IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2024CD00065

IN THE MATTER OF an Application by the FINANCIAL SERVICES Commission for a Declaratory Judgment on the interpretation of sections 27(2)(b) and 27(4) of the Pensions (Superannuation Funds and Retirement Schemes) Act, 2006

AND

IN THE MATTER OF the PENSIONS (SUPERANNUATION FUNDS AND RETIREMENT SCHEMES) ACT, 2006

Re: The Financial Services Commission and the Pension Superannuation Funds and Retirement Scheme Act, 2006

Pensions - The Pensions (Superannuation Funds and Retirement Schemes) Act, 2006 – Section 27(2)(b) – Section 27(4) – Whether requirement of 90 days' notice of an intention to wind up is mandatory – Whether failure to give 90 days' notice renders notification void – Whether regulator's jurisdiction to give approval affected – Whether notice may be varied or time within which to consider extended – Whether declaration should have a prospective effect.

Mikhail Williams and Aneisha Brown Dixon for the Financial Services Commission

Kerri-Ann Allen Morgan and Sanya Goffe instructed by Livingston Alexander & Levy for the Pension Industry Association of Jamaica
Lisa White and Rochelle Brown instructed by the Director of State Proceedings for the Attorney General of Jamaica

Davia Blake watching proceedings for Sagicor Group (Jamaica)

Heard: 13th & 14th January and 7th March 2025

IN OPEN COURT

Cor: Batts, J.

THE ISSUES

[1] The Fixed Date Claim is brought to obtain the court's decision as to the correct interpretation of two sections of the **Pensions (Superannuation Funds and Retirement Schemes) Act**, hereafter referred to as "the Act", which was passed in 2006. The claim is what used to be called a "*construction summons*". Such claims are normally heard in chambers as was recognized by my sister judge, the Honourable Mrs. Justice S. Jackson Haisley, by an order to that effect on the 20th May 2024. However, as the judge presiding at trial, I felt it appropriate that the issue be heard in open court. I therefore, prior to the commencement of the hearing, made it clear that the matter was to be heard in open court. The issues to be determined are of public interest even if most members of the public may not find it particularly interesting. The matter concerns the due administration of pension funds and any pensioner or pension fund manager ought, if they so desired, to be able to attend. No counsel present objected to my ruling.

[2] There were no issues of fact. The affidavit in support of the claim, by Nicolette Jenez filed on the 19th February 2024, was unchallenged. Ms. Jenez is the Deputy Executive Director of the Financial Services Commission (which I will refer to as the 'FSC'). It is the regulator. The FSC filed the claim and is therefore the applicant

for relief. The Pension Industry Association of Jamaica (which I will refer to as the 'Association') was granted permission by the order of the 20th May 2024, to file and serve affidavits in response. No affidavit was filed. Counsel indicated that that organization represents a majority of the registered pension funds in Jamaica. The Attorney General of Jamaica was of course representing the public interest. The facts, outlined in the affidavit, reflect a situation in which the regulator received a notice of intention to wind up which, if computed in the manner for which the regulator contends, was less than the stipulated 90 days. A true interpretation of the Act will determine whether the notice was good and the consequences if it was not.

[3] The sections of the Act which fall to be construed are sections 27(2)(a)(ii)(A) and 27(4). These, alongside other relevant provisions, read as follows:

> *"27. (1) The court may order the winding-up of an approved superannuation fund or approved retirement scheme in accordance with the provisions of this Act or regulations made hereunder or the Trust Deed or Master Trust Deed, as the case may require.*
>
> *(2) An approved superannuation fund or approved retirement scheme may be wound up –*
>
> *(a) Subject to subsections (3) and (5), on the petition of –*
>
> *(i) The Commission, or*
>
> *(ii) The Trustees who shall –*
>
> *A. give the Commission ninety days' notice of their intention to do so and obtain the Commission's prior approval for such action; and*

B. forthwith serve on the Commission a copy of the petition;

(b) subject to subsection (4), voluntarily by the Trustees pursuant to the rules for winding-up in the Trust Deed or Master Trust Deed, as the case may require; or

(c) …

(3)….

(4) Where Trustees intend to voluntarily wind-up an approved superannuation fund or approved retirement scheme, they shall notify the Commission of their intention no later than ninety days before the winding-up and obtain the prior approval of the Commission for such winding-up.

(5) to (13) …

(14) A superannuation fund or retirement scheme shall, during the period of winding-up and until all assets have been distributed, be subject to the provisions of this Act and the rules and regulations made hereunder."

Although the Fixed Date Claim asks specific questions of the Court (see paragraph 5 below) the crux of the matter has to do with whether the provisions requiring 90 days' notice are mandatory or directory and, if it is mandatory, the consequence of not giving that period of notice. That is, is it open to the FSC, having received less than 90 days' notice, to approve a voluntary winding up by Trustees.

[4] The FSC, the Association and the Attorney General all gave fulsome written submissions supported by authorities. Each counsel was allowed ample time to orally articulate and did so with admirable precision and clarity. I will summarize,

hopefully without distortion, the respective arguments before giving my decision and the reasons therefor.

[5] The questions presented to the court in the Fixed Date Claim Form, are as follows:

> *"1. Whether for the purposes of section 27(2)(b) and 27(4) of the Pensions (Superannuation Funds and Retirement Schemes) Act, 2006 ("the Act"):*
>
> *a. the Financial Services Commission ("the Commission") has the discretion to set an effective date of winding up which predates the date of approval of windingup by the Commission;*
>
> *b. Trustees are required to notify the Commission of their intention to voluntarily wind-up a pension plan no later than ninety days before the effective date of such voluntary winding-up; and/or*
>
> *c. Trustees are required to obtain the Commission's prior consent or approval before commencing voluntarily windingup the pension plan.*
>
> *2. Whether section 27(2)(b) and 27(4) of the Act or the winding-up rules contained within a Trust Deed or Master Deed grants the Commission the power to exercise a discretion to shorten or wave the Trustees' ninety-day notification period.*

3. *Whether a Trustee who fails, neglects, or refuses to give, to the Commission, ninety days' notification of its intention to voluntarily wind up a pension plan is precluded from winding up the pension plan pursuant to section 27(2)(b) and 27(4) of the Act."*

SUBMISSIONS OF THE FSC

[6] The FSC contends that these questions can be considered under three headings: Orders 1(a), (b) and (c) concern "*the Commission's Statutory Discretion*", order 2 concerns the "*Effective Date*" and order 3 concerns the "*Trustees'* alternative" if the Commission's prior approval cannot be obtained. Counsel for the FSC commenced by referring to section 27(2)(a)(ii)(A) of the Act. He submitted that on a plain reading it creates two obligations for the Trustees: give the FSC 90 days' notice and obtain the approval from the FSC before filing a petition in Court. In relation to section 27(4) it was submitted that similar obligations were also created: they are to provide the FSC ninety days' notice of their intention to wind up and obtain prior approval from the Commission before commencing winding up. Counsel posited that these two conditions are preconditions for the FSC to exercise its discretion to approve either the petition or the winding up by the Trustees without an application to the court.

[7] Focus was also on the definition of the word "*shall*" in section 27(4). Reliance was placed on paragraph 54 in the case of **Jamaica Public Service Company Limited v Dennis Meadows et al [2015] JMCA Civ 1 at paragraph 54**, where Brooks JA (as he then was) stated:

> **"The *learned authors of Cross' Statutory Interpretation 3rd edition proffered a summary of the rules of statutory interpretation. They stressed the use of the natural and ordinary meaning of***

words and cautioned against "judicial legislation" by reading words into statutes. At page 49 of their work they set out their summary thus:

> ***'1. The judge must give effect to the grammatical and ordinary or, where appropriate, the technical meaning of words in the general context of the statute; he must also determine the extent of general words with reference to that context.***
>
> ***2. If the judge considers that the application of the words in their grammatical and ordinary sense would produce a result which is contrary to the purpose of the statute, he may apply them in any secondary meaning which they are capable of bearing.***
>
> ***3. The judge may read in words which he considers to be necessarily implied by words which are already in the statute; and he has a limited power to add to, alter or ignore statutory words in order to prevent a provision from being unintelligible, absurd or totally unreasonable, unworkable, or totally irreconcilable with the rest of the statute.... (Emphasis supplied)"***

[8] Counsel for the FSC also relied on the case of **Michael Young et al v Kingston and St. Andrew Municipal Corporation et al [2020] JMSC Civ 251** where the word "*shall*" would either, connote an imperative (meaning if it is mandatory, the failure to do so being likely to result in an invalidation of the action) or, if it is directory, that the failure to comply would not necessarily have an invalidating effect. At paragraph 105, in coming to her conclusion, that "*shall*" in the Natural Resources Conservation Authority Act was mandatory, Justice Fraser held that:

> "***the test most satisfactory and conclusive is, whether the prescribed mode of action is of the essence of the thing to be accomplished, or in other words whether it relates to matters of substance or merely of convenience.*"**

In applying this test, counsel for the FSC submitted that, the 90 days' notice and prior approval of FSC are not matters of convenience, but are to ensure that the Commission exercises its supervisory functions appropriately. As the entire winding up process is complex, the intention of Parliament was to ensure the FSC has sufficient time to review the matter before granting approval. Furthermore, as the FSC supervises the entire winding up process, it is imperative that approval be obtained before winding up commences that is, before assets are paid out of the fund.

[9] In summary the FSC submitted that the answers in response to questions 1(a), (b), and (c) asked in the Fixed Date Claim form in (paragraph 5 above) should be no, yes and yes, respectively.

[10] In the event the Trustees fail to give the 90 days' prior notice, counsel for the FSC submitted that, they may apply directly to the court for an order directing the fund to be wound up under section 27(1) of the Act. In that event the Trustees must give the Commission 90 days' notice and obtain its approval before petitioning the court for a winding-up order. They must also serve the court documents on the Commission. Additionally, the Trustees must inform the members in writing of the reasons for wanting to wind up the plan before filing the petition, demonstrate to the court that a prima facie case exists, and provide sufficient security for costs. Other provisions under section 27 of the Pensions Act are considered adequate alternatives to the procedure outlined in section 27(4).

SUBMISSIONS OF THE ATTORNEY GENERAL

[11] The submissions of the Attorney General bear some similarity to those of the FSC therefore I will refer to areas they have added to, or differed from the FSC. The Attorney-General referred to *Black's Law Dictionary 7TH edition* for guidance in the interpretation of the Act. It was submitted that the requirement placed upon a Trustee who intends to voluntarily wind up a fund/scheme that they must notify the Commission, no later than 90 days before the winding up, is mandatory, not optional. According to Black's Law Dictionary, '*shall'* means '*has a duty'* or '*is required to'*. This, the Attorney-General asserts, means that the Commission has no authority, whether by the Act or by virtue of any rule in a Trust or Master Deed, to shorten or waive the statutory 90-day notification period. The Attorney General submits that it is a jurisdictional matter.

[12] The term '*winding up'* is defined as *"the process of settling accounts and liquidating assets in anticipation of a partnership's or a corporation's dissolution."* Focus was had on the term '*process'* which, the Attorney-General submitted, suggests there is a commencement and a conclusion, with steps in between. With this in mind counsel advanced the submission that the term '*prior'* in section 27 of the Act meant that the approval of the FSC must be obtained before the commencement of the winding up. It was submitted that although the word "*commencement*" was not used the context made the meaning clear.

[13] The Attorney-General also submitted that, given the numerous steps involved in the dissolution process, it is improbable that one would know at the outset the precise date of dissolution or conclusion of the winding-up process. However, an intended or anticipated commencement date can always be identified. It was emphasized that the term "*winding-up*" is expressed in the continuous tense, signifying an ongoing process rather than a singular final event. On this basis, it is argued that the prescribed 90-day notification period should be calculated from the intended commencement date rather than an uncertain conclusion date.

[14] Regarding the requirement under section 27(4) of the Act for Trustees to obtain the Commission's "*prior approval*" for winding-up, the Attorney-General relied on both the *Cambridge Online Dictionary* and *Black's Law Dictionary* to define "*prior*" as meaning "*earlier*" or "*preceding in time or order*." It is contended that this means approval must be obtained before the winding-up process begins. It was further noted that the provision is framed in the continuous tense, referring to "*such winding-up*," rather than "*the scheme or fund being wound up*." Consequently, section 27, and in particular subsections 27(2)(b) and 27(4), do not permit an interpretation that allows the Commission to set an effective date of winding-up which predates its own approval. The Attorney-General contends that neither section 27(2)(b) nor section 27(4) of the Act grants such authority. The term "*effective day of winding-up*" is not defined in the Act. The requirement for "*prior approval*" means approval must be obtained before the process begins. There is therefore no statutory basis for granting approval retrospectively, and doing so would be ultra vires. It is further submitted that had the Act intended to permit retrospective approval, it would have said so expressly. Applying the literal rule of interpretation, the Act does not support such an approach, nor is it consistent with its overall scheme. Therefore, it is argued, the Commission cannot lawfully approve a winding-up date preceding its own authorization.

[15] Finally, the Attorney-General submitted that if a Trustee fails to comply with the statutory 90 day notification requirement, the winding-up could still proceed in several ways. The Trustee could withdraw the defective notice and submit a new one in compliance with the Act, or delay the winding-up process to satisfy the required notification period while relying on the previously submitted notice. Alternatively, the Commission could be invited to initiate winding-up under section 27(2)(a)(i) or 27(2)(c) of the Act.

SUBMISSIONS OF THE ASSOCIATION

[16] The Association presents a contrary view as to the correct interpretation of the Act. Counsel argued that the winding up of a pension plan occurs only when all benefits have been fully allocated, or ceased to be paid, rather than at the point of its discontinuance. They contend that Trustees must obtain consent from the Commission before a voluntary winding-up, and *therefore the 90-day notice is required to be prior to the date a final payment is made.* ***Air Jamaica Limited and others v Charlton and others (1999) 54 WIR 317*** is cited. That case outlines three stages of winding up: (1) closure to new entrants, (2) cessation of contributions while payments continue, and (3) the final winding-up when all benefits have been distributed. They emphasize that the Judicial Committee of the Privy Council clarified that discontinuing a pension plan, such as ceasing contributions, did not equate to winding it up. Counsel also cited **Maria Perea et al v Gillette Caribbean Limited Vivion Scully and others Claim No. 2002/E320 (unreported, delivered November 20, 2004)**, where the court found that a discontinued pension plan is not considered wound up until all allocations have been completed according to the plan's rules. Ultimately discontinuance, or cessation of contributions, does not constitute winding-up. The crucial factor is the final distribution of all benefits in accordance with the plan. On this basis counsel submitted that section 27(4) requires the Trustees to notify the Commission of their intention to make the final payment of benefits 90 days before making the final payment, rather than at the commencement of the winding up.

[17] The Association posited that the FSC's reliance on the definition of "*Terminated Open*" in the **Pensions (Superannuation Funds and Retirement Schemes) (Registration, Licensing and Reporting) Regulations** is not entirely useful. It is significant that the glossary demonstrates that a pension plan may be discontinued, in that contributions cease, before the FSC's approval is obtained. The glossary defines an "*inactive plan*" as a pension plan *"for which there is a cessation of contributions and member enrolment."* "*Termination Pending*" is defined as:

> *"A termination pending superannuation fund/ retirement scheme is an active or inactive fund/scheme for which approval of termination/winding up has not yet been granted by the Commission or Court."*

It means therefore that a pension plan may discontinue before obtaining windingup approval and that, under the Act, cessation of contributions does not equate to winding up. Instead, winding up only occurs once final benefit payments have been made, requiring prior approval at that stage, not at the point of discontinuance. Furthermore, if this court were to agree that it is the beginning of the winding up which requires the 90 day notice, the discontinuance would not be the beginning, nor even a part of the winding up process. Instead, the Trustees would be required to notify the FSC 90 days before they intend to start liquidating assets and paying benefits.

[18] The Association further submitted that the FSC has a discretion to accept a shorter notice period and that Court approval is only necessary in exceptional circumstances. The argument asserts that even if Trustees fail to notify the Commission within the required timeframe, the Act does not mandate that this failure should automatically lead to a denial of approval. Counsel submits that a shorter notice period does not strip the FSC of its jurisdiction to grant approval. The submission draws support from the House of Lords decision in **R v Soneji [2005] All ER (D) 294 (Jul), [2005] UKHL 49**, which examined the consequences of non-compliance with statutory time limits. The court held that a failure to comply with a mandatory timeframe is not necessarily fatal unless Parliament explicitly states so. Instead, the focus should be on the practical consequences of noncompliance and whether Parliament intended non-compliance to invalidate the process. The ruling also emphasized examining the broader statutory scheme and considering factors such as prejudice or injustice caused by the delay.

[19] The Association submits that it could not have been Parliament's intention that a failure to provide 90 days' notice would strip the Commission of its jurisdiction to approve a winding up application that is otherwise satisfactory. During oral submissions an example was given of an 89-day notice and whether that would render the process void. It is argued that such a rigid interpretation would lead to absurd or undesirable consequences, making court intervention necessary in situations where it was never intended. In support of this position, counsel argued that where a pension plan discontinues unexpectedly, whether due to redundancies, a change in employer control, or the employer's insolvency, Trustees may not have sufficient time to notify the Commission before contributions cease. It was submitted that, under a strict interpretation, every such case would require court approval, even where the Commission would have otherwise approved the winding up. It is further argued that this interpretation would mean that if the Commission is unable to complete its review and grant approval before the given "*effective date*" of winding up, Trustees would be forced to abandon their application and seek court approval instead. Such an approach would leave participants awaiting the settlement of their benefits in a state of uncertainty, with indefinite delays that could lead to a deterioration in the financial health of the pension plan. It is also contended that requiring court approval in such circumstances would increase winding up expenses, reducing the assets available for distribution and further prolong the settlement of benefits.

[20] Counsel argued that it is illogical for a pension plan that has clear Commissionapproved rules for winding up, and that otherwise satisfied the Commission's criteria, to nonetheless be required to seek court approval only because the Trustees failed to meet the precise notice period. It is submitted that this would shift winding up applications from the Commission, a specialized body with expertise in pension governance, to an already overburdened court system that lacks the same specialized knowledge. Concerns were raised that Trustees seeking court approval would be required to establish a prima facie case and

provide security for costs, requirements that do not align with a winding up process that is merely being carried out in accordance with the plan's established rules. Ultimately, counsel submits that a strict reading of the 90-day notice requirement would create unnecessary procedural barriers, increase costs, cause significant delays, and shift responsibility from the Commission to the court in a manner that Parliament could not have intended. It is therefore argued that the Commission retains the discretion to approve winding up applications despite a shorter notice period, with court approval only necessary in exceptional circumstances.

Furthermore, failure to provide the full 90 days' notice does not create any prejudice. It is argued that the practical effect of a shorter notice period is simply that the Commission has less time to assess the application and/or it may complete its review after the effective date given by the Trustees. However, since Trustees cannot wind up without the Commission's approval, no harm results from the shorter notice period. In support of this position it is pointed out that, for more than a decade, the Commission has routinely approved the winding up of pension plans with retrospective effective dates. This fact demonstrates that no prejudice arises when the notice period is not strictly adhered to.

[21] Counsel further submits that statutory provisions designed to promote efficiency or order are generally considered directory rather than mandatory. Relying on the analysis, in **Michael Young et al v KSASMC et al [2020] JMSC Civ 251**, it is argued that the key question is whether the provision relates to a matter of substance or mere convenience. In this instance, the Association contends that the 90-day notice requirement is purely a procedural convenience, intended to provide the FSC with adequate time to review an application and confirm that all necessary conditions for winding up have been met. It is further submitted that this interpretation is reinforced by the Commission's historical practice, as until recently, it did not insist on strict compliance with the notice requirement, suggesting that such strict adherence was never deemed necessary.

[22] The Association also relies on section 57 of the Act, which allows the Commission to extend statutory time limits in the absence of a specific provision prohibiting such an extension. While the Commission has taken the position that section 57 only permits the extension of time and not its reduction, counsel argues that there is no basis for this restrictive approach. It is submitted that if the Commission has the power to extend a deadline beyond its original timeframe, it logically follows that it can also allow a notice to be submitted later than originally required. More broadly, counsel asserted that the existence of section 57 indicates that Parliament intended to grant the Commission flexibility in dealing with statutory timelines. Thus reinforcing the position that timeframes under the Act are meant to be an ideal, rather than rigidly mandatory.

ANALYSIS AND DECISION

[23] The first question, I consider, is whether the FSC has the authority to set an effective winding-up date that predates its approval. The relevant provision is section 27(4). The requirement for "*prior*" approval by the Commission necessarily implies that the Commission's decision to approve the winding-up is the legal trigger that authorizes the process to begin. There is no language within the section that empowers the FSC to give the go-ahead for a winding-up which took effect prior to its own approval. The function of the FSC, as contemplated by the Act, is not merely to acknowledge the Trustees' intention but to actively consider and approve the proposed winding-up before it takes place. The statutory requirement for prior approval is consistent with the objective of regulatory oversight, ensuring that the interests of members are adequately protected before any step toward winding-up is taken. If the FSC were to determine an effective date predating its own approval, this would create a legal fiction whereby a winding-up would be deemed to have taken effect at a time when the statutory conditions for it had not yet been satisfied. Such an approach would be inconsistent with the plain meaning of section 27(4) and would undermine the statutory scheme by allowing a windingup to be treated as having occurred before it was lawfully authorized. A

practical consequence of such an interpretation would be to place pensioners and pension funds at risk since, in that scenario, distribution and other acts of winding up may have taken place. What then if the Commission declines its approval?

[24] The Act does not expressly grant the FSC a discretionary power to backdate its approval, nor is there any indication that Parliament intended such a discretion to be inferred. The wording of section 27(4) imposes two clear prerequisites: (i) a notification period of at least ninety days, and (ii) the Commission's prior approval before the winding-up. The existence of these express preconditions negates any implied power to set a retrospective effective date. Accordingly, I hold that the Commission does not have the discretion to set an effective date of winding-up which predates the date of its approval.

[25] Turning now to the 2nd question, whether Trustees are required to notify the Commission of their intention to voluntarily wind up a pension plan no later than ninety days before the commencement of the winding-up. I am guided by the clear words of section 27(4). I accept the submissions, and the reasons advanced, by the FSC and the Attorney-General that the word "*shall*" in the section is mandatory. An important question is whether the notification period is tied to the commencement of the winding-up process or to the date the Trustees intend to start liquidating assets and paying benefits. I find that the phrase "*before the winding-up*" is to be given its ordinary and natural meaning, which is, before the initiation of the winding-up process rather than before its conclusion or before the date for which final payments are to be made and liquidation done. This interpretation is consistent with the purpose of the provision which is to guarantee the Commission a minimum time, deemed necessary by Parliament, for an assessment. of the proposed winding-up before any irreversible action is taken. If Trustees were permitted to give notice based on an anticipated effective date rather than the actual commencement of winding-up, the Commission's ability to intervene, regulate, or impose conditions on the process would be significantly weakened. Moreover, such an interpretation would introduce uncertainty, as Trustees could, in theory, manipulate the process by setting an arbitrary effective

date well into the future while taking steps in the winding up, thereby circumventing the regulatory safeguard of prior notice.

[26] On the related issue of whether Trustees are required to obtain the Commission's consent or approval before commencing the voluntary winding-up of a pension plan, section 27(4) clearly states that Trustees *"shall... obtain the prior approval of the Commission for such winding-up."* The use of the term "prior" in conjunction with the requirement to obtain approval demonstrates Parliament's intent that approval is a precondition to the lawful commencement of winding-up. The provision does not merely require Trustees to seek approval or notify the Commission; it expressly mandates that they obtain approval before proceeding.

[27] The principle of obtaining prior consent is particularly relevant in the context of regulatory oversight, where such approval serves an essential public interest. In the present case, the statutory scheme is designed to protect the interests of pension beneficiaries and ensure the orderly winding-up of retirement schemes.

To allow Trustees to commence winding-up before receiving the Commission's approval would defeat the purpose of the regulatory framework and render the requirement for "*prior*" approval meaningless. The practical implications of an interpretation that would allow Trustees to initiate winding-up while awaiting approval must be considered. That approach would create legal uncertainty, as the winding-up process could be set in motion but the Commission later determined that it was inappropriate, unlawful, or contrary to members' interests. The potential for loss and harm, should such an eventuality occur, far outweighs the or any inconvenience caused by a strict application of the provisions. The statutory requirement for prior approval ensures that all regulatory concerns are addressed before any substantive step toward winding-up is taken, thereby preventing legal and financial instability. For these reasons, I find that Trustees are required to obtain the Commission's approval before commencing the voluntary winding-up of a pension plan.

[28] I now turn to the issue of whether the Act or the winding-up rules contained within a Trust Deed or Master Deed grants the FSC power to exercise a discretion to shorten or waive the 90 day notification period. I have found that the word "*shall*" reflects a mandatory obligation, rather than a discretionary one. This interpretation aligns with the regulatory purpose of the section, which is to ensure that the Commission is afforded a minimum time, deemed by Parliament as necessary, to permit a review and assessment of a proposed winding-up. The fact that section 27(2)(a) speaks to 90 days' notice of an intent to petition the court, while section 27(4) says 90 days before the winding up, is not I think material to this point. There is no express provision within section 27(2)(b) or section 27(4) which grants the Commission power to waive or shorten the ninety-day notification period. While regulatory bodies are sometimes afforded a discretion in the exercise of statutory functions, such discretion must be expressly provided for or arise by necessary implication. The statutory text and its context, in this case, provides no such authority. On the contrary, the provision suggests a strict procedural requirement that must be followed by Trustees, without any power of modification in the Commission. A statutory body can only act within the scope of the powers granted to it by Parliament. The Commission cannot derive a discretion, to adjust the notice period, from the Trust Deed or Master Trust Deed governing a pension plan. It is I believe trite law that a contractual provision, whether contained in a Trust Deed or Master Trust Deed, cannot override express statutory provisions. The Deed may provide additional rules for winding-up, but must remain consistent with the statutory framework set out in the Act. If the Act mandates a fixed 90-day notification period, the provisions in a Trust Deed cannot confer on the Commission power to waive or reduce that statutory timeframe.

[29] This leads to a consideration of section 57 of the Act which reads:

> *"Where any provision of the Act or regulations made hereunder requires anything to be done within a specified period of time and no provision is made for the*

extension thereof, that period may in any particular case be extended by the Commission."

The provision did cause me to pause. Is a requirement that notice be given *"no later than 90 days before the winding up," a* requirement that something be done within a "*specified period of time"?* The answer is in the affirmative. It means the Commission may extend the required 90 days' notice. This provision does not permit, or imply, a power to contract that 90-day requirement. It does not assist the Association's case.

[30] I now consider whether a Trustee who fails, neglects, or refuses to provide the Commission with 90 days' notification of its intention to voluntarily wind up a pension plan is thereby precluded from proceeding with the winding-up under section 27(2)(b) and 27(4) of the Act. It is clear from these sections that Trustees must give the Commission no less than ninety days' notice before voluntarily winding up an approved superannuation fund or retirement scheme. As the requirement is mandatory, failure to give the required notice means any subsequent winding-up action is unauthorized. However, I accept the submission that the legislative scheme does not suggest the Commission is thereby barred from ever approving the winding-up, or that the Trustees' actions in that regard are necessarily void ab initio. The matter can be remedied through several mechanisms. Firstly, a Trustee who has submitted a faulty notice may withdraw it and submit a new notice that complies with the 90-day requirement, thereby resetting the process in accordance with the Act. Secondly, the Trustee may delay commencement of the intended winding-up process to allow the statutory notice period to be satisfied before proceeding. In such a case, although the initial notification was short, the Trustee by adjusting the commencement date will have provided the 90-day period required. This of course presumes that the Trustee did not commence the winding up process before service of notice on the Commission. The Commission retains the power to seek the winding-up of the scheme under section 27(2)(a)(i) or 27(2)(c) of the Act. This avenue ensures that the pension plan

is not left in an uncertain state merely because the Trustees have failed to comply with a procedural requirement. The statutory framework thus provides alternative mechanisms to facilitate winding-up while maintaining regulatory oversight and adherence to the mandatory procedural safeguards.

[31] Counsel for the FSC referenced the case of **Mossell (Jamaica) Limited (T/A Digicel) v The Office of Utilities Regulation [2010] UKPC 1** where Lord Phillips indicated that, while declarations usually have prospective and retroactive effect, there are cases in which the declarations should only be prospective. It was submitted that this is an appropriate case for the court to make declarations which are not retroactive because otherwise the past conduct of the Commission might be invalidated, with serious repercussions in the pensions industry and possibly severe disadvantage to innocent pensioners. All counsel appearing agreed with that submission. I agree that this is an appropriate case for declarations with prospective rather than retroactive effect. If the Court were to declare that the Commission's previous interpretation of section 27(2)(b) and 27(4) was incorrect, and apply that ruling retroactively, it could create significant uncertainty regarding past winding-up approvals and regulatory decisions. This could, in turn, expose pension plans to legal challenges, disrupt settled expectations, and jeopardize the financial security of pensioners who have already received benefits. All parties also agreed that whatever the result of the proceedings it was appropriate that there be no order as to costs.

[32] For the reasons stated above I declare the following with prospective effect only:

1. The Financial Services Commission does not have a discretion to set an effective date for the winding up of a pension plan which date predates the Commission’s date of approval of the winding up.

2. Trustees are required to notify the Financial Services Commission of their intention to voluntarily wind up a pension plan no later than 90 days before the commencement of such voluntary winding up.

3. Trustees are required to obtain the Financial Services Commission's prior consent or approval before commencing to voluntarily wind up the pension plan.

4. The Financial Services Commission does not have a discretion to shorten or waive the requirement that the Trustees give a 90-day notification.

5. A Trustee who fails to give 90 days' notice is precluded from winding up the relevant plan pursuant to sections 27(2)(b) and 27(4) unless the Commission is afforded a 90-day period of notification prior to the commencement of the winding up.

6. No order as to costs.

David Batts
Puisne Judge