Neutral Citation No. [2005] IEHC 87

THE HIGH COURT
COMMERCIAL

2004 No. 200 SP

IN THE MATTER OF CENTRAL REMEDIAL CLINIC PENSION AND DEATH BENEFITS PLAN

BETWEEN

IRISH PENSIONS TRUST LIMITED

PLAINTIFF

AND

CENTRAL REMEDIAL CLINIC, RICHARD TIERNEY AND MERCER HUMAN RESOURCE CONSULTING LIMITED

DEFENDANTS

Judgment of Mr. Justice Kelly delivered the 18th day of March, 2005

The Issue
1. The plaintiff is the trustee of the Central Remedial Clinic Pension and Death Benefit Scheme (the scheme).

2. As is usual in such schemes provision is made for the escalation or increase of pension payments to the members. That much is not in dispute. Neither is there any dispute as to the fact that the headline rate of such increase is 5% per annum.

3. The matter that is in dispute is whether this escalation or increase is subject to what is called a "CPI Cap". Such a cap, if it operates, limits pension increases by reference to the Consumer Price Index.

4. If the cap does not apply it is as a result of the adoption of special rules for the scheme in July 1993. It is argued that insofar as they purport to permit of an increase without the CPI Cap they ought to be rectified or alternatively set aside so that the scheme may continue to operate with such a cap.

Background
5. The plaintiff carries on business as trustee of occupational pensions schemes. One of the schemes for which it acts in that capacity is the scheme. The sponsoring employer of the scheme is the first defendant (CRC) which is a charitable body established in 1951. Prior to November, 1998, the plaintiff acted as the administrator, actuary, documentation draftsman and consultant to the scheme in addition to fulfilling its role as trustee. In November, 1998, all aspects of the plaintiff's business with the exception of trustee services were transferred to the third name defendant, (Mercer).

6. The above accounts for the joinder of all of the parties to this suit save the second named defendant (Mr. Tierney). He was joined as a representative defendant on behalf of pensioners of the CRC who are in receipt of pensions at present.

7. The reason for joining Mr. Tierney arises as follows. The plaintiff contends that the escalation rights of pensioners are and were always intended to be capped at the applicable rate of the CPI since a pensioner's retirement date. If the plaintiff is wrong in this contention then an escalation entitlement of 5% per annum compound would apply without any CPI Cap. This has serious ramifications for the solvency of the scheme and could ultimately lead to its winding up. The scheme would not have sufficient assets to meet the totality of its liabilities to its members in such circumstances. This is because escalation rights uncapped by reference to the CPI have not been funded for to date either by the employer's contributions or the contributions of active members.

8. Liabilities to current pensioners enjoy first priority on a winding up. If such were to occur, members of the scheme currently in receipt of pension payments, i.e. pensioners in payment, would be entitled to receive 100% of their benefits including escalation rights. Thus pensioners in payment have a clear interest in arguing that the CPI Cap should not apply because it would be more beneficial to their pension payments in the short term and they would receive 100% of their benefits in the event of a winding up. Pensioners in payment are the only persons in whose interests an argument for the absence of a CPI Cap could be made.

9. Escalation rights uncapped by reference to CPI would have to be funded by substantially increased contributions from both the first defendant and active members of the scheme. Their contributions would have to increase dramatically over a short period so as to ensure that such enhanced benefits could be paid. Given the amount of such increases it is more likely that the scheme would be wound up to their ultimate disadvantage. Thus Mr. Tierney was joined to argue in favour of an escalation clause which is not capped by reference to the CPI. He is being indemnified as to his legal costs by the plaintiff.

The Main Affidavit
10. The principal grounding affidavit is sixty pages long and runs to 245 paragraphs. It was sworn by Mr. Tom Molloy, the managing director of the plaintiff. He commenced working with the plaintiff in 1971 and so has well in excess of thirty years business experience with it. It is quite clear that an enormous amount of research was done in order to ensure that all relevant information was placed before the Court on this application. It is not necessary for me to rehearse in detail all of the matter dealt with in the extensive evidence placed before the Court. I will content myself with a recital of what I perceive to be the relevant factual matters pertinent to the reliefs which are claimed.

The Plaintiff
11. The plaintiff was formed in 1953 and is thus one of the longest established service providers in the Irish pensions market. Prior to November 1998, when the plaintiff's business with the exception of trustee services was transferred to Mercer, the plaintiff was providing a comprehensive pensions service. Typically an employer who wished to establish a pension scheme would approach the plaintiff who would then provide a range of services. They included advice in respect of the design of the scheme to be established, the drafting and settling of the scheme documents, preparation of material to communicate with the employees, arranging of insurances and investments necessary for the scheme and its administration by, *inter alia*, effecting pension payments on a continuing basis. If requested the plaintiff also acted as trustee of the scheme.

12. Since the transfer of the bulk of the plaintiff's business to Mercer it has carried on the business of acting as a trustee of pension schemes. At present it acts as trustee for approximately 550 self administered pension schemes.

Occupational Pension Schemes
13. An occupational pension scheme is constituted as a trust. The beneficiaries of the trust are the present and future employees of the employer in respect of which the scheme is established who are eligible and who participate in it together with their dependants. The assets of the trust are contributed by both the employer and to a lesser extent the employee.

14. Retirement benefits under a scheme may be granted on a defined benefit basis or on a defined contribution basis.

15. In a defined benefit scheme the retirement benefit is based on a promise to pay a certain level of pension. The amount of such benefit is often based on the number of years a member has participated in the scheme multiplied by a fraction (usually one sixtieth) of the members final pensionable salary. Thus if a member has participated in a defined benefit scheme for thirty years his or her retirement benefit would be thirty sixtieths. The maximum retirement benefit which the Revenue Commissioners approve is forty sixtieths of final remuneration. The scheme which is the subject of these proceedings is a defined benefit scheme. It is therefore not necessary to deal in any detail with a defined contribution scheme save to say that such a scheme is not based on a promise to pay a certain level of pension but rather on the value of the member's retirement account. That is made up of the benefits accrued to the investment of the contributions made to that account by both the employer and the employee.

Revenue Implications

16. In order for a pension scheme to attract tax advantages it has to obtain the approval of the Revenue Commissioners as an exempt approved scheme pursuant to the relevant tax legislation. Crucial to the success of a pension scheme is the availability of tax reliefs.

17. Employees are entitled to tax relief on contributions made subject to certain limits and the employers contributions are not assessed as income of the employee. Normally an employer's contributions are deductible for tax purposes as an expense in the year in which they are paid but this is not relevant to the scheme in suit because CRC is a charity.

18. The statutory regime for the approval of occupational pension schemes was formerly contained in Chapter II Part I of the Finance Act, 1972 and is now principally contained in Part 30 Chapter 1 of the Taxes Consolidation Act, 1997. Over the years the Revenue Commissioners established guidelines which indicated the conditions which must be met by an occupational pension scheme before it could be approved. These guidelines were originally contained in a revenue publication called "Occupational Pension Schemes: Notes on approval under the Finance Act, 1972". These notes were updated regularly. These guidance notes and the updates have now been superseded by a document known as the "Revenue Pensions Manual". I will refer to all of these documents in the course of this judgment as "the Revenue Guidelines".

Documents

19. The 1972 Finance Act introduced a new regime for the tax treatment of occupational pension schemes. When that Act commenced the plaintiff had up to 2500 pension schemes which had to be converted in order to meet with Revenue approval under the new statutory regime. That involved either amending the documents to ensure the schemes would be approved schemes under the 1972 Act or re-documenting benefits. At the time of the 1972 legislation coming into force the plaintiff was then setting up approximately 15 - 20 new pension schemes per month.

20. For understandable reasons the plaintiff wished to have all its schemes documented on a standard basis. Accordingly it designed a series of documents which are referred to as "governing documents" which would be applicable for every scheme with which the plaintiff is involved. These documents consist of:-

a. An interim trust deed

b. A declaration of trust

c. A subscribers agreement form between the employer and the trustee

d. A deed of amendment

e. General rules

f. Members notifications (particularly explanatory booklets) given to members of the scheme from time to time.

g. Special rules

h. Additional special rules

21. The plaintiff executed an interim deed on 13th October, 1972, followed by a declaration of trust on 15th January, 1975, establishing what was known as the "IPT retirement benefits trust". The declaration of trust was amended by a deed of amendment on 2nd August, 1977.

22. The purpose of the interim deed was to provide existing schemes of the plaintiff with a trust framework whose terms would ensure they could enjoy approval under the Finance Act, 1972, until such time as the declaration of trust was executed and approved. The declaration of trust consists of a set of standard terms for governing and administering any number of different pension schemes with individual scheme designs. It is a central trust to which many employers establishing pension schemes with the plaintiff subscribed.

23. Under clause 1 of the declaration of trust the plaintiff "offers to act as trustee of schemes for the provision of relevant benefits as defined in s. 13(1) of the 1972 Finance Act arranged by any employers for the benefit of their employees and to establish trust funds for the purpose of securing benefits under such schemes".

24. Under clause 2 of the declaration of trust an employer wishing to establish a pension scheme entered into a written agreement with the plaintiff establishing a pension scheme to be governed by and administered in accordance with the declaration of trust. The employer completes a form known as a "subscribers agreement form" and thus is established a separate plan for each employer. Hundreds of such plans have been established with the plaintiff over time. Each plan is established under the trust, such being a requirement for Revenue approval.

25. The documents constituting the scheme include a set of rules known as "the general rules" which are scheduled to the declaration of trust. These general rules contain enabling provisions in respect of *inter alia* admission to membership, contributions payable and benefits payable.

26. As I have pointed out the declaration of trust is a standard document which is intended to govern different schemes with a variety of designs. Similarly the general rules make standard provisions regarding design and administration of benefits under the declaration of trust. Both these documents are designed to fulfil two functions. They provide a mechanism whereby specific provisions

can be adopted to govern a specific scheme and they also provide a standard set of provisions which can govern any scheme to the extent that no alternative provision is specifically adopted.

27. Under clause 4 of the declaration of trust special rules may be adopted which, in relation to a scheme, can have the effect of altering, extending, amending or modifying provisions of the declaration of trust or the general rules or indeed any previously adopted special rules relating to the scheme.

28. Clause 6(b) of the declaration of trust provides that:-

> *"A members notification containing such information as is required to be supplied to a member under the rules shall be given in writing to the member by the trustee or, with the consent of the trustee by the employer, and shall be titled in accordance with the agreement and shall be regarded as forming part of the trusts of the plan".*

29. This clause has to be read in conjunction with general rule 4(a) which insofar as it is relevant provides as follows:

> *"Subject to the provisions of the rules…there shall be provided in respect of a member such of the benefits as are subsequently described in the rules…each such benefit, if any, being of such amount or at such rate as the employer with the consent of the trustee shall in its absolute discretion decide and shall have been specified by members notification, provided that unless the employer in consultation with the trustee shall otherwise determine and the member shall be so notified in the case of a specified member, the amount or rate of any such benefit shall, subject to the aforesaid provisions, be as set out in the special rules".*

30. The provisions are of some importance as will be shown later.

31. I should explain that a specified member is one who has been admitted to the scheme under a special rule which defines a category of employees who are entitled to be members, as opposed to one who has been admitted to the scheme because the employer has, in its discretion, decided to admit them. All of the members of the instant scheme are "specified members". The provisions of rule 4 which allow members notifications to specify the amount or rate of any benefit are supplemented in some specific cases by other general rules. In particular, normal pension date is defined in general rule 1 as the date specified in the members notification and in the special rules for specified members.

32. In general the terms on which the Revenue Commissioners will approve a scheme are intended to ensure that the benefits which the scheme provides are not excessive having regard to both the level of earnings and the length of service of the scheme members. Thus the maximum pension which can be paid on retirement at the normal retiring age is two thirds of final remuneration.

33. During the period under consideration there were two forms of Revenue approval. The first was interim approval which would be given upon the establishment of a scheme subject to compliance with certain basic requirements. Final approval was given only when the Revenue Commissioners approved the scheme in its entirety. Such approval almost invariably occurred years after the obtaining of interim approval.

Pension Escalation

34. Whenever a pension scheme is designed, one of the questions which falls for decision is whether cost of living increases should be awarded while pensions are in payment. In times of high inflation such as the 1970's and 1980's many employers wished to do what they could to protect pensioners from the effects of inflation. Understandably, however, they were not prepared to undertake an open ended liability to pay inflation linked increases. A variety of approaches were adopted. Some gave no pension increases at all. Others made a commitment in the scheme rules to providing annual increases which might be at a fixed annual rate or at a rate depending on the consumer price index or at a rate depending on pay increases granted to the employers currently serving employees. Other schemes opted to make no formal commitment to giving pension increases but rather provided for increases which were discretionary.

35. In some cases a combination approach was adopted. In such cases a scheme would typically provide for increases in line with the consumer price index but capped at a specified level, for example, 5%. Others might provide a guaranteed increase of, for example, 3% per annum but with discretionary increases if inflation was higher and the funding level of the scheme permitted.

36. Even with discretionary increases however, if there was an intention on the part of the employer to grant any such increases, it would have to be taken into account in calculating the contributions to be paid in respect of the scheme. If that were not done then the scheme would run the risk of having insufficient funds to provide pension increases.

37. Promised benefits require to be pre-funded. This is so even though the increases may not be granted until the member has retired and is in receipt of pension. A possibility that increases might be granted is normally recognised and contribution rates are fixed accordingly at the time when the member is in employment and contributions are being paid in respect of him.

38. The Revenue Guidelines made their position in relation to increases in pensions clear. These have been reflected in the general rules. I will have more to say on this later in the judgment.

Establishment and Administration of Pension Schemes

39. The evidence satisfies me that in the establishment and administration of pension schemes a number of specific steps are typically taken. The first can be called the drafting process. That involves seven different stages. They are:-

> (a) The plaintiff's consultant meeting with the client for instructions,
>
> (b) The completion of a subscribers agreement form to establish the scheme,
>
> (c) The completion of a lead sheet by a new business consultant,
>
> (d) The transmission of that lead sheet to the legal and administration department of the plaintiff,
>
> (e) The drafting of explanatory booklets in consultation with the client,
>
> (f) The review of and finalising of the explanatory booklets with the client employer,

(g) Thereafter drafting and finalising special rules.

40. Normally the legal and administration department of the plaintiff was responsible for drafting the special rules and the explanatory booklet for each scheme after the scheme consultant had taken instructions for the employer in respect of the schemes design. There were standard template documents for the explanatory booklets and special rules which were used by the plaintiff. The steps taken are set out in great detail in the affidavit of Mr. Molloy. I accept his evidence in that regard and it is not necessary for me to reproduce what he has to say in detail.

41. On the topic of increases in pensions and the Revenue Guidelines I am satisfied that during the 1970's there was considerable discussion and indeed confusion within the industry about pension increases, the level they should be provided at and how they would be funded. It was recognised that employers could not give open ended promises in respect of escalation and that therefore increases would have to be capped. During the mid-1970's there were discussions between the plaintiff and the Revenue Commissioners as a result of which it was decided that increases for a pension could be pre-funded up to 3%. Later it was obvious that 3% would be insufficient having regard to prevailing inflation rates. The approval of the Revenue Commissioners was sought to pre-fund for up to 5% increases. The Revenue Commissioners agreed with 5% pre-funding of increases provided that they were capped by reference to CPI increases if 5% was promised. This meant that employers could pre-fund for increases and could automatically pay fixed increases up to 3% even if the cost of living index fell below 3%. If however they wanted to pre-fund and pay increases of up to 5% a CPI cap had to apply.

42. As I have already pointed out under clause 4 of the declaration of trust, special rules may be adopted. Strictly speaking such special rules amend the general rules but they are more generally regarded as supplementary to them. Normally they were drafted some considerable time after the explanatory booklet and shortly before final approval was obtained from the Revenue. These special rules were usually drafted using a template document. Rarely did their drafting require direct contact with the employer because they were highly technical documents and so the employer did not need to have any involvement with them. Generally the special rules were not sent to members of the scheme because there was no requirement to do so. In any event their highly technical nature was unlikely to advance to any great extent the knowledge of the member of the scheme. Much greater attention was given to the explanatory booklet. That was so for two reasons. First, the explanatory booklet antedated the special rules and secondly, and more importantly, it was that booklet that was intended to inform members of the terms of the scheme and the benefits which they would enjoy thereunder.

Member's Notification

43. I have already pointed out that clause 6(b) of the declaration of trust provides that a member's notification containing such information as is required to be supplied to a member under the rules shall be given in writing to the member by the trustee or, with the consent of the trustee, by the employer. Once it is given it is to be regarded as forming part of the trusts of the plan.

44. A scheme had to issue a document in the nature of an explanatory booklet as a pre-condition to obtaining interim approval from the Revenue.

45. Clause 3 of the declaration of trust defines a member's notification as "such notification or notifications as shall have been given to the member as required under the rules". The same clause defines "rules" as meaning the general rules or the special rules.

46. I have already reproduced the relevant part of general rule 4(a). General rules 4(b) and (c) provides:-

> *"The trustee may, with the consent of the subscriber, augment any of the benefits including pensions in payment to which any person may be entitled under the rules.*
>
> *(c) Any benefits so provided and any other benefits or forms of benefit derived therefrom shall be subject to such of the limitations set out in general rule 14 as may be appropriate and such limitations as may be necessary to comply with the terms of the general undertaking or any other undertaking or undertakings given to the Revenue Commissioners by the trustee or an administrator appointed by the trustee under the provisions of clause 6(h) of the deed."*

47. It is argued that the explanatory booklets are "member's notifications". They are required under the rules of the scheme in order to obtain interim approval and now in any event are required under the provisions of the Pensions Act, 1990. I will deal with this argument later.

Logistical Problems and Escalation

48. In the early 1990's the plaintiff's documentation department was in serious arrears. Its backlog had important consequences. A number of schemes were operating without complete documentation in place and so were unable to obtain final Revenue approval. The introduction of the Pensions Act, 1990, coupled with the increasing number of self-invested schemes brought with them a new set of requirements which imposed significant new regulatory and compliance demands on occupational pension schemes. This required the plaintiff to draft a new set of template documents to reflect the provisions in the new legislation. At that time also the Central Bank was putting pressure on investment managers of schemes operated by entities other than insurance companies to ensure that compliance obligations with regard to the required formal and final Revenue approval were met. Thus dealing with a documentary backlog became a priority for the plaintiff.

49. This problem was not unique to the plaintiff but was an industry wide one. The logistics involved in dealing with this difficulty were substantial because the plaintiff acted for 550 large pension schemes and 1,500 smaller schemes. Whilst dealing with this documentary backlog became a priority for the plaintiff but it must be said still took a considerable time to resolve.

50. In 1997 the legal department of the plaintiff carried out a review of the standard documents. By September of that year 425 separate schemes had been examined. Of those 236 had no escalation provision whilst 156 did. 33 more were schemes formerly administered by another company which were not established pursuant to the plaintiff's retirements' benefits trust and so were not governed by the same documents. Of the 156 schemes with escalation provisions some involved semi-State companies in respect of which civil service parity rules applied. 60 schemes provided for fixed escalation at the level of 3% or less. A further 60 schemes were identified as providing escalation at levels higher than 3% but in these cases the review suggested that the scheme documentation included references to escalation provisions being capped.

51. Of the 425 schemes reviewed and the 156 which were identified as having escalation provision, 26 were identified as providing for escalation at levels above 3% in circumstances where the explanatory booklets confirmed a CPI cap but the special rules read in isolation did not. It was thought that these schemes had been drafted on the basis that general rule 14.9 applied. It had been thought that that rule operated to impose a CPI cap. That was a view which had been held widely amongst employees of the plaintiff

but was not considered to be accurate. It was therefore recommended that the position concerning these 26 schemes should be reviewed further.

52. It is convenient here that I should deal with the provisions of general rule 14 and in particular rule 14.9.

General Rule 14
53. This provides that:-

> *"Any benefit payable to a member or to his beneficiary or personal representatives or dependants shall not…exceed the relevant maximum set out below or such other amount as will not prejudice approval of the plan under the Act (chapter (ii) part 1 of the Finance Act, 1972)."*

54. There then follows, in summary form, a statement of the maximum benefits which the Revenue Commissioners will approve on retirement at the normal age, on early retirement, on late retirement and in various other circumstances.

55. General rule 14.9 summarises the Revenue Guidelines with regard to escalation rights. It provides:-

> *"Post Retirement Increases.*
>
>> *This maximum applies only when a particular benefit as increased by post retirement increases under all employers' schemes already equals the appropriate maximum for that benefit as set out in the foregoing paragraphs. Subject thereto it is an amount proportionate (by reference to the maximum for that particular benefit, reduced in the case of the member's pension by any part of such pension which he has surrendered for a dependant's pension, so increased under all employers' schemes) to the increase in the index covering the period from the date of the members retirement or earlier commencement of pension under sub-rule (c) of general rule 11 or death, or, if arising under general rule 12 from the date of leaving service, to the commencement date of the increase, except that if it is limited to not more than 3% per annum compound on such maximum, the benefit shall not be reduced to take account of a fall in the index."*

56. The evidence satisfies me that there was a general misapprehension that this rule operated to set a cap with regard to escalation. The correct view is that it did so only in respect of a pension that had reached the maximum permitted by the Revenue. It did not operate in respect of a pension which had not reached such a maximum. It seems to me that there was the mistaken belief on the part of the plaintiff that the CPI cap applied to any pension in respect of which general rule 14.9 was applicable. It was taken as mirroring the Revenue Guidelines.

57. The presence of general rule 14.9 also played a significant part in the mistake which occurred when the special rule in suit was adopted by CRC. I will deal with this aspect of the matter at the appropriate place in the judgment.

Solving the Problem
58. By January, 1998, a total of 36 plans were identified where the issue of CPI capping merited further investigation. Unfortunately little progress was made during 1998 and the same obtained for a substantial part of 1999. It was in October of that year that a lawyer in Mercer which had now assumed all of the activities of the plaintiff except its trusteeship was appointed to review the escalation issue from a documentation perspective and seek a resolution of the matter. It was her report in February, 2000, that resulted in Senior Counsel being instructed on the matter. Counsel's advice was obtained and a further review was carried out in 2001. Over the following few years further research was done with a view to trying to obtain clarity on the issue and ultimately the present proceedings were commenced on 21st May, 2004.

59. To date I have dealt for the most part with the activities of the plaintiff in relation to occupational pension schemes in general. I must now turn to the particular history of the scheme in suit. Again very detailed information is put before the court not merely in the affidavit of Mr. Molloy but also in the affidavit of Mr. Paul Kenny (Mr. Kenny) who is the present pensions' ombudsman. He was employed within the consultancy department of the plaintiff from 1972 to 1988 and was responsible *inter alia* in the 1970's and early 1980's for the scheme. He was the main contact in the plaintiff's organisation for the scheme at the time of its establishment. Evidence is also put before the court by Mr. Mortimer, who was a consultant to CRC between 1987 and1994.

The Scheme
60. CRC began to establish retirement benefits for employees as far back as 1962. A trust deed was executed in respect of its first scheme in March of that year. Escalation rights were not mentioned in that trust deed and were not provided for as a benefit by CRC until after 1977.

61. Following the enactment of the Finance Act of 1972, CRC established the scheme with effect from the 1st December, 1974. It did so by virtue of a subscribers agreement form. Interim approval for the scheme was sought from the Revenue on 4th April, 1975. A second scheme was established from 1st June, 1975, which comprised the 1961 scheme and two further schemes.

62. In March 1977, at a meeting attended by Mr. Kenny it was agreed that CRC's pension schemes which were then in operation should be merged and that 1st January, 1977, should be the effective date of this amalgamation. Rather than establish an entirely new scheme the merger was effected by winding up the 1975 scheme and transferring its members into the scheme.

63. Special rules had not been executed at that time and so final Revenue approval was not obtained. In April, 1979, the plaintiff wrote to the Revenue Commissioners stating that they were enclosing a subscriber's agreement form and explanatory booklet which had been issued to members. The Revenue Commissioners were asked to confirm final approval of the scheme.

64. The Revenue Commissioners replied that a subscriber's agreement form of the 1st April, 1975, had already been submitted to them (on 5th April, 1975) and that the form enclosed with the April, 1979, letter was an associated companies agreement form. The Revenue also pointed out that there was a discrepancy between the effective date as stated in the subscriber's agreement form and the explanatory booklet. There was obviously a good deal of confusion which was contributed to by the fact that the scheme came about as a result of an amalgamation of a number of existing schemes.

65. The ultimate obtaining of Revenue approval was a lengthy process to put it mildly. Final approval was forthcoming on 10th November, 1993.

66. The scheme was governed by the plaintiff's declaration of trust which was used for the operation of many schemes which I have

already described earlier in this judgment. General rules 9 and 14.9 dealt with escalation rights. General rule 9 reads as follow:-

> *"Post Retirement Increases.*
>
> > *(a) Any pension in course of payment, whether to a member or to a dependant of a member, may be increased annually or at such other intervals as the trustee shall determine after the commencement of such pension by such amount as the employer with the consent of the trustee shall decide.*
> >
> > *(b) Such pension increments shall be payable with the normal instalments of pension and shall terminate when the normal instalments cease.*
> >
> > *(c) No part of any pension under this rule which exceeds the maximum members pension set out in general rule 14, such maximum being exclusive of that relating to post retirement increases, shall be capable of commutation under sub-rule (a) of general rule 6. In all other respects any pension under this rule shall be subject mutatis mutandis to the provisions of the rules as though it were part of the pension being increased."*

67. I have already set forth rule 14.9 of the general rules. It sets out the terms of the Revenue Guidelines applicable to escalation rights at the time when the general rules were adopted. Those Revenue Guidelines are today substantially the same as they were when the general rules were adopted in January, 1975.

The Explanation Booklets
68. Over the years explanatory booklets have been issued to employees from time to time. The first such booklet which was issued in respect of the scheme and which referred to escalation was in 1978. That is not surprising since escalation was not provided for as a benefit until after 1977. The 1978 explanatory booklet states as follows in respect of escalation rights:-

> *"Pensions and Rising Prices.*
>
> *Prices seem to be always rising and people on fixed incomes feel the strain most; this plan, therefore, provides for increases to your pension (i.e. the pension which is remaining after any exercise by you of the option to take cash rather than pension). These increases will be given annually at the rate of 5% p.a. compound, provided that such an increase does not exceed the percentage increase in the official cost of living index since your normal pension date."*

69. Explanatory booklets were also issued in 1992, 1996 and 2001. All of these explanatory booklets contained statements which were consistent with that of the 1978 booklet in respect of pension increases of 5% per annum compound but subject to such an increase not exceeding the percentage increase in the consumer price index since the pensioners normal pension date.

The 1993 Special Rules
70. It was not until the 9th of July, 1993, that the special rules for the scheme were adopted. As I have already pointed out such a delay is not unusual. Special rules were normally executed in the context of obtaining final approval from the Revenue. This case was no exception.

71. Special rule 10 provides as follows:-

> *"The pension as computed under special rule 4 of a member who attains normal pension date on or subsequent to 1st January, 1977, but after the payment of any lump sum in lieu of so much pension as shall have been agreed shall be increased by 5% per annum compound."*

72. It is of course this special rule that has given rise to the present difficulty. The rule purports to set an escalation rate of 5% per annum compound. It also purports to be applicable to any person who attains their normal pension date on or after 1st January, 1977. Accordingly it purports to be retrospective in effect.

73. There is no evidence demonstrating that the special rules were drafted in consultation with CRC or Mr. Kenny. Neither is there evidence that the provisions in the special rules in relation to escalation were discussed with them. Arguably more importantly however, there is no evidence that they were the product of a decision on the part of CRC to enhance the escalation rights of members beyond that set out in the original explanatory booklet, still less to do so with effect from 1977. The omission from the special rules of a reference to the CPI cap does not on the evidence reflect the original intention of the scheme insofar as it can be gleaned from the explanatory booklets or the other contemporaneous documentation which is available.

74. The 1993 special rules were recommended by the plaintiff to be executed by CRC so as to enable final approval to be obtained from the Revenue. In fact the special rules were formally approved by the Revenue before they were executed by CRC. However, the Revenue made it clear that whilst they had approved the draft special rules, formal approval would not issue until adoption by CRC. The special rules were sent to CRC in February, 1992, but were lost and fresh copies were requested in mid 1993.

75. In any event the special rules were adopted.

76. There is no explanation to be found in the contemporaneous documents giving any indication as to why the special rules differed from the explanatory booklets. Neither is there anything to suggest that there was the slightest change in practice in relation to the administration of the scheme subsequent to the execution of the special rules. For example, the plaintiff's reports for 1993 through 1998 all contain a statement to the effect that post-retirement pension increases were payable at the rate of 5% per annum compound subject to that increase not exceeding the percentage increase in the CPI. The plaintiff's report for 1999 spoke of the average increase over the year of pensions in payment as being 1.5%. The CPI in that period was 1.6%. In the plaintiff's report for 2000 it spoke of the average increase over the year of pensions in payment as being 5%. The CPI figure for that period was 5.6%.

77. The thrust of the evidence is that prior and subsequent to the 1993 special rules the scheme has been operated on the basis that its members were entitled to the escalation rights specified in the explanatory booklets.

Contribution Rates
78. As I have already pointed out pensions are funded through contributions from the employer and employee. The contribution rate is expressed as a percentage of the employer's pensionable salary roll. Employee contributions are normally expressed as a percentage of the employee's pensionable salary. These are taken into account by the scheme actuary when determining the employer's contribution rate. The rate of contribution in defined benefit schemes such as the scheme is set by the actuary based on assumptions

agreed between the plaintiff and the employer regarding the necessary level of funding to provide the benefits promised under the scheme. The contribution rate is normally reviewed every three years.

79. The evidence in this case is that between the period from 1984 to 2003 the total contribution rate remained fairly constant, at about 18% to 19%. There was no change subsequent to the execution of the 1993 special rules. Indeed it is interesting that the actuarial report for 1993 and the draft actuarial report for 1996 recommended decreases in the level of employer contributions. These recommendations were however ignored and a total contribution rate of 19% was maintained.

80. I am satisfied that if the intention at the time of execution of the special rules in 1993 was to amend the scheme by providing fixed increases at 5% this would have required an increase in contribution levels. Rather than recommending an increase in contribution rates the plaintiff actually recommended a decrease. This suggests that there was no intention in 1993 to alter the existing escalation rights of members.

Pension Payments
81. Evidence has been put before the court of what has been the practice in respect of the payment of pensions. The only relevant payments are those in respect of persons who retired in 1992 and later. That is so because persons who retired prior to 1992 had annuities purchased for them. Subsequent thereto pensioners in payment had their benefits funded directly out of the assets of the scheme. With a single exception all have been paid on the basis of the CPI cap being applicable. The one exception was the first recipient of a pension payment directly from the assets of the scheme. That pensioner was paid a pension which escalated at 5% compound until 1996 and from there on the increases were capped at CPI. The correspondence suggests that there was some confusion within the plaintiff as to the pension entitlements of this pensioner. However, she was written to and was told that her pension was subject to the CPI cap and appears to have accepted that. Every other pensioner was paid in accordance with the terms of the explanatory books.

Lead Sheets
82. I have already referred to the completion of a lead sheet by a new business consultant at para. (c) dealing with the establishment and administration of pensions schemes. These lead sheets are filled out in an effort to record the requirements or instructions of a client in relation to the establishment or amendment of a pension scheme.

83. A review of the lead sheets in respect of the scheme has taken place and they throw a little light on the escalation question.

84. The earliest lead sheets contain either the letters "N/A" or "Nil" in the sections relating to escalation. They appear to date from some time before February 1976. It is not surprising that they would contain such a legend because of course at that time escalation was not provided for as a benefit in the scheme.

85. A lead sheet of the 19th August, 1977 records that the non commuted pension is to be escalated at a rate of 5% per annum compound and it also includes a manuscript addition which provides that that is subject to a CPI cap since normal pension date. It is not possible to say when that manuscript addition was effected. However, another version or copy of the same document does not refer to the CPI cap. Mr. Kenny in his affidavit said that he completed the original version of this lead sheet but that the manuscript addition referring to a CPI Cap was an additional note not in his handwriting. He thinks it may have been inserted at a later stage by personnel in the administration department in order to clarify the position in respect of escalation.

86. In the drafting file relating to the scheme the only lead sheet which was on it was a version of the lead sheet of the 19th August 1977 which had no reference to a CPI Cap. Accordingly although there was a lead sheet for the scheme which expressly referred to escalation capped by the CPI that was not contained on the drafting file. Nobody can say when the reference to CPI was added to the lead sheet of the 19th August 1977 nor can it be said whether at the time of the drafting of the special rule there was in existence a lead sheet which contained a reference to the CPI Cap.

87. The nett effect therefore is that the special rules were consistent with the lead sheets on the drafting file for the scheme. They made no reference to a cap on escalation. That however was not the case in respect of the lead sheets on the administration files one of which at least has a reference to the 5% increase being subject to the CPI Cap.

The Evidence of CRC
88. The Chief Executive of the CRC (Mr. Kiely) swore an affidavit in the proceedings. He began his career with CRC in January of 1977 as an assistant accountant. A few years later he became the accountant then assistant administrator, administrator and ultimately Chief Executive in 1988.

89. When he began to work for the CRC the scheme was already in place.

90. I do not propose to lengthen an already long judgment by a detailed recital of the evidence given by Mr. Kiely. It is quite clear that he has carried out extensive investigation and has located any documents of relevance which may throw light on the topic in suit.

91. He deals as far as is possible with the circumstances in which the special rules came to be executed.

92. It seems highly unlikely that there was any discussion in respect of the escalation provisions in the special rules at the time of execution.

93. Prior to execution Mr. Kiely sought advice from Mr. Ernest Goulding who was a member of the clinic and had some expertise in the area of pensions. Mr. Goulding apparently gave advice but I think on the evidence it is unlikely that he communicated any advice in respect of the escalation provisions of the special rules.

94. CRC has I am satisfied always relied upon the advice correspondence and documents furnished by the plaintiff in respect of the terms conditions and benefits pursuant to the scheme. I am satisfied that it has particularly relied upon the explanatory booklets furnished by the plaintiff over the years. I am also satisfied that CRC has always been of the understanding that the increase in benefit provided under the scheme was 5% per annum compound provided that such increase did not exceed the CPI. The same booklets were supplied to all the members of scheme who received like information.

95. I am also satisfied on the evidence that although the plaintiff knew of a potential difficulty concerning escalation rights since at least 1997 it did not inform CRC of that until late 2003 or early 2004. During all of that time CRC continued to fund the plan on the same basis that it had always done.

96. The evidence also satisfies me that all of funding arrangements undertaken by CRC were on the basis of the CPI Cap being applicable to any increase in benefits under the scheme. If there were an unqualified 5% per annum compound increase applicable then I am satisfied that the fund is significantly under funded and that CRC would as a matter of probability not be in a position to meet the deficit.

97. An affidavit was also sworn by Mr. Ray McLoughlin (Mr. McLoughlin) the former administrator of CRC but he retired in 1980 and cannot assist on the issue before the court.

The Evidence of Mercer

98. Mercer is a late arrival on the scene since it only became involved with the scheme in 2000. Since its arrival it has at all times proceeded on the understanding that the appropriate escalation rate has been capped by reference to the CPI.

99. Such evidence as it gives is confirmatory of both factual matter and the expressions of opinion contained in the affidavit of Mr. Molloy.

100. There is also an affidavit from Mr. Mortimer who is at present an employee of Mercer's. He is a former employee of the plaintiff and worked for it for 20 years from 1978 until November 1998. He transferred to Mercer at that time.

101. He gives evidence confirmatory of what is sworn to by Mr. Kenny and says that he is in no doubt that in general it was the explanatory booklets that accurately reflected the intention of employers and that insofar as there is any difference between such booklets and the special rules it is the former that reliance would have been placed on by all concerned.

102. As far as he can recollect there were no changes aside from those prescribed by law in the benefit structure of the scheme during his period as its consultant. He has a recollection of the special rules being executed in 1993. He has however no recollection of discussing those with CRC in any great detail. He does not believe that there was any intention to change, by the adoption of the special rules in 1993, the benefit structure regarding escalation or otherwise which had been in place and reflected in the explanatory booklets of 1978 and 1992. Neither can he recall any intention to alter the position as having been expressed to him by CRC. In fact he says his abiding memory of CRC was that it was very concerned about cost curtailment given its charitable status. He is of the belief that it would have been important to CRC to have its liabilities in respect of escalation subject to a CPI Cap.

The Evidence of Mr. Tierney

103. Mr. Tierney is the sole party to this litigation who opposes the reliefs sought by the plaintiff. It is therefore important to set forth his evidence in some detail.

104. He is a retired member of the staff of CRC and is in receipt of a pension under the scheme. He was joined in the action to represent the interest of retired members of the staff who are in receipt of pensions under the scheme.

105. He was born in 1930 and began work with CRC some days short of his 38th birthday. He reach retirement age in 1995. He retired from the post of transport manager. He had 27 years service at that stage.

106. His final pensionable salary was £17,012.00 which yielded a pension of £7,626.00 per annum. He exercised an option to commute up to 25% of his pension in exchange for a tax free cash lump sum of £25,518.00. That left him with a reduced personal pension of £4,821.00 per annum. Those terms were notified to him and he accepted them.

107. In the letter notifying him of these entitlements there was no mention of any escalation in his pension benefits. However he says he was aware and relied on the fact that there were escalation provisions included in his pension which were referred to as "a hedge against inflation".

108. He swore that he had an understanding that his pension would increase by a minimum of 5% per annum year on year once the pension was in the course of payment and commencing on the first anniversary of his retirement in October 1996. However, he says he never checked his pension payment details nor would he question CRC or the plaintiff in that regard. He relied instead on the trust and confidence which he placed in them in respect of financial matters. He says and I accept that he has a fairly straight forward approach to personal finances and that includes living within his means whatever those means are. That view is shared by his wife.

109. When he joined CRC there were no pension arrangements for staff. In the early 1970's discussion took place about the provision of retirement benefits. Mr. McLoughlin was instrumental in proposing that the plaintiff should provide retirement benefits for the staff of CRC. That was a progressive development and was received with great enthusiasm. Mr. Tierney has no recollection of any negotiations which took place in respect of the benefits which were subsequently agreed. I have no doubt but that his recollection to the effect that the introduction of the scheme was gratefully received by the employees is correct. It represented security into retirement for employees at a time when pension benefits in retirement were not the norm and were generally reserved for more senior executives.

110. Paragraphs 13 and 14 of his affidavit read as follows:

> *(13) "When agreed employees were advised of the benefits of the plan and eventually given details of what was covered in an explanatory booklet which set out the various benefits which would be enjoyed. I distinctly remember that it was a term of the said plan that after retirement, once the pension was in the course of payment it would increase in line with that stated in the explanatory booklet, that is by 5% per annum compound.*
>
> *(14) I had an opportunity to peruse this explanatory booklet just prior to swearing this affidavit and the provision contained in that booklet is as follows:-*
>
>> *'Pensions and Rising Prices.*
>>
>> *Prices seems to be always rising and people on fixed incomes feel the strain most; this plan, therefore, provides for increases to your pension i.e. the pension which is remaining after any exercise by you of the option to take cash rather than pension. These increases will be given annually at the rate of 5% p.a. compound, provided that such an increase does not exceed the percentage increase in the official cost of living index since your normal pension date.*

You may elect to take the value of these increases in the form of a level increase in your pension from your normal pension date provided that such increased pension is within the limits for such pensions under current legislation'."

111. It would appear clear that his recollection as sworn to at paragraph 13 of his affidavit was not in accord with what was actually contained in the explanatory book to which he refers at paragraph 14.

112. He received increases in his pension and the details of those are set out in the affidavit. He should have received the first such increase on the first anniversary of his retirement but it would appear that he did not. Thereafter he received increases which he said he expected to increase by 5% per annum compound. It is quite clear that he did not receive increases at that rate. It was only when he came to swear his affidavit that he realised that this was so.

113. Later in his affidavit he exhibits a letter written by the plaintiff to the CRC accountant concerning an employee of CRC who elected to take a paid up pension on his withdrawal from the scheme in December 1980. That letter is written by Mr. Paul Kenny and speaks of the pension escalating at a rate of 5% per annum compound from the date of retirement.

114. He also refers to the 1993 actuarial valuation and says that it disclosed that the assets at that date were sufficient to cover the accrued liabilities of the members and declared that the plan made provision for the pension to increase at a rate of 5% per annum compound. He avers to an actuarial investigation as at the 1st January 1996 which was carried out after his retirement date which demonstrated that the assets were sufficient to cover the accrued liabilities of the scheme. On this occasion however reference was made to the increase at a rate of 5% per annum compound being subject to CPI.

The Reliefs Claimed
115. The following are the reliefs sought by the plaintiff. They are:-

> *"1. Rectification of the 1993 special rule by the addition of the following words at the end thereof, namely:*
>
> > *'Provided that such an increase shall not exceed the cumulative percentage increase in the consumer price index since the member's normal pension date'.*
>
> *2. In the alternative (but strictly without prejudice to the foregoing), an order setting aside the 1993 special rule.*
>
> *3. In the further alternative, an order declaring the 1993 special rule void.*
>
> *4. A declaration that the governing documents (and in particular the explanatory booklets) provided have the effect that escalation rights are to be applied year on year at the CPI capped rate of escalation or 5% per annum compound if less.*
>
> *5. An order directing and authorising the trustee to provide for and make payments of any pension increases by way of escalation at the CPI capped rate of escalation.*
>
> *6. A declaration that the proper construction of the governing documents with regard to escalation rights is such that the applicable provisions in the explanatory booklets prevail and accordingly that the CPI capped rate of escalation applies.*
>
> *7. Without prejudice to the generality of the foregoing, a declaration that the explanatory booklets are member's notifications and further a declaration that pursuant to the terms of general rule 4(a) the terms of the explanatory booklets (whether as member's notifications or otherwise) prevail.*
>
> *8. A declaration that the trustee is not bound to provide the escalation rights purportedly provided by special rule 10.*
>
> *9. A declaration that the 1993 special rule is to be read and construed subject to the applicable provisions in the explanatory booklets so that it is deemed to be an implied term of the 1993 special rule that the escalation right expressed in the 1993 special rule is subject at all times to the CPI capped rate of escalation."*

The Claim for Rectification
116. This is the principal relief which is sought.

117. Rectification permits the court to correct an instrument which has failed to record the actual intentions of the parties to an agreement. It is a discretionary equitable remedy.

118. The circumstances in which rectification is available was authoritatively considered by the Supreme Court in *Irish Life Assurance Co. v. Dublin Land Security* [1989] I.R. In that case Griffin J. speaking for the Supreme Court adopted the principles outlined by Lord Lowry L.C.J. in *Rooney McFarland v. Carlin* [1981] N.I. 138 at 146 where he said:-

> *"1. There must be a concluded agreement antecedent to the instrument which is sought to be rectified; but*
>
> *2. The antecedent agreement need not be binding in law (for example, it need not be under seal if made by a public authority or in writing and signed by the party if relating to a sale of land) nor need it be in writing: such incidents merely help to discharge the heavy burden of proof;*
>
> *3. A complete antecedent concluded agreement is not required, so long as there was prior accord on a term of a proposed agreement, outwardly expressed and communicated between the parties as in Joscelyne v. Nissen [1970] 2 Q.B. 86."*

119. Commenting on these priciples Griffin J. said:-

> *"Applying those principles to the facts of this case, and bearing in mind the heavy burden of proof that lies on those seeking rectification, the question to be addressed is whether there was convincing proof, reflected in some outward expression of accord, that the contract in writing did not represent the common continuing intention of the parties on*

which the court can act, and whether the plaintiff can positively show what that common intention was in relation to the provisions which the appellants say were intended to exclude the vacant lands at Palmerstown."

120. All of these comments were of course made in the context of bilateral contracts.

121. Is the remedy of rectification available in respect of pension schemes? If it is do any different criteria apply?

122. The question of the availability of rectification in respect of pension schemes was dealt with by Rimer J. in *Lansing Linde Limted v. Alber* [2000] P.L.R. 15. In that case he said:-

> *"Rectification is a discretionary equitable remedy which is available to correct the manner in which a transaction is recorded in a written instrument. It is not a remedy which is available to change the transaction itself. The need for the remedy is because it is a fact of life that sometimes mistakes arise in the drafting of documents which the signatories do not spot before they sign. The result is that they lend their names to a document which they believe and intend achieves effect X, whereas by mistake it in fact purports to achieve a different, and unintended effect, Y. Provided the requisite conditions are satisfied, the court has a discretion to correct the executed document so that it reflects the intention to achieve effect X.*
>
> *There is, however, a strong presumption that a signatory of a document intends to sign it in its executed form, since the purpose of singing it is to make the document do the legal job it purports to do; and of course the signatory has every opportunity to satisfy himself before he signs it that it is in a form which meets his needs, an opportunity which responsible signatories will usually take. The jurisdiction to rectify documents is, therefore, one which is 'cautiously watched and jealously exercised' (Whiteside v. Whiteside & Ors. [1950] 1 Ch. 65 at 71 per Sir Raymond Evershed M.R.): and, although the question of whether or not there is a mistake in the document as executed is one which falls to be tested by reference to the civil standard of balance of probability:*
>
> > *'…Convincing proof is required in order to counteract the cogent evidence of the parties' intention displayed by the instrument itself. It is not, I think, the standard of proof which is high, so differing from the normal civil standard, but the evidential requirement needed to counteract the inherent probability that the written instrument truly represents the parties intention because it is a document signed by the party.'*
>
> *(See Thomas Bates and Son Limited v. Wyndham's Lingerie Limited [1981] 1 W.L.R. 505, at 521, per Brightman L.J.)."*

123. Rimer J. then went on to examine the parties intentions at the material time and whether there was any evidence of an outward expression of accord.

124. Whilst clearly accepting that there was jurisdiction to order rectification in respect of pension schemes the judge dismissed the claim on the evidence.

125. The question was raised the following year in the case of *AMP (U.K.) Plc. v. Barker* [2001] P.L.R. 77. That was a decision of Lawrence Collins J.

126. In that case the trustees of the pension scheme with the consent of the employer adopted an amendment to the rules of the scheme. It had the intended effect of increasing pension payments to those who were forced to leave work because of incapacity. However, in adopting the amendment, the trustees and the employer overlooked another provision in the scheme rules to the effect that early leavers would have the same entitlements as those leaving because of incapacity. Accordingly, the rule change with regard to incapacitated employees had the unintended effect of increasing the benefits payable to early leavers. A claim for rectification was brought.

127. In considering the appropriate criteria to apply the judge commented that in the case of a bilateral transaction there must be convincing proof that the concluded instrument did not represent the common intention of the parties. He commented that the policy reason for the need for convincing proof was that certainty and ready enforceability of transactions would otherwise be hindered by constant attempts to cloud the issue. He then went on to consider whether the requirements needed in order to obtain rectification differ from those applicable to bilateral transactions.

128. In this context he reviewed the previous case law including *Joscelyne v. Nissen* which was referred to by Lord Lowry in *Rooney McFarland's* case and the decision of Rimer J. in the *Lansing Linde* case. He concluded that in the case of pension schemes it was not necessary to demonstrate the agreement or accord such as would be required in bilateral transactions. He concluded that what was required was convincing evidence of-

> *"A continuing common intention by the trustees and (the employer) to affect only incapacity benefits. It is clear from the factual findings that there is overwhelming evidence that their intentions were limited to improving the benefits for those leaving on account of incapacity, and they had not the slightest intention to benefit early leavers in general. If objective manifestation of their intentions is a separate requirement, then there can be no doubt that it is fulfilled in abundance".*

129. His judgment then went on (at para. 68) to consider what the position would be if it were in fact necessary to show a common accord between the trustee and the employer. He formed the view that if there was such a requirement it was met on the evidence.

130. At para. 69 of his judgment he then addressed the question as to whether the right to rectification was affected by the fact that the trustees and the board sub-committee intended to pass, or consent to, the very wording in the resolution. He said:-

> *"It is plain that it is not so affected. Butlin's Settlement illustrates another general proposition in the law of rectification, which is that rectification may be available even if the parties have quite deliberately used the wording in the instrument. Brightman J. said:-*
>
> > *'…Rectification is available not only in a case where particular words have been added, omitted or wrongly written as a result of careless copying or the like. It is also available where the words of the document are purposely used but it was mistakenly considered that they bore a different meaning as a matter of true construction. In such a case… the court will rectify the wording so that it expresses the true intention…'*

> *'Consequently rectification may be available if the document contains the very wording that it was intended to contain, but it has in law or as a matter of true construction an effect or meaning different from that which was intended: Whiteside v. Whiteside [1950] Ch. 65, 74; Grand Metropolitan Plc. v. William Hill Group Limited [1997] 1 B.C.L.C. 390.'*

> *It is sometimes said that equitable relief against mistake is not available if the mistake relates only to the consequences of the transaction or the advantages to be gained by entering into it: cf. Whiteside v. Whiteside Supra; Gibbon v. Mitchell [1990] 1 W.L.R. 1304, 1309. This distinction seems to have been derived in the former case from the 1929 edition of Kerr on Fraud and Mistake. If anything, it is simply a formula designed to ensure that the policy involved in equitable relief is effectuated to keep it within reasonable bounds and to ensure that it is not used simply when parties are mistaken about the commercial effects of their transactions or have second thoughts about them. The cases certainly establish that relief may be available if there is a mistake as to law or the legal consequences of an agreement or settlement…."*

131. At para. 71 of his judgment he said:-

> *"It is therefore quite unreal to contend that the intention of the trustees and (the employer) was simply to pass a resolution containing the words which it did in fact contain, or that they did not intend or agree to abolish the link between the calculation of benefits under rules 4.1 and 8.4(1). Nor can it be said that they intended, as was held in Lansing Linde, simply to sign anything which was put before them. The resolution was the subject of preparation, advice and discussion. It was not the result of a rubber stamping exercise, and the fact that, as a result of an oversight or of negligence it had an effect going far beyond the intentions of the trustees and the employer not only does not prevent rectification, but it is a ground for it."*

132. The decision in *AMP* is also relevant insofar as it considered the position of members of the pension scheme. A suggestion was made that they were *bona fide* purchasers and therefore took free from the equitable right to rectification. The judge held that pension is not a gift by the company. The employee has worked for the right to a pension and has given consideration for it. Whether or not the scheme is a contributory scheme, the payments from the scheme are part of the consideration for the services of the employee. Notwithstanding that however, it did not follow that the members were to be regarded as *bona fide* purchasers in respect of any additional benefits conferred upon them by the impugned amendment to the scheme rules in the *AMP* case. He said:-

> *"It is true that they gave consideration for their pension rights, but they gave no additional consideration for the 'rights' which the rule changes mistakenly conferred on them, and it is wholly unrealistic to treat them as purchasers of anything in the present context other than such rights as were properly granted in the rules."*

133. Rectification was granted.

134. Insofar as the approach of Lawrence Collins J. may have differed from that of Rimer J. in the two cases from which I have just cited, I prefer the approach of Lawrence Collins J. It appears to me that bilateral transactions are substantially different to transactions which create rights for persons other than the maker of the instrument but which are not the result of a bargain. I can see good sense in drawing a distinction between the former and the latter. In the case of bilateral transactions some outward expression of accord or evidence of a continuing common intention outwardly manifested is required. In the case of a pension scheme however, evidence of the intentions both of the trustees and of the employer is required but not necessarily of their agreement or accord. That approach makes sense having regard to the different nature of the transactions. It also appears to me to be in accord with the general approach which is taken to the construction of pension schemes. That approach is purposive rather than literal.

135. In *Re Courage Pension Schemes* [1987] 1 W.L.R. 495, Millett J. set forth the general approach to the construction of pension schemes and in particular powers to amend them. He said:-

> *"Before I consider this question I should make some general observations on the approach which I conceive ought to be adopted by the court to the construction of the trust deed and rules of a pension scheme. First, there are no special rules of construction applicable to a pension scheme; nevertheless, its provisions should wherever possible be construed to give reasonable and practical effect to the scheme, bearing in mind that it has to be operated against a constantly changing commercial background. It is important to avoid unduly fettering the power to amend the provisions of the scheme, thereby preventing the parties from making those changes which may be required by the exigencies of commercial life. This is particularly the case where the scheme is intended to be for the benefit not of the employees of a single company, but of a group of companies…*
>
> *Secondly, in the case of an institution of long duration and gradually changing membership like a club or pension scheme, each alteration in the rules must be tested by reference to the situation at the time of the proposed alteration, and not by reference to the original rules at its inception. By changes made gradually over a long period, alterations may be made which would not be acceptable if introduced all at once. Even the main purpose may be changed by degree."*

136. The approach of Millett J. was followed by Warner J. in his decision in *Mettoy Pension Trustees v. Evans* [1990] 1 W.L.R. 157. He accepted that the construction of a pension scheme should be practicable and purposive rather than detached and literal. He said that the scheme should be construed so as to give reasonable and practical effect to it and said:-

> *"That is in my judgment particularly so where, as here, the documents governing the scheme include not only documents such as the 1973 and 1978 booklets but also documents such as the memoranda of 1973 and 1976 and the deed of 1978, which were intended to have legal effect but were couched in very general terms."*

137. There is no doubt but that the court in approaching a claim to rectification is entitled to take into account the factual background and the surrounding circumstances. (See *O'Neill v. Ryan* [1992] 1 I.R. 166; *Kramer v. Arnold* [1997] 3 I.R. 43 and my own decision in *Analog Devices B.V. v. Zurich Insurance*, Unreported 20th December, 2002).

138. In his judgment in *Mettoy's* case, Warner J. identified a number of special factors which formed part of the facts of that case. One of them was that what were described as temporary and imprecise documents were brought into existence for the purpose of satisfying certain statutory authorities. He said:-

> *"It would be inappropriate and indeed perverse to construe such documents so strictly as to undermine their*

effectiveness or their effectiveness for their purpose. I do not think that, in saying that, I am saying anything different from what was said by Lord Upjohn when in Re Gulbenkians Settlements [1970] A.C. 508, 522, he referred in the context of a private settlement to –

> *'The duty of the court by the exercise of its judicial knowledge and experience in the relevant matter, innate common sense and desire to make sense of the settlors or parties expressed intentions, however obscure and ambiguous the language that may have been used, to give a reasonable meaning to that language if it can do so without doing complete violence to it.'*

What the court has to do here is to perform that duty in the comparatively novel and different context of pension scheme trusts."

139. Whilst these cases were of course dealing with the question of construction of pension schemes it does appear to me that the purposive approach does have a bearing upon how a claim for rectification in the context of a pension scheme should be looked at. The approach of Lawrence Collins J. in the *AMP* case appears to me to be the one that I should adopt here in approaching the plaintiff's claim. Such an approach is not merely more appropriate when dealing with a pension scheme as distinct from an ordinary bilateral arrangement but also appears to me to reside comfortably with the purposive approach.

Conclusions on the Rectification Claim

140. The extensive affidavit evidence satisfies me that there was a continuing common intention between the plaintiff and CRC that pensions in payment would be subject to escalation at 5% per annum subject to a CPI cap. That found expression in a number of different ways. They were:-

(a) The terms of the explanatory booklets issued by the plaintiff which antedated and post-dated the adoption of the special rules in 1993.

(b) The way in which the scheme operated both prior to and subsequent to the 1993 rule change.

141. As to (a) the explanatory booklets have at all times been consistent in stating that the annual increases in pensions were subject to them not exceeding the percentage increase in the CPI. The first such booklets were issued in 1978 and updated ones were issued in 1992, 1996 and 2001. All of them are *ad idem* on this topic.

142. The 1978 booklet was circulated close to the time when the scheme was adopted. It was considered by CRC and the plaintiff prior to its approval and circulation. Of all the booklets it is probably the most reliable statement of the intention of the parties. The reissues of that booklet in 1992, 1996 and 2001 seem to me to provide evidence of a continuing intention of CRC and the plaintiff on the topic of pension escalation. In addition to the explanatory booklets there is of course the testimony which has been placed on affidavit by both the plaintiff and CRC particularly via Mr. Kiely which is supportive of the continuing common intention which I have identified.

143. As to (b) there cannot be the slightest doubt but that the actual operation of the scheme at all times since pension escalation was introduced involved the application of the CPI cap to such pension increases. Any discrepancies were minuscule and I do not regard them as being in any way significant.

144. Both of these elements i.e. the booklets and the way in which the scheme operated seem to me to demonstrate outward expression of a continuing common intention.

145. I do not accept that that common intention was displaced by the adoption of special rule 10.

146. The special rules were adopted in order to obtain Revenue approval. There is no evidence that the intention was to alter the existing position concerning escalation of pensions. If there was any intention to permit of escalation without a CPI cap it would have had substantial implications for the funding of the scheme. No alteration to that funding was brought about and I regard this as strong evidence of the continuing common intention.

147. There is a further element which seems to me to negate any intention to alter the arrangements. Special rule 10 in the form in which it was executed was expressed to take effect from 1977. Such retroactive application of the rule change would likewise have had profound implication which would have to reflect themselves in alterations to the funding arrangements. There were no such alterations.

148. It seems highly likely on the evidence that has been put before me that special rule 10 was adopted because of a mistaken belief to the effect that general rule 14(9) already incorporated a CPI cap into the scheme rules and so it was unnecessary to refer to such a cap in the special rules.

149. I have come to the conclusion that the plaintiff and CRC made a mistake as to the legal consequences of adopting special rule 10 in the form in which it was adopted. Those consequences extended far beyond what was intended. All that was intended was that the rules would comply with the Revenue requirements and it was considered unnecessary to refer to the CPI cap in the special rules because of the belief that such a cap was already incorporated in the scheme in general rule 14(9). A mistake of this sort is a ground for granting rather than refusing rectification as observed by Lawrence Collins J. in the *AMP* case.

150. It does not matter whether this mistaken belief can be described as oversight or negligence. That is not relevant to the issue of whether or not rectification is an appropriate remedy. In this regard I repeat what was said by Lawrence Collins J. in *AMP*-

"…And the fact that, as a result of an oversight or of negligence (see Walker v. Armstrong) it had an effect going far beyond the intentions of the trustees and (the employer) not only does not prevent rectification, but is a ground for it."

151. That observation is entirely consistent with the views of Dixon J. in *Monaghan County Council v. Vaughan* [1948] I.R. 306 where he held that in a case of a claim for rectification of a contract on the ground of mutual mistake, negligence on the part of the plaintiffs could not be raised as a defence.

152. There was never any intention on the part of the plaintiff or CRC to alter the *status quo* concerning pension escalation by the adoption of the special rules in 1993.

153. In these circumstances I have come to the conclusion that the plaintiff is entitled to succeed on the claim for rectification.

154. It is therefore not strictly necessary for me to proceed to consider the other reliefs. I will briefly do so however for the sake of completeness.

Setting Aside Rule 10
155. In *Gibbon v. Mitchell* [1990] 1 W.L.R. 1304 Millett J. said:-

> *"…Wherever there is a voluntary transaction by which one party intends to confer bounty on another, the deed will be set aside if the court is satisfied that the disponor did not intend the transaction to have the effect that it did. It would be set aside for mistake whether the mistake is a mistake of law or of fact, so long as the mistake is as to the effect of the transaction itself and not merely as to its consequences or the advantages to be gained by entering into it."*

156. That observation was of course made in the context of a voluntary transaction. However, in the *AMP* case Lawrence Collins J. expressed the view that there was no reason in principle why it should be so limited. He took the view that this relief would be available also in the context of an occupational pension scheme.

157. The reasoning for him so concluding was that while occupational pension schemes were not voluntary settlements they were similar to them so as to merit the same approach been taken in dealing with the effect of a mistake on the part of the settlor.

158. Whilst the members of the scheme were not volunteers in respect of their pension rights none of them were privy to or aware of the adoption of special rule 10. That rule confers on them benefits far beyond what was intended by both the plaintiff and CRC. Whilst therefore they gave consideration for their pension rights they gave no additional consideration for the rights which the rule change mistakenly conferred on them. It is therefore unrealistic to treat them as purchasers of anything.

159. In *O'Neill v. Ryan (No. 3)* [1992] 1 I.R. 166, Costello J. said:-

> *"In most cases, then, a shared common mistake will not result in a void contract. This does not mean however that an injured party is without a remedy. As Solle v. Butcher [1950] 1 K.B. 671 showed, the court may, in the exercise of its' equitable jurisdiction set aside an agreement even though it is not avoided by common shared mistake."*

160. His views were approved by the Supreme Court and in fact were described by O'Flaherty J. as making a significant contribution to our jurisprudence on this aspect of contract law.

161. In the present case it does not much matter whether CRC and the plaintiff executed the special rule under a common mistake or whether one party executed under a mistake as to its effect. On either view the mistake involved was a major and fundamental one and therefore the equitable jurisdiction to set aside can be successfully invoked.

162. There is also a claim made for a declaration that special rule 10 is void. That is sought on what is described as the rule in *Hastings-Bass*. That was a decision of the Court of Appeal in the case of *Hastings-Bass v. Inland Revenue Commissioners.* (See [1975] Ch. 25).

163. The decision was considered by Lawrence Collins J. in *AMP*

164. The principle in Hastings-Bass is to the effect that when a trustee is given discretion and acts in good faith in its exercise the court should not interfere with his action notwithstanding that it does not have the full effect which he intended unless-

> *(a) What he has achieved is unauthorised by the power conferred on him, or*
>
> *(b) It is clear that he would not have acted as he did-*
>
> > *(1) had he not taken into account considerations which he should not have taken into account, or*
> >
> > *(2) had he not failed to take into account considerations which he ought to have taken into account.*

165. Collins J. expanded the test somewhat by concluding that it was not, whether the trustees would have acted differently but rather whether they might have done so. On the facts in *AMP* he held that it did not matter which test applied.

166. It is said here that the plaintiff would not have agreed to special rule 10 if it had been aware of, and taken into consideration, the implications of that rule for the funding of the scheme and the attitude of CRC. It follows it is said that on the Hastings-Bass principle special rule 10 should be declared void.

167. I do not have to decide this issue having regard to the conclusions which I have already reached. Had I not found for the plaintiff on the claim to rectification I would have been much inclined to set aside or declare void special rule 10 under either of the two rubrics with which I have just been dealing.

Member's Notification
168. The plaintiff claims that even if they fail in all of their other claims that it does not matter because the explanatory booklets prevail over the 1993 special rule. The basis for that claim is as follows.

169. Clause 3 of the trust deed defines member's notification as meaning:-

> *"Such notification and notifications as shall have been given to the member as required under the rules."*

170. The rules require that the members be given details of the benefits to which they are entitled. That much is clear from rule 4(a) of the scheme. I have already set it out earlier in this judgment but it is convenient to the argument to restate it here. It provides:-

> *"Subject to the provisions of the rules and sub-rule (b) of this rule, there shall be provided in respect of a member such of the benefits as are subsequently described in the rules, for himself, his beneficiaries or personal representatives or his dependants, each such benefit, if any, being of such amount or at such rate as the employer with the consent of the*

trustee shall in its absolute discretion decide and shall have been specified by member's notification, provided that unless the employer in consultation with the trustee shall otherwise determine and the member shall be so notified in the case of a specified member, the amount or rate of any such benefit, subject to the aforesaid provisions, be as set out in the special rules."

171. Clause 6(b) of the trust deed provides:-

> *"A member's notification containing such information as is required to be supplied to a member under the rules shall be given in writing to the member by the trustee or, with the consent of the trustee by the employer, and shall be titled in accordance with the agreement and shall be regarded as forming part of the trusts of the plan."*

172. Thus the amount or the rate of the benefits payable under this scheme are those that shall be specified in a member's notification. That would include the rate of escalation applicable to pensions which are in payment.

173. In this case it is clear that all of the information required to be supplied to a member under the rules was given in the explanatory booklets.

174. Those booklets specified that the escalation rate was subject to a CPI cap.

175. Whilst it is true that there is a proviso in rule 4(a) to the effect that the "amount or rate of any such benefit shall be as set out in the special rules" that is in turn qualified by the phrase "subject to the aforesaid provisions" i.e. the provisions of rule 4(a) relating to member's notifications. It seems to me to follow therefore that where conflicting provision is made in a member's notification and what is contained in the special rules regarding the amount or rate of benefit payable under the scheme it is the notification rather than the rules that would prevail.

176. Again in this case it is not necessary for me to come to a conclusion on this aspect of the matter but if I had to it would be in favour of the plaintiff.

Concluding Comments

177. In reaching my conclusions I have taken fully into account the strong arguments and indeed criticisms that were made by counsel for Mr. Tierney in respect of each of the reliefs sought. I have not entertained the argument made solely by Mercer on the grounds of estoppel by convention. That argument was described by counsel for Mr. Tierney as being a somewhat audacious one. I make no comment as to whether that is an accurate description of it or not. If successful the effect of the argument would on one view of it at least have effectively denied the opportunity to Mr. Tierney to make his case in full. I think that would have been undesirable particularly in circumstances where he is a representative defendant.

178. In reaching my conclusion I derive some comfort from the fact that none of the pensioners in this scheme did or indeed could have organised their affairs on the basis that they were going to get an unfettered 5% increase each year. All of the information which they received in the explanatory booklets was to the effect that increases were subject to the CPI cap. As a matter of fact that is the level of increase which they actually received. Whatever about the views sworn to by Mr. Tierney at para. 13 of his affidavit they were clearly formed as a result of a mistake on his part rather than on any inaccurate information furnished to him in the explanatory booklet from which he quoted in the very next paragraph.

Conclusion

179. I direct that special rule 10 adopted in 1993 be rectified by the addition of the following words at the end thereof, namely:-

> *"provided that such an increase shall not exceed the cumulative percentage increase in the Consumer Price Index since the Members Normal Pension Date."*