Neutral Citation Number [2007] IEHC 60

THE HIGH COURT

COMMERCIAL

[2006 No. 141 S.P.]

[2006 No. 42 COM]

IN THE MATTER OF THE TARA MINES PENSION PLAN

BETWEEN

BOLIDEN TARA MINES LIMITED

PLAINTIFF

AND

FRANK COSGROVE, TADG FARRELL, CHRISTOPHER GORMAN, JOHN KELLY, PETER MULLIN, ALAN BROXSON, IRISH PENSIONS TRUST LIMITED AND (BY ORDER) MICHAEL SHEILS

DEFENDANTS

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 9th day of March, 2007.

1. The plaintiff ("the Company") is the principal employer of the Tara Mines Pension Plan ("the Pension Plan"). The first to sixth named defendants are the current trustees of the Pension Plan. The seventh named defendant ("IPT") was the trustee of the Pension Plan until 20th December, 1999. The eighth defendant is joined as a representative beneficiary whose entitlements are such that they may be affected by the granting of the relief sought by the Company. He replaced by consent an earlier representative beneficiary. Both have been granted an indemnity by the Company in respect of their costs herein.

2. The Pension Plan was established and is operated pursuant to trusts and rules declared by the Company. Since 1996, it is governed by a Deed of Amendment and Substitution of the 24th June, 1996, between the Company and IPT which consolidated and substituted earlier Deeds and Rule. The definition of "Pensionable Salary" in the schedule to the rules attached to the 1996 Deed was defined as meaning:

> "the Member's annual rate of basic salary less an amount to be determined by the Employer but not exceeding one and a half times the annual rate of the Retirement Pension attributable to a single person payable under the Social Welfare Acts."

3. The deduction of an amount by reference to the retirement pension payable under the Social Welfare Acts from basic salary for the purposes of pensionable salary was and is known as "integration" and stated to be common in occupational pension schemes. The Pension Plan is an exempt approved scheme under the provisions of part 30 chapter 1 of the Taxes Consolidation Act, 1997 and an occupational pension scheme as defined by s. 2(1) of the Pensions Act 1990.

4. The Deed of Amendment of 19th October, 1999, ("The 1999 Deed of Amendment") at paragraph D. amends the definition of "pensionable salary" in the schedule to the 1996 Deed by the addition of the following at the end of such definition:

> "provided in the case of a Member whose benefits are being calculated by reference to a date on or after the 20th February, 1998, it shall be his annual rate of basic pay excluding overtime, bonuses or other fluctuating emoluments provided further in the case of a Member in the category of employment of direct miner it shall be 1.25 times such annual rate of basic pay."

5. The effect of the first proviso in the amendment above is to remove integration for those members to whom it applies. It is a significant benefit, particularly for the lower paid workers.

6. The issues in these proceedings relate to the 1999 Deed of Amendment and are:

> (1) Whether the first proviso in the above amendment applies to the class of members represented by the eighth defendant. Such members are those persons who were in receipt of benefits under the Income Continuance Plan of the Company on the 20th February, 1998.
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> (2) If the first proviso when properly construed does apply to such members then:
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> (i) Is the Company entitled to rectification of the Deed of Amendment to exclude such members.
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> (ii) In the further alternatives is the Company entitled to have such proviso set aside or declared void.

No relief is claimed in relation to the second proviso which amended the definition of pensionable salary for a member 'in the category of employment of direct miner'.

Income Continuance Plans

7. The Company had two Income Continuance Plans. Their existence appear to have been of particular importance because of the physical demands relating to mining work. One was for the hourly paid workers who paid their own premium and another for the

salaried workers for whom the Company paid the premium. Nothing turns on the existence of two separate plans and I propose referring in this judgment to those plans as a single Income Continuance Plan (ICP). The ICP was closed to new entrants from 2002. It was underwritten at the relevant time by the Norwich Union Insurance Company.

8. Under the terms of the ICP an employee accepted by reason of his disability, received after the deferred period an income benefit which, subject to periodic medical assessment, continued until age 65. I propose referring to persons in receipt of such benefits as ICP Beneficiaries. In addition to the income benefit the underwriter paid directly into the Pension Plan in respect of each ICP Beneficiary 15.4% of the ICP Beneficiaries' pensionable salary at the date of acceptance into the ICP. Such pensionable salary was increased for this purpose only at 5% compound per annum. An ICP Beneficiary ceased to be an employee of the Company but it is agreed remained an "active member" of the Pension Plan as that term is normally used. The years in receipt of benefit under the ICP were considered as years of service with the Company for pension benefit purposes.

9. In 1991, an issue had arisen as to whether the 5% annual increase provided for under the ICP should also apply to an ICP Beneficiary's basic salary used for the purpose of computing pension benefits under the Pension Plan. The dispute was referred, with other disputes relating to the Pension Plan to the Labour Court and was the subject of recommendation No. 14523 which is of some importance to the issues in these proceedings. In the course of the reference to the Labour Court, the Company offered to increase the basic salaries of ICP Beneficiaries used for pension purposes in line with the increases granted to the grade or category in which they were working when they went on ICP benefits. The Labour Court recommended acceptance of the Company's proposal on the basis of full backdating rather than the 5% compound increase claimed by the Unions. This was accepted and applied in relation to basic salary for benefits under the Pension Plan from 1st July, 1992. Notwithstanding, no formal amendment was made to the Pension Plan rules to give effect to this until the 1999 Deed of Amendment. Paragraph C of the 1999 Deed adds a new rule 16 to so provide. Its terms are not in dispute but are relevant to the construction of the 1999 Deed of Amendment.

Factual Background to 1999 Deed of Amendment

10. The following is a short summary of the facts leading to the 1999 Deed of Amendment. There is dispute between the parties as to the meaning and effect of certain of the agreements and decisions referred to below. Such disputes will be considered in the context of the plaintiff's claim for rectification of the 1999 Deed of Amendment. It is only proposed at this stage to set out the essential facts which are not in dispute and which are relevant to the first legal issue which must be considered namely the construction of the 1999 Deed of Amendment.

11. In 1996, low metal prices and the Company's poor and worsening competitive position amongst world zinc producers showed that major changes would be required in order that it survive. In July, 1996, the "Tara 2005" survival plan was introduced and it became apparent it was not acceptable to employees. Following a Labour Relations Commission recommendation the Joint Working Group (JWG) was established and commenced work in March, 1997. The JWG proposed that a joint strategy be agreed between management and unions to implement a New Work Organisation specific to the Company.

12. At a Labour Relations Commission meeting in June, 1997, the Joint Steering Committee (JSC) was established to implement the change process identified in the report of the JWG. The JSC comprised representatives of management, the unions and workers.

13. The JWG in their deliberation had identified the Pension Plan as a major issue. The JSC appointed the Pensions Project Group to investigate the Pension Plan and report back.

14. The Pension Project Group presented a final report to the JSC on the 18th July, 1997. Its proposals related to changes to the definition of pensionable salary (elimination of integration and increase for direct miners); indexation; funding; the normal pension date and the identity of trustees.

15. The JSC issued "Agreed Proposals" on the 25th November, 1997. This document has subsequently been referred to as the "JSC Agreement". The Agreed Proposals concerned wide-ranging changes relating to the New Work Organisation at Tara. On pension the agreed changes were summarised at paragraph 6.4 as:

1. The elimination of integration.

2. An increase in the Direct Miners' pensionable salary to one and a quarter times basic salary.

3. An extra supplement to be paid, in the form of a bridging pension, between the ages of 62 and 65 years.

4. Reduction of the compulsory retirement age to 62 years.

5. Member Trustees to be elected to the Board of Trustees of the Scheme.

16. The JSC Agreed Proposals were approved of by the employees in January, 1998. No evidence has been given as to when or how they were approved of by the Company. It is not in doubt that they were so approved. They were implemented by the Company.

17. On the 3rd March, 1998, a meeting was held between Mr. Christopher Blake, an employee relations superintendent with the Company, Mr. Colm Conachy who was then Human Resources Manager of the Company, and Mr. Alan Doherty and Ms. Marian White of IPT. The changes to Pension Plan proposed by the JSC and by then agreed to were "reviewed" at that meeting.

18. Subsequent to that meeting a notice was prepared by IPT addressed "to all active employees as at 20th February, 1998" outlining what are headed "Pension Plan Improvements".

19. Approximately one year later in March, 1999, Mr. Doherty gave instructions to the legal department of IPT to prepare documentation to amend the Pension Plan Deed and Rules.

20. The 1999 Deed of Amendment was executed under seal both by the Company and IPT, and is dated the 19th October, 1999.

21. A Deed of Retirement and Appointment of the 20th December, 1999, was executed between the Company, IPT and the then new trustees to effect the changes proposed in relation to trustees. IPT retired as trustee with effect from 20th November, 1999 and the 1st to 5th named defendants and Mr. John Tully were appointed trustees from that date. The 6th named defendant subsequently replaced Mr. Tully in 2006.

Background to the Proceedings

22. Mr. Oliver Hilliard was an employee of the Company who left its employment and went on Income Continuance Benefit in 1988. He was 65 on 1st July, 2002. In July 2002 he appears to have received information from Mercer Human Resource Consulting (who by then had taken order from IPT as the administrators to the Pension Plan) of his proposed pension benefits. He then appears to have made contact with the Pensions Board as a result of which the Pensions Board wrote to the then trustees of the Pension Plan in November, 2002 raising queries as to Mr. Hilliard's pension benefits.

23. Mr. Hilliard had been told *inter alia* that his pensionable salary was to be his salary "less one and a half times the single person's annual rate of State retirement pension as at 1st July each year". Integration was applied to his pensionable salary.

24. The initial response to the Pension Board came from Mr. Doherty who was by then employed by Mercer Human Resource Consulting. He explained *inter alia* that the Company's intention in the improvements introduced as at 20th February, 1998, was that they should only apply to the active workforce at that date. There was further and subsequent correspondence throughout 2003 and the first half of 2004 between the Pension Board and the second named defendant who is the Financial Controller of the Company and acts as Secretary to the Trustees. The Pension Board referred to the express amendment made by paragraph D of the 1999 Deed of Amendment, the support of Mr. Hilliard's entitlement to pension benefits without integration. Ultimately, in a letter dated 7th July, 2004, the second named defendant informed the Pension Board of the position of the Company and Trustees and *inter alia* stated:

> "The Trustees and the Company having taken legal advice now understand that the rules of the Scheme, as currently constituted, do not reflect what was intended. The Company are now moving to seek rectification from the High Court to reflect what was intended, which if granted, will confirm that Mr. Hilliard was in receipt of his correct benefits since his normal pension date. If rectification is not granted then the Trustees will ensure that his benefits are amended immediately and backdated to his pension commencement date."

Construction of 1999 Deed of Amendment

25. The Company nevertheless, has sought in the proceedings a declaration that the amendment effected by paragraph D of the 1999 Deed of Amendment is applicable only to those members of the Pension Plan who were in active employment on 20th February, 1998 and thereafter. The only members of the Pension Plan whose benefits are calculated by reference to a date on or after 20th February, 1998, in respect of whom it is contended that the amendment does not apply are those members of the Pension Plan who were ICP Beneficiaries on 20th February, 1998 (i.e. were in receipt of benefits under the Company's Income Continuance Plan as of that date). Mr. Hilliard is within this category as is Mr. Sheils who replaced him as eighth defendant.

26. Counsel for the Company, at all times submitted that this was not the strongest part of the Company's claim. The submissions, both written and oral on such construction of the 1999 Deed of Amendment were made subsequent to submissions on the other claims. Logically they must be considered first in this judgment for if the amendment effected by paragraph D is to be so construed then there is no need to consider the Company's claim for rectification and/or the alternative claims for a declaration that the amendment is void or ought to be set aside.

27. The Court in considering these proceedings has had the considerable benefit of the very detailed judgment delivered by Kelly J. in *Irish Pensions Trust Limited v. Central Remedial Clinic and Others* (Unreported, High Court, 18th March, 2005) and his review of the authorities cited therein. The principal claim in that case was for rectification. In the course of considering the claim for rectification Kelly J. considered the principles applicable to the construction of pension documents and cited with approval the approach taken by Millett J. in *Re Courage Pension Schemes* [1987] 1 WLR 495 and Warner J. in *Mettoy Pension Trustees Limited v. Evans* [1990] 1 WLR 157. I am satisfied that those are the principles which should be applied to the construction of the 1999 Deed of Amendment. They may be summarised as follows.

28. There are no special rules of construction which apply to Pension Scheme Documents. Nevertheless where possible they should be construed so as to give reasonable and practical effect to the Pension Scheme. This is particularly so where the documents are ones intended to have legal effect but couched in very general terms. The construction should be practical and purposive rather than detached and literal. In construing the documents the court should take into account the factual background and surrounding circumstances (i.e. "the factual matrix").

29. In *Igote Limited v. Badsey Limited* [2001] 4 I.R. 511 the Supreme Court affirmed that the normal rule of construction for a written contract is that the intention of the parties should be ascertained from the words used in the context of the relevant factual matrix. Murphy J. (with whom Keane C.J. and Denham J. concurred) at p. 516 stated:

> "At the end of the day the rule as to construction and the context in which it is to be achieved is most succinctly expressed in the judgment of Keane J. (as he then was) in *Kramer v. Arnold* [1997] 3 I.R. 43 at p. 55 when he said:-
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> > 'In this case, as in any case where the parties are in disagreement as to what a particular provision of a contract means, the task of the court is to decide what the intention of the parties was, having regard to the language used in the contract itself and the surrounding circumstances.'"

30. The 1999 Deed of Amendment is not a bilateral contract, with a dispute between the parties as to its meaning as was at issue in *Igote Limited v. Badsey Limited*. Under clause 30 of the 1999 Deed of Amendment and Substitution an amendment may be made by the Company with the consent of the Trustees. It is therefore in the nature of a settlement being effected by the Company recording the consent of IPT as trustee to the specific amendment.

31. This distinction does not alter the fundamental rule of construction that the intention of the Company is to be ascertained from the words used in the 1999 Deed of Amendment when construed in the relevant factual context. In *Mettoy Pension Trustees Limited v. Evans* [1990] 1 WLR 1587 Warner J. at p. 1611 having set out the principles summarised above, considered four special factors which may form part of a matrix of fact in construing pension documents and then noted the similarity of his approach to that of Lord Upjohn who in the context of a private settlement in *Re Gulbenkian's Settlements* [1970] AC 508 at 522 referred 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 settlor's 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."

32. The 1999 Deed of Amendment in paragraph D does not use obscure or ambiguous language such as was at issue in a number of the decisions referred to above. It uses clear and precise language. The amendment in paragraph D is an addition to the definition of

pensionable salary and therefore must be considered in the context of the full definition when amended. Following the 1999 Deed of Amendment the definition of "Pensionable Salary" in the schedule to the rules attached to the 1996 Deed reads:

> "the Member's annual rate of basic salary less an amount to be determined by the Employer but not exceeding one and a half times the annual rate of the Retirement Pension attributable to a single person payable under the Social Welfare Acts provided in the case of a Member whose benefits are being calculated by reference to a date on or after the 20th February, 1998, it shall be his annual rate of basic pay excluding overtime, bonuses or other fluctuating emoluments provided further in the case of a Member in the category of employment of direct miner it shall be 1.25 times such annual rate of basic pay."

33. The submission of the Company is that the first proviso in the amendment above is to be construed as confining "Members" to those members who were in active employment with the Company on the 20th February, 1998 and thereafter. It is common case that the only other category of members whose benefits under the Pension Plan would be calculated by reference to a date on or after the 20th February, 1998, were the Members who were ICP Beneficiaries on that date. Hence the Company is seeking to construe the amendment effected by paragraph D as excluding persons who were ICP Beneficiaries on the 20th February, 1998.

34. It is also undisputed by the Company that an ICP Beneficiary was a "Member" of the Pension Plan as defined. It is also not disputed that persons who were ICP Beneficiaries on the 20th February, 1998, are persons whose Pension Plan benefits would be calculated by reference to a date after the 20th February, 1998. For the reasons set out above, and in accordance with Rule 16 added by paragraph C of the 1999 Deed of Amendment, an ICP Beneficiary's basic salary used to compute his pensionable salary is increased in accordance with increases to the category or grade of employment held by the ICP Beneficiary at the date he became an ICP Beneficiary until the ICP Beneficiary commences pension benefits at age 65. Accordingly, in accordance with the plain meaning of the words used when construed in the context both of the definition of "Member" in the Pension Plan and the new Rule 16 added by the next preceding paragraph in the same Deed (and the scheme as operated since 1992, in relation to ICP Beneficiaries) they were persons who were included in the first proviso in paragraph D of the 1999 Deed of Amendment.

35. Notwithstanding, the Company contends that as the 1999 Deed of Amendment was entered into to give effect to the changes in the Pension Plan in the JSC Agreed Proposals and that as the entire of those proposals were proposals resulting from negotiation with the active work force and referable to changes agreed with the active work force that the words used should be construed so as to confine "Members" to those members who were active employees as at the 20th February, 1998, or as alternatively put to exclude those members who were ICP Beneficiaries.

36. In the absence of the words used in the 1999 Deed of Amendment giving rise to any ambiguity, it does not appear that the Court should go beyond construing paragraph D of the 1999 Deed of Amendment in the context of the entire of that Deed and the 1996 Deed and Rules of the scheme. However, even if it were to do so and consider the purpose of the 1999 Deed of Amendment (with the exception at paragraph C) as being to give effect to the changes in the Pension Plan in the JSC Agreed Proposals it appears that the Court should primarily consider those proposals from the words used in the JSC Agreed Proposals as recorded in the written document of November, 1997 when placed in its relevant factual matrix.

37. As stated by Etherton J. in *Gallagher Limited v. Gallagher Pensions Limited* [2005] EWHC 42 at par. 100:

> "There are cases in which it is apparent, from the background facts objectively ascertained, that the parties have used language or grammar in a way particular to themselves. In such a case, that idiosyncratic usage may colour the meaning of their document."

38. The above statement was made in relation to the construction of a Deed of Amendment to a Pension Scheme following a consideration of the well known statement of Lord Hoffman in *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896, 913:

> "The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investment Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.* [1997] AC 749"

39. The background relied upon by the Company is the JSC Agreed Proposal following negotiation with the active workforce. The question is whether it is apparent from the JSC Agreed Proposals (even considered to be the result of negotiation with the active workforce) that the Company and IPT are using the word "Member" in the first proviso in paragraph D of the 1999 Deed of Amendment as meaning a Member other than a Member who is an ICP Beneficiary.

40. I have concluded that it is not so apparent in particular by reason of the wording used by the parties in paragraph B of the same Deed.

41. I have set out at par. 15 above the five proposed changes to the Pension Plan as summarised at paragraph 6.4 of the JSC Agreed Proposal. Changes 1 and 2 i.e. the elimination of integration and an increase in the direct miners' pensionable salary are sought to be implemented by paragraph D of the 1999 Deed of Amendment. Change 3, an extra supplement to be paid in the form of a bridging pension between the ages of 62 and 65 years is sought to be implemented by paragraph B of the 1999 Deed of Amendment. Paragraph B of the 1999 Deed of Amendment amends rule 5(a)(i) of the Pension Scheme by the addition of a long sentence (providing for the additional supplements between ages of 62 and 65 years which commences:

> "Provided further in the case of a Member other than a Member receiving benefit under the Employers Income Continuance Plan as amended by Rule 16 whose annual amount of pension is being computed by reference to a date on or after the 20th February 1998 it shall be…"

42. In the above "Member" cannot have any meaning other than including a Member who is an ICP Beneficiary as the wording then expressly excludes such a Member in a context also where as in paragraph D the proviso is to apply to a Member whose annual amount of pension is being computed by a reference to a date on or after the 20th February, 1998. No similar words of exclusion were used by the Company in paragraph D. In the absence of any such wording, having regard in particular to the use of the express words of exclusion in paragraph B it does not appear that the Court can construe the first proviso in paragraph D as contended for by the

Company to give a special meaning to "Member" so as to exclude ICP Beneficiaries. To do so in the words of Lord Upjohn in *Re Gulbenkian's Settlements* would be to do "violence" to the differing words used by the Company in paragraphs B and D of the 1999 Deed of Amendment both of which were intended to implement changes in the JSC Agreed Proposals.

43. Accordingly, the Company's claim for a declaration that the amendment effected by paragraph D of the 1999 Deed of Amendment is applicable only to those Members of the Pension Plan who were in active employment as at 20th February, 1998, or thereafter is refused.

Rectification
44. This, in reality is the principal relief sought by the Company. It seeks rectification of paragraph D of the 1999 Deed of Amendment by the insertion of the words appearing in brackets below in the first proviso sought to be added to the definition of "Pensionable Salary" in the schedule to the rules. If rectification is granted the definition of "Pensionable Salary" would then read:

> "the Member's annual rate of basic salary less an amount to be determined by the Employer but not exceeding one and a half times the annual rate of the Retirement Pension attributable to a single person payable under the Social Welfare Acts provided in the case of a Member (other than a Member receiving benefit under the Employer's Income Continuance Plan as of the 20th February, 1998) whose benefits are being calculated by reference to a date on or after the 20th February, 1998, it shall be his annual rate of basic pay excluding overtime, bonuses or other fluctuating emoluments provided further in the case of a Member in the category of employment of direct miner it shall be 1.25 times such annual rate of basic pay."

45. It is common case that the court has jurisdiction to grant rectification of a deed such as the 1999 Deed of Amendment. It is further agreed that the legal principles according to which the jurisdiction should be exercised are those set out by Kelly J. in the *Irish pensions Trust Ltd. v Central Remdial Clinic, (CRC)* judgment. In that judgment at pp. 44 to 57 Kelly J. considers those principles primarily in the context of the Supreme Court decision in *Irish Life Assurance Company v. Dublin Land Securities Ltd*. [1989] I.R.253 in relation to rectification of a bilateral contract and the English High Court decisions of Rimer J. in *Lansing Linde Limited v. Alber* [2000] PLR 15 and Lawrence Collins J. in *AMP (UK) Plc. v. Barker* [2001] PLR 77 and the authorities referred to in those decisions.

46. Rectification is a jurisdiction which permits the court to correct an instrument which has failed to record the actual intentions of the parties to that instrument. It is a discretionary equitable remedy. The decisions make clear that the starting point for a consideration of the exercise of the jurisdiction in relation to pension documents are the decisions relating to rectification of bilateral contracts. The approach of the courts to rectification of instruments which are "unilateral transactions" i.e. those which create rights for others but which do not result from a contract or bargain e.g. voluntary settlements are also relevant.

47. The essential nature of the jurisdiction being exercised by the court in a claim for rectification of a deed or other instrument appears to be the same whether the transaction is a bilateral contract, unilateral transaction or as in this instance a transaction which is a hybrid in the following sense. Clause 30(iii) of the 1996 Deed of Amendment and Substitution permits the Principal Employer i.e. the Company with the consent of the Trustees i.e. IPT to alter or amend the Rules of the Pension Plan either by Deed executed by the Principal Employer and the Trustees or by resolution in writing of the Board of Directors. On the facts herein, the amendment to the Rules was effected by the 1999 Deed of Amendment executed by the Company and IPT. The Company needs the consent of IPT but is the person effecting the amendments by execution of the Deed. The 1999 Deed of Amendment creates rights for others, namely the Members of the Pension Plan.

48. In *Lansing Linde* Rimer J. explained the purpose and limits of the jurisdiction to rectify at paragraphs 123 – 124 of his judgment in the following terms:

> "123. 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.
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> 124. There is, however, a strong presumption that a signatory of a document intends to sign it in its executed form, since the purpose of signing 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:
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> > '…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.'
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> *(See Thomas Bates and Son Limited v. Wyndham's (Lingerie) Limited [1981] 1 W.L.R. 505, at 521, per Brightman L.J.).*"

49. *Lansing Linde* concerned an application to rectify a Deed of Amendment executed in 1992. It was contended that it failed to give effect correctly to a resolution which had been passed by the Trustees of the Scheme in August, 1990. The power of amendment was similar to that in this application. *Lansing* might with the consent of the Trustees by Deed amend the earlier Deed or by Deed or Board resolution amend the Rules (paragraph 156 of the judgment). Further similarity to this application is the gap in time between the point at which it is alleged that it was decided to amend the Rules and the execution of the Deed. On the facts of that case Rimer J. at paragraph 125 cited with approval what appears to have been the consensus between counsel for the applicant and counsel for the opposing representative beneficiary as to what *Lansing* had to prove. He stated:

> "125. It is agreed between Mr Etherton and Mr Green that if Lansing is to arrive at the point at which the court can consider whether to exercise its discretion to rectify the 1992 deed in the claimed respects Lansing has to prove according to the requisite standard that: (i) on 22 August 1990 Lansing and the trustees intended and resolved to make

certain specific amendments to the 1977 deed; (ii) that they continued to have the same intention down to the execution of the 1992 deed; and (iii) that, by mistake, the deed included provisions which departed from, or failed to give effect to, that intention."

50. In *Lansing* the application was opposed upon three separate grounds. Firstly, it was contended that *Lansing* had failed to prove the formation and continuation of the intentions which they asserted before the court. Secondly, and separately it was contended that even if the court were to conclude that *Lansing* and the Trustees did form and retain the intentions which they asserted that there was no "outward expression of accord" which was required. The third ground is not relevant. On the facts, *Lansing* failed on the first ground.

51. Notwithstanding that *Lansing* failed on the first ground, Rimer J. continued to consider the second objection that there was no "outward expression of accord" as to *Lansing* and the Trustees' alleged intentions with respect to the relevant amendments. It is only in considering this second ground that Rimer J. formed the view, in reliance upon the decisions relating to bilateral contracts that the amendment provisions in the Deed required objective evidence of an accord between *Lansing* and the Trustees, and an outward expression of that accord.

52. In the subsequent English case of *AMP* Lawrence Collins J. considered an application to rectify changes to the Rules of a Pension Scheme where the power to alter the Rules was given to the Trustees to do so by written resolution or Deed after obtaining the consent of the Principal Employer. On the facts of that case the changes had been effected by a written resolution of the Trustees. At the relevant time NPI was the Principal Employer. It had proposed the changes; the Trustees passed the necessary resolution which were then formally approved by a Board subcommittee of NPI. It was agreed that nothing turned on the fact that the formal approval of the Principal Employer (which was done by resolution of an authorised Board subcommittee) was given after the Trustees' resolution rather than (as it was agreed the rules envisaged) in advance of the resolution of the Trustees.

53. Lawrence Collins J. then considered the obiter view expressed by Rimer J. in *Lansing Linde* that it was necessary that there be an outward expression of accord between the Trustees and the Principal Employer. Nothing turns on the fact that in one case the amendment could be effected by the Principal Employer with the consent of the Trustees and in the other by the Trustees with the consent of the Principal Employer. Lawrence Collins J. having considered the precise rule and facts in the *AMP* case continued at paragraph 64:

> "…no agreement between the Principal Employer and the trustees is envisaged by the rules. The Principal Employer simply has to consent to the exercise of the power of amendment by the trustees. But the consent is not to the exercise of the power of amendment in general. The Principal Employer must consent to the actual amendments. It probably does not matter whether this is regarded as a joint power of the trustees and the Principal Employer to amend the Rules, or (probably more accurately) as a power vested in the trustees but subject to the consent of the Principal Employer: *cf Re Earl of Coventry's Indenture* [1974] Ch 77. The reason that it does not matter for present purposes is that, although a power exercisable with consent is not the same as a joint power, the trustees cannot act unless their 'wishes happen to coincide with those' of NPI (*cf* [1974] Ch at 91).
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> 65. Consequently, the intentions of the trustees and the Principal Employer must converge. But they do not have to agree *inter se*…"

54. The judge then turned to the evidential question and at paragraph 66 stated:

> "There must, therefore, be cogent evidence of the intentions both of the trustees and of NPI, but not necessarily of their agreement or accord. In some of the earlier cases on voluntary settlements, rectification was ordered on the uncontradicted affidavit evidence of the settlor without any need for objective manifestation of intention: see, e.g. *Hanley v. Pearson* (1879) 13 Ch D 545. Mr Nigel Inglis-Jones QC for the trustees suggested that a similar approach would be appropriate in a case such as this. It may be that the need for objective manifestation in the case of a unilateral transaction is simply one element of the need for convincing proof of the mistake. It was present in the two leading modern cases on mistake in unilateral transactions, *Re Butlin's Settlement and Gibbon v Mitchell* [1990] 1 WLR 1304, *infra*, para 81. The certainty of transactions would be undermined if the court could act, otherwise than in exceptional circumstances, simply on the assertion of a party to the transaction. But when one is considering the intentions of a collective body such as a group of trustees or a committee of a board it is their collective intention which is relevant, and it would be a very odd case (and certainly not this one) if that collective intention were not objectively manifested."

55. Kelly J. in *CRC* preferred the approach of Lawrence Collins J. in *AMP* to that of Rimer J. in *Lansing Linde*. At p. 53 of his judgment he stated:

> "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."

56. I would respectfully agree with the preference by Kelly J. for the approach of Lawrence Collins J in *AMP* to that of Rimer J. in *Lansing Linde* on the question as to whether or not in circumstances where an amendment to Pension Scheme Rules may be made by either the Principal Employer or Trustees with the consent of the other by Deed or resolution it is or is not necessary to prove accord or agreement between those parties and an outward expression of that accord. The analysis of Lawrence Collins J. set out above appears to me apposite to the power of amendment in clause 30 the 1996 Deed of Amendment and Substitution herein. The Company, as Principal Employee may, with the consent of IPT as Trustee amend the Pension Plan rules by deed executed by both of them. This requires a decision of the Company to make certain amendments and the consent of IPT as Trustee to those specific amendments. However it does not require an agreement between those parties.

57. The principal ground upon which the application for rectification is opposed on behalf of the representative beneficiary is that the evidence relied upon by the plaintiff and supported by IPT and the current Trustees to establish an intention of the Company and IPT to exclude ICP Beneficiaries from the amendment in paragraph D of the 1999 Deed falls far short of the "convincing proof" or "cogent evidence" required in accordance with the principles set out above. It is also contended that the alleged common intention must be "outwardly manifested" and that there is not evidence of such outward manifestation.

58. Insofar as it is necessary for me to decide whether "outward manifestation" of the common intention or the intentions of the Company and IPT I would respectfully agree with the approach of Lawrence Collins J. in *AMP* at paragraph 66 of his judgment referred to above. It appears to me that the requirement of outward or objective manifestation is properly part of the requirement that there be cogent or convincing evidence of the intentions both of the Company and IPT. The 1999 Deed which is sought to be rectified is objective or outward manifestation of the parties' intentions at the date of execution of the Deed. It is also cogent evidence of their intention as of that date. The burden of proof on the plaintiff is the civil burden of the balance of probabilities. The convincing proof or cogent evidence is required to counteract the cogent evidence of the parties' intentions displayed by the Deed sought to be rectified. I agree that it would be an exceptional case that there could be cogent evidence of an intention without an objective or outward manifestation of that intention.

59. This appears particularly so, where as in this case the parties to the Deed are both companies. A company, being an artificial legal entity without a mind cannot of itself have an intention. An intention may be ascribed to a company by reason of authorised acts done on its behalf or by reason of the intention of a person or group of persons authorised to act or take decisions on its behalf. In many instances decisions on behalf of a company will be taken by a collective body such as the Board of Directors or a subcommittee of the Board. Where this is so, as observed by Lawrence Collins J. "it would be a very odd case if that collective intention were not objectively manifested". In other instances, one person (e.g. a managing director) may be authorised to act or take decisions.

60. Accordingly, it appears to me that the need for objective manifestation of the intentions of the Company and IPT or their common intention should not be seen as a separate legal requirement but rather part of the evidential proof of the intentions of the Company and IPT sufficient to establish, as a matter of probability, that paragraph D of the 1999 Deed of Amendment does not represent the then common intention of the parties to the Deed.

61. Counsel for the representative beneficiary submits that the Court in assessing the plaintiff's claim for rectification should have regard to the Company's obligation to exercise its power of amendment under the 1996 Deed of Amendment in accordance with its implied obligation of good faith to all members of the Pension Plan. He relies upon the principles set out by Browne-Wilkinson V.-C. in *Imperial Group Pension Trust Limited v. Imperial Tobacco Limited* [1991] 1 WLR 589, 597:

> "There remains the submission of Mr. Topham for the employed members which I accept. Pension scheme trusts are of quite a different nature to traditional trusts. The traditional trust is one under which the settlor, by way of bounty, transfers property to trustees to be administered for the beneficiaries as objects of his bounty. Normally, there is no legal relationship between the parties apart from the trust. Then beneficiaries have given no consideration for what they receive. The settlor, as donor, can impose such limits on his bounty as he chooses, including imposing a requirement that the consent of himself or some other person shall be required to the exercise of the powers.
>
> As the Court of Appeal have pointed out in *Mihlenstedt v. Barclays Bank International Ltd*. [1989] I.R.L.R. 522 a pension scheme is quite different. Pension benefits are part of the consideration which an employee receives in return for the rendering of his services. In many cases, including the present, membership of the pension scheme is a requirement of employment. In contributory schemes, such as this, the employee is himself bound to pay his or her contributions. Beneficiaries of the scheme, the members, far from being volunteers have given valuable consideration. The company employer is not conferring a bounty. In my judgment, the scheme is established against the background of such employment and falls to be interpreted against that background.
>
> In every contract of employment there is an implied term:
>
> > 'that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee;' *Woods v. W.M. Car Services (Peterborough) Ltd*. [1981] I.C.R. 666, 670, approved by the Court of Appeal in *Lewis v. Motorworld Garages Ltd*. [1986] I.C.R. 157.
>
> I will call this implied term 'the implied obligation of good faith'. In my judgment, that obligation of an employer applies as much to the exercise of his rights and powers under a pension scheme as they do to the other rights and powers of an employer. Say, in purported exercise of its right to give or withhold consent, the company were to say, capriciously, that it would consent to an increase in the pension benefits of members of union A but not of the members of union B. In my judgment, the members of union B would have a good claim in contract for breach of the implied obligation of good faith: see *Mihlenstedt v. Barclays Bank International Ltd.* [1989] I.R.L.R. 522, 525, 531, paras. 12, 64, and 70.
>
> In my judgment, it is not necessary to found such a claim in contract alone. Construed against the background of the contract of employment, in my judgment the pension trust deed and rules themselves are to be taken as being impliedly subject to the limitation that the rights and powers of the company can only be exercised in accordance with the implied obligation of good faith."

62. The above principles apply to a decision by the Company to amend the Rules of the Pension Plan by Deed. It is however important to note the limitation of the obligation to act in good faith. The representative beneficiary correctly does not contend that the employer (contrary to the position of a trustee) cannot take into account its own interests when deciding whether or not to exercise its rights and obligations under a pension trust Deed. See *National Grid Co. Plc v. Mayes (HL(E)*) [2001] 1 WLR 864 at 868.

63. The court in this application is not considering the validity or otherwise of a decision taken by the Company to amend the Rules of the Pension Plan by Deed. The only relevance of the above principles appears to be as follows. Where, as on the facts of this application the Company is contending for an intention to amend the Pension Rules by Deed so as to improve pension benefits for part only of the active members or to put it another way to exclude a group of members from the proposed improved benefits, then the above principles emphasise the need for the Company to adduce cogent evidence of a clear intention as contended for. They also create an expectation of there being available at minimum evidence of consideration by the Company of the relative impacts of the proposed changes on the differing classes of members and funding implications if such an intention had been formed.

64. Having regard to the above legal principles the following are the factual issues on the intentions of the Company and IPT as the parties to the 1999 Deed of Amendment which require to be decided.

> 1. Is there cogent evidence that the Company in deciding to amend the definition of Pensionable Salary in the Rules of the Pension Plan by the elimination of integration did not intend to eliminate integration for those Members who were ICP Beneficiaries as at the 20th February, 1998, or only intended to eliminate integration for active employees.

2. Is there cogent evidence of a continuing intention by the Company when it authorised the execution of or executed the 1999 Deed of Amendment not to eliminate integration for those members who were ICP Beneficiaries as at the 20th February, 1998, or only for those who were active employees.

3. Is there cogent evidence that IPT in consenting to the proposed amendment to the definition of pensionable salary in the Rules did not intend to eliminate integration for those members who were ICP Beneficiaries as at the 20th February, 1998, or only intended to eliminate integration for those who were active employees.

4. Insofar as such consent was given in advance of the execution of the Deed of Amendment, is there cogent evidence of a continuing intention of IPT up to when it approved or authorised the execution of or when it executed the 1999 Deed of Amendment not to eliminate integration for those Members who were ICP Beneficiaries as at the 20th February, 1998, or only to eliminate integration for those who were active employees.

Intention of Company

65. The contention on behalf of the Company is that the 1999 Deed of Amendment (other than paragraph C) was intended to implement those changes to the Pension Plan contained in the JSC Agreed Proposals of November, 1997. Paragraph C of the 1999 Deed of Amendment was intended to implement the changes agreed in 1994 (with effect from 1992) in relation to the basic salary by reference to which ICP Beneficiaries' pensionable salary would be determined for the purposes of pension and other benefits under the Pension Plan.

66. Much of the factual dispute on the affidavits relates to the question as to whether or not the changes to the Pension Plan and in particular the elimination of integration in the JSC Agreed Proposals were intended to apply to all members of the Pension Plan or only to the then active workforce and not to the ICP Beneficiaries. However, it is the 1999 Deed which is sought to be rectified. If the Company is to succeed in its claim for rectification then, in accordance with the legal principles set out above, it has to establish by cogent evidence that the Company in deciding to amend the Pension Plan Rules intended only to eliminate integration in respect of the active employees and not to eliminate integration in relation to the members of the Pension Plan who were ICP Beneficiaries.

67. The plaintiff has not adduced any evidence relating to a decision taken by or on behalf of the Company to approve the Pension Plan changes in the JSC Agreed Proposals. As previously stated it is not in dispute that all the changes in the JSC Agreed Proposals were agreed by the Company. However, the plaintiff has not adduced any evidence of when, how or by whom the JSC Agreed Proposals were approved or agreed on behalf of the Company.

68. In the absence of any evidence in relation to the decision taken by or on behalf of the Company to approve the JSC Agreed Proposals, it appears that if the plaintiff is to establish the existence of cogent or convincing evidence of an intention by the Company only to apply the elimination of integration to the active employees or not to apply the elimination of integration to ICP Beneficiaries as at the 20th February, 1998, then such an intention must be clear from the terms of the JSC Agreed Proposals (and any documents expressly referred to therein). It cannot be determined from either the intention or understanding of individual members of the JSC. Insofar as the court can take into account a presumed decision made on behalf of the Company to amend the Deed to implement the Pension Plan changes in the JSC Agreed Proposals it can only presume (in the absence of relevant evidence) that the persons who took such a decision did so on the basis of the express wording of the JSC Agreed Proposals.

69. There is, in any event on the affidavits a clear dispute as to the understanding and intention of four of the members of the JSC who swore affidavits. These are the first and fourth named defendants who are current trustees and who swore affidavits supporting the application of the plaintiff. The first named defendant Mr. Cosgrove is an employee representative trustee and was an employee representative on the JSC. Mr. Kelly is the chairman of the trustees and a trustee nominated by the Company and now the Human Resources Manager of the Company. Mr. Kelly in his first affidavit stated that it was his understanding (and of each of the current trustees) that the elimination of integration was only intended to apply to members of the Pension Plan who reached normal pension age (62) after the 20th February, 1998, provided that such persons were in active employment with the Company as of the 20th February, 1998, or thereafter. Mr. Cosgrove in his affidavit states that he makes the affidavit for the purpose of verifying the affidavit of Mr. Kelly.

70. Affidavits have been sworn by Mr. McQuillan and Mr. Devoy who were also members of the JSC. Both were members of the JSC as trade union officials, representing T.E.E.U. and SIPTU. Both Mr. McQuillan and Mr. Devoy have sworn affidavits in which they assert that the changes in Pension Benefits were intended to benefit those who were ICP Beneficiaries.

71. This approach to the construction of the JSC Agreed Proposals is also consistent with the approach which the court should take if this were to be considered an agreement. The agreement must be construed primarily by reference to the words used therein, though of course it is permissible to construe those words in the relevant factual matrix. The subjective intention or understanding of the parties cannot be taken into account. The JSC Agreed Proposals are not drafted as a precise legal agreement. The Court has taken into account that imprecision in considering their terms.

72. The JSC Agreed Proposals must be considered in their relevant factual matrix. This includes the origin of the JSC which as set out above was established at a Labour Relations Commission Meeting in June, 1997. Its purpose was to implement the change process identified in the report of the Joint Working Group. This in turn had arisen out of the "Tara 2005" survival Plan and its non-acceptability to employees. As stated at p. 2 of the JSC Agreed Proposals its objective was "to arrive at agreed proposals within the JSC on all issues pertaining to the change process at Tara and this included monitory issues".

73. The JSC set up a number of project teams. One such project team was the Pension Project Group ("PPG"). The PPG issued its final report to the JSC on the 18th July, 1997. That report was received by the JSC and is stated in the Agreed Proposals to have been given "careful consideration". The members of the PPG included the principal deponent on behalf of the Company, Mr. Blake and the first, third and fifth named defendants all of whom are employee representative trustees. Each of those have sworn affidavits as to the intention of the PPG and their understanding on the question as to whether or not the proposals were or were not intended to apply to ICP Beneficiaries. There is no evidence that the JSC sought clarification or amplification from the members of the PPG of their report. The JSC Agreed Proposals only record a consideration of the report. Accordingly it appears that the court should confine its consideration of the relevant factual matrix of the JSC Agreed Proposals to the contents of the PPG report as expressed in writing and cannot take into account the subjective intent of the Members of the PPG.

74. That report makes clear that the background to the work of the PPG includes the Labour Court recommendation No. 14523 (which was included at appendix 1 to the PPG report) and which recommended that the Company and the unions negotiate on the following

main items:

(a) Pensionable salary

(b) Indexation

(c) Funding

In their report at paragraph 3.1 in considering pensionable salary the PPG state that in the recommendation No. 14523 the Labour Court recognised that the level of pensionable salary was a problem; that the hourly paid are adversely affected by low pensionable salary as their basic pay is a lower percentage of their gross income than staff and then indicate that they looked at a number ways of addressing the problem including integration. On integration the report states:

> "As stated above the deduction of £6084.00 from the basic salary results in a low level of pension which is not reflective of earnings prior to retirement. The Group examined the partial and total elimination of integration. We consulted with the Pension Plan Actuary, Billy Bell and investigated the funding implications for both past and future service. The hourly paid staff in particular felt that integration discriminated against them disproportionately and that its total elimination was most desirable. The funding of this improvement to the plan is substantial (in excess of £500,000 per annum). After giving the matter serious consideration we have decided that in the interests of all concerned, the total elimination of integration, is the best solution to the problem."

75. At paragraph 3.3 the PPG report dealt with funding in the following terms:

> "In our examination of the funding issue we acknowledged that the costs of backfunding improvements to the plan is substantial. Delays in reaching agreement in the past have exacerbated this problem. It is essential that our recommendation be implemented as soon as possible to prevent further deterioration. There is presently a substantial surplus in the fund as a result of strong investment returns in recent years and the fact that the Company have never taken a contribution holiday. This surplus will enable us to partially fund enhanced benefits. The balance of funding will be equally divided between the members and the Company. As a result members' contributions will increase from 5% of pensionable salary to 6% of the enhanced pensionable salary."

76. The PPG expressly adverted to the position of ICP Beneficiaries. They are referred to as "Income Continuance claimants" and at paragraph 3.6 the PPG report stated:

> "The Group recognises that Income Continuance claimants are full active members of the pension plan and any changes which take place will affect them. Further information is required as to what affect any change to the plan would have on these members."

77. At paragraph 3.10 the PPG advises an information campaign by stating:

> "It is imperative that information on the plan and any changes to it are disseminated to all employees and plan members in a fully comprehensive way as speedily as possible. This should be done through information sessions approximately 25/30 attending each session over a period of one week."

It is to be noted in this paragraph that the PPG refers expressly to "all employees and plan members".

78. PPG sets out its conclusions/final proposals at paragraph 4 in the following terms:

> "The Pension Project Group had its first meeting on Friday 20th June 1997. Since then we have spent 13 days in session. We have examined in detail all aspects of our pension plan and we have looked at various methods of improving the plan. We acknowledge the assistance of everyone who helped us in out deliberations.
>
> The pension has been the subject of protracted negotiations over several years and the task facing us was a difficult one. We consider that the conclusions reached are fair and equitable to all parties. The proposals we have agreed upon are a total package and we recommend their acceptance.
>
> In summary the proposals are,
>
> 1. Pensionable Salary. The new pensionable Salary will be basic salary (integration eliminated).
>
> 2. Indexation. Indexation of 1% per annum commencing 1st July 1998.
>
> 3. Funding. Employees funding increased from 5% to 6% of Pensionable Salary. The Company's funding of the enhanced benefits will be on a 1 : 1 basis.
>
> 4. Normal Pension Date. The normal pension date of 62 will now become compulsory with the benefits as outlined under the heading Normal Pension Date / Penalty Clause.
>
> 5. Trustees. Members Trustees will be appointed to replace Irish Pensions Trust as of 1st January 1998."

79. The JSC in considering the final report of the PPG were expressly put on notice by the PPG by reason of paragraph 3.6 of the report that Income Continuance Claimants (i.e. ICP Beneficiaries) "are full active members of the Pension Plans and any changes which take place will affect them". The changes agreed by the JSC and set out in its Agreed Proposals must be considered in the context of that express advice. The JSC Agreed Proposals set out the pension agreed changes at paragraph 6.4. As stated they were:

> "The Joint Steering Committee received the final report of the Pension Project Group in early October and have given it careful consideration. The agreed changes to the Tara Pension Plan from the JSC are summarised as follows (see Appendix 5 for further information):

1. The elimination of integration.

2. An increase in the Direct Miners' Personable Salary to 1¼ times basic salary.

3. An extra supplement to be paid, in the form of a bridging pension, between the ages of 62 and 65 years.

4. Reduction of the compulsory retirement age to 62 years.

5. Member Trustees to be elected to the Board of Trustees of the Scheme.

If agreed, the above changes will be implemented and an information campaign to inform all employees of the Tara Pension Plan will be undertaken by the Pension Project Team.

In addition to these changes the following improvements to the Scheme are proposed, subject to the fund being sufficient and at the discretion of the Trustees.

a) Indexation of 1% per annum from age 65.

b) Pension between 62 and 65 years be increased by C.P.I. to a maximum of 3% per annum.

The funding required to implement the agreed changes is considerable and will result in members' contributions increasing from 5% of pensionable salary to 6% of an enhanced pensionable salary. The Company will also be required to increase its contribution by £350,000 per annum to a new figure of £1m per annum and to use the current surplus in the Pension Fund to fund these enhancements.

The changes, if implemented, will deliver a considerably improved pension to all members of the Tara Pension Plan.

Pensionable salaries for all employees will be based on the pay rates operating at the 1st July 1997 prior to any proposed increases.

For further information on the proposals for the Tara Pension Plan see Appendix 5."

80. The wording used at paragraph 6.4 does not expressly indicate that the agreed changes or elimination of integration is only to apply to the active workforce or employees. Further it does not expressly indicate that they are not to apply to those "full active members" of the Pension Plan who were ICP Beneficiaries at the date for implementation of these proposals.

81. Counsel for the Company submit that having regard to the principal focus of the JSC Agreed Proposals which were essentially negotiations on all issues pertaining to a change of process of a New Work Organisation with the active workforce that the Agreed Proposals in relation to pensions should be construed as being confined to those Members of the Pension Plan who were active employees. It does not appear to me, particularly having regard to paragraph 3.6 of the PPG report that the JSC Agreed Proposals in relation to pension changes and in particular the elimination of integration can be so construed. The JSC were expressly put on notice that ICP Beneficiaries were "full active members" of the Pension Plan; also that any changes which take place "will affect them". Notwithstanding this express warning the JSC determined that integration would be "eliminated". The use of such language is not a technical term which might bear a special meaning in relation to pensions. Further, the JSC at paragraph 6.4 makes the express statement that "the changes, if implemented will deliver a considerably improved pension to all members (emphasis added) of the Tara Pension Plan". Having been expressly told by the PPG report that ICP Beneficiaries were "full active members of the Pension Plan" and having, as is stated at the opening sentence of paragraph 6.4, given careful consideration to that report it appears to me that the above sentence is inconsistent with an intention expressed by the JSC Agreed Proposals that the elimination of integration was only to apply to active employees or was not to apply to members of the Pension Plan who were ICP Beneficiaries at the implementation date.

82. I have reached this conclusion having taken into account the statement at paragraph 6.4 of the JSC Agreed Proposals that "the funding required to implement the agreed changes is considerable and will result in members contributions' (emphasis added) increasing from 5% of pensionable salary to 6% of enhanced pensionable salary". The equivalent sentence in the PPG report states "Employees funding increased from 5% to 6%..." It is undisputed that this increase only applied to those members who were active employees. Only active employees contributed at 5%. The contribution paid under the ICP on behalf of ICP Beneficiaries was 15.4%. The furthest it could be put is that this sentence creates some uncertainty that the elimination in integration was to apply to "all members" as stated elsewhere in paragraph 6.4. Such uncertainty does not assist the Company as it must establish a clear intention in the JSC Agreed Proposals if they are to be accepted as cogent evidence of the Company's intention as contended. The Court is not simply construing the JSC Agreed Proposals to ascertain their probable meaning.

83. I have also considered the statement in paragraph 6.4 that "an information campaign to inform all employees of the Tara Pension Plan will be undertaken by the pension project team". Whilst this may suggest only the need to inform employees as distinct from Pension Plan members of changes when one turns to Appendix 5 to which reference is made in the opening paragraph 6.4 under a heading "Information Campaign" it is stated "it is imperative that information on the plan and any changes to it are disseminated to all employees and plan members in a fully comprehensive way as speedily as possible". It does not appear to me therefore that this helps to clarify the issues.

84. Finally, I have considered as part of the factual matrix the documentation and evidence relating to the work done by the actuary on the cost of funding the removal of integration prior to November, 1997. The Company has not sought to rely upon such evidence as supporting the alleged intention of the Company to exclude ICP Beneficiaries from the elimination of integration. It is relied upon by the representative beneficiary in support of the contrary intention. As stated in its report, the PPG consulted Mr. Bell who was then the actuary to the Pension Plan and investigated (presumably with his assistance) the funding implications. No evidence has been adduced from Mr. Bell and the Court assumes that he is not now in a position to give evidence. The documentation still available was given to a Mr. Philip Shier, an actuary retained on behalf of the representative beneficiary. Mr. Shier has sworn two affidavits. In his first affidavit he exhibits a report which he prepared. In that report he refers to seven documents at paras. (a) and (g) which include exchanges between Mr. Bell and Mr. Blake who was a member of the PPG in July 1997, prior and subsequent to the final report of the PPG. The documents also include a letter from Mr. Bell to Mr. Blake of 20th August, 1997, setting out results of a valuation as at 1st

July, 1997, and then letters between Mr. Bell and Mr. Colm Conachy who was then the Human Resources Manager of the plaintiff in September 1997 and March 1998. The final document is a formal actuarial valuation of the plan as at 1st July, 1998, which is dated 15th February, 1999. Mr. Shier's conclusion from a review of those documents is set out at p. 5 of his report as:

> "There is nothing stated in any of these documents to indicate that the removal of integration from the definition of pensionable salary did not apply to current ICB recipients or that the calculation of the liabilities in respect of ICB recipients was different from the calculation for those 'actively at work'."

85. Mr. Donal O'Flaherty who is currently an actuary to the Tara Mines Pension Plan and an actuary with Mercer Human Resource Consulting Limited swore an affidavit on behalf of IPT and did not disagree with those conclusions. At paragraph 6 of his affidavit he appears to put a slightly different complexion on the conclusions but nothing really turns on this. Mr. O'Flaherty states in that paragraph:

> "It seems to me that it is unclear from the available documentation if the ICP members were included or excluded in any calculations prepared by the scheme actuary in 1998. Consequently, and insofar as the scheme actuary's calculations could provide any assistance one way or the other as to what was the intention of the Company or the then Trustees of the Plan, IPT, at the relevant time that documentation does not provide any guidance."

86. Mr. Blake at paragraphs 36 and 55 of his second affidavit expressly avers that as the ICP beneficiaries were not members of the active workforce that they were not included in the actuarial calculations by IPT to cost the proposed changes. However he did not carry out the costings. Mr. Shier at paragraph 3 of his second affidavit expresses the view that had a class of pension scheme members been excluded from costings it would have been normal to disclose this. He repeats his assertion that he has "been furnished with no documentary evidence that ICB recipients were excluded from the actuarial costings". He also repeats in that affidavit at paragraph 6 his conclusion in his report that "there is nothing stated in any of the documents that IPT furnished to him to indicate" that the removal of integration from the definition of pensionable salary was not intended to apply to ICB recipients or that the calculation of the liabilities in respect of ICB recipients was different from the calculations for those "actively at work". He also states expressly that he had seen no documentation containing any instruction from either the JSC or the Company to Mr. Bell advising that ICB recipients should be excluded from costings and no reference in any advice provided by Mr. Bell to indicate that they were so excluded. He refers to certain documents which he considers indicate to the contrary.

87. I have concluded on the evidence adduced in relation to Mr. Bell's work as an actuary that as a matter of fact, there is nothing in any of the documents of Mr Bell or communications with him which indicate that the removal of integration from the definition of pensionable salary did not apply to active members who were ICP Beneficiaries. Further, Mr. Bell made no distinction in the calculation of the liabilities of the ICP Beneficiaries from the calculations for those "actively at work". As a matter of probability such an approach continued long after the JSC Agreed Proposals in November, 1997. Such was the approach in the formal actuarial valuation of the Pension Plan as at 1st July 1998, which is dated 15th February, 1999. It also appears to have been the basis for valuation at 1st April, 2001, (see par. 15 of Mr. Shier's second affidavit).

88. Construing the JSC Agreed Proposals by the words used in the context of the factual matrix to which I have referred, I have concluded that they cannot be construed as disclosing a clear intention either to exclude Members who were ICP Beneficiaries at implementation date from the benefit of the elimination of integration or to confine the Pension Plan changes to those members of the Pension Plan who were then active employees. The furthest that the matter can be put is that there was a lack of clarity on the question in the JSC Agreed Proposals.

89. In the absence of such a clear intention disclosed by the JSC Agreed Proposals, even if the Court now presumes a decision taken on behalf of the Company to amend the Pension Rules by deed (subject to obtaining consent from IPT) to implement the pension changes in the JSC Agreed Proposals, it cannot be satisfied that there is cogent evidence at the end of 1997 or early 1998 of an intention by the Company to amend the Pension Rules by deed so as to eliminate integration only for "active employees" or for Members other than ICP Beneficiaries.

90. The next question is whether there is cogent or convincing evidence of an intention so formed by the Company prior to or at the time of execution of the 1999 Deed of Amendment.

91. The Company relies upon evidence of a meeting on 3rd March, 1998, between Mr. Blake and Mr. Colm Conachy, the then Human Resources of the Company with Mr. Alan Doherty and Ms. Miriam White of IPT. Mr. Blake in his first affidavit at paragraph 14 states of that meeting:

> "On 3rd March 1998, I attended (along with Colm Conachy of the Company) a meeting with IPT (who were represented by Alan Doherty and Miriam White) at which it was confirmed that the pension improvements would only apply to active employees of the Company. I beg to refer to a copy of the minutes of that meeting (which I believe were prepared by IPT) upon which I have marked with the letters and number "CB17" I have signed my name prior to the swearing hereof, and in particular to paragraph 6 thereof. Although the JSC Agreement had included the removal of State Pension 'integration', employees who had left the Company's employment prior to 20th February 1998 were not party to the JSC agreement and were not intended to be affected by the arrangements to be implemented under the JSC Agreement."

92. Mr. Alan Doherty has sworn two affidavits on behalf of IPT. At the relevant time he was the accounts manager for the Tara Mines Pension Plan with IPT. From 1980 until December 1999, IPT was the Trustee of the plan. It also provided certain administrative and actuarial services in respect of the plan. Mr. Doherty in his first affidavit confirms that he prepared the minutes of the meeting and states that the confirmation was given by Mr. Conachy and Mr. Blake. Paragraph 6 of the minutes of the meeting referred to by both Mr. Blake and Mr. Doherty read:

> "6. ICP Claimants
>
> It was confirmed that the Pension Plan changes will only apply to active employees. Announcement letters will specifically include them."

93. The Pension Plan changes are recorded at paragraph 1 of the minutes to that meeting and at that time the effective date was confirmed as 9th February, 1998. The relevant change is described as "elimination of integration with State Scheme".

94. Counsel for the representative beneficiary made submissions in relation to certain inconsistencies in the minutes in relation to the need to communicate with ICP Beneficiaries. It is not necessary to consider these as it does not appear to me that the confirmation

given at this meeting by Mr. Conachy and Mr. Blake can assist the Company in the context of the conclusions which I have reached on the JSC Agreed Proposals. There is no evidence that this confirmation resulted from any separate decision taken by persons duly authorised on behalf the Company to exclude ICP Beneficiaries from the elimination of integration in amending the Pension Deed or that Mr. Conachy and Mr. Blake were so authorised. Rather, it is explained by Mr. Blake at paragraph 14 of his affidavit as having been his or his and Mr. Conachy's understanding of the intention of the JSC Agreed Proposals. This can be no more than their subjective understanding of such intention. Mr. McQuillan and Mr. Devoy who were also members of the JSC have sworn affidavits expressing an opposing subjective understanding. The recording at that meeting of the "confirmation" that the Pension Plan changes were only to apply to "active employees" is indicative of a lack of clarity in the information originally communicated. No evidence has been given as to who raised a question which gave rise to this confirmation. Nevertheless the confirmation is relevant to a consideration of the subsequent events prior to the execution of the 1999 Deed of Amendment. The minutes of the meeting of 3rd March, 1998, do not record any precise instructions as to revised documentation. Instructions were not given by Mr. Doherty to his legal department to prepare the revised documentation until approximately one year later in March 1999.

95. During the following year there were communications to the active workforce informing them of the changes. These include a document prepared by Mr. Doherty expressly addressed to the active workforce and a document which Mr. Blake states was circulated only to the active workforce but which is not expressly addressed to them. There is no evidence of any general communication to ICB Beneficiaries. However, in a letter of 14th October, 1998, Mr. Conachy wrote to Mr. Cantwell who is a member of the Tara Mines Disabled Workers and Pensioners Association (and swore an affidavit herein) stating "the only changes that are proposed to the Pension Plan are for those who are currently in our employment and paying into the plan". This was in response to a letter of 13th October, 1998, from Mr. Cantwell which has not been exhibited. It is therefore not clear as to the precise query. However Mr. Conachy's understanding of the position does not appear to have been shared by all employees of the Company. At the same time, Mr. Hilliard had written on 28th September, 1998, to a personnel officer of the Company with a number of queries including at paragraph 3:

> "Following the Joint Steering Committee Agreement, I understand that in calculating Pensionable Salaries workers in Tara Mines will no longer have a deduction of 1.5 times State Old Age Pension. Please confirm that this practice will also be applied to Disabled Tara Workers in receipt of Income Continuance."

In response to this query the personnel officer replied on 7th October, 1998, "This is a decision for the Trustees of the Tara Mines Fund."

96. During this period it appears as a matter of probability that Mr. Conachy as Human Resources Manager and Mr. Blake and possibly others working for him understood that the changes were intended to apply only to those in active employment. However, this position was not understood by all employees in the Personnel Department. Whilst Mr. Blake and Mr. Doherty have averred that they believe the pension scheme was administered from March 1998 as only applying elimination of integration to active employees this does not appear to be fully so on the evidence adduced and the findings I have made in particular in relation to the valuation as at 1st July, 1998, prepared in February 1999 and the valuation at 1st April, 2001, both by the then actuary, Mr. Bell. In accordance with Mr. Shier's evidence I have concluded as a matter of probability Mr. Bell did not distinguish between ICP Beneficiaries and other Members in valuing the liabilities in respect of them in either the valuation at 1st July, 1998, or at 1st April, 2001.

97. Also there is a Pension Plan booklet which Mr. Blake says was published prior to 2001 and which Mr. Doherty believes was prepared in IPT in mid-July 1999. This refers to the new definition of pensionable salary and makes no reference to exclusion of ICP Beneficiaries. Further it does not expressly confine its application to any part of the membership of the Pension Plan. It purports to be the explanatory booklet then applicable for the Tara Mines Pension Plan. Two later booklets exhibited by Mr. Blake published in 2003 and 2005 expressly state that the document is applicable "only to the active workforce in 2003 (or 2004) and thereafter". There is no evidence as to the circulation of the Pension Plan booklet prepared in July, 1999.

98. Company also relies upon a "clarification" given at a meeting of the JSC held on 23rd February, 1999 in support of a continuing intention to exclude ICP Beneficiaries from the elimination of integration. It appears that in this period the JSC continued to meet. Mr. Blake at paragraph 17 of his first affidavit exhibits the minutes of this meeting "for completeness". He was not present at the meeting. Mr. Cosgrove and Mr. Kelly who are now Trustees were present as was Mr. Conachy.

99. The validity of this meeting and any decision taken at it are strongly disputed by Mr. McQuillan in his affidavits. It appears unnecessary to form any view on that dispute. The relevant minute records:

> "Pension
>
> At a previous JSC meeting some clarification was requested on aspects of the improved pension scheme incorporated in the JSC Agreement, and responses to these are outlined below.
>
> Clarification was requested on the benefits to the following pension scheme members:
>
> 1. …
>
> 2. Employees on income continuance or going on income continuance?
>
> 3. …
>
> The following responses to the above were received respectively:
>
> 1. …
>
> 2. They will receive income continuance up to the age of 65 and will then receive pension as per the old scheme.
>
> 3. …"

100. The minutes of previous JSC meetings have also been exhibited. They cast no light on the persons by whom or in what circumstances the clarification was sought. No evidence has been given of this. Even if these clarifications were validly given by the JSC it does not appear to me that they can constitute cogent evidence of an intention by the Company to exclude ICP Beneficiaries

from the elimination of integration. There is no evidence that this clarification either resulted from or gave rise to any new or separate decision by the Company to amend the pension deed in a manner consistent with this clarification. If anything, it confirms the view already formed as to the lack of clarity of the pension changes proposed in the JSC Agreed Proposals. Further, the response given is in fact inconsistent with the rectification to the 1999 Deed now sought by the Company. The rectification sought by the Company is only to exclude persons who were ICP Beneficiaries on 20th February, 1998. Even if rectification were granted any person who became an ICP Benificary after that date receives pension benefits in accordance with what in the JSC minutes is referred to as the "improved scheme". The clarification sought and given as recorded in the minutes relates also to persons who were on income continuance in February 1999 (including those who went on ICP after 20 February 1998), or who would in the future go on income continuance.

101. I have also considered the evidence in relation to the valuation and funding of the Pension Plan in this period. Whilst Mr Blake and Mr Doherty aver that it was at all material times funded on the basis that ICP Beneficiaries were only entitled to pensions subject to integration the evidence of Mr Shier in relations to the valuations of the Pension Plan as at 1st July 1998 and 1st April 2001 does not support this position. The formal actuarial investigation (and valuation) of the Pension Plan as at the 1st July, 1998 was sent under cover of a letter of the 17th February, 1999, from Mr. Bell addressed to the Trustees of the Pension Plan. As pointed out by Mr. Shier, at paragraph 1.3 of the report the actuary states:

> "The current scale of benefits being provided under the Plan is shown in the appendix and forms the basis for valuing the liabilities."

In the appendix under the summary of the existing plan benefits pensionable salary is stated to be "determined on the renewal date and is the Member's annual basic salary excluding overtime, bonus or other variable payments. In the case of direct miners pensionable salary is 125% of annual basic salary". Pensionable salary is thus defined without integration.

102. In the same report the membership data at the valuation date (i.e. 1st July, 1998) is set out under four separate headings the first of which is "Active Members (eligible for pension benefits)". It is common case that ICP Beneficiaries are included as Active Members. As stated by Mr. Shier there is no distinction made in any part of the report between different classes of Active Members for the purposes of valuing the liabilities or otherwise. Further the report at paragraph 5(D) refers to the changes in benefits introduced in February, 1998, as including "integration with state pension was eliminated". There is no indication that such change was confined to one class of Active Members.

103. This document is the latest valuation or costings of liabilities for past and future service which appears to have been done prior to the execution of the 1999 Deed of Amendment. The report discloses a surplus in the fund. In the conclusions at paragraph 9 the assets are stated to be 117% of liabilities based on salaries projected to normal pension date. The report also recommends that the next valuation be done as at the 1st July, 2001. The evidence is that following the valuation as at 1st July, 2001, the surplus in the fund was such that the Company was able to take a contribution holiday. This evidence must further be considered in the context of Mr. Shier's view expressed at paragraph 15 of his second affidavit that "there is nothing in the report in the valuation as at 1st April, 2001,to indicate that the benefit for ICB members were valued differently to those for active employees at that time".

104. The Company, the current trustees and IPT have emphasised the funding implications for the Pension Plan if this application is refused. The court has noted the serious implications for the funding of the scheme. However it does not appear to be a fact which the court may take into account in determining the claims herein. The Court has been given no evidence of the date from which the valuation of the liabilities of the pension fund were done on a basis which differenciated between the liabilities of Members who were ICP Beneficiaries at the 20th February, 1998, from those then in the active work force. On Mr Shier's evidence no distinction was made in the valuations next after the date of implementation of the changes and next after execution of the 1999 Deed of Amendment. Those valuations were the basis of funding decisions at that time. Mr. Blake in his second affidavit has also dealt with certain of the funding issues. Insofar as there are disputes between him and Mr. Shier as to the meaning of the valuations carried out by Mr. Bell I prefer the evidence of Mr. Shier by reason of his professional expertise and my consideration of the documents to which they refer.

105. The 1999 Deed of Amendment in accordance with its express terms is stated to have been executed on 19th October, 1999. At recital C it recites that "the Principal Employer with the consent of the Trustees is desirous of amending the Rules of the Plan in accordance with the provisions of Clause 30 of the Deed of Amendment and Substitution". The Deed then witnesses that "the Principal Employer with the consent of the Trustees hereby amends the Rules and the Schedule to the Deed of Amendment and Substitution …" It is executed under the seal of the Company and a Director and the Secretary of the Company have signed stating that they were present when the seal of the Company was affixed to the Deed.

106. No evidence has been adduced of any decision taken by or on behalf of the Company to approve the Deed; nor to authorise the execution or affixing of the seal of the Company to the Deed; nor of the requirements of the Articles of Association of the Company in relation to the use of the Company's seal. If the standard provisions in Regulation 115 of Table A to the Companies Act 1963 applied to the use of the seal of the Company then it could only be used by the authority of directors or a committee of the directors and as was done in this instance, the document to which the seal was affixed must also be signed by a director and countersigned by the secretary or a second director.

107. The company has entered into this Deed by causing its seal to be affixed in the presence of a director and the secretary of the Company who also signed their names. Those persons have not sworn affidavits. There is no evidence before the Court of any intention formed by those persons or any other person authorised to take such a decision to amend the Rules of the Pension Plan other than in accordance with the terms of the Deed. Further there is no evidence of any communication between Mr Conachy, Mr Blake or any other employee of the Company who may have believed elimination of integration was intended only to apply to active employees with any director or the secretary of the Company.

108. In accordance with the principles set out above to be entitled to an order for rectification the Company must adduce cogent evidence of its intention prior to and continuing to the time of execution of the Deed to effect an amendment to the Pension Plan rules which is not correctly recorded in the 1999 Deed. No evidence has been adduced of the intention of any person authorised to determine on behalf the Company that the rules of the Pension Plan be amended by Deed and/or that the Company execute the Deed under seal. No evidence has been adduced of the intention of the persons who took such decisions on behalf of the Company. On the facts of this case, the plaintiff has failed to adduce cogent evidence, or indeed any evidence, of the intention of the Company at the time of execution of the Deed. Mr. Blake at paragraph 18 of his first affidavit simply states:

> "The pension improvements agreed as part of the JSC Agreement were implemented by means of the 1999 Deed of Amendment which I have exhibited at 'CB8' above."

109. Even if the Court were now to presume an intention on the part of the Company at the time of execution of the 1999 Deed of Amendment to implement the JSC Agreed Proposals in relation to Pension Plan changes, by reason of the lack of clarity of intention in the JSC Agreed Proposals as already found and the absence of any evidence of the decisions taken on behalf of the Company, I have concluded that it has not adduced cogent evidence of an intention by the Company in executing the 1999 Deed of Amendment to exclude persons who were ICP Beneficiaries as at 20th February, 1998, from the elimination of integration.

Intention of Irish Pensions Trust

110. Having regard to the findings made in relation to the alleged intention of the Company it is strictly speaking unnecessary to consider the alleged intention of IPT. However having regard to the full submissions made it appears appropriate that I should shortly express my conclusions on the issue as to whether the Company has adduced cogent evidence of the consent of IPT to an amendment to the definition of pensionable salary which excluded ICP Beneficiaries as at 20th February, 1998, from the elimination of integration.

111. Mr. Alan Doherty who is now a retired pension's consultant but at the relevant time was employed by IPT and was the Accounts Manager for the Tara Mines Pension Plan from 1996 swore the principal affidavit on behalf of IPT. For the reasons set out above I have concluded that he received at the meeting of 3rd March, 1998, confirmation from Mr. Conachy and Mr. Blake that the improvements to the Pension Plan were only to apply to the active workforce. I am also satisfied from Mr. Doherty's affidavit and the documents exhibited by him of the exchanges with the then Head of the Legal Department in IPT that he gave instructions that the changes apply only to the active workforce and by implication exclude ICP Beneficiaries.

112. Counsel for the representative beneficiaries submits correctly in my view that such evidence is not evidence of a decision by IPT in their capacity as Trustee of the Pension Plan to consent to an amendment which excluded ICP Beneficiaries. IPT at the relevant time provided administrative and actuarial services for the Pension Plan. It also was the Trustee. It was a corporate and professional Trustee.

113. Mr. Doherty in his affidavit does not aver or provide evidence that he was authorised by IPT to take a decision which had to be taken by it as Trustee to consent to a proposed amendment to the Pension Plan rules. Further, there is no evidence from Mr. Doherty's affidavits that on behalf of IPT he ever considered the question as to whether the proposal, as he understood it, to amend the definition of pensionable salary by the elimination of integration only in respect of one section of the active Members i.e. the active workforce was or was not an amendment to which the Trustee should consent.

114. It is common case that the improvement in Pension Plan benefits in the JSC Agreed Proposals including the elimination of integration was to be funded in part from the then surplus in the pension fund, in part by the Company and in part by the increased contributions from the active workforce. It is accepted on behalf of the represented beneficiary that members of a pension scheme have no rights to a surplus but it is contended that they have a reasonable expectation that any dealings with that surplus will have a fair regard to their interests. As put by Brooke L.J. in *The National Grid Co. Plc and Others v. The Laws, Mayes and Others* [1999] P.L.R. 37 at paragraph 43:

> "It is also well settled that although the members of a pension scheme have no rights in the surplus of a pension scheme have no rights in the surplus revealed by an actuarial valuation (see for instance, In *re Courage Group's Pension Schemes* [1987] 1 W.L.R. 495, 515F), they have a reasonable expectation that any dealings with that surplus, whether by the employers or by the trustees of the scheme acting within the powers vested in them by the scheme, will pay a fair regard to their interests, since the express purpose of the scheme is to provide benefits for their retirement."

115. It is important to note the limits of this principle. As confirmed in the same judgment at paragraph 46 members of a contributory pension scheme do not have an interest in the application of a surplus equivalent to rights of property.

116. IPT as Trustee owes a fiduciary duty to all the members of the Pension Plan. It is common case that the ICP Beneficiaries as at 20th February, 1998, were the only active members of the Pension Plan whom the Company contends were intended to be excluded from the elimination of integration. An active member is stated in the glossary of pension terms commonly encountered at Appendix 12 of Irish Pensions Law and Practice (2nd Edition) Finucane, Buggy and Tighe (Thompson Round Hall, 2006) as "a member of a scheme who is included in the scheme for retirement benefits and is continuing to accrue retirement benefit – usually a member who is in service." It is common case and expressly acknowledged by Mr. Blake in his affidavit that ICP beneficiaries were considered to be active members of the Tara Mines Pension Plan. Unusually they were a member not in service. However by reason of the ICP benefit payments made on their behalf they were continuing to make contributions and each year of benefit under the ICP was deemed to be a year of service with the Company for pension purposes.

117. On the facts herein, if IPT as Trustee was asked to consent to the amendment as now contended for by the Company the fiduciary duty owed by it to all the members of the Pension Plan, including ICP beneficiaries as at 20th February, 1998 required, at minimum, that it ask itself questions such as "Is this an amendment which should be consented to in the interests of all of the members of the Pension Plan" and "Is it justifiable to exclude ICP Beneficiaries in the interests of all the members of the Pension Plan". These were serious questions which would have had to be addressed particularly having regard to the context of the proposed changes i.e. the JSC Agreed Proposals; the difficult financial position of the Company; the healthy position of the Pension fund in surplus and the difference in contributions both existing and proposed between active employees (5% of integrated pensionable salary increasing to 6% of non-integrated) and ICP Beneficiaries (15.4%. of of integrated pensionable salary).

118. No evidence has been adduced of any express decision taken by IPT to consent to an amendment to the definition of a pensionable salary which was to exclude ICP Beneficiaries from the benefit of the elimination of integration. There is no evidence that any person on behalf of IPT addressed the question as to whether their exclusion was justified in the interest of all the members of the Pension Plan. The evidence in relation to the costings of the funding of the improved benefits which has been adduced suggest that insofar as they were then available to IPT as a matter of probability no distinction was made in the costing of liabilities for ICP Beneficiaries and other active members prior to October 1999.

119. The 1999 Deed of Amendment is executed by IPT under seal. The seal is witnessed by two persons who are stated to be a director and a director/secretary. Mr. Doherty is not stated to have been a director of IPT at the time.

120. As appears from paragraph 21 of Mr. Doherty's first affidavit he was sent the engrossed Deed of Amendment for sealing by the Company and IPT as Trustee by the Head of the Legal Department of IPT. The accompanying memorandum refers to a meeting between them on 12th October and states:

> "… the only changes that are to be in the Deed of Amendment are the benefit changes as agreed by the Company."

Mr. Doherty then states at paragraph 22 "the Deed of Amendment was then signed by IPT on 19th October, 1999".

121. As with the Company, there is no evidence from the directors or secretary of IPT who were present when the document was sealed nor any evidence of any resolution of the Board of directors or a committee of the directors approving the execution or sealing of this Deed. Further, there is no evidence of any communication between Mr. Doherty and the persons who approved or witnessed the sealing of the document by IPT. Counsel for the representative beneficiary submitted that this lack of evidence must be viewed in the context of discovery made by IPT which did not disclose any such documents.

122. Accordingly, I have concluded that the only evidence of an intention attributable to IPT as Trustee of the Pension Plan to consent to the specific amendments proposed by the Company is the evidence of the execution of the 1999 Deed. This is evidence of a consent to the amendments in the 1999 Deed. There is no evidence of an intention of IPT, as Trustee, to consent to any differing amendment at any time prior to or upon the execution of the 1999 Deed of Amendment.

123. The Company's claim for rectification of paragraph D of the 1999 Deed of Amendment must be dismissed by reason of a failure to establish by cogent or convincing evidence the intentions of either the Company or IPT contended for in these proceedings.

Setting aside for Mistake

124. In the alternative the Company claims that paragraph D of the 1999 Deed of Amendment should be set aside for mistake. It is agreed that the principles according to which the court should determine the Company's claim to set aside the 1999 Deed of Amendment for mistake are those summarised by Millett J. in *Gibbon v. Mitchell* 1 WLR 1304 at 1309 cited with approval by Kelly J. at p. 61 in the CRC case:

> "…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."

125. Whilst *Gibbon v. Mitchell* concerned a voluntary transaction both Lawrence Collins J. in *AMP* and Kelly J. in CRC considered that similar principles should apply to a mistake on the part of an employer as settlor in an occupational pension scheme.

126. The purpose of this equitable jurisdiction is to relieve a settlor who has executed a deed or other document under a mistake as to the effect of the transaction. The person seeking to set aside the instrument must adduce convincing evidence of such mistake. In *Gallagher Limited v. Gallagher Pensions Limited* [2005] EWHC 42 which concerned claims for rectification of 1987 Deeds of Amendment to pension schemes and in the alternative a claim to set aside for mistake Etherton J. in considering the claim to set aside for mistake in accordance with the principles set out in *Gibbon v. Mitchell* said at par. 154:

> "As in a claim to rectification, it is for the person seeking to set aside the instrument to produce convincing evidence of the mistake: *Anker-Petersen –v- Christiensen* [2002] WTLR 313, 330."

127. In that case the employer was Gallagher Limited (referred to as GL in the judgment). The execution was under seal as in this case. The conclusion on the evidence before Etherton J. was at par. 157:

> "In the light of my findings of fact, it is clear that the 1987 Deeds were executed by GL, acting by its directors and by the company secretary who executed the 1987 Deeds on its behalf, under a fundamental mistake as to their effect. Those persons intended and believed that the 1987 Deeds did no more and no less than to guarantee for 10 years a continuation of a policy of annual increases, previously made on a discretionary basis, but limited to 2% LPI."

128. On the facts of this case, the Company has adduced no evidence as to the understanding of the Director and Secretary who witnessed the execution of the Deed under seal by the Company of the effect of the amendment in paragraph D of the 1999 Deed of Amendment. Similarly there is no evidence from any person or group of persons such as the Board of Directors or a subcommittee thereof who either decided upon the amendments to be made or authorised the execution of the Deed as to their understanding of the effect of the proposed amendments.

129. The evidence of Mr. Doherty and Ms. Kelly the then head of the legal department in IPT establishes that they both understood that the changes introduced in February 1998 were to apply only to active employees. Further that Ms. Kelly believed that paragraph D of the 1999 Deed of Amendment so provided by reason of what now must be considered an erroneous view taken by Ms. Kelly that a "Member" only included active employees (see par 7 of Ms Kelly's affidavit). However it does not appear that the mistaken belief of Ms Kelly and probably that of Mr. Doherty as to the effect of the amendment in paragraph D of the 1999 Deed can assist the company in its claim to set aside for mistake for the following reason. There is no evidence that either of their understanding of the intended effect of the proposed amendment in paragraph D was ever communicated to any person who took a decision by or on behalf of The Company or indeed IPT to execute the 1999 Deed of Amendment.

130. Similarly there is no evidence of any communication which took place between Mr. Doherty and any relevant person in the Company in relation to the effect of the amendments in the 1999 Deed of Amendment subsequent to its drafting. Also there is no evidence of any communication between any relevant executive in the Company (including Mr Conachy or Mr Blake) with any senior person in the Company, whether a director secretary or other as to the amendments intended to be effected by the 1999 Deed of Amendment prior to its execution. I recognise that the directors of a Company or very senior management may not be involved in the detail of amendments to a pension scheme. However what one would expect at minimum is that where such persons are asked to take decisions to effect amendments to a pension scheme or to authorise the execution or witness the execution of documents by the Company under seal that there would at minimum be a memorandum from the relevant executive in the Company who has been involved in the detailed preparation explaining what is sought to be achieved and identifying if there are any issues which should be considered and determined by the directors or a subcommittee of same. There is no evidence of any such communication on the facts of this application.

Accordingly insofar as a mistake may have occurred within IPT in the drafting of the Deed of Amendment it does not appear that any relevant person in either the Company or IPT who took the decisions to execute the Deed of Amendment were aware of any mistaken belief by those involved in the drafting that the wording of paragraph D only applied the elimination of integration to active employees and hence did not include ICP Beneficiaries.

129. On these facts, I must conclude that the Company has not adduced evidence that the Company executed the 1999 Deed of Amendment under a mistake as to the effect of the amendment to the definition of pensionable salary in paragraph D. The Company's

claim to set aside the Deed by reason of mistake must be dismissed.

Rule in Hastings-Bass
130. The final claim by the Company is for a declaration that paragraph D of the 1999 Deed of Amendment is void. This claim is pursued on the basis of the so called rule in *Hastings-Bass v. Inland Revenue Commissioners* [1975] Ch 25.

131. The rule derives from the following statement of principle (expressed in the negative) by the Court of Appeal in that case at p. 41:

> "…where by the terms of a trust…a trustee is given discretion under some matter under which he acts in good faith, the court should not interfere with his action notwithstanding that it does not have the full effect which he intended, unless (1) what he has achieved is unauthorised by the power conferred on him, or (2) it is clear that he would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account."

132. The application of the above principles to acts of trustees in relation to pension scheme has been the subject of much consideration by the English Courts, though several cases obiter and also by Kelly J. in CRC (again *obiter*). Kelly J. puts the principle in the following way at p. 63:

> "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 to 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 failed to take into account considerations which he ought to have taken into account."

Kelly J. then observed:

> "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."

133. Counsel for the Company has submitted that in considering this application I should follow the legal principles as determined by Kelly J. in *CRC*. The principle as stated by Kelly J. is without the expansion by Lawrence Collins J. in *AMP*. I propose applying the principle without the expansion of Lawrence Collins J. in *AMP*. Whilst not necessary, it appears appropriate to add that having considered a number of the English decisions in which the so-called rule was considered I would also prefer the statement of the principle as expressed by Kelly J. without the expansion of Lawrence Collins J. in *AMP*.

134. The discretion at issue exercised by IPT as trustee herein was to consent to the amendment in paragraph D of the 1999 Deed of Amendment. It is now contended that such amendment does not have the full effect then intended by IPT in the sense that it does not exclude those persons who were ICP Beneficiaries on the 20th February, 1998.

135. It appears unnecessary on the facts herein for me to consider the evidential requirements of such an intention or their distinction with those requirements for a claim in rectification to succeed. This was considered in some detail by Warner J. in *Mettoy Pension Trustees Limited v. Evans* [1991] W.L.R. 1587. Even if IPT as Trustee when consenting to the amendment had an intention to exclude persons who were ICP Beneficiaries on the 20th February, 1998 (which intent I have not found) it does not appear that the Company has established an entitlement to relief under the rule in Hastings-Bass as explained by Kelly J in *CRC*.

136. On the facts herein it is contended on behalf of the Company, and supported by IPT that if IPT had been aware that the amendment proposed in terms of paragraph D of the 1999 Deed of Amendment eliminated integration for the ICP Beneficiaries that IPT as trustee would not have consented to such amendment by reason of the funding implications of such an amendment for the Pension Plan.

137. For the reasons set out above I have already found that the only evidence of a decision by IPT as trustee to consent to the proposed amendments is the decision evidenced by the execution of the Deed. No evidence has been adduced from the persons who witnessed the sealing of the Deed as to what they did or did not consider prior to witnessing the execution of the Deed. On the evidence in relation to work done by the Actuary on the funding implications of the proposed changes and his valuation at 1 July 1998 I have concluded indicates that as a matter of probability Mr. Bell made no distinction in the calculation of the liabilities of the ICP Beneficiaries from the calculations for those "actively at work". That was the information in relation to the funding implications then available to the Trustee and relates as a matter of probability to the change effected by the amendment in paragraph D.

138. Accordingly I have concluded that in accordance with the principle in *Hastings-Bass* as set out by Kelly J. in *CRC* that the Company and IPT have failed to establish by evidence that IPT either failed to take into account the funding implications or that if they had taken into account the funding implications for the Pension fund of the amendment in paragraph D of the 1999 Deed on the financial information then available that it would not have acted as it did in executing the 1999 Deed of Amendment.

Conclusion
139. All the claims of the plaintiff in these proceedings must be dismissed.