THE HIGH COURT

[2024] IEHC 526

[Record No. 2021/158SP]

IN THE MATTER OF THE CIÉ SUPERANNUATION SCHEME 1951 (AMENDMENT) SCHEME 2002 AND PURSUANT TO ORDER 54 RULE 1 AND ORDER 3 RULE 6 OF THE RULES OF THE SUPERIOR COURTS

BETWEEN

CIARAN MASTERSON, CHRISTOPHER LEHANE, JOHN FURLONG, GREGORY O'SULLIVAN, CAROL GRENNAN, THOMAS AYRES, BRIAN CONNOLLY, EMMETT COTTER

APPLICANTS

AND

CÓRAS IOMPAIR ÉIREANN

RESPONDENT

AND

BY ORDER, GERALDINE FINUCANE, ANDREA KEANE AND LIAM DARBY (AS TRUSTEES OF THE CIÉ SUPERANNUATION SCHEME 1951 (AMENDMENT) SCHEME 2002 AND THE MINSTER FOR TRANSPORT

NOTICE PARTIES

JUDGMENT of Mr Justice Mark Sanfey delivered on the 26th day of August 2024.

Introduction

1. On 19 April 2024, I delivered a substantive judgment in the above proceedings, which concerned the interpretation of the Córas Iompair Éireann superannuation scheme ('the scheme'), a superannuation scheme for clerical, supervising and executive staff of the respondent, CIÉ. The decision was reported at [2024] IEHC 222, and should be read in conduction with this judgment, which adopts the same terminology and abbreviations as the substantive judgment.

2. At the conclusion of the judgment, I urged the parties to agree appropriate orders on foot of the findings in the judgment, and stated that I would list the matter for a short hearing if agreement proved elusive. For a number of reasons, this turned out to be the case, and I accordingly convened a hearing on 29 July 2024 as to the orders to be made.

3. Between delivery of my judgment and the hearing at the end of July, agreement between the parties could not be reached, due mainly to two factors. Firstly, resignations or retirements from the applicant committee had caused its numbers to fall below the quorum required for it to act as a body. Somewhat ironically, the responsibility to appoint members to the committee is that of the respondent, CIÉ. The applicants' solicitors therefore pointed out that it could not take instructions from the committee as it was not quorate, the fault for which it contended lay with the respondent.

4. Secondly, the parties conducted discussions in relation to the terms of the orders to be made by the court, and in relation to the issue of costs, notwithstanding that the applicants' solicitors were unable to take formal instructions in that regard. It became apparent that the parties would be unlikely to reach agreement on those issues.

5. There was extensive correspondence between the respective solicitors on these matters, and several "for mention" appearances before the court to review progress. CIÉ denied that it was at fault for the applicant committee becoming inquorate, citing the efforts it had made to appoint new members to the committee and the particular difficulties it had experienced in that regard. The court expressed the view that the making of orders could not be postponed indefinitely until CIÉ succeeded in appointing enough members to render the committee quorate, and suggested that the solicitors and counsel who had acted for the committee might make submissions which the court would hear *de bene esse*, albeit that such submissions would be made without instructions. The applicants' lawyers agreed to proceed in this manner; CIÉ's representatives ultimately indicated that it would not oppose this *modus operandi*.

6. Accordingly, the hearing took place on 29 July 2024, with Joe Jeffers SC instructed by Matheson Solicitors representing the interests of the applicant committee, although not instructed by it. Una Tighe SC appeared for the respondent instructed by McCann Fitzgerald Solicitors. No written submissions were proffered, as the parties had set out their respective positions in voluminous correspondence which was made available to the court, along with two books of authorities.

The terms of the order.

7. By a letter of 30 April 2024, McCann Fitzgerald furnished a draft order to reflect the terms of the judgment. After an exchange of correspondence, Matheson furnished with a letter of 19 June 2024 a reworked order which drew attention to some typographical errors in the judgment and expanded that McCann Fitzgerald draft in relation to the applicants' question (II), the court's answer to which appears at para. 85 of the judgment. McCann Fitzgerald responded by letter of 25 June 2024 with a further version of the order.

8. At the hearing on 29 July 2024, Mr Jeffers referred to paras. 62 to 66 of the judgment, and in particular the passage at para. 65 in which I stated that "…the applicants are correct in suggesting that an excess of over 3.6 times the member's contribution triggers a review of the contributions by Board and members'…". Counsel submitted that the finding by the court that the obligation in r.20(1) of the scheme on the respondent to contribute such sum as the respondent deems necessary to support and maintain the solvency of the fund did not preclude an increased contribution by members or a reduction in benefits was "untethered from the trigger" for such a possibility, *i.e.*, that such a review of the member's contributions or benefits would not occur unless triggered by CIÉ's contribution exceeding 3.6 times the contributions the Board and members. Ms Tighe indicated that the respondent did not oppose further context being included in the order to reflect the judgment.

9. It seems to me that the difficulty in formulating the order stems from the entirely understandable attempt by McCann Fitzgerald to make it more concise, and to avoid having to reproduce in the order the lengthy replies by the court in answer to the questions by the applicant and the respondent. However, it seems that this effort has led to disagreement as to what context must be included.

Decision on the terms of the order.

10. Unfortunately, the questions posed by each of the parties gave rise to complex issues, and did not admit of a "yes" or "no" answer, or even a concise one. I think the only safe thing to do although somewhat unwieldy, is to incorporate the entire text of my answers to the two questions raised by each of the parties in the order itself. The context for these answers is set out in the judgment, which I would hope is clearly expressed; para. 65 of the judgment makes it clear that the "review" envisaged by r.20(3) of the scheme is triggered if the contribution by CIÉ under r.20(1) exceeds "3.6 times the contributions payable by members during that period…". It would not be usual to include in an order all of the context set out in a

comprehensive judgment which has led to the making of that order; however, that context makes the intent and import of the order clear, and both sides have the benefit of the judgment in this regard.

Costs

11. Mr Jeffers submitted in relation to the issue of costs – on which issue the parties disagreed and set out their respective views at length in correspondence – that the principles governing the question of costs were those set out in s.169(1) of the Legal Services Regulation Act 2015 ('LSRA'). It was contended that the only issue in relation to which the applicant had not been "entirely successful" was the contention that there could never be a reduction in member's benefits; the "real meat" of the dispute between the parties related to whether or not the contributions to be made by CIÉ in accordance with r.20(1) of the scheme required to satisfy the Statutory Funding Standard.

12. It was also submitted that, to the extent that the court held that a review of contributions could only be "triggered" by the contribution pursuant to r.20(1) being in excess of 3.6 times the members' contributions, this represented a "win" for the applicant. Counsel submitted that the applicant had won on the main issues, and should be awarded its costs.

13. Ms Tighe for CIÉ submitted firstly that the committee's costs had already been discharged, and that in any event, the normal position in trust scheme cases where the court was asked to exercise its supervisory jurisdiction in relation to complex issues was that the parties would bear their own costs; in its letter of 25 July 2024, McCann Fitzgerald referred to a number of cases in this regard, including *Vodafone v Kavanagh* [2024] IEHC 280, "…where Vodafone's proposed interpretation of the pension deed did not prevail, but where the trustee's costs were borne by that scheme's fund (Vodafone, of course bearing its own costs, as CIÉ has done)".

14. Section 169(1) of the LSRA, in as far as relevant, is as follows: -

"A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including –

(a) conduct before and during the proceedings,

(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,

(c) the manner in which the parties conducted all or any part of their cases, …

15. Counsel for the applicant contended that there was nothing in the section which suggested it was not applicable to the present dispute. The parties had conducted the dispute in an adversarial manner, and each fought its corner aggressively, advocating for its own interests in what was clearly a *lis inter partes*.

16. Counsel for the respondent on the other hand submitted that CIÉ was the *legitimus contradictor* to the position of the committee, and that the nature of the dispute required opposing positions to be taken and argued. What occurred, in essence, was a "genuine dispute" as to legal issues arising from the scheme, and in such circumstances the matter should not be regarded as an adversarial *lis inter partes*.

Decision and costs.

17. At para. 47 of the judgment, I set out the two questions on which the committee sought the determination of the court in its special summons. For ease of reference, I reproduce them here:

"(i) Does the obligation imposed on the Board, by r.20 of the 1951 scheme, 'to support and maintain the solvency of the fund' require, at a minimum, that such contributions satisfy the statutory funding standard.

(ii) Is the obligation imposed on the Board by r.20 of the 1951 scheme 'to support and maintain the solvency of the fund' compatible with reductions in the benefits of members thereunder in accordance with the recommendation?"

18. Broadly speaking – leaving aside the context and nuance set out at length in the judgment – the applicant succeeded on the first question. The second question was the one most closely aligned with the interests of the members represented by the committee, and it was strongly pressed by the committee that CIÉ had sole responsibility for any increased contribution necessitated "to support and maintain the solvency of the fund", and that the members' benefits could not under any circumstances be reduced. In relation to this question, the committee was largely unsuccessful.

19. It seems to me that the "result" of the case was something of a "score-draw", to use sporting parlance. If the principles in s.169(1) are applicable – there are arguments either way on this, and it is not necessary for me to express a definitive view – it was certainly "reasonable for [CIÉ] to raise, pursue or contest" all of the issues in the proceedings, in accordance with s.169(1)(b).

20. In this regard, I note that the scheme rules provide that the committee is entitled to payment from the fund of the costs and expenses of administering the scheme. The respondent's solicitors point out in their letter of 25 July 2024 that this provision meant that the committee could bring the proceedings "secure in the knowledge that they would have no liability for costs, if unsuccessful". It is suggested that this factor should also militate against an award of costs against the respondent.

21. I should say that, in the event that I decided that costs should be awarded against CIÉ, I do not consider that the fact that the committee is entitled to be indemnified by the fund in respect of its legal expenses would prevent an order being made against CIÉ. To order

otherwise would be to permit the unwarranted depletion of the fund by the amount of such costs.

22. However, whether pursuant to s.169 of the LSRA, or – as counsel for the respondent urges – by reference to the principles governing proceedings invoking the court's inherent supervisory jurisdiction over trusts and trustees, I am satisfied that the applicant and respondent should each bear its own cost of the proceedings, including all post-judgment matters.

Orders

23. The typographical errors in the judgment pointed out in Mathesons letter of 19 June 2024 are accepted as such. I will arrange for the original to be amended to correct these errors.

24. Subject to review by the registrar of the court, I have no difficulty with the recitals and the draft order proffered by Matheson with their letter of 19 June 2024. However, in the curial part of the order, after setting out the text of the two questions each asked by the applicant and the respondent, the "answer" should in each case be exactly as set out at para. 85 of the judgment.

25. As regards costs, the amendment suggested by the applicant should be deleted, and the provision suggested in the McCann Fitzgerald draft, "…the court doth make no order as to costs…" inserted instead.

26. I would be grateful if the parties could give effect to these amendments to the order and proffer a draft amended order to the registrar for their approval. The parties have liberty to apply in the event of any specific difficulty.