



Pensions Update - Vodafone Ireland Ltd v Kavanagh & Ors 2022/215 SP

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Ireland

The recent Commercial Court case of *Vodafone Ireland Ltd v Kavanagh & Ors* provides a very valuable summary of the principles applicable to the interpretation of pension deeds.

The applicant, Vodafone Ireland Ltd, requested the Commercial Court to determine the correct interpretation of certain provisions of the Vodafone Ireland Pension Plan (“VIPP”) governing entitlement to post-retirement pension increases. Conflicting interpretations were advanced by the employer and the scheme trustees/members as to the meaning and effect of the provisions.

If the correct interpretation was that the scheme provided for guaranteed increases, those increases would have to be included in statutory minimum funding standard calculations, resulting in a cost of approximately €64m to Vodafone.

Background

The VIPP is a defined benefit scheme, containing four schedules relating to different cohorts of members. The case concerned Schedule C members, who were originally civil servants employed by the Department of Posts and Telegraphs (“P&T”). P&T employees

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transferred to Telecom Éireann in 1983 when Telecom Éireann was formed as a state company. Telecom Éireann was required by the Postal and Telecommunications Services Act 1983 (the “**1983 Act**”) to preserve the terms and conditions of employment of the employees transferred to it from P&T, including with respect to pensions.

Telecom Éireann was then privatised in 1999 becoming Eircom. Prior to that privatisation, S46(4) of the 1983 Act was substituted by section 5 of the Postal and Telecommunications Services (Amendment) Act 1999 (the “**1999 Act**”) which provided, inter alia, as follows: “*Every scheme for the granting of pensions, gratuities and other allowances on retirement or death... shall provide for not less favourable conditions in respect of those persons than those to which they were entitled immediately before the vesting day*”. Eircom became the principal employer of the Eircell pension scheme.

In 2001, Eircell demerged from Eircom and was sold to Vodafone. The Eircom employees who had been seconded to Eircell at that time had their employment transferred to Vodafone and became members of the VIPP. The transfer of the former Eircom employees was the subject of an agreement between Eircom and the relevant trade unions in relation to transferring employees (the “**Terms and Conditions Agreement**”). The Terms and Conditions Agreement provided that “*Current pension entitlements for the various staffs affected by this acquisition will be maintained on no less favourable terms.*”

Interpretation

The Court was tasked with interpreting Rule 10 of Schedule III of the Trust Deed and Rules dated 15 December 2005 (The “**2005 Deed**”). In doing so, the Court considered the law applying to contractual interpretation. Rule 10 of the 2005 Deed provides that “*All Pensions under this Scheme C will increase in no less favourable a Manner than had the Member remained as a Member of the Eircom Scheme and will increase in line with the percentage increase in the relevant grade for that Member*”. Prior to its amendment in 2005, the wording of Rule 10 of the VIPP had provided that the Company “*may*” grant increases to Scheme C members.

Vodafone’s interpretation was that any pension increases that were to be granted to Scheme C members were within their discretion and required Vodafone’s consent. Vodafone argued that the reference to the Eircom Scheme reflected an intention that increases would be discretionary in nature (in line with the Eircom Scheme) and that the 2005 Deed was an exercise in consolidation which was not intended to introduce any changes to the nature of pension increases provided.

The trustees argued that the wording of the Rule clearly provided for guaranteed increases for Scheme C members.

The Court cited *Law Society of Ireland v Motor Insurers Bureau of Ireland*¹ as the leading authority on contractual interpretation. That judgement set out that the meaning of a relevant provision of an agreement must “*be determined from a consideration of the Agreement as a whole*”. It was confirmed that in utilising the “*text in context*” approach “*the Court must consider not just the words used, but also the specific context, the broader context, the background law, any prior agreements, the other terms of this Agreement, other provisions drafted at the same time and forming part of the same transaction, and what might be described as the logic, commercial or otherwise, of the agreement. [...]*”. Therefore, Rule 10 should not be read without giving consideration to the surrounding context.

*Irish Pensions Trust v Central Remedial Clinic*² was also cited. That case endorsed the UK approach to the construction of pension trusts described by Millett J in *Re Courage Pension Schemes*³ as follows: “*There are no special rules of construction which apply to Pension Scheme Documents. Nevertheless, where possible they should be construed so as to give reasonable and practical effect to the Pension Scheme. The construction should be practical and purposive rather than detached and literal. In construing the documents, the court should take into account the factual background and surrounding circumstances (i.e. “the factual matrix”)*”.

The Court noted that the 2005 deed was drafted by specialists and designed to operate in the longer term. Justice Roberts confirmed that he must consider the plain meaning of the words used while keeping in mind the relevant context. The context in this case included

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the general employment history of Scheme C members moving from the civil service to Vodafone (private sector); the legislative provisions enacted in relation to that employment transfer; the manner in which the VIPP was operating at the time and any stated reasons or objectives for introducing the 2005 Deed. Notably, admissible context as an aid to interpretation in this case was not found to include correspondence or positions taken by parties after the fact whether to indicate their subjective understanding of the 2005 Deed or otherwise. Neither was expert evidence of complex pensions law which was not available to the parties at the time.

Findings

Contrary to Vodafone's arguments, the Court found that Rule 10 of the 2005 Deed did not require that the same or identical increases be provided to Scheme C members as they had enjoyed in the Eircom scheme. Instead, it merely required that their pensions increase in no less favourable a manner than under the Eircom Scheme and the provisions could be different as long as they were not less favourable. Justice Roberts held that the 2005 Deed contained substantive changes which could not be explained merely by consolidation.

On its terms as drafted, the 2005 Deed provided Scheme C members with a guaranteed entitlement to pension increases on a pay parity basis. The Court found that Vodafone's interpretation would leave Scheme C members worse off than Scheme A and B members. This outcome would appear to conflict with the provisions of the 1983 Act and the 1999 Act which were introduced for the very purpose of recognising the need to protect the Scheme C members' pension status as former civil servants.

Comparator Issue

The 2005 Deed referenced increases in line with the percentage increase in the "relevant grade for that Member". With abolition of grades, Vodafone argued that there was no longer a direct comparator. However, the trustees proposed a number of possible comparators. The Court directed that the appropriate comparator for the purposes of Rule 10 of the 2005 deed is the average percentage salary increase across general Vodafone staff.

Conclusion and Commentary

This case confirms that there is a high bar when seeking to imply words into a trust deed. Trust documentation needs to be carefully drafted and reviewed to ensure that it reflects the agreed intentions of the parties.

Vodafone also sought an order for rectification. This was left over for consideration pending the outcome of this interpretation issue. An order for rectification of the relevant wording would seek to reinstate language contained in the earlier Deed.

Sources:

1. Law Society of Ireland v Motor Insurers Bureau of Ireland [2017] IESC 31.
2. Irish Pensions Trust v Central Remedial Clinic [2006] 2 IR 126.

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3. *Re Courage Pension Schemes* [1987] 1 WLR 495.

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EVERSHEDS
SUTHERLAND



Peter Fahy
Partner
Dublin, Ireland



David McKeating
Partner
Dublin, Ireland



EVERSHEDS
SUTHERLAND



Jane McKeever
Of Counsel
Dublin, Ireland



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