THE HIGH COURT

[2023] IEHC 148

2020 No. 79SP

IN THE MATTER OF AN APPLICATION BY

GERARD O'ROURKE AND MAJELLA O'ROURKE

AS TRUSTEES OF THE MEADOWVALE PENSION SCHEME

APPLICANTS

AND BY ORDER

AFRICAN GATEWAY CONVENTION AND EXHIBITION PRECINCT

PROPRIETARY LIMITED

NOTICE PARTY

JUDGMENT of Ms. Justice Eileen Roberts delivered on 23 March 2023

Introduction

1. The applicants Gerard O'Rourke and Majella O'Rourke are trustees of the Meadowvale Pension Scheme (the "**Scheme**"). The Scheme is the registered owner of shares in African Gateway Convention and Exhibition Precinct Proprietary Limited, who was joined as a notice party to these proceedings by order of the High Court dated 15 April 2021.

2. On 31 August 2011 the trustees of the Scheme sought to wind up the Scheme, having previously purported to transfer to a third party the Scheme's ownership of shares in the notice party. However, the Scheme remains the registered owner of the shares in the notice party and it is now accepted that the purported transfer of shares was ineffective.

3. Against that background, the applicants issued a special summons on 3 March 2020 seeking an order pursuant to the provisions of Order 3 rule 1(2) and (6) of the Rules of the Superior Courts and pursuant to the inherent jurisdiction of this court, answering and determining the following questions, as questions which affect the rights or interests of a person or persons under a trust and which arise in the course of the administration of the trust. The two questions are agreed as follows:

(1) Have the trustees of the Meadowvale Pension Scheme properly and effectually divested themselves of the entire of the shareholding in African Gateway Convention and Exhibition Precinct Proprietary Limited (the notice party)?

(2) If the answer to the previous question is in the negative, then does the shareholding in the notice party acquired by the Scheme on 9 December 2005 continue to be vested in the trustees of the Meadowvale Pension Scheme?

4. It was accepted at the hearing of this matter that this court is only required to determine the second question above as the applicants now accept that the trustees of the Scheme failed to properly divest themselves of the relevant shareholding. This arises in circumstances where the applicants now concede that neither did they give written notice to the notice party in accordance with clause 9 of the relevant shareholders agreement nor was the required consent of the other shareholders obtained to the purported transfer by the applicants of the shares to Davycrest Nominees.

5. The question before this court therefore is whether the shareholding in the notice party which had been acquired by the Scheme on 9 December 2005, continues to be vested in the trustees following the purported winding up of the Scheme. The notice party argues that the shareholding registered in the name of the dissolved Scheme is prima facie property to which the state is entitled as *bona vacantia*. The applicants argue that the

trust assets (shares) never left the hands of the trustees despite the purported winding up of the Scheme and therefore the shares remain vested in the trustees.

6. In order to answer the second question, it is necessary to consider the Scheme and the background to the transactions at the centre of these proceedings.

The Scheme

7. The Scheme was established as an irrevocable trust by deed of trust dated 1 September 1996 (the "**Trust Deed and Rules**") entered into between Chieftain Construction Limited (as Principal Employer) of the one part and Gerard O'Rourke and Majella O'Rourke and Planlife Trustee Services Ltd (as Trustees) of the other part.

8. The purpose of setting up the Scheme was to hold pension assets for and on behalf of the applicants being Gerard O'Rourke and Majella O'Rourke. The principal asset of the Scheme (which was acquired in December 2005 as set out below) was a shareholding in the notice party (previously called Pretoria International Convention and Environment Centre ("**PICEC**"), which is a company incorporated and registered in the Republic of South Africa.

9. The Scheme was approved by the Irish Revenue Commissioners by letter dated 3 November 1997 as a retirement benefits scheme for the purposes of Chapter II, Part 1 of the Finance Act 1972 with effect from 1 September 1996 and the letter confirmed the Scheme would be treated as an "*exempt approved scheme*" for the purposes of section 16 of that Act with effect from 1 September 1996.

10. By letter dated 24 October 2008, the Scheme was confirmed as registered with The Pensions Board as a small self-administered pension scheme with a start date of 1 September 1996. The trustees where Majella O'Rourke, Gerard O'Rourke and Planlife Trustee Services Ltd.

The acquisition of notice party shares by the Scheme

11. On 9 December 2005, Gerard O'Rourke in his capacity as a trustee of the Scheme entered into a shareholders agreement to acquire 30% of the share capital of the notice party through acquiring 30% of the issued share capital held by two existing shareholders in the notice party, namely Community Investment Holdings (Pty) Ltd and Bantsho Investment Holdings (Pty) Ltd. The Scheme was registered as the "*registered proprietor*" of 30 ordinary shares in the notice party on 1 January 2007. This registration remains in place.

12. The shareholders agreement imposed a number of restrictions on the transfer of shares by a shareholder in the notice party. It is now accepted by the applicants that those restrictions were not complied with when the trustees sought to transfer the shares to Davycrest Nominees. The shareholders agreement is governed by the substantive laws of South Africa. The notice party does not however dispute that the Scheme is to be interpreted in accordance with the laws of Ireland.

The purported transfer of the notice party shares by the Scheme

13. In or about 2010, the applicants wished to restructure their pension arrangements. This restructure envisaged the transfer of the applicants' pension benefits from the Scheme to another entity known as the Melita International Retirement Scheme. This restructuring required the notice party shares to be transferred from the Scheme to Davycrest Nominees, which was the entity which would hold these shares on behalf of the Melita International Retirement Scheme.

14. In order to make this share transfer, the trustees of the Scheme entered into a deed of assignment with Davycrest Nominees on 1 August 2011. This deed of assignment is a short document made between the trustees (as "Assignor"), Davycrest Nominees (as "Assignee") and Gerard O'Rourke (as the "Member"). Pursuant to the deed of assignment, the trustees purported to assign absolutely "*all their right title and interest [in the PICEC shares] together with all moneys assured thereby and all moneys which may become payable under or by virtue of them and all benefits and advantages of them*" to Davycrest Nominees with the consent of Gerard O'Rourke as beneficiary to the Scheme.

15. This court was furnished with expert legal opinions from South African lawyers engaged by both sides and details of applications made to the South African courts. There was also a significant amount of material exhibited to affidavits filed by both sides regarding the position originally adopted by the applicants that the transfer of the notice party shares had been valid. I do not propose to outline those matters in this judgment as it is now accepted by the applicants that the deed of assignment did not validly transfer the shares in the notice party, given the failure to comply with the restrictions on transfer in the shareholders agreement, and so the shares remained in the ownership of the Scheme despite that deed of assignment. As indicated above, this answers the first question posed in these proceedings in the negative.

The steps taken to wind up the Scheme

16. On 31 August 2011 (it would appear in the mistaken belief that the notice party shares had by then been validly transferred), Chieftain Construction Limited (as "Principal Employer") and Gerard and Majella O'Rourke (as "Trustees") and Planlife Trustee

Services Limited (as "Pensioner Trustees") entered into and executed a deed of wind up of the Scheme.

17. Given the importance of this deed to the second question before this court it is worth reciting the relevant terms in full.

18. The relevant recitals are as follows:

> "*B.* *All members of the Scheme have become members of an approved retirement benefit arrangement or arrangements to which the Trustees have transferred the assets of the Fund referred to in the Definitive Deed to the extent that such Members shall be entitled to benefits upon retirement or death in service in lieu of entitlement under the Scheme;*
>
> *C.* *All liabilities of the Scheme have been discharged and the Trustees have wound up the said Fund by distributing or otherwise disposing of all assets of the Scheme under the foregoing recital;*
>
> *D.* *The Principal Employer and the Trustees have decided that the Scheme should be determined*".

19. The remaining provisions of the deed of wind up are in the following terms:

> "*1.* *The Scheme created by the Definitive Deed dated 1st September 1996 and administered in accordance with the provisions of the Definitive Deed and Rules annexed thereto is hereby determined.*
>
> *2.* *The Principal Employer hereby discharges the Trustees.*
>
> *3.* *The Trust created by the aforementioned deeds is hereby dissolved".*

20. The question arises as to the legal effect of the deed of wind up insofar as it related to the notice party shares.

21. The Settlor of the Scheme, Chieftain Construction Limited, had been placed into voluntary liquidation on 7 January 2011. Strictly therefore the deed of wind up should have been executed by the liquidator of Chieftain Construction Limited rather than by the company itself, as appears to have occurred. The court was provided with copy correspondence from the liquidator of Chieftain Construction Ltd to Gerard O'Rourke dated 3 February 2015 confirming that as liquidator he "*did not have any interest in the assets of the trust*…".

22. It is also worth noting the provisions of clause 19 of the Trust Deed and Rules entitled "*Replacement of Principal Employer*". Clause 19(b)(i) provides that

> "*If the Principal Employer shall cease to carry on business and if at the time of such cesser of business or at any time thereafter there shall not be any such agreement as is referred to in paragraph (i) of subclause (a) of this clause* [i.e. where another entity enters into an agreement with the Trustees to perform the obligations of the Principal Employer under the deed] *and the Trustees shall be of the opinion that there is no reasonable expectation of such agreement…then in any such event the Trustees may either determine the Scheme and wind up the Fund or may exercise the power to alter or modify any of the trusts powers and provisions of this Deed and the Rules conferred upon them by clause 15 hereof without reference to the Principal Employer and may make such arrangements to enter into such agreement (not being arrangements or agreements of such a kind as to cause the Scheme to cease to be an Exempt Approved Scheme) as they shall…think fit for the continuance of the Scheme…*".

23. Clause 20 of the Trust Deed is entitled "*Causes of winding up*" and provides that

"*The Scheme shall be determined and the Fund wound up in accordance with Clause 21 hereof upon the happening of any one of the following events:*

(i) the termination by the Principal Employer of its liability to contribute to the Fund (unless the Trustees shall determine that the winding up thereof shall be deferred)".

24. Clause 21 (c) provides that if after having provided the benefits under the Scheme any balance of the Fund then remains unexpended *"the Trustees shall refund such balance to the Employers in such proportions as the Trustees shall determine".*

The applicant's arguments as to the effect of the winding up of the Scheme

25. The applicants submit that the deed of wind up did not divest the trustees of the notice party shares. They also say it is not possible to dissolve a trust by simply walking away from it and that a party must divest itself of trust assets before the trust can be wound up. They say that because the deed of wind up proceeded on its face on the incorrect assumption that all assets had been transferred out of the Scheme, the trust has not in fact been dissolved because so long as there is an asset which remains part of the trust fund there is an asset for which the trustees must account. They point to the provisions of clause 1 (d) of the Trust Deed which confirms that the Trustees "*shall hold all benefits payable under the Scheme in trust for the respective persons for whose benefit the said benefits are payable in accordance with the Rules*".

26. Therefore, the applicants say that the deed of wind up was ineffective to dissolve the Scheme by reason of the failure of the trustees to properly divest themselves of the assets comprised in the trust. They submit that the Scheme continues to exist and its trustees continue to be the applicants and Planlife Trustee Services Limited (now Willis Towers Watson). They say there is no dispositive provision in the deed of wind up

whereby the trustees decanted trust assets or transferred them to anyone else so therefore the trustees still hold the trust assets notwithstanding the purported dissolution of the Scheme.

27. This position is supported by Joseph Moran, director of Planlife Trustee Services Limited. In his affidavit sworn 19 January 2022 he avers at paragraph 4 that Planlife Trustee Services Limited "*remains a trustee of the Meadowvale Pension Trust*". He confirms at para 5 that the Scheme continues to be approved by the Revenue Commissioners.

28. Mr Moran exhibits (at JM1 to his affidavit) correspondence he had with the Revenue Commissioners in June 2018 when he was advised that "*[a] transfer payment should relate to the whole of an employee's benefits; split transfers are not permitted*". The letter confirms that while there is no legislative provision in relation to split transfers, it is Revenue practice not to allow them.

29. At exhibit JM5 to his affidavit, Mr Moran exhibits correspondence to him from the Revenue Commissioners dated 24 August 2018 which confirms as follows: –

> *"…I am authorised by the Revenue Commissioner to inform you that the above-named pension scheme was approved as a Retirement Benefits Scheme for the purposes of Part 30, Chapter 1 Taxes Consolidation Act 1997 with effect from 1st September 1996 and was to be treated as an "Exempt Approved Scheme" for the purposes of Section 774 of that Act with effect from 1st September 1996. This scheme continues to be a Revenue exempt approved scheme*".

30. In his supplemental affidavit filed on 5 July 2022, Mr Moran confirms that in correspondence from the Revenue dated 18 August 2017, they stated that

"*This district has recently been advised that the PICEC investment did not transfer across from the SSAP to the Davy PRSA at that time. Revenue take the view that the winding-up of the above scheme involved a split transfer which is not in keeping with Revenue requirements. As the scheme was not wound up according to Revenue requirements it is not considered to be a valid wind up. Resulting from this, the assets from the above scheme transferred to the Davy PRSA must now be returned to the SSAP with Planlife Trustee Services as the Revenue approved Pensioner Trustee. All accounts from August 2011 to date must be submitted by them with the payment of the pension scheme levy deducted & submitted to Revenue according to Revenue requirements*".

31. Mr Moran avers at paragraph 12 of his affidavit that the Scheme is deemed an active scheme and all submissions as required by the Revenue Commissioners and the Pensions Authority have been done on a timely basis and submitted to the relevant authorities. He avers that the Scheme is compliant.

32. In summary, the applicants' position is that they are not requiring this court to revive or restore the Scheme. They say it has continued on despite the notice of wind up and that the trustees remain subject to its terms. They say the deed of wind up did not cause the notice party shares to fall out of the trustees' hands – where they accordingly remain.

The notice party's arguments as to the effect of the winding up of the Scheme

33. The notice party has raised a number of complaints regarding the context in which these proceedings issued in 2020 without advance warning to the notice party and in circumstances where two earlier South African cases had been brought which were discontinued by the applicants and by Davycrest Nominees. While there may certainly be some valid complaint regarding these matters and generally how multiple affidavits

were required before all relevant information was available to this court, I believe these matters are not relevant to the resolution of the question this court has to determine – although they may be very relevant to the question of legal costs incurred by the notice party.

34. An objection has been taken by the notice party to the fact that Planlife Trustee Services Limited, the pensioner trustee, has not been joined to this application. While I agree that it would certainly have been preferable for them to be joined from the outset, I am satisfied based on the affidavits filed by Mr Moran, a director of Planlife Trustee Services Limited, that they are aware of this application and supportive of the applicants' position in relation to it. They have also confirmed they are continuing to act in the role of pensions trustee for the Scheme and are engaging with Revenue and the Pensions Board in relation to same.

35. The notice party has pointed out that the Revenue are not on notice of these proceedings. The notice party does not accept that there is evidence from the Revenue Commissioners before the court .While it is true that there is no affidavit filed by Revenue, I am satisfied based on the materials, albeit belatedly provided to the court in exhibits to other affidavits, that the Revenue have continued to recognise the Scheme as an ongoing scheme which is required to be administered by the trustees in compliance with legislation and Revenue requirements. I agree with the notice party however that the Revenue practice regarding split transfers is not the same as a legal finding that the deed of wind up is ineffective.

36. The notice party does not agree with the applicants' key contention that the Scheme must have continued to exist because all the trust property had not been disposed of on wind up. They say this is an incorrect position. The notice party says that equity provides for what happens when a trust fails or where its objects cannot be carried out

or where there is a surplus remaining following distributions. The notice party says that in all of these circumstances the continued existence of trust property does not mean *per se* that the same trust continues in place. Rather they say a resulting trust or *bona vacantia* arise as a possibility.

37. The notice party says that the deed of wind up was executed under seal and the applicants have not argued that the deed should be set aside for legal infirmity. The applicants only say that the very fact of the continued existence of trust property means the deed of wind up is of no effect. There is no evidence however to impugn the validity of that deed. The notice party argues that the applicants seek to invoke the supervisory jurisdiction of this court to set aside the deed without justification and to revive a trust which was validly dissolved with the approval of the pensioner trustee over 10 years ago.

38. The notice party says that if a court has to imply a resulting trust as a result of a surplus of trust property then the assets will ordinarily go back to the person who provided them. This is complicated by the provisions of the shareholders agreement in this case as other shareholders have a right of pre-emption which would mean they were entitled to prevent the shares going back to the liquidator of Chieftain Construction Limited. This would create a stalemate where the shares become *bona vacantia*.

39. In relation to *bona vacantia* the notice party argues that surplus assets of a pension scheme which fall to be distributed following the dissolution of a participating employer may become property of the state as *bona vacantia*. In order to form *bona vacantia* there must be an absence of express or implied provision under the scheme providing for what is to happen with surplus funds. There must also be a situation where either the law of trusts does not apply or, if it does, no resulting trust will be imposed by law. They argue that undistributed assets belong to no one where there are

no express provisions describing what is to happen when the pension scheme has been terminated. Under these circumstances the law of trusts does not apply to create a resulting trust.

40. The notice party also says that the fact that a dissolved entity continues to appear on its register of members does not have the effect that the entity continues to exist following a wind up by deed.

41. The notice party submits that the applicants' shareholding in the notice party is not vested in the discharged trustees of the now dissolved Scheme. The notice party says that the wind up of the Scheme had to happen in August 2011 as Chieftain Construction Limited had by that stage gone into liquidation (since January 2011) and could no longer sustain the required contributions.

42. The notice party also argues that given the delays which have occurred in this case this court should not intervene to afford equitable relief to the applicants.

Analysis of this court

43. Underhill and Hayton, Law Relating to Trusts and Trustees (16th ed) states at page 3, para 1.1.2:

> "*A trust is an equitable fiduciary obligation, binding a person (called a trustee) to deal with property (called trust property) owned and controlled by him as a separate fund, distinct from his own private property, for the benefit of persons (called beneficiaries or, in old cases, cestuis que trust), of whom he may himself be one, and any one of whom may enforce the obligation…A trust, unlike a company, has no legal personality so it is the trustee as principal who personally sues third parties or is sued (even to bankruptcy) by third parties in relation to the trust property*".

44. Bloomsbury Professional, *Trust drafting and Precedents*, states at paragraph F.1.43:

> "*Since a trust has no legal personality, it is not possible to "dissolve" it in the sense that a corporate body can be dissolved. A trust comprises a series of promises, which continue to have effect for so long as there exists any property in relation to which the promises are capable of being enforced (or until the promises are varied). On occasion, it may be that the trusts which are believed to have come to an end are "revived" in relation to property which has previously been undiscovered or which falls back into the trust from a failed disposition or for other reasons*".

45. The New Zealand case of *Johns v Johns* 2004 3 NZLR 202 is authority for the proposition that the fact that a trust has been purported to have been wound up by the trustees does not prevent a court from permitting the beneficiary of a future interest in that trust from bringing proceedings against the trustees for breach of trust.

46. In the decision of *Mettoy Pension Trustees v Evans* [1990] 1 WLR 1587 there was a surplus in the pension fund and the trustee company issued a summons for the court to determine how the property and monies held by it ought to be applied in consequence of the winding up of the pension scheme. That decision is not however particularly helpful on the facts of the present case as it deals with surplus funds rather than trust assets still required to provide the relevant benefits to members.

47. A decision I have found helpful is the case of *Bayley v SG Associates* [2014] EWHC 782 (Ch), where at para 51 of his judgment Mr Railton QC (sitting as a Judge of the High Court) stated: "*While there is trust property which remains vested in the Trustee the Trust necessarily continues until that property is distributed in accordance with the terms of the Trust*". The notice party seeks to distinguish that statement on the basis

that it refers to trust property "*which remains vested in the Trustee*" and they say this is not the case here.

48. The deed of wind up was premised on the understanding that "*all*" assets of the Scheme had by that date been disposed of. This was incorrect – the shares in the notice party had not been validly disposed of and they remained subject to a trust even when/if the Scheme was wound up.

49. The deed of wind up purported to discharge the trustees and dissolve the Scheme but it did not provide for what was to happen to any remaining trust assets. This was unsurprising as the expressly stated assumption of the dissolution was that there were no assets remaining in the trust at that time.

50. There was no divestiture of the shares by the trustees achieved by the deed of wind up. Neither had the earlier deed of assignment been effective to transfer the shares. The shares therefore remained in the hands of the trustees despite the deed of wind up. The shares remained subject to a trust. Rather than this being a resulting trust, I believe the better view is that it is the same trust on which the shares had always been held as the trustees never validly parted with them.

51. The effect of the deed of wind up was therefore not to terminate the Scheme. The deed was fundamentally flawed being incorrectly based on the premise that all trust assets had been distributed and it failed to provide for any means of the trustees divesting themselves of assets which continued to be held by them (albeit inadvertently). While the Trust Deed and Rules provide that the trustees shall refund to the employers any balance remaining after all benefits have been provided under the Scheme, there is no provision for refunding monies on a wind up which are needed to provide the trust

benefits to members. Indeed, clause 21 of the trust deed envisages that the trustees will apply the fund towards the benefits due to the members on a wind up.

52. I have concluded therefore that the trustees continue to hold the notice party shares on trust and they did not validly divest themselves of these shares at any time. The trustees continue to hold these shares subject to the terms of the Scheme. The deed of wind up did not have the effect of terminating the Scheme, albeit that that was its original objective.

53. I do not believe that the notice party shares can correctly be equated to a "surplus" of trust funds which could, in general, be held on a resulting trust or which could be redistributed pursuant to the terms of the Trust Deed and Rules. There has not been a distribution of the Scheme assets. The notice party shares remain trust assets necessary to provide the intended benefits for the members and are not therefore to be equated to a trust surplus following distribution or to the failure of a trust's objects.

54. As it happens, because the winding up involved transferring only some assets (the notice party shares not being transferred), it is not accepted as a valid winding up by the Revenue who refuse to permit a winding up of an approved scheme which involves a split transfer. In practical terms therefore Revenue have continued to treat the Scheme as a live scheme and the pensioner trustee has continued to have obligations to ensure that the Scheme complies with Revenue rules and legislation. This factor is not determinative of the legal position but it reflects a reality which sits comfortably with the determination of this court and avoids any conflict with the system of regulatory approval of the Scheme.

55. It would have been better had all the trustees joined in the proceedings from the outset for the reasons set out by Keane J in *In the matter of the estate of Thomas Houston*

Stanley deceased [2016] IEHC 8 at para 36 where he stated it had been "*quite improper to issue proceedings impugning the validity of a trust in a non-trustee capacity without joining the other trustees of the relevant property or estate*". This case is sought to be distinguished by the applicants who say it concerned a declaration of invalidity and the court was unaware of the views of the other trustees. I am satisfied that the pensioner trustee, having filed two affidavits in these proceedings has presented its position to the court, albeit not formally joined as a party. I am also satisfied that the notice party has served a very useful role as a *legitimus contradictor* for the benefit of this court in circumstances where the rights of others were engaged.

Conclusion

56. As the parties have already agreed, I answer the first question posed in these proceedings in the negative. Due to non-compliance with the provisions of the relevant shareholders agreement, the trustees of the Scheme did not effectually divest themselves of the Scheme's shareholding in the notice party.

57. I answer the second question posed in the positive. For the reasons outlined in this judgment I find that the shareholding in the notice party acquired by the Scheme on 9 December 2005 continues to be vested in the trustees of the Scheme.

58. I will list this matter for mention on Tuesday 18 April 2023 at 10.30am to hear the parties in relation to the form of order required and to deal with legal costs and any other issues which may arise.