look at one of these old-fashioned tobacco weighing scales where you have these big brass scales and you have weights on one side and then you put the tobacco on the other and you see what the weight is. You see them in antique shops. Is it like that? And in which case if a kilo represents a decision where you go in favour of the company's proposal, of that kilo how much is the fact that if you don't go with the proposal… everyone is going to lose their jobs? You and the beneficiaries, but you are thinking about the beneficiaries?
>
> Answer: Yeah, well, if you're saying that that thing is so balanced that the one difference is loss of jobs.
>
> Question: Well, I am saying that you are going down the route of accepting… and the route of accepting, let us weigh it as a kilo. Can you give me in terms of this situation what regard do you think the trustees are entitled to have to the fact that the Shannon plant is going to be shut and their beneficiaries are going to lose their jobs?
>
> Answer: I think it would be correct to have regard to it. I mean, my own approach and I have to say, Judge, that even when you ask for a legal opinion on this, the extent to which you can take it into account, you do get various answers. But my own approach is that the trustees don't live in a vacuum and if the consequences of a particular approach is that

jobs are lost, I think it's an issue that they are entitled to take into account.

Question: Is it a 10%, or again, I suppose, you think it's silly to ask?

Answer: If you are talking about percentages, maybe it is 10%, judge; it's a very difficult one to answer.

16.5 The evidence of Alan Broxson that legal opinion differs on this issue is challenging. The weighty preponderance of evidence supports the view that beneficiaries are not simply to be defined and regarded as those who are in technical and isolated benefit under a pension scheme but, rather, are people to be regarded as such within the wider context in which a decision must be made. The loss of the employment of those people is a serious detriment. It is an issue to be weighed according to the best approach of the trustees and it is for them, in accordance with settled law, to take into account what weight must be put on such a factor. Certainly, the primary duty of trustees is to administer the scheme in accordance with the limits of the trust deed but in doing so, the trustees should never lose sight of the fact that a short-sighted application of the scale of benefit to them is more than mathematical. Some support for this approach is to be found in *Edge v Pensions Ombudsman* [2000] Ch 602. There, Chadwick LJ made these remarks at page 626:

> The need to consider the circumstances in which the surplus has arisen does not lead to the conclusion that the trustees are bound to take any particular course as a result of that consideration.... Nor does the need to consider the circumstances in which the surplus has arisen lead to the conclusion that the Trustees are not required to take – or are prohibited from taking – any other matters into account in deciding what course to adopt. They must, for example, always have in mind the main purpose of the scheme – to provide retirement and other benefits for employees of the participating employers. They must consider the effect that any course which they are minded to take will have on the financial ability of the employers to make the contributions which that course will entail. They must be careful not to impose burdens which imperil the continuity and proper development of the employer's business or the employment of the members who work in that business. The main purpose of the scheme is not served by putting the employer out of business. They must also consider the level of benefits under their scheme relative to the benefits under comparable schemes; or in the pensions market generally....
>
> The matters to which we have referred are not to be taken as an exhaustive or a prescriptive list. It is likely that, in most circumstances, pension trustees who fail to take those matters into account will be open to criticism. But there may well be other matters which are of equal or greater importance in the particular circumstances with which trustees are faced. The essential requirement is that the trustees address themselves to the question of what is fair and equitable in all the circumstances. The weight to be given to one factor as against another is for them

16.6 This is undoubtedly correct. If too much weight is given to a particular factor, the Court is only entitled to condemn the decision of trustees where that assignment of importance was one that no reasonable body of trustees could have made. The burden of proof in that regard is on whoever alleges a decision based on a perverse balancing of factors.

16.7 Secondly, there is the issue of how much the trustees were entitled to take into account; only the €23.1 million to the defined benefit scheme or the external benefit of the €14 million extra to the defined contribution scheme structured so as to benefit only those people who were in both schemes. One of the trustees, Dermot Tuite, was definite in taking that wider benefit into account and said so at the crucial meeting of 25th of November. Of the reports prepared for the trustees, that of Holmes O'Malley Sexton does not deal with this issue. The expertise shown by the authors of legal advice to the trustees from this source was consistently to the point and well expressed. The main advisor from that firm was at the meeting at that point, advisors later left before the decision was taken, and her lack of dissent could reasonably be taken as positive advice. The Howarth Bastow Charleton report considers the figure of €23.1 million as being the crucial figure for comparative purposes. The report from Willis refers to the larger figure on an actuarial basis in analysing the appropriate range of choice open to the trustees. Apart from Dermot Tuite, the evidence of the other trustees was that some degree of consideration was given to the wider offer. In the direct examination of Siobhán Duffy, the testimony emerges as follows:

> Question: And the second thing I wanted to ask you about is the extent to which you took into account the €14 million which was being paid outside the scheme, some of it to low paid pensioners and others to other groups. Just tell the judge what view you took of that, and whether and the extent to which you took it into account in your decision?
>
> Answer: Okay. With regard to the proposal that was given to us by the company, all of the money that was in the proposal, the €35.4 million or that €37.1 million, was all going to members of the scheme and as a trustee I felt that since our obligation was to the beneficiaries of the scheme that it was relevant to consider the two sums. And also there was the point that the condition was that the €23.1 million was conditional on us accepting the €14 million, so they were linked.
>
> Question: Yes. You had raised with the company, I think, the trustees had raised with the company the prospect of paying it all into the scheme, isn't that correct?
>
> Answer: We had. We had asked the company actually on the first day that it was presented, the trustees had asked the company was it possible to actually put all of the €35.4 million, as it was at the time, into the fund and the company had advised us that no, it wasn't. And I think you've heard through other evidence the reasons that they gave was that they wanted to give an equitable distribution across the different members of the scheme.
>
> Question: Yes. And the wind up of the scheme of course has a particular order of priorities, isn't that correct?
>
> Answer: Yes. The wind up of the scheme in Irish pension law has a particular priority. So with regard to pensioners, pensioners get preference, so therefore they get one hundred per cent of what is due to them at the given time, and then afterwards the deferred and actives are treated. …
>
> Question: And one of the things… you asked Willis to do was to work out for you the amount that would go to each category under the company's offer on the one hand or under an insolvent liquidation on the other hand; isn't that correct?
>
> Answer: That is correct. In order to understand the proposal that was put in front of us and also to understand what our options were with regard to a wind up and an insolvent liquidation we asked Willis to give us a breakdown of what that meant to the different members of the fund. …

Question: All right. And it sets out, for instance, but under the company's proposal the actives were getting €17 million additional money?

Answer: Correct.

Question: And whereas if €42.5 million was paid into an insolvent winding up they would get less, €14 million?

Answer: Correct.

Question: On the second line it says that they would get €3 million, in fact its €2.5 million, by an increase in the rate of payment into the defined contribution scheme?

Answer: If they worked until the age of 65.

Question: If they worked until the age of 65 they get that under the company's proposal but they wouldn't get it on an insolvent winding up?

Answer: Correct.

Question: And then it does the same comparison for deferred pensioners. They would get €14 million additional money under the company's proposal but €21 million under a €42.5 million payment arising from an insolvent liquidation?

Answer: Correct.

Question: And pensioners would get €2 million, that's going to the low paid pensioners I think, under the company proposal, but they would get a maximum of €8 million if €42.5 million came in, from an insolvent winding up?

Answer: Correct.

16.8 As emerges from the questions, these figures were based on a written analysis by Willis. The more extensive evidence of Danny Coady also dealt with this. In cross-examination, the following evidence emerges:

Question: Well, the offer was €23.1 million?

Answer: Well, the offer that was – the monies going directly into the fund were €23.1 million, yes. The offer was for an additional €14 million to be paid to the beneficiaries of the scheme.

Question: And did you approach it on the basis so that the offer you are considering was one of €37.1 million?

Answer: Ultimately I had to consider the €14 million, yes.

Question: So the answer is – you approached your decision on the basis of the offer being €37.1 million?

Answer: Again I have to say again that I had to consider the €14 million. It had to be considered.

Question: Who advised you to approach it on the basis of €37.1 million rather than €23.1 million?

Answer: There was no direct advice. There wasn't any direct advice that I should consider it to be €37.1 million.

Question: There wasn't any indirect advice either, was there?

Answer: No, I don't believe so.

Question: Mr McEnery [of Willis] approached it on the basis of €23.1 million, isn't that so?

Answer: Mr McEnery-based it on the €23.1 million because it was his understanding that's what our legal advisers had indicated.

Question: And in fact that's the approach that the legal advisers seem to have taken as well, isn't it, Holmes O'Malley Sexton?

Answer: Certainly at stages that is exactly what they had said, yes.

Question: And counsel was never asked for advice as to whether the appropriate comparator was €23.1 million or €37.1 million?

Answer: No, I don't believe so.

Question: If the offer was €23.1 million, do I take it you would have refused the offer?

Answer: I actually didn't ever consider it to be only €23.1 million.

Question: I appreciate that. You said that. There must come a point in time where the offer is in your opinion not enough. Treating the offer as being one for €37.1 million you seem to have taken the view that the offer should be accepted. If the offer was in fact €23.1 million, on the basis of the McEnery [Willis] report and other information you had available, what would your decision have been? Would it still have been to accept the offer rather than to serve a demand and face the possibility of liquidation?

Answer: As I said, I haven't considered that, and certainly my thought process is that the level of risk that we're talking about on liquidation – and not just risk in terms of proceeds, but risk in terms of time it will take for all those things to be settled, during that period it's going to cause serious disruption to all of the beneficiaries and is going to cause them problems. So, for me the way up here, risk is the biggest single thing to consider here. As I say I didn't consider it. I can't say whether I would or I wouldn't. I think risk would still have been a big consideration for me.

Question: Risk was factored into Mr McEnery's figures [in the Willis report]. He had put in the discount factor, he had calculated the risk of certain assets not being fully recovered, so he took the risk into account in the figures that he came up with?

Answer: But he didn't consider the impact on the beneficiaries of the scheme of litigation and liquidation going on for a prolonged period of time.

Question: Did you consider the impact on the beneficiaries of the scheme of them getting nearly €23.1 million into the scheme when €240 million was required in order to provide their benefits when there would be inevitable litigation that you had been warned of in advance anyway? Did you take that into account?

Answer: I considered everything.

Question: Well now, risks had been taken into account in Mr McEnery's figures. If the offer had been €23.1 million and no €14.4 (sic) million on the side, would you have still taken it on the basis that you don't want to take any risk?

Answer: I may well have done so.

Question: If it was €10 million would you still have taken it on the basis that you still don't want to take any risks?

Answer: I really would have had to think about it long and hard.

16.9 This is honest evidence. The relevant factors were taken into account. The scheme of priorities on winding up was also properly considered.

16.10 The relevant expert evidence does not undermine the approach that the trustees took. It is instructive to note the similarity of their approach. Alan Broxson for the defendant trustees gave evidence as follows:

Question: Now then we talked about money outside the scheme. Your view on this, because really it's a difference between saying its €23.1 million or is it €37.1 million? So your view on this is, as I understand you, yes, you can take that into account. So do you look at it as a trustee that the amount on offer is – in fact it became €37.1 million, but at the time they were thinking about it in the most detail it was €35.4 million, but let's stick with €37.1 million. Do you take it that the trustees, in other words, the view expressed in the minutes by [Dermot] Tuite that, yes, I am taking that into account, is that right or?

Answer: Yes, I think it is right. I think I said in my evidence that a trustee would probably prefer that the totality goes into the fund, because that is the way the rules are actually structured, because then it is clear as to how the money is distributed, but if the company takes a different view, provided the money is going into the benefit of somebody, well maybe I won't go and fight so much over it. It depends on how tough the company is being and what they want to do with it.

Question: Again the dilemma that is posed is obviously very extreme because if you take the €2.5 million that is still a defined contribution scheme that applies only really to people, it can't apply to anyone who wasn't ever in the defined benefit scheme?

Answer: Yes.

Question: So that is not benefiting all of the trustees, it's benefiting only those who are continuing to work, in other words who are active?

Answer: I think you are right, Judge, and I think my reading of that was that what the company was at here—just remember that the company removed the entitlement to future credit going forward and removed pension increases—and therefore the people with the longest past service, pensioners, which will include pensioners and deferreds, they would have all of that. The people who were losing, the people who are actually bearing the cost, if you like, of past problems. And this is unfortunately the case, and I hesitate to put it in these terms but, as I said, the problem in most pension funds are caused by the weight of the pension liability and when companies make a change to the benefit structure to try to recover it, inevitably it is those still in employment who actually suffer most. So it is not a surprise to me therefore that companies will try, as part of the settlement, to somehow redress that. That is simply what I have seen and I have seen it happen several times.

Question: Then we are talking about €2 million to low incomes. That became €2.5 million, but I think that was for those who were pensioners already who are under €17,500 [pension income] annually?

Answer: Indeed, yes.

Question: So is that kind of more reasonable to take that into account?

Answer: Well, where we sit as trustees, we have known for quite some time, that the Pensions Act was unduly favourable to pensioners and the very fact that the Minister has recently proposed in a Bill, which is going to the Dáil to change the priority and if you look at it it's geared to protect the lower pensioners, I think what the company was trying to do, if you like, was very much what the Minister has now tried to do. So, you know, as, if you look at it from the outside you would have to say that is a reasonable thing to do.

Question: And then, finally, you have the €8.1 million which was €7.8 million, which is going to the actives. So those were working and actively contributing that is going… outside… into the defined contribution scheme. Again, do you take that into account, given that it's only a sector? Because as I understand the sector in terms of the numbers we are talking about kind of … 173 actives, as opposed to 258 who are actually on pension and 375 who are deferred and really, I suppose, 375 who are deferred or hit the worst?

Answer: Like I said, Judge, inevitably the actives are the ones who lose most in a restructuring. And that has happened in this case and I can therefore perfectly understand why the company would want to do that to redress some of the laws that they have suffered to get a better balance and it's interesting that the changes being made by the Minister in fact will achieve that going forward.

16.11 A definite view in favour of the trustees being enabled to consider the effect of the wider offer was given by Vernon Holgate on behalf of the plaintiff trustees. He had thought that the trustees had received legal advice not to take the extra €14 million into account. He continued as follows:

Question: Well, that's actually not clear from the Holmes O'Malley Sexton legal report. It simply talks about €23.1 million. It doesn't comment on the question of whether you should only consider the €23 million or not?

Answer: I think it's one of the few areas of directed legal advice which they received which told them to take it out. So if you – it undermines the value of this as a slide.

Question: Sure. Well I'm not sure that they did. Just leaving that aside for a moment Mr Holgate if you wouldn't mind just leaving that aside, it does emphasise the importance of considering the total offer, doesn't it?

Answer: I think, I think it is a very difficult area where people are talking about making settlements for one class of members into another trust, not your trust. But, these are a group of active members and they are beneficiaries. You owe them obligations and rights and duties, if you are not seeking to prefer one group over another and you want to take that into account and you can be sure that payment would be made for their benefit, I don't think it is unreasonable to factor that in. Actually the problem tends to come from the lawyers who will not let you. So there is a difference between, if you like, my professional view and the legal view.

16.12 Earlier questions and answers in cross-examination confirmed this viewpoint as a professional trustee:

Question: All right. So the company is offering a payment of €23 million, €23.1 million straight into the fund and it's offering a top up of €14 million to be paid outside the fund, isn't that correct?

Answer: Yes.

Question: …And in summary they are payments of various sorts, some to active members and some to lower paid pensioners outside the fund, isn't that correct?

Answer: Yes.

Question: All right. And they are intended to provide benefits for those two categories of people that wouldn't easily be provided through the fund, that is active's and low paid pensioners, and they wouldn't be easily provided through the fund because of the priority issues, because of the priorities that apply in the winding up of a [pension] fund, isn't that correct?

Answer: Yes.

16.13 From the point of view of loss of employment, a detriment reasonably to be expected as arising from a refusal of the offer, and from the point of view of taking account of the sums to go to the members of the defined benefit scheme but under the defined contribution scheme, a benefit to those members arising from accepting the offer, the trustees acted correctly. This approach accords with what the duty of trustees ought to be. They are entrusted with sums of money and property in order to benefit defined individuals. They are expected to act honestly and in good faith. They are expected to act within the range of what reasonable trustees would do. The property that they are called on to administer is for the benefit of the members of the pension fund and it would be wrong for trustees to take a narrow view that admits of only the financial considerations under the trust deed and not financial benefits arising from an offer that would go to those same members. Where an offer includes a detriment in real terms of loss of employment and an ongoing detriment to any future contributions to the fund by a demand putting the funder out of business, that as a matter of law and on the evidence is something the trustees can take into account. In public law, these issues would be questions of vires, or excess of jurisdiction. There is no evidence of it. Questions of weight, as previously considered, are matters for them once the decision is reasonable.

Overall factors in the decision
17.0 Additional factors to the threat of the loss of employment and the additional benefit to defined benefit scheme members under the defined contribution scheme were taken into account. These emerge clearly from the text of the reports and are in the context of the correspondence and various steps taken up to the meeting of 25th of November 2011. In that context the evidence of the three trustees who gave evidence is instructive.

17.1 Siobhán Duffy said that one of the factors was the liquidation of the company, certainly, but she couldn't lose sight of the fact that making a demand would mean the entire loss of the offer. She regarded the trustees as having weighed the certainties and the uncertainties to try and make the best decision. She was shocked by some of the evidence given at trial on behalf of the company. The Court shares her concern. Her clear view was that the trustees would not obtain a better return by making a demand. Her view of the variables on the Howarth Bastow Charleton analysis was that some between €42.5 million and €18 million might be available on liquidation. There was also an issue as to whether the contribution demand would be considered as a debt on the company in liquidation at all. The lower figure was encountered in the event that the debt was not preferential. She had personal knowledge of the Shannon plant, as did the other trustees, but the personal view that you took in relation to the money that might be recovered in liquidation was more sanguine. Trustees are entitled to take their own information into account as well as seeking the advice of experts. After all, the reason they are there as trustees is to exercise their judgment on the basis of common sense and local knowledge as well as seeking expert advice for more difficult decisions or ones which are outside the sphere of their immediate competence and experience. Her view of the Shannon buildings was that there were empty buildings which had not been shifted over some years; that the legacy and obsolete stock that was being valued might not be as saleable as the estimates on liquidation proposed; that a great deal of the product on hand was unfinished; that without brand support from the parent company, or some branch of it, sales at an appropriate value were dubious apart from the possibility of sale at low value to a buyer in China; and she felt that the process of liquidation could have been a long one perhaps lasting over a period of three years. Dermot Tuite took a similar view. He said that the decision of 25th of November 2011 had come after a detailed consideration of the legal advice available, the report of Howarth Bastow Charleton, the presentation by Willis and the knowledge which the trustees had of the company and the background. The threat of liquidation was serious. If the demand was made then the offer might be lost. He felt that the offer was the least bad offer but that the offer was not good. The Willis report gave the numbers but he differed from the accountancy report on the issue of the value of local property. He felt that the company was paying high rates on big buildings and that some of these buildings had zero attraction for investors. On the question of the inventory, sales he thought would be dubious as what was involved was a raw material. Holmes O'Malley Sexton took the trustees through all the relevant information. One proposal by the company trustees was to seek a meeting with a higher official than the one with which they were meeting but some of the trustees declined. Danny Coady had regard to the seriousness of the situation. The pension deficit was a multiple of the annual group profit. He had interacted with Carmel Sexton on the question as to whether more money might be available and she had told him that there was no more on the table. This answer was given by Carmel Sexton in good faith from a source within the company that was not acting in good faith. The concerns which he had were shared by the other trustees. The fact that some trustees came out in favour and some against does not render a decision unreasonable. The variables in the decision were: whether Element Six Limited would shut down the plant; whether the debt could be recovered through liquidating the insolvent company; would the debt to fund the pension deficit be preferential; and could the sums in dispute that were alleged to have been siphoned off be recovered? On the latter issue, he felt there was little room for manoeuvre as a major firm of accountants had signed off on the relevant accounts. As he saw it, the rationale for the decision was that the company would end up in liquidation; that money in the hand had to be considered as against the multiple risks on a liquidation; that among the risks was whether, and the extent to which, the pension fund was a creditor or not and the extent to which this debt was preferential or not; that the time for liquidation could be up to three years and that it could be a very difficult liquidation; and that, overall, the his sense of responsibility required him to take the guaranteed money on behalf of the beneficiaries. Letting go of the money was not an option. Everything was given serious consideration in light of the threat of shutting down the company. Payments outside the scheme of €14 million which were going to go to the beneficiaries are to be considered in addition.

Reasonable body of trustees

18.0 Did the trustees act reasonably? This is not something in respect of which a court needs expert evidence; though the Court has had the benefit of expert views which have been helpful in debating the issues back and forth. The trustees were experienced people with a good knowledge of the company, how the company was likely to react, and who had obtained expert advice on issues of accountancy, the likely results on insolvency, the actuarial value of the various figures and pertinent legal opinions. The final summary of the issues presented for decision by Holmes O'Malley Sexton was admirable.

18.1 Having regard to all of the evidence which the Court has heard and seen and the variable factors as they were reasonably considered at the time, the decision of the trustees could not be regarded as one which no reasonable body of trustees could have made. The trustees' decision of 25th of November 2011 was well within the range of what might be considered a reasonable response to a very difficult situation. The same observation applies to all the other trustee decisions that have been put in issue in this case.

Result

19.0 The defendant trustees would have been under enough pressure already without further stress in having to make the decision which they made on 25th of November 2011. But, the Court must regrettably record that it is clear from the evidence that Element Six Limited in Shannon organised additional stresses. This was not ostensibly authorised at the ultimate board level of the international company in Luxembourg and, in fact, there is no evidence to suggest that. At the local level, the attitude adopted by the company in Shannon by the two relevant male executives was one lacking any emotional intelligence and was completely geared towards monetary success at the expense of any humanity in approach. That is not always what business is about. The attitude was always: there is no more money and this is our final offer. This was not true; the board minutes of the ultimate parent company in Luxembourg indicate that an offer of €40 million was authorised. Earlier in the year, larger sums were mentioned at that board level as possibly being made available, but times change. A degree of flexibility might have stretched even the €40 million available, in the Court's best estimate, by up to 10%. The local negotiators falsely adopted an attitude that in law no contribution demand could be served by the defendant trustees when they knew that this was untenable. Overall, this was a textbook example of how not to approach the delicate negotiation of exit from a defined benefit scheme. In contrast to this approach, the correct matrix for the making of a difficult decision on the future of a pension fund should be one of both sides attempting to solve a shared and very difficult problem. Honesty in laying out the position of both sides aids such a process. Experience has shown that such an approach is almost always a sure guarantee against later being brought to court.

19.1 The defendant trustees did their best. They were not overwhelmed or crippled or influenced to any degree by any conflict of duty or interest. As a matter of fact, their decision was solely made in the interests of the beneficiaries. That decision was arrived at on a fair appraisal of the situation as they saw it and after all reasonable enquiries. It was made honestly and in good faith. Their actions can only be judged according to the knowledge which they had at the time of their decision. They might be criticised had they not obtained the best possible advice; but, they did this and from reliable and expert sources. They took all of that advice into consideration and, with prudence and fortitude, made the decision which they thought was in the best overall interests of the beneficiaries under the defined benefit scheme. They did not take any irrelevant factor into account and nor did they ignore any relevant factor. Nor does the weighting which the defendant trustees gave to particular factors emerge as unreasonable. Ultimately, in the entirety of the circumstances, the decision which the trustees made to decline to serve a contribution demand and to accept the company's offer of €37.1 million in winding up the pension scheme was not one with which any court could take issue.

19.2 Having heard counsel on costs, the Shannon company has indemnified the trustees and is not seeking costs. Having lost, plaintiff beneficiaries are not seeking costs either.