Neutral Citation Number: [2014] IEHC 383

THE HIGH COURT

Record No. 2013/6239P

BETWEEN

PAUL HOLLOWAY, TIMOTHY CROWLEY and GRIET VANDENHEEDE

PLAINTIFFS

AND

DAMIANUS B.V., OMEGA TEKNIKA LIMITED and CHEFARO IRELAND LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Michael Moriarty delivered on the 25th day of July,

1. These are plenary proceedings in which the plaintiffs seek payment of the sum of €2.23 million from the defendants. The plaintiffs are the current trustees of a defined benefit pension scheme ("the Scheme") operated for the benefit of employees of Omega Pharma Limited, an Irish subsidiary of a European multinational company. The first named defendant is the principal employer for the purposes of the Scheme and the second and third named defendants are associated employers in respect of the Scheme (collectively "the employers"). The dispute arises from a contribution demand issued by the trustees to the employers on 7 December, 2012.

Background Facts

2. The background to the issue of the contribution demand by the trustees is as follows. In September, 2012 the employers announced redundancies and their intention that the pension scheme would be wound down. On 1 October, 2012, the principal employer served notice on the trustees of its intention to discontinue contributions to the Scheme. The notice requested that the trustees agree the date of winding up of the Scheme to be 31 December, 2012. Following legal advice and consultation with the Scheme actuary, by letter dated 26 October, 2012, the trustees acknowledged receipt of the notice, advised the principal employer of the sum required to secure the Scheme's benefits and formally requested the employer enter a consultation process, seeking a reply by 23 November, 2012. There was no response to this letter.

3. A further letter dated 22 November, 2012, was sent by the trustees to the employers, which requested a written response to the proposed final contribution amount by 30 November, 2012, in the absence of which the trustees would determine the final contribution amount without the employer's consultation. There was no response to this letter and on 7 December, 2012, a contribution demand was served on the employers for the sum of €3,010,000. Prior to the expiry of the notice period on 31 December, 2012, two Scheme members requested a transfer of their entitlements, which reduced the additional contribution required by the trustees, as of 31 December, 2012, to approximately €2.25 million, which was revised to the figure claimed in these proceedings of €2.23 million.

4. By letter dated 28 January, 2013, the trustees requested an urgent meeting with the employers and referred to the possibility of legal action if no response was received. On 29 January, 2013, the employers replied to acknowledge receipt of correspondence and to say that a response would be issued after advice had been taken. There were some without prejudice discussions between the first named plaintiff and a representative of the employers in March and April, 2013. On 25 April, 2013, the trustees were informed by telephone that the principal employer would not engage with them on the demand or take further actions in relation to the Scheme. The trustees decided to instruct solicitors to begin legal proceedings on 2 May, 2013. The trustees issued a demand letter dated 17 May, 2013, requiring the reduced figure of €2.25 million to be paid within 7 days. These proceedings were issued on 19 June, 2013, and they were entered into the commercial list on 15 July, 2013.

Relevant Provisions of the Trust Deed

5. The Scheme was established with effect from 1 June, 2004. It is a defined benefit pension scheme subject to the Pensions Act 1990 (as amended). It is governed by a definitive deed and rules dated 24 November, 2004, which has been amended on a number of occasions subsequently (the "Trust Deed" and "Rules" respectively).

6. Clause 8.1 of the Trust Deed sets out the trustees' duty to collect contributions from the employers.

> "The Employers shall transmit to the Trustees all contributions (if any) collected by each of them respectively from the members and, subject to the rights reserved to them by Clause 18, from time to time shall pay to the Trustees the moneys which the Trustees determine, after consulting the Actuary and the Principal Employer, to be necessary to support and maintain the Fund in order to provide the benefits under the Scheme."

Rule 5 provides that the employers shall pay the contributions required under clause 8.1, subject to the rights reserved to them by clause 18.

7. Clause 18 of the Trust Deed provides for the circumstances in which the employer may cease contributions to the Scheme. Clause 18.1 provides that:

> "If an Employer ceases to carry on business, or gives three months' written notice to the Trustees of its intention to discontinue contributions (or such lesser period as the Employer shall agree with the Trustees) it shall discontinue contributions to the Scheme with effect from whichever of the following dates is applicable ('the Discontinuance Date'):
>
> (a) immediately on ceasing to carry on business, or where the Employer is an Associated Employer on such later date as that Employer agrees with the Trustees being not later than the Review Date next but one following the date the Employer ceases to carry on business; or
>
> (b) the date specified in the notice or agreed with the Trustees."

Clause 18.7 provides that if the principal employer gives notice to discontinue contributions then the trustees are to decide whether an associated employer will enter into an agreement to take over the liabilities of the principal employer or if the Scheme is to be wound up and the fund dissolved.

8. Clause 19.1 provides that the Scheme can be wound up on the expiry of notice given by all employers under clause 18.1 of their intention to discontinue contributions.

> "The Scheme shall be wound up on the day on which the first of the following events occurs:
>
> (a) On the Principal Employer being wound up, ceasing to carry on business or giving or being deemed by the Trustees to have given notice under Clause 18.1 or 18.2, as applicable of its intention to discontinue contributions to the Scheme unless
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> …
>
> (iii) (If the Principal Employer ceases to carry on business or give or is deemed by the Trustees to have given notice of its intention to discontinue contributions) an Associated Employer has agreed to become the principal Employer under Clause 18.7(a).
>
> (b) On the expiry of the notice by all the Employers under Clause 18.1 of their intention to discontinue contributions."

9. Clause 20 provides for the dissolution of the pension fund and sets out the order of priority to be applied. Clause 20.1 provides that employers continue to be liable for contributions which were due but were unpaid on the date of winding up. Clause 20 provides that the date of winding up should be as soon as practicable after the day on which the clause 19 event occurs.

Matters in Dispute

10. During the course of the hearing the parties addressed a number of issues disputed between them including the construction of the trust documents; the effect of the notice served by the employers in October, 2012; the entitlement of the trustees to make a contribution demand; and the amount claimed by the trustees. The primary point of dispute is whether or not, in the context of all the Trust documentation, pension legislation and actuarial expert evidence adduced on each side, the Trustees were entitled to claim as a contribution a sum which is in fact discounted or compromised. This entitlement is contested by reason of the alternative modes of computation potentially applicable.

Modes of Computation Available

11. The trustees of a defined benefit scheme must ensure that the scheme complies with the minimum funding standard ("MFS"), which is required by Part III of the Pensions Act 1990. The trustees must arrange for an actuary to carry out a valuation of the scheme's assets and liabilities at regular intervals and submit to the Pensions Board an actuarial funding certificate signed by the actuary indicating whether the scheme satisfies the funding standard. The objective of the MFS is to ensure a minimum level of funding for pension benefits in the event the scheme is wound up. The computation of the MFS relies on standard transfer values set by the Society of Actuaries in Ireland, which are set out in an actuarial standard practice document known as ASP PEN-2.

12. The dispute between the parties concerns the appropriate method of computation of the value of benefit entitlements of the members under the Scheme. There are three methods of computation in issue: the statutory basis noted above, an annuity buy-out basis and a hybrid basis that uses elements of both. If the value of benefits is measured on the statutory basis alone then the Scheme fund is solvent. However, if the value of benefits is measured on an annuity buy-out basis alone then the Scheme fund is insolvent. The valuation using this basis puts the Scheme deficit at €5.8 million.

13. The amount contained in the contribution demand issued by the trustees does not represent a deficit in the Scheme fund measured by reference to measurement on either the statutory basis or annuity buy-out basis alone. The calculation of the contribution amount carried out by the Scheme actuary uses a combination of methods, to take account of the different age profiles and benefit entitlements of members. It was the view of the Scheme actuary that, in light of these factors, using an annuity buy-out basis alone would be excessive. In light of this view, the trustees asked the Scheme actuary to look at alternative valuations with a view to identifying a reasonable basis. This computation method adopted by the Scheme actuary and approved by the trustees uses a combination of annuity buy-out and standard transfer values (as set out by the Society of Actuaries in Ireland) gave the figure of €3.01 million (including expenses) as the amount required to secure Scheme benefits. As already stated, this figure was revised to €2.23 million after two members transferred out of the Scheme.

14. The defendants submit that the valuation on the statutory basis, which uses the standard transfer values set out by the Society of Actuaries in Ireland, is the appropriate one and that members have no entitlement to amounts above this valuation.

15. The plaintiffs submit that they have an obligation to secure the benefits of the Scheme for its members on a wind up and that the statutory basis is not appropriate in the particular circumstances of this Scheme. Mr. Maurice Whyms, the Scheme actuary, in his direct examination explained that the calculation of standard transfer value involves the application of a set of assumptions contained in ASP PEN-2. Mr. Whyms stated that ASP PEN-2 involves the application of some assumptions about trust rules, which may not correspond with the rules of a particular scheme as they apply in a winding up. He also stated, by reference to his experience, that all trust deeds and rules tend to be unique and that the balance of power is only revealed by reading the particular documents. The method of computation used by the trustees to arrive at the contribution amount demanded from the employers was devised by the Mr. Whyms in response to concerns expressed at a meeting with trustees that the statutory basis would not deliver on benefits, but that an annuity buy-out basis would be excessive. The plaintiffs believe the computation basis that they have used, and the contribution figure arrived at, to be reasonable.

16. In submission, counsel for the plaintiffs, Mr. McDonald S.C., noted the views of Finucane and Buggy in *Irish Pensions Law and Practice*, 2nd ed., (Dublin, 2006) as stated at p. 265:

> "However, compliance with the minimum funding standard does not necessarily satisfy the duty of the trustees with regard to the proper funding of a defined benefit scheme. Specific duties imposed upon them by the provisions of the Scheme, or (more likely) their general duty to protect the benefit entitlements of the members and other beneficiaries, may require them to observe a higher funding standard than that required under Pt IV of the Pensions Act."

17. In this regard, counsel for the plaintiffs also referred to admissions in cross examination by Mr. Donal Casey, one of the actuarial expert witnesses for the defendants, that the statutory basis is not automatically applied in his experience of the winding up of

pension schemes. Counsel also relied on a purposive construction of s. 48 of the Pensions Act 1990.

18. The defendants reject the computation method adopted by the plaintiffs. Using the statutory basis, they submit that the Scheme was solvent and that there was no justification for the contribution demand. They reject that the statutory basis is merely an absolute minimum funding level and submit that, while actual liabilities on winding up may be different to those earlier assumed, this is not a reason to calculate those liabilities on a basis different to the statutory standard. In submission, counsel for the defendants, Mr. MacCann S.C., submitted that while standard transfer value was not the only standard of valuation, it acted as a benchmark that parties should be slow to depart from. Counsel argued that, as the Trust Deed authorised the trustees to discharge the Scheme's liabilities to active and deferred members on the basis of standard transfer value, then it is not necessary for them to go further.

19. Counsel for the defendants acknowledged the criticism that the dispute on the calculation and quantum of the contribution demand should have been the subject of negotiation with the trustees in November and December, 2012. He stated that he did not seek to justify the employers' silence. He framed the subject matter of the case as the exercise of the Court's supervisory jurisdiction over the trustees of the Scheme.

Lack of engagement by the employer

20. There is, clearly, a dispute between the trustees and the employers on a number of factors surrounding the trustees' contribution demand amount of €2.23 million. The actuarial factors disputed include the significance of the MFS as a benchmark in winding up negotiations, the strength of the trustee's contribution demand power under the trust deed, the significance of a Pricewaterhouse Cooper report in July, 2012, on the financial health of the Scheme, the appropriate discount rate, and the incorporation of uncertainty in the valuation of benefits.

21. Clause 8.1 of the trust deed points to engagement between the trustees, the Scheme actuary and the principal employer on contribution amounts. After the issue of the notice of cessation of contribution payments by the employers on 1 October, 2012, there was no response from the employers or engagement with the trustees or the Scheme actuary until after the expiry of the notice period on 31 December, 2012. It was in the absence of any communication from the employers in relation to the offers made by the trustees to negotiate the final contribution amount, and in view of 31 December, 2012, as the winding up date for the Scheme, that the contribution demand was made by the trustees on 7 December, 2012.

22. In cross examination, Mr. Casey, an actuarial expert witness for the defendant acknowledged by reference to his own experience in winding up negotiations that he would expect an employer to engage with trustees once invited to do so. He also accepted on a hypothetical basis that, in the face of failed attempts to create engagement with the employers, he would have taken the same course of action as the trustees and issued a contribution demand.

23. Towards the conclusion of his closing submissions to the Court, counsel for the defendants acknowledged that a number of the matters in dispute between the parties on the contribution amount could be categorised as the appropriate subject matter of the negotiation that never occurred in November and December, 2012. He acknowledged this aspect of the submissions and stated that he did not seek to justify the employer's silence. In cross examination, Mr. Holloway, the first named plaintiff and trustee of the scheme, stated that the figure given in December, 2012 of €3,010,000 was what the trustees believed to be reasonable, but acknowledged that it was a figure which would have been capable of discussion and negotiation with the employers.

24. Mr. Dirk Fraeyman, the global head of product supply and manufacturing operations for Omega Pharma N.V., a company that is part of the corporate group of which the defendants are members, appeared as a witness for the defendant. His explanation of the employers' position in November and December, 2012, is as follows. He stated that, initially, the trustees' letter slipped through the cracks, as it was addressed to four different individuals within the company, but that subsequently a decision was taken by the Omega Pharma executive committee, of which he was and is not a member, some time after 22 November, 2012, but before Christmas, not to respond to the trustees. He stated it is not the normal practice within Omega Pharma for minutes to be taken at executive committee meetings so there is no record of the meeting in which the decision was taken not to respond to the trustees. Later in cross examination, Mr. Fraeyman stated that he had no plausible answer to the question of why the decision not to negotiate with the trustees was not communicated to them. Minutes are available for a meeting on 10 January, 2013, of the Omega Pharma finance committee where it is recorded that legal advice from Irish lawyers was yet to be taken on the contribution demand made by the trustees on 7 December, 2012. In cross examination, Mr. Fraeyman acknowledged that decisions of Omega Pharma prior to 10 January, 2013, in relation to the issues raised by the trustees, were taken without the benefit of Irish legal advice.

Entitlement to make a demand

25. In relation to the employers' obligation to meet contributions to the Scheme, the plaintiffs rely on clauses 8.1 and 18.1 of the Trust Deed. Clause 8.1 provides for the obligation to make contributions generally, while clause 18.1 provides that the obligation to make contributions continues up to the discontinuance date, which is the date specified in the notice to the trustees in this case as 31 December, 2012.

26. The defendants submitted that, on a proper construction of the Trust Deed, clause 19 determines the date of winding up to be the date of notice of cessation of contributions. While counsel for the defendants acknowledged that the employers had specified 31 December, 2012, to be the date of winding up, this could not trump the provisions of clause 19. The defendants further submitted as clause 20 limits liability after the winding up date to amounts accrued due but unpaid at the winding up date, the employers could not be liable for the "new" amount of the contribution demand.

27. Counsel for the plaintiff was critical of this argument as to the effect of clause 19. He stated this argument had never been raised by the employer until the delivery of the defence in these proceedings, and the correspondence between the parties up to that point reflects an agreed basis on the winding up date. Further, counsel submitted that such a construction of clause 19 is inconsistent with the language in clause 18.1 and in particular to the discontinuance date referred to.

28. The plaintiffs submitted that the issue of the notice of termination by the employers did not prohibit the trustees from making a contribution demand during the notice period. Counsel relied on *McClelland v. Unisys New Zealand Limited* [2002] Pens. L.R. 87 and *Curtis v. Capital Cranfield Trustees Limited* [2005] EWCA Civ 860, [2005] 4 All E.R. 449 in support of this submission. In *McClelland* the High Court of New Zealand found, on a purposive construction of the trust documents, that a contribution demand issued by the trustees during the period of notice of the employer's intention to cease contributions bound the company. Ellis J. noted the obligations of good faith in an employment relationship, and the ability of the employer to withdraw the notice of cessation during the notice period, as supporting his conclusion that the contribution clause was not terminated by the issue of notice alone. In *Capital Cranfield* the Court of Appeal held that a period of reasonable notice was required before the notice of cessation of contributions by the employer could take effect. Smith L.J. noted, at p. 456 para. 32, that the scheme would be "virtually unworkable if the company could withdraw with immediate effect".

29. The defendants rejected the application of *McClelland and Capital Cranfield* to the present facts on the basis that they would imply terms into the trust deed inconsistent with the express terms of the deed, contrary to the Supreme Court decision in *Sweeney v. Duggan* [1997] 2 I.R. 531, and that the terms of the trustees' demand power in this case is not as broad as those at issue in *McClelland* or *Capital Cranfield*.

Observations

30. The plaintiffs' submissions on the construction of clauses 8.1 and 18.1, that the obligation to make contributions remains until the discontinuance date of 31 December, are more convincing than the interpretation given to clause 19 by the defendants. On my reading of clause 19.1 the reference to the giving of notice in sub-clause (a) is for the purpose of identifying the exception in sub-clause (iii) to the general rule as set out by clause 19.1. If clause 19.l(a) was read as setting the date of winding up as the date of the notice, this construction would be inconsistent with clause 19.l(b), which puts the date of winding up at the expiry of the notice given by the employers under clause 18.1. It would appear to be a difficult construction to interpret clause 19.1 as providing that the first in time of either the giving of notice or the expiry of the notice period can be the winding up date, because it would be impossible for the latter to arise and an alternative construction, which does not render clause 19.1(b) a nullity, is reasonably open.

31. I find the characterisation of the arguments on the appropriate method of computation as appropriate subject matter for negotiation between the parties to be of interest. The employers did have the opportunity to negotiate these matters with the trustees, and were expressly invited to do so in October and November, 2012. After the expiry of the notice period, the employers were again invited to discuss the contribution amount by the trustees in January, 2013. On the basis of the evidence of Mr. Fraeyman, it appears that a deliberate decision was made by the employers to take this course of action and not to avail of these opportunities for discussion or negotiation. Further, receipt of the trustees' correspondence of October and November, 2012 was not even acknowledged by the employers at that time. Again, on the basis of Mr. Fraeyman's evidence, it appears that the employers had not sought or received Irish legal advice at the time the decision not to communicate to the trustees was made.

32. Clause 8.1 of the Trust Deed states "[t]he employers shall... subject to the rights reserved to them by clause 18... pay the Trustees the moneys which the Trustees determine, after consulting the Actuary and the Principal Employer, to be necessary to support and maintain the Fund in order to provide the benefits under the Scheme". Clause 18.1 provides this obligation continues until the discontinuance date, which in this case was stated to be 31 December, 2012. The trustees sought to consult the principal employer on two separate occasions before determining the amount they deemed necessary to provide the benefits under the Scheme. The trustees did consult the Scheme actuary and the amount ultimately demanded by the trustees was determined in accordance with his advice. These events occurred in the three month window of the notice period set by the employers and in view of 31 December, 2012, as the winding up date.

33. Further, the defendants' actuarial expert witnesses in cross examination, although they contested the basis of computation adopted, appeared to concede that the trustees were left with little option but to proceed as they did in the face of the employers' silence.

34. In *Green and Ors. v. Coady and Ors*. [2014] IEHC 38 Charleton J. considered a challenge by members of a pension scheme to a decision by the scheme's trustees not to issue a contribution demand for €129.2 million and instead accept an offer of €37.1 million from the scheme's contributor. The Court considered, at para. 3.1, that once trustees had acted honestly and in good faith, taking into account all relevant considerations and excluding irrelevant ones, the appropriate standard for review of their decisions is whether no reasonable body of trustees could have come to the same decision. Charleton J. cautioned at para. 3.0 against the simple substitution of the trustees' view with the court's view, and stated that the court must take the perspective of the trustees, in a similar fashion to the taking of the testator's perspective in applying the armchair principle, in order to evaluate their decision.

35. Set against this standard of review, the decision of the trustees to issue a contribution demand on 7 December, 2012, does not appear to be one which no reasonable body of trustees would have made. The apparent concessions by the defendants' expert witnesses in cross examination in particular point to this being the case.

36. In terms of the computation method, Mr. Holloway, one of the trustees and the first named plaintiff, and Mr. Whyms, the Scheme actuary, testified that they sought to identify a reasonable basis of valuation which would provide the benefits to the members of the Scheme. In the course of their discussion, they moved away from an amount they believed would represent an excessive level of contribution from the employer. They sought to gauge reasonability effectively in a vacuum, where the employer gave no input, much less made the detailed submissions on the adequacy of the MFS and detailed analysis of the chosen computation method given in these proceedings. Leaving to one side an actuarial analysis of the computation method, the trustees appear to have been acting in good faith in pursuit of what they believed to be the best interests of the members of the Scheme, in accordance with their fiduciary responsibilities. In the circumstances, given my interpretation of the relevant documentation and assessment of all that transpired between the parties, or indeed, on the defendants' side did not transpire, I am satisfied that the Plaintiffs are entitled to succeed in their claim in the discounted sum of €2.23 million.

37. While I shall of course hear the parties on any aspect of costs that may be raised, it would appear that the ordinary principle of costs following the event should apply *a fortiori* in light of Mr. MacCann's concession in closing submission of the plaintiffs' entitlement in that regard in any event.