

Report under s89 of the Pensions Act 2004

Issued by The Pensions Regulator ('the regulator') in relation to the Desmond & Sons Ltd 1975 Pension and Life Assurance Scheme

Executive summary

The regulator initiated regulatory action in February 2010 via a Warning Notice seeking the issue of Contribution Notices (CNs) to four former shareholders (three of whom were also directors) of Desmond & Sons Limited, the employer in relation to the Desmond & Sons Ltd 1975 Pension and Life Assurance Scheme (the Scheme).

In April 2010 the Determinations Panel of the regulator (the Panel) determined to issue Contribution Notices to two targets (Mr Desmond and Mr Gordon) for a total of £1 million. It also determined that CNs should not be issued to the two other targets.

This determination was referred to the Upper Tribunal by Mr Desmond and Mr Gordon, who argued that no CN should be issued to them. It was also referred by the trustee of the Scheme, who argued that a CN should be issued to one additional target (Mrs Annick Desmond) and that the sum sought in the CNs should be higher.

The regulator and the trustee then successfully defended a number of legal challenges arising from the proceedings.

The hearing of Mr Desmond, Mr Gordon and the trustees ('the references') was due to take place in May 2015. Mr Gordon was separately represented for the hearing. In advance of that hearing an agreement was reached between the trustee and Mr and Mrs Desmond and Mr Gordon. Under the terms of that agreement, a payment will be made by Mr Desmond to the Scheme. This will assist the Financial Assistance Scheme (FAS) in providing member benefits.

The references have been settled on terms of no admissions of liability. As a result of the settlement, the allegations made by all parties in the proceedings, including those that parties have acted otherwise than in good faith, are not maintained. The remaining terms of the agreement are confidential to the parties.

The regulator will accordingly not be issuing CNs to Mr or Mrs Desmond or Mr Gordon.

Background

The employer, Desmond & Sons Limited, entered Members' Voluntary Liquidation (MVL) on 3 June 2004.

Under the legislation at the time, the debt due from an employer to a pension scheme on entering liquidation (including MVL) was calculated using the Minimum Funding Requirement (MFR) basis instead of a buyout basis.

In May 2010, CNs were determined to be issued by the Determinations Panel to two out of the four targets. The sums specified in those CNs was to be £900,000 in respect of Mr Desmond and £100,000 in respect of Mr Gordon. The regulator's announcement of that decision, and a copy of the Panel's reasons for it, is at www.tpr.gov.uk/desmond.

The Panel's determination was referred to the Upper Tribunal by the trustee, Mr Desmond and Mr Gordon. The trustee argued that the amount of the CN should be higher and that a CN should also be issued against one other target – Mrs Desmond. Mr and Mrs Desmond and Mr Gordon argued that it was unreasonable to issue a CN against them.

Legal proceedings

Following the references to the Upper Tribunal, the following legal challenges were made by the targets, which resulted in the Upper Tribunal proceedings being stayed.

The targets sought a strike out of the regulator's case on the basis that:

1. As the Panel did not find against Mrs Desmond, any claim against her was now out of time.
2. The regulator made allegations in its 'Statement of Case' which were not part of the determination and should not be pursued.
3. The act/series of acts relied on commenced prior to the six year time limit for the issue of a CN.

This was heard before the Upper Tribunal in February 2011, which in a judgment* upheld point (1) above but dismissed points (2) and (3). The regulator and trustee appealed point (1) to the Court of Appeal of Northern Ireland and were successful. The targets sought permission to appeal points (2) and (3) but this was refused.

Upper Tribunal process

The stay of the Upper Tribunal proceedings was lifted on 8 November 2013 following the Court of Appeal of Northern Ireland's decision. The regulator filed an amended Statement of Case in early February 2015. The trustee and the targets' responses to the Statement of Case were filed later that month. The hearing of the references was due to take place in May 2015. Mr Gordon was separately represented for the hearing.

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Found at www.tribunals.gov.uk/financeandtax/Documents/decisions/DesmondsGordon_v_PR.pdf

Settlement discussions

In advance of the commencement of the Upper Tribunal hearing, an agreement was reached between the trustee and Mr and Mrs Desmond and Mr Gordon. Under the terms of that agreement, a payment will be made by Mr Desmond to the Scheme. The amount agreed will assist the FAS in providing member benefits.

As a result of the agreement, Mr Desmond and Mr Gordon and the trustee are not proceeding with the references. Those parties, and Mrs Desmond and the regulator, have agreed to settle the references on terms of no admissions of liability, including without any findings being made in respect of allegations that parties have acted otherwise than in good faith. As a result of the settlement, the allegations made by all parties in the proceedings, including those that parties have acted otherwise than in good faith, are not maintained. The remaining terms of the agreement are confidential to the parties.

The regulator will accordingly not be issuing CNs to Mr or Mrs Desmond or Mr Gordon.

Outcome

The amount agreed will assist the FAS in providing member benefits.

The regulator's consideration and approach to individual cases is informed by the specific circumstances presented by a case, not all of which are referred to or set out in this summary report.

This summary report 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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Desmond & Sons Ltd

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