THE HIGH COURT

COMMERCIAL

[2024] IEHC 280

2022 No. 215 SP

(2022 No. 109 COM)

PROCEDURE BY SPECIAL SUMMONS UNDER ORDER 3, RULE 6 AND ORDER 54, RULE 1 OF THE RULES OF THE SUPERIOR COURTS 1986 (AS AMENDED)

AND IN THE MATTER OF A TRUST DEED AND RULES OF THE VODAFONE IRELAND PENSION PLAN DATED 15 DECEMBER 2005 AND MADE BETWEEN VODAFONE IRELAND LIMITED OF THE ONE PART AND CELINE FITZGERALD, JAN MOTTRAM, JOSEPH MAHER, SARAH CALLERY AND EAMON FARRELL OF THE OTHER PART

AND IN THE MATTER OF A DEED OF AMENDMENT OF THE VODAFONE IRELAND PENSION PLAN DATED 5 APRIL 2012 AND MADE BETWEEN VODAFONE IRELAND LIMITED OF THE ONE PART AND JOSEPH MAHER, EAMON FARRELL, MIKE O'CONNOR, JOHN KEANEY, COLM LYONS AND PAUL RYAN OF THE OTHER PART

BETWEEN

VODAFONE IRELAND LIMITED

PLAINTIFF

-AND-

EAMON FARRELL, MIKE O'CONNOR, JOHN KEANEY, KATIE CRAIG,

MICHAEL FARRELL, DAVID HARNEY AND IRISH PENSIONS TRUST LIMITED

BEING THE TRUSTEES OF THE VODAFONE IRELAND PENSION PLAN

FIRST NAMED DEFENDANTS

AND (BY ORDER OF THE HIGH COURT MADE ON 13 FEBRUARY 2023)

GERARD FAHY

SECOND NAMED DEFENDANT

JUDGMENT of Ms. Justice Eileen Roberts delivered on 14 May 2024

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Introduction

1. In this case the court is asked, pursuant to its inherent jurisdiction and under Order 54, Rule 1 of the Rules of the Superior Courts (as amended), to interpret certain provisions of a pension scheme deed regarding the entitlement of certain members of that scheme to post-retirement increases in their pensions. Conflicting interpretations are advanced by the employer on the one hand and by the scheme trustees/ members on the other as to the proper meaning and effect of those provisions.

2. The proceedings commenced by way of Special Summons on 25 November 2022. A considerable amount of materials and affidavits (including from experts) has been put before the court to advance each side's interpretation and to provide relevant "context" to the court of the circumstances surrounding the deed. Much of the legal argument at the hearing concerned the relevance and admissibility of those materials to the question of interpretation. Certain deponents were cross-examined on their affidavits, the parties having previously secured orders to permit such cross-examination.

3. The proceedings seek in the alternative a declaration that the plaintiff is entitled to an order for rectification of the relevant wording to reinstate language contained in an earlier deed. However, this relief (which would require full pleadings and oral evidence) was not advanced at the hearing before this court and has been left over for further consideration pending the decision of this court on the interpretation questions raised.

4. It is worth noting at this point that issues of misrepresentation, estoppel or legitimate expectation are also not before this court for determination, although material potentially

relevant to such claims formed a considerable part of the exhibited documentation and the expert reports.

The parties and the directions sought.

5. The pension deed at issue in these proceedings is the Vodafone Ireland Pension Plan (the "**VIPP**"), which was formerly the pension scheme of Eircell Limited ("**Eircell**"). The plaintiff ("**Vodafone**") is the principal employer under the VIPP (having taken on this role from Eircell on Vodafone's acquisition of Eircell in 2001). The first named defendants are the trustees of the VIPP (the "**Trustees**").

6. The VIPP is a defined benefit occupational pension scheme with four schedules of rules each pertaining to different cohorts of employee members, namely: Scheme A (rules applicable to Vodafone and former employees of Eircell, Limited) ("**Scheme A**"); Scheme B (rules of the spouse's and children's scheme applicable in respect of Scheme A members) ("**Scheme B**"); Scheme C (rules applicable to Vodafone employees who were previously members of the eircom Scheme)("**Scheme C**"); and Scheme D (applicable to former members of the Cable and Wireless Limited Employee Benefit Scheme ("**CWEBS**") who transferred to the VIPP following the termination and wind up of the CWEBS) ("**Scheme D**").

7. The interpretation issues in these proceedings arise in relation to Scheme C members only.[1]

8. The second named defendant ("**Mr Fahy**") is a member of the VIPP and has been appointed in a representative capacity to represent the interests of the Scheme C members of the VIPP. The vast majority of Scheme C members (including Mr Fahy) commenced

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[1] Mr Magill in his first affidavit avers at para 14 that "*At the current time, I am advised there are a total of 169 Scheme C members; this number being composed of 12 active members, 30 deferred members, and 127 pensioners*." Counsel advised the court that the Scheme C members represent "*something in the order of less than 4% of Vodafone Ireland's total pension scheme members*" – Transcript Day 1 p10

employment as civil servants in the Department of Posts and Telegraphs ("**P&T**") before 1983.

9. Eircell established its pension scheme ("the **Eircell Scheme**") by Interim Trust Deed dated 2 April 1997 (the "**1997 Interim Deed**") and it was governed by a Trust Deed and Rules dated 31 March 1998 (the "**1998 Deed**"). The VIPP (including its predecessor the Eircell Scheme) was subject to six amending deeds during the period from 1999 to 2005 (dated 12 March 1999, 9 March 2001, 2 November 2001 ("**the 2001 Deed**"), 14 March 2002, 24 June 2004 and 3 November 2004 respectively) . In 2005, what is described by Vodafone as a "consolidating deed" was prepared, inter alia, to replace the multiplicity of deeds amending the VIPP. This exercise was achieved by way of Trust Deed and Rules dated 15 December 2005 (the "**2005 Deed**").

10. Prior to a revision referred to in a deed of amendment dated 5 April 2012 (the "**2012 Deed**"), Rule 10 of Schedule III of the 2005 Deed ("**Rule 10, 2005 Deed**"), governed increases to pensions in payment and preserved pensions for Scheme C members.

11. Rule 10, 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*".

12. The first direction sought from the court is the proper interpretation of Rule 10 (the "**Interpretation Issue**"). This essentially concerns whether or not Rule 10, 2005 Deed properly interpreted, provides for guaranteed pension increases to Scheme C members. Directions are sought from the court in respect of the proper meaning and effect of Rule 10, 2005 Deed as to:

"(*i) Whether properly construed, Scheme C, Rule 10, does or does not provide for "guaranteed" pension increases for any Scheme C member or beneficiary claiming in*

respect of the membership of a Scheme C member (i.e. an associated dependant's or children's pension);

(ii) Whether or not the proper interpretation of the 2012 Deed is that it creates an additional benefit in the form of a "guaranteed" pension increase in respect of the portion of a Scheme C member's benefit which is attributable to pensionable service between 15 December 2005 and 20 May 2012 and that, as this is an additional benefit in the form of future increases, it applies to all Scheme C members (and related dependants' benefits) and not just Scheme C members who were active members on 5 April 2012 -the effective date of the 2012 Deed;

(iii) Whether or not the VIPP Scheme C provisions have been validly and effectively amended by the 2012 Deed for all Scheme C members, irrespective of the date on which they left service, with effect from 5 April 2012, such that for all Scheme C members increases to pensions in payment awarded on and after 5 April 2012 are to be determined as follows:

(a) pension increases for the benefits attributable to pensionable service prior to 15 December 2005 would be discretionary (i.e. were subject to the consent of the Company);

(b) pension increases attributable to pensionable service between 15 December 2005 and 20 May 2012 would be granted by reference to the percentage increase of the remuneration of the applicable employment grade; and

(c) pension increases for the benefits attributable to pensionable service after 20 May 2012 would be discretionary (i.e. were subject to the consent of the Company)." [2]

13. In brief, Vodafone contends that Rule 10, 2005 Deed affords discretion to Vodafone in terms of pension increases and does not provide for guaranteed or so-called "pay parity" increases to Scheme C members. On the other hand, the Trustees and Mr Fahy argue that

[2] Paras B (i – iii) of the Prayer for Relief in Amended Special Summons

Scheme C members are entitled under Rule 10, 2005 Deed to guaranteed pension increases aligned throughout their retirement with salaries for the grade and point at which that member retired (i.e. pay parity increases), which they say follows from their transfer from the civil service on the basis that their entitlement to pay parity pension increases as civil servants was replicated in the VIPP. Both sides rely on the wording of Rule 10, 2005 Deed and also on a range of contextual material.to support their positions.

14. The second related issue that this court is asked to determine is:

"*For the purposes of calculating any pension increases under Scheme C, Rule 10 (in accordance with the interpretation of the Court), who is the appropriate comparator and/or what is the appropriate reference*?" [3] (the "**Comparator Issue")**

15. In brief, Vodafone believes a comparator benchmark increase of the prior year's annual increase in Consumer Price Inflation Index (**"CPI")** up to a maximum of 4% per annum ("**Capped CPI**") is appropriate. The Trustees and Mr Fahy disagree and say that the proposal by Vodafone of Capped CPI would, if accepted, break the mandated pay parity link and is not what the 2005 Deed (or the relevant legislation) contemplates or permits. Possible alternative comparators are suggested by the Trustees which will be discussed later in this judgment.

16. The practical effect of the Interpretation Issue is that if, as the Trustees and Mr Fahy contend, Rule 10, 2005 Deed confers an entitlement to guaranteed pension increases on a pay parity basis, that entitlement is to be included in the Minimum Funding Standard ("**MFS**") calculations under the Pension Act, 1990; must be funded by Vodafone; and forms part of the calculation of the transfer value for Scheme C members. This is in marked contrast to Vodafone's position which is that any pension increases to Scheme C members remains at the discretion of Vodafone and is therefore not required to be

[3] Paragraph B(iv) of the Prayer for Relief of the Amended Special Summons:

included in Vodafone's MFS calculations or in member transfer values. The practical effect of the Comparator Issue is the difference between pension increases for Scheme C members based on pay parity (however that is defined) and the proposed Capped CPI.

Background to the VIPP and Scheme C

17. In Ireland up until 1984, postal and telecommunications services were the responsibility of P&T, whose employees were civil servants entitled to civil service pensions. The Postal and Telecommunications Services Act, 1983 (the "**1983 Act**") provided for the reorganisation of the postal and telecommunication services, and the establishment of two State companies, namely a postal company (An Post) and a telecommunications company, Bord Telecom Éireann – also, known as Telecom Éireann. The employment of Mr Fahy (along with other former P&T employees) was transferred from P&T to Telecom Éireann on its formation as a State company, effective from the vesting day, which was 1 January 1984.

18. Telecom Éireann was required by the 1983 Act to preserve the terms and conditions of employment of the employees transferred to it from P&T. Section 45(2) of the 1983 Act provided that, save as negotiated by way of a collective agreement, no employee who transferred to Telecom Éireann could receive a lesser scale of pay or be brought to less beneficial conditions of service than the scale of pay to which he was entitled and the conditions of service to which he was subject in P&T immediately before the vesting day.

19. Section 45(4) of the 1983 Act provides that:

"*The conditions in regard to tenure of office which are granted by ..[Telecom Éireann].. in relation to a member of the staff so transferred shall not, while he is in the service of the company, be less favourable to him than those prevailing for the time being in the civil service; any alteration in the conditions in regard to tenure of office of any such member shall not be less favourable to him than the prevailing conditions in the civil*

service at the time of such alteration, save in accordance with a collective agreement negotiated with any recognised trade union or staff association concerned."

20. Telecom Éireann was required by the 1983 Act to establish a pension scheme for its employees. Section 46 of the 1983 Act provides for the establishment of pension schemes for employees of the new telecommunications and postal companies. Section 46(4) and 46(5) originally provided as follows:

"S46(4) : *Every scheme under this section shall provide for not less favourable conditions in respect of persons who, immediately before the vesting day, were members of the staff of the Department of Posts and Telegraphs than those to which they were entitled immediately before the vesting day,*

(5*) Disbursement of pensions, gratuities and other allowances which may be granted to or in respect of persons who, immediately before the vesting day, were members of the staff of the Department of Posts and Telegraphs shall not be on less favourable conditions than would apply if the benefits referred to had continued to be paid out of moneys provided by the Oireachtas*."

21. The Telecom Éireann Main Superannuation Scheme was established in accordance with section 46 of the 1983 Act by interim deed dated 31 July 1984. As a transferring employee Mr Fahy became a member of the Telecom Éireann Main Superannuation Scheme. I will outline later in this judgment the relevant wording of that scheme in relation to pension increases.

22. Certain Telecom Éireann employees (including Mr Fahy) were seconded to Eircell, a mobile phone operator and a subsidiary of Telecom Éireann which was formed in 1996. Eircell (under the 1997 Interim Deed) became the first principal employer of the Eircell Scheme which commenced on 27 May 1996. The 1998 Deed was executed on 31 March 1998. Employees of Eircell (but not secondees) were eligible for membership of the

Eircell Scheme. Mr Fahy and the other seconded Telecom Éireann employees remained members of the Telecom Éireann Main Superannuation Scheme.

23. Eircell members' entitlement to increases to pensions in payment in respect of benefits attributable to pensionable service pursuant to Scheme A and Scheme B was a grant at Eircell's discretion subject to ministerial consent.[4]

24. Telecom Éireann was privatised in 1999, becoming Eircom plc ("**eircom**") at which point the Telecom Éireann Main Superannuation Scheme became known as the eircom Main Superannuation Scheme (the "**eircom Scheme**"). 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:

"*(4A) Every scheme for the granting of pensions, gratuities and other allowances on retirement or death to or in respect of—*

(a) persons who are or were members of the staff of .. [Telecom Éireann] and who, immediately before the vesting day, were members of the staff of the Department of Posts and Telegraphs, or

(b) those persons who were members of the staff of the Department of Posts and Telegraphs and who retired or died before the vesting day as the Minister for Finance may specify,

shall provide for not less favourable conditions in respect of those persons than those to which they were entitled immediately before the vesting day.

(5) *Disbursement of pensions, gratuities and other allowances which may be granted to or in respect of persons referred to in subsections .. (4A) shall not be on less favourable*

[4] Rule 10 of Schedule I of the 1998 Deed relating to the Scheme A members of the Eircell Scheme provided in relation to pension increases that "*The Company* [i.e Eircell*] may grant such increases in such pensions and preserved pensions under this scheme A as may be authorised from time to time by the Minister* [ie Minister for Public Enterprise*] with the consent of the Minister for Finance*".
The relevant rule applicable to Scheme B members was set out in Rule 19 of Schedule II of the 1998 Deed.

conditions than would apply if the benefits referred to had continued to be paid out of moneys provided by the Oireachtas."

25. Section 46 (4A) (which was substituted by the 1999 Act) therefore extended the obligations provided for in the 1983 Act in respect of pensions to every scheme relating to those Telecom Éireann/eircom staff who were former P&T employees. It is accepted that the eircom Scheme was established in accordance with section 46 of the 1983 Act.[5] The eircom Scheme was therefore required by law to provide not less favourable pension conditions to former P&T employees than they would have had immediately before 1 January 1984 while employed by P&T.

26. On 11 May 2001, Eircell demerged from eircom in two stages. The assets and liabilities were first transferred from Eircell to eircom, and then transferred from eircom to Eircell 2000 plc (now Vodafone). On the same date, Eircell was replaced as 'Principal Employer' of the Eircell Scheme by eircom which was itself then replaced by Vodafone. Vodafone therefore replaced Eircell as the principal employer in the Eircell Scheme, which was then renamed the VIPP.

27. The requirement for Ministerial consent was removed from the VIPP in advance of the demerger of Eircell from eircom by a deed of amendment dated 9 March 2001. This reflected the fact that Eircell was no longer a semi-State company and Ministerial consents were therefore no longer relevant. Schedule I of the 1998 Deed as originally drafted[6] was replaced by the following wording in rule 10- "*The Trustees (having obtained the advice of the Actuary) may grant such increases in such benefits under this scheme as may be agreed by the Company*".

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[5] Para 11 of James Magill affidavit sworn 25 November 2022.

[6] See footnote 4

28. As part of the sale of Eircell to Vodafone, a number of employees of eircom, including Mr Fahy, transferred their employment to Vodafone. It was agreed that these former eircom employees (who were members of the eircom Scheme) would become members of the VIPP.

29. The 1998 Deed was amended by the 2001 Deed adopting a new Schedule III providing for a new Scheme C to commence with effect from 11 May 2001. Members of Scheme C were the employees of eircom on 11 May 2001 who were members of the eircom Scheme and who transferred employment to Eircell 2000 plc (now Vodafone) on that date.

30. The new Schedule III to the VIPP inserted by the 2001 Deed stated at rule 10 as follows: "*The Trustees may grant such increases in such pensions and preserved pensions under this scheme C as may be agreed by the Company*."

31. The transfer of the former eircom employees was also the subject of an agreement between eircom and the relevant trade unions in relation to transferring employees (the "**Terms and Conditions Agreement**").

32. The 1998 Deed (as amended from time to time, including by the 2001 Deed) was replaced by the 2005 Deed – although the extent of any amendments effected by the 2005 Deed are a matter of some controversy between the parties. The 2005 Deed contained different wording regarding pension increases for Scheme C members than the wording (set out above) on pension increases set out in the 2001 Deed. Rule 10, 2005 Deed is the specific provision required to be addressed by this court for both the Interpretation Issue and the Comparator Issue.

Background to the dispute on the Interpretation Issue and the Comparator Issue

33. The evidence establishes that Scheme C members received pay parity pension increases while in the eircom Scheme and in the years following their transfer to the VIPP, both before and after the 2005 Deed. It appears that increases continued to be granted to

Scheme C members on a pay parity basis up until 1 January 2019 [7], although disputes on interpretation began to emerge between the parties from 2009.

34. The evidence also establishes that each of the 2004, 2007 and 2009 triennial actuarial valuations for the VIPP reflected the inclusion of pay parity pension increases for Scheme C members as part of the VIPP's MFS calculations under the Pension Act, 1990. There is disagreement as to the implications, if any, of this on the question as to whether those benefits were guaranteed for Scheme C members. While guaranteed or contractual benefits must be included in a scheme's MFS calculation, it is also possible to include discretionary benefits. The expert actuaries are agreed that an actuary's view one way or the other is not determinative of the legal status of the benefits and I agree with that position. I will return to this matter in light of the expert evidence tendered by the parties.

35. In or around 2009 in the aftermath of the global financial crash, a dispute arose between Vodafone and the Trustees as to whether pension increases to Scheme C members provided for in Rule 10, 2005 Deed were discretionary or guaranteed. The Trustees did not agree with Vodafone that such pension increases were discretionary. Following a protracted period of negotiation, the 2012 Deed was executed on 5 April 2012.

36. The 2012 Deed reflected what the parties describe as a form of compromise between Vodafone and the Trustees. Pursuant to the 2012 Deed, Vodafone and the Trustees agreed that benefits for Scheme C members were to be treated as follows for the purposes of future pension increases:

(i) pension increases for the benefits attributable to pensionable service prior to 15 December 2005 [i.e. the date of the 2005 Deed] for Scheme C members would be discretionary (i.e. subject to the consent of Vodafone);

[7] Para 17 Affidavit of Patrick Foley sworn 29 March 2023

(ii) pension increases attributable to pensionable service between 15 December 2005 and 20 May 2012 for Scheme C members would be guaranteed and granted by reference to the percentage increase of the pensionable remuneration "*payable to employees in the employment grade applicable to that Member*";[8]

(iii) pension increases for the benefits attributable to pensionable service after 20 May 2012 for Scheme C members would be discretionary (i.e. subject to Vodafone consent).

37. Vodafone regards the 2012 Deed as having created a *new* right to a guaranteed pension for Scheme C members for the period between December 2005 and May 2012 and that otherwise, all pension increases to Scheme C members are discretionary. Mr Fahy regards the 2005 Deed as providing for guaranteed pension increases. He says that the 2012 Deed is not relevant to the administration of his benefits and cannot reduce the preserved or accrued benefits of Scheme C members.

38. In 2016, Vodafone changed the basis or comparator for the guaranteed increases under the 2012 Deed to the "Active Scheme C Member" basis. Mr Fahy contends that this was impermissible. In fact, as later set out in this judgment it appears that no party now contends that this cohort is a suitable comparator for the purposes of the 2012 Deed or indeed the 2005 Deed.

39. In 2018, Mr Fahy, who is a former director of Vodafone, a former trustee and a deferred member of the VIPP, made a claim to the Trustees that he was entitled to guaranteed increases in respect of all of his benefit by virtue of Rule 10, 2005 Deed – and not just the limited guaranteed increase referred to in the 2012 Deed. Mr Fahy also claimed that the 2012 Deed did not apply to his benefits as he had left service on 31 July 2011, prior to its execution. Mr Fahy sought to transfer his benefits to another pension scheme and argued that only the 2005 Deed applied to the calculation of his transfer value and that he was

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[8] Rule 10 of the 2012 Deed

entitled to guaranteed increases in respect of all of his benefits. If Mr Fahy's benefits were guaranteed by the 2005 Deed they must be included in his pension transfer value – but discretionary benefits do not need to be included, thus resulting in a lower transfer value.

40. Mr. Fahy submitted a complaint through the VIPP's internal dispute resolution procedure on 12 July 2018 which was rejected by the Trustees. Vodafone place considerable reliance on the Trustees' correspondence with Mr Fahy at that time when the Trustees argued that his pension increases were discretionary rather than guaranteed – a position which contradicts what the Trustees now say. Vodafone says this correspondence is admissible as part of the relevant factual matrix and can be used as an aid to interpreting the 2005 Deed [9].

The Evidence adduced by the parties

41. In total 22 affidavits were filed by or on behalf of the parties, most exhibiting a volume of documentation. The actuarial experts (Mr Shier and Mr O'Connell) as well as Mr Magill on behalf of Vodafone were each cross-examined on their affidavits over the course of 3 days. I propose now to set out the main points arising from the various affidavits, the expert joint meeting and the cross-examinations (endeavouring not to repeat the general background facts set out in the previous sections of this judgment). I have considered all affidavits in full but refer here only to the key points arising.

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[9] A letter dated 19 June 2019 McCann Fitzgerald to Financial Services and Pensions Ombudsman, exhibited to first affidavit of James Magill sworn 25 November 2022 states: "*There was no intention on the part of the Company to provide for more favourable treatment than had applied previously nor was this sought by the Trustees….. The Trustees secured 6.5 years approximately of guaranteed increases which was in essence a windfall benefit for members*." Counsel for Vodafone said that although this correspondence long postdated the 2005 Deed it was relevant to the factual matrix in which the 2005 Deed should be interpreted as it was correspondence setting out the Trustees position at the time and entirely contradicts the position they are now adopting in these proceedings. He says that the Trustees have not explained this contradiction on affidavit. However the court notes that Mr Foley on behalf of the Trustees avers that*:" [F]ollowing Mr Fahy's FSPO complaint …, the Trustees sought further advice concerning the issues raised therein. Having considered that advice, and having engaged in discussions with Vodafone in which it was apparent that Vodafone and the Trustees were not in agreement as regards the proper interpretation of the Rules of the scheme*."

The evidence of James Magill on behalf of Vodafone

42. Mr James Magill swore 4 affidavits on behalf of Vodafone. Mr Magill is the Director of HR Operations & Transformation for Vodafone and was previously Vodafone's Director of Human Resources between September 2016 and November 2022. He admitted that he had no personal involvement in or knowledge of the 2001 Deed or the 2005 Deed, having joined Vodafone in Ireland in 2016. He confirmed under cross-examination that his knowledge was accordingly based on and confined to a detailed review of documents held by Vodafone which he had reviewed.[10]

43. Mr Magill relied on correspondence exchanged between eircom's deputy HR director, Mr Foley, and Ms Ingle of Vodafone in October 2009 in which Mr Foley advised that "*Increase*s [under the eircom scheme] *are thus not guaranteed under the scheme and can only be initiated by the company*". [11] This correspondence of course significantly post-dates the 2005 Deed.

44. Mr Magill set out his understanding of the background to the drafting of the 2005 Deed. He referred firstly to minutes of a trustee meeting of 3 November 2004 where it was stated that:

"*In response to a Trustee comment that the Deed of Amendment was somewhat unclear in relation to previous amendments, YM [Yvonne Melinn] advised that the Trust Deed and all subsequent amendments would be revisited and that one overall comprehensive Deed would be produced.*"[12]

45. He also referred to an internal Vodafone memorandum dated 18 March 2005 which references that at a recent meeting of the [VIPP] Trustees one of the issues raised was "*the indexation of pensions in the course of payment*'. That memorandum records that in

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[10] Transcript day 1 page 48
[11] Para 21 and 22 of James Magill first affidavit sworn 25 November 2022 and Tabs 4A and 4B.
[12] Para 24 ibid.

1996 it was decided that the then newly established Eircell subsidiary would have its own pension scheme "*separate from that of the parent company and with different conditions*". The memorandum records that a collective agreement was reached at that time with the trade unions that the Eircell pensioners (ie Scheme A and B) would be entitled to indexation of pension benefits to CPI subject to a maximum of 4% per annum, with increases over that amount to be at the discretion of the Trustees and the Company. However, as noted, that agreement was not given effect to in the drafting of the 1998 Deed, although Scheme A and B members were advised in the Vodafone Explanatory Booklet 2002 that their pension would increase in that manner. The memorandum continues:

"*In IR/ER terms the situation is reasonably clear:*

-We have a collective agreement which commits to the CPI - 4% pension indexation arrangement……..-We have communicated that pension plan members, pre and post the Vodafone transaction, that ……pension indexation will be as per the CPI 4% model.: in fact we are still communicating this on Vista.

It is also clear that the original decision of the company, accepted by the Trustees, was to include these provisions.

9. It is the view of HR that we should amend the scheme rules as outlined. Your authority to proceed accordingly is sought, please."

46. There is no reference in that memorandum to the scheme C members at all. Mr Magill believes that is "*of note*", but I am not convinced that this is the case. This memorandum refers to a 1996 Collective Agreement that appears to be relevant only to Scheme A and Scheme B members. It shows that the 1998 Deed did not accurately reflect the position regarding pension increases for the Scheme A and B members and explains why the wording relevant to them changed in the 2005 Deed to reflect the agreement of increases

subject to CPI capped at 4%, which had been agreed by way of collective agreement some years previously. It does not however even reference, let alone explain, the changes to the language in the 2005 Deed for scheme C pension increases.

47. Mr Magill suggests that the 2005 Deed was introduced only to reflect changes in the pension increase rules for Scheme A and Scheme B and to consolidate previous changes under various rules. [13] This was presented to the court as evidence that nothing had changed in respect of Scheme C members between the 2001 Deed (where the wording stated that their pension increases were discretionary) and the 2005 Deed. Therefore, the argument runs, although the wording in the 2005 Deed was very different to the 2001 Deed, the effect on pension increases for scheme C was exactly the same under both deeds – i.e. Scheme C pension increases remained as before, entirely at the discretion of Vodafone. Mr Magill accepts that the "*no less favourable basis*" wording inserted by Rule 10, 2005 Deed was "*necessary to reflect a statutory right or entitlement deriving from the Scheme C members' original entitlements in the eircom Scheme as a scheme provided for under s. 46 of the 1983 Act*". Mr Magill says that Vodafone gave no instruction for the amendment of the VIPP to remove its consent for increases to Scheme C members and that the eircom Scheme itself provided for discretionary pension increases to Scheme C members.

48. Mr Magill exhibited a signed report outlining management side proposals on Eircell customer operations dating from January 1997 [14] which noted that …"*Guarantees were sought that staff seconded from the parent company should retain the pay and conditions of that company. The Staff Side said that they had reservations about the proposed*

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[13] Para 28 James Magill first affidavit sworn 25 November 2022- "*I am advised that the drafting process undertaken which led to the 2005 Deed and Rules appears to have been an exercise in reflecting collective agreements, and consolidating previous changes"*

[14] Transitional Scheme of Conciliation and Arbitration Irish Telecommunications Board Joint Conciliation Council Report No, 541

pension which they said would only be acceptable on the basis that it would not prejudice their position in the future.....The Management Side ..stated that seconded staff would continue to hold Telecom Éireann pay and conditions."

49. Mr Magill also exhibited a letter from Vodafone to Eircom dated 5 March 2001 attaching terms and conditions ("**Terms and Conditions Agreement**"), signed by eircom for and on behalf of "new" Eircell and the trade unions relating to Eircell/eircom staff who would transfer to the "new" company as part of the acquisition of Eircell by Vodafone. The letter confirms that:

"*The Union sought an assurance from the Company that the Terms and Conditions agreement would be honoured by Vodafone and that they had authority to act on behalf of Vodafone in this matter. The following letter was sent by Vodafone to Mr. Alfie Kane and confirms Vodafone's acceptance of the agreement*".

Reliance is placed by Mr Fahy and the Trustees on this documentation.

50. In the letter dated 5 March 2001 Vodafone "*acknowledge and endorse*" the Terms and Conditions Agreement and agree that, in the event of Eircell being acquired by Vodafone, "new" Eircell will be bound by the said terms and conditions which may be changed only by agreement between the Unions and "new" Eircell Management. Clause 2 of the Terms and Conditions Agreement deals with the pensions of the transferring employees and states as follows:

"2. **Pensions**

Current pension entitlements for the various staffs affected by this acquisition will be maintained on no less favourable terms. In particular:

(a) The Eircell Defined Benefit Pension Plan in all its aspects will be maintained for members of that plan and "new" Eircell will become the Principal Employer for this purpose.

(b) ...

(c) Transferring Employees within the Eircell environment who have benefits in the eircom Defined Benefit scheme will remain members of that scheme until "new" Eircell designs and establishes a pension scheme which will provide benefits on a no less favourable basis."

51. In his second affidavit, Mr Magill refers to FAQ documents dating from May 2012 answering questions concerning the drafting of the 2005 Deed. I don't view these documents as relevant to the interpretation of the 2005 Deed given that they post-date the 2005 Deed by many years.

52. Mr Magill rejects the suggestion advanced by Mr Fahy that as a civil servant he had a guarantee of increases to pensions in payment, linked to increases in the pay of staff serving in the relevant or equivalent grade. Mr Magill exhibits the Commission on Public Service Pensions Final Report in which it is recorded, at paragraph 16.3.2, "*Thus, it is formally the case that pension increases are at the discretion of the Minister for Finance*".[15] He says that none of the documents sent to members demonstrate the creation of a guaranteed pension increase *entitlement*. Furthermore, he says that funding for pay pension increases does not create an entitlement to pension increases. He observes that Vodafone has funded, and continues to fund, increases notwithstanding their view that they are discretionary.[16]

53. Mr Magill confirms that the "graded"/"non-graded" distinction was abolished in Vodafone from January 2013. From that date, employees of Vodafone received increases under the Vodafone Annual Remuneration Review ("**ARR**") process, with pay

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[15] At para 26 second affidavit of James Magill sworn 25 May 2023. This document contains other statements too however such as "Pension increases in the public service are currently determined on the basis of pay parity, that is, in line with the pay of the grade in which the former public servant once served."
[16] Para 53 second affidavit of James Magill sworn 25 May 2023.

determined by individual performance and local role market benchmarking. This translated into pension increases for Scheme C members (both graded and non-graded) equal to the ARR increase percentage of all Vodafone Ireland employees.[17] In a letter dated 17 August 2015, Vodafone informed the Trustees of its preferred approach to determining discretionary pension increases for Scheme C members, which was that they would follow the same increase methodology as other members of the V1PP (in Schemes A and B), thus applying CPI up to a maximum of 4% per annum i.e. Capped CPI.

54. For the 2005 to 2012 service period, Vodafone has looked at the Scheme C cohort of active staff members only and applied the average of the ARR increase percentage awarded for that cohort (the “active Scheme C employee basis”). This last element differs from previously calculated averages (e.g. all Vodafone Ireland employee cohort).

55. Mr Magill says that there is no longer a “relevant” or “applicable” grade for a particular Scheme C individual. He acknowledges that the “active Scheme C employee” basis is unsustainable and becoming unworkable as the Scheme C active cohort diminishes in number. He says that the legacy arrangements regarding Scheme C pension increases are no longer appropriate or workable in circumstances where increases in salary depend not just on inflation but also on individual performance.

56. Because Vodafone does not accept that the Scheme C members have any guarantee of pay parity increases, Vodafone does not accept that the policy objective of pay parity should be achieved by the chosen comparator. Mr Magill says that Vodafone maintains that the true underlying comparator for Scheme C increases is eircom scheme increases, which increases are discretionary and which have at various times been capped by reference to amounts substantively lower than the CPI Capped Basis.[18]

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[17] See Third Affidavit of James Magill sworn 20 October 2023 (paras 21 -26)
[18] Para 16 fourth affidavit of James Magill sworn 29 January 2024

57. Mr Magill says that the Trustees' contention that there is no reference in Rule 10, 2005 Deed to CPI, or any cap, is not a valid objection. He avers that, with the abolition of grades, the rules "*are unworkable*" and he refers to the "*inoperability of this provision in 2024*".[19] He states that:" *The small and diminishing size of the affected Scheme C population relative to the larger Vodafone workforce creates administrative expense and complication in endeavouring to map a hypothetical or notional role/employee-based comparator from a non-graded general workforce*". Vodafone wish to avoid an "*increase mechanism requiring an expensive, artificial, non-commercial retention of outdated remuneration structures or roles, or the modelling of notional or hypothetical roles to facilitate an administratively disproportionately burdensome increase calculation mechanism for a diminishing group creating a drag on the business which is not in the interests of the wider workforce or other Vodafone stakeholders…. and does not become a material financial burden*" on Vodafone."[20]

58. Mr Magill sought to provide evidence to establish that the Capped CPI Basis is more favourable than the current eircom/eir discretionary pension increase provision both retrospectively and prospectively as outlined in eir's published company accounts. However, I accept the objections raised to the relevance or admissibility of that material and I have not considered it for the purposes of this judgment.

<u>The evidence of Patrick Foley on behalf of the Trustees</u>

59. Mr Foley is a director of Irish Pensions Trust Limited, which is chairperson of the Trustees. He refers to the dispute regarding the interpretation of Rule 10 which he says first arose between Vodafone and the Trustees in 2009. He states that:" *It is important to note that the Trustees did not accept the position of Vodafone that pension increases for*

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[19] Paras 18 and 19 and 31 ibid
[20] Para 38 fourth affidavit of James Magill sworn 29 January 2024

Scheme C members were discretionary, or that Rule 10 of Schedule III to the 2005 Deed had been an error." He says that the 2012 Deed represented a compromise position and not an acceptance of or acquiescence in Vodafone's interpretation of Rule 10, 2005 Deed.

60. Mr Foley exhibits the full suite of contemporaneous excerpts from the Trustees' meeting minutes which refer to the 2005 Deed-, comprising minutes from January 2004 to December 2005. He does not however explain or set out in his affidavit what was the rationale for the change in language of Rule 10, 2005 Deed.

61. Having reviewed these minutes in some detail, they reference the need for a new deed to provide for various issues including (i) the operation of a new internal dispute resolution mechanism; (ii) to allow part-time workers to join the VIPP; (iii) to consolidate all recent deed amendments into one revised deed; (iv) to change the renewal date of the VIPP; and (v) to close the VIPP to new members from 1 January 2006. The final version of the 2005 Deed was presented to the Trustees by Vodafone HR personnel at the 15 December 2005 meeting in which it is recorded that : "*YM advised that both [Vodafone] and the Trustees are satisfied that the necessary amendments have been made to bring the Deed and Rules into line with the Pensions Act and to ensure that all previous [Vodafone] agreements are accurately reflected in the Deed*".

62. The Trustees signed the Deed. Nowhere is there any express reference in the Trustee minutes of the change to the wording of Rule 10, 2005 Deed. There was no affidavit from the drafters of the 2005 Deed before the court as to their instructions at that time. Vodafone was, it would appear, also involved at least to some degree in the drafting – presenting the 2005 Deed to the Trustees for approval. Mr Fahy, who was then a director of Vodafone, signed the 2005 Deed on behalf of Vodafone as did the Company Secretary, but the latter signature is not legible by the court. Counsel for Vodafone stated that Mr. Fahy, is the sole director who signed on behalf of Vodafone, and that his signature was

witnessed by the Company Secretary[21]. There is no affidavit from any Vodafone signatory other than Mr Fahy who avers he has no relevant recollection of the circumstances in which he did so. Whatever about any confusion as to who in fact signed the 2005 Deed, it is no part of Vodafone's case that the Vodafone signatories had no authority to sign the 2005 Deed.

The evidence of Barbara Browne on behalf of the Trustees

63. Ms Browne is a director of Irish Pensions Trust Limited which is chairperson of the Trustees. She confirms that from the Trustees' perspective the Capped CPI Basis does not address the policy objective that pay parity ensures that, over time, pensions are not eroded by inflation, but reflect wage growth. She says that the Trustees are not persuaded that the Capped CPI Basis is consistent with the wording of the VIPP trust deed and rules and says that Vodafone has not set out any basis for why it believes it would not be possible to identify a reasonable approximation or equivalent reference population from the employees of Vodafone. She says that the Trustees believe that the appropriate comparator must be one which supports the principle of pay parity and it is only if it proves impossible to identify an appropriate compactor that alternative mechanisms might properly be considered.[22]

64. Three possible bases of comparator are suggested by her as follows:

"*Basis 1: An equivalent notional comparator from the Vodafone working population which represents a fair and reasonable approximation or equivalent to the pensioner's grade at the time of retirement:*

Basis 2: The average annual increases in remuneration across the Vodafone working population as a whole;

[21] Transcript day 1 p22 lines 12-19

[22] Affidavit of Barbara Browne sworn 11 December 2023

Basis 3: CPI, but subject to an increase to reflect any excess in the rate of salary inflation over general inflation in goods and services, and not subject to any cap; such increase to be in an amount (or calculated in a manner) to be determined."

The evidence of Eamon Farrell on behalf of the Trustees

65. Mr Farrell was appointed as a trustee of the Scheme in 2001 and has held the position of trustee since that date. Mr Farrell denies that Vodafone ever communicated to the Trustees that any of the various changes in the approach to determining the basis of pension increases for Scheme C members were intended to follow any contemporaneous changes that may have taken place in eircom. He says that the Capped CPI basis was suggested by Vodafone in 2015 to match increases for members of Schemes A and B and to create equality between them and Scheme C members.

66. Although a signatory to the 2005 Deed on behalf of the Trustees, Mr Farrell, surprisingly, makes no reference to his understanding of the circumstances in which the 2005 Deed was prepared and executed. Other minutes and correspondence he exhibits from 2009 and later years are not, in my view, relevant to the Interpretation Issue.

The evidence of Gerard Fahy on his own behalf and on behalf of the Scheme C Members

67. Mr Fahy's position is that all Scheme C Members are entitled to pension increases in parity with pay increases for existing Vodafone staff. Mr Fahy confirms that he commenced his career in the civil service within P&T in 1976, with an entitlement to a civil service pension, and ceased employment with Vodafone in July 2011. He, in common with the vast majority of Scheme C members, was classed under Schedule D for PRSI contribution purposes with the effect that he is not entitled to a contributory State pension. This brings him in line with retired civil servants who receive pay parity pension increases.

68. Mr Fahy states that in his view:" [*A] discretion as to pension increases resting in Vodafone's hands cannot realistically be interpreted as leaving Scheme C Members "no worse off' than they were when that discretion was vested in the Minister and the risk of a refusal of increases was, in truth, theoretical rather than real*"[23]

69. He avers that he was personally "*very concerned*" on being transferred to Telecom Éireann to ensure that his job security and pension rights arising from being a civil servant were preserved. He outlines the trade union negotiations, legislation and staff circulars which issued at that time regarding the preservation of those rights. He became a member of the Telecom Éireann pension scheme, which later became the eircom Scheme. He exhibits a guide published for members in 1989 which states that "*pensioners are granted periodic increases in pensions in line with pay increases to their relevant grade*" and a cartoon which vividly depicts this same message.

70. He sets out his role in relation to the privatisation of eircom and avers that: "*No successful privatisation could have been envisaged with a threat of industrial action*".[24] He states he was also involved in the sale of Eircell and the preparation of the prospectus for its sale. He avers that "*As many of the senior management and the technical employees of the business were Eircom Secondees, as opposed to employees of Eircell Ltd., they would automatically retain their Eircom employment status and could not be the subject of a TUPE (Transfer of Undertakings) process when the company was sold, nor could they be forced to transfer in any event. As a result another key trigger was the explicit acceptance of transfer by a minimum of number of the overall staff in the business, with the number being in Vodafone's discretion. My understanding is that Vodafone's requirement was that approximately 70% of the staff would agree to transfer. Given the requirement to*

[23] Para 13 affidavit of Gerard Fahy sworn 8 May 2023
[24] At para 34 affidavit of Gerard Fahy sworn 8 May 2023

achieve these transaction triggers, it was necessary to satisfy the concerns of Eircom contracted staff in respect of the preservation of their employment contracts and their continuing pension entitlements."[25]

71. He exhibits the offer document from Vodafone which made commitments that all pension rights of eircom secondees would be "*fully safeguarded*" and says this was designed to ensure the requisite staff would agree to transfer to Vodafone with the sale. This document was later followed by the Terms and Conditions Agreement.

72. Mr Fahy exhibits internal presentations made to former Eircell secondees in September 2001 noting that "*eircom terms and conditions replicated*" and that "*Practice is to increase pensions in payment in line with appropriate pay increases for relevant grade in eircom*". He transferred his rights from the eircom Scheme to the VIPP in September 2001.

73. Mr Fahy says that other presentations were given including in November 2004 (prior to the 2005 Deed) and indeed after the 2005 Deed to the same effect. His affidavit does not refer specifically to the changed wording of Rule 10, 2005 Deed or his knowledge of that at the time save to say that: "*.. in my role as Director ..I signed the 2005 Consolidated Trust Deeds under Company Seal. I was not involved in the process of the preparation of the Deed and have no direct knowledge of the process involved. It was normal for me to sign a large number of documents on a regular basis, as given the multi-national makeup of the Board I was likely the only available member for signing on many occasions ... I have no particular recollection of the circumstances of my signing of the 2005 Trust Deeds other than I would have undoubtedly taken significant comfort from the fact that it had already been signed by all the Trustees, two of whom were my colleagues on the*

[25] At para 38 ibid

Executive Management Team, they presumably possessing direct and intimate knowledge of the process, and one of those being the Finance Director.." [26]

74. This appears to be an unusual averment in circumstances where Mr Fahy was, of his own admission, most concerned to protect his pension entitlements as he saw them, although I accept that he was receiving what he believed to be due to him at that time. It serves to illustrate however the lack of contemporaneous information available to the court regarding the circumstances in which the wording of Rule 10, 2005 Deed came to be changed as it was.

75. Mr Fahy was appointed as a trustee of the VIPP as a Management representative in or around 2006 and he served as a trustee until his retirement in 2011.

76. Reference is made to later Trustee minutes dating from 2011 but I do not believe these to be relevant to the interpretation of the 2005 Deed and so I do not propose to set that information out here.

77. Mr Fahy's third affidavit exhibits correspondence from the civil service pensions support team on the history of pay parity increases in the public service. The comparator he argues for is the comparator previously used for pension increases for non-graded staff, namely the average pay increase across all Vodafone staff.

<u>The expert evidence</u>

78. Mr O'Connell, actuary, was instructed by the Trustees and he prepared 4 affidavits. Mr Philip Shier, actuary, was instructed on behalf of Vodafone and prepared 2 affidavits. Mr Nigel Tennant, actuary, prepared 1 affidavit on behalf of Mr Fahy, although this appears to be unsworn. Mr Paul Kenny, former Pensions Ombudsman prepared 2 affidavits on behalf of the Trustees.

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[26] At para 68

79. Mr O Connell and Mr Shier very helpfully met prior to the hearing and prepared a joint expert memorandum setting out core areas of agreement and disagreement between them. The areas of agreement can be summarised as follows:

1. The actuarial assumptions used in a scheme's valuations do not determine core pension entitlements which are determined by the relevant Trust Deed and Rules of the scheme.

2. In the case of the VIPP, the approach adopted for the ongoing valuations consistently allowed for pay parity pension increases and there was no change in approach after the 2005 Deed. The assumed rate of pay parity increase depended on the view of the actuary at the time of the valuation and hence varied in line with economic conditions and expectations from time to time.

3. Contractual benefits (such as guaranteed pension increases) must be included in MFS calculations, but discretionary increases are not required to be included. Prior to 23 September 2005, the actuarial funding certificate was a simple pass/fail. From 23 September 2005 the certificate valued assets and liabilities and the approach most compatible with the regulations and actuarial guidance would be either to exclude discretionary benefits or, if including them, to draw attention to their inclusion. Since the financial crisis in 2008 the practice has been that discretionary benefits are not included in a scheme's MFS calculation.

4. The inclusion of discretionary increases in an MFS valuation does not result in such increases becoming contractual/guaranteed.

5. In the MFS calculations for the VIPP up to 31 December 2011, pay parity increases were taken into account. After the 2012 Deed pay parity increases for periods other than 15/12/2005 – 20/05/2012 (i.e. the guaranteed period under the 2012 Deed) were excluded.

A reader of the references to the MFS calculation in the valuation reports of the VIPP prior to the 2012 Deed might infer that the increases were contractual.

6. Whether the "no less favourable" wording in the 2005 Deed is intended to reflect the wording of the 1983 Act is a matter for legal interpretation.

7. The wording of the 2001 Deed gave Vodafone a broad discretion to pay increases in line with public sector practice, consistent with the requirements of the 1983 Act, but did not require them to do so. The history of public sector pay parity provides some context for the provision of increases in the VIPP but is not directly relevant.

8. The determination of pension increases for pre-2013 joiners to the Civil Service are set out by regulation and include the exercise of Ministerial discretion. Whether this meets the threshold of "entitlement" is a legal matter.

80. The actuarial experts disagreed on how likely it was that the inclusion of pay parity increases in VIPP valuations up to and including the 2009 valuations signified that these increases were contractual/guaranteed. Mr Shier believes such inclusion was likely made to provide a margin for prudence but acknowledged that it would have been good practice for the actuaries to have made clear in their valuation reports which increases were discretionary. Mr O Connell believes that the decision to include pension increases within the MFS calculation most likely reflected the views of the principal employer, trustees and actuary that the pension increases were contractual in nature.

81. The 2004 VIPP actuarial valuation provided that: "*Pensions in course of payment are generally increased in line with consumer price inflation subject to a maximum of 4% p.a., except for ex-Eircom members where increases are generally intended to be in line with salary increases granted to active members on the same grade*".

82. The 2007 actuarial valuation states that:" *The scheme aims to provide increases to pensions in payment for Vodafone staff in line with annual increases in consumer prices,*

capped at 4% per annum. Ex-Eircom staff receive increases that achieve parity with salary increases granted to active members. I have allowed for these increases by including projected pension increases at a rate of 2.25% per annum for Vodafone staff and 4.75% per annum for ex-Eircom staff…."

83. The 2009 valuation states that: "*Pensions in payment increase at the following levels and deferred benefit entitlements (gratuity and pension) also increase in a consistent manner: Vodafone members: In line with Consumer Price Inflation subject to a maximum of 4% p.a. Ex-Eircom members: In line with salary increases granted to active members on the same grade*".

84. The actuarial valuation in each case was prepared by a different actuary. The 2004 valuation took place when the 2001 Deed was in place. The 2007 and 2009 valuations took place when the 2005 Deed was in place.

85. The evidence of Mr O'Connell is that from at latest 1973 onwards, pensions for civil servants were increased in line with the pay levels. From 1983 onwards, the timing of pension increases was aligned with the timing of pay increases such that pension increases were granted in line with pay levels that applied in the current year.[27]

86. Mr O Connell confirms that pay parity remains the basis for civil service and public sector pension increases for employees recruited prior to 2013. Post-2013 joiners do not receive pay parity pension increases. Mr O' Connell says that his view is that in practice, pay parity increases were granted to Scheme C members at the time the 2005 Deed was executed. At the same time, the 'discretionary' approach to pension increases in the public sector was in name only and public sector pension increases were in practice granted (and had been for many years).[28]

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[27] Para 4.1 of O'Connell Supplementary Expert Report dated 2 July 2023.
[28] At page 19 of his Expert Report dated 27 March 2023 as revised.

87. Mr Paul Kenny's expert report dated 16 November 2023 supports Mr O'Connell's evidence on the history and practice of pay parity pension increases in the public service, which he says was understood to be a principle since Budget 1969. He references the 2021 report prepared by the Department of Public Expenditure and Reform (and later also exhibits the 2024 report) [29] which states that:

"*Pension increases are a discretionary benefit and require Ministerial consent. Pensions for pre-2013 cohorts are assumed to increase at pay parity. For the most part, general increases for staff are passed on to pensioners on the same basis. While discretionary, it is assumed that future pension payments will be indexed in line with general salary increases for the main valuation results presented in this review*."

88. His report states that: "*My understanding based on my experience is that, notwithstanding the Ministerial discretion provided for, pension increases in the civil service were regarded as, and were in practice, "automatic". That is to say, a Minister has never exercised his or her discretion in any way other than to grant increases in line with any salary increases*."[30]

89. Mr Kenny also notes that in the Civil Service and in the Public Service at large, when a post is abolished, it is customary to maintain as a record a "notional salary" for the abolished post, which will be "uprated" in line with pay increases generally for comparable grades, and which is then used as a benchmark against which future pension increases can be measured. He refers to how this was done in relation to his own previous role as Pensions Ombudsman when that post was abolished.

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[29] In his affidavit sworn 26 January 2024.

[30] Para 2.1.2 of Mr Paul Kenny's expert report dated 16 November 2023

90. I propose now to consider the legal principles applicable to the Interpretation Issue, particularly to determine what, if any of the evidence and materials put before the court can properly be considered in interpreting Rule 10 of the 2005 Deed.

The Law applying to contractual interpretation

91. The leading authority on contractual interpretations is the decision of the Supreme Court in *Law Society of Ireland v Motor Insurers Bureau of Ireland* [2017] IESC 31 ("**MIBI**") setting out the "text in context" approach. This text in context approach was explained in the judgment of O'Donnell J (as he then was) for the majority in MIBI. At para 6 of his judgment, he stated that the meaning of the relevant provision of an agreement has "*to be determined from a consideration of the Agreement as a whole*" and "*not an interpretation in which some aspects win out over others*". He continued:

"*Rather it is a case of providing an interpretation of the Agreement as a whole, which not only relies on those features supportive of the interpretation, but also most plausibly interprets the entire Agreement and in particular those provisions which appear to point to a contrary conclusion. Even if the majority of factors appeared to tend broadly to one side of the argument, that interpretation cannot be accepted if it is wholly and fundamentally irreconcilable with some essential features ... It is important therefore to test any interpretation of a clause against the understanding of the agreement to be gleaned from what is said, and sometimes not said, elsewhere in the agreement*."

92. At para 12 of his judgment O'Donnell J continued:

"*It is not merely therefore a question of analysing the words used, but rather it is the function of the court to try and understand from all the available information, including the words used, what it is that the parties agreed, or what it is a reasonable person would consider they had agreed. In that regard, 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. […]"

93. In his judgment in *Brushfield Ltd (T/A The Clarence Hotel) v Arachas Corporate Brokers Ltd* [2021] IEHC 263, McDonald J confirmed that the process of interpretation of a written contract is entirely objective. For that reason, the law excludes from consideration the previous negotiations of the parties and their subjective intention or understanding of the terms agreed. Instead, the court is required to interpret the written contract by reference to the meaning which the contract would convey to a reasonable person having all the background knowledge which would have been reasonably available to the parties at the time of conclusion of the contract. The court, therefore, looks not solely at the words used in the contract but also the relevant context (both factual and legal) at the time the contract was put in place. The context includes any objective background facts or provisions of law which were reasonably available to the parties at the time the contract was concluded, and which would affect the way in which the language of the document would have been understood by a reasonable person.

94. McDonald J stated in *Brushfield* at para 110 of his judgment:

"(f) *While a court will not readily accept that the parties have made linguistic mistakes in the language they have chosen to express themselves, there may be occasions where it is clear from the context that something has gone wrong with the language used by the parties and, in such cases, if the intention of the parties is clear, the court can ignore the mistake and construe the contract in accordance with the true intention of the parties:*

(g) ….Any contract must be read as a whole and it would be wrong to approach the interpretation of a contract solely through the prism of the dispute before the court.."

95. In *Irish Pensions Trust Limited v Central Remedial Clinic* [2006] 2 IR 126. Kelly J (as he then was) endorsed the approach to the construction of pension trusts described by Millett J in *Re Courage Pension Schemes* [1987] 1 WLR 495.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. This is particularly so where the documents are ones intended to have legal effect but couched in very general terms. 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*")".

96. In *Greene v Coady* [2015] 1 IR 385 Charleton J relied upon the approach to the interpretation of pension deeds as set out by the Vice Chancellor in *Armitage v Staveley Industries Plc [2005] EWCA Civ 792*. In particular, he noted at para 6.2(7) of his judgment that: *"..the ultimate question is what meaning would be conveyed to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the date of the contract".*

97. In *Boliden v Cosgrove* [2007] IEHC 60 Finlay Geoghegan J noted at para 61 of her judgment in reliance on *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 2 All ER 597 that:

"*Beneficiaries of the scheme, the members, far from being volunteers have given valuable consideration. The company employer is not conferring a bounty. In my judgment, the scheme is established against the background of such employment and falls to be interpreted against that background.*"

98. A court can as a matter of construction construe the contract as if it had been corrected for an obvious mistake "*…in any case where the court, having regard to the relevant factual background, can come to a clear conclusion that (a) the parties to a contractual document have failed to express themselves correctly such that there are obvious mistakes in the document and (b) it is equally obvious how those mistakes should be corrected.*" This was confirmed in the case of *Dublin Port Company v Automation Transport Ltd* [2019] IEHC 499 (at para 51) which followed the line of authority in *Chartbrook Limited v Persimmon Homes Limited* [2009] UKHL 38, [2009] 1 AC 1101.

99. I am satisfied that in seeking to interpret the 2005 Deed I must have regard to the nature and circumstances of it. As a pension deed it is a formal legal document prepared and drafted by specialists (even if not drafted by lawyers as the evidence here appears to indicate). It was designed to operate in the longer term, defining member's rights into the future and in circumstances which might change over time. There is no evidence it was a document drafted under obvious time pressures. I must consider the plain meaning of the words used in the 2005 Deed (not just in Rule 10 itself) but recognise that this is not an isolated exercise of interpreting those words removed from all context. In my view, the relevant context in this case (which would have been known to all parties at the time) includes the general employment history of Scheme C members moving from P&T (civil service) to Vodafone (private sector); the relevant 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. Admissible context as an aid to interpretation in this case does not include correspondence or positions taken by parties after the fact whether to indicate their subjective understanding of the 2005 Deed or otherwise. It does not include specialist technical expert evidence of complex pensions law which was not available to the parties at the time. Nor does it

include looking with the benefit of hindsight at how other schemes or pensioners may have fared since the 2005 Deed.

100. I now propose to look at the wording of Rule 10, 2005 Deed and to consider the differing interpretations suggested as to its proper meaning.

The varying interpretations suggested in respect of Rule 10, 2005 Deed

101. Rule 10, 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*".

102. Vodafone contends that the proper interpretation of Rule 10, 2005 Deed is that it:

(i) Provides that eircom employees who transferred to Vodafone were to be treated on "a no less favourable" basis.;

(ii) Affords discretion to Vodafone in terms of increases; and

(iii) Does not provide for guaranteed or so-called "pay parity" pension increases.

103. It is accepted by all parties that the words "*no less favourable*" clearly reflect the language of the 1983 Act (and the 1999 Act).

104. There is however complete disagreement on the other interpretation points. Vodafone accepts that there is no express reference to Vodafone consent in Rule 10, 2005 Deed. Vodafone also accepts that the use of the words "*will increase*" in the first limb of the wording of Rule 10, 2005 Deed could be interpreted to suggest guaranteed increases. Of course the words "*will increase*" also appears in the second limb of Rule 10, 2005 Deed.

105. Vodafone argues that the approach of the defendants would wrongly assume that Rule 10, 2005 Deed does more than it indicates – namely, to preserve no less favourable treatment for Scheme C Members than had they remained members of the eircom

Scheme. They say that a construction which would mean that Vodafone has no discretion as regards increases must be wrong for the following reasons:

(A) It ignores the objective background information regarding the nature of the 2005 Deed and the background to Scheme C -Vodafone says that the evidence reflects that the drafting of the 2005 Deed was an exercise in consolidation. It is accepted that the wording of the 2001 Deed (which the 2005 Deed replaced) clearly provided for a general discretion for Vodafone in relation to pension increases to Scheme C members and does not reflect the position of pay parity increases [31]. Vodafone says there is no evidence that any rule change was intended by the 2005 Deed for Scheme C members. Vodafone says that the Scheme C members were only ever entitled to discretionary pension increases at the discretion of the relevant Minister (irrespective of what was the practice). Ministerial consents were removed from the VIPP in advance of the demerger of Eircell from eircom by a Deed of Amendment dated 9 March 2001, but they were replaced by the need for consent of Vodafone. The 2001 Deed, Vodafone says, correctly reflected that discretionary position. Neither the Trustees nor Mr Fahy accept that Vodafone properly ought to have had an open-ended discretion under the 2001 Deed. Vodafone says that in the eircom Scheme, pension increases were paid at the discretion of the company subject to the consent of the Minister for Finance. This practice continued, albeit without Ministerial input, after privatisation. The "*no less favourable*" treatment is achieved, Vodafone says, by maintaining these discretionary increases for Scheme C members.

(B) It is a construction that makes certain words in the clause redundant - Vodafone argues that if Rule 10, 2005 Deed had intended to remove Vodafone's discretion entirely in favour of guaranteed annual increases, there would be no need at all to provide that pensions would increase "*in no less favourable a Manner than had the Member remained as a Member*

[31] "*The Trustees may grant such increases in such pensions and preserved pensions under this scheme C as may be agreed by the Company*."

of the Eircom Scheme". A guaranteed increase is by definition more favourable than a discretionary one. In the circumstances, Vodafone says that the use of the quoted phrase is otiose, redundant, and anomalous. Vodafone says it is not credible that the "*no less favourable*" language is merely surplusage. They say that if the purpose of Rule 10, 2005 Deed was to grant guaranteed "pay parity" increases, there would, again, be no need to use the quoted phrase.

(C) It fails to accord with the purpose and logic of the 2005 Deed, and commercial common sense – Vodafone submits that the identification of a very significant fiscal and practical consequence flowing from an interpretation of Rule 10, 2005 Deed favouring guaranteed pension increases was never, on the evidence, considered by either the Company or the Trustees in the lead up to the adoption of the 2005 Deed. This it says is plainly inconsistent with the alternative construction suggested by the Trustees and Mr Fahy. Vodafone says it is necessary to read Rule 10, 205 Deed as preserving the discretion of Vodafone, to which the reference to "no less favourable" refers and that this represents the more reasonable, plausible, and natural meaning of Rule 10, 2005 Deed.

(D) The expert evidence the parties have commissioned, when considered in the round, supports the interpretation contended for by Vodafone - I have previously set out a summary of the expert evidence. I do not believe this evidence is directly relevant to or admissible as an aid to the Interpretation Issue. The experts are agreed that the meaning of Rule 10, 2005 Deed is a legal rather than an actuarial matter.

106. Finally, Vodafone submits, in the alternative, that if the court reaches the conclusion that there is an obvious mistake in the wording of Rule 10, 2005 Deed the *Chartbrook* principle of interpretation is appropriate in this case. This would require that there must be, to a reasonable and informed person, an obvious mistake, and it should be clear what

words ought to have been used. Vodafone says that it is manifest that Vodafone did not intend to remove its discretion which applied under the eircom Scheme.

107. The Trustees submit that, viewed in its proper context, Rule 10, 2005 Deed conferred an entitlement on Scheme C members to non-discretionary pension increases calculated on a pay parity basis.

108. The Trustees point out that there was a significant change in language from the 2001 Deed to the 2005 Deed. They do not accept that there was no intention on the part of Vodafone to move from the discretionary wording in the 2001 Deed – but say in any event that Vodafone's subjective views or intentions are inadmissible to the interpretation of Rule 10, 2005 Deed. The Trustees say that, viewed in the context of a change from wording that had theretofore unequivocally conferred discretion on Vodafone in relation to pension increases to the mandatory "*will*", (which word is used twice in Rule 10), the proper and inexorable conclusion is that Rule 10, 2005 Deed confers, and was intended to confer, on Scheme C members an entitlement to pension increases on a pay parity basis. They point out that there is no reference whatsoever to "discretion" in Rule 10, 2005 Deed.

109. The Trustees argue that Vodafone's interpretation would also require the court to simply ignore a large section of the clause i.e., "*and will increase in line with the percentage increase in the relevant grade for that Member*."

110. They say it is perfectly logical and sensible that Rule 10, 2005 Deed should: (i) record the "*no less favourable principle*" and its genesis in the eircom Scheme (not least because to do so puts, on the face of the 2005 Deed, a clear explanation of the rationale for the different treatment of Scheme C pensioners compared with Scheme A and Scheme B); and (ii) explain how the pay parity principle was to operate. They argue that an interpretation such as that contended for by Vodafone would have the consequence that

Vodafone could, by the simple mechanism of exercising its discretion not to award pension increases at all, render nugatory the express provision for pay parity increases.

111. The Trustees say that the context is that pension increases for Scheme C members have their genesis in the eircom Scheme and the 1983 Act. They say that contrary to the position advanced by Vodafone, increases were not discretionary because the eircom Scheme was established under, and required to comply with, the 1983 Act which was enacted in the context of a long-standing practice of "guaranteed" pay parity increases for civil servants.

112. Looking at the 2005 Deed as a whole, counsel for the Trustees pointed to the very different language used in respect of Scheme A and Scheme B members regarding their pension increases. She says this shows that the drafters had no difficulty expressly providing for discretionary increases in the 2005 Deed when they wished to. The fact that they did not adopt this language in Rule 10 is relevant to how the court should interpret Rule 10, 2005 Deed.

113. The Trustees point out that the cost of a particular pension benefit is irrelevant to the question as to whether the terms of the pension scheme provide that the benefit is an entitlement of members. They say that Vodafone has not in any event advanced any question of "unaffordability" in relation to the benefit.

114. The Trustees say that recourse by Vodafone to "commercial common sense" ignores the commercial position that pertained in 2001 when key personnel who were on secondment from eircom to Eircell (so as not to be compulsorily transferrable on the sale of Eircell) voluntarily agreed to transfer their employment to Vodafone, which they would only do if their pension benefits, including their entitlement to pay parity pension increases, were replicated in the VIPP. Even if it could be said that Rule 10, 2005 Deed if interpreted according to its natural language, has worked out badly for Vodafone – and

that is not accepted by the Trustees – they say that is not a reason for departing from the natural language used.

115. The Trustees deny that the *Chartbrook* principle applies at all in this case and say that the attempt to invoke it represents an attempt on the part of Vodafone to obtain rectification by the back door.

116. Mr Fahy's position broadly aligns with the Trustees. He says that the proper interpretation of Rule 10, 2005 Deed is one that provides for pension increases in parity with pay for existing Vodafone staff on a non-discretionary basis.

117. Mr Fahy says that the reference made in Rule 10, 2005 Deed to the "*Eircom Scheme*" can only properly be interpreted as referring to the pension benefits which were required to be upheld as a matter of law by section 46 in the Eircom Scheme (and all schemes, including the VIPP). He says that the clear purpose of that provision was to protect the rights of former civil servants.

118. In response to Vodafone's contention that a discretion is imported into Rule 10,2005 Deed by the reference to "*no less favourable*" treatment than the eircom Scheme, he says this requires an interpretation of the words "*no less favourable*" as meaning "*no more favourable*". He says that the "*no less favourable*" language clearly places a floor rather than a ceiling on entitlements, by reference to the eircom Scheme. Vodafone's contention, he argues, also requires the latter part of the rule to be disregarded in its entirety, which would not account for all the words used as required by **MIBI**. He also points out that the Vodafone interpretation is one which invests a discretion in the company where none is stated in the text of Rule 10, 2005 Deed.

119. Mr Fahy says that in the context of a well-established, invariable Ministerial practice of passing on pay increases to pensioners, the suggested investment of a discretion in

respect of pension increases in a private company would plainly represent the imposition of a less favourable condition for those affected.

Analysis of the Interpretation Issue.

120. The first place for the court to start must of course be the words used by the parties. Rule 10, 2005 Deed states 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*".

121. It is self-evident that this clause is not drafted in a straightforward way and there is scope for ambiguity. There are some obvious drafting issues such as that the word "Manner" appears as though it is a defined term, which it is not. This however is not an issue of any consequence.

122. At first glance, the reference in Rule 10, 2005 Deed to the "*Eircom Scheme*" as a benchmark or reference point against which pension increases for Scheme C members were to increase, makes little sense. It would be most unusual for one private company to link its pension provisions to the manner in which an entirely unrelated pension scheme was operated by a competitor private company (now eir). The only way this makes sense in the present case is to view this wording against the background of the employment history of Scheme C members (who had transferred to the VIPP from the eircom Scheme) and to see the '*no less favourabl*e' language as necessary to reflect the statutory right deriving from Scheme C members' original entitlements in the eircom Scheme as provided for under s. 46 of the 1983 Act, as amended by the 1999 Act. This therefore explains the reference to the eircom Scheme in Rule 10, 2005 Deed.

123. The eircom Scheme, formerly the Telecom Éireann Main Superannuation Scheme, 1988 (and amending deeds up to 2000) was exhibited as exhibit DOM1 to the third affidavit of Deirdre O'Mahony sworn on day 3 of the hearing in April 2024. Counsel for Vodafone confirmed to the court that Vodafone did not previously have a copy of the eircom Scheme but had requested and received it from eircom. Counsel for the Trustees and for Mr Fahy confirmed likewise. As eircom (now eir) is and was in 2005 a competitor to Vodafone, it is not surprising that the eircom Scheme was not available to Vodafone or the Trustees in 2005. Mr Fahy, although formerly a member of the eircom Scheme did not appear to have a copy of the eircom Scheme either.

124. The eircom Scheme confirms that it was adopted by Bord Telecom Éireann (with effect from 28 May 1985) in exercise of the powers conferred on it by s.46 of the 1983 Act. It followed on from the interim deed of 31 July 1984 establishing the fund with effect from 1 January 1984. The eircom Scheme was required by the 1983 Act to provide pensions to former P&T employees on "*not less favourable conditions*" than those which employees had been entitled to while they were civil servants.

125. Clause 10 of the eircom Scheme deals with pension increases and provides as follows: "*The company may grant such increases in such pensions and preserved pensions under this Scheme as may be authorised from time to time by the Minister [for Communications] with the concurrence of the Minister for Finance*".

126. Similar wording appears in clause 20 of the Telecom Éireann Spouses and Children's contributory pension Scheme 1988.

127. Thus, Vodafone argues, pension increases under the eircom Scheme were discretionary. This it says reflects the position regarding pension increases in the public service which were a matter of discretion under the Pension (Increase) Act 1964. Legally, Ministerial consent was required for pension increases. If a Scheme C member remained

a member of the eircom Scheme, that member would not have enjoyed a guaranteed entitlement to pension increases. Rather, an increase in pensions, if any, was subject to the discretion of eircom as the Company. The Company was entitled, but not obliged, to grant increases in pensions that might be authorised from time to time.

128. Counsel for Vodafone sought to distinguish between practices and legal entitlements under a pension scheme. He argued that practice (including industrial relations practice), no matter how established, cannot override the legal entitlements in a pension deed. He said that all this court is being asked to determine is the interpretation of the 2005 Deed and not issues of estoppel, representations or indeed rectification. I agree that there is a distinction between practice and legal entitlement. A significant amount of evidence was adduced by the parties to support their arguments regarding whether civil servants (and their successor positions) had an entitlement to guaranteed pension increases on a pay parity basis, and the impact of replacing Ministerial consent with company consent. However, I do not need to determine this issue for the purposes of the matters before me. The reason for this is that Rule 10, 2005 Deed does not require that the *same* or *identical* pension increases be provided to Scheme C members as they had in the eircom Scheme – merely that their pensions increase in *no less favourable* a manner. This means that Scheme C members' pension increases cannot be worse or less favourable than they had been under the eircom Scheme – but they can be different so long as they are not less favourable and indeed they could of course be improved. Therefore, even if increases under the eircom Scheme were discretionary, the 2005 Deed could provide for guaranteed increases as they would be *no less favourable* than those provided under the eircom Scheme.

129. I do not believe that the actual performance or practice of pension increases in the eircom Scheme since 2005 can aid the interpretation of Rule 10, 2005 Deed.

130. Rule 10, 2005 Deed twice refers to the fact that pensions "*will increase*". No mention is made of Vodafone discretion or consent (as there was for example in the 2001 Deed) or that pensions might not increase. This is in stark contrast to other wording in the 2005 Deed relating to pension increases for Scheme A members which provides that: "*Pensions under this Scheme A will increase in line with the consumer price inflation index subject to a maximum of 4% per annum; the first such increase to take effect on the first anniversary of your retirement date. Increases over this amount will be at the discretion of the Trustees and the Company*".

131. Identical wording is used for pension increases for Scheme B in the 2005 Deed.

132. It is agreed by all parties that the 2005 Deed effected a guaranteed pension increase for Scheme A and Scheme B members in line with CPI capped at 4% per annum, with any greater increase being at the discretion of Vodafone and the Trustees.

133. This wording must be compared to Rule 10, 2005 Deed which is in very different terms. The 2005 Deed clearly calls out discretionary pension increases for Schemes A and B (above the 4% cap). The fact that it does not do so for Scheme C is in my view relevant to the interpretation of Rule 10, 2005 Deed. Similarly, I do not see how it can credibly be argued that the use of the phrase "*will increase*" can give rise to an admitted guaranteed pension increase for Scheme A and B members but not for Scheme C members, where in fact that phrase is used twice. The Vodafone interpretation requires this court to assume that the words "*will increase*" were a drafting error and so should not be given their natural meaning by this court. While that may be a matter more appropriately raised in a rectification claim, the court at the hearing of this application had insufficient evidence to depart from the natural and ordinary meaning of this phrase for the purposes of interpreting Rule 10, 2005 Deed.

134. Furthermore, looking at matters from a purposive perspective, Vodafone's interpretation would in fact leave Scheme C members worse off than Scheme A and B members (who at least have a guaranteed entitlement to some increases). This outcome would appear to fly in the face of the legislative protections which were introduced for the very purpose of recognising the need to protect the Scheme C members' valuable pension status as former civil servants. This employment history and the relevant legislation was objectively available to all parties at the time of drafting the 2005 Deed.

135. Vodafone's interpretation of an entirely open ended discretion for pension increases does not sit comfortably with the final half of Rule 10 which states that pensions "*will increase in line with the percentage increase in the relevant grade for that Member*". This wording would be completely redundant and indeed entirely contradictory to the earlier part of Rule 10 if Vodafone's interpretation was to be accepted. I must assume that the drafters intended that all parts of Rule 10, 205 Deed were to have meaning.

136. I do not agree with Vodafone's position (as at 2009) that the pension increases for Scheme C members were discretionary and that Rule 10, 2005 Deed should be read as follows:

"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 [<u>If such increases are granted they</u>] will increase in line with the percentage increase in the relevant grade for that member"[32] (emphasis added).

137. One of the extraordinary features of this case is how little contemporaneous information there was available to the court regarding the circumstances in which the wording of Rule 10 was changed in the 2005 Deed. However, in my view, Rule 10, 2005

[32] See para 41 of first affidavit of James Magill sworn 25 November 2022

Deed contains substantive changes in language which cannot be explained merely by consolidation.

138. I am satisfied that the *Chartbrook* principle cannot be invoked in this case. Even if there was an obvious mistake in Rule 10, 2005 Deed (which I do not believe to be the case), it is not at all obvious how this could be corrected.

139. I believe therefore that the correct interpretation of Rule 10, 2005 Deed is that, on its terms as drafted, it provided Scheme C members with a guaranteed entitlement to pension increases on a pay parity basis in line with the percentage increase in the relevant grade for that member.

140. Given the stated difficulty in identifying the appropriate comparator for pay parity purposes I now consider the Comparator Issue.

Analysis of the Comparator Issue

141. The 2005 Deed refers to increases in line with the percentage increase in the "*relevant grade for that Member*". With the abolition of grades, Vodafone says that there is no longer a direct comparator, based on grades.

142. The evidence is that in relation to non-graded Scheme C members, their pension increases were historically granted in line with average general salary increases granted in Vodafone. Grades were abolished within Vodafone in 2013 and pension increases for graded Scheme C members were then also calculated in line with average general salary increases granted in Vodafone.

143. On 29 November 2017, Vodafone determined that the new reference population for Scheme C members were active members of Scheme C as opposed to the general working population within Vodafone. It was proposed that increases would be granted by reference to the "*average rate of increase in pensionable remuneration of Scheme C members*."

144. There has, therefore, been various different approaches taken by Vodafone to assess the appropriate comparator for pension increases for Scheme C members over time, including differences as between so-called "graded" and "non-graded" members. These different approaches include: (a) increases based on Vodafone's ARR process; (b) increases by reference to the average annual increases of all Vodafone employees for the relevant year; (c) increases by reference to the average increases for active Scheme C employees only and (d) the now suggested increases by reference to CPI up to a maximum of 4%.

145. The Comparator Issue arises in circumstances where it is acknowledged that the size of the Scheme C cohort is shrinking compared to the Vodafone workforce generally and also compared to VIPP active, deferred and pensioner members. Due to the naturally reducing number of Scheme C members still in active employment with Vodafone, that adversely affects the calculation of pension increases and, of course, when this population comes to zero (as it must) there would then be no further pay increases for Scheme C members if that were to remain the appropriate comparator.

146. The parties are agreed that the issue as to the appropriate reference population is one which it would be appropriate for this court to determine in these proceedings. In many respects this is a difficult task for this court and would preferably have been achieved by negotiation and agreement between the relevant stakeholders. However, in circumstances where this court has determined that the 2005 Deed guarantees increases to Scheme C members and where there is no longer a direct comparable to "*the percentage increase in the relevant grade for that member*", the court will consider the various options proposed.

147. Vodafone argues that it is a commercial entity with a non-graded general workforce and the process of endeavouring to map a hypothetical or notional role to the Scheme C pensioners is an uncommercial practice that represents a strain on resources owing to the

work required to carry out this exercise. It is Vodafone's position that determining the notional comparator within Vodafone is administratively unworkable.

148. Vodafone considers that the Capped CPI Basis is consistent with its industrial relations commitments on Scheme C increases and accordingly is an appropriate benchmark for determining increases under the 2005 Deed.

149. Vodafone also says that the actuarial analysis demonstrates that the Capped CPI basis is more favourable than the current eir (eircom) discretionary pension increase, both retrospectively and prospectively.

150. Vodafone argues that Capped CPI is an option which is fair to Scheme C pensioners, employees, deferred members, and the wider Vodafone workforce. It says this option is, in practical terms, no less favourable than the eircom Scheme and is financially affordable for Vodafone and commercially sustainable, avoiding the administrative and commercial burden of revisiting the mechanism as the Scheme C active numbers reduce. Vodafone acknowledges that the Capped CPI is a "proxy" – but argues that it is a fair and reasonable one and that the court ought to proceed to fix this comparator on the basis of the jurisdiction recognised in *re Benjamin* [1902] 1 Ch 723.

151. The imposition of a maximum limit or "cap" on increases would, in the opinion of the Trustees and Mr Fahy, have the effect that Scheme C Members' pensions would potentially be left without adequate protection in the event of high inflation and the value of that pension would thus decrease in real terms over time. They also note that due to their classification for PRSI purposes, Scheme C members are not entitled to a contributory state pension.

152. The Trustees' expert evidence confirms that the fact that an organisation had grades and structures that cease to be relevant does not mean that pay parity is not operable. Companies can, and do, find some alternative linkage that generates a comparable

outcome so that pay parity continues. They say that the proposal by Vodafone of Capped CPI would, if accepted, break the mandated pay parity link. That may be financially advantageous to Vodafone, but it is not what the 2005 Deed (or the legislation that informed the eircom Scheme) contemplates or permits.

153. The Trustees propose one of the following comparators:

Basis 1 ("**Notional comparator within Vodafone**") – Vodafone rejects this proposal as administratively unworkable from a practical perspective. Vodafone says that benchmarking against a notionally similar group is unworkable for Vodafone, as many of the roles that pensioners previously occupied have evolved over time to meet the changes in business requirements and skills of the employee. Vodafone says this comparator would be a significant administrative burden which would be neither straightforward nor practical, nor commercially sustainable.

Basis 2 ("**General working population in Vodafone**") - Vodafone rejects this proposal as it involves increases greater than required to be consistent with the industrial relations position of "no less favourable than eircom scheme increases". Vodafone says that to determine a comparator Scheme C baseline increase from the average ARR figure would require significant work to strip out from the overall Vodafone pay increases, promotional, performance-related and discretionary factors that do not relate to Scheme C members. This proposal is also rejected on cost and financial sustainability grounds.

Basis 3 ("**CPI plus**") - Vodafone does not consider this to be an appropriate comparator as it is an equivalent to public sector pay parity and is ruled out on financial considerations, as the most expensive solution and one which, if guaranteed, would provide an increase greater than Vodafone's general remuneration in the event of a financially constrained period for the company.

154. All parties agree that the "active Scheme C employee" basis is unsustainable, and no-one is proposing that comparator.

155. Vodafone accepts that the Capped CPI Basis is an alternative to a direct comparison with the eircom Scheme, but it believes that it is a fair, commercially sustainable, simple alternative based on a clear objective measure which it says has resulted in fair increases in practice. Vodafone says this comparator is also consistent with its industrial relations commitments on Scheme C increases.[33] Vodafone has not averred that any particular comparator is unaffordable.

156. Capped CPI has the attraction of being easy to calculate and to control in terms of exposure. It would bring pension increases for Scheme C members in line with the basis of increase for members of Schemes A and B. For all of these reasons it is easy to see its appeal for Vodafone. In truth however a benchmark of Capped CPI does not involve any actual comparator at all and if the parties do not agree to it, it cannot be imposed as fulfilling the terms of Rule 10, 2005 Deed.

157. While there was a lot of evidence tendered about pay parity in the civil service, I will instead confine my considerations to a comparator based on the wording of Rule 10, 2005 Deed. That comparator does not include a cap. It envisages increases which are aligned with the percentage increase in the relevant grade for that member – there must therefore be some pay parity connection with serving staff in Vodafone for the comparator to comply with Rule 10, 2005 Deed. It was Vodafone itself who abolished grades.

158. In my view either of the first two bases suggested by the Trustees would satisfy the essential elements of Rule 10, 2005 Deed. The notional comparator within Vodafone is perhaps the closest basis, but it appears to be problematic for Vodafone to identify the relevant notional comparator in each case. Basis 2 therefore appears to be the best

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[33] Paras 63and 64 fourth affidavit of James Magill sworn 29 January 2024

substitute being increases based on the average salary increase within Vodafone. This was the basis for pension increase calculations used from 2001 to 2012 for non-graded staff. This was also the basis for pension increase calculations for graded Scheme C members from 2013 until 2016. Mr Magill gave evidence of a sophisticated and complex ARR process within Vodafone. Undoubtedly Vodafone needs to remain flexible and creative on its remuneration structures in order to retain and attract talent. I accept that these processes have become more sophisticated and bespoke in recent times. Even so, I do not accept that it would be impossible or onerous for Vodafone to calculate the average annual increase of salary within Vodafone, as they did historically, and as they would have to accurately budget for on an ongoing basis. The comparable salary relates to core salary only and excludes increases relating to increments, promotion, overtime, expenses and any other variable payments such as performance related bonuses or ex gratia payments.

159. Basis 3 suggested by the Trustees namely CPI plus, is not a proper comparator within the meaning of Rule 10, 2005 Deed and in reality breaks the link with pay parity even if it includes some wage index. It may also be the most expensive option for Vodafone and one which Rule 10, 2005 Deed does not require.

160. There is nothing however to prevent the members, Trustees, and Vodafone agreeing to a proxy for pension increases acceptable to them, which could be linked to more objectively measurable criteria and statistical records such as CPI or average wage growth. In the absence of any agreement on such matters however, I direct that the appropriate comparator for the purposes of Rule 10, 2005 Deed is the average percentage salary increase across general Vodafone staff.

Decision and the Orders to be made

161. In relation to the Interpretation Issue, I determine that:

(i) Properly construed, Rule 10 2005 Deed, provides for guaranteed pension increases for any Scheme C member or beneficiary claiming in respect of the membership of a Scheme C member.

(ii) Accordingly, the 2012 Deed did not create an additional benefit in the form of a guaranteed pension increase in respect of the portion of a Scheme C member's benefit which is attributable to pensionable service between 15 December 2005 and 20 May 2012.

162. In relation to the Comparator Issue, I determine that, for the purposes of calculating any pension increases under Rule 10, 2005 Deed the appropriate comparator is the average percentage salary increase across the general Vodafone staff. For clarity, this excludes any payments relating to increments, promotions or any variable or ex gratia payments such as performance related bonuses.

163. The parties are free to agree to any other comparator that is acceptable to all stakeholders, including a comparator that is measured solely on the basis of an agreed statistical metric.

164. In circumstances where the parties may wish to agree a precise form of order to reflect the decision of this court, I will list this matter for mention before me on **Wednesday 29 May** at 10.30 am to rule the final orders to be made.