

Report under s89 of the Pensions Act 2004

Issued by The Pensions Regulator
in relation to the Bonas Group
Pension Scheme (the 'Scheme')

The Pensions Regulator ('the regulator') and Michel Van de Wiele NV (VdW) have settled the proceedings before the Upper Tribunal (the 'tribunal') by agreeing that a Contribution Notice be issued to VdW for £60,000.

This is the first Contribution Notice (CN) issued by the regulator since its inception. The CN power allows the regulator to intervene where an employer or its associate avoids liabilities to a pension scheme.

The case concerned VdW's involvement in the administration of its subsidiary company Bonas Machine Company Limited ('Bonas'), the scheme's sole employer. The directors of Bonas resolved to put it into administration on 5 December 2006. On the same day, it was agreed that a newly-formed subsidiary of VdW would purchase the business and certain assets of Bonas, but would not take on its pension liabilities.

The administration triggered a Pension Protection Fund (PPF) assessment period and the scheme subsequently entered the PPF.

Background

In April 2010, the Determinations Panel (DP) determined to issue a CN in the sum of £5.089 million against VdW. That CN was not issued because on 21 May 2010, VdW referred the decision of the DP to the tribunal and a CN may not be issued until all proceedings have been determined. A full hearing of those proceedings has not taken place because there has been an agreement to settle those proceedings, which the tribunal has sanctioned.

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The Judgment

On 12 August 2010, VdW made an application to the tribunal to strike out the regulator's case.

On 17 January 2011, Mr Justice Warren refused VdW's application.

This case has tested a power previously untested by the DP or the tribunal. The tribunal's decision confirms that a CN can be issued in circumstances where a business is sold for a value at the lower end of a range of acceptable values to the disadvantage of the pension scheme creditor. On the basis of the evidence before the tribunal, Warren J took a different view of the facts than the regulator had taken. Supplementary, obiter dicta, comments by Warren J discussed the reasonable sum of a CN (discussed further below).

The tribunal also clarified important aspects of the scope of a reference to the tribunal from the DP. Warren J held that the reference was a re-hearing of the regulator's case against VdW and not an appeal from the decision of the DP, although he made it clear that the tribunal could actively manage the case before it and make directions that also take into account prior proceedings, eg in relation to witness evidence. Warren J also held that although the regulator could not itself make a reference to the tribunal, it was not bound to support all the reasoning behind the decision taken by the DP and could depart from it, establishing that the regulator's case team (and not the DP) was the appropriate respondent to a reference.

The tribunal also decided that although the regulator is prevented from continuing a case against a target that the DP has rejected, it is open to Directly Affected Parties (such as the trustees or the PPF) to bring a reference and, if they do so, the regulator will play a role in those proceedings.

The sum of a CN

In the regulator's opinion, there is the potential for some of Mr Justice Warren's comments about the appropriate sum of a CN to be misunderstood. First, it should be remembered that the comments are obiter dicta. Second, Warren J's comments should not be taken out of context; they relate to the particular facts of the Bonas case and should not be relied on in other cases.

It is plain that the jurisdiction of the regulator's power to issue a CN in a particular sum is not limited to compensation for the detriment caused (although this will often be one of the factors that the regulator will take into account when assessing reasonableness). Warren J's obiter comments concern the question of a reasonable amount that might be specified in the CN in this particular case. The regulator does not consider that Warren J meant to restrict, in all cases, the amount of a CN to the detriment suffered by a pension scheme which could be demonstrated to be caused by the specified act or failure to act. Certainly, that is not how the regulator will approach the sum of a CN in existing and future cases, including cases involving pre-pack administration.

The Bonas case will not cause the regulator to change its approach to taking appropriate and proper regulatory action in other cases. In effect, the regulator will be operating 'business as usual' in its approach to investigating and enforcing avoidance activity.

The regulator's powers were strengthened by the introduction of the material detriment test as a ground for issuing a CN. This particular ground may be available for acts on or after 14 April 2008 (after the acts specified in the Bonas case).

The regulator will seek to use its so-called 'moral hazard' powers in a reasonable manner wherever appropriate.

Recoveries in the Bonas case

These settlement monies will bring the total proceeds paid to the PPF from the insolvency of the scheme's employer to over £1 million.

The PPF is already providing compensation to members of the former Bonas scheme. Before PPF entry, the scheme had approximately 400 members.

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