THE HIGH COURT

[2020] IEHC 716

[Record No. 2015/5819 P]

BETWEEN

CORNELIUS CLARKE, PATRICK FAGAN, KAY GARVEY AND HUGH O'BRIEN

PLAINTIFFS

AND

IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Ms. Justice Pilkington delivered on the 25th day of June, 2020

1. In summary the plaintiffs claim;

   (a) A declaration that section 32B of the Air Navigation and Transport Act 1988 as inserted by s.34 of the State Airports (Shannon Group) Act 2014 ('the Shannon Act') ('s.32B') is invalid pursuant to Articles 15.5.1, 40.1, 40.3.2 and 43 of the Constitution.

   (b) A declaration that the first named defendant's failure to properly transpose Directive 2003/41EC of the Institutions for Occupational Retirement Provision ('The IORP directive' or 'the Directive'), and in particular Articles 16 and 20 into Irish law.

   (c) A declaration that the first named defendant's failure to properly transpose the IORP directive violates the plaintiffs' rights under Article 17 of the Charter of Fundamental Rights of the European Union.

   (d) If necessary, a declaration pursuant to s.5 of the European Convention on Human Rights, 2003 that s.32B of the 1988 Act is incompatible with the European Convention of Human Rights and Fundamental Freedoms.

   (e) Damages arising from breaches of constitution rights, breaches of European Union law, if necessary pursuant to s.3 of ECHR 2003, for wrongful interference with economic interests and/or damages for breach of legitimate expectation, aggravated and/or exemplary damages.

   (f) This judgment does not deal with the quantification of any potential award of damages, but rather the possible entitlement of these plaintiffs to damages. Any other issue concerning damages is for another day.

   (g) The principal reliefs sought before this Court are in respect of (a) and (b) above.

2. The plaintiffs are all pensioners and former employees of Aer Lingus Limited ('Aer Lingus') or DAA Public Limited Company ('DAA'). At all times they are members of the Irish Airlines (General Employees) Superannuation Scheme ('IASS' or 'the Scheme').

3. The plaintiffs represent a significantly larger group of claimants, all of whom are also members of the Scheme. They institute these proceedings on their own behalf and on the behalf of the other claimants.

4. IASS is the pension scheme for employees of Aer Lingus and DAA. The scheme, which I will set out in considerable detail below, deals with three "classes" of members:-

   (a) The active members ('the actives') – as the term suggests it deals with the persons currently employed within Aer Lingus or DAA, who were paying into the pension fund in the normal course.

   (b) The deferred members ("the deferreds") – these were persons who had been employees of Aer Lingus or DAA but, for whatever reason, were no longer employed by them but who had paid into the pension fund during the course of their employment.

   In respect of the deferreds, a watching brief was held on their behalf before this Court and I was informed they have also instituted proceedings against this defendant and I believe other parties also. The proceedings were not opened within this litigation and form no part of it.

   (c) The pensioners ("the pensioners") - these are persons (including the plaintiffs) who, having reached retirement age, are entitled to their pension pursuant to the terms of the Scheme.

5. The only group this Court is concerned with is the plaintiff pensioner grouping within IASS.

6. On 31st December 2014 the IASS rules, pursuant to a s. 50 direction of the Pension Authority, were amended in two important respects:-

   (a) For reasons set out below, the actives and the deferreds were thereafter no longer members of IASS. Their respective interests were transferred to a new separate pension scheme, which included a financial contribution from Aer Lingus and DAA.

   (b) The pensioners interests remained in IASS. In respect of those pensioners, there was no additional financial contribution to the Scheme and there was a reduction in their pension entitlements as follows;

      (i) a 10% reduction in annual pensions between €12,000 to €60,000 (but no pension to fall below €12,000).
      (ii) for an annual pension over €60,000, a 20% reduction, (but no reduced pension to fall below €54,000).

7. The issues that arise from this lengthy hearing are complex and multi-faceted. The background facts and circumstances are largely agreed. The plaintiffs, and another pensioner Mr. Brian Dodd all gave evidence. Both sides called expert evidence and those experts met in advance to see what points of agreement (or not) might be reached. In addition, evidence was given by the Chief Executive of the Pensions Authority ('PA') Mr. Brendan Kennedy, Ms. Patricia Murphy, Principal Officer in the Pensions Policy Unit of the Department of Social Protection (as it then was) and Ms. Ethna Brogan, a principal officer

in the aviation services division in the Department of Transport Tourism and Sport, she dealt with the State's interest in Aer Lingus until its sale in 2015. Evidence was also given by Ms. Mary Dunning, a principal officer of the Airports Division of the Department of Transport, Tourism and Sport, dealing with DAA.

State Airports (Shannon Group) Act, 2014 – S. 32B

8. The constitutionality of s.32B is challenged in its entirety. Sections (1) and (5) of that section were commenced on 17th November, 2014, the remainder having commenced with its enactment on the 27th July, 2014.

"Power of trustee to amend provisions of IAS scheme.

32B. (1) (a) Notwithstanding anything contained in any provision of the IAS scheme, the trustees of that scheme may make such amendments to the provisions of that scheme as they consider appropriate in the overall interests of the scheme members and with due regard to the interests of the different categories of member, having regard to such matters as the trustees consider relevant including the funding deficit of the scheme, the potential impact of the deficit on the interests of the categories of members and any other superannuation provisions made for such members or any of them, to provide—

(i) that with effect from a date to be decided by the trustees the accrual of benefits under, and the contribution liability to, the scheme for all or any such members and their employers shall simultaneously cease and any such member or members shall be treated under the provisions of the IAS scheme as though his or her service had terminated on that date with an entitlement to a deferred benefit, and

(ii) for such other changes as shall be necessary to give effect to, or which are consequential upon, the amendment referred to in subparagraph (i).

(b) The consent of the members or of a company or other employer participating in the IAS scheme or of any other person referred to in any provision of the IAS scheme shall not be required by the trustees for the exercise of the powers conferred on them by this subsection.

(c) This subsection does not limit any power to amend any provision of the IAS scheme that, apart from this section, vests in the trustees or any other powers of the trustees pursuant to the scheme.

(2) Where the trustees of the IAS scheme, acting honestly and reasonably, exercise the powers conferred on them under subsection (1)(a), they and the IAS scheme shall be discharged from any obligation to provide benefits attributable to service in the IAS scheme on and after the date of cessation of accrual of benefits.

(3) Where any amendment of the IAS scheme is, in the opinion of the trustees, necessary to comply with any direction of the Pensions Authority under section 50 of the Pensions Act 1990 , following an application by the trustees or otherwise under that section, the consent of the members or of a company, other employer

participating in the IAS scheme or any other person referred to in any provision of the scheme is, for the avoidance of doubt, not required.

(4) In this section 'IAS scheme' has the meaning assigned to it in section 32(12).

(5) Where the trustees of the IAS scheme exercise the powers conferred on them under subsection (1)(a), the revaluation of preserved benefits under the IAS scheme in accordance with section 33 of the Pensions Act 1990 shall cease and thereafter no further revaluation of IAS scheme benefits shall occur.

(6) Subsections (1) and (5) come into operation on such day or days as the Minister may appoint by order or orders either on the same day or, with reference to a particular subsection, on different days."

The parties within this litigation have primarily focused upon ss. 32B(1), (3) and (5) above.

9. The genesis of this matter is the IASS Deed of Trust which was executed in 1954. At that time Aer Lingus and DAA were both state owned companies. Aer Lingus was subsequently privatised in 2006, with the government retaining a 25.1% shareholding, and sold in 2015.

10. The IASS Deed of Trust is dated 31st March, 1954 between Aer Rianta Teoranta, Aer Lingus Teoranta and Aerlinte Éireann Teoranta of the one part and John Thomas Donovan, James Moran and Michael Toohey ("the trustees") of the other part ("the 1954 Deed").

IASS Deed of Trust – 31 March 1954 ('the 1954 Trust')

11. As I understand it, there were prior iterations of this deed or pension scheme and the recitals themselves assert that the preparation for a suitable superannuation scheme presented many difficulties, but that arrangements had been completed for the establishment as what is described as the superannuation fund ("the Fund") which is deemed to have been established on 1st April, 1950.

12. Essentially, the administration of the fund is governed by the 1954 regulations as set out below. The Irish Airlines Pensions Limited is the sole corporate trustee of the scheme, who in turn appointed directors for its management.

13. The scheme, the Irish Airlines (General Employees) Superannuation Scheme, known throughout as IASS. I shall refer to the Trust Deed and the Trust Rules of the 1954 Trust respectively.

14. The Trust Deed itself comprises a mere nine paragraphs and requires that the fund be administered in accordance with the Trust Rules, which comprises the more substantive document.

Trust Deed.

15. The parties to the 1954 Deed are as set out above and it is deemed to commence from 1st April 1950.

16. Paragraph 3 vests the fund in the trustees to deal with in accordance with the Deed and the Rules.

17. Paragraph 5 states;

> "Any of the Rules in the Scheme hereto may be amended, altered or repealed and a new Rule or Rules may be added from time to time as occasion requires in accordance with the provisions in that behalf contained in the Rules and the Rules so altered, amended or added to shall be as effective in all respects as if originally contained in the Schedule hereto and any reference in these presents to 'the Rules' shall when necessary be construed as applying to the Rules for the time being in force.
>
> "PROVIDED ALWAYS that any Rule which is expressed to be fundamental shall not be amended, altered or repealed and no new Rule shall be made which is inconsistent with a Rule expressed to be fundamental".

18. Paragraph 9 of the Deed is as follows:-

> "If one or more of the Employers shall withdraw from the Scheme and Fund……., the rights of the members then in the employment of such employer or employers and of the members who being in receipt of pensions were formerly in the employment of such Employer or Employers shall be determined in accordance with the rules but such withdrawal or cessation of contributions shall not affect the operation or validity of the Scheme...".

The Rules.

19. The IASS rules are extensive.

20. Part I is headed 'Interpretation';

    (a) Subparagraph (g) defines 'pensioner' as meaning 'any person who having retired from the service of the Employers is in receipt of a pension from the Fund'.

    (b) Subparagraph (h) defines 'The Committee' as meaning 'the Irish Airlines Employees' Superannuation Committee, duly appointed for the purposes of the Scheme'.

    (c) Subparagraph (q) defines 'final retiring salary' as meaning 'the annual basic salary of a member at the date of his retirement or of his death in service…..' The description goes on to deal with matters relating to promotion and salary increase within three years of retirement and other matters.

21. Part II headed "Object" defines it as follows:-

"The main object of the Fund and Scheme shall be to provide pensions which shall be granted and paid out of the Fund in accordance with the Rules for the benefit of the members on retirement owing to age or infirmity… The provisions of this rule are fundamental and are not subject to alteration".

22. The reference in Part II to 'fundamental' relates to paragraph 5 of the Trust Deed which states that any rule deemed fundamental cannot be amended, altered or repealed.

23. Part III headed "The Fund". Paragraph 1 describes it as consisting of, in part, contributions from contributing members, from employers, and 'any other sum which may be paid to the Trustees from the time to time for the purpose of the Scheme'.

24. Part IV headed 'Trustees' states (paragraph 12) that a trustee is not liable for loss occasioned by negligence or breach of duty if in the opinion of the Employer that trustee 'has acted honestly and reasonably in the matter and ought fairly to be excused'.

25. Part V headed 'Committee'; its definition within Part I is as set out above. Its composition, from 1st November 1975 is set out as 8 people, 4 nominated by the employers and 4 elected by the members (member being defined as any person, including a Director who being or having been in employment of employers and is admitted to the Scheme in accordance with the rules).

26. Within Part V paragraph 16 headed 'Functions of Committee' states:-

"16(a) If any question arises in relation to the interpretation of the Rules the period of pensionable service of any Employee …. the Committee shall at the request of any interested party, investigate the question and if they see fit, make a report thereon …. and they shall assist the trustees in an advisory capacity if and when required".

27. Within Part V, paragraph 18 (there would appear to be no paragraph 17) under the heading "Power to Amend Rules" states:-

"(a) Notice of any repeal or alternation of the Rules or the making of any new Rule shall be given to every member in such manner as the Committee may consider to be most satisfactory…...

(b) Notwithstanding anything elsewhere contained in the Rules all or any of the Rules, other than a Rule expressed to be fundamental, may be altered, amended, varied or repealed and any new Rule or Rules may be made by the Trustees:

(i) For Rules required by or relating to (i) the laws in the Republic of Ireland, (ii) the laws in the UK, insofar as they affect the members employed in the United Kingdom of Great Britain and Northern Ireland (UK), (iii) the laws of the treaties of the European Union and of any institution established by the European community and (iv) the laws of any international organisation of which the Republic of Ireland or UK is a member, with the consent in writing of the Employers and the Committee.

(ii) For any other Rules with the consent of the employers and the members in accordance with the rules.

The term "laws" in this Rule shall mean all present and future decisions, legislation, directives, recommendations or other measures of any legislative, executive, judicial or statutory body and of any institution established by the European Communities".

28. Part VIII headed "Accounts and Records" states that the trustees shall retain an actuary (paragraph 4) and in paragraph (5) headed "Actuarial Valuation" provide at least once every five years the financial position of the fund shall be examined and make an actuarial valuation and a written report to the trustees.

29. The same clause continues under the heading, paragraph 5(c) "surplus" states:-

> "If any actuarial valuation made by the actuary under paragraph (a) hereof discloses a surplus in the fund, such surplus shall be applied by the trustees after consultation with the actuary for the purpose of increasing the benefits to members or reducing the rate of contribution by the employee and/or the members".

30. Part VIII, subparagraph 5 "d" headed "Deficiency" states:-

> "If on the other hand such valuation discloses an actuarial deficiency, the Trustees shall take measures, in consultation with the Actuary, to remedy any such actual or anticipated deficiency provided that no such measure shall, without the consent of the Employers, make provision for payment of any increased contribution by the Employers or without the consent of the members make provision for the payment of any increased contribution by the members".

31. Part IX relates to membership of the scheme, confirms it as a condition of the contract of employment that in joining the service of the employer, they must also become a contributing member of the scheme.

32. Part X of the scheme headed 'Contributions' essentially sets out the rate of contribution to the scheme calculated as a percentage of salary.

33. Part XII headed "Benefits" states in clause (2):-

> "(a) With effect from 1st April, 1967, a member who retires at his normal retiring age or thereafter shall be paid a pension for his life from the date of his retirement at the rate of 1 equal 60th part of his final retiring salary for each year of pensionable service".

34. Clause 6 of the same section states that "pensions are payable for the lifetime of the pensioner…".

35. Part XIV headed "Miscellaneous" at clause (14) states, under the heading' Winding up of companies' following:-

"With effect from 6th April, 1972, if a court order is made or a resolution passed for a simultaneous winding up of the Employers, …… or if the employers shall simultaneously give the Trustees notice of their inability to make further contributions to the fund …. the Fund and the income thereof shall be held by the trustees in trust to apply the net proceeds of realisation to:-

(a) The purchase of non-commutable and non-assignable life annuities for existing pensioners as near as possible to the pensions payable at the termination date.
(b) The transfer of credits to another scheme under the permissions of Rule 18 Part IX and
(c) The purchase for each member prospectively entitled to a pension of a non-commutable and non-assignable life annuity payable from normal retirement date, or such earlier date from which an immediate pension on early retirement may be paid under the rules, and purchasable by the joint contributions of such member and the employers with compound interest thereon.

After the purchase of annuities as aforesaid, any surplus remaining shall be applied by the trustees in the purchase of additional non-commutable and non-assignable life annuities for members in proportion to their interests in the fund PROVIDED ALWAYS that the total of all benefits payable in respect of any member shall not exceed the maximum approvable by the revenue authorities if the employee concerned withdrew from service on the termination date. Any residual surplus then remaining shall be returned to the employers in a ratio in which the employers previously contributed to the fund".

36. Within IASS there was also an issue, after the introduction of a state pension, as to whether pensions were coordinated or uncoordinated. Essentially, within the scheme, contributions were on a coordinated basis i.e. the percentage contribution of salary from both members and employers, is coordinated to take account of benefits within the state pension system. However, what is perceived as a *lacunae* within the scheme states that if a member leaves employment, for reasons other than normal or early retirement, the scheme rules provide for the member's benefits to become 'uncoordinated'. This created an anomaly whereby a member can leave employment at any time prior to the Normal Retirement Date (as defined within the Rules) and become eligible for 'uncoordinated' benefits.

37. The Deed and the Rules refer to certain rules being fundamental; The Deed states that any rule expressed to be fundamental cannot be amended, altered or repealed and no new Rule shall be made which is inconsistent with a Rule expressed to be fundamental. The term 'fundamental' is used twice within the Rules, in Part II in stating that the provision to provide pensions to be paid out of the fund in accordance with the Rules are fundamental. It also appears in Part V, Rule 18 where it sets out the manner in which there can be any alteration, variation or repeal of a Rule, other than one expressed to be fundamental.

38. In the subsequent IASS document amending the Rules on 31 December 2014, pursuant to a s.50 direction of the Pension Authority, those Rules that are specifically mentioned, within its recitals, as being subject to amendment are Part V, Rule 18 dealing with the power to amend the Rules, Part VIII, Rule 5 dealing with the issue of consent for the provision of payments by both members and employers and Part XII Rule 6 dealing with payment of pensions. These will be specifically considered below.

39. It is certainly fair to say that any pension trust deed enacted in 1954 will have to deal with circumstances and events never envisaged by those who drafted it. The experts agree, and I believe it is common case that the pension scheme reflected within the 1954 Deed was, when established, drafted and considered as if it were a civil service pension scheme, or certainly analogous to it. When it came into existence in 1950, all of its members were employed within significant State organisations. So, whilst it was always a private trust, for a long time after 1954, all of it members being employees, former employees and pensioners of Aer Lingus and DAA worked for State owned organisations.

40. Its rigidity and the absence (or *lacunae*) of certain matters has created ongoing difficulties for those dealing with the 1954 Deed and these are considered below. However, whilst subject to statutory amendments from time to time, it remained the pension trust for all members within Aer Lingus and DAA up to December 2014 and it remains the pension trust for the pensioners.

41. Upon application to the Pension Authority ('PA') and following receipt of submissions, on March 2006 the PA adjudicated the IASS trust as a defined benefit scheme. One of the experts suggested it potentially constituted a more hybrid form of scheme, but the majority agreed with this designation. In my view the position is straightforward; it was dealt with by the Trustees, employers, the Pension Authority and all parties having an interest in it (including those within this litigation) as a defined benefit scheme and all considerations and adjudications in respect of it operated from this premise. I accept it as a defined benefit scheme.

42. On 25 March 2006 the PA approved the operation of the IASS as a cross border scheme. This of course is also of relevance to the IORP Directive which is considered in more detail later within this judgment.

Aer Lingu

43. The IPO of Aer Lingus shares took place in September/October 2006 and 25.1% shareholding was retained by the State. Ms. Brogan (and others) also confirmed an agreement between the company and the trade unions of the establishment of supplemental pension funds set up with €104m of shareholders' funds raised from this IPO.

44. Immediately after the IPO, Ryanair built up a significant shareholding in Aer Lingus. Notwithstanding that its CEO is reported (in 2013) to have described Aer Lingus as a pension deficit with wings, it made three takeover bids for the company, in 2006, 2008 and 2012, all of which were defended and/or rejected by the board of Aer Lingus.

45. The bids of 2006 and 2012 were subsequently prohibited by the European Commission on anti-competition grounds, the 2008 offer was ultimately withdrawn in January 2009. Ms. Brogan gave evidence that the State was anxious to ensure that Aer Lingus retained continued access to a range of connectivity available particularly through its portfolio of landing slots at Heathrow airport and the continuation of the direct transatlantic services and the distinct Aer Lingus brand.

The Financial Crisis.

46. The experts agreed with Mr. John O'Connell, an actuary called by the plaintiffs, that one of the usual features of a defined benefit ('DB') scheme is that the benefits of both members and employers are fixed, but the contributions variable. Within this IASS scheme, both benefits and contributions were fixed, and this is one of its unusual features. Evidence was also given that, within most DB schemes, there is a provision for additional employer contributions. Not so within this scheme, without employer consent (Part VIII, 5 (d) of the Rules). Mr. Alan Broxson was called by the defendants as a pension's expert. He described this aspect as one of the most regressive aspects of the scheme, particularly from the members perspective.

47. In the actuarial valuation report for 31 March 2005 the scheme actuary (James Keogh (then Michael Madden) of Mercers) had pointed out that the cost of future benefits was likely to exceed the cost of future contributions and, therefore, past investment returns which had built up a surplus were now being used to fund a future benefit and contribution structure. If the Scheme was unable to maintain or increase its holdings from the increase in value of its investments, then it was likely to run a deficit. In short, it could only be sustained in a rising market.

48. All experts agree that the scheme was adequately funded up to 2008. In the actuarial valuation report of IASS for 31 March 2008 the actuarial certificate confirms that the scheme has sufficient resources if wound up, to satisfy the minimum funding standard provided within s.44. of the Pensions Act. The Pensions Act is considered in more detail below but essentially the IASS scheme actuary was confirming that the scheme had sufficient resources if wound up at 31 March 2008.

49. I take it as common case (and in any event all of the experts agree) that the financial crash of 2008 had a profound effect upon investment values generally, upon pension schemes and upon defined benefit pension schemes in particular. That was certainly true of IASS.

50. In those circumstances, an actuarial valuation report was commissioned for 31 March 2009 and it, together with those of 31 March 2011 and 31 March 2014 confirm within the actuarial certificates that the scheme resources would not be sufficient to meet the minimum funding standard if it were wound up, pursuant to s.44 of the Pensions Act.

51. Within documentation submitted to the PAA by the IASS trustees in November 2014 and considered in detail later within this judgment, as at 31st August, 2014, the minimum funding position is stated to be:-

(a) As at 31st March, 2009, a deficit of €645 million.

(b) As at 31st March, 2011, a deficit of €343 million (it has risen then fallen in the interim).

(c) As at 31st August, 2014 (estimated), a deficit of €707 million.

52. Ms. Patricia Murphy was a Principal Officer in the Pensions Policy Unit of the Department of Social Protection (as it then was) from May 2010 to July 2014 and on the Board of the Pensions Authority (then Board) from December 2010 to the end of 2013. She confirmed that the bulk of the time within the policy unit in the Department and indeed the PA was dealing with the general issue of underfunded DB schemes.

53. Ms. Murphy was taken to a Department of Social Protection Press Release of the 17th of December 2010 which provides the following statistics:

(a) In accordance with the Pension Board Annual Report of 2009 in respect of defined benefit pension schemes there were 1,212 schemes with 254,325 employee members and approximately 65,991 pensioners.

(b) The defined contribution pension schemes comprised 82,939 schemes with 266,909 employee members. The total assets within pension schemes (being the Irish Association of Pension Funds [IAPF] survey) to the end of 2009 disclosed total assets of €52bn of which defined benefit schemes held €48bn which comprised 67% of the total. The same report also disclosed that, within defined benefit schemes, investments in equities comprised 64.3% of total investments having a monetary total of €31.1bn, followed by bonds at 24% (€12.1bn) and thereafter much smaller holdings in property (3.5% - €1.7bn), cash 4.2% being €2.1bn and "alternative" at 2.8% being €1.4bn. It appears from the documentation accompanying the actuary's valuation reports that the IASS investment in equities (Irish, Eurozone and non-Eurozone) slightly exceeded that percentage figure of 64.3% above.

54. It is again common case that from at least March 2009 onwards IASS was running a substantial deficit. This was confirmed by the scheme actuary as set out above. That situation only worsened over time. Certainly, from that point onwards, the deficit to the IASS pension fund increasingly became a matter of concern. That concern found expression across various areas; the trustee and the directors charged with administering the trust itself, scheme members, the employers Aer Lingus & DAA, within the wider industrial relations arena, the relevant government departments dealing with DAA and Aer Lingus, the Pension Authority and the Retired Aviation Staff Association ("RASA"), which represented the interests of the plaintiff pensioners and in respect of which the first named plaintiff played a significant ongoing role within the Rights of Pensioners Action Committee. This is perhaps not an exclusive list. It is what arose from what I might describe as the intersection of these concerns that informs this litigation.

55. Notwithstanding that some of these interests did interact it is necessary, at least initially, to consider some in turn.

Industrial Relations Arena.

LRC

56. It was clear, from at least 2010, that the pension issue within IASS was becoming a matter of concern within the industrial relations arena. The Labour Relations Commission (LRC) was involved from 1st November, 2010 when a plenary meeting was held to discuss and review developments in relation to IASS.

57. After that plenary meeting on 1st November to review developments, there was a note from the LRC Chief Executive (Kieran Mulvey) who stated that bilateral discussions were taking place between various parties as well as between the chairman of IASS trustees (Brian Durcan) and the scheme actuary, Michael Madden.

58. Within the LRC process, there is also a reference to the technical group of the LRC being consulted. Its report is headed 'strictly private and confidential' and states its purpose is to assist the LRC during the conciliation process. The documentation submitted and considered by the technical group is significant. It is clear, as the name suggests, that significant technical work has been undertaken in respect of how the IASS deficit issue might be resolved. Each party to this group - Aer Lingus, DAA, ICTU and the Trustees (the later stated their participation in the technical group is on an observer basis) are all listed as participating, together with their named actuarial advisors and separate legal firms representing each of them.

59. Its report headed 'Summary to Freeze and De-risk the IASS' includes consideration of the following matters;

    (a) The proposal to freeze and de-risk the IASS and how that might be attained is considered in detail. It is also considered that once this proposal has been implemented, no further contributions to the IASS will be required from employers or employees.

    (b) The removal of the coordination anomaly.

    (c) The possible 'shape' of any s.50 application to the Pensions Board.

    (d) "The trustees will enter into an agreement with an insurance company to provide sovereign annuities for all current pensioners of the IASS. This will be on a buyout basis…. It is envisaged that this will require extensive negotiation and due diligence over an extended period of time".

60. In Kieran Mulvey's report on the LRC negotiations dated 28th November, 2012, he notes that, whilst the parties could not agree upon terms and the matter was thereafter referred to the Labour Court, nevertheless the report confirmed that the freeze and de-risk principle was now acceptable to all parties, stated to be DAA/Aer Lingus and the ICTU group of unions. This accords with the deliberations of the LRC technical group above.

61. In the absence of agreement, the dispute was then referred to the Labour Court on 3rd December, 2012 described in part as "aimed at resolving a longstanding dispute concerning the current and future pension arrangements of Aer Lingus staff."

Labour Court

62. The Labour Court issued an interim recommendation on 2nd January, 2013 in respect of Aer Lingus and a separate recommendation for DAA in May, 2013.

63. The Labour Court recommendations were not accepted. The main issue (certainly for active members) was the adequacy of the funds being injected by DAA and Aer Lingus. With regard to pensioners there was a recommendation that 'pensionable pay be frozen for a period of five years from the date of the agreement.'

64. However, in my view, it is clear that the broad outlines of what was ultimately proposed, in respect of the changes to the IASS scheme, are now being considered.

65. Thereafter, in March, 2014 in conjunction with IBEC and ICTU together with the Department of Transport, Tourism and Sport and the Department of Jobs, Enterprise and Innovation, an expert panel was established to review the situation and make final recommendations.

66. Within the chronology of this matter, by the time the expert panel was deliberating, there had been additional significant statutory changes to the Pensions Act 1990, affecting or potentially affected (reduced) pensioner benefits. The order of priorities upon the winding up of any scheme, within the same Act, had also been amended.

67. The formation of the Experts Panel and its deliberations were relied upon heavily by the relevant government departments, the unions and indeed the employers to provide a resolution or a method of resolution of this matter. Its conclusions appear, particularly in documentation emanating from the relevant government departments, Aer Lingus and the IASS Trustees as providing the framework for the resolution of this matter.

The Expert Panel

68. The Expert panel was co-authored by four members comprising Brendan McGinty (IBEC nominee), Laura Gallagher (PMG), Peter McLoone (ICTU nominee) and Eugene McMahon (Mazars). It produced its report on 16 June, 2014.

69. The Expert report states within its introduction that:-

> "The panel has examined the complex issues that remain to be resolved arising from the Labour Court's recommendations from 2013 and the terms and impact of the IASS trustee proposal which issued on February 14, 2014 on those Labour Court recommendations"

70. Within the report it states that the recommendations are being put forward on a number of bases:-

(a) The employers regard the IASS as being incapable of being sustained and will not contemplate any addition funding to address the IASS deficit.

(b) Final solution must be framed around the acceptance of het freeze and de-risk strategy.

(c) That this is the final opportunity to resolve matters and if it fails 'the Trustee will immediately proceed with the S.50 application 'together with the funding proposal to the Pensions Authority which will involve freezing the IASS for future service, no future accrual, no future revaluation, removal of uncoordination and a 20% cut in accrued benefits'.

71. The expert panel recommended that the injection of a capital sum proposed by Aer Lingus be increased by €36.7 million to a total of €146.7 million. For DAA, the capital sum increase was €9.15 million, raising the total capital to be paid to €63 million. In essence, following consideration by the companies and, indeed, the trade unions, this expert panel's report formed the basis of the resolution of the dispute between the parties. The overall strategy as set out within the LRC technical panel was confirmed.

72. Insofar as the plaintiffs are concerned, the following appears at clause 7 of the expert panel report:-

> "Pensioner Members of the IASS
>
> During its engagement with stakeholders, the Panel met with representatives of pensioner members as represented by the 'Retired Aviation Staff Association'.
>
> The Association sought that their current pension should be updated to retain pensions in payment that the employers should put up more money, that provision be made for post-retirement increases, a recognition that benefits should reflect different levels of contribution and service provide for statutory revaluation for deferred members and a fair and equitable solution based on the employer's promises.
>
> The Panel explained to them that this process is an industrial relations process, consistent with our terms of reference and that the responsibility for dealing with the pensioner members of the scheme rested with the IASS Trustee."

That is clear in its terms. The presentation by RASA to the expert panel in March 2014 was given by the first named plaintiff.

73. The addendum to the Experts' panel report sets out the reports submitted to it. The IASS trustees submitted a proposal, which in part, noted:-

> "In order to address the deficit under the IASS in the absence of additional funding and to be in a position to submit a viable funding proposal as required under the Pensions Act, the IASS Trustee has confirmed that changes to the IASS to reduce

benefits will be required. The Trustee has advised scheme members that it is intended that this will be affected by the submission of a Section 50 Application to the Pensions Authority and other changes to the Rules of the IASS. The benefit changes being considered were set out on 14th February 2014 in a draft funding proposal which identified the following elements:

- Freeze and de-risk of the IASS to proceed;
- A recovery period of 25 years;
- A reduction in pensions in payment to be applied to the maximum extent permitted under the Social Welfare and Pensions (No.2) Act, 2013 (i.e. a 10% reduction for those with a pension of more than €12,000 per annum and a 20% reduction for those with a pension of more than €60,000)
  …
- The targeted completion date for the implementation of the changes is 31st December 2014."

74. This statement by the expert panel with regard to pensioners, quoted above, very much reflected the entirety of, what one might describe as, the industrial relations process – in essence, it was not a process formally open to the pensioners. They were no longer employees and therefore non-union members. Whilst they did make certain representations, it is clear that the bulk of the matters discussed, and the focus of those discussions very much concerned deferred and principally active members of the IASS scheme.

75. Joseph Wallace is an emeritus senior lecturer in Industrial Relations at the University of Limerick. He was called by the plaintiffs and he points not only to the significant engagement of the LRC in the Labour Court, but also to the involvement of Government departments in conjunction with the trade union movement in establishing an expert panel mechanism. This involvement was on the basis that it would produce a resolution of the dispute that would be recommended for acceptance by all of the parties involved. Mr. Wallace confirmed that in his view that the focus was very much upon the avoidance of industrial action by the active members. No one dissented from that view.

76. Ms. Dunning stated that she was personally advised in June of 2012 that ICTU had formally notified DAA and Aer Lingus that the unions in both companies had decided to commence a ballot to seek a mandate to engage in industrial action in the event that the IASS scheme reduced the pension benefits of members. No such action was taken as talks were continuing at that time under the auspices of the LRC. An injunction was obtained to prevent an industrial dispute over St. Patricks weekend in 2014.

77. In her evidence Ms. Dunning stated that her department took advice following the Labour Court recommendation and that advice was to the effect that amending s.32 of the 1998 Act through primary legislation was the appropriate course to take. It would allow a new scheme for all DAA members and facilitate the recommendations of the Labour Court. In June, 2013, she conveyed that position to DAA and stated that the required legislative

amendments could be provided for in the State Airports (Shannon Group) Bill, which was being drafted at that time.

78. The issues within the Industrial Relations arena are important in my view for a number of reasons; to show that the focus and concern was in respect mainly of the actives and also to explain the lead up to and circumstances surrounding the deliberations of the Expert Panel.

79. It is also clear that by this time the employers, unions and the IASS trustees have had extensive deliberations and discussions, the basic framework of how to deal with the IASS pension deficit would appear to have almost reached a consensus.

80. That consensus involved certain key issues:-

(a) No further employer contributions into IASS from either DAA or Aer Lingus.

(b) A new pension trust scheme (defined contribution, not defined benefit) for actives and deferreds.

(c) DAA and Aer Lingus would contribute to the new scheme. The principal was accepted before the LRC, but the precise amount determined ultimately by the expert panel.

(d) The actives and deferreds would exist IASS by a freeze and de-risk strategy.

(e) It is apparent, in my view, that there would likely be a reduction in pensioner benefits; the amount made clear by the amendments to S.50 (1C) and (1D) of the Pension Act in December 2013 (below). Prior to that time there were various suggestions largely centred upon freezing their pensions for a significant period and indeed other avenues were also explored to deal with the payment of pensions.

(f) What was clear, in my view from the outset, is that there would be no additional employer contributions to IASS and quickly thereafter there was a consensus amongst employers and the trade unions that it would remain the pension trust for pensioners only.

The Pension Act, 1990 (as amended) ('the 1990 Act')

81. The 1990 Act initially created the Pensions Board, which became the Pensions Authority, from 2013 onwards. For ease of reference I will refer to it throughout as the Pensions Authority ('PA').

82. Section 10 of the 1990 Act states that the functions of the PA are:-

"(a) to monitor and supervise the operation of this Act and pensions developments generally;

(b) to advise the Minister either at his request or on its own initiative on all matters relating to the functions assigned to the Board under this Act and on matters relating to pensions generally;

(c) to issue guidelines on the duties and responsibilities of trustees of schemes and codes of practice on specific aspects of their responsibilities;

(d) to encourage the provision of appropriate training facilities for trustees of schemes;

(e) to advise the Minister on standards for trustees of schemes and on their implementation;

(f) to publish an annual report and such other reports as it may from time to time consider necessary;

(g) to perform such tasks as the Minister may from time to time request."

83. The 1990 Act also contains the following sections:-

(a) One of the features of the 1990 Act was the introduction of the concept of a minimum funding standard ("MFS") for DB pension schemes. S. 42 provides that the trustees must submit an actuarial funding certificate to the PA. That certificate must state whether the scheme satisfies or does not satisfy the funding standard provided within S.44. It was enacted on 1 May 2013 pursuant to the Social Welfare and Pensions Act. 2012.

(b) As referred to above S.44 sets out the criteria, which is extensive, by which the minimum funding standard ('MFS') must be assessed.

(c) S. 48 deals with priorities in a winding up and is considered separately.

(d) S. 49, states that where an actuarial funding certificate has certified (S.43) that the scheme does not satisfy the funding standard then it must submit a funding proposal to the PA. If, given the criteria set out above, where the trustees of a scheme submit a funding proposal to the PA, they then seek a direction of the PA pursuant to S. 50.

Section 50 - Direction by Board to trustees.

84. Section 50 as originally enacted was only "in respect of members of the scheme then in relevant employment"; that is the actives and no other category.

85. Its terms are of significance to this litigation. It has been amended significantly over time and both the timings and contents of the amendments are also important. In this case the direction of the PA follows notification by the scheme actuary that the IASS scheme could not meet the MFS and seeking a direction of the PA in accordance with its proposal, in order that it might satisfy the funding standard.

86. The amendments to s.50 are somewhat difficult to follow. By various statutory amendments s.50 itself was significantly expanded and an additional s.50A, s.50B and s.50C were also added. So, within s.50 itself there are now the insertions of s.50(1A) and s.50 (1B) and separately the enactments of s.50A, s.50B and s.50C. Indeed, some of these amendments were themselves the subject of further amendment(s).

87. In any event the (relevant) amended version of s.50 is as follows;

"S. 50. Direction by Board to trustees

(1) The Board may, by notice in writing, following an application by the trustees or otherwise, direct the trustees of a relevant scheme (other than a regulatory own funds scheme) to take such measures as may be specified by the Board in the notice or, if no measures are specified in the notice, such measures as may be necessary in respect of members of the scheme then in relevant employment, who have not reached normal pensionable age and members whose service in relevant employment has ceased, who have not reached normal pensionable age and who have an entitlement to a preserved benefit or any other benefit under the scheme, the payment of which has not commenced, to reduce the benefits that would be payable to or in respect of those members from the scheme where—

(a) the trustees of the scheme fail to submit an actuarial funding certificate within the period specified in section 43,

(b) the actuarial funding certificate certifies that the scheme does not satisfy the funding standard and the trustees of the scheme have not submitted a funding proposal in accordance with section 49,

(c) the actuarial funding certificate certifies that the scheme does not satisfy the funding standard and the trustees of the scheme have submitted a funding proposal in accordance with section 49,

(d) the Board consents to the amendment of a scheme in accordance with section 50A (inserted by section 18 of the Social Welfare and Pensions Act 2009),

(e) the trustees of the scheme fail to submit a funding standard reserve certificate within the period specified in section 43,

(f) the funding standard reserve certificate certifies that the scheme does not satisfy the funding standard reserve and the trustees of the scheme have not submitted a funding proposal in accordance with section 49, or

(g) the funding standard reserve certificate certifies that the scheme does not satisfy the funding standard reserve and the trustees of the scheme have submitted a funding proposal in accordance with section 49.

88. The matters set out at s.50 above refer only to actives and deferreds and therefore do not apply to pensioners. However, the criteria at (a) to (g) above are replicated below as s.50 is amended.

89. Section 50(1A), for the first time explicitly refers to pensioners and the prospect of a reduction to 'reduce future increases in benefits'. It was introduced pursuant to the Social Welfare and Pensions Act, enacted on 1 May 2012 and is in the following terms:-

'(1A) The Board may, by notice in writing, following an application by the trustees or otherwise, direct the trustees of a scheme (other than a regulatory own funds scheme) to take such measures as may be specified by the Board in the notice or, if no measures are specified in the notice, such measures as may be necessary to reduce future increases in benefits payable from the scheme to or in respect of persons receiving benefits under the scheme or persons who have reached normal pensionable age, where—

[Here sub-categories (a) to (g) as set out above in respect of S.50 are replicated here]

90. Section 50 (1B), (1C) and (1D) were all enacted on 25th December 2013 pursuant to the Social Welfare and Pensions Act (No. 2) Act 2013. They also refer to pensioners and this time refer to a possible direction for a reduction in pensioner benefits. They are as follows:-

"(1B) The Board may, by notice in writing, following an application by the trustees or otherwise, direct the trustees of a relevant scheme (other than a regulatory own funds scheme) to take such measures as may be specified by the Board in the notice or, if no measures are specified in the notice, such measures as may be necessary to reduce, in accordance with subsection (1C) and subject to subsection (1D), the benefits payable from the scheme to or in respect of persons receiving benefits under the scheme or persons who have reached normal pensionable age, where—

[Here sub-categories (a) to (g) as set out above in respect of s.50 and s.50(1A) above are replicated here]

(1C) A reduction in the benefits referred to in subsection (1B) shall, subject to subsection (1D), be made as follows:

(a) where the annual amount is €12,000 or less, no reduction shall be made from such annual amount;
(b) where the annual amount is greater than €12,000 and is less than €60,000, the reduction in such annual amount shall not exceed 10 per cent;
(c) where the annual amount is €60,000 or more, the reduction in such annual amount shall not exceed 20 per cent.

(1D) Where—

(a) the reduction referred to in subsection (1C) would result in the annual amount being reduced to less than €12,000, that reduction shall operate to reduce such annual amount to €12,000, and

(b) the annual amount is €60,000 or more and the reduction referred to in subsection (1C) would result in such annual amount being reduced to less than €54,000, that reduction shall operate to reduce such annual amount to €54,000."

Sections 50A, 50B and 50C.

91. Section 50A was initially and indeed substantially inserted pursuant to the Social Welfare and Pensions Act, 2009 on 29 April 2009 and then with minor amendments pursuant to the Social Welfare and Pensions Act, 2011 on 29 June 2011.

"50A.Power to amend relevant scheme

(1) Subject to this section and section 50, the trustees of a scheme (other than a regulatory own funds scheme) may—

(a) for the purpose of ensuring that the winding up of the scheme will not be required by reason only of the scheme not having sufficient resources to enable the liabilities of the scheme to be discharged,

(b) after compliance with regulations (if any) under this section, and

(c) with the consent of the Board, make such amendments to the scheme as they consider appropriate.

(2) The Minister may make regulations requiring the trustees of a relevant scheme …..

…

(4) Notwithstanding the rules of a relevant scheme, the consent of the members of the scheme to the amendment of the scheme pursuant to this section shall not be required.

(5) This section shall not operate to limit any power to amend the rules of a relevant scheme, that apart from this section, vests in the trustees of the scheme."

92. The effect of this section would appear to be that trustees of a scheme could make such amendments as they consider appropriate (subject to compliance with the PA rules and the Board) in circumstances where a scheme's winding up would be required by virtue of its not having sufficient resources to meet scheme liabilities. In such circumstance's member consent 'shall not be required'.

93. Counsel for the plaintiffs was at pains to point out that, in the events that have happened, this section (50A) was not invoked by the IASS trustees.

94. Section 50B was enacted principally pursuant to the provisions of Social Welfare and Pensions Act (Miscellaneous Provisions) Act 2013 from 28 Jun 2013, with certain subsequent minor amendments. It gives the Board an entitlement to give directions to trustees to wind up a scheme and again is not relevant to events that happened in terms of the Board's direction to IASS in this case.

95. Section 50C was enacted pursuant to the provisions of the Social Welfare and Pensions Act (Miscellaneous Provisions) Act 2013 from 28 Jun 2013, with certain subsequent minor

amendments. It gives the Board of the PA an entitlement, subject to certain criteria, to apply to the High Court for an order compelling a person to comply with a direction pursuant to ss.(1), (1A) or (1B) or 50B of s.50, s.50 itself or pursuant to subsection (2B) or (3) of section 50.

The IASS Trustees

96. On 6 October 2008, the then chairman of IASS trustees (Brendan Walsh) wrote to members as follows: -

> "At the actuarial valuation date of 31st March, 2008, the IASS did satisfy the statutory minimum funding standard. However, subsequent adverse investment market developments have changed the situation significantly and a review of the funded status of the scheme will be needed at the end of the current scheme year, namely, 31st March, 2009."

97. In a document headed "Communication to Active Scheme Members" which appears undated, the chairman of trustee's states:-

> "Due to the continued investment market downturn and the scheme's financial year to the 31st March, 2009, the actuary has reported that the scheme had a deficit of €700 million according to the minimum deficit standard as at that date. Since the 31st March, 2009, the funding position has improved slightly due to the upturn in investment markets.
>
> As statutorily obliged, the trustees have commenced a consultative process with the employers and the member's representative bodies with a view to facilitating a formal funding process which must go to the Pension's Board by 31st March, 2010."

98. On 16 April, 2012, Brian Duncan (then and now the chairman of trustees) provides an update to all scheme members. He points to the minimum funding standard as at 31 March, 2011 at €343 million and notes that the deficit had increased to €700 million but had decreased to the lower figure as set out above and points to the consideration of the LRC at that time.

99. Thereafter, there is considerable correspondence between the trustees, the CEO of Aer Lingus and RASA with regard to the implications of the outcome of the order of Murphy J. on 17 March, 2013.

100. Pursuant to a petition presented by Aer Lingus Group Plc for an application of a proposes capital reduction pursuant to s.72 of the Companies Act 1963 Murphy J. ordered:-

> "…..that the reduction of the Companies non-distributable reserves from €859,449.140 to €359,449.140, a reduction of €500,000 on the basis that €500,000 shall be credited as profits available for distribution in the reserves of the Company as approved by ……"

101. In the first named plaintiff's evidence he strongly contended that Aer Lingus had €500,000 available to provide funding to IASS and assist pensioners but chose not to do so.

102. The next substantive letter (Brian Duncan) from IASS updating all members is dated 14th April, 2014. It goes in detail through the background of the matter, pointing out that the employers would not pay any increased contributions to the IASS but that in 2011, their proposal for addressing the deficit would be what became known as the "freeze and de-risk" proposal would include:-

    (a) The purchase of a range of Irish Sovereign Government Bonds;

    (b) A reduction in accrued benefits for active and deferred members, mainly through the restoration of coordination and the removal of statutory revaluation on deferred benefits; and

    (c) Employer and member contributions to the IASS would cease and future service provision for the active members would be made outside the IASS.

103. The industrial relations arena in respect of the LRC and the Labour Court are then considered together, with the judgment of Murphy J. referred to above. Mr. Duncan continues:-

> "Having considered all relevant factors and having obtained all appropriate advice, we, in principle, decided that it is in the best overall interests of members to progress the employer's proposal…"

104. This was in turn stated to be subject to the approval and implementation of the Labour Court proposals and any that might emerge from the work of the expert panel together with the approval by the Pension's Authority of a s.50 application "to reduce benefits under the IASS and a funding proposal to address the deficit". Again, considering the chronology of this matter this letter follows the amendments to the Pension Act, 1990 permitting a reduction in pensioner benefits.

105. In appendix 3, the benefit changes being considered to pensions in payment are very clearly set out. In essence, they reflect the amendments within the Pension Act (s.50(1C) and (1D)) to the Act and to what ultimately occurred in respect of the reductions to the plaintiff pensioners benefits.

106. There is then an interchange of correspondence between IASS and RASA (as there has been throughout) in respect of these proposals.

107. On 12 September, 2014, a letter is sent by IASS to all pensioners setting out in brief the outcome of the expert panel and reiterating the comments within the letter in April above, the reductions in pensioner payments, and confirming that "due to different legislation UK pensioners will not be affected by the proposed changes".

108. The letter, seeking submissions or comments by 27 October 2014 to the IASS in respect of its proposed application to the PA is a comprehensive summary of the position adopted by the IASS trustees.

109. The background position and those of the various parties, including the views of the IASS are very clearly and comprehensively set out within this document. Again, the percentage reduction in pensioner payments is the same as set out above and as was enacted subsequently. Within the consultation announcement under "Summary of Main Points", it states:-

> "By law, the IASS trustee is required to take measure to address the deficit and place the IASS on a sustainable footing, the IASS rules provide that those measures cannot require increased employer or member contributions without the consent of the employers and the members."

110. It continues:-

> "1. In order to address the funding deficit, the IASS trustee proposes, under the powers given to it under recent legislation, for freeze the IASS as at 31st December, 2014. This means no further contributions will be paid and no further benefits will accrue after that date and active members will essentially become deferred members as at 31st December, 2014. Statutory revaluation will also be removed from that date for all current active and deferred members.
>
> The IASS trustee also proposes to apply to the Pension Authority to reduce accrued benefits in order to address the current deficit. This will involve a reduction in benefits by those deferred members who paid coordinated contributions…"

111. Under "Trustee Proposal" there is the following:-

> "…it is proposed … as a consequence of the powers given to the IASS trustee under the State Airports (Shannon Group) Act, 2014,….. in particular, it is proposed to freeze active members' benefit accrual at 31st December, 2014 and to remove any link to salary increases. This change will also result in employer and active member contributions to IASS ceasing."

That refers to active members and does not affect the plaintiff pensioners.

The proposal continues:-

> "In addition, under the terms of the Shannon Act by virtue of the freezing of the scheme of the IASS, the provisions of the Pension Act, 1990 (as amended)….. which normally required deferred pensions to be increased annually up to normal retiring date at the lesser of the increase in the consumer price index and 4% will not apply to the IASS."

This applies to the deferred members.

112. There is then what is described as the second set of changes. These are:-

- to reduce the benefits of those deferred members who paid coordinated contribution but who currently have an uncoordinated deferred IASS pension.
- Reduce the value of accrued benefits of active and deferred members after coordination by 20%.
- Reduce the value of IASS pensions and payments which are over €12,000 per annum.

113. The proposal again continues:-

> "The second set of changes (within the paragraph above) can only occur if there is a statutory direction from the Pensions Authority. Therefore, the IASS trustee proposes to apply to the Pension Authority for an order under section 50… However before this application can be made the IASS Trustee is required to consult with members and authorised trade unions about these changes….."

114. It is pointed out by counsel for the defendants that this IASS consultation paper makes it very clear that one set of proposals will be undertaken pursuant to the Shannon Act and the second pursuant to a proposal to the P.A. seeking a s.50 direction.

115. On 13 November, 2014, the IASS wrote to all scheme members after the consultation period and stated that the IASS trustee is satisfied that it has the power to make the benefit reductions envisaged and will now seek the s.50 order provided that the commencement order under the Shannon Act is made (this refers to the enactment of s.32B(1) and (5). The proposal, its outcome and the amendments to the IASS scheme are dealt with below.

The Pension Authority ('PA')

116. Mr. Brendan Kennedy gave evidence as the Pensions Regulator and Chief Executive of the Pensions Authority ("PA") since December, 2006.

117. With regard, to a s.50 direction he confirmed that there had been no directions up until 2009. Thereafter, applications for directions became commonplace. This was of course linked, as Mr. Kennedy confirmed, to a large number of defined benefit pension schemes who were in financial difficulty from about 2008/2009 onwards.

118. The idea of a s.50 direction is essentially to consider an application accompanied by a funding proposal, pursuant to s.49 of the Act, which had been agreed by the trustees with the employers and this, with a s.50 direction had the intention of restoring the relevant scheme to solvency at the end of the nominated recovery period.

119. With regard to the funding proposals themselves, Mr. Kennedy accepted that the various deadlines instituted by the Pension Authority for defined benefit schemes to file funding proposals had been extended or suspended over time between September, 2008 to the

30 June, 2013. The discussions between IASS trustees and the PA arose consequent upon the 20 June, 2013 deadline extension for its funding proposal.

120. Ms. Murphy, whose department section dealt with the amendments to the Pensions Act, mainly through various amendments to social welfare legislation, took the view that such extensions were granted against the background of the introduction of new legislation (in her evidence usually bi-annually) setting out revised criteria in respect of the content and criteria to be employed in any funding proposals. In her view, it was appropriate for scheme actuaries and trustees to be afforded time to consider these various amendments.

121. Mr. Kennedy confirmed that in this, as in other schemes, there were discussions in advance of the submission of the funding proposal itself. In respect of IASS, his recollection was that these arose after the date in June 2013 for the submission of the funding proposal. He stated this was the first funding proposal in respect of a cross-border scheme and he had been aware for some time, in general terms, of the financial difficulties surrounding the IASS and some of the unusual features of the scheme.

122. The documentation records, and Mr. Kennedy confirmed, meetings with the trustees of IASS (and their advisors) on 25 April and 3 July, 2013 respectively. The minutes essentially disclose that IASS is seeking as much comfort as it can in respect of its anticipated proposal and the PA, whilst unable to give a definitive response, is discussing the various issues and proposals advanced by IASS. Between the date of these two meetings the statutory amendments to s.50, giving the PA powers to wind up a Scheme within the 1990 Act have been enacted and this possibility is also discussed at the July meeting.

123. There is also an email of 17 July, 2013 to Ethna Brogan and Mary Dunning which records that the Pension Authority met with DAA and Aer Lingus on 16 July to obtain an update on its discussions with the IASS trustees. It further records the technicalities of the scheme being discussed particularly the possible solution of the purchase of portfolio bonds (25% Irish, 25% French, 25% Italian and 25% Spanish) to meet the projected cash flow requirements. The difficulty anticipated is that, as the email records, it would likely take up to 70 years before the scheme would meet the required minimum funding standards. That would not meet or address the concerns of the PA and concern is in turn expressed as to the ability of the Trustees to assuage its concerns.

124. On 24 July 2013 IASS (Brian Duncan) writes to the PA confirming that if it is not possible to agree a plan that the trustees will seek to have the PA wind up the scheme. The potential costs associated with this are included within this correspondence.

125. A more formal response is sent by letter from the PA (signed by Brendan Kennedy) to the IASS on 30 July, 2013. It notes that, in respect of a future funding proposal for the above scheme, it is unlikely to conform to the current statutory guidance. It is pointed out that any modification would require ministerial sanction and the PA could give no guarantee or undertaking in that regard.

126. Nevertheless, the letter goes on to state that some aspects of the recently proposed approach could form the basis of a recovery plan with the two key parameters being the assumed rate of return and how soon the scheme is likely to meet the funding standard. It points out that the PA is unlikely to accept an assumed rate of return of more than 5.5% and unlikely to consider any proposal covering more than 25 years (and that would require the PA to be satisfied that 25 years constituted appropriate exceptional circumstances).

127. Mr. Kennedy was adamant that he had no role in the drafting or, indeed, any discussions with regard to s.32(B). The first he became aware of it was after it was enacted.

128. In Mr. Kennedy's view the IASS proposal could be summarised as follows:-

    (a) A cessation of benefit accruals and contributions from 31st December, 2014 – the so-called freezing aspect of the proposal.

    (b) An order under s.50 to reduce pensions in payment and reduce the accrued benefits of active and deferred members.

    (c) A bond-based investment strategy to provide a fixed level of return to enable the scheme to meet expected reduced benefit payments during the period of the funding proposal and to satisfy the funding standard.

    (d) To reduce the nature of the investment strategy (risk) and to extend the funding proposal term of 25 years under s.49(3)(b) of the Pensions Act.

129. With regard to s.32B of the Shannon Act and the freezing of contributions both from employers and active members, Mr. Kennedy agreed that this was enabled by s.32(B)(1).

130. With regard to the criteria that there would be no revaluation in respect of deferred pensions, in the period from 1 January, 2015 onwards, Mr. Kennedy agreed that that was encompassed within the removal of revaluation, pursuant to s.32(B)(5).

131. It was put to Mr. Kennedy by counsel for the plaintiffs that, if the proposal did not have the provisions for the freezing and revaluation of the scheme, that it would not have been acceptable to the PA. Mr. Kennedy accepted this, on the basis that the IASS trustee proposal would not be in a position to demonstrate that they had a reasonable chance of restoring solvency, upon their nominated date without the enactments of s.32 B(1) and (5).

132. That nominated date to restore solvency to IASS was eventually accepted as a period of 25 years. In favour of agreeing that length of time it was noted:-

    (a) The liabilities are fixed in monetary terms, given the proposal to freeze deferred pensions for actives and deferreds;

    (b) That deferred pensions will not be revalued further by virtue of the 2014 Act;

(c) No future contributions and no link to final salary; and

(d) It is therefore possible to predict the outflow of benefits with a relatively high degree of certainty.

133. Mr. Kennedy confirmed he held many meetings with various organisations in respect of the difficulties within the IASS, including RASA on 4 December, 2014. With regard to the issues raised at that meeting concerning the IORP scheme, Mr. Kennedy's view was that that was very much a matter for the legislature and not for the PA. Mr. Kennedy at all material times confirmed that he worked within the Irish legislation as presented to him. He also considered the IORP to have been correctly transposed and acted upon it within those confines.

134. Throughout, Mr. Kennedy was conscious that this was a significant and unique scheme. He accepted that if a funding proposal could not be put in place, then either the proposal could be accepted, or the scheme would have to be wound up.

135. Mr. Kennedy confirmed that insofar as there were any discussions between the Government and the PA, it was with regard to the "timeline" within which the Pension Authority could set with regard to bringing the IASS into a position of solvency.

136. Whilst Mr. Kennedy had some intimation of the amendments to the Pension Act legislation (particularly insofar as s.50 and the "windup" provisions were concerned), he had no such intimation with regard to s.32(B).

Application by IASS to the Pension Authority

137. The IASS initially forwarded a conditional funding proposal in November, 2014 and its final proposal in December, 2014. The conditional funding proposal dated 4 November, 2014, prepared by Mercer, is a substantial document. In essence whilst the final s.50 application was lodged on 19 December, the bulk of the detailed documentation is within the conditional proposal.

138. In essence it was in final form, but conditional and subject to the following:-

"☐ Aer Lingus Limited holding an extraordinary general meeting and obtaining shareholder approval that it may carry out its obligations under the terms of the agreement entered into with the trustee.

- The relevant government minister bringing s.32B(1) and s.32B(5) of the Air Navigation and Transport (Amendment) Act, 1998 (as amended by the State Airports (Shannon Group) Act, 2014) into operation. As set out above, this was to ensure that the 'freeze and de-risk strategy' as it affected the actives and deferreds could be affected.

- Aer Lingus Limited making certain payments into escrow accounts for the benefit of active and deferred members of the IASS.

- DAA/SAA delivering to the trustee a copy of the necessary ministerial and other consents required to carry out their obligations under the terms of the agreement entered into with the trustee and;

- DAA/SAA reserving sufficient funds to enable them to make certain sums available in respect of active and deferred members of the IASS."

139. The proposal begins by confirming the participating employers are Aer Lingus Limited, DAA PLC and Shannon Airport Authority PLC (introduced since the enactment of the Shannon Act, 2014).

140. It confirms the trustee as Irish Airlines Pensions Limited and its current directors as Brian Duncan, Anne Maher and Jean Cashman with the scheme actuary being Michael Madden of Mercer.

141. By way of background, there is confirmation that the last two actuarial funding certificates for the scheme as at 31 March, 2009 and 31 March, 2011 showed that the scheme did not meet the minimum funding standard under the Pension Acts, 1990 at those dates. In such circumstances, they recite that the trustee is now required to submit a funding proposal (currently in conditional form) which shows that the scheme can be reasonably ensured to meet the minimum standard by a specified date.

142. As at 31st August, 2014, the minimum funding position is stated to be:-

    (d) As at 31st March, 2009, a deficit of €645 million.

    (e) As at 31st March, 2011, a deficit of €343 million.

    (f) As at 31st August, 2014 (estimated), a deficit of €707 million.

143. The document further confirms:-

    (a) That the employers have confirmed to the trustees that they will not provide further funding to the scheme beyond the normal contributions under the rules.

    (b) A willingness by those employers to make payments outside of the scheme in respect of active and deferred members as part of a general restructuring that would include freeing the scheme and providing benefits on a DC basis in a new scheme for future service.

    (c) The actual s.50 application form discloses the number of pensioners at 4,959 (average age 71 years), the number of active members 4,066 (average 45 years) and the number of deferred members 5,179 (average age 48 years).

    (d) Insofar as the pensioners are concerned, it is made clear that UK pensioners are excluded from any adjustments or proposed benefit changes within this plan.

144. The proposal is set out as follows (and this is, in essence, what ultimately occurred):-

"☐ A cessation of benefit accrual and contributions from 31st December, 2014;

- An order under s. 40 of the Pensions Act to reduce pensions in payment and to reduce the accrued benefits of current active and deferred members;

- A bond-based investment strategy providing a fixed level of return that will enable the scheme to meet expected (reduced) benefit payments during the period of the funding proposal and to satisfy the funding standard at the end of the period.

- Owing to the risk reduced nature of the investment strategy, an extended funding proposal term of 25-years under s. 49(3B) of the Pension Act."

145. Within the detailed funding proposal, insofar as it affects the pensioners, as of 31 December, 2014, the following was envisaged:-

(a) A further final reduction in respect of the pension levy.

(b) Adjustments to pension currently in payment (after the pension levy reduction above, if applicable) will be made in the terms set out. Those terms are, in essence, as we now understand them, that pensions below €12,000 will not be adjusted, pensions and payment that exceed €12,000 per annum will be reduced by 10% but the pension will not itself fall below €12,000 per annum and pensions and payment that exceed €60,000 per annum will be reduced by 20% but the pension will not fall below €54,000 per annum.

(c) In respect of a coordination deduction to a pension at a future date, the percentage reduction to apply (as above – 0/10/20%) will be determined by reference to the pension net of the prospective coordination deduction and the percentage reduction will apply to both their current pension and to the coordination deduction when it comes into force.

146. The proposals for active and deferred pensioners are also set out. Within the scheme proposal, the scheme actuary states that he could certify that the scheme could reasonably be expected to satisfy the MFS by 31 December, 2039 (the 25-year period envisaged).

Aer Lingus – Extraordinary General Meeting

147. As set out above it was a precondition of the IASS proposal to the PA that Aer Lingus Limited hold an extraordinary general meeting and obtain shareholder approval of that proposal.

148. Aer Lingus had on the 18 November, 2014 set out a detailed and comprehensive document, entitled "IASS proposal and notice of extraordinary general meeting," seeking shareholder approval at its extraordinary general meeting.

149. The introduction to the document states:-

> "Aer Lingus Limited's consistent position is that it is not responsible for the funding deficit in the IASS and that it has no obligation to increase its rate of contribution to the IASS in order to address the deficit in the scheme. Nonetheless, the Board views the issues arising from the funding deficit within the IASS as representing a real and significant risk to the success of the Group and considers that the solution delivers benefits for all stakeholders, including Aer Lingus, shareholders and employees."

In essence, the document distils the IASS proposal as follows:-

"(a) Shareholders being asked to approve a one-off cash payment of €190.7 million by Aer Lingus under the proposed pension contribution;

(b) Current and former Aer Lingus employees will have their expected level of accrued IASS pension benefit reduced. This will happen firstly through coordination (whereby the scheme benefits are designed to take account of any pension which is received from the State) and, secondly, through an application of a further 20% reduction in benefits and, thirdly, as the benefits will no longer be revalued prior to repayment; and

(c) That retired IASS members will have their pensions reduced by between 0 and 20% depending upon the level of their annual pension."

150. After reciting the four years of complex multiparty negotiations, the consultation paper states that:-

> "…..the IASS proposal is significantly better than the alternative of maintaining participation in the multi-employer IASS which is no longer appropriate for the provision of sustainable pension arrangements for Aer Lingus employees, which has a significant funding deficit and which gives rise to a real and significant risk of industrial action, disputes, claims and/or litigation for the group. Furthermore, the IASS proposal provides benefits to Aer Lingus including industrial relations and legal risk litigation, employment cost stabilisation and the establishment of suitable pension arrangements for employees."

151. The proposal makes it very clear that, if the IASS proposal is not accepted "it is likely that the IASS trustee would have to significantly reduce accrued benefits or seek the direction of the Pensions Authority to have the IASS wound up. Any windup of the IASS is likely to involve a significantly greater reduction in benefits for both active Aer Lingus IASS members and deferred Aer Lingus IASS members than that which is contemplated within the IASS proposal".

152. The bulk of the matters dealt with in the proposal are directed towards the interests of the active and the deferred members of the scheme. Aer Lingus is also clear when it states:-

"While Aer Lingus Limited believes and has consistently maintained that it has neither a constructive nor a legal obligation to increase its rate of contribution to the IASS in order to address the deficit in the IASS, it also recognises that this position could be subject to legal challenge… Accordingly, the potential winding up of the IASS presents a significant industrial relations issue for Aer Lingus together with a significant risk of disputes, claims and/or litigation that could have material adverse implications for Aer Lingus operations and financial performance in current and subsequent years."

153. In my view, it is a fair inference from this very detailed document that whilst the position of the pensioners and the proposed reduction in their pension is clearly set out, the engagement with the various issues identified by Aer Lingus is very much directed to the active and deferred members, who collectively would comprise some two-third of the members of IASS.

154. At the EGM on 10 December 2014 Aer Lingus shareholders approved the proposal with over 95% of the almost 80% of shareholders who voted in favour. Ryanair did not vote in favour, the Minister for Finance, in respect of the state's shareholding voted to accept the proposal.

Pension Authority Direction

155. By letter dated 23 December, 2014, the Pensions Authority included its direction to the trustees of IASS in the following terms:-

"Whereas:

(1) The trustee of the scheme (the "trustee") has applied to the Pension Authority for a direction… pursuant to an application form dated 19th December, 2014 (the "application").
(2) The actuary to the scheme has confirmed that in his opinion, if the benefit reductions proposed in the application are implemented, the scheme could reasonably be expected to satisfy the funding standard… at the effective date of the next actuarial funding certificate or, where applicable, any later date specified under s. 49(3B) of the Act and, where applicable, the funding standards reserve… at the effective date of the next funding standard review certificate or, where applicable, any later date specified under s. 49(3B) of the Act.
(3) The authority is satisfied that the reductions in the application are reductions which the authority may direct under s. 50 of the Act.

Order:

Having considered the application and pursuant to s. 50 of the Act, the Authority hereby directs the trustees to take such measures as set out in the application that allowing for scheme experience between 30th September, 2014 and the date of implementation of the direction by the trustee:

(1) In respect of the members of the scheme in recent employment… and in respect of those whose relevant employment has ceased but had not reached normal pensionable age… the payment of which has not commenced to reduce the benefits that would be payable to or in respect of those members from the scheme and, as applicable,

(2) To reduce future increases in benefits payable from the scheme to or in respect of persons receiving benefits under the scheme or persons who have reached normal pensionable age and, as applicable,

(3) To reduce, in accordance with subs. (1C) of the Act and subject to subs. (1D) of the Act, the benefits payable from the scheme to or in respect of persons receiving benefits under the scheme or persons who have reached normal pensionable age as may be necessary to comply with s. 50(2A) of the Act."

The s.50 order is dated the 23rd December, 2014 and signed by Brendan Kennedy.

IASS Rules Amendment

156. It is pursuant to the terms of that direction dated 23 December, 2014 that the IASS on 31 December, 2014 issued its amendment to its scheme rules. Headed:-

> "Alteration and the Rules of the Irish Airlines (General Employees) Superannuation Scheme."

The opening paragraph is as follows:-

> "Irish Airlines Pension Limited (the trustee) as trustee of the Irish Airlines (General Employees) Superannuation Scheme (the scheme) hereby with effect from 31st December, 2014 makes all and any amendments to the provisions of the rules, the scheme or any bylaw as necessary to provide for the implementation of and giving effect to the changes envisaged by s. 32B of the Air Navigation and Transport (Amendment) Act, 1998 (as amended) and, in particular, by the State Airports (Shannon Group) Act, 2014 and the order made in relation to the scheme made under s. 50 of the Pensions Act, 1990 (as amended) and without prejudice to the generality of the foregoing hereby exercise the powers conferred on the trustee of the scheme under subs. (1)(a) of the said s. 32B and hereby amends the rules of the scheme, the scheme and any bylaw in the manner and with effect from the date set out in the schedule below in accordance with the powers conferred upon it under s. 32B of… by order in relation to the scheme made under s. 50 of the Pensions Act, 1990 (as amended), s. 59(h) of the Pensions Act, 1990 (as amended), clause of the deed dated 31st March, 1954 establishing the scheme, Rule 18 of Part V of the Rules of the Scheme, Rule 5 of Part VIII of the Rules of the Scheme and by virtue of any other provision or power enabling it in this behalf."

157. The rules amendments are significant and substantial (the document is over 30 closely typed pages) and many do not concern the pensioners. However, insofar as pensioners are directly concerned, clause 8.3 states that:-

"With effect from 31st December, 2014, delete Rule 6 of Part XII and insert the following in its place:

6. Payment of Pensions

(a) …

(b) With effect from the effect of date notwithstanding any provision of the rules of the scheme or a bylaw any pension in payment to or in respect of a member or other person on the effective date shall be reduced permanently by the amount and in the manner set out below.

[there then follows the amendments as set out above].

"PROVIDED THAT no such reduction shall apply in respect of non-ROI membership benefits…"

158. In accordance with the directions of the Pension Authority, the IASS in turn writes to its members on the 23 January, 2015 enclosing the previous documentation used during the consultation process and setting out and notifying members of the changes envisaged by the s.50 direction of the Pension Authority.

Sale of Aer Lingus

159. In December 2014 the Aer Lingus board confirmed that IAG had submitted a proposal the initial offer was rejected. Ms. Brogan's evidence is that this offer came as a surprise. There were then discussions between the Minister and the department and the government decided in May 2015 to sell its remaining minority shareholding to IAG.

160. Mr. McMahon an expert on the airlines industry was of the view that, notwithstanding the rejection of the initial offer, it was apparent that this was part of what might be described as the negotiation process and would lead to an eventual sale for a slightly higher share price.

161. Ms. Brogan took a different view. Her evidence is that there was an interdepartmental group established in 2012 to seek to implement the McCarthy Group recommendation that certain state assets, including Aer Lingus be disposed of as soon as was 'opportune'. In 2012 the government agreed to its disposal, and an interdepartmental steering group was set up to examine options for its sale. It also looked at the third Ryanair bid in 2012 and made submissions to the European commission seeking that it not be permitted on grounds of anti-competitiveness and maintaining connectivity through Heathrow airport and in respect of its transatlantic services. New ERA under the auspices of the NTMA was also assisting and advising in the disposal of certain government assets, including Aer Lingus, within the context of the Troika programme.

162. Ms. Brogan felt that given the state of negotiations between Aer Lingus between January to March 2015 that at times throughout that process it was unlikely the 'deal' would proceed.

163. On 24 January, 2015, IAG made its third and final bid for Aer Lingus and on 27 January, 2015, the Aer Lingus Board indicated that it was prepared to recommend IAG's revised bid. On 26 May, 2015, the Irish Government agreed to a sale of its 25% shareholding. This was not without political controversy.

164. On 27 February, 2015, Aer Lingus won a UK Court of Appeal decision forcing Ryanair to sell down its shares in Aer Lingus and on 10 July, 2015, the Ryanair Board voted to sell its nearly 30% stake in the airline.

165. On 19 June, 2015, Aer Lingus Group PLC issued a circular to shareholders in relation to an EGM on 16 July, 2015 to approve the recommended cash offer by AERL Holdings Limited (a wholly owned subsidiary of IAG). On 2 September, 2015, IAG assumed control of Aer Lingus. The sale price of the government's shareholding totalled approximately €335 m.

166. In essence, there were only two entities interested in acquiring Aer Lingus; Ryanair, whose previous bids were blocked by Aer Lingus and the EC and, ultimately, IAG. Willie Walsh had been CEO of Aer Lingus from October, 2001 to January, 2005 had made it plain, or certainly press reports of his attitude made clear, that he was not interested in Aer Lingus with its substantial pension difficulties as evidenced by its on-going pension deficit. It is also clear that acquiring an airline with a pension deficit could also give rise to other issues in the industrial relations arena. In short, in Mr. McMahon's view, it was not at all unreasonable to attempt to resolve the pensions issue prior to any sale of Aer Lingus, as otherwise there was little prospect that it could in fact be disposed of.

An Alternative Scenario

167. A number of expert witnesses were asked to assess what might have occurred had no s.50 direction been given. In other words, assuming the deficit, that pensioner payments would continue and the fact that the IASS rules did not provides for any increased contributions or diminutions in benefits.

168. Against that background Mr. Wallace was asked to analyse, from an industrial relations perspective, what the impact would have been on Aer Lingus, DAA or SAA if the s. 50 direction had not been given, particularly in the context of the likelihood of industrial action.

169. In dealing with that question Mr. Wallace, emphasising that the answer is inherently speculative (which I entirely accept), considered it would mean that active members pension entitlement benefits would be seen to "fall off a cliff" and that that would undoubtedly have led to calls for industrial action and, most likely, strike action. He specifically asserts:-

> "The effect of maintaining benefits to retired members (those outside the industrial relations arena) at the expense of current employees (those within the industrial relations arena) would have been seen as provocative. It would have represented a departure from the established way of doing business going back to the couple plan."

170. Mr. Wallace also noted and quoted from the Aer Lingus letter in advance of the EGM of 10 December, 2014 by its chairman, where he highlighted what he perceived, to be the inherent possibilities or difficulties for the operation of Aer Lingus in the future years should its proposal not be accepted.

171. Mr. Wallace posits the possibility that additional resources would have to have been made available to the IASS scheme if no resolution had been reached in order to hold out the prospect of a negotiated resolution to the dispute. He also points to the possibility of major political pressure being brought to bear.

172. Notwithstanding the inherent speculative nature of the likelihood of industrial action, both he and Mr. Alan Gray an economist, presently managing partner of Indecon Economic Consultants, agreed that a prolonged series of strikes would have been damaging to the economy with the actual estimation of such damage sensitive to the number of strikes, length of the strikes and the percentage of trips which were rescheduled.

173. The evidence of Mr. Gray was in turn sought by the defendants to provide an expert opinion on two questions:-

    (a) the threat of industrial action in the air transport sector, and

    (b) its impact on the Irish economy.

174. In short, he was asked to provide his expert opinion on the potential impact of a strike on Ireland's main airports on the aviation and tourism sectors.

175. While Mr. Gray was at pains to points out that economists who can divine with great precision what will happen in the future are either fools or frauds or usually a combination of both, placed the *caveat* that seeking to extrapolate from figures to predict likely outcomes was always an inherently difficult proposition. That, I entirely accept.

176. Mr. Gray outlined a number of factors that a strike (of short or longer duration) would necessitate a loss both to the airline in question and to the State (all the airlines in question and, indeed, the airports, Dublin, Cork and Shannon being operated by semi-State enterprises, and that the two major airlines and freight carriers would comprise Aer Lingus and Ryanair who would also have a significant market share in terms of passenger numbers). In respect of the figures advanced by Mr. Gray he estimated, both in terms of direct and indirect losses due to an airline strike to be in the order, as at October, 2012 of a total gross loss to the Irish economy of €62.5 million per day and the figure, as at March, 2014, of €52.9 million per day as a consequence of an airport strike. Mr. Gray was anxious to *caveat* those figures in the manner set out above but, in broad terms, they appear to be accepted (or no evidence was brought to contradict them on behalf of the plaintiffs) in respect of the suggested gross daily loss to the Irish economy.

177. According to Ms. Murphy's evidence, in 2009 90% of DB schemes were in deficit. There was concern that there would be a public collapse in some of those schemes and that promised benefits would not be met. She also acknowledges that there was a pressure,

directly or indirectly that Government would have to make up for the deficits in the schemes.

IORP Directive 2003/41/EC

178. One of the recitals to this Directive refers to there being a need for procedural rules intending to guarantee a high degree of security for future pensioners and also to clear the way for the efficient management of what are described as occupational pension schemes.

179. The sections relied upon by the plaintiffs, in respect of which they contend have been improperly transposed, relate to Article 16 and, in particular, Article 16(3).

180. Article 16 is headed "Funding of technical Provisions".

181. Article 16(1) requires that home Member States shall require that every institution has at all times sufficient and appropriate assets to cover the technical provisions in respect of the pension scheme that it operates.

182. Article 16(2) states that the home Member State may allow an institution "for a limited period of time, to have insufficient assets to cover the technical provisions. In this case, the competent authorities shall require the institution to adopt a concrete and realisable recovery plan in order to ensure that the requirements of paragraph 1 are met again". There are then a series of conditions very much relating to the setting up of that "concrete and realisable plan" and a requirement that in the event of termination of a pension scheme, procedures are established for the transfer of assets and corresponding liabilities to another financial institution or similar body.

183. The plaintiffs rely upon s. 16(3) which states:-

> "In the event of cross-border activity as referred to in Article 20, the technical provisions shall at all times be fully funded in respect of the total range of pension schemes operated. If these conditions are not met, the competent authorities of the home Member State shall intervene in accordance with Article 14. To comply with this requirement the home Member State may require ring-fencing of the assets and liabilities."

184. The competent authority is the Pension Authority. I understand 'technical provisions' to refer to liabilities.

185. Article 16(3) in turn makes intervention mandatory, in accordance with Article 14. It contains a number of powers and duties that must vest in a mandatory authority, including:-

(a) that the competent authority shall require every institution located in their territories to have sound administrative and accounting procedures and adequate internal control mechanisms;

(b) that the competent authority shall have the power to take measures which are appropriate and necessary to prevent or remedy any irregularities prejudicial to the interests of members and beneficiaries;

(c) may restrict or prohibit the free disposal of that institution's assets;

(d) the component authority may transfer the powers of the persons running an institution to a special representative who is fit to exercise those powers;

(e) the competent authority may prohibit or restrict the activities of an institution within their area; and

(f) Article 14(5) states:-

"Member States shall ensure that decisions taken in respect of an institution under laws, regulations and administrative provisions adopted in accordance with this Directive are subject to the right to apply to the courts."

186. Accordingly, as I construe Article 16(3), there is a reference that the technical provisions shall at all times be fully funded and, if not, the competent authority shall intervene in accordance with Article 14. As I construe Article 14, it is directed to a scheme not only with financial irregularities but also one with governance issues that require to be addressed.

187. The plaintiffs contend that had this Directive been correctly transposed, then within the Pension Act (or otherwise) there should have been a provision for a winding up of this cross-border scheme (and other schemes), when it was clear the scheme was not "at all times… fully funded". In the case of IASS, the first intimation of this would appear to be the scheme actuary's certification in March 2009 that IASS could not meet the requisite funding standard.

188. The plaintiffs further contend that if the IASS scheme had, by direction of the PA been wound up, then two matters would have occurred; (a) pursuant to the Rules of the Scheme (Part IV, rule 14) annuities would be purchased for the payment of pensioners and (b) pursuant to the order of priorities for a pension scheme pursuant to s.48 of the Pension Act, in any wind up of the scheme (and all the experts agree) in applying the correct order of priority the pensioners would have been paid in full through the purchase of annuities.

189. For the reasons set out above, I construe the IASS trust deed as having no internal mechanism or procedure for its winding up.

190. The Pension Act was amended to permit a direction for the wind up of a pension scheme, pursuant to the Social Welfare and Pensions (No. 2) Act, 2013, enacting s.50B, from 25 December 2013. Prior to that, there was no internal mechanism for a wind up of the scheme by direction of the PA.

191. The order of priorities for payment in the winding up of a scheme was affected by the same legislation as set out above, in amending s.48 of the Pensions Act.

192. Prior to the amendment of s.48, Mercer was engaged by the Department of Social Protection, in August 2012 and its comprehensive report issued on 4 January 2013. Under the heading 'Background and terms of reference' it states:-

> "'To undertake a review of the wind-up priority provision in section 48 of the Pensions Acts. The objective of this review is to determine to what extent, if any, the provisions in s.48 of the Act might be revised to provide for a different approach to the distribution of assets of the wind-up of an underfunded pension scheme'".

193. They define the context as including the following:-

- The pressure upon DB schemes with at least 70% not meeting the funding standard criteria under the Pensions Act.

- 'If a scheme winds up, priority is currently given to pensioners…. before other members. This means that an underfunded scheme, if it has a high weighting of pensioner liabilities, may deliver little or no benefit to active members and deferred members on wind-up. This outcome is particularly harsh for actives and deferreds close to retirement, who could lose significant accrued benefits. They have very little working lifetime left in which to build up additional pension benefits to compensate for the loss".

194. Within its summary and conclusions Mercer set out a number of various options. They are specified and evaluated carefully.

195. On what Ms. Murphy describes as the "windup priority" her evidence was that the Department (of Social Protection) determined that it needed to examine the issue but that it was an incredibly difficult, controversial issue and a very sensitive area. That was one of the reasons the Mercer's technical report was obtained.

196. The Social Welfare and Pensions (No. 2) Act, 2013 introduced a new priority order for defined benefit pension schemes wound up after that date (December 2013). Benefits thereafter would be distributed in order of priority comprising:-

(a) …...

(b) Pensioner benefits (excluding post-retirement increases) in accordance with the following limits:-

(i) If the annual pension is €12,000 or less 100% of the pension;
(ii) If the annual pension is more than €12,000 and less than €60,000, the greater of €12,000 and 90% of the pension; and

(iii) If the annual pension is €60,000 or more, the greater of €54,000 and 80% of the pension.

(c) 30% of active and deferred benefits excluding post-retirement increases.

(d) Remaining pensioner benefits excluding post-retirement increases.

(e) Remaining active and deferred benefits, excluding post-retirement increases.

(f) Any remaining benefits including post-retirement increases.

197. The experts agree that any wind up of IASS would have left very little available for the actives and deferreds (around 5% of the scheme left available for distribution). There was a further suggestion that the costs of purchasing annuities could have left the scheme with even less available for the actives and deferreds.

198. The plaintiffs contend that had the IORP directive been incorporated correctly into Irish law then IASS would have been wound up, as a cross border scheme, by way of an earlier intervention from the PA, when it was apparent that it was not fully funded. That it was not fully funded is accepted. That any wind up prior to the amendment to s.48 would result in a payment of the pensioners payment in full is also accepted.

199. The IASS Trust is a pension scheme established to administer the pensions of three defined categories of members; the actives, the deferreds and the pensioners. Recital 7 within the IORP Directive states that the rules laid down by the Directive 'are intended both to guarantee a high degree of security for future pensioners through the imposition of stringent supervisory standards, and to clear the way for the efficient management of occupational pension schemes'. I am far from satisfied that the plaintiffs' contention that their being paid in full at the expense of other scheme category members is in accordance with Directive 2003/41/EC, particularly with regard to those members (as the Mercer report highlights) who were shortly to become pensioners within the IASS scheme, but whose pension benefit would have been dramatically reduced.

200. Mr. Kennedy was clear, with his knowledge of the IORP Directive, that it was properly implemented within this jurisdiction pursuant to the terms of the pension legislation within the Pension Act. In his view, there was no realistic scenario whereby any pension could be fully funded at all times and in particular in respect of a DB scheme. There had to be, almost by definition, an inherent flexibility within a system where investments are subject to variation on an ongoing basis.

201. In my view s.16(3) requires adherence to the provisions of Article 14. I do not construe s. 16(3) as precluding the application of section 16(2). The extension of the timeline for the submission of funding proposals have been set out by Ms. Murphy and Mr Kennedy – they were not ignored but a decision taken that it was in the interest of the future management of pension trusts that time be afforded to ensure that the minimum finding standard might be attained.

202. I also accept that the provisions of Article 14 do find reflection within the amendments to the Pensions Act as outlined above; a clear procedure was put in place. Therefore there is an appropriate linkage made within this legislation between Article 16(3) and Article 14.

203. Whilst I accept it is very likely that a wind up of IASS prior to December 2013 would have ensured that pensioners would have been paid in full, I cannot anticipate that a wind up would have accorded with the IORP Directive for the protection of all within occupational pension schemes. In my view any consideration of the wind up of any pension trust must have regard to all scheme members and any wind up prior to December 2013 would have skewed benefits significantly in favour of one group, the pensioners.

204. I have also considered the scheme of the Pension Act (and its amendments) elsewhere. Mr. O'Connell noted that he is unaware of any other private trust scheme where there has been the statutory diminution in pensioner benefits pursuant to the Pension Act legislation. That legislation is not challenged.

205. By its amendments, I accept that the legislation and the PA (as the competent authority), by the Pension Act enactments, did seek to ensure proper and appropriate governance of pension trust schemes. The contention that the government failed to properly transpose the Directive by legislating for a wind up provision for a scheme where it was not fully funded or that the period of time envisaged by s.16(2) was impermissibly long on the facts of this case does not satisfy me that a failure to wind up this scheme as contended for by the plaintiffs would have accorded with a Directive which seeks, in my view, to protect all members within member states occupational schemes.

The Plaintiffs Constitutional Rights

206. The plaintiffs contend their entitlement to a pension is a property right enjoying constitutional protection. The defendants contend that the plaintiff's case falls at the first hurdle and rely up the decision of McMahon J. in *J. and J. Haire & Company Limited & ors v. The Minister for Health and Children & ors* [2010] 2 IR 615 (*'J.J. Haire'*). This case is dealt with below but if the defendants are correct that the plaintiffs enjoy no property right in the IASS then they have no constitutional right capable of protection. The first issue is therefore whether their pension entitlements constitutes a property right.

Is an Entitlement to a Pension a Property Right?

207. In *Cox v. Ireland & Ors* [1992] 2 IR 503, the plaintiff (who had been employed as a secondary school teacher) was convicted of certain scheduled offences pursuant to s.34 of the Offences Against the State Act, 1939. The relevant subsection of s.34 provided for the automatic disqualification of all public sector employment and forfeiture of pension entitlements of any public servant convicted of a scheduled offence under the 1939 Act.

208. In seeking a declaration that s.34 was unconstitutional, the plaintiff invoked Article 40.1 which guarantees equality before the law.

209. Finlay C.J. delivering the judgment of the court stated as follows:-

> "It is clear that the provisions of Section 34 of the Act of 1939, when it becomes applicable to any person convicted of a scheduled offence in the Special Criminal Court, potentially constitutes an attack, firstly, on the unenumerated constitutional right of that person to earn a living and, secondly, on certain property rights protected by the Constitution, such as the right to a pension, gratuity or other emolument already earned, or the right to the advantages of a subsisting contract of employment…"

The court continued:-

> "Secondly, the unilateral variation and suspension of contractual rights, including rights which may involve the entitlement to a pension to which contribution over a period has been made, constitutes a major invasion of those particular property rights."

The court concluded:-

> "For these reasons it has been established to the satisfaction of the Court that, notwithstanding the fundamental interests of the State which the Section seeks to protect, the provisions of Section 34 of the Act of 1939 fail as far as practicable to protect the constitutional rights of the citizen and are, accordingly, impermissibly wide and indiscriminate."

210. Counsel for the plaintiff in this case sought to draw an analogy between the argument advanced on behalf of the defendants in *Cox* to the effect that the necessity for the legislation on the protection of public order criteria was in some sense analogous to the defendants' argument in this case regarding the States apprehension of potential industrial and other type disputes, should the deficit in the pension fund not be resolved in the manner in which it did so.

211. Counsel for the defendants pointed out that what was being challenged in Cox was a state pension, not a private pension as in IASS to which different principles apply.

212. In *Lovett v. The Minister for Education & Ors*. [1997] 1 I.L.R.M. 89, the relevant section of the Teacher's Superannuation Act provided that where a person in receipt of a pension under the scheme is sentenced to a term of imprisonment exceeding 12 months automatically forfeit their pensions.

213. The applicant sought judicial review of, amongst other matters, whether the provisions of the scheme were inconsistent with the provisions of the Constitution. The reliefs sought were in the following terms:-

214. Kelly J. (as he then was), having considered the applicability of *Cox* to the facts of this case, stated:-

> "I am satisfied that the Applicant's right to a pension in the instant case constitutes a property right which is protected by the Constitution. I am fortified in that conclusion by what is stated in the passage which I have just cited."

That passage is the one quoted in full above.

215. Kelly J. did not declare the provision unconstitutional as he had already declared it *ultra vires* the relevant Act.

216. In *PC v. The Minister for Social Protection, Ireland and the Attorney General* [2017] IESC 63, the Supreme Court was considering the constitutionality of a section of the social welfare legislation where a plaintiff was disqualified from a State benefit contribution by virtue of the statute (Section 249(1) of the Social Welfare (Consolidation) Act, 2005) prohibiting his entitlement whilst he was undergoing "penal servitude, imprisonment or detention in legal custody…"

217. The court considered *Cox* and *Lovett* as set out above. Thereafter, the court continued:-

> "For the purposes of this judgment, it is unnecessary to hold that the statutory entitlement contains all the attributes of a property right, properly so-called. What ss. 108 and 109 of the Act undoubtedly do contain is a legal entitlement, on foot of which, subject to compliance with the statutory conditions, an eligible person might sue if denied the pension. Of course, eligibility hinges on compliance with conditions. But, the statutory provisions, at least, give rise to a justiciable, if conditional, legal entitlement. It is unnecessary to go so far as to hold, therefore, that this constitutes a form of property right recognised and protected by law. The Minister submits there has been a breach of the statutory conditions. But, what is undoubted is that the provision is mandatory, not subject to any provisions of law, and affects some prisoners in a more severe way than others in receipt of private pensions, or other pensions, emanating from the State, such as Army pensions."

218. In my view, that quotation, relied upon by the defendant in its submissions, is not a denial of the possibility of it existing as a property right but that the Supreme Court (MacMenamin J.) considered that the case could be determined by an interpretation of the statutory provisions.

219. The case of *J. and J. Haire & Company Limited & ors v. The Minister for Health and Children & ors* [2010] 2 IR 615 *('J.J. Haire'*), is relied upon by the defendants as being more analogous to the present case than *Cox* or *Lovett* above. McMahon J. was considering the constitutionality of an Act and regulations which, in essence, allowed the Minister to unilaterally alter contracts between the plaintiff pharmacists and the HSE. The entitlement to do so arose pursuant to Government introducing the Financial Emergency Measures in the Public Interest Act, 2009 (known as "FEMPI").

220. The court held that, pursuant to the terms of the contract between the parties, the Minister was entitled to vary the rates under the contract and that the varying of those

rates pursuant to a statutory power did not infringe any constitutional right of the plaintiffs.

221. In considering the argument as to whether there had been an alleged interference with property rights, the court put the position as follows:-

> "It is clear that before a litigant can invoke the protection of Articles 43 and 40.3.2, he must be able to show that there is some invasion or attack on an existing property right. If he has no property right in the first instance or the property rights which he has, whether they are based on contract or not, are not as expansive as he maintains, then seeking protection from either Article 43 or Article 40.3.2 is a futile exercise. Consideration of the unjustness of the attack, or the justification which the State may have in passing the relevant measures (in this case the Act of 2009 and the Regulations), that, for example, it is for the common good, simply do not arise."

222. The court continued:-

> "The plaintiffs' property rights in this instance are no more and no less than those rights which are accorded to him in the contract. Either the Minister is entitled to make the changes under the contract or she is not. If she is entitled to do so, then she is not in breach of the contract; if she is not entitled to do so, she is first and foremost in breach of the contract and the plaintiff's primary remedies are in contract…
>
> The so-called right claimed by the pharmacists under the contract is not in fact a right at all. At most it is merely a spes, a hope that the present rates will continue. Whether they do, however, is not a matter which is to be determined by the pharmacists. It is a matter exclusively for the Minister."

223. The court concluded:-

> "In my view, subject to what I will say on the consultation process, the Minister has every right under the contract to introduce the changes now proposed in the Regulations, if she wished…
>
> From this analysis, it seems that much of the arguments advanced by the plaintiffs on the various constitutional issues become unsustainable. Furthermore, the Regulations made under the Act of 2009, which attempt to achieve the same result, cannot be criticised, at least on the grounds that they infringe an identified contractual right. No such right exists in this case."

224. In this case the plaintiff distinguishes *J.J, Haire* on the basis that the Minister always had the entitlement, following consultation, to unilaterally lower the rates paid to pharmacies in contradistinction to the trustees in the present case who had no such right.

225. In *Muldoon v. The Minister for the Environment and Local Government & ors* [2015] IEHC 649, Peart J. was concerned with the regulation in respect of the deregulation of the taxi market with regard to the payment of a taxi licence. The regulation in question caused to eliminate a very significant capital value which had built up within the existing licences. Amongst other matters, the plaintiffs sought declaratory relief as to the constitutionality of the regulations as being a breach of property rights, right to earn a livelihood and right to be treated equally before the law. In considering the question of any breach of constitutional rights, Peart J. stated as follows:-

> "It has been recognised in many cases to which the Court has been referred by the defendants that the Oireachtas may regulate in the public interest even if to do so diminishes the value of certain owners' property. These cases have been consistent in their conclusion that when the owner of a licence acquires it, he/she is aware, or at least must be taken to be so aware, that the conditions under which the licence are held, or the regulatory scheme itself, may be so altered that the value of what he/she has acquired may be diminished or disappear."

226. The court continued:-

> "The obligation on the State not to unjustly attack the plaintiffs' property rights in their licences does not in my view extend to any value that may have existed in the licence at the time the 2000 Regulations were introduced. …….Ultimately, a Government must govern. A Minister who has statutory powers to regulate the industry must try and exercise those powers effectively in the public interest and not necessarily in the interests of the taxi owners."

227. The protection of property rights under the Constitution requires protection pursuant to Articles 40.3.2 and Article 43.

228. The defendants also point to the fact that *Cox* and *Lovett* concerned state pensions, in contradistinction to the 1954 Deed. Whilst it is possible that the 1954 Deed, in the circumstances of its creation, was drafted as, in essence, a civil service scheme, it operates as a private trust. Its analogy to a civil service scheme has created difficulties for its ongoing operation, just one example being its failure of its framers to insert any provision that ever contemplated its being wound up.

229. What the 1954 Deed does however is create a trust for nominated classes or categories of beneficiaries. So whilst it perhaps doesn't extend to the state pensions within *Cox* and *Lovett*, it is also very far from according with the regulation of pharmaceutical pricing by Ministerial regulation as in *J.J. Haire*. Whilst *Cox* and *Lovett* did concern state pensions, there is nothing I can see that precludes persons having a constitutionally protected property right in a pension that is not a state pension. In those two cases it was the terms of the pension entitlement that was of relevance, not its origin as a state pension. The plaintiffs hold their interest as beneficiaries in a trust to which they have made financial contributions and that, in my view, gives them potentially certain rights of legal redress over simple contractual entitlements. As such in my view, the plaintiff's interests

within this trust does afford them a property interest within it and as such therefore a property right enjoying constitutional protection.

230. That being said, the issue remains as to the nature and extent of those rights and whether s.32B constitutes a constitutional infringement of them.

231. Section 32B enjoys the presumption of constitutionality. *In The matter of Article 26 of the Constitution and in the matter of Part V of the Planning and Development Bill*, *1999* [2000] 2 I.R. 321, the Supreme Court observed;-

> "It should be pointed out that, in reaching that conclusion, the court has had regard to the observation by Kenny J. in *Ryan v. Attorney General* [1965] IR 294, that the presumption that every Act of the Oireachtas is constitutional until the contrary is clearly established applies with particular force to legislation dealing with controversial social and economic matters. It is peculiarly the province of the Oireachtas to seek to reconcile in this area the conflicting rights of different sections of society and that clearly places a heavy onus on those who assert that the manner in which they have sought to reconcile those conflicting rights is in breach of the guarantee of equality."

232. The plaintiffs contend that s.32 B constitutes bill of attainder legislation and rely up the case of *An Blascaod Mor Teoranta & ors v. The Commissioners of Public Works in Ireland & Ors*. [1997] 1 I.R 1 (*'An Blascaod Mor'*).

233. The decision concerned An Blascaod Mór National Park Act of 1989 which gave powers of compulsory acquisition which did not extend to land owned or occupied by a person who had owned or occupied it since November, 1953. The plaintiffs had, for some years, been the largest owners of lands and building on the Great Blasket Island but had commenced their ownership and occupation after 1953. Accordingly, they were the subject of compulsory purchase order notices, whilst pre-1953 owners were not and instituted High Court proceedings challenging the constitutionality of a number of the provisions of the 1989 Act.

234. In the High Court (Budd J.), declared the Act of 1989 to be invalid as it discriminated against the plaintiffs in a manner which was disproportionate, invidious and unjustifiable and because the procedures adopted by the defendants failed to vindicate the plaintiffs' property rights. The net effect of the relevant provisions was that the Commissioners could compulsorily acquire the lands of any of the plaintiffs but could not acquire compulsorily lands owned or occupied by any person who is ordinarily resident on the island before 17 November, 1953.

235. Budd J. pointed out (a fact confirmed by the Supreme Court) that the 1989 Act was particularly unusual in that one small group of landowners may be expropriated whereas another group of landowners are exempted on the grounds of their lineage or pedigree.

236. In considering that the requirement of proportionality had not been respected in respect of the difference and treatment of the different plaintiff landowners, the court went on to consider whether this was individualised targeting or "bill of attainder". Within the facts of that case, the plaintiffs claimed that the Act cannot properly be regarded as a law of general application since its scope is limited to a specific island in a tiny group of landowners. The plaintiffs further contend that the law is not of general application but is targeted against a specific minority. In the High Court, Budd J. stated:-

> "In the Irish Constitution, unlike in the United States Constitution or the South African Constitution, there is no explicit ban on legislation which contains Acts of attainder against a tiny specifically designated group of people. However, such an Act would also at the same time specifically exempt another group who also own similar lands on the one small island is in the present circumstances without adequate justification and is in violation of the equality provision in Article 40.1. The Oireachtas has the sole power to legislate under Article 15.2.1; if an Act is found to be in the nature of a bill of attainder aimed at an individual person or a tiny group of people, as in the present case, then the Act is not merely legislative in nature. Such a bill of attainder in the circumstances violates the equality provision in Article 40.1 of the Constitution."

237. In the Supreme Court, in upholding the judgment, Barrington J. stated:-

> "In this bitterly fought case no-one seriously questioned the power of the Oireachtas to acquire an uninhabited island such as the Great Blasket for the purpose of establishing a National Park. It is the form which the Act took which has created all the controversy."

238. The plaintiffs contend that s.32B comprises bill of attainder legislation. It is a private trust and this legislation only deals with the IASS.

239. However, unlike *An Blascaod Mor* the plaintiffs in the present case did not seek to distinguish or advance any argument of unfair treatment between the categories of beneficiaries to this IASS trust. Section 32B deals with the totality of the IASS trust, the argument in *An Blascaod Mor* was that within the small category of persons targeted by that legislation they were being treated differently, to the significant detriment of one category. That is not the case here. In my view, the Supreme Court in *An Blascaod Mor* made the position clear; it is not that legislation was enacted to acquire land, it was its arbitrary separation of the interest of both groups.

240. I do not see that s.32B constitutes bill of attainder legislation. It does affect only a limited group of people; that certainly makes it unusual but, in my view, nothing more.

Section 32B

241. The plaintiffs have amended their pleading to claim that the entirety of s.32B is unconstitutional (initially they only invoked s.32B(3)). They do so on the basis that it must be considered, in its entirety, as targeted legislation. It was designed to ensure, in

so far as the plaintiff pensioners are concerned, that a scheme could be devised which ensured payment by employers into a new scheme, none into IASS, which has maximised the reduction of payments in pension as provided for within the legislation.

242. In so far as s.32B is concerned the plaintiffs contend it provides total protection/indemnity for the trustees and removes any possibility of the plaintiff pensioners being in a position to furnish consent to its terms provided by the Trust Deed and Rules.

243. Each of the plaintiffs gave evidence; all were adamant that they never envisaged a scenario where they were not paid their full pension, or where it would be cut, having paid into the scheme throughout their years of dedicated service. They believe the employers owe them a duty of care and certainly that funding should have been made available to ensure that there was no reduction in their pension benefits. They further point to the fact that neither of the employers was insolvent (in particular they point to the Order of Murphy J, considered above) and could have contributed to IASS.

244. Of course, the pension reductions were effected by amendments to the Pension Act, not pursuant to s.32B and those amendments to s.50 of the Pension Act were not challenged.

245. They also strongly contend that s.32B was also part of a wider scheme to ensure the removal of the IASS pension deficit in order that Aer Lingus might be sold to realise a profit for the state in respect of its shareholding, at the expense, they contend, of a significant diminution in their pension. That, in part, informs their claim for damages for unjust enrichment.

246. The IASS trust suffered from a number of perceived deficiencies;

(a) Structured in 1954 as akin to a civil service scheme which lacked many features of a 'conventional' private trust scheme.

(b) Thereafter, becoming a multi-employer scheme, with some members within state owned company DAA and Aer Lingus, a private company, where the government held a 25.1% shareholding.

(c) That both employer and member benefits and contributions were defined and could not be altered without their respective consents.

(d) Arising from (c) above, unlike most DB schemes there was no provision for increased employer contributions.

(e) That there was no rule within the trust deed or the rules which permitted the trustees to initiate a means of winding up the IASS trust.

The difficulty was that whilst other trusts or schemes could and did have some of these features, the IASS had them all.

247. The plaintiffs have stressed throughout that the measures introduced affecting pensioners must be considered in a wider context as a means to achieve a desired end, which was to ensure the sale of Aer Lingus and that the issues with regard to IASS could be resolved without industrial unrest or further loss to the exchequer.

248. In my view it is clear that certain sections of s.32B do not deal with amendments to the IASS scheme that directly affect the plaintiff pensioners. Section 32B(1) and s.32B(5) affects the freezing and de-risk aspects of the active and deferred members within the Scheme. Those sections are considered in detail within this judgment. Those sections can only be of relevance if I accept that the totality of the section constitutes targeted legislation and not otherwise.

249. The pension deficit within IASS was clearly a significant problem and there were no assurances that the issue would resolve itself. Quite the contrary. From the outset, the evidence is clear that both employers made it absolutely clear that they were not going to make any payments into the IASS scheme and any payments would be made to a new scheme, a contributory one, for the actives and the deferreds. It is clear that that proposal met with the approval of the trade unions and indeed was recommended by the IASS trustees in its consultation paper. That position may be criticised by the plaintiffs. The first named plaintiff in his evidence pointed to Aer Lingus' more paternalistic attitude to the IASS in previous years.

250. However, it is not for this Court to suggest or consider what alternatives might have occurred, had different options been exercised. I must consider whether there has been an infringement of the plaintiff's constitutional rights, within the events that occurred and the decisions that were actually taken. That concerns consideration of the proposal by the IASS trustee seeking a s.50 direction, pursuant to the terms of the Pension Act 1990 (as amended), as it links and is specifically referable to the issue as to whether there has been any infringement of the plaintiffs' constitutional rights pursuant to s.32B.

251. Within this judgment, I have set out the various groupings affected by this pension deficit; by any standards it constituted a difficult issue. Clearly there were ongoing discussions, possibly even negotiations between some of the various groupings as to how this issue might be resolved. Equally its ultimate resolution would likely have required a certain degree of co-ordination and it is also clear that there were significant legal resources utilised in dealing with this issue.

252. My difficulty is in considering s.32B as targeted legislation. I have carefully considered all of the evidence. In my view the overall parameters of what was eventually accepted as a resolution of this issue, was arrived at relatively early within the process. Those parameters appear to have emerged from within what I have described as the industrial relations arena.

253. In considering the evidence of Ms. Brogan, Ms. Dunning and Ms. Murphy, I do not see the defendants having, as their starting point, the intent to effect the changes that ultimately occurred but rather seeing a huge pension deficit, in the context of ongoing serious

economic difficulties and thereafter seeking a resolution within that context. I accept that the government wished to see this issue resolved. The agreement for the sale of certain state assets was part of its agreement with the troika. I accept they feared ongoing industrial issues. But I do not discern any evidence that what emerged was in any sense targeted at the plaintiff pensioners or even targeted at them by default.

254. The IASS trustees were certainly anxious to be further protected by way of additional indemnities and did at one point suggest that this matter might have to be resolved by seeking directions of the court. However, Ms. Murphy gave evidence that the insertion of the phrase 'for the avoidance of doubt' within s.32B(3) was at her suggestion as she did not wish it to detract from the Pensions Act legislation.

255. The plaintiffs contend that they were denied a right of consent pursuant to the terms of the IASS trust. In my interpretation of it, its terms state they had a fundamental right to a pension; this reduction being enacted by legislation. I have difficulty with regard to any suggestion that, without more, any trust scheme can preclude amendment by statute, simply by virtue of its terms. Part II of the Trust Deed states that an entitlement to a pension is a fundamental term that cannot be altered or amended and in Part V Rule 18 that no other statutory amendment can be made without written consent of the employer and the committee. I do not see these as entitling this trust (its trustees) to decline to accept modification or changes to trust rules pursuant to statutory amendment. These were of course statutory amendments to this scheme and they, like any such amendments, could be challenged in what might be described as the normal manner in respect of any legislation. The amendments to the plaintiff pensioners benefits were enacted by legislation not s.32B. Section 32(B)(3) does appear to have been directed at affording some degree of comfort to the scheme trustees but I do not see how the issue of the plaintiff pensioners consent was a pre-condition to the enactment of statutory legislation.

256. In my view, whilst s.32B is solely directed at the IASS trust, it does not constitute targeted legislation. The legislation was designed to deal with the agreements arrived at between the various groups. It was not in any sense a co-ordinated movement to ensure, from the outset, that the plaintiff pensioners would have their pensions reduced and the IASS scheme altered. Section 32B as enacted was primarily directed at the actives and the deferreds, with legislation reducing the plaintiff pensioner benefits.

257. Section 32B is challenged in its entirety. In my view, s.32B(1) and (5) does not affect any infringement of the plaintiff's constitutional rights, as it does not affect them directly. As I have rejected it as targeted legislation then in my view there is no entitlement of these plaintiffs to claim that sections dealing with different beneficiary groupings within IASS can affect their constitutionally protected property rights. Accordingly, the challenge to the constitutionality of the entirety of s.32 B is rejected. For the avoidance of doubt, I do not consider that s.32B(3) is in breach of the plaintiff pensioners constitutional property rights, as the reductions in pension of which they complain arose and were enacted

pursuant to the amendments to the Pension Act and not within s.32B. The issue of consent is considered above.

258. The declarations sought are therefore refused. In light of my conclusions the question as to any entitlement of the plaintiffs to damages does not arise. I will hear the parties as to any consequential orders and reliefs as may be required.