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ARTICLE

Pensions: Upper Tribunal Rules on Bonas Contribution Notice

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In May last year, the Pensions Regulator used its strongest enforcement power and issued its first contribution notice (CN), for GBP 5.1 million. The CN was issued against Michael Van De Wiele (VDW), the parent company of Bonas UK (Bonas), the sponsor of a defined-benefit pension scheme. The CN was the first of its kind and it caused something of a stir as it upset many preconceptions, particularly regarding the Regulator's ability to pierce the 'corporate veil' and, perhaps more importantly, the principle of 'reasonableness' that must underlie such regulatory action.

In summary

On 17 January 2011, Mr Justice Warren, sitting as president of the Upper Tribunal of the Pensions Regulator, published the Tribunal's findings on the appeals by VDW and the Regulator. The application by VDW was for a barring order to strike out the CN. The Regulator on the other hand wanted the CN increased to the amount of the GBP 20 million buy-out deficit and a reversal of the Determinations Panel's decision not to impose it on the group's managing director, Mr Beauduin, personally. In short, VDW's application to have the CN struck out failed, because the Tribunal was not persuaded that many of the complex arguments were suitable for consideration at a summary hearing. Other than barring the Regulator from pursuing its separate CN against Mr Beauduin, the findings are not conclusive because the dispute is now proceeding to a full hearing of the Tribunal. This is, of course, unless the parties find a way to settle in the meantime. Justice Warren did, however, make some interesting observations that may be instructive pending the final outcome.

Observations

Much of the judgment, which is detailed and extensive, relates to procedural matters, and is outside the scope of this article. Instead, it is his comments regarding liability of VDW and the amount of the CN that are most noteworthy. By way of a reminder, the Regulator may impose a CN on a party to an act, or failure to act, the purpose (now amended in the legislation to 'effect') of which was to prevent the recovery of all or part a debt due, or which may become due, from an employer under section 75 of the Pensions Act 1995, i.e. the buy-out deficit. The CN may be for anything up to the s75 debt and its imposition must be 'reasonable'. The original CN was made following a sale of the Bonas business to a company owned by VDW, via a pre-packaged administration. The scheme entered into Pension Protection Fund (PPF) assessment and a dividend was subsequently paid to the trustees and other creditors. The Regulator seemed to conclude that the pre-pack sale had been deliberately undertaken to allow VDW to retain the Bonas business whilst avoiding liability for its pension scheme. The Regulator was seeking to establish the CN at the level of the GBP 20 million s75 deficit. The actual determination was for the PPF deficit of GBP 5 million, which represents the estimated PPF deficit of GBP 8 million less recoveries from the insolvency process.

Following extensive legal argument, Justice Warren concluded that, for consideration at the full Tribunal hearing, the issues boil down to assessing liability and amount in relation to three alleged 'acts'.

In summary:

- **Act 1** – failure to engage and negotiate with the trustees or the Regulator;
- **Act 2** – minimising the sum paid by VDW for the buy-back of the Bonas business through the administration pre-pack sale; and
- **Act 3** – retaining the business while avoiding the ongoing liability to make contributions to the scheme.

There is extensive analysis in the ruling and liability has yet to be determined, but we set out below a summary of the issues on quantification. One of the key issues to establish in relation to amount is whether it should be proportionate to the level of detriment suffered by the trustees. There was evidence put before the Determinations Panel that VDW had provided support via net funding to Bonas over the course of its ownership of the company, which was not disputed, however the appropriateness of the consideration for the sale of its business came under scrutiny. As one would expect, the administrator's view was that the consideration

was reasonable and there was no evidence put forward by the Regulator to the contrary. There is therefore no evidence that either the s75 debt or the PPF deficit bears any relation to detriment, if any, and Justice Warren makes a number of observations in this regard.

Act 1 – failure to negotiate

To quote: 'The real point is whether, had there been such engagement as the Regulator submits should have taken place, negotiations would have produced any more money for the Scheme than was received in the liquidation of Bonas (and if so how much). Assuming that VDW would have declined to inject £8 million or any significant sum into the Scheme, all the Trustees could have done would have been to force Bonas into liquidation possibly resulting in a smaller dividend than they actually obtained.' While VDW may have been prepared to pay something, commercial logic dictates that it would have been limited to an amount that bore some relation to the value to it of the business of Bonas, not the size of the deficit on any basis (except perhaps by coincidence).

Act 2 – minimising the sum paid

As there was no independent evidence on whether a 'proper price' was paid for the business, both parties have been invited to provide such. Justice Warren says: 'The Panel expressed the view that the case was not made out on the evidence before it. However, my own view is that the case falls within [the relevant provisions] on the basis of the sale at an undervalue issue.' However, on amount, he goes on to say: 'Even if one takes a very generous view in favour of the Regulator, it appears to me hard to contend on the evidence so far that the market value was more than GBP 100,000. In that case, it is difficult to see how the Regulator could properly form the view, by reference to the sale at an undervalue point, that it would be reasonable for the contribution notice to specify an amount more than the difference between the sum and the price actually paid.'

Act 3 – retaining the business while avoiding ongoing pension liabilities

Justice Warren distils the issue as: 'By bringing about the pre-pack administration of Bonas, VDW has prevented future contributions being paid by Bonas.' There is some legal argument as to whether this is technically avoidance of the s75 debt, but the arguments remain to be fully developed. He goes on to say: 'To succeed on its argument, the Regulator needs to show that if VDW had not acted as it did, Bonas would have paid the ongoing contributions.' The evidence 'is perfectly clear that Bonas would not have been able to afford to make significant repair contributions.' There was some consideration of whether VDW should have supported the scheme, but Justice Warren concludes that: 'There is nothing before me to suggest that VDW was legally bound to provide such support. Whether it is possible to issue a contribution notice to VDW on the basis that it could have chosen voluntarily to support Bonas and thereby the Scheme but chose not to do so must be highly questionable.'

It appears that Act 3 is the 'other side of the coin' of Act 2. Although they may be different routes to establish grounds for a CN, they are theoretically the same in relation to amount. The proper price for the business is its market value, which is the present value of the future income stream from the business, and the various ways of calculating this will no doubt form the arguments around Act 2. It is that future income stream that would service the contributions. If VDW paid a proper price for the business, thereby acquiring the future income stream, it's difficult to see how there can be further liability for unpaid contributions. The Regulator can't have its cake and eat it.

In conclusion

It therefore seems that Justice Warren has given a firm steer to the effect that all that is likely to turn on a full hearing of the Tribunal will be a few tens of thousands of pounds, if anything. In commercial proceedings parties would usually rather agree settlement for such an immaterial amount, but it's not clear in these proceedings whether that would be desirable to both parties.

The findings of the Tribunal appear to be consistent with the assumption before the determination that the amount of any CN should be proportionate to the detriment caused by the act in question. In the words of Justice Warren, 'It is not, as I see it, the purpose of [the relevant legislation] to go further than that, so as to impose a penalty on the target for his behaviour.'

Until the full Tribunal hearing, both employers and trustees will be left in some doubt as to how they should proceed in the event that they find themselves in similar circumstances. Caution, appropriate advice and engagement with the Pensions Regulator would seem to be the most appropriate course of action.

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International Corporate Rescue

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