

# Report under s89 of the Pensions Act 2004

Issued by The Pensions Regulator ('the regulator') in relation to the Lehman Brothers pension scheme

## **Executive summary**

Following a detailed investigation commencing in late 2008, the regulator initiated regulatory action in May 2010 via a Warning Notice seeking the issue of a Financial Support Direction (FSD) to certain members of the Lehman Brothers group in support of the Lehman Brothers pension scheme (the Scheme).

In September 2010 the Determinations Panel of the regulator (the Panel) determined that six companies in the Lehman Brothers group should secure that financial support was put in place for the Scheme, and should therefore receive FSDs. It also determined that no FSD should be issued to a further 38 companies listed in the Warning Notice.

This determination was referred to the Upper Tribunal by these six companies, who argued that no FSD should be issued to them. It was also referred by the trustees of the Scheme, who argued that FSDs should also be issued to the original 38 companies.

The regulator and the trustees of the Scheme then successfully defended a number of legal challenges arising from the proceedings, including an appeal to the Supreme Court in July 2013 to determine whether FSDs were effective against insolvent companies.

The Scheme's deficit on the buyout basis on 30 June 2014 was estimated at £184m.

The parties to the regulatory action have now agreed the terms of a settled outcome which results in certain companies in the Lehman Brothers group paying the trustees of the Scheme an amount which is expected to buy out in full the Scheme's liabilities to its defined benefit (DB) members. The final payment under this settlement will be made just before the benefits have been bought out with a third party insurer. The Scheme will therefore not enter the Pension Protection Fund (PPF), to the benefit of PPF levy payers.

## Background

Lehman Brothers Holdings Inc filed for Chapter 11 protection on 15 September 2008. This was followed by the insolvency of the majority of the Lehman Brothers group including the main sponsoring employer of the Scheme, Lehman Brothers Limited (LBL), a UK company which provided virtually all the staff and infrastructure for the group's UK operations. The Scheme was in deficit. The insolvency of LBL as well as the main UK Lehman Brothers operating companies resulted in there being no ongoing support for the Scheme.

On 13 September 2010, following an oral hearing, the Panel determined that it would be reasonable to issue FSDs to six companies in the Lehman Brothers group. The Panel decided that it would not be reasonable to issue FSDs against a further 38 group companies that were also part of the regulator's case.

In October 2010, the six potential recipients of FSDs referred the matter to the Upper Tribunal primarily arguing that the Panel's decision was not reasonable. The trustees of the Scheme also made a reference to the Upper Tribunal for a determination that it would be reasonable to issue FSDs against the 38 targets excluded by the Panel.

## Legal proceedings

Following the References to the Upper Tribunal, the following legal challenges were made by the target companies, which resulted in the Upper Tribunal proceedings being stayed:

### **The status of an FSD against companies in administration**

These proceedings were concluded by the Supreme Court judgement of 24 July 2013, which determined that an FSD is effective against insolvent targets and that liabilities under it rank as a provable debt. (For further information please see the regulator's statement 'Nortel Lehman' Supreme Court Judgement, dated 23 July 2013.)

### **Whether the trustees are Directly Affected Parties for the purposes of the Upper Tribunal proceedings/whether the time limit for issuing FSDs against the 38 targets had expired**

These proceedings were heard before the Upper Tribunal in March 2012 and then the Court of Appeal in May 2013. The judgement of the latter was handed down on 21 June 2013. The targets' applications were rejected on both grounds in both courts.

### **Whether recovery was limited to the section 75 debt**

These proceedings (commonly known as the 'Storm Funding' litigation after the name of one of the applicant companies) were heard in the High Court in October 2013 and concerned the maximum liability of the targets under any FSDs that were issued. The trustees and the regulator argued that the amount imposed against the targets could in aggregate (where it was reasonable) exceed the certified section 75 debt owed to the Scheme. The High Court agreed with this argument in its judgement of 18 December 2013. This judgement was appealed to the Court of Appeal.

## Upper Tribunal process

The stay of the Upper Tribunal proceedings was lifted on 24 July 2013 following the Supreme Court decision. The regulator filed its Statement of Case in January 2014, and an amended version in April 2014.

The trustees served a Response to the regulator's Statement of Case in February 2014, and the targets, represented by three separate law firms, served their Responses in June 2014.

## Settlement discussions

Following the signing of a Pensions Settlement Deed containing terms of settlement on 14 August 2014, the parties filed an agreed Consent Order in the Upper Tribunal withdrawing and/or staying proceedings indefinitely. The consent order was approved by the Upper Tribunal on 18 August 2014.

## Outcome

It is expected that the amount payable under the terms of the Settlement Deed will be sufficient to buy out members' benefits in full.

The parties have also agreed to discontinue the Storm Funding appeal, which ensures that the first instance decision of the High Court on this matter remains the current law.

The regulator is fully supportive of this outcome which is intended to ensure that members' benefits are funded in full.

## General

This case demonstrates the regulator's commitment to initiating and pursuing regulatory action (where reasonable to do so), over an extended period and at all judicial levels in order to protect member benefits and minimise calls on the PPF. The proceedings have also resulted in a number of judgements establishing precedents clarifying the scope of the regulator's powers.

This statement must be read in conjunction with the relevant legislation. It does not provide a definitive interpretation of the law. The exercise of the regulator's powers in any particular case will depend upon the relevant facts and the outcome set out in this report may not be appropriate in other cases. This statement should not be read as limiting the regulator's discretion in any particular case to take such action as is appropriate. Trustees and other parties should where appropriate seek legal advice on the facts of their particular case.

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