THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 19

Kelly J.
Hogan J.
Mahon J.

No. 1376/2014

Paul Holloway, Timothy Crowley And Griet Vandenheede

Plaintiffs/Respondents

and

Damianus BV, Omega Teknika Ltd. And Chefaro Ireland Ltd.

Defendants/Appellants

Judgment of the Court delivered on the 10th day of February 2015

1. These are our reasons for dismissing the Defendants/Appellants appeal.

2. This is an appeal from an order of the High Court (Moriarty J) made on 31st July 2014 granting judgement against the Defendants/Appellants in the sum of €2,439,193.56 (inclusive of interest): See [2014] IEHC 383.

3. The Plaintiffs are the Trustees of the Omega Pharma Ireland (the second named Defendants/Appellants) Pension and Death Benefits Scheme (the "Scheme"). The first named Defendant/Appellant is a company registered in the Netherlands and is the principal employer under the Scheme. The second and third Defendants/Appellants are companies registered in Ireland, and are the associated employers in respect of the Scheme.

4. The Scheme is governed by Definitive Deed Rules dated 24th November 2004, made between the (then) trustees and the (then) principal employer.

5. On the 1st October 2012 the first Defendant/Appellant served notice on the Plaintiffs/Respondents in their capacities as Trustees of the Scheme, of its intention to discontinue contributions to it, and nominated 31st December 2012 as the winding up date, it sought agreement on that date. The Notice stated:

> *"As Principal Employer of the Omega Pharma Ireland Pension and Death Benefits Scheme, we hereby give you three months written notice commencing from the date hereof, pursuant to clause 18 of the Definitive Deed Rules dated 24th November 2004 ("The Definitive Deed"), of our intention to discontinue contributing to the Scheme. The date of expiry of the three months notice is the date specified for the purpose of clause 18.1.*
>
> *We request that the Trustees agree that the date of the winding up of the scheme be 31 December 2012.*
>
> *There is no Associated Employer (as defined in the Definitive Deed) that will take on the role of Principal Employer. Accordingly, there is no basis for the Trustees to defer the winding up of the scheme."*

5. The Trustees responded to this letter of 1st October 2012 by letter dated 26th October 2012. In that letter, the Trustees agreed to the suggested 31st December 2012 as the winding up date. They also advised the First Defendants/Appellants that the Scheme's funds currently in place were insufficient to maintain the fund to enable it to support and provide the benefits under the Scheme, and that steps were being taken to ascertain the additional funding necessary to provide for the shortfall as of the winding up date.

6. Reference is made to clause 8.1 of the Trust Deed as the provision requiring the calculation of the funding shortfall and the basis for calculating the amount involved. The letter of 26th October 2012 sought to establish consultation with the first Defendant/Appellant in relation to these matters, and to commence such consultation on 26th November 2012, and requested that it contact the Trustees on or before 23rd November 2012 in that regard. There was no response to this letter.

7. A reminder letter was sent by the Trustees on 22nd November 2012, in which it was clearly stated that the final contribution amount would be determined after the 30th November 2012 if no response was received by then. In the event, no response was received, and the Trustees actuaries duly assessed the contribution amount at €3,010,000 by letter dated 7th December 2012, the trustees demanded payment of that sum. This sum was subsequently adjusted downwards to €2,250,000.00.

8. The first Defendant/Appellant did not respond to the letter of 7th December 2012 until 29th January 2013, following a further letter from the Plaintiffs/Respondents of 28th January 2013 in which reference was made to the possible institution of legal proceedings to recover the amount claimed. On 25th April 2013, the first Defendant/Appellant informed the Plaintiffs by telephone that, effectively, it did not intend to pay the amount. A formal demand letter seeking payment of €2,250,000 within seven days was despatched on 17th May 2013, following which legal proceedings were instituted on 19th June 2013. In due course the Defendants/Appellants delivered a full defence thereto.

9. Clause 8.1. of the Trust Deed provides as follows:

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

10. The other relevant clauses (in relation to these proceedings) of the Trustees are those numbered 18, 19 and 20.

11. Clause 18.1 provides as follows:

> *"If an Employer ceases to carry on business, or gives three months written notice to the Trustees of its intention to discontinue contributions (or such lesser period as the Employer shall agree with the Trustees) it shall discontinue contributions to the Scheme, with effect from whichever of the following dates is applicable:*
>
> *The "Discontinuance Date":*

(a) Immediately on ceasing to carry on business or where the Employer is an Associated Employer on such later date as that Employer agrees with the Trustees being not later than the Review Date next but one following the date the Employer ceases to carry on business;

Or

(b) The date specified in the notice or agreed with the Trustees."

10. Clause 18.7 provides that in circumstances where the Principal Employer gives notice to discontinue contributions under Clauses 18.1 or 18.2, and where no Associated Employer is willing to undertake the liabilities of the Principal Employer under the Scheme, the Scheme shall be "wound up and the Fund dissolved as described in Clause 20."

11. Clause 19.1 provides as follows:

"The Scheme shall be wound up on the day on which the first of the following events occur:

(a) On the Principal Employer being wound up, ceasing to carry on business or giving or being deemed by the Trustees to have given notice under Clause 18.1 or 18.2 as applicable of its intention to discontinue contributions to the Scheme, unless …"

(b) On the expiry of notice by all the Employers under Clause 18.1 of their intention to discontinue contributions"

12. Clause 20.1 provides as follows:

"As soon as may be practicable after the day upon which the first of the events specified in Clause 9 occurs (in this Clause called the "Winding Up Date"), the Fund shall be realised, subject to Clause 20.3(c). The Employers shall continue to be liable for contributions which have accrued due but are unpaid at the winding up date and for the costs, fees, charges and expenses of, or incidental to, the administration, management and determination of the Scheme…"

13. The Defendants/Appellants maintain that there are not liable for the amount claimed, or for any amount by way of contribution to the Pension Fund, and that a proper construction of the Trust Deed supports this position. In particular, they take issue with the Plaintiffs/Respondents contention that Clause 8.1 of the Trust Deed imposes an obligation on them to, in effect, fund the shortfall in the Pension Fund necessary "*to provide the benefits under the scheme*" as of the 31st December 2012, the agreed winding up date as indicated in their notification to the Trustees dated 1st October 2012. The Defendants/Appellants maintain that any liability on their part to fund any shortfall in the Pension Fund ceased as of 1st October 2012, and that in any event, such liability as existed was capped at the statutory Minimum Funding Standard ("MFS"). It is their case that as of 1st October 2012 (or indeed, 31st December 2012) the MFS funding requirement had been met.

14. The shortfall claim of €3,010,000 (and which was subsequently reduced to €2,250,000.00) was actuarially calculated and notified by the Actuary to the Plaintiffs/Appellants on 26th October 2012, and subsequently notified to the Defendants/Appellants. That figure represented the "*Estimated Value of Accrued Liabilities at 31st December 2012*". It was calculated on the basis that, as of that date, such a contribution was required in order to enable the Pension Fund "*provide the Benefits under the Scheme*" (Clause 8.1.), and not merely to its MFS level. The accuracy of the figure calculated (and as subsequently reduced) as being the amount necessary to meet the Scheme's liability to pay the benefits as provided for by the Scheme as of 31st December 2012, was not disputed by the Defendants/Appellants.

15. The Defendants/Appellants submissions can be summarised as follows:

• Clause 18.1 of the Trust Deed allows for the giving of three months written notice by any of the Employers to the Trustees of its intention to discontinue contributions. Clause 18.1 further provides that where an Employer gives such notice it shall discontinue contributions to the scheme with effect from the dates specified in the Notice, or agreed with the Trustees. Clause 18.7 of the Trust Deed provides for what should happen if the Principal Employer "*gives or is deemed to have given notice to discontinue contributions under Clause 18.1*", and provides that in the circumstances either an associated Employer may undertake the liabilities of the Principal Employer under the Scheme or, failing this, the Scheme shall be wound up and be dissolved in accordance with Clause 20.

• The Termination Notice issued by the first Defendant/Appellant requested that the Trustees agree that the date of the winding up of the Scheme be 31st December 2012. It is submitted that irrespective of the date suggested by the Employers for the commencement of the winding up, the Trustees were still obliged to commence the winding up with effect from 1st October 2011.

• The learned trial judge misconstrued the Trust Deed in holding that Trustees were entitled to make a contribution demand notwithstanding the fact that the Termination Notice had been served by the first Defendant/Appellant as Principal Employer (on 1st October 2012), with the second and third Defendants/Appellants simultaneously confirming that neither of them intended to take over as Principal Employer.

• In relation to the date on which the Scheme is to be wound up, it is provided in Clause 19.1 that:

"The Scheme shall be wound up on the day on which the first of the following events occurs:
(a) On the Principal Employer being wound up, ceasing to carry on business or giving or being deemed by the Trustees to have given notice under Clause 18.1 or 18.2 as applicable of its intention to discontinue contributions to this Scheme unless …

(b) On the expiry of notice by all the Employers under Clause 18.1 of their intention to discontinue contributions." (emphasis added in Defendants/Appellants written submissions).

• The clear and unequivocal effect of Clause 19.1 (a) is that if the Principal Employer gives Notice of Intention to cease contributions under Clause 18.1, and if no other Associated Employer is willing to take on the role of Principal Employer,

the Trustees ought to wind up the Scheme as of the date on which the Clause 18.1 notice is given, i.e. 1st October 2012.

• This is in contrast to the position that pertains under Clause 19.1 (b) where all of the Employers give notice of their intention to discontinue contributions. In that situation it is clear that the winding up date is the date of the expiry of the Notice of Termination, namely 31st December 2012.

• While it may appear odd that there are to be different winding up dates depending on whether the Notice of Termination is given by the Principal Employer alone rather than being given by all Employers, it is nevertheless the case that Clause 19 clearly provides for this. It is submitted that there is no ambiguity or uncertainly in relation to the words used and thus, it was not open to the learned trial judge to interpret them otherwise than in accordance with their clear and plain meaning.

• In this regard it is significant that Clause 20 goes on to deal with the manner in which the Funds of the Scheme are to be applied in a winding up, setting out the order of priority in which benefits are to be purchased for pensioners and members. In this regard it is to be noted that Clause 20.1 specifically states inter alia that

> *"The Employer shall continue to be liable for contributions which have accrued due but are unpaid at the winding up date and for the costs, fees, charges and expenses of, or incidental to, the administration, management and determination of the Scheme".*

• Clause 19.1(a) of the Trust Deed clearly envisages the possibility of the Scheme being wound up as soon as the Termination Notice has been given (where the notice is given by the Principal Employer and no Associated Employer is willing to take on the role of Principal Employer).

• Clause 20 states that once the winding up commences, the Employers only have a liability for contributions "which have accrued due but are unpaid at the winding up date".

• Thus the termination provisions of the Trust Deed operates so that if the Principal Employer gives Notice of Intention to seek contributions under Clause 18.1 and if no other Associated Employer is wiling to take on the role of Principal Employer, the Trustees are obliged to wind up the Scheme as of the date on which the Clause 18.1 Notice is given and that the only contributions that the Employers shall continue to be liable for following that date are contributions which have accrued due but are unpaid at the "winding up date" (as for example, where the Trustees have, at the start of the year made a demand for a contribution of x Euros payable by twelve equal monthly instalments and some of those instalments have not yet been paid because, the Termination Notice was served in the middle of that year).

16. The Defendants/Appellants contend that the trial judge fell into error in his construction of the aforementioned provisions. At para. 30 of his Judgment he stated:

> *"On my reading of Clause 19.1, the reference to the given of notice in Sub Clause (a) is for the purposes on identifying the exception in Sub Clause (iii) to the general rule as set out by Clause 19.1. If Clause 19.1 (a) was read as setting the date of winding up of as the date of the notice, this construction would be inconsistent with Clause 19.1 (b) which puts the date of winding up at the expiry of the notice given by the Employers, under Clause 18.1. It would appear to be a difficult construction to interpret Clause 19.1 as providing that the first in time of either the giving of the notice or the expiry of the notice period can be the winding up date, because it would be impossible for the latter to arise and an alternative construction which does not render Clause 19.1 (b) in nullity, is reasonably open".*

17. It is the Defendants/Appellants case that because Clause 19 provides for the winding up of the Scheme as of the date of service of the Termination Notice (being 1st October 2012) their liability for any shortfall can only be in respect of any unpaid contributions as of that date, and that any claim subsequent to that date is invalid.

18. A second heading of Appeal by the Defendants/Appellants is that, irrespective of the operative date being either 1st October 2012 or 7th December 2012 (the date of the actuarial calculation of €3,010,000). There was, in fact, no shortfall as there was in place (as of both dates) 100% funding calculated on the MFS basis. It was acknowledged by counsel for the Defendants/Appellants that the MFS funding level was insufficient to "*provide the benefits under the Scheme*" as per Clause 8.1 of the Trust Deed.

19. The Plaintiffs/Respondents reject the arguments put forward by the Defendants/Appellants. In particular they reject the contention that the liability of the Defendants/Appellants to fund any shortfall in the Pension Fund existed after 1st October 2012 (other than such contributions that would be payable in the ordinary way during the three month notice period) or that the measure of any shortfall (as of 1st October 2012, or identified during the course of the three month notice period) was to be measured using the MFS standard. The Plaintiffs/Respondents submissions might be summarised as follows:

• Clause 18.1 envisages that where the Employer intends to discontinue contributions to the Scheme, such contributions will be discontinued from "*the date specified in the Notice or agreed with the Trustees*". The date specified in the Notice, and which was agreed with the Trustees, was 31st December 2012.

• It is clear from Clause 18 that where the Employer gives three months written notice of its intention to discontinue contributions, the discontinuance of the contribution obligation runs from the date of expiry of that three month notice period (unless some other date is agreed with the Trustees). In this case the Employers notice of 1st October 2012 is consistent with the wording of Clause 18. It gave notice of the employers "*intention to discontinue contributions to the Scheme*".

• The notice also stated:

> *"The date of expiry of the three month notice is the date specified for the purpose of Clause 18.1."*

• It is clear that the obligation to make contributions on the part of the Employer was to continue until the expiry of the relevant notice period (i.e. 31st December 2012), and that accordingly, during that notice period, the Trustees were entitled to make a contribution demand. It is argued that there is no suggestion in the terms of Clause 18 of the Trust Deed that the employers have an immediate entitlement to seek contributions (at least where the Employer continues in business). It is pointed out that the employers were obliged to continue to make contributions to the Scheme up to the

winding up date specified in the notice, namely 31st December 2012, and this is consistent with the fact that the Members benefits continued to accrue up to the winding up date.

• There is nothing in the language of Clause 20.1 of the Trust Deed which expresses overrides, or purports to override, the provision of Clause 18.1, which entitles a contribution demand to be made up to the date of the expiry of the notice, namely in this case, 31st December 2012. The Trustees submit that if the words of Clause 18.1 were to be overwritten, it would be expected that this would be expressly provided for in the Trust Deed. The argument which the Employers contend for would have the result that the obligation to pay contributions would cease immediately on service of the notice, notwithstanding the Clause 18.1 clearly envisages a period of notice being given prior to the "*discontinuance*" of the contribution obligation. It is submitted that this would make the Scheme unworkable.

• The view of the relevant legal authorities suggest that Courts interpret pensions scheme provisions so as "*to give a reasonable and practical effect to the Scheme*" and so reflects a purposive approach. They referred to the judgment of Kelly J in *Irish Pensions Trust Limited v. Central Remedial Clinic* [2006] I.R126 and to *Mettoy Pension Trustees Limited v. Evans* [1990] 1WLR 1587, *R.e Gulbenkian Settlements* [1970] AC508, 522, and *Boliden Tara Mines Limited v. Cosgroves and Others* [2010] IESC62 amongst others.

• In relation to the contention that the proper standard of funding is that of the MFS, it is contended that such ignores the fact that the statutory standard is no more than a minimum, and the fact that in this case the members are entitled to the benefits provided for under the Scheme, and which if they are to be met, would require a funding standard greater than MFS.

• Reference was made by the Plaintiffs/Respondents to the PwC report prepared in September 2012, in the context of the proposed restructuring of the first named Defendant/Appellants Irish operations. In that report, it is stated as follows:

> *"There is the potential for the Trustees to seek cash funding beyond the MFS liability such that the "buy out" cost of accrued liabilities would be funded by the Employer, thereby providing the members with the Fund which could be expected to replicate the benefits they were expecting in the DB Scheme."*

20. Counsel for the trustees, Mr. McDonald SC, urged us to adopt the principle articulated in *Forbes v. Git & Ors.* [1922] 1 A.C. 256, where Lord Wrenbury stated (at page 259):

> *"….the principle of law to be applied may be stated in a few words. If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant and the earlier clause prevails. In this case the two clauses cannot be reconciled and the earlier provision in the Deed prevails over the later. Thus if A covenants to pay £100 and the deed subsequently provides that he shall not be liable under his covenant, that latter provision is to be rejected as repugnant and void, for it altogether destroys the covenant. But if the later clause does not destroy but only qualifies the earlier, than the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole. Thus, if a covenant to pay £100 and the deed subsequently provides that he shall be liable to pay only at a future named date or in a future defined event or if at the due date of payment he holds a defined office, then the absolute covenant to pay is controlled by the words qualifying the obligation in the manner described."*

21. While there may well be cases where effect should be given to the earlier rather than the later provisions by reason of the sequence of such clauses in the contract, this Court is of the view that cases where this would be an important consideration are likely to be rare. Even in those types of unusual case, much may depend on the context (including, for example, the nature of the contract and whether it was a contract in standard form offered by one party to another) and the later inconsistent clause may sometimes be readily explained as an obvious error or oversight. Yet we would nonetheless be reluctant to adopt such a principle as a general rule, not least if it were to be applied in some quasi-mechanical or artificial fashion. Such an apparently dogmatic approach would be out of line with the modern attitude to the construction of contracts prescribed by the Supreme Court. This modern approach generally favours an holistic approach to the resolution of apparently conflicting contractual provisions, often by reference to well established doctrines such as the general "matrix of fact" principle, the parol evidence rule, the *contra proferentem* rule and the maxim of *generalia specialibus non derogant*; as adopted in a number of cases including *Welch v. Bowmaker (Irl.) Ltd.* [1980] I.R. 251, *Analog Devices BV v. Zurich Insurance Co*. [2005] 1 I.R. 274, *ICDL GCCC Foundation v. European Computer Driving Licence Ltd*. [2012] IESC 55.

22. Indeed, it may be observed that the English courts have shown no subsequent real enthusiasm for the principle articulated in Forbes v. Git. Thus, for example, in *Peabody Trust Governors v. Reeves* [2008] EWHC1432 (Ch.) Gabriel Moss Q.C. (sitting as a Deputy High Court judge) certainly applied the principle so to give effect to the earlier two irreconcilable clauses. He nonetheless added, however, that:

> *"….this solution seems to me to be one of last resort only. It is not clear why the two sub-clauses in the present case come in the order in which they do. It may be that they could just as easily have appeared in the reverse order. That would have led to the opposite solution if this were the only applicable test. It is hardly satisfactory for the true agreement of the parties to be ascertained on grounds which may be arbitrary and I suspect it is only in rare cases that this approach will be applied."*

23. A similar view was taken in *RSPCA v. Barry* [2011] EWCA Civ 1474, [2011] 1 W.L.R. 980 where Lord Neuberger M.R., said in the context of the construction of a will that:

> *"….as a free standing point, the mere fact that one clause precedes another seems to me to be of minor potential relevance on the issue of how they inter-relate with each other."*

24. We consider that the more relevant principles of construction are instead to be found in the judgment of Henchy J. in *Welch v Bowmaker (Irl.) Ltd.* [1980] I.R. 251, a case where, as it happens, a later provision was preferred to an apparently conflicting earlier provision on the application of the principle *generalia specialibus non derogant*.

25. In that case a debenture was given by a company known as Central Garage (Cork) Ltd. to Bowmaker. Central Garage subsequently went into liquidation and the liquidator applied to the High Court pursuant to s. 280 of the Companies Act 1963 to determine which particular creditor should have priority in view of an apparent inconsistency in the provisions of the debenture itself.

26. Clause 3 of the debenture charged its property and assets, together with a charge over a particular premises specified in a schedule. While certain other properties belonging to the company were included in the schedule, a property known as Ivy Lawn was not. The particulars of the charge were then duly registered with the Registrar of Companies.

27. Approximately one month later Central Garage gave the Bank of Ireland an equitable mortgage over the property at Ivy Lawn by deposit of title deeds. As Henchy J. pointed out, if matters had stood at that point, there would have been no question of the Bank yielding priority to Bowmaker so far as the Ivy Lawn property was concerned. The complicating factor was that clause 1 of the debenture provided:

> *"This debenture is to rank as a second charge on the property within mentioned and such charge is to be as regards the company's lands and premises for the time being and all its uncalled capital a specific charge and as regards all other the property and assets of the company a floating security but so that the company is not to be at liberty to create any mortgage or charge on its property for the time being in priority or pari passu with this debenture."*

28. Faced with this difficulty of interpretation, Henchy J. acknowledged (at P. 254):

> *"Read literally and on its own, this condition is in conflict with the charging provision [in clause 3]. The charging provision makes only the properties specified in the schedule subject to a specific charge: all else (including Ivy Lawn) is subject only to a floating charge. If the first condition is to be given prevailing force, it would make the company's lands and premises for the time being (thus including Ivy Lawn) subject to a specific charge."*

29. In the High Court, Costello J. held that condition 1 operated to give Bowmaker a specific charge over the Ivy Lawn property, thus defeating the Bank's claim to priority. This conclusion was, however, reversed by a majority of the Supreme Court with Henchy J. (254-255) applying the maxim *generalia specialibus non derogant* in order to hold that the general words of clause 1 should yield to the special provisions contained in clause 3:

> *"I consider that the primary and dominant words and expressions delineating the powers and the interests vested in Bowmaker by the debenture are to be found in the charging provision rather than in its attendant condition.*
>
> *The relevant rule of interpretation is that encapsulated in the maxim generalia specialibus non derogant. In plain English, when you found a particular situation dealt with in special terms and later in the same document you find general words used which could be said to encompass and deal differently with that particular situation, the general words will not, in the absence of an indication of a definite intention to do so, be held to undermine or abrogate the special words which were used to deal with a particular situation. This is but a common sense way of giving effect to the true or primary intention or primary intention of the draughtsman, where the general words will usually have been used inadvertent of the fact that the particular situation has already been specially dealt with."*

30. Having set out the principle of interpretation, Henchy J. then proceeded to apply it to the facts of the case:

> *"In this debenture the charging provision limits the creation of a specific charge to the properties especially marked out with particularity in this schedule. If given its full literal meaning the subsequent condition, which provides that the charge created by the debenture is to be a specific charge "as regards to the company's land and premises at the time being" would have such a generality of application as to make nonsense of the clear distinction that is drawn between the charging provisions between the properties marked out for a specific charge and the company's other properties. In such a case, in order to effectuate the draftsman's true intentions, it is the special rather than the general words that must prevail. Those special words show that the primary and transcendent intention was that the Ivy Lawn property, since it was not included in the schedule, was not to be subject to a specific charge. Therefore, I would hold that the debenture gave Bowmaker only a floating charge over it.*
>
> *The words and the condition referring to "the company's land and premises for the time being" should be construed as if they read "the company's land and premises for the time being as specified in the schedule herein". In that way the charging provision and the condition are brought into harmony."*

31. It is true that in the present case, as all the parties acknowledged, the relevant provisions of the trust deed cannot be easily aligned. Clause 19.1 provides that the scheme should be wound-up on the day when, inter alia, the employer ceased to carry on business or on the "*giving or being deemed by the trustees to have given notice under clause 18.1 or clause 18.2 as applicable of its intention to discontinue contributions to the scheme*." If clause 19 were viewed in isolation, it would suggest that the obligation to make contributions ceased as of the date of the giving of notice by the trustees, namely, 1st October 2012.

32. Clause 18.1 in contrast expressly states that the obligation to discontinue payments contributions ceases with effect "*from whichever of the following dates is applicable*", namely (a) the cesser of business by the employer or (b) the date specified in notice or agreed with the trustees. It is beyond question but that this latter provision was the one which was actually invoked by the employer, and agreed with the trustees, with a date of 31st December 2012 being agreed and fixed for this purpose.

33. It would make little practical sense to require the Defendants/Appellants (in their capacity as the Employer) to give three months written notice to the Plaintiffs/Respondents (in their capacity as the Trustees) of their intention to discontinue contributions to the scheme while at the same time providing (at Clause 19) that, in circumstances where such notice was given (as occurred in this case), the Scheme was to be deemed to have wound up on the first day of the giving of such notice. If Clause 19 was to create that result, it begs the question as to why a Scheme that was wound up should, (or indeed could), reasonably require three further months of contributions to be paid into it. It is likely therefore that the parties who drafted and executed the Trust Deed intended that a requirement, in particular circumstances, to provide three months notice in one of its Clauses would be rendered meaningless and inoperative by the immediately following numbered clause.

34. Yet, if the principles of interpretation articulated by Henchy J. in *Welch* are applied in the present case, it will be seen that in the context of the critical issue in this case – namely, the operative date on which the employer's obligation to make contributions to the scheme is to cease - clause 18.1 of the trust deed must be regarded as a special clause in this sense. It is this provision which directly addresses the question of the notice period required in the case of the discontinuation of the employer's contribution to the scheme. By contrast, clause 19.1 is in this context a general clause dealing with the winding-up of the scheme rather than with the more specific question of when the employer's obligation to make contributions actually ceased.

35. It can therefore be observed, applying the expressive language of Henchy J. in *Welch*, that the "primary and dominant words and

expressions" delineating the date on which the obligation to make contributions ceased are to be found in clause 18(1) rather than in what are in this context the more general words of clause 19(1).

36. Applying, therefore, the principle of *generalia specialibus non derogant* we consider that in the face of this apparent inconsistency, the words of clause 18(1) must be taken to prevail.

37. In relation to the Defendants/Appellants second ground of appeal, namely that any inability on their part to fund a shortfall in the Scheme's fund was limited to the Minimal Funding Standard (MFS), and that as of 1st October 2012, or a later date in December 2012, the level of the fund satisfied this threshold, this court is satisfied that the threshold determining the Defendants/Appellants obligation is not so limited.

38. The threshold is as provided for in Clause 8.1. of the Trust Deed, that is a level of funding "necessary to support the Fund in order to provide the benefits under the Scheme". The shortfall required to fund the Scheme sufficiently to meet that liability is €2,250,000.00, the amount claimed in these proceedings.

39. Accordingly, the Defendants/Appellants appeal is dismissed.