[2005] IEHC 118

THE HIGH COURT

[2003/565 SP]

IN THE MATTER OF THE RETIREMENT BENEFITS SCHEME KNOWN VARIOUSLY AS IRISH EXPRESS CARGO AND ASSOCIATED COMPANY RETIREMENT BENEFIT SCHEME, IRISH EXPRESS CARGO AND ASSOCIATED COMPANY RETIREMENT BENEFITS (No. 2) SCHEME AND IRISH EXPRESS CARGO AND ASSOCIATED COMPANY RETIREMENT BENEFITS STAFF SCHEME

BETWEEN

ANGELA O'MAHONY, COLM WILLIS, FRANCIS KELLY, JOHN DEVINE, PAULINE SHERRARD, MIRIAM COLLINS, HARRY WILLIS, GAY KEANE, ANGELA BALL, MAI MULHOLLAND, JOHN KEANEY, MATTHEW DUNNE, THOMAS MACNAMEE, THOMAS CLANCY, TONY KELLY, NOLEEN KIERAN, DECLAN COYNE, ANTHONY DUFFY, PAUL MOORE, BARRY PENDER, DECLAN POWER, JAMES O'NEILL, MICHAEL C. BRIAN, PAUL CONNERTY, DIANA SHEEHAN, KEVIN NOONAN, ROISIN KAVANAGH, NOREEN ROBINSON AND LIAM STAUNTON

PLAINTIFFS

AND

FERGUS McNAMARA, JOHN TYLER, DEIRDRE GIBLIN AND GAVIN MURRAY

DEFENDANTS

Judgment of Carroll J. delivered on the 16th day of March, 2005.

1. This application brought on a special summons claims an order for disclosure against the trustees of the Retirement Benefit Scheme for the employees of Irish Express Cargo Limited (I.E.Cargo) concerning the scheme.

2. In the 1980s to the mid-1990s a defined benefit scheme existed which conferred 1/80th of final salary for each employee for each employed year. It was non-contributory to start but by mid-1980 each employee contributed 4% of salary each year and I.E. Cargo, the employer, made up the rest.

3. In late 1994/1995 a letter from the trustees of the scheme stated that due to obligations under the Pensions Act, 1990 there would be significant amendments for staff. The employees were told a separate staff scheme would be set up. Prior to that staff and management were together. The staff were going to be hived off the original scheme and there would be a change from a defined benefit scheme to a defined contribution scheme. This meant that the members instead of getting a pension based on salary would get whatever benefit could be purchased with the contributions accumulated over the years. This was less attractive as no-one knew how much each person would end up with.

4. The new scheme was set up for staff members, funded mainly by payment from the original scheme. An interim trust deed dated 25th January, 1995 was drawn up and a definitive trust deed and rules were executed on 21st September, 1995.

5. The original scheme continued for the management and directors for a number of years as a defined benefit scheme but then it was converted to a defined contribution scheme. There was an appeal to the Pensions Board which concluded the conversion was valid. This decision was not appealed.

6. The plaintiffs, having sought legal advice, have been told by their legal advisers to get information about the staff scheme. They want access to all trust documents back to the establishment of the staff scheme. The documents set out in the summons are as follows:

a) the trust deed of the scheme insofar as the scheme is constituted by such a deed;

b) the contents of any document constituting the scheme where the scheme is not constituted by a trust deed;

c) the contents of the rules of the scheme;

d) the contents of any document which amends or supplements or wholly or partly supersedes the document the contents of which fall to be furnished under paragraphs a, b and c above;

e) reports or other documents prepared by Paul McNamee and/or Buck Consultants or any other person regarding the purported transfer of the staff element of the original scheme into a separate defined contribution scheme while maintaining the original scheme as a defined benefit scheme for executives and in particular reports and other documents.

(i) reviewing the original transfer calculations in 1995

(ii) commenting on both the calculations and methodology involved.

7. Seven of the plaintiffs wrote on 13th September, 2001 to Mr. Derek McNamee of Buck Consultants concerning the pension scheme as follows:

"Dear Mr. McNamee,

We have serious concerns in relation to our pension fund. A number of concerned staff members have raised the following questions and have asked me to present them to you:

· 1977 – 1984 non-contributory pension scheme. Can you advise the value of the fund during this period?

· 1984 – 1995 what monies did the company pay into the fund on members' behalf? What was the value of the fund at year end 1995? How was the fund invested, to include property/facility/private borrowings?

· The pension fund was divided into two schemes in 1995. Can you advise –

(i) the amount in the fund,

(ii) the basis on which the monies were allocated

(iii) how many members were attached to each scheme and the benefits attached to each.

· What rule of calculation was used to assess the pension to each individual, across the board?

· What monies/pensions were paid out of the fund and to whom. How did the sum paid equate to the individual's contributions and service?

· Can you advise yearly returns for 1984 to 1995?

· What instructions were given to the actuary prior to the split of the pension fund in 1995 and can you advise his company name and address?

· What fees were paid to the administrators and did the members pay for this service?

· P.H.I. Any members currently under this scheme, will they be covered up to pensionable age (65)?

· Can you advise the present state of the pension fund and will irregularities, if any, be made good by Flextronics and when?

Yours sincerely,

etc."

8. Mr. McNamee replied on 12th December, 2001 on behalf of Buck Consultants as follows:

"To the Trustees of the Irish Express Cargo Limited and associated staff retirement benefit scheme (the 'staff scheme').

The Irish Express Cargo Limited Pension and Life Assurance Scheme (the 'original scheme')

Dear Trustees,

Information requested by members of the staff scheme

This letter has been prepared for the trustees of the above named pension schemes (the trustees) to provide the information which has been requested by certain members of the staff scheme in relation to the past administration and management of the schemes.

This information was requested in a letter addressed to me by seven members of the staff scheme who had previously been included in the original scheme and who transferred to the staff scheme in 1995. The information requested relates mainly to the management of the original scheme prior to 1995 and in particular to the apportionment of the original scheme in 1995.

For completeness, all of the questions asked by the members are listed in this letter in the order in which they were raised. However, some of the information requested goes back many years and is not available to me at present. This information has been requested from the previous advisors and will be provided to members as soon as it has been received.

(1) What was the value of the non-contributory pension fund during the period 1977/1984?

This information is not currently available to me and has been requested from the previous advisors.

(2) What monies did the company pay in to the fund on the members' behalf during the period 1984 to 1995? What was the value of the fund at year end 1995? How was the fund invested, including properties, facilities, private borrowings?

The audited accounts indicate that the company paid contributions at the rate of 4% of basic salaries in the years 1990 to 1995 inclusive, except in 1991 when the company paid 3% of basic salaries.

I understand that the company also paid the cost of insuring death-in-service and disability benefits and the cost of administering the original scheme. I have requested copies of the audited accounts for the period prior to 1990 in order to determine the contribution rates paid by the company during that period.

The audited accounts for the original scheme for 1994 and 1995 show that the value and distribution of the assets of the original scheme at 31st December, 1994 (the effective date of the apportionment) and 31st December, 1995 were as follows:

Asset Category.	**31.12.94.**	**31.12.95**
	IR£000s	**IR£000s**
Irish Exempt Property Unit Trust	204	216
Exempt Unit Trust – International Fund	1101	1334
Equities	529	588
Government Fixed Interest Securities	465	489
Non Irish Fixed Interest Securities	20	20

Government Indexed Linked Securities	46	62
Unit Trust – Liquidity fund	1331	34
Unit Trust – Managed Fund	-	22
Bank Balances	439	1022
Loans to Company	258	-
Other Loans	242	242
Freehold Property	259	259
Sundry current assets/liabilities	16	11
Total Assets	**4964**	**4229**

The asset value as at 31st December, 1994 is prior to making the transfer to the staff scheme and the asset value as at 31st December, 1995 is after making the said transfer.

The notes to the accounts indicate that the 'freehold property' valued at £259,000 was leased to the company. The notes also indicate that the 'other loans' were loans to members of the original scheme. The members concerned were charged interest on these loans at rates between 8% and 8.5% per annum. These loans were subsequently repaid in full.

(ii) The amounts allocated to those within ten years of their normal retirement age (eleven individuals in total) were enhanced by a total amount of £37,000. I am not aware of the exact formula used to calculate these enhancements.

After allowing for these adjustments the total transfer payment calculated as at 31st December, 1994 was IR£1,200,427.00.

The transfer payment to the staff scheme was actually made on 1st December, 1995 (i.e. eleven months after the effective apportionment date). The amount allocated to transferring staff members was increased by 5% in respect of the period from 1st January, 1995 to 1st December, 1995, giving a final transfer payment of IR£1,260,654.00. This amount is confirmed by the audited accounts for the original scheme in respect of 1995.

(4) What rule of calculation was used to assess the pension to each individual across the board?

The basis used to calculate each member's transfer value was as described in the answer to question (3) above.

(5) What monies/pensions were paid out of the fund and to whom? How did the sum paid equate to the individual's contributions and service?

The answer to question (3) above shows the amounts paid out of the fund to the various membership categories and the relationship of the transfer payments with members' contributions and service.

(6) What were the yearly returns for the years 1984/1995?

Returns for the years 1989 to 1995 inclusive derived from the audited accounts are as follows:

Year	**Overall return**
1989	27.3%
1990	4.2%
1991	8.4%
1992	6.7%
1993	33%
1994	0.1%
1995	11.6%

(7) What instructions were given to the actuary prior to the split in the pension fund in 1995 and what was his company's name and address?

I have been unable to ascertain the precise instructions given to the then actuary of the original scheme prior to the split of the fund in 1995. The actuary concerned was Mr. A. Roberts of 17 The Lawns, Southport, PR9 9NS, England.

(8) What fees were paid to the administrators and did the members pay for this service?

I have been advised that all administration fees were paid by the company and this is confirmed by the audited accounts.

(9) Will any member currently under the P.H.I. scheme be covered up to pensionable age (65)?

P.H.I. benefits are payable until a member's 60th birthday (see page 18 of the members' explanatory booklet) however, under a previous arrangement P.H.I. benefits were payable until age 65 and a small number of members who commenced to receive disability benefits under that arrangement will continue to receive benefit until age 65 (subject to the policy conditions).

(10) Can you advise the present state of the pension fund and will irregularity, if any, be made good by Flextronics and when?

The staff members of the original scheme transferred to the staff scheme in 1995 and their transfer payments were invested in their personal accounts under the staff scheme. I am not aware of any irregularities or issues of concern regarding the administration or management of the staff scheme from its establishment to the present date.

As mentioned earlier, I have requested additional information from the previous advisors in order to complete the above responses and will report further when this information is to hand."

9. Following correspondence with the Pensions Board one of the plaintiffs, Mr. Liam Staunton, received a letter dated 22nd March, 2002 from the Pensions Board as follows:

"Dear Mr. Staunton,

Re: Irish Express Cargo Limited and associated company staff retirement benefit scheme.

I refer to previous correspondence regarding the above scheme and in particular to your letter of 15th February, 2002.

The issue of the transfer value calculation in 1995 was discussed at the most recent trustee meeting and Derek McNamee has been asked to review the original transfer calculations in 1995 and to comment both on the calculation and the methodology used. I believe that this is a positive development that will hopefully address the concerns of yourself and the other members on this issue. I trust this is in order. If you have any further queries please do not hesitate to contact me.

Gerry Moriarty

Head of Investigations and Compliance"

10. Despite a request, Mr. McNamee's report was not made available to the plaintiffs.

11. The defendants claim that the documents listed from (a) to (d) in the endorsement of claim are the statutory requirements and the plaintiffs have already been provided with these documents. In addition the defendants provided copies of four deeds of removal and appointment of trustees dated 16th May, 2001, 6th September, 2001, 12th October, 2001 and 5th March, 2002.

12. With regard to the documents sought at paragraph (e) the defendants claim that they are not covered by the statutory requirements. They were prepared by Buck Consultants on behalf of the company and/or the trustees of the original scheme and not the trustees of the staff scheme and related to the apportionment of the fund of the original scheme. Buck Consultants, the actuaries appointed in respect of both schemes, produced three reports relating to the apportionment of the original scheme as at 1st January, 1995. The first report of Buck Consultants was produced before and in contemplation of legal proceedings brought by the company and its US parent company, Flextronics International Inc. and the trustees of the original scheme against the former shareholders and owners of the company, namely Fineen O'Sullivan, Gerard Tyrrell, Margaret Metcalf, Thomas Walsh and Emmet Brady. Those proceedings (the expert proceedings) were brought before an expert pursuant to the terms of a contractual agreement between the parties and were ultimately settled in May, 2003. The second report of Buck Consultants was prepared during the expert proceedings and the third report of Buck Consultants since the expert proceedings concluded in May, 2003. The defendants claim that the plaintiffs are not entitled to such documents as they were requested by parties other than the defendants, namely the trustees of the original scheme and/or the company. They were provided by Buck Consultants accordingly and they relate to matters concerning the original scheme per se and not the staff scheme. The defendants claim the documents prepared for the purpose of the expert proceedings are the subject of a claim to legal professional privilege and the defendants, as the current trustees of the staff scheme, do not have these documents in their possession and have no entitlement to require their production by the company and/or the trustees of the executive scheme.

13. What is not disclosed in the affidavit filed on behalf of the defendants is the fact that three of the trustees of the staff scheme are also trustees of the original scheme. This was only disclosed in answer to a direct question from the bench. The defendants also claim that whether or not any further information is provided to them from Buck Consultants as staff scheme trustees would in turn be made available by them to the staff scheme members would remain a matter for them to decide as the staff scheme trustees. In any event, the defendants claim no further information was provided to them.

14. At the conclusion of the defendants' replying affidavit they say they are assisting in the application of an additional payment of €1,750,000 which the company has agreed to provide to augment the transfer payments made in respect of relevant former members of the original scheme who transferred to the staff scheme with effect from 1st January, 1995. This figure had been arrived at following a recommendation by Buck Consultants. In this regard the benefit augmentations relate to the difference between a leaving service transfer value of 156% and the amount which a relevant member actually received, plus the investment return on such difference up to 17th November, 2003. Buck Consultants considered this to be a fair basis of assessing what relevant members should have received at the time they transferred from the original scheme to the staff scheme in 1995. The augmentations will be made by the defendants as the trustees of the staff scheme at the request ultimately of the company and with funds provided by the company. The defendants consider that these benefit augmentations address on a fair and equitable basis what the relevant employees, including the relevant plaintiffs, ought to have received when they transferred from the original scheme to the staff scheme in 1995.

15. It appears to me that three defendants may well have a conflict of interest between their roles as trustees of the original scheme and trustees of the staff scheme.

16. The methodology and calculation of the proportion of the assets of the original scheme to be transferred to the staff scheme must have been flawed since an additional payment of over one and three-quarter million euro is now to be paid. The plaintiffs have been furnished with no information as to how this miscalculation arose. I do not see how the trustees of the staff scheme can say they are satisfied that the "augmentations" are fair and equitable if they do not have Buck Consultants' report and can judge if the methodology and calculations stand up to examination.

17. The law relating to a beneficiary's right to information is dealt with in a recent case, *Schmidt v. Rosewood Trust Limited* [2003] 3 All E.R. 76, in which it was held that it was fundamental to the law of trusts that the court has jurisdiction to supervise and if appropriate intervene in the administration of a trust. The right to seek disclosure of trust documents was one aspect of the court's inherent jurisdiction to supervise and if necessary to intervene. The court may have to balance the competing interests of beneficiaries, the trustees themselves and third parties.

18. In my opinion the plaintiffs are entitled to the information they seek in relation to the original transfer calculations and methodology used in 1995 and also the methodology and calculations used to ascertain the amount which now is to be paid into the staff scheme. If the defendants do not have this information they should obtain it. The third report of Derek McNamee is not affected by legal privilege and if the defendants do not have a copy, they should obtain one. The defendants require this information in any event so that they can be satisfied that no mistake is made in the calculations this time round.

19. The plaintiffs, therefore, are entitled to an order requiring the defendants to give them information relating to the methodology and calculation of the transfer in 1995 and the methodology used in calculating the proposed transfer to the staff scheme.