Neutral Citation Number: [2012] IEHC 513

THE HIGH COURT

[2011 No. 1864 P.]

BETWEEN

PAUL RYAN

PLAINTIFF/RESPONDENT

AND

SOUTH EASTERN CATTLE BREEDERS SOCIETY LIMITED

FIRST NAMED DEFENDANT

AND

GER RYAN, TOM NOLAN, ANNE MURRAY, ROGER KENNEDY,

TOM HEFFERNAN AND PADRAIG COLLINS

SECOND NAMED DEFENDANTS/APPLICANTS

JUDGMENT of Mr. Justice Roderick Murphy dated the 7th day of November 2012

1. Motion

The second to the seventh named defendants, ("the trustees") are the trustees of a Defined Benefit Pension Scheme constituted by Trust Deed made the 20th February, 2007, which was supplemental to a first deed of the 9th September, 1975, and to Trustees Resolutions and Definitive Deed of the 20th December, 1993.

By notice of motion dated the 10th May, 2012, the trustees applied for an order dismissing the within proceedings pursuant to O. 19, r. 28, that the plaintiff proceedings disclosed no reasonable cause of action and were frivolous and vexatious.

The plaintiff had unsuccessfully applied to the trustees for early retirement benefit on the grounds of ill health, and sought declarations that the trustees were, *inter alia*, obliged to fund the plaintiff's pension.

In the alternative the trustees sought an order pursuant to the inherent jurisdiction of the court dismissing the proceedings as against them on the grounds that they were bound to fail.

In the further alternative orders were sought that paras. 9 to 44 (excluding paras. 12, 18, 21, 22, 26, 28 and 30 to 34) of the statement of claim be dismissed on the grounds that they amounted to recitals of evidence and were not proper pleadings.

2. Grounding Affidavit

The affidavit of Roger Kennedy, the fifth named defendant and chairman of the trustees of the South Eastern Cattle Breeders Society Limited Retirement and Death Benefits Plan (hereinafter called "the Pension Scheme") referred to the two claims against the trustee defendants:

> (a) That the trustees acted in breach of trust by refusing the plaintiff's application for an ill-health pension under the first named defendant's Pension Scheme and
>
> (b) That the trustees were guilty of breach of contract, misrepresentation, breach of warranty, conspiracy and breach of duty, in relation to their administration of the Pension Scheme.

Mr. Kennedy averred that on the date the plaintiff made the said claim, the Pension Scheme was wholly insolvent and unable to meet its obligations to existing pensioners. He averred that it was conceded by the plaintiff that his application for ill-health early retirement was not made until after the decision was taken by the trustees to wind up the Pension Scheme. In such circumstances, the trustees were statutorily obliged to protect the interests of the members of the Scheme who were currently in receipt of pensions.

Any decision by the trustees to pay an ill-health early retirement out of an insolvent scheme being wound up would have been invalid having regard to the provisions of s. 59(g) of the Pensions Act 1990, (as amended). In the statement of claim the plaintiff conceded that his application for ill-health early retirement was not made until after the decision was taken to wind up the Pension Scheme. Accordingly, Mr. Kennedy deposed, the trustees were statutorily obliged to protect the interests of the members of the Scheme who were currently in receipt of pensions.

The plaintiff's daughter had applied on his behalf to the Pensions Ombudsman for a determination of his rights. The Ombudsman, by letter dated the 20th May, 2010, to his daughter said:-

> "In the light of the circumstances, the trustees could not consider an application for early retirement for your father, because that would simply dilute the amount available for pensioners who had already retired and, in trust law, they would not be allowed to do that,"

Mr. Kennedy said that decision of the Ombudsman amounted to a binding adjudication in relation to the plaintiff's claim against the defendants insofar as the issue of ill-health retirement was concerned.

The second part of the plaintiff's claim was concerned with the administration by the trustees of the Pension Scheme. In this regard Mr. Kennedy referred to a letter from the company secretary of the employer, the first named defendant, to him in his capacity as chairman of the trustees of the Pension Scheme, notifying the trustees that the company would cease making contributions to the

Pension Scheme with effect from the 26th September, 2009.

By letter dated the 3rd September, 2009, he had asked the employer to look favourably upon the trustees request to fund the deficit between the assets and liabilities of the Pension Scheme prior to its being wound up. The employer replied on the 17th September, 2009, saying it would not do so.

He said that the insolvency of the Scheme was not caused by any wrongdoing on the part of the trustees. There was no pleaded basis in fact or law for the allegations to that effect in the statement of claim. The plaintiff's claim (if he has any claim at all) was against his employer, the first named defendant.

3. Replying Affidavit of Carol Fawsitt
Ms. Fawsitt, solicitor for the respondent/plaintiff said that no communication was received from the trustees in relation to the motion until it was served on the 14th May, 2012.

She said the trustees had delayed for an excessive length to time in bringing the motion as the statement to claim was delivered on the 3rd August, 2011. The first named defendant's notice for particulars was delivered on the 23rd April, 2012, followed by a letter of the 20th April, demanding the trustees defence.

The grounding affidavit failed to mention what was pleaded at paras. 8(1) (2) and para. 46 of the statement of claim which provides as follows:-

> "8. The second to the seventh named defendants, their servants or agents owed fiduciary and/or contractual duties and obligations to the plaintiff which included the following:
>
> (1) The defendant would apply fair procedures in their fiduciary duty in all of their dealings with the plaintiff;
>
> (2) The defendant would act in good faith.
>
> The second to seventh named defendants were in breach of their fiduciary duty and obligations as trustees of the Scheme and/or were in breach of warranty. The second to seventh named defendants failed to discharge the duty of care owed to the plaintiff and in conjunction with the first named defendant and its representatives on the board of trustees there was failure to adequately preserve the Pension Fund and had failed to enable the plaintiff to benefit from the contributions he made and to ensure that adequate contributions were made by the first named defendant as were contemplated under the terms of the Scheme, and further that they excluded the plaintiff from being admitted as being admitted as a beneficiary under the Scheme on spurious grounds and without proper or adequate consideration of his condition of Parkinson's disease."

It was contended that the averment in the grounding affidavit should properly have been pleaded by way of a defence and be subject to the plaintiff's seeking particulars.

As had been pleaded in para. 16 of the grounding affidavit, the plaintiff was aware that there had been a vote by the members of the Pension Scheme to wind up the Pension Scheme and that his application for ill-health early retirement was made after that decision. However, there was no provision whereby a vote of the members would bring about a winding up.

> Clause 20 of the Trust Deeds is entitled and provides as follows :
>
> "20. Causes of winding up
>
> (a) The Scheme shall be determined and the fund wound up in accordance with Clause 21 hereof upon the happening of any of the following events:
>
> (i) the termination by the principal employer of its liability to contribute to the fund (unless the trustees shall determine that the winding up thereof shall be deferred);
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> (ii) the failure by the Principal Employer at any time to pay to the Trustees any sum or sums due under the Rules on or within thirty days or such extended period as the trustees may allow after the date on which the trustees may have required the same to be paid or any failure by the Principal Employer to observe and perform any other of its obligations hereunder or in the rules or in any deed or agreement supplemental hereto (unless the trustees shall determine that the winding-up thereof shall be deferred);
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> (iii) the exercise by the trustees of the power to wind up the Fund conferred on them in certain events by Clause 19 hereof;
>
> (iv) the trustees deciding to wind up the Fund at any time after it would have been wound up under any one of subparas. (i), (ii), and (iii) of this sub-Clause but for a decision by the trustees that such winding-up shall be deferred; and
>
> (v) the trustees deciding to wind up the Fund at any time after they might have exercised the power to wind up the same conferred on them in certain events by Clause 19 hereof.
>
> (b) Upon the Scheme being determined the liability of the Employers to contribute thereto shall terminate but without prejudice to the liability of the Employers for payment of any contribution then payable or accrued and the Fund shall be held upon the trusts declared by the next following Clause."

Clause 21 deals with the application of the Fund by the trustees on winding up. The third Schedule to the Clause refers to the categories in the Pensions Act. That Schedule provides for a funding standard and benefits. Part IV of the Act applies to any scheme other than a defined contribution scheme and public sector schemes and requires the trustees to an actuarial funding certificate to the Pensions Board under s. 2, every three and a half years.

The deponent was instructed that the plaintiff was unaware of any decision by the trustees to wind up the Scheme at the time he applied to them.

The plaintiff pleaded in paras. 18 to 20 of the statement of claim that he made his application for ill-health early retirement pension on the basis of representation by Dr. Ger Ryan who was a member of the board of the trustees as well as being general manager of the employer. The plaintiff was informed that he was in time. By letter dated the 17th July, 2009, he was informed that his application for the ill health pension was unsuccessful. No reasons were given. He was then informed on the 10th August, 2009, that the wind up process had commenced. He appealed the trustees' decision, which appal was heard by the same trustees. The trustees had requested his medical records dated the 21st August, 2009. On the 21st September, 2009, he was informed that his appeal was unsuccessful. No reasons were given. Deductions in respect of pension contributions were taken from his salary up until and including the 25th September, 2009. He learned that the commencement date of the wind up was the 26th September, 2009.

Reference was made to the assertions by Mr. Kennedy that the trustees were statutorily obliged to protect the interests of the current pensioners in priority too the plaintiff's claim. No evidence was furnished to establish the insolvency of the Scheme or its distribution in winding up.

The replying affidavit made reference to the Ombudsman's letter of the 20th May, 2010, and says that the citations by Mr. Kennedy were highly selective and omitted references which were critical of both the employer and the trustees and raised a number of serious questions relating to the plaintiff's claims.

The assertion that the decision of the Ombudsman was a binding adjudication had no basis in law. The letter did not state that it was a binding adjudication.

The affidavit averred that the plaintiff had pleaded that the trustees had failed, refused and neglected to perform their duties in conformity of the terms of the Trust Deed.

The Ombudsman had said that he did not know why the Scheme had become so insolvent, because "the state of insolvency was such that it must have been known to the employer and the trustees for quite a long time, even before the catastrophic falls in asset values which have occurred in the last few years".

There were serious issues which the plaintiff was entitled to be adjudicated upon at a hearing of the proceedings.

Moreover, four members of the board of trustees were involved in varying ways with the employer and the deponent believed that there was a close association between the defendants and that they were acting in concert.

The plaintiff had contributed to the Pension Scheme for over 41 years and had suffered considerable financial loss. There were no grounds on which it could, in any reasonableness, be suggested that the proceedings were frivolous and/or vexatious.

The alternative application to have some of the matters pleaded dismissed on the grounds that they amounted to recitals of evidence was opposed as there were material facts necessary to define the issues between the parties. Discovery would be necessary. The trustees had not responded to the proceedings and failed to address the central elements of the plaintiff's claim.

4. Supplemental affidavit of Roger Kennedy
Mr. Kennedy did not accept that the trustees were guilty of any culpable delay in the bringing of the application. There was no prejudice by the timing of the application and it was in all the parties' interest to determine whether or not the plaintiff had a *prima facie* case against the trustees to avoid unnecessary expenditure of costs by both sides.

He said that the averments made did not give rise to any cause of action against the trustees. The suggestion that the plaintiff did not believe or accept that the Scheme was insolvent was not borne out by the plaintiff when he attended a meeting in June 2009, where the extent of the deficit of the Scheme was outlined to staff. He said the plaintiff lent support to the proposal to cease making contributions to the Scheme. Moreover, the plaintiff alleged in the statement of claim that the Scheme was insolvent.

The notice to cease contributions was served by the employer on the 26th June, 2009, and clause 20(a)(i) of the Trust Deed of the 20th February, 2007 applied. That, as already referred to above, provided that the Scheme "shall be determined and the fund wound up in accordance with clause 21 hereof upon the happening of any one of the following events:-

> "(i) The termination by the principal employer of its liability to contribute to the fund (unless the trustees shall determine that the winding up thereof shall be deferred)"

The trustees then wrote to the employer requesting that they make good the deficit in the Scheme which the employer refused. The trustees then formally issued a resolution to wind up. The trustees were obliged to protect the interests of the members of the Scheme who are currently in receipt of the pensions and irrespective of what might have been said to the plaintiff, the trustees could not agree to pay the plaintiff an ill-health pension.

Mr. Kennedy asserted that the decision of the Ombudsman on the plaintiff's compliant was a binding adjudication. He submitted that that was clearly a matter of law.

The repeated allegation that the deficit of the Scheme was caused by the mismanagement or other actionable breach by the trustees had no basis, other than the fact that the Scheme was insolvent. The deficit was not caused by any wrongdoing on the part of the trustees.

5. Entitlement of Members
The entitlements of an employee as a member to benefit from the Trust Fund are subject to the provisions of the Pensions Act 1990, to the Trust Deed and rules and to the general law relating to trustees.

A pension is a form of deferred remuneration which increases in value with each year of service completed. The funding of such Schemes is critical and determining factors in relation to benefits.

Deferred remuneration, current or "Pay- As-You-Go" may have been appropriate in a period of low inflation and relatively low wages, where an employer could pay future pensions out of resources then available. This, of course, assumed that the employer was solvent and still a going concern at the time and subsequent to the retirement of employees.

Even if solvent and a going concern the employer might experience cash flow problems and be unable to meet the costs of the deferred remuneration on a consistent basis.

This led to the practice whereby employers funded future costs of pensions in advance, by way of reserves or by the use of a trust.

The development of pension schemes is, of course, facilitated by tax relief accorded to schemes approved by the Revenue Commissioners whereby payments from the employer's profits before taxation is made into the pension scheme or fund together with employees contributions with the approval of the Revenue Commissioners.

Until the Pensions Act 1990, there is no legal requirement for an actuarial evaluation to be prepared. The National Pensions Board, in its first report in 1987, recommended that pension's legislation be introduced to require defined benefit schemes to maintain, at the very least, a specific minimum – funding position referred to as the minimum – funding standard. (See Finucane, Buggy and Tighe: *Irish Pensions Law and Practice*, 2nd Ed. at pp. 9 to 33) This was one of the main features introduced by the Pension Act 1990, which is contained in Part IV and in the third Schedule of the Act.

However, it was always a Revenue requirement for approved Schemes in particular where the Scheme was a small self administered Scheme.

6. Employee Protection under Insolvency
It is common practice for the Trust Deed constituting a pension scheme to provide for the winding up of the Scheme on the insolvency of the employer. As appears in the present Scheme the non payment by the employer is a cause of winding up under clause 20(a)(i).

In the event of liquidation or receivership of an insolvent employer any unpaid pension contributions are preferential debt under s. 285 of the Companies Act 1963, as amended by s. 10 of the Companies (Amendment) Act 1982, s. 134 of the Companies Act 1990 and s. 37 of the Social Welfare Act 1991, in relation to liquidation and s. 98 of the Companies Act 1963, in relation to receivership.

If an employer becomes insolvent, employees are unsecured creditors and may have little prospect of enforcing the employer to make payment into the fund.

It is clear that the employer and not the trustees have a continual obligation to fund the Scheme.

7. The obligation of trustees regarding adequate funding.
Section 42 of the Pensions Act 1990 provides that the trustees of a defined benefit scheme shall, from time to time in accordance with s. 43, submit to the Pensions Board an actuarial funding certificate calculating the liabilities and resources of the Scheme. Where such certificate does not meet the funding standard set out in the Pensions Act, the trustees are required to submit a funding proposal to the Pensions Board.

The Trust Deed of the Pension Scheme exhibited and referred to in the grounding and replying affidavits was made on the 20th February, 2007, between the first named defendant and sixth trustees which, then, included the fourth and fifth defendants.

Clause 3, deals with trustee's functions and decisions and provides that the trustees should hold the fund upon the trusts subject to the powers of the Deed and the rules. The general powers and actions by trustees are provided for in Clauses 7 and 8 of the Deed.

Clause 9, requires the trustees to keep such accounts, entries, registers and records as are necessary for the proper working of the scheme and, if they think fit or they are so required under the Pensions Act, shall cause the same to be audited, inspected or investigated and a report prepared thereon in accordance with the requirements of the Pension Act by the auditor. It further provides for in s. 42 above referred to, a valuation by an actuary at intervals of not more than three years initially and three and half years subsequently.

There are provisions at Clause 12(a) that no trustee shall be responsible, chargeable or liable in any matter whatsoever in respect of any loss of or any depreciation in or default upon any of the investments etc. Furthermore at Clause 12(c) the trustees are indemnified by the employers jointly and severally against all liabilities incurred by the trustees in the execution of the trusts and in the management and administration of the scheme and of the fund (other than liabilities arising as a consequence of fraud or deliberate and culpable disregard of the interests of any person entitled or prospectively entitled to a benefit under the scheme . . .). To the extent that the employers failed to indemnify the trustees, they are indemnified out of the fund.

The Deed provides for three months notice of the employer terminating its liability to contribute to the fund.

The employers as, "participator" have obligations which are binding upon them and they are required to be performed by them in relation to the employees so long as they remain members of the scheme. The participation of a participator shall cease upon the happening of one or more of the certain events at Clause 22(b) including the expiry of the notice given to the trustees under Clause 18. The court notes that Clause 26 of the Deed provides for arbitration where the trustees and the employers so decide.

The rules of the Scheme contained in Schedule I, which is applicable to all the members of the scheme, defines the actuary, the auditor, the Fund and member contributions among other definitions.

While the normal retirement age is defined as meaning the 65th birthday of a member, there would appear to be no provision for ill health retirement other than rule 5 which deals with benefits and early retirement on or after the age of 50.

The plaintiff's claim in this case is that, given the number of year's contribution to the scheme as referred to in the grounding affidavit, that he should be entitled to a pension under rule 5.

In such a case the member is entitled to receive as from the date of retirement an immediate pension resulting from the application of the formula in rule 4(a)(i) which are contained in Schedules II, III or IV. Schedule II applies to all members other than AI field staff members. Schedule IV is applicable to AI staff members.

It would appear, accordingly, that Schedule II applies in the present case. Rule 3 provides that contributions at the rate of 7.5% of pensionable salary are made by each member which percentage is deducted from salary by the employer and paid to the trustees. The employers shall pay to the trustees the sum or sums determined by a certificate in writing of the actuary payable as stated in the certificate.

Section 59(G) of the Pension Act 1990 as substituted by s. 42 of the Pensions (Amendment)Act 2002, and s. 43 which amended section 59 to 59D, E, and F were further amended by s. 31(e) of the Social Welfare and Pensions Act, 2005. The paragraph reads:-

> "59G. In the case of a defined benefit scheme the rules of which include an early retirement rule, notwithstanding the terms of that rule, if the actuary advises the trustees that he is reasonably satisfied that, if the actuary were to prepare an actuarial funding certificate under s. 42 having an effective date of the day on which any member's immediate retirement benefit by virtue of that early retirement rule is expected to commence, the actuary would not certify that the scheme satisfies the funding standard provided for in s. 44, the member's right to the immediate retirement benefit by virtue of that early retirement rule is subject to the consent of the trustees of the scheme."

The paragraph of that section provides that if a scheme does not satisfy the funding standards, it may have a consequential impact on early retirements within the scheme. The provision is that the trustees of the scheme may refuse to allow early retirement notwithstanding that they may have no power under the rules to do so. Trustees are entitled to protect the benefits of other members of the Scheme.

The court notes the provision in the rules, and in particular rule 5, in relation to the benefits in early retirement which states that subject to Revenue approval of the Scheme not being prejudiced (and with the consent of the trustees so provided in the Pensions Act) a member may retire on or after the age of 50 in which event he shall be entitled to receive from the date of retirement certain benefits based on pensionable service to the date of retirement being reduced by such amount as the Trustees on the advice of the actuary decided to reflect early payment.

Rule 5(b) provides that a member may (with the consent of the trustees if so provided in the Pension Act) retire at any time prior to normal retirement date on the grounds of ill health or disability, (which must be proved to the satisfaction of the Trustees) in which event he should be entitled to receive, as from the date of retirement, a pension based on analogous provisions and subject to provisos.

Section 28(2) provides that where a member of the Scheme, who serves relevant employment terminates otherwise than on death after the commencement of this part but before normal pensionable age and who has completed at least five years qualifying service of which at least two years fall after the commencement of this part, shall be entitled to a benefit (in this Act referred to as a 'preserved benefit').

Part A of the second schedule to the Act provides a formula for the calculation of preserved benefits in accordance with the formula A x B over C, where A is the amount of long service benefit calculated at the date of termination of the member's relevant employment; B is the period of reckonable service and C is the period of reckonable service that would have been completed if the member had remained in relevant employment until normal pensionable age and such service had continued to qualify for long service benefit.

8. Employers' obligations
The employers' have an obligation to make what the Revenue Commissioners term a "meaningful contribution" to an approved or exempt approved Scheme. Finnucane *et al: Irish Pensions Law and Practice* at pp. 6 to 43 distinguishes between obligations of employers to make contributions at least monthly to a *defined contribution scheme* while the timing of contributions is largely a matter for the employer for a *defined benefit scheme*.

Finnucane *et al*, stated that the main restrictions are the requirement to make "meaningful" contributions and the requirement that overall revenue benefit limits on retirement are not likely to be exceeded. The Commissioners do not define what a meaningful contribution is, but it does give some examples. The Revenue Pensions Manual provided defined benefit schemes will satisfy the rule if at normal retirement the employer will have made a meaningful contribution (so defined) over the period of membership of the Scheme to retirement. Contributions are regarded as meaningful by the Commissioners, where an employer bears the cost of establishment, and the ongoing operating costs of the Scheme in addition to meeting the costs of death in service benefits. Alternatively, an employer's contribution of not less than 10% of the total ordinary annual contributions to a Scheme (exclusive of employee voluntary contributions) will always be considered to be meaningful (Para. 4.1 of the Pensions Manual).

9. Case Law
Murphy J. in *Irish Pensions Trust v. First National Bank of Chicago* (Unreported, High Court, 15th February, 1989) held that:-

> "There is no doubt that one of the features of Schemes of this nature is the expertise of the actuaries who determine or advise the premium or contribution which is necessary to pay annually to create and maintain a fund out of which benefits of this nature can be met and discharged over a long period of time and in circumstances which may of course vary radically during that period."

Kelly J. in *Murray v. The Trustees of the Irish Airlines* [2007] 2 I.L.R.M. 196, decision of the 25th January, 2007, referred to the role of the pensions Ombudsman.

Mr. Murray, on retirement after 40 years with Aer Lingus had received a gratuity and pension based on the average of his basic salary in the twelve months up to the date of his retirement. He believed that his retirement benefit should be based on the basic rate of pay applicable on the date of retirement. He did not receive a satisfactory response to his complaint and wrote to the Ombudsman in August 2003, in relation to a 1974 amendment to the relevant trust deed which provided that "final salary" should mean the annual average salary in respect of the previous three years. Under the main Civil Service Superannuation Scheme, this was taken to mean the annual rate to salary that was received at the point to retirement.

The judgment referred to the well publicised policy of the Ombudsman that not every case required an oral hearing and the Ombudsman's communication that it was not intended to hold formal oral hearings which would be restricted to particularly problematic cases where there is doubt about the veracity of the evidence or direct conflict of evidence or the primary facts could not be uncovered or substantiated.

On the basis of information gathered by him, the Ombudsman formed the preliminary view of the matter adverse to Mr. Murray on the 20th January, 2006. The trustees stated that they had nothing further to add to their previous submissions but Mr. Murray, through his solicitors, by letter dated the 30th March, 2006 and again on the 6th April, 2006, made a submission based on additional information before the Ombudsman.

Having examined those submissions the Ombudsman did not find that they contained any additional information, facts or arguments

that swayed him from the preliminary view which he expressed. Accordingly on the 16th June, 2006, the Ombudsman issued a final determination leading to some 15 pages adverse to Mr. Murray's claim. In the appeal before the High Court, commenced on the 3rd July, 2006, against the trustees Mr. Murray issued a notice of motion seeking certain reliefs which were heard on the 16th January, 2007.

Kelly J. made reference to the observations of Lord Bridge in *Thrasyvoulou v. Secretary of State for the Environment and Others* [1990] 2 A.C. 273, where Lord Bridge said:-

> "In relation to adjudication subject to a comprehensive self-contained statutory code, the presumption, in my opinion, must be that where the statute has created a specific jurisdiction for the determination of any issue which establishes the existence of a legal right, the principle of *res judicata* applies to give finality to that determination unless an intention to exclude that principle can properly be inferred as a matter of construction of the relevant statutory provisions."

This statement was accepted as correctly stating the law in this jurisdiction by the Supreme Court in *Ashbourne Holdings Ltd. v. An Bord Pleanála* [2003] I.E.S.C. 18.

Having looked at the statutory code under which the Ombudsman operates, Kelly J. said that it was clear that the relevant statutory provisions contained a self contained statutory code investing the Ombudsman with a wider restriction, powers akin to that of this Court in many respects and the ability to make a binding determination which establishes a legal right capable of enforcement in the manner prescribed by the Act.

He was satisfied that the Pensions Act had established a specific jurisdiction for the determination of issues which established the existence of a legal right and that there cannot be inferred from these provisions an intention to exclude the principle of *res judicata* in respect of such determination.

This is of course, not an appeal against the decision of the Ombudsman. If it were then, in regard to the statutory framework and the judgment of Finnegan P. in *Ulster Bank Investment Funds Limited v. Financial Services Ombudsman* [2006] I.E.H.C. 323, the court, in hearing an appeal under s. 140 of the Act, is confined to the material which is before the Ombudsman.

The court in the *Murray* case was of the view that it would be contrary to the policy of the legislature as being from the relevant statutory provisions that it should be open to a party to avail himself of the statutory machinery but when dissatisfied with the result seek, not merely the exercise of a statutory right of appeal, but also to commence proceedings of a substantive nature which seek to, in effect, set aside the determination of the Ombudsman.

10. Pensions Ombudsman
Pursuant to S.I. No. 397/2003, the Pensions Ombudsman Regulations 2003, provides procedures for the conduct of investigations under s. 131 of the Pensions Act.

Regulation 6(c) provides that upon receiving a copy of the details of a complaint or dispute, the respondent shall reply to the allegations made detailing any matters in which it relies opposing the allegations to the Pensions Ombudsman.

The Pensions Ombudsman is specified for the purposes of section 38(3). That section deals with the conflict between Part 3 (Preservation of Benefits and Minimum Value of Contributory Retirement Benefits) and Schemes. The provisions of the Act and any Regulations and of the second Schedule overrides any rule of a scheme to the extent that the rule conflicts with those provisions.

Moreover, any question as to whether any of the provisions of Part 3 and Regulations conflict with any rules of the scheme or whether a scheme is a defined benefit scheme or defined contributions scheme for the purposes of Part 3 or whether the members service in relevant employment may be treated as terminated for the purpose of Part 3, shall be determined by the Pensions Board on an application in writing by specified persons. Those persons include the trustees of a scheme, any person who is an employer, any member or prospective member of a scheme or such other persons as may be prescribed.

Pursuant to the Pension Ombudsman Regulations, the Ombudsman is such a person who is, in the opinion of the Minister, entitled to make such an application.

It is clear from the Statutory Instrument referred to that the Ombudsman is a person who can refer matters to the Pensions Board. However, it is also clear from the functions of the Pensions Ombudsman outlined under s. 131 of the Principal Act as amended by s. 5 of the Pensions (Amendment) Act 2002, in addition to providing for the independence of the performance of the Ombudsman his role is to "investigate and determine the following complaints and disputes:–

> "(a) a complaint made to him by or on behalf of an actual or potential beneficiary of an occupational pension scheme or PRSA, who alleges that he has sustained financial loss occasioned by an act of maladministration done by or on behalf of a person responsible for the management of that scheme or, as appropriate, PRSA;
>
> (b) any dispute of fact or law that arises in relation to an act done by or on behalf of a person responsible for the management of the scheme or, as appropriate, PRSA, and that is referred to him by or on behalf of the actual or potential beneficiary; and
>
> (c) any other complaint or dispute falling within a category of complaint or dispute prescribed by regulations made by the Minister, after consultations with the Minister for Finance, as a category of complaint or dispute to which this subsection shall apply."

Subsection (7) of the section does not appear to arise in the present case given that the Ombudsman's role appeared to have ended in 2010, before these proceedings were initiated in 2011 from the motion dated the 11th June, 2012. There is no challenge to the jurisdiction of the Ombudsman which, in any event, would be subject to subs. (8) of the section.

The Pensions Ombudsman, pursuant to subs. 9 of the section has such powers as are necessary or incidental for the performance of his functions.

The procedures laid out in s. 132 are those contained in S.I. No. 397/2003, the Pensions Ombudsman Regulations of 2003. There is no issue regarding the compliance with those regulations.

With that background in mind the Ombudsman, on the 20th May, 2010, having referred to previous correspondence and telephone conversations said he had an opportunity to review the situation in detail with regard to the plaintiff's daughter's complaint on his behalf. His letter then states:-

> "Unfortunately, the news is not very good. The Pension Scheme is completely insolvent and the administrator, Mercer, has advised me that there were no circumstances in which the trustees of the scheme actually ever considered properly the application for your father to receive an early retirement pension on the basis of ill health.
>
> I do not know why the scheme had become so insolvent as it did, because the state of insolvency was such that it must have been known to the employer and the trustees for quite a long time, even before the catastrophic falls in the asset values which have occurred in the last few years.
>
> When a discontinuance valuation was done on the scheme, it was found that there was not even enough money in the scheme to cater for pensioners already in payment, who have a first priority on the assets of any scheme and winding up. Consequently, what is now going to happen in relation to the winding up of the scheme is that the existing pensioners will receive pensions in the future which are some fraction of the pensions they were already receiving. None of the deferred beneficiaries (who left the employment with an entitlement to a future benefit) or of the active members (those in employment when the scheme closed) will receive any benefit whatsoever from the scheme."

There has been no challenge to the statement of the Ombudsman in relation to the priority of pensioners already in payment who, in any event, would not receive their full entitlement given the insolvency of the scheme. Nor is it challenged that deferred beneficiaries who had retired but who had not yet received a benefit would not receive any benefit now that the scheme was insolvent. The Ombudsman continued:-

> "In the light of these circumstances, the trustees could not consider any application for early retirement for your father, because that would simply dilute the amount available for the pensioners who had already retired and in trust law they would not be allowed to do that.
>
> I know that the question that sale of some land has been under discussion but this will only serve to slightly increase the amount that is due to existing pensioners, and will not benefit anyone else."

While the Ombudsman does not give any particulars in relation to the value of the sale of land which was under discussion, his conclusion assumes that he is aware of the sale value of such land being under the amount due to existing pensioners. In any event this has not been challenged by the applicant

> "In the circumstances, if your father had been offered a statutory redundancy payment with some enhancement, it is my view that he should take it as the alternative option of an early retirement pension is simply not there."

The Ombudsman's view in relation to the enhanced statutory redundancy, while more than is strictly necessary for his determination, simply expresses his view. It is an alternative to early retirement which could not be considered as redundancy.

> "I am very sorry indeed that there is nothing in my part to help you. I had no idea, at the outset of our correspondence, that the state of the pension scheme from a financial standpoint was so bad.
>
> As I said earlier, I don to know why the scheme got into such a mess from a financial standpoint. The Pensions Board, which is the regulator of pension schemes, does have powers to ask the High Court to order restoration of funds to a scheme, if they had been unlawfully or improperly removed from it but if the bad state of the solvency of the scheme was simply due to mismanagement, there is not a lot anyone can do.
>
> Yours sincerely."

The applicant relies on the last paragraph of the Ombudsman's letter and also the said paragraph where it was stated that "the state of insolvency was such that it must have been known to the employer and the trustees for quite a long time".

There is, however, nothing before the court by way of evidence, nor, indeed even an allegation that funds of the scheme had been unlawfully or improperly removed. The issue of mismanagement has got to be seen within the context of the scheme itself and under trust law generally.

The obligation to adequately fund the pension scheme has been the subject of some disquiet during the periods of high inflation and low interest rates particularly with regard to defined benefit schemes.

The court has already referred to the role of Pensions Board in this regard. As mentioned/stated, the causes of winding up under clause 20 of the scheme provide that it should be determined and the fund wound up upon the happening of any one of five events. The court has already dealt with the termination by the principal employer of the liability to contribute to the fund, but should also refer to the failure by the employer at any time to pay to the trustees any sum or sums due under the rules or any failure by the employer to observe and perform any other of its obligations. The other three causes of winding up are the exercise by the trustees to do so.

It is clear that where the scheme is determined and the fund wound up, liability of the employers to contribute to the fund shall terminate without prejudice to the liability of the employers for the payment of any contribution then payable or accrued. The fund shall be held on trust declared by the next following clause (21), which deals with the distribution on winding up in relation to securing additional benefits, and distributed among the categories of the third Schedule of the Pensions Act, which, as the Ombudsman has referred to, gives priority to those already in benefit.

Accordingly, it would seem that the letter of the Ombudsman is, indeed, a determination of the issues raised by the plaintiff. There is no appeal against that determination.

11. Decision of the Court

The court notes that this is a motion pursuant to O. 19, r. 28, that the plaintiff's proceedings disclose no reasonable cause of action and, indeed, were frivolous and vexatious.

The Trustees, as moving parties, rely on the insolvency of the pension fund and refer to the decision of the Ombudsman. The case sent to the Ombudsman consisted of many letters and e-mails to and from the plaintiff's daughter raising a series of queries. The determination by the Ombudsman on 10th December, 2009 refers to the valuation of 31st December 2008 undertaken by Mercer, the administrator of the fund who was not informed of the decision of the employer to discontinue payments to the fund. Meanwhile contributions continued to be deducted from the plaintiff's salary. The Ombudsman's determination was based on the fact that the fund did not meet the solvency requirements, and could not even meet its liabilities to existing pensioners. The Ombudsman stated that the Pensions Board, as regulator, had power to ask the High Court to order the restoration of funds to a scheme if (funds) had been unlawfully or improperly removed, but adds "if the bad state of the insolvency of the scheme was simply due to mismanagement, there is not a lot anyone could do".

There is no reason to doubt the Ombudsman's determination. However, the court has to consider in this interlocutory application whether the trustees are entitled to have the plaintiff's case dismissed at an interlocutory stage.

The court notes that the plaintiff makes no plea of illegality or of impropriety.

If a member has contributed to a pension fund – and a court does not have precise information as to what contributions were made other than he was a member for 41 years and contributed to the fund even after his application had been refused – it would not seem to be frivolous or vexatious to take an action to ascertain what (if any) preserved benefits he has or what efforts were made to have actuarial advice, audit of the fund and compliance with the provisions of the pension legislation.

Moreover, the rule relating to leaving service (rule 11) would seem to apply to the plaintiff as a member who seeks to leave service before normal retirement date and who may elect, within two years of so leaving, to receive payments equal to the value of member contributions less the amount of any tax to which the Trustees were liable by virtue of the making of such payments or to receive a deferred non assignable pension or transfer of the amount representing such deferred pension.

To the extent that the scheme is insolvent, it may not be possible for the trustees to fund a deferred pension, to continue funding existing pensions, or to make a payment equal to the net value of member contributions. Notwithstanding, there would appear to be an obligation on the part of the trustees to ensure adequate funding (s. 59G) and to consider a member's preserved benefits.

The court notes that the trustees have not referred to how these obligations have been complied with. The grounding affidavit refers to the insolvency of the Scheme at the date the respondent made his claim which was subsequent to the decision to wind up the Scheme. However, there is no averment as to the compliance of the trustees' statutory obligations prior to that date.

The court has a further concern regarding the plaintiff's contributions as a member of the scheme. That would appear to have been at a rate of 7.5% of pensionable salary.

In the circumstances the court refuses the application to dismiss the within proceedings as disclosing no reasonable cause of action or as being frivolous and vexatious.

The court has also considered the alternative application to dismiss certain matters pleaded on the ground that they amount to recitals of evidence, were prolix and not proper pleadings.

Order 19, r. 3, provides that every pleading should only contain a statement in summary form of the material facts relied on *factum probandum* but not the evidence by which the facts are to be proved.

Pleadings define the issue between the parties and the court may insist upon pleadings being as accurate as possible, (per. Pallace CB in *O'Grady v Warden* 12 I.L.T.R. 150). Pleadings will not be parsed too stringently (*Moroney v Gunst* 1 I.R. 554 (see O'Floinn: *Practice and Procedure in the Superior Courts*)). Pleadings confine the evidence of the trial to matters relevant to those issues (Keane J. in *McGee v. O'Reilly* [1996] 2 I.R. 229.

The court notes that paras. 9, 10, 11 and 13 – 17, 19, 20, and 23 – 25, 27, 29, 35 – 42 and 44 are headed: "Particulars Pertaining to the Plaintiff's Employment". Those paragraphs are broadly relevant to the service and purported redundancy of the plaintiff. Other paragraphs, under the same headings are not objected to by the applicant. The issues between the parties have been adequately defined. There was no suggestion that the trial of the action would disadvantage the applicants by the introduction of the matters complained of in the pleadings. The court is satisfied that, while some appear to be evidence rather than issues, they do not require to be excised.

The court will also refuse this alternative application.