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Judgment: approved by the Court for handing down | *Delivered:* **27/08/2014**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

_____

2009 No. 22838

UNITED DAIRY FARMERS LIMITED

Plaintiff;

-And-

THE DEPARTMENT OF AGRICULTURE AND RURAL DEVELOPMENT
AND
THE NORTHERN IRELAND LOCAL GOVERNMENT OFFICERS SUPERANNUATION COMMITTEE

Defendants.

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MR JUSTICE DEENY

[1] United Dairy Farmers Limited ("UDF") is a co-operative society registered under the Industrial Provident Societies Act (Northern Ireland) 1969 and 1976. According to the principal affidavit lodged in support of its originating summons it is owned by 2,000 member farmers with a wide range of activities in the agricultural field with particular reference to dairy cattle. It is the successor body to the Milk Marketing Board for Northern Ireland ("MMB").

[2] The first defendant is the department of government formerly known as the Department for Agriculture and now also responsible for Rural Development in Northern Ireland ("DARD"). The residuary liabilities of the Milk Marketing Board (MMB), following the dissolution of that Board in August 2004, devolved unto DARD.

[3] The second defendant ("NILGOSC") asked to be joined to the proceedings as a concerned but neutral party. It is responsible for the administration of the

Northern Ireland Local Government Pension Scheme the operation of which and the liabilities arising therefrom are central to these proceedings.

[4] In 2009 the plaintiff issued and served an originating summons seeking certain reliefs. The originating summons was amended on 20 March 2013 leaving a single issue for the consideration of the court. This reads as follows:

> "A determination of which of the Plaintiff and First Defendant, on the true construction of the Milk Marketing Board for Northern Ireland's Scheme of Reorganisation … is liable under the Local Government Pensions Scheme (Administration) Regulations (Northern Ireland) Regulations 2009 [sic] to pay the contributions to the Scheme required to fund the pension and other benefits of, and other Scheme liabilities relating to, the former employees of the Milk Marketing Board of Northern Ireland whose contracts of employments were not transferred to the plaintiff on 1 March 1995 pursuant to Clause 5A(2) of the Scheme of Reorganisation and who were deferred members of pensioners under the Scheme as at that date."

[5] The matter arises in this way. MMB was established by the Government of Northern Ireland in 1955 to administer the Milk Marketing Scheme in Northern Ireland. It purchased all the milk produced by farmers in Northern Ireland and resold that to the public. It was also active through its commercial arm, Dromona Quality Foods, in producing milk products.

[6] Shortly after its establishment MMB became a designated body pursuant to Section 8(1) of the Local Government (Superannuation) Act 1950. As a result of that its employees participated in the NILGOSC Pensions Scheme and enjoyed the benefits of that final salary pension scheme. In return MMB were obliged to make the necessary contributions to finance those pensions.

[7] In the early 1990s government concluded that there was a need to restructure the milk marketing system. Lengthy consideration was given to this which concluded with the enactment of the Agriculture (Northern Ireland) Order 1993 ("the 1993 Order"), which came into force on 27 October of that year.

[8] Article 4 of that order revoked the most recent version of the Milk Marketing Scheme in 1989 with effect from 1 April 1995. It fell to MMB to prepare a Scheme of Reorganisation for the approval of the Department of Agriculture, as it then was, pursuant to Article 5 of the 1993 Order. The issue that has now arisen is whether, pursuant to the 1993 Order and the Scheme of Reorganisation, liability under the Scheme with regard to any former employees of MMB falls entirely upon the

plaintiff, which became the successor body to MMB or, whether, as the plaintiff contends, it is only liable for the pensions of those employees of MMB who transferred to UDF on 1 March 1995.

[9] There are in effect four categories of persons with relevance to the receipt of pensions. They are as follows:

A. Former employees of MMB who transferred to UDF. As I have just said UDF accepts responsibility for them. By virtue of the Local Government (Superannuation) (Milk Marketing Board for Northern Ireland) Regulations (Northern Ireland) 1997, which came into operation on 28 April 1997 UDF was deemed to be an admitted employer of the NILGOSC Scheme (which it would not otherwise have been) but only for its employees, and the employee of any wholly owned subsidiary thereof "who, immediately prior to 1 March 1995, was an admitted employee" i.e. worked for MMB and was thus in the NILGOSC Scheme.

B. Deferred members i.e. those who had been employed by the Milk Marketing Board prior to 1 March 1995, had left its employment prior to that date but had not yet reached pensionable age at that time and were not therefore in receipt of pension benefits but had a legal entitlement to the same on reaching pensionable age.

C. Pensioner members i.e. those who had been employees of MMB and who had reached retirement age by 1 March 1995 and were already in receipt of pension benefits from the Scheme. Those pensioners who are still alive will still be entitled to such benefits as will be those deferred members who have since reached pensionable age.

D. Those employees of UDF or any subsidiary of it who only commenced employment after 1 March 1995 and were never employed by MMB have entirely separate pension arrangements and are not relevant to this issue. They do not enjoy the benefits under NILGOSC Scheme.

[10] The task of the court therefore is to interpret the 1993 Order and the Scheme to ascertain whether the liability for the deferred and pensioner members of NILGOSC remained with MMB and thus, since its dissolution with DARD or whether, as the first defendant submits, it was one of the liabilities which passed to UDF. In addressing this task the court has had the assistance of learned and helpful argument from Mr Frank O'Donoghue QC, with whom Mr David Dunlop, on behalf of the plaintiff; Dr Tony McGleenan QC, with whom Mr Adrian Colmer, on behalf of DARD and Mr Keith Bryant QC on behalf of NILGOSC. These submissions, written and oral, have been taken into account even if not expressly referred to in this judgment.

[11] Counsel are agreed that the correct legal approach to the task before the court is found in the judgment of Lord Bingham in Regina (Quintavalle) v Secretary of State for Health [2003] 2 AC 687, a case relating to the licensing of the creation of live human embryos pursuant to the Human Fertilisation and Embryology Act 1990. Lord Bingham, delivering the principal judgment of the House of Lords, described the approach to interpretation at paragraphs [6] to [10] of which the following three paragraphs are most relevant:

> "6. By the end of the hearing it appeared that the parties were divided less on the principles governing interpretation than on their application to the present case. Since, however, the Court of Appeal were said to have erred in their approach to construction, it is necessary to address this aspect, if relatively briefly.
>
> 7. Such is the skill of parliamentary draftsmen that most statutory enactments are expressed in language which is clear and unambiguous and gives rise to no serious controversy. But these are not the provisions which reach the courts, or at any rate the appellate courts. Where parties expend substantial resources arguing about the effect of a statutory provision it is usually because the provision is, or is said to be, capable of bearing two or more different meanings, or to be of doubtful application to the particular case which has now arisen, perhaps because the statutory language is said to be inapt to apply to it, sometimes because the situation which has arisen is one which the draftsman could not have foreseen and for which he has accordingly made no express provision.
>
> 8. The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it

> enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

The plaintiff's case

[12] In the Agriculture (NI) Order 1993 the Milk Marketing Board for Northern Ireland is referred to as the Board. Articles 4 and 5 contemplate the transfer of the property rights or liabilities of the Board to the successor body, which proved to be the plaintiff. But Article 13 contemplates some liabilities being retained by the Board after the transfer under Article 14.

[13] Article 14(3) reads as follows:

> "For the purposes of (1) (a), a transfer is a qualifying transfer if it is –
>
> (a) a transfer of property, rights or liabilities of –
>
> (i) The Board; or
>
> (ii) The subsidiary of the Board, to a body which is a qualifying body …"

[14] By Article 14(4) the qualifying body could be a society registered under the Industrial and Providence Societies Act which had not previously traded which, it is submitted, the plaintiff is.

[15] Mr O'Donoghue relies on Article 16 to the effect that the Board shall not be deemed to be dissolved by reason of the revocation of the 1980 Scheme. He relied on Article 16 as supportive of his argument. It reads:

> "The Board shall not be deemed to be dissolved by reason of the revocation of the 1989 Scheme by Article 4(1) and so much of that Scheme as relates to the winding up of the Board shall (subject to any provision of Regulations under Article 17(2)) continuing forth notwithstanding the revocation. The

> statutory requirements of the Scheme of Reorganisation were set out in Schedule 1 to the 1993 Order."

Paragraph 4 thereof, under the rubric "Disposition of Property, Rights and Liabilities" reads as follows as far as relevant:

> "4-(1) The Scheme must specify, in relation to the property, rights and liabilities of the Board on the vesting day –
>
> (a) Which are to be transferred; and
>
> (b) Which are to be retained by the Board."

Paragraph 5 was to like effect as to the transfer of property rights and liabilities before the vesting day.

[16] Mr O'Donoghue then passes to the Scheme itself as exhibited to the affidavit of Mr McAleese, the plaintiff's group financial director. Counsel points out that at paragraph 2 of the objectives it says "the transfer on March 1995 of certain of the property rights and liabilities of the Board to United". "Certain of" implies that not all liabilities are to be transferred to his client but that some will remain with the Board although that must be seen in the context of the succeeding paragraphs. One of these is (5):

> "The retention after 1 March 1995 by the Board of its remaining property, rights and liabilities not being transferred or otherwise disposed of under this Scheme and that performance by it of certain residual functions, including the discharge of its estimated liabilities and winding up of its affairs."
> (My underlining).

Pausing there one might think that that language pointed against the Board being left with a liability which would last until the last of its former employees then in NILGOSC died. That would not fit easily with the language of "residual functions" and "winding up" although the latter is merely included in the former. Indeed although I do not see express reference to it the pension liabilities almost certainly extended to some of the dependants of such pensioners or deferred members extending even further into the future.

[17] I pause to mention paragraph 3(2) of the Scheme under the rubric Methods of Achieving Objectives. It reads as follows:

> "To enable United and DQF to commence their operations on vesting day the Scheme transfers to them the relevant property rights and liabilities of the Board as defined in the Scheme.
>
> (4)A After vesting day, the Board will perform certain residual functions identified in the Scheme, including the collection of sums due from dairy companies, the payment of the milk price due to producers in respect of the Board's trading activities prior to vesting day, the conduct (including settlement) of all litigation to which the Board is a party as detailed in Schedule 7 and the winding up of its affairs. Once the winding up of the Board is completed, it will be dissolved."

[18] I observe that this language is certainly unhelpful to the plaintiff with its emphasis on residual functions of a particular character necessary for a public body of this kind prior to being wound up. It is inconsistent with the idea that the Board, and any public body taking on its liabilities after its dissolution, would have this very substantial and open ended liability for the pensions of a person who had worked for it.

[19] Mr O'Donoghue preferred to lay stress on paragraph 4(3) of the Scheme which reads as follows:

> "(3)A All the property, rights and liabilities of the Board will transfer to United and its processing subsidiary DQF with certain specified exceptions being either bulk tax transferred to registered producers or certain property rights and liabilities being retained by the Board."

But even that can be seen to be very much a two-edged sword. The opening word "All … liabilities" transferring to United clearly envisages what the first defendant contends for with the exceptions being akin to those mentioned in paragraph 3(4). I also note paragraph 4(5) to this effect:

> "The residuary Board will retain £1.1m from the assets of the Board by way of provision for the expenses in carrying out of its residual functions and the expenses of winding up."

Why retain this relatively modest sum if in fact the Board was accepting a much larger liability? Part of counsel's answer to that is that at the time the Pensions Scheme was perceived to be fully funded. This is before Parliament in 1997 altered

the rights of pension schemes in relation to dividends in a way that contributed significantly to a downward revaluation of their assets in comparison to their liabilities, which in any event increased with increased longevity of life in the population.

[20] Counsel for the plaintiff properly drew the court's attention to important provisions at paragraph 5A (2) of the Scheme. For these purposes this reads as follows:

> "All the property rights and liabilities of the Milk Marketing Division of the Milk Marketing Board as included in the accounting records of the Board as at 28 February 1995 (save the bulk tax referred to at 1 above) and including without prejudice to the generality thereof
>
> (i) …
>
> (ii) …
>
> (iii) …
>
> (iv) all rights powers, duties and liabilities under or in connection with contracts of employment and occupational pension schemes relating thereto.
>
> … will transfer to UDF on vesting day pursuant to Article 14 of the [1993] Order excepting or excluding the following assets and liabilities which will be retained by the MMB pursuant to its residual functions under the order."

[21] Dealing firstly with the beginning of that sub-paragraph (1) again one finds the words "All … liabilities" of the Board but Mr O'Donoghue lays stress on the need for those to be in accounting records of the Board as at 28 February 1995 and he contends that that is not true of the pension liabilities. I shall return to this. Furthermore as to (iv) although the word all appears he lays stress on the fact that the reference to occupational pension schemes is relating to contracts of employment i.e. he says the contracts of employment of the continuing employees of the plaintiff which he accepts the plaintiff retains liability for.

[22] With reference to 5B we find that it is provided that:

> "A. Any right, asset or liability (actual or contingent) of the Board which:

(a) Is excluded or excepted under the United transfer at paragraph A (2) above;

OR

(b) Is not expressly transferred under any other provision of this Scheme … shall remain with the Board."

Mr O'Donoghue argues, as he has to, that this is in ease of him because the pension liabilities of the employees not transferring to the plaintiff but already members of NILGOSC have not been expressly transferred but to substantiate that he has to rely on his interpretation of the whole document and 5A (2) in particular.

[23] 5J is not in dispute. "All employees of MMB who are members of the NILGOSC Pension Scheme at vesting days will continue within NILGOSC".

Accounting records

[24] Part of the plaintiff's case is that the pension schemes are not included in the accounting records of the Board. I find that is not a correct submission. If one turns to the accounting records as at 28 February 1995 exhibited to the affidavit of Mr McAleese one finds at page 40 thereof the following: "Accounts of the Board. Accounting policies at 28 February 1995 (continued). Pensions. The Board participates in a defined benefits scheme. Contributions are charged on a systematic basis so as to spread the costs of pensions over employees working lives. Any excess or deficiency, identified in the actuarial valuation of the value of assets over the value of liabilities is amortised over the expected remaining working lives of employees."

[25] Although this paragraph does not descend to actual sums of monies it seems to me an acknowledgment of liabilities in the accounting records consistent with paragraph 5A (2) of the Scheme.

[26] Furthermore, in the notes to the same accounts at page 58 one finds a lengthy paragraph, 28, headed Pension Commitments. For the avoidance of doubt I shall set this out.

> "The Board participates in … the NILGOSC scheme for the majority of its employees. This Scheme is a 'multiple employer' pension scheme with some 45,000 members. It provides members of participating employers with benefits related to pay and service at rates which are defined under statutory regulations. To finance these benefits, assets are accumulated in

> the scheme and/or held separately from the assets of the employers.
>
> Participating employers pay contribution at rates recommended by the scheme's professionally qualified actuaries, based on regular actuarial reviews of the financial position of the scheme. The total contributions paid by the Board for the period were £145,498 (1994 - £161,996). These contributions were based on an actuarial value made as at 31 March 1992.
>
> The market value of the scheme's assets at 31 March 1992 was £920,300,000. By using the projected unit method of actuarial valuation the actuarial value of the scheme's assets at the valuation date represented 127% of the value of benefits that had accrued to the scheme's pensioners, deferred pensioners and members based on past service, allowing for assumed future pay and pension increases. This excess is reflected in lower Board costs from 1 April 1993 and could continue for approximately ten more years. The main assumptions used in this valuation were that the rate of return in investments exceeded the rate of general increase in salaries by 2½% per annum and that the rate of increase in pensions in payment was 5½% per annum."

It seems to me clear from this paragraph 28 that the Milk Marketing Board had properly set out in its accounts references to its on-going liabilities not only to its employees but to its pensioners and 'deferred pensioners'. Contrary, therefore, to the plaintiff's argument there is express reference in the accounting records to the pension schemes and it clearly was the intention, one might think, from this to expressly transfer those liabilities to the plaintiff as the successor body.

In the light of these two passages I find that pensions were included in the accounting records.

The defendants' case

[27] The first defendant adopted a number of the points which had already arisen ex arguendo. Dr McGleenan QC submitted, justifiably, that Article 16 of the 1993 order was supportive of his submission as showing that the continuance of the Board was for the purposes of winding up any remaining rights and liabilities before being dissolved. As indicated briefly above he pointed out that under Schedule 1 paragraphs 4, 5 and 6 the Scheme must specify what liabilities are to be transferred and, per 4(1)(b), which are to be retained by the Board. Contrary to the

plaintiff's interpretation there is no such specification of the retention by the Board of the pension liability. On the defendant's interpretation of the Scheme, and particularly 5A (2), there is indeed an express transfer of that liability to the plaintiff.

[28] Counsel also pointed out paragraph 10 of Schedule 1 which reads as follows:

> "10. Where the Scheme provides for the Board to retain any property or rights after the vesting day, it must make provision for any surplus assets of the Board remaining on the winding up of its affairs to be distributed to the persons who, under the Scheme are entitled to participate in the distribute of assets of the Board by virtue of there being, or having been registered producers."

He says that it is inconsistent with the sort of open ended liability which the plaintiff contends for on the Board or DARD in succession to it. He also relies on paragraph 16 of the Schedule.

[29] With regard to the Scheme itself I have dealt with most of the paragraphs therein. In addition to the points which I have made he points out that even if the pensions were not excluded in the accounting records, as I find they are, there is a disjunctive "and" in the opening of 5A(2) which allows the transfer of liabilities under Occupational Pensions Schemes to be freestanding. The phrase 'contracts of employment' in (iv) is not qualified by the adjective "present" or "continuing". The deferred pensioners and the actual pensioners, with whom we are concerned are enjoying or will enjoy those pensions on foot of their former contracts of employment with the Board, even if they are no longer employed.

Conclusion

[30] As will be apparent by now, in my view the proper reading of the 1993 Order and the Scheme of Re-organisation made under it expressly transferred to the plaintiff these responsibilities, not only for the continuing employees of MMB who continued to be employed by UDF but also for the deferred members and pensioners of MMB. That is the correct interpretation of the meaning of the texts as a whole. It is also consistent with the purpose of the legislation and of the Scheme. The outcome sought by the plaintiff would be a paradoxical one which was unlikely to have been contemplated either by the then legislative body or by those framing the Scheme. The intention is clearly to transfer the liabilities under the occupational pension scheme i.e. NILGOSC to the plaintiff.

[31] There was considerable discussion in the course of the four days of hearing which ultimately this case took, owing to necessary adjournments, about the exchange of correspondence leading up to the Order and indeed after it. It is not

necessary for me in this case to rely on that correspondence but my view of it would be as supportive of the first defendant's case.

[32] At one point in Mr O'Donoghue's opening of the Local Government (Superannuation) (Milk Marketing Board for Northern Ireland) Regulations (NI) 1997 I was concerned with the proposition that an implication in those Regulations was to the effect that the liabilities for the deferred members and pensioners had remained with the Board and had not transferred to UDF. Having heard further submissions from counsel I am satisfied that that is not the case. The purpose of these Regulations was to ensure that those employees of MMB who continued in the employment of UDF after 1 March 1995 were not ejected from the NILGOSC Scheme. Here, it must be admitted, the correspondence is of relevance because it indicates that NILGOSC would not have been happy to take UDF, which it regarded as a private body, as a member of the NILGOSC Scheme which, is designed for the public sector. It was therefore necessary to have a statutory provision expressly providing that those employees who were, "immediately prior to 1 March 1995" members of the Scheme could remain members of the Scheme. Inter alia, this gave effect to 5J of the Scheme. As I indicated above those who became employees of UDF at a later date are not able to benefit from that provision. I therefore conclude, on foot of the submissions of counsel, including the reference to the explanatory note of the Regulations, that that does not assist the plaintiff.

[33] I find therefore that the plaintiff is liable under the Local Government Pension Scheme (Administration) Regulations (NI) 2009 to pay the contributions to the Scheme required to fund the pension and other benefits of and other Scheme liabilities relating to, the former employees of the Milk Marketing Board of Northern Ireland whose contracts of employment did not transfer to the plaintiff on 1 March 1995 and who were deferred members or pensioners under the Scheme at that date. This is in addition to the plaintiff's admitted responsibility for those who remained their employees having been members of NILGOSC immediately prior to 1 March 1995.