THE HIGH COURT

COMMERCIAL

[2024] IEHC 222

[Record No. 2021/158SP]

IN THE MATTER OF THE CIÉ SUPERANNUATION SCHEME 1951 (AMENDMENT) SCHEME 2002

AND PURSUANT TO ORDER 54 RULE 1 AND ORDER 3 RULE 6 OF THE RULES OF THE SUPERIOR COURTS

BETWEEN

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

APPLICANTS

AND

CÓRAS IOMPAIR ÉIREANN

RESPONDENT

AND

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

NOTICE PARTIES

JUDGMENT of Mr Justice Mark Sanfey delivered on the 19th day of April 2024

Introduction

1. This judgment concerns complicated issues of interpretation of the Córas Iompair Éireann Superannuation Scheme ("*the Scheme"*), which came into operation on 29 November 1951. The Scheme is a superannuation scheme for clerical, supervisory and executive staff of the respondent ("CIÉ") and was established by the Córas Iompair Éireann Superannuation Scheme 1951 as established by statutory instrument 353 of 1951 and which has been amended from time to time.

2. The applicants are the members of the committee responsible for the administration of the scheme, and are referred to collectively in this judgment as *"the committee"*. The applicants seek *"the Court's directions and determination regarding the proper interpretation of r. 20"* of the rules of the scheme (*"the rules")* set out in S.I. 353 of 1951 as amended. The applicants also raise two specific questions regarding the funding of the scheme for the determination of the court; the respondent does not accept that these questions are appropriate, and has suggested two alternative questions for determination which it regards as more appropriate.

3. The applicants at paras. 3 and 4 of their written submissions, express the net issue in the following terms;-

> *"3. The crux of the dispute is the extent of Córas Iompair Éireann's ("CIÉ") obligation to fund the Scheme and in particular, the meaning of r. 20(1) of the rules (defined below) which provides that in every year the Board shall contribute to the Fund (defined below) such sum as the Board after consulting the actuary of the*

Scheme determines "to be necessary to support and maintain the solvency of the fund".

4. Simply put, the committee maintains that CIÉ's contribution obligation is not compatible with reductions in member benefits."

4. While the *"crux"* of the issue is thus concisely expressed from the point of view of the applicants, the issues before the court were of considerable complexity. As the rules of the scheme are contained in a statutory instrument, the principles of statutory interpretation require to be applied in determining the meaning of the rules. The statutory context of the Transport Act, 1950 and the Pensions Act, 1990 also require to be considered. In order for the reader to understand the statutory landscape, it will be necessary to set out the provisions of the acts and rules in some detail.

5. The present proceedings were initiated by special summons on 17 September 2021. A very detailed special indorsement of claim was accompanied by an extensive grounding affidavit of Ciaran Masterson, the first named applicant. An equally detailed points of defence was delivered by CIÉ on 15 November 2021, accompanied by an affidavit of that date by Aidan Grogan, head of group human resources and organisational development of CIÉ. Both deponents swore further affidavits.

6. The special summons was also accompanied by an affidavit sworn by Gavin Howlin, who is an actuary with the firm of Willis Towers Watson. Mr. Howlin acted as advisor to the applicants. His affidavit was the subject of protracted complaint by the respondent as to the admissibility of certain parts of his evidence on the hearing of the application for admission to the commercial list. A revised affidavit was sworn by Mr. Howlin on 5 November 2021; a letter of 15 November 2021 from CIÉ's solicitors enclosed a notice to cross-examine Mr. Howlin on both of his affidavits. Correspondence ensued as to whether or not Mr. Howlin should be cross-examined as an expert or as a witness to fact; the applicants accepted

ultimately that Mr. Howlin's evidence should be regarded as being given in the latter capacity.

7. Mr. Howlin in fact swore a third affidavit on 3 March 2022. However, the parties continued to correspond in relation to the necessity for Mr. Howlin's oral evidence; the respondent asserted in a letter of 19 May 2022 that it wished to cross-examine both Mr. Howlin and Mr. Kevin Reynolds, an independent expert actuary testifying for the applicants, as to their *"credibility"* and *"the appropriate weight to be attached to their evidence"*. This was not withstanding that, in the same letter, the respondent's solicitors commented that *"….all three of [Mr. Howlin's] affidavits… in truth, add nothing to the issue for determination by the judge"*. There ensued extensive correspondence between the parties as to the admissibility of various aspects of the evidence to be adduced at the hearing.

8. Ultimately, Mr. Howlin and Mr. Reynolds gave evidence to the court; Mr. Howlin in relation to his affidavits, and Mr. Reynolds in relation to his report of 2 February 2022 and the report of 15 November 2022 by Mr. Liam Quigley, the independent expert actuary for the respondent. While the applicants served a notice to cross-examine Mr. Quigley by letter of 12 April 2022, in the event they declined to cross-examine Mr. Quigley, who did not give oral evidence to the court.

9. The evidence of the actuaries both written and oral, gave rise – both in correspondence and at the hearing itself – to more heat than light. The facts and background to the dispute are by and large not contentious. While all three actuaries gave helpful evidence – in Mr. Quigley's case, by the report exhibited to his affidavit – in relation to the practice surrounding the various issues, the core issues for decision by the court all relate to the interpretation of legal provisions of the rules and the relevant acts, which is of course solely a matter for the court. Any views expressed in the affidavits, reports or oral evidence

as to the appropriate interpretation of legal provisions were, as the parties acknowledged, simply inadmissible. The evidence before the court was therefore of limited utility.

10. The hearing took four days. Both sides made extensive written and oral submissions. In delivering this judgment, I have had the benefit of transcripts of the hearing, and have availed of access to the digital audio recording to refresh my memory of evidence or submissions.

The rules and statutory provisions

11. The scheme cannot be understood without an exposition of the rules relating to it, and the sections of acts of the Oireachtas which are relevant to them. Both the special indorsement of claim and the written submissions of the applicants deal with these provisions at length. As ever in a case of statutory interpretation, the court must have regard, when interpreting a provision of a statutory instrument, to the whole of that instrument and to any related statutory context.

12. The scheme was submitted by CIÉ to the Minister for Industry and Commerce pursuant to s. 44 of the Transport Act, 1950 (*"the Transport Act" or "the 1950 Act"*), which provides that the *"the Board" "…may prepare and submit to the minister and shall, if so required by the minister, submit to the minister within such time as he may direct, a scheme (in this section referred to as a superannuation scheme) for establishing on a contributory basis a superannuation fund for the benefit of the employees or any particular class of the employees of the Board".*

13. All parties accept that the scheme is governed by rules set out in S.I. no. 353 of 1951 as amended from time to time, most significantly – as we shall see – in 2000.

14. Rule 3 of the rules deals with *"membership of the scheme"*; r. 3 (1) provides that *"…every person holding a clerical, supervisory or executive position under the board who is on its regular establishment and who is not a member of any special superannuation*

scheme… shall be entitled to become a member of this scheme subject to the provisions of clause (3) of this rule in regard to the maximum age for entering the scheme". Rule 3 (3), to which r. 3(1) refers, lays down certain age restrictions.

15. Rule 4 relates to the *"establishment of the fund"*, and states as follows:-

"(1)(a) upon the coming into operation of the scheme a fund shall be established.

(b) The purpose of the fund shall be the provision in accordance with the schemes of annuities and other benefits for the members of the schemes and other salaried staff formerly in the service of the board or for the spouses, children or dependants of deceased members of the schemes and other salaried staff formerly in service of the board.

(2) The Fund shall consist of:-

…(b) the contributions of the members;

(c) the contributions of the Board;

(d) any assets or contributions received in accordance with article 5 of the Córas Iompair Éireann Superannuation Scheme, 1951 (Amendment) Scheme, 2000 ["the 2000 amendment"]*;*

(e) interest, dividends or other income from the investments and property of the fund;

(f) any other funds which may be paid to the Trustees from time to time for the purposes of the Scheme."

16. Rule 4 (4) provides that the fund shall be vested in the trustees, who are appointed pursuant to r. 5. Rules 6 and 7 provide for the engagement by the trustees in the investment and operation of the fund. Rule 10 (1) provides that *"… the Scheme shall be administered by a committee consisting of eight committee men, of whom four shall be appointed by the board and four shall be elected by the members of the Scheme".*

17. Rule 17 (1) provides for the appointment by the board of *"an actuary for the purposes of the scheme"*, referred to herein as *"the scheme actuary"*. Rule 17 (2) is as follows:-

> *"The Board shall cause an actuarial investigation of the Fund to be made by the Actuary whenever the Board thinks necessary and not less than once every five years. The Actuary shall make a report on every such investigation to the Board, the Committee and the Trustees"*.

Rules 19 and 20

18. These rules are at the heart of the dispute between the parties. Rule 19 (1) provides that *"…every member shall make contributions to the fund"*. Rule 19 (2) sets out the level of such contributions relevant to the age of the member contributing.

19. Rule 19 (3) provides as follows:-

> *"At any time and from time to time the Committee may provide that the contributions of all the members of the Scheme except the Scheduled Officers, shall, in substitution for the scale set out in clause (2), be regulated by such other scale as the Actuary, after an investigation of the Fund, may recommend as being the scale of contributions required for the time being to maintain the solvency of the Fund. Provided, however, that no member shall be required by such a substituted scale to contribute at a higher rate than fifteen per cent of his salary."*

20. While r. 19 relates to contributions by the members, r. 20 relates to the contributions by the "Board" – defined in r. 2 as meaning CIÉ itself. The applicant draws attention to the fact that r. 20, which was amended in 2000, originally stated as follows:-

> *"(1) The board shall make contributions to the fund in respect of every member equal to the contributions made by such member."*

21. The amendment to r.20 introduced by Coras Iompair Eireann Superannuation Scheme 1951 (Amendment) Scheme (Confirmation) Order, 2000 (SI 323 of 2000) provides as follows:-

> *"(1) In every year the Board shall contribute to the Fund such sum as the Board after consulting the Actuary determines to be necessary to support and maintain the solvency of the Fund.*
>
> *(2) All contributions by the Board to the Fund in any year shall be paid to the Trustees and may be so paid by one payment or in equal or unequal instalments and at such time or times that shall appear expedient to the board.*
>
> *(3) Notwithstanding the foregoing, the Committee retains the right to vary the contributions payable by the members under r. 19 and in particular, if the contribution determined by the Board under para. (1) to be necessary to support and maintain the solvency of the Fund (exclusive of any contributions arising under r. 21 (9) (b), r. 29 (1) (c) or r. 39) will in any period exceed 3.6 times the contributions payable by the members during that period, the contributions payable by the Board and the members shall be reviewed."*

22. The applicants emphasise the requirement in r. 20 (1) that the contribution of the board *"be necessary to support and maintain the solvency of the fund"*, and submit that *"... it is the meaning, extent and scope of this obligation that falls to be determined on this application"* [written submissions para. 9]. The parties do not agree about the limit of *"3.6 times the contributions payable by the members…"* The respondent regards this a *"a cap"* on its contribution pursuant to para. 20 (1); the applicants deny that it is a *"a cap"*, submitting that the board's contribution in excess of 3.6 times the contributions payable by the members merely triggers a review of the contributions payable by the board and the members. The applicants submit that *"…the sub-rule also expressly recognises that a*

greater contribution from the Board may be necessary "to support and maintain the solvency of the Fund"." [para. 10 written submissions]

The statutory funding standard

23. When considering the rules, and r. 20 in particular, it is necessary to consider the provisions of the Pensions Act, 1990 (*"the 1990 Act"*) and in particular Part IV (ss.40-53) of that Act, which require a funding standard and a funding standard reserve (referred to collectively as "*statutory funding standard*" or "*SFS*") for relevant schemes. The applicants draw attention to s. 56 (1) (b) of the 1990 Act which provides that the trustees shall cause the resources and liabilities of the scheme to be valued by the Actuary of the scheme at prescribed times. Section 43 (1A) provides that any subsequent actuarial funding certificates shall have an effective date not later than three years after the effective date of the immediately preceding certificate. Section 43 (2) provides that an actuarial funding certificate and a funding standard reserve certificate shall be submitted to the pensions board – which is established by s. 9 of 1990 Act – by the trustees within nine months of the effective date of the relevant certificate. Pursuant to s. 42 of that act, the actuarial funding certificate must state that a scheme (a) satisfies the funding standard provided for in s. 44 (1) or (b) does not satisfy the funding standard.

24. The funding standard and the funding standard reserve are established by s. 44 (1) and (2) of the 1990 Act. This section is central to the dispute between the parties, and is therefore set out below in full, despite its length:-

"44.— (1) Subject to the subsequent provisions of this Part, a relevant scheme shall be deemed to have satisfied the funding standard if, in the opinion of the actuary, the resources of the scheme at the effective date of the actuarial funding certificate would have been sufficient, if the scheme had been wound up on that date, to provide for—

(a) the liabilities of the scheme consisting of—

(i) additional benefits secured or granted by way of additional voluntary contributions or a transfer of rights from another scheme to which paragraph 2 of the Third Schedule relates to the extent that the rights to which the transfer relates were originally secured or granted by way of additional voluntary contributions,

(ii) benefits in the course of payment to which paragraph 1 of the Third Schedule relates,

(iii) benefits, other than those referred to in subparagraphs (i), and (ii), which consist of a transfer of rights from another scheme to which paragraph 2 of the Third Schedule relates,

(iv) benefits other than those referred to in subparagraphs (i), (ii) and (iii), to which paragraphs 3 and 4 of the Third Schedule relate, and

(v) the percentage (in this Part referred to as the 'specified percentage') of any benefits, other than those referred to in subparagraphs (i), (ii) and (iii), to which paragraph 5 of the Third Schedule relates,

and

(b) the estimated expenses of administering the winding up of the scheme.

(2) Subject to the subsequent provisions of this Part, a relevant scheme shall be deemed to have satisfied the funding standard reserve if, in the opinion of the actuary, the additional resources of the scheme at the effective date of the funding standard reserve certificate are at least equal to the aggregate of –

(a) an amount equal to A x (B - C) where –

A is 15 per cent (or such higher percentage, being not more than 50 per cent, or lower percentage, being not less than zero per cent as may be prescribed by the Minister),

B *is the amount of the funding standard liabilities of the scheme at the effective date of the funding standard reserve certificate, and*

C *is the amount subject to a maximum of an amount equal to the funding standard liabilities, of the resources of the scheme invested in the following assets –*

(i) securities under section 54(1) of the Finance Act 1970 and known as bonds,

(ii) securities issued under the laws of a Member State (other than the State) that correspond to securities referred to in subparagraph (i)

(iii) cash deposits with one or more credit institutions,

(iv) such other assets of a type that offers a similar degree of security to those assets referred to in subparagraphs (i), (ii) or (iii) as may be prescribed by the Minister,

and

(b) the amount by which the funding standard liabilities of the scheme would increase on the effective date of the funding standard reserve certificate if the interest rate or interest rates assumed for the purposes of determining the funding standard liabilities was one half of one per cent (or such higher percentage, being not more than 5 per cent, or lower percentage, being not less than zero per cent, as may be prescribed by the Minister) less than the interest rate or interest rates (as appropriate) assumed for the purposes of determining the funding standard liabilities for the actuarial funding certificate which has the same effective date as the funding standard reserve certificate less the amount by which the resources of the scheme would increase at the same date as a result of the same change in interest rate or interest rates.

(c) For the purposes of paragraphs (a) and (b), resources shall not include resources which relate to contributions or a transfer of rights from another scheme to the extent that the benefits provided are directly determined by the accumulated value of those

contributions or the amount transferred and a given investment performance is not guaranteed or specified in relation to those contributions or the amount transferred."

25. It should be noted that the name of the Pensions Board was changed to the *"the Pensions Authority"* pursuant to s. 26 of the Social Welfare and Pensions (Miscellaneous Provisions) Act, 2013. I shall refer to the Pensions Authority as *"the Authority"* henceforth in this judgment.

26. The applicants characterise the statutory funding standard set out in s. 44 as *"a calculation device for the purposes of establishing statutory minimum funding requirements"* [para. 15 written submissions], rather than an assurance that there are sufficient assets to meet actual liabilities arising on a winding up. It is suggested that the scheme is expected to satisfy the funding standard and the funding standard reserve; the applicants point out that the scheme is not exempted from s. 44.

27. Section 49 of the 1990 Act provides for the provision by the trustees of a funding proposal to the Authority in circumstances where the funding standards are not satisfied by the scheme. Section 50 (1) empowers the Authority *"by notice in writing, following an application by the trustees or otherwise…"* to direct the trustees of a scheme *"to take such measures as may be specified by [the Authority] or …such measures as may be necessary …to reduce the benefits that would be payable to or in respect of members of the scheme…"*

Funding of the scheme

28. The position as regards funding of the scheme is addressed by the applicants at paras. 19 to 28 of the special indorsement of claim. The respondents address those pleas specifically at paras. 70 to 79 of the points of defence.

29. It appears that the scheme was adequately funded until 2008; this is accepted by the respondent, which at para. 71 of the points of defence comments that the underfunding at this point was *"in common with many other pension schemes and arising in significant part from*

the extraordinary turbulence in the financial markets from that time". The respondent states that the scheme actuary certified the state of affairs accordingly, and a funding proposal ("*the 2013 proposal*") was submitted to the Authority in 2013. The 2013 proposal set out how the scheme would meet the statutory funding standard over the period to December 2023; this would involve the board paying contributions to the scheme at a rate of 2.8 times members contributions.

30. The respondent accepts that the funding proposal was certified *"off track"* as at 31 December 2016 *"as a consequence of which a further funding proposal was due to be submitted in, and has been outstanding since, December 2017"* [para. 74 points of defence]. The respondent states that, in the period since 2017, the deficit in the scheme has been reduced by the respondent determining, on the recommendation of the scheme actuary, to pay employer contributions in a multiple of 3.4 times member contributions from 1 January 2018. This contribution has continued to date.

31. It appears that the Authority wrote to the committee by letter of 10 January 2020 stating that it was considering whether to commence the statutory process under s. 50 and s. 50B of the 1990 Act, unless it received, within eight weeks, a positive actuarial funding certificate and a positive funding standard reserve certificate, or a valid funding proposal [para. 26 special indorsement of claim]. It does not appear that a valid funding proposal or positive actuarial funding certificate or funding standard reserve certificate were submitted on foot of this letter; the respondent pleads that it *"sought to progress proposals to address the deficit in the Scheme and to ensure the long-term sustainability of the Scheme through the industrial relations process whereby it engages with recognised employee representative groups that are referred to collectively within the respondent as the Trade Union Group (TUG) which process included engagement with the Workplace Relations Commission (WRC) and the Labour Court…"* [para. 77 defence]. It appears that there was a further

intimation, by letter of 27 April 2021, by the Authority that it was considering making a direction under s. 50 and s. 50B of the 1990 Act *"to reduce benefits under the scheme or to wind up the scheme"*.

<u>The industrial relations process</u>

32. The industrial relations process gave rise to a ballot of union members on 5 May 2021, by which the membership of the TUG accepted the proposals set forth in a recommendation of the Labour Court of 23 November 2020. Non-members of the TUG which comprised 35 percent of the active membership of the scheme were not included in the ballot. The respondent asserts that, on completion of the ballot, it submitted an amending scheme to the minister incorporating the substantive recommendations of the Labour Court. By a letter of 27 May 2021, CIÉ informed the committee that it had notified the Minister for Transport and the Authority *"that it has commenced the statutory process to implement the changes to the scheme outlined in the [recommendation]"*. It was further asserted that the change would bring the scheme into compliance with the minimum funding standard requirements of the 1990 Act, so that a funding proposal would not be required.

33. The applicants make reference to s. 44 of the Transport Act, 1950. As we have seen, the scheme is submitted to the appropriate minister pursuant to s. 44 (1); this was done in or about 1951. Under s. 44 (5), the board (i.e. the respondent) can submit an amended scheme; s. 44 (3) provides that the board *"shall publish in such a manner as the minister may direct a notice that the scheme has been so submitted or resubmitted to the minister…."*, and that representations can be made within a defined period by interested parties. These representations must be considered, but the minister may then *"by order confirm, either without modification or with such modifications… as the minister thinks proper"* the submitted scheme.

34. The applicants complain that they have not been furnished with the draft amending scheme, and that accordingly it is *"not clear what changes that board propose to make to the 1951 scheme to bring it into compliance with the statutory funding standard"* [para. 37 special indorsement of claim].

35. The applicants initially pleaded that the respondent was in breach of s. 44 (3)(a) of the 1950 Act by failing to publish a notice that an amending scheme had been submitted to the minster and that its understanding was that, in fact, no such scheme has been submitted to the minister. They asserted that CIÉ has refused to provide the applicants with the proposed amending scheme.

36. In the points of defence, the respondent asserts that the applicants have in fact no right to receive a copy of any amending scheme, and that publication of an amended scheme, pursuant to s. 44 (3) (a) of the 1950 Act occurs only at the direction of the minister. CIÉ's position is as set out at paras. 78 – 79 of the points of defence;

> *"78. On completion of its industrial relations process culminating on 5 May 2021 in a ballot of union members, the result of which was acceptance of a recommendation of the Labour Court…, the respondent submitted an amending scheme to the minister incorporating the substantive recommendations of the Labour Court (insofar as same required or contemplated amendment to the 1951 scheme)… [79] [t]he statutory process for amendment of the 1951 scheme having been commenced, it is a matter for the minister, after consultation with the Minister for Public Expenditure and Reform and subject to the statutory notification process hereinafter more particularly set out, to confirm either without modification or with such modifications as the minister thinks proper (whether by way of addition, omission or variation) the said amending scheme or any resubmission thereof…."*

37. CIÉ refers to the Labour Court recommendation made on 23 November 2020, and comments that *"…[t]he only change to accrued member benefits included in the LC recommendation was a change in the minimum normal age of retirement from age 60 to age 63, reflecting the actual experience of the scheme that the average age of retirement was, in fact. 64.9 for class A PRSI contributors and 63.3 for class D PRSI contributors …."* [para. 81 defence]. CIÉ goes on at para, 82 of the defence to comment that *"…[a]n amendment to the scheme rules to increase the minimum normal age of retirement to reflect the experience of the scheme as to actual age at retirement, coupled with the availability of funding from the respondent outside the scheme, results in considerable reduction in the amount required for the scheme to satisfy the statutory funding obligation, whilst facilitating anyone wishing to retire before age 63…"*

<u>The situation as it stands</u>

38. Accordingly, the applicants now acknowledge that CIÉ did indeed a submit an amending scheme pursuant to s. 44 (5) of the Transport Act, and that this amending scheme *"apparently incorporates the substantive recommendations of the Labour Court"* [para. 31 written submissions]. The text of the amending scheme has not been seen by the applicants; although the applicants now accept that CIÉ *"is not statutorily obliged to make available the draft amending scheme until the minister so directs…"* [para. 35 written submissions], it contends that it is *"disappointing and unhelpful that CIÉ has maintained its refusal to provide the committee with a copy of the draft"* [para. 35 written submissions].

39. While the amending scheme submitted to the minister under s. 44 (5) was not made available to the court, it appears that it seeks an amendment to the existing scheme to give effect to the Labour Court recommendation that the only change to the accrued member benefits would be a change in the minimum normal age of retirement from 60 to 63. The respondent pleads that this change *"results in considerable reduction in the amount required*

for the scheme to satisfy the statutory funding obligation, whilst facilitating anyone wishing to retire before aged 63…" [para. 82 points of defence] for the reasons set out in para. 82 and quoted at para. 37 above.

40. The respondent's position is that, having participated in what it contends was an appropriate industrial relations process, the respondent now wishes to have the scheme amended to reflect the result of that process. It points out, at para. 83 of its points of defence, that the Transport Act does not in fact require a ballot before an amending scheme can be submitted to the minister – although such a ballot was conducted in the present case – and that all members of the scheme will have an opportunity to make objections and representations to the proposed amended scheme pursuant to s. 44 (3) (a) of the 1950 Act.

41. By its letter of 27 April 2021, the Authority informed the committee that it was considering *"making a direction under s. 50 and s. 50B of the 1990 Act to reduce benefits under the scheme or to wind up the scheme".* In August 2021 – by which point the applicants had mooted the present proceedings – the Authority informed CIÉ and the committee that at its September meeting, it might *"decide to suspend the s. 50/50B process, or …request the trustees to notify the members and other persons or their representatives of the matters referred to in regulation 4 (2) of the regulations …"* [applicants written submissions para. 38]. It seems that no further steps have been taken by the Authority, presumably pending the outcome of the present proceedings.

42. In the event, although both the trustees and the Minister for Transport were made notice parties to the present application, no affidavits were filed by them. The trustees did however file written submissions, in which they stated that they *"were and would remain neutral as regards to the central dispute in the proceedings concerning the nature and extent of the respondent's contribution obligation pursuant to r. 20 and the correct interpretation of r. 20 (1)"* [written submissions para. 1.2]. They contend further that they do not have a role

or responsibility for submitting a funding proposal to the Authority; the committee *"is the entity responsible for the administration of the scheme and thus the 'trustee' of the scheme in the relevant sense and within the meaning of s. 49 Pensions Act, 1990. The submission of a funding proposal to the Pensions Authority to address any statutory funding deficit under the Pensions Act, 1990 is thus a matter for the committee, and it is open to the respondent to agree or not agree to its terms."* [para. 5.9 written submissions]. Counsel appeared at the hearing and confirmed that the trustees' position was as set out in its written submissions.

43. The minister did not furnish written submissions. However, by letters of 3 May 2022 to the applicants and the respondent, solicitors for the minister indicated that the minister *"is supportive of the position adopted by the respondent in its submissions".* The letters did not elaborate on this position, which was confirmed by the minister's counsel to the court, again without elaboration or further explanation.

The net positions of the parties

44. Having set out the background to the matter at length, I think it would be worthwhile to set out how the parties express their net positions. In doing so, I am very conscious of the risk of over-simplification of the issues, and the possibility of losing sight of subsidiary arguments, of which there were many, and the nuances affecting interpretation of the rules, about which the parties made copious submissions. However, I consider that the benefit of bringing focus to the central issues outweighs any disadvantages.

45. The committee expresses its net position in its written submissions in the following terms:-

> *"42. The committee's position is that member's benefits should not be reduced having regard to the obligation, pursuant to r. 20 (1), to contribute, on an annual basis, such sum as is 'necessary to support and maintain the solvency of the Fund'.*

43. Put differently, as CIÉ has an obligation 'to support and maintain the solvency of the fund', benefit reductions should not be imposed on members simply because CIÉ refuses to honour that obligation.

44. The committee has consistently maintained that CIÉ's obligation 'to support and maintain the solvency of the fund', requires CIÉ to take all necessary steps to bring the scheme into compliance with the SFS. This can be achieved by combination of increased contributions and/or the provisions of a contingent asset rather than reducing benefits.

45. Whilst CIÉ maintains that 'it is unable to fund the Scheme on the basis contended for by the applicants' the issue of CIÉ's ability to meet its statutory obligation is not a matter that falls for determination in this application. Moreover, the rules do not entitle CIÉ to pay only the contributions it states it can afford.

….48. It is clear from the affidavits and the inter-partes correspondence that the parties are deadlocked on the central question; i.e. whether the obligation imposed by r. 20 'to support and maintain the solvency of the fund' is compatible with reductions in member benefits".

46. CIÉ expresses its net position in its written submissions as follows:-

"10. The Scheme imposes contribution obligations on both employer (CIÉ) and employees (active members) under the rules.

11. The issue in these proceedings is the proper construction of the employer contribution rule of the Scheme, although, as explained herein, the employer contribution rule cannot be divorced from the employee (active member) contribution rule, not least because each refers to 'the solvency of the fund'.

12. At this stage, it is useful to note that although the first rules of the Scheme referred, at r. 19 (employee contribution rule) to 'the solvency of the fund', the

concept of a statutory funding standard was only introduced some 40 years later by the Pensions Act (1990) and the funding standard reserve – essentially, a risk reserve or 'buffer' – only came into effect in 2016 (having been provided for by the Social Welfare Pensions Act, 2012).

13. The central error in the applicant's case is to conflate an employer's obligation under the contribution rule with the separate and distinct obligations under part IV of the Pensions Act. The applicants suggest that because the word 'solvency' is used in r. 20 (as, indeed, it is in r. 19 the employee contribution rule), this must import into the Scheme rules (and, by implication, into the rules of any other scheme which uses the word 'solvency') the particular concept of solvency which underpins the funding standard provisions in part IV of the Pensions Act but, curiously, without importing any other requirements of part IV. The applicants also appear to suggest that, despite the clear language of rules 19 and 20, the requirement they allege is imported into the Scheme rules to satisfy the SFO is imposed only in respect of employer contributions and not in respect of employee contributions. CIÉ will show that neither of these suggestions is sustainable."

<u>The questions for the court</u>

47. In the special summons, the applicants seek the determination of the following two questions:-

"(i) Does the obligation imposed on the board, by r. 20 of the 1951 scheme, 'to support and maintain the solvency of the Fund' require, at a minimum, that such contributions satisfy the Statutory Funding Standard."

(ii) Is the obligation imposed on the board by r. 20 of the 1961 scheme 'to support and maintain the solvency of the Fund' compatible with reductions in the benefits of members thereunder in accordance with the recommendation?"

48. The respondent does not consider these questions to be appropriate, and suggests at para. 54 of its points of defence that the following questions would be more appropriate:-

" (i) On its proper construction, does r, 20 of the scheme rules require the respondent to make, in every year, a contribution to the Fund in an amount sufficient to ensure that the Scheme would on receipt on that contribution satisfy *__both__* *the funding standard (as prescribed by s. 44 (1) of the Pensions Act, 1990) and the funding standard reserve (as prescribed by s. 44 (2) of the Pensions Act, 1990)?*

(ii) If the answer to the question at (i) above is 'yes',

(A) Is the respondent thereby prevented from exercising its statutory power under s, 44 (5) of the Transport Act, 1950 to, whenever it thinks proper, prepare and submit to the Minister for Transport an amending superannuation scheme (including an amending scheme that contemplates a reduction of benefits)?

(B) Is the Minister for Transport thereby prevented from exercising his statutory power under s. 44 (4), by reference to the s. 44 (5), to confirm an amending superannuation scheme (including an amending scheme that contemplates a reduction of benefits)?" [Emphasis in original].

__Expert evidence__

49. Expert evidence was provided to the court by Mr Kevin Reynolds on behalf of the applicants, and Mr Liam Quigley on behalf of the respondent. Both witnesses are Fellows of the Society of Actuaries in Ireland, and are extremely experienced and eminent in their field; their expertise and ability to deal with the matters in issue were not challenged by either side.

50. Mr Quigley furnished two reports of 15 November 2021 and 25 February 2022. The latter report was in response to a report by Mr Reynolds of 02 February 2022. In addition, Mr Quigley and Mr Reynolds made a helpful joint memorandum on 24 March 2022, summarising the matters on which they agreed and disagreed. The respondent cross-

examined Mr Reynolds at the hearing; the applicants declined to cross-examine Mr Quigley. The reports of the experts were verified by affidavit and form part of the evidence before the court.

51. The evidence of the experts was particularly helpful in communicating the practical aspects of the basis upon which actuarial valuations are made. Mr Quigley expressed the view that there were three possible bases for measuring "solvency": the "ongoing funding basis", the "statutory funding basis", and the "discontinuance basis". An entity was "generally considered to be solvent on an ongoing funding basis so long as it can meet its long-term benefit and other financial obligations". Mr Quigley was of the view that the concept was "conventionally applied to defined benefit pension schemes through a scheme actuary's assessment of the ongoing financial condition of the scheme in an actuarial valuation" [para. 31 of first report]. Mr Quigley opined that, from an actuarial point of view, the ongoing funding basis was "a reasonable approach on which the board might determine the contributions that the board is required to pay under r.20 to 'support and maintain the solvency of the fund'" [para. 64 first report].

52. Mr Quigley considered whether the SFS could be an appropriate measure of the solvency to be supported and maintained under r.20. After a lengthy analysis, he accepted that it "could be a measure of solvency under r.20", but stated that it was "not an ideal basis and not one that many companies, given a choice, would be likely to make…" [para. 92 first report]. He expressed the view that the "discontinuance funding basis" could also be adopted as a measure of solvency; however, he considered this approach to be "mostly suited to schemes that are likely to actually wind up in the foreseeable future and less suited to circumstances where the scheme is ongoing and likely to remain so" [para. 100 first report].

53. Mr Reynolds, on the other hand, was of the view that "…it is not tenable that solvency, at a minimum, could mean anything less than meeting the [SFS]…" [para. 5.17

report]. He drew attention to the fact that, in its "Financial Management Guidelines for Defined Benefit Schemes (May 2015), the Authority itself had referred to the funding standard as "…a statutory measure of solvency whose purpose is to protect members' benefits. However, it is important to remember that it is a minimum standard only" [para. 5.15 report]. He went on to conclude as follows:

> "5.41. I cannot reconcile an obligation to meet the balance of cost and an assertion that this does not require the employer to pay contributions to meet the Statutory Funding Obligation. I am not aware of any other balance of cost scheme in Ireland where the employer does not accept that meeting the balance of cost means at a minimum paying such contributions that satisfy the Statutory Funding Obligation".

54. While the evidence of the experts was of assistance to the court, and while they examined the questions put to them in exhaustive detail in their reports, the court has to bear in mind that the scheme is created and governed entirely by statutory provisions. Its rules are contained in a statutory instrument, and the scheme is governed by part IV of the 1990 Act. Evidence of actuarial practice was therefore of very limited value to the court. The task of the court, as ever with statutory interpretation, is to discern the intention of the legislature in accordance with well-established principles of interpretation, and the view of experts as to what may be appropriate in actuarial terms in given circumstances is unlikely to be relevant to the court's task. Still less relevant is the view of the experts or the Authority on what the words of the rules or the 1990 Act mean; in fairness, the experts each acknowledged several times, particularly in their joint statement, that certain issues were legal issues on which they could not comment.

Statutory interpretation

55. Both the applicants and the respondent – in particular the latter – made substantial submissions about the principles of statutory interpretation as they applied to the rules of the

scheme. Of course, this is an area of law which has benefitted from a number of recent decisions of the highest authority: *Bookfinders v The Revenue Commissioners* [2020] IESC 60*, Minister for Justice & Equality v. Vilkas* [2020] 1 IR 676, *Dunnes Stores v The Revenue Commissioners [2020] 3 IR 480, The People (Director of Public Prosecutions) v AC* [2022] 2 IR 49*, and, most recently, Heather Hill Management Company CLG v McGoldrick & Ors.* [2022] 2 ILRM 313.

56. There is little point in traversing the legal principles so exhaustively examined by the Supreme Court in these cases. An invaluable synthesis of the relevant principles may be found at paras. 105 to 128 of the judgment of Murray J in *Heather Hill*. In particular, the court at para. 106 of the judgment summarised with approval the "essential points" made by McKechnie J in *Vilkas* as follows: -

> "(i) The first and most important port of call is the words of the statute itself, those words being given their ordinary and natural meaning (at paras. 92 and 93).
>
> (ii) However, those words must be viewed in context; what this means will depend on the statute and the circumstances, but may include *'the immediate context of the sentence within which the words are used; the other subsections of the provision in question; other sections within the relevant Part of the Act; the Act as a whole; any legislative antecedents to the statute/the legislative history of the Act, including ... LRC or other reports; and perhaps ... the mischief which the Act sought to remedy'* (at para. 94).
>
> (iii) In construing those words in that context, the court will be guided by the various canons, maxims, principles and rules of interpretation all of which will assist in elucidating the meaning to be attributed to the language (see para. 92).
>
> (iv) If that exercise in interpreting the words (and this includes interpreting them in the light of that context) yields ambiguity, then the court will seek to discern the

> intended object of the Act and the reasons the statute was enacted (at para. 95) [Italics in original]".

57. There was no substantive argument between the parties as to the approach to be adopted by the court regarding the interpretation of the rules, or indeed the 1990 Act. Both parties cited several cases regarding the interpretation of pension schemes. However, these cases were of little assistance on the issue of interpretation: each of them was very dependent on its own facts, and in any event concerned private pension schemes which were not created by statute.

58. In my view, it is possible to discern the legislative intent in the rules by applying the principles set out above, while being conscious of the cautionary words of the Supreme Court in *Heather Hill*:

> "109…What, in fact, the modern authorities now make clear is that with or without the intervention of [s.5 of the Interpretation Act 2005], in no case can the process of ascertaining the '*legislative intent*' or the '*will of the Oireachtas'* be reduced to the reflexive rehearsal of the literal meaning of words, or the determination of a plain meaning of an individual section viewed in isolation from either the text of a statute as a whole or the context in which, and purpose for which, it was enacted" [Italics in original].

Rules 19 and 20

59. With these principles in mind, the court approaches the construction of rules 19 and 20, the text of which, in as far as relevant, is set out at paras. 19 and 21 above respectively.

60. Rule 19 governs members' contributions, and in particular the ability of the committee to vary the scale of contributions by members "required for the time being to maintain the solvency of the fund" [r.19(3)]. Rule 20 relates to the contributions to be made by CIÉ. The current version of r.20 as set out at para. 21 above was introduced by statutory

instrument in 2000. It must therefore be deemed to have been enacted in the context of the applicable provisions of the 1990 Act, and part IV of that act in particular.

61. The wording of r.20(1) suggests that:

- the contribution by CIÉ must be made annually;
- CIÉ must consult the scheme actuary;
- CIÉ then determines the sum "necessary to support and maintain the solvency of the fund"; and
- CIÉ "shall contribute" the sum thus determined.

62. Rule 20(2) confirms the annual nature of CIÉ's contribution ("…contributions…to the fund in any year…") while giving CIÉ flexibility as to instalments of payment. Rule 20(3):

- affirms the committee's right under s.19 to vary the scale of contributions by members;
- provides that, if CIÉ's contribution under r.20(1) exceeds "3.6 times the contributions payable by the members during that period…", the contributions of both CIÉ and the members must be reviewed.

63. It is not clear from the rules as to how this review should be conducted or what should happen if there is no agreement as to what should happen although, as we shall see, the 1990 Act provides some clarity in this regard.

64. The respondent argues that CIÉ has an "undoubted discretion" under r.20(1) as to the amount of its employer contribution: see para. 25.2 of the respondent's written submissions. The respondent goes on to argue that this discretion is "inconsistent with the notion that r.20(1) incorporates the statutory funding obligation…". In my view, this interpretation, to the extent that it might suggest an unfettered discretion on the part of the board, goes too far. The board must ("shall") contribute to the fund; it must first consult a scheme actuary; but its determination of the sum to be paid must be for the purpose of identifying a sum which is

"necessary to support and maintain the solvency of the fund". The real issue is whether it must make that determination based on the requirements of s.44 of the 1990 Act, *i.e.,* in compliance with the SFS.

65. The respondent also argues that r.20(3) "caps the employer contribution at 3.6 times the contribution obligation of the members". On the wording of the section, this is plainly not the case; the applicants are correct in suggesting that an excess of over 3.6 times the members' contribution triggers a review of the contributions of board and members, which could result in an agreed contribution by CIÉ of over 3.6 times the members' contribution, or result in the imposition of such a contribution by the Authority pursuant to s.50 of the 1990 Act.

66. It does seem to me however that r.19 obliges the committee to consider "at anytime or from time to time" whether a scale of contributions by the members "as the actuary, after an investigation of the Fund, may recommend as being the scale of contributions required for the time being to maintain the solvency of the fund" should be introduced, albeit that no member could be required to contribute "at a higher rate than fifteen per cent of his salary". The scheme does not therefore seem to me to impose on CIÉ the entire burden of supporting and maintaining the solvency of the fund; r.19(3) appears to enable the committee, in the context of a negotiation with the Board, to propose that its members accept some of the burden of ensuring the solvency of the fund, particularly in the context of the "review" envisaged by r.20(3) and an attempt to agree with CIÉ the terms of a funding proposal pursuant to s.49 of the 1990 Act.

Relationship between Rule 20 and the 1990 Act

67. Section 53(1) of the 1990 Act provides that the provisions of part IV of the Act, which includes the SFS, and of any regulations made thereunder "shall override any rule of a scheme to the extent that that rule conflicts with those provisions".

68. Section 42(1) of the 1990 Act requires that the trustees of a scheme "shall from time to time in accordance with s.43, submit to the [Authority] a certificate, in this Act referred to as 'an actuarial funding certificate'". Section 43 governs the effective dates for the submission of such certificates: see para. 23 above.

69. While the interpretation of s.44 of the 1990 Act is solely a matter for the court, Mr Quigley, at paras. 66 to 68 of his first report to the court, helpfully summarised the objective of the funding standard and the funding standard reserve as follows:

> "66. The objective of the Funding Standard (sometimes referred to as the Minimum Funding Standard) is to ensure that, in the event that a defined benefit scheme has to be wound up, the scheme has sufficient funds to:
>
> > (1) Cover the costs of windup; and
> >
> > (2) Secure the pension rights that members who have retired or attained retirement age have built up; and
> >
> > (3) Provide transfer values, determined on a basis prescribed by the Pensions Authority, in respect of other members.
>
> 67. A scheme must hold or have access to assets that are at least equal to the Funding Standard measure of the scheme's liabilities to satisfy that requirement.
>
> 68. The objective of the Funding Standard Reserve, which is a "risk reserve", is to provide a buffer in the scheme's finances which would allow the scheme to satisfy the Funding Standard in the event of the occurrence of a specified adverse market outcome. A scheme most [sic] hold or have access to additional assets, over what is required to satisfy the Funding Standard, which are at least equal to the Funding Standard Reserve to satisfy the funding standard reserve requirement."

70. Mr Quigley goes on to comment on what occurs when an actuarial funding certificate does not satisfy the SFS:

"75. Where a certificate confirms that a scheme does not satisfy either the Funding Standard and/or the Funding Standard Reserve, the trustees are required, under s.49 of the Pensions Act to submit a funding proposal (**'Funding Proposal'**) to the Pensions Authority. A Funding Proposal sets out how a scheme will meet its statutory funding obligation by a future date. It will include all of the intended measures, including proposed rates of contribution, plans for the scheme's investments and any changes to the benefits provided by the scheme".

71. As we have seen, the 2013 proposal sought to address a failure to meet the SFS standard. Mr Reynolds provides the proposal in an appendix to his report. He makes the point in his report that the 2013 proposal was drafted with the objective of meeting the SFS, rather than the ongoing funding basis; he draws attention to the first paragraph in section 3 of the proposal:

"The funding proposal has been designed such that the scheme could reasonably be expected to satisfy the funding standard and funding standard reserve as at 31 December 2023 if the contributions recommended below are paid, the liability containment measures described below are implemented and the assumptions outlined in section 4 are borne out in practice".

72. Although it may be that an actuarial funding certificate only requires to be submitted every three years, there is no suggestion in s.44 or part IV of the Act generally that the requirements of the SFS need only be satisfied at the point at which the certificate issues. It is clear from the terms of s.44, and indeed the nature of the funding standard and the funding reserve, that the legislature intended an applicable scheme to comply with the SFS at all times, so that it could meet its liabilities in the event of being wound up – an eventuality specifically envisaged in s.50B of the Act, which gives the Authority power to direct the trustees to windup the relevant scheme in the event that: -

"(a) the trustees of the scheme fail to submit an actuarial funding certificate within the period specified in s.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 s.49,

(c) the trustees of the scheme failed to submit a funding standard reserve certificate within the period specified in s.43,

(d) 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 s.49, or

(e) the trustees of the scheme have failed to comply with a direction under sub. (1), (1A) or (1B) of s.50 within the period specified in sub. (3)(a)(i) of that section".

73. The applicants contend that CIÉ's obligation to contribute to the fund, after consulting the actuary, "…such sum…as [CIÉ] determines to be necessary to support and maintain the solvency of the fund", includes the obligation to contribute such sum as would be necessary to satisfy the requirements of SFS. They argue that this is a "balance of cost" scheme, *i.e.,* a scheme in which the necessary cost over and above the income generated from employee contributions is discharged by the employer. They say that there is no basis upon which CIÉ can pay less than the full cost – including that necessary to satisfy the SFS – and expect the employees to make up the difference by accepting a diminution of their own rights, such as would occur if the minimum normal retirement age were increased from 60 to 63. The point is made that the employees are not volunteers as regards these benefits; they have been earned by virtue of contributions paid, in most cases over many years.

<u>The operation of the Scheme</u>

74. It seems to me that the structure of the scheme, in conjunction with the Act, is as follows:

- The employees' pay pension contributions is determined by the committee, although those contributions cannot exceed 15% of salary [r.19(3)];
- CIÉ must contribute to the Fund such sum as it determines to be necessary to "support and maintain the solvency of the fund" [r.20(1)];
- the scheme does not envisage that CIÉ is necessarily obliged to pay more than 3.6 times the contributions payable by the members; in such a case, "the contributions by the board and the members shall be reviewed", and sub-rule 20(3) reiterates the committee's right to change the subscriptions of its members to "a scale of contributions required for the time being to maintain the solvency of the fund" [r.19(3)];
- CIÉ and the committee, on such a review, would attempt to agree a funding proposal to be made to the Authority under s.49. Any such agreed proposal – which might include increased contributions for members as well as CIÉ – would be submitted by the trustees to the Authority. The requirements of the funding proposal are set out in s.49(2):

> "(2) A funding proposal shall –
>
> > (a) contain a proposal designed to ensure that, in the opinion of the actuary –
> >
> > > (i) the scheme could reasonably be expected to satisfy the funding standard at the effective date at the next actuarial funding certificate or any later date specified under sub. (3) or (3B) where the funding proposal is submitted before 01 January 2016 and the effective date

of the next actuarial funding certificate or any later date specified under subsection (3) or (3B) is before that date, and

(ii) in any other case, the scheme could reasonably be expected to satisfy the funding standard at the effective date of the next actuarial funding certificate or any later date specified under subsection (3) or (3B) and the funding standard reserve at the effective date of the next funding standard reserve certificate or any later date specified under subsection (3B),

and

(b) comply with regulations made under subsection 2(A),

(c) be certified by the actuary as meeting the requirements of para. (a),

(d) be signed by or on behalf of the employer or by or on behalf of the trustees of the scheme, in each case signifying agreement to the proposal, and

(e) be submitted by the trustees of the scheme with the actuarial funding certificate or funding standard reserve certificate to which it relates."

- In the event that no agreement is possible, the trustees may apply under s.50 to the Authority. That section sets out a range of measures by which the Authority can direct the trustees to take measures to reduce members' benefits under the scheme. Section 50B enables the Authority to direct the winding up of the scheme.

- As we have seen, an amended scheme may also be submitted by CIÉ to the Minister for Transport pursuant to s.44(5) of the Transport Act 1950. This route does not require the consultation and cooperation of the committee, although the Act provides for representations from interested parties once the amended scheme has been published at the direction of the Minister.

Discussion

75. CIÉ has an obligation under r.20(1) of the scheme to "support and maintain the solvency of the fund". The term "solvency" is not defined in the scheme. Both parties made lengthy submissions that what constitutes "solvency", although it was clear that much of the case-law concerning how that word should be understood dealt with specific statutory contexts in which the word appears.

76. In the present case, I accept Mr Quigley's unchallenged summary of the objective of the SFS set out at para. 69 above. However, he suggested in that paragraph that the SFS was "separate to the requirement in a scheme's rules and under s.56 of the Pensions Act to obtain an actuarial valuation of a scheme". This interpretation was endorsed and pressed on the court by counsel for CIÉ at the hearing.

77. Section 56 of the 1990 Act is, in as far as is relevant for present purposes, as follows:

> "(1) The trustees of a scheme or a trust RAC shall –
>
> > (a) cause the accounts of the scheme or trust RAC in respect of such periods as may be prescribed to be audited by the auditor of the scheme or trust RAC,
> >
> > (b) cause the resources and liabilities of the scheme (including the benefits in respect of UK members which the scheme is required to provide under the Occupational Pension Schemes (schemes with external members) (United Kingdom) Regulations 2000) to be valued by the actuary of the scheme at such times as may be prescribed and,

(c) in respect of each such audit and valuation, cause to be prepared the documents to which this section applies.

(2) The documents to which this section applies are -

(a) the accounts of the scheme or trust RAC concerned,

(b) the auditor's report on the accounts specified in paragraph (a), and

(c) the actuary's report on his valuation of the assets and liabilities of the scheme or regulatory owned funds trust RAC".

78. What is being suggested is that, in preparing an actuarial valuation on the assets and liabilities of the scheme, the scheme actuary is entitled to ignore the requirements of s.44, which sets out explicitly the liabilities for which provision must be made to ensure compliance with the funding standard and the funding standard reserve; this is in circumstances in which the rules of the scheme oblige CIÉ to determine the contribution "necessary to support and maintain the solvency of the fund…". Section 44 makes it clear in my view that the liabilities set out in the SFS are real, statutorily-imposed liabilities for which provision must be made in the accounts of the fund, and in the scheme actuary's reports and certificates. The fund is expressly required in s.44 to "provide for" the liabilities set out in that section.

79. It was argued by CIÉ that the funding standard did not exist when the original scheme began, and that the funding standard reserve was introduced in 2016, long after the amendment of r.20(1) in 2000. However, it does not seem to me that this allows CIÉ to ignore the SFS or the fact that it requires funding to be put in place for real, identified liabilities set out in s.44.

80. Rule 20(1) requires CIÉ to determine the contribution "necessary to support and maintain the solvency of the fund". In my view, this requires a determination as to the adequacy of assets to meet liabilities, to include the liabilities for which provision must be

made to satisfy the SFS. It is not, as suggested by CIÉ in argument, a question of choosing between an ongoing funding standard and the SFS; all liabilities must be identified by the scheme actuary and provision made to meet them. If there are liabilities, whether relating to future benefits such as those arising from projected wage increases, which do not come within the terms of the SFS, these must also be taken into account.

81. The determination by CIÉ in accordance with s.20(1) as to the contribution "necessary to support and maintain the solvency of the fund" is made after consultation with the scheme actuary, and will involve ensuring the provision to the fund of sufficient assets to meet, at the very least, all liabilities as and when they fall due; the requirements of s.44 however are mandatory, and as they address the solvency of the scheme, I consider that the fund – and accordingly, the contribution referred to in r.20(1) – must, at a minimum, include assets at all times which satisfy the SFS, in addition to provision for all liabilities not included in the SFS. The fact that s.49(2) – see para. 74 above – requires that any funding proposal must be "designed to ensure" that the SFS is satisfied "at the next actuarial funding certificate"… is consistent with this conclusion.

82. However, s.44 is not directed specifically to the employer of the scheme. Rule 20, as we have seen, explicitly acknowledges that there are two funders of the scheme: the employer and the contributing members. Rule 20(3) provides for a review of their respective contributions if the amount determined by the board as necessary to support and maintain the solvency of the fund exceeds 3.6 times the contributions payable by the members in a specific period.

83. In my view, the obligation in rule 20(1) of CIÉ to contribute to the fund is not absolute; it must be seen in the context of r.20(3), which explicitly refers to the right of the committee to vary members' contributions, and provides for a review in the event that CIÉ determines that a contribution of over 3.6 times the members' contributions is required to

"support and maintain the solvency of the fund". It seems to me clear from the wording of rules 19 and 20 that, in attempting to agree a funding proposal, both contributors – CIÉ and the members – are expected to contribute and to "support and maintain the solvency of the fund". In the case of the members, this may mean increased contributions and/or reduced benefits.

84. I do not consider that these provisions are in conflict with Part IV of the 1990 Act. At a certain point, when the employer determines that the appropriate contribution exceeds 3.6 times the members' contribution, the parties must confer with a view to a negotiated solution, which should involve – according to the scheme of the Act – a funding proposal by the trustees to the Authority pursuant to s.49. This is what occurred in 2013, albeit unsuccessfully. It may be that an industrial relations process must be initiated, such as in the present case. If a negotiated solution cannot be found, it may be necessary for s.50 to be invoked, so that measures may be imposed by the Authority in respect of the scheme, although one would hope that would not be necessary.

Answers to the questions posed

85. The questions posed by the applicants and respondent are set out at paras. 47 to 48 above. For ease of reference, they are reproduced below, together with the court's responses.

The applicants' questions:

Question: (I) Does the obligation imposed on the board, by rule 20 of the 1951 scheme, "to support and maintain the solvency of the fund" require, at a minimum, that such contributions satisfy the Statutory Funding Standard"?

Answer: Yes, save that, in the event that CIÉ's contributions in any period exceed 3.6 times the contributions payable by members in that period, a review of the contributions payable by CIÉ and the members must take place: see paras. 82 to 84 above.

Question: (II) Is the obligation imposed on the board by rule 20 of the 1951 scheme "to support and maintain the solvency of the fund" compatible with reductions in the benefits of members thereunder in accordance with the recommendation?"

Answer: The rules of the scheme specifically envisage that the committee may provide that the contributions of all members of the scheme "…shall…be regulated by such other scale as the actuary, after an investigation of the fund, may recognise as being the scale of contributions required for the time being to maintain the solvency of the fund" [rule 19(3)]. This "right to vary the contributions payable by the members under rule 19" is reiterated in rule 20(3). In this context, the obligation in rule 20(1) on CIÉ to "contribute such sum as the board after consulting the actuary determines to be necessary to support and maintain the solvency of the fund" cannot be considered to be absolute, or as precluding an increased contribution by the members, or a reduction in benefits.

<u>The respondent's questions</u>

Question: (I) "On its proper construction, does rule 20 of the scheme rules require the respondent to make, in every year, a contribution to the fund in an amount sufficient to ensure that the scheme would on receipt of that contribution satisfy <u>both</u> the funding standard (as prescribed by s.44(1) of the Pensions Act, 1990 and the funding standard reserve (as prescribed by s.44(2) of the Pensions Act, 1990)"?

Answer: The scheme must satisfy the SFS. This means that the resources of the scheme are sufficient to provide for the liabilities set out at s.44(1)(a), and the additional resources of the scheme are consistent with the requirements, as regards the funding standard reserve, of section 44(2). Section 44 of the 1990 Act does not prescribe a specific time at which contributions must be made to ensure compliance with the section. However, the liabilities set out in the section must in the court's view be taken into account as liabilities for which provision must be made when the board is determining, in accordance with rule 20(1), the

contribution “necessary to support and maintain the solvency of the fund”. The respondent’s contribution is however subject to review under r.20(3) where the contributions determined by the Board in accordance with that sub-rule will in any period exceed 3.6 times the contributions payable by the members during that period.

Question: (II) If the answer to the question at (I) above is “yes”,

(a) Is the respondent thereby prevented from exercising its statutory power under section 44(5) of the Transport Act, 1950 to, whenever it thinks proper, prepare and submit to the Minister for Transport an amending superannuation scheme (including an amending scheme that contemplates a reduction of benefits)?

(b) Is the Minister for Transport thereby prevented from exercising his statutory power under section 44(4), by reference to section 44(5), to confirm an amending superannuation scheme (including an amending scheme that contemplates a reduction of benefits)?

Answer: The relationship, if any, between s.44(5), of the 1950 Act and part IV of the 1990 Act is not clear, and indeed, was not the subject of any sustained commentary or argument by the parties. The detailed provisions of part IV and the 1990 Act generally do not appear to preclude an application to amend the scheme under the 1950 Act. The 1990 Act contains very explicit and tailored provisions where an amendment to a scheme may be necessary; the Authority is of course an entity which has specialist expertise in the area of pensions. On the other hand, section 44 of the 1950 Act is cast in very general terms, and the submission of an amended scheme is to the Minister for Transport. However, as the 1990 Act does not appear to supercede or render obsolete the relevant provisions of the 1950 Act, it seems to me that any issues arising in relation to CIÉ’s submission to the Minister under section 44(5) are not before the court and are for another day.

Orders

86. The parties may wish to consider what orders should be made on foot of this judgment. I propose to list the matter for mention on the 3rd of May 2024 for mention. I would urge the parties to agree appropriate orders in advance of that date. In the absence of agreement, I shall list the matter for a short hearing to deal with the question of orders, and in particular the costs of the proceedings.