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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **23/05/2013**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Desmond (Denis and Annick) and Gordon's (Donal) Application [2013] NIQB 58 (Leave Stage)

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IN THE MATTER OF AN APPLICATION BY DENIS DESMOND, ANNICK DESMOND AND DONAL GORDON FOR JUDICIAL REVIEW

and

IN THE MATTERS OF THE DETERMINATION OF PROCEDURES UNDER ARTICLE 88 OF THE PENSIONS (NORTHERN IRELAND) ORDER 2005; THE WARNING NOTICE GIVEN BY THE PENSIONS REGULATOR ON 23 FEBRUARY 2010; THE DETERMINATION NOTICE GIVEN BY THE DETERMINATIONS PANEL OF THE PENSIONS REGULATOR ON 17 MAY 2010 AND ASSOCIATED PROCEEDINGS

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TREACY J

Introduction

[1] This application for leave was heard on 19 April 2013. Following consideration of the detailed skeleton arguments from the applicant, respondent and notice party and detailed oral submissions the Court refused leave and indicated that it would give its written reasons at a later date which I now do.

[2] The applicants were represented by Nicholas Hanna QC and David Dunlop, the respondent regulator by David Scoffield QC and Thomas Robinson and the trustee notice party by Richard Hitchcock and Farhaz Khan of Outer Temple Chambers.

[3] I am greatly indebted to all Counsel for their excellent written and oral submissions.

Relief Sought

[4] The applicants sought the following relief in their Order 53 Statement:

> "(a) a declaration that the Pensions Regulator ('the Regulator') has failed to determine the procedure which it was required to determine under article 88(1) of the Pensions (Northern Ireland) Order 2005 ('the Order');
>
> (b) a declaration that the Determinations Panel of the Pensions Regulator ('the Panel') has failed to determine the procedure which it was required to determine under article 88(3) of the Order;
>
> (c) a declaration that warning notices purporting to have been given to each of the applicants by the Regulator on 23 February 2010 ('the warning notices') were given ultra vires and are nullities having no effect or validity in law;
>
> (d) a declaration that determinations ('the determinations') and determination notices ('the determination notices') purporting to have been made/given against each of the applicants by the Panel on 17 May 2010 were made/given ultra vires and are nullities having no effect or validity in law;
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> (e) if necessary, a declaration that purported references of the determinations ('the references') to the Upper Tribunal are nullities having no effect or validity in law;
>
> (f) A declaration that the determinations were made in breach of the applicants' rights under article 1 of the first protocol to the European Convention on Human Rights and that in consequence they are unlawful;
>
> (g) an injunction to restrain the Panel from issuing any contribution notice against any of the applicants pursuant to any of the determinations;

(h) an order of certiorari quashing each of the warning notices;

(i) an order of certiorari quashing each of the determinations;

(j) an order of certiorari quashing each of the determination notices;

(k) if necessary, an order of certiorari quashing each of the references;

(l) if necessary, an order under order 53 rule 4(1) of the Rules of the Court of Judicature (Northern Ireland) 1980 extending the period of time within which this application for leave may be made;

..."

Grounds Upon Which Relief Sought

[5] The grounds upon which the relief was sought were as follows:

"(a) that the Regulator had not determined the procedure which it was required to determine under article 88(1) of the Order;

(b) that the Panel had not determined the procedure which it was required to determine under article 88(3) of the Order;

(c) that the Regulator and the Panel were obliged by article 90(1) to comply with the standard procedure in any case where the Regulator considered that the exercise of the power to issue a contribution notice under article 34 of the Order might be appropriate;

(d) that in the absence of determinations under article 88 there were no valid and lawful procedures making provision for the standard procedure required under article 91 of the Order;

(e) that the determination of, and subsequent compliance with procedures determined under article 88, making provision for the standard procedure, were mandatory pre-conditions to:

- the giving of a warning notice by the Regulator in respect of any proposal by the Regulator to issue a contribution notice;

- the making of any determination by the Panel to exercise the power to issue a contribution notice;

- the giving of any determination notice by the Panel containing notice of any such determination;

(f) that, in the exercise of their respective functions, the Regulator and the Panel did not have any power or discretion to make, apply or comply with any procedure other than one which had been determined under article 88 of the Order;

(g) that in the absence of any procedures determined under article 88 the Regulator did not have any power to give the warning notices, and the Panel did not have any power to make the determinations or to give the determination notices;

(h) that in consequence of the foregoing each of the warning notices, determinations and determination notices were given or made ultra vires and were nullities having no effect or validity in law;

(i) that any contribution notice made without having first complied with a procedure lawfully determined under article 88 of the Order would constitute deprivation of the applicants' possessions otherwise than subject to conditions provided for by law and would be in breach of the applicants' rights under article 1 of the first protocol to the European Convention on Human Rights;

(j) that at all material times prior to 14 December 2012 the Regulator and the Panel had represented, and had led the applicants to believe, that procedures had been lawfully determined under article 88 making provision for the standard procedure;

(k) that it was not until 14 December 2012, following receipt of an email of that date from the Regulator, that the applicants became aware that no such procedures had been lawfully determined.

Factual Background

[6] The Pensions Regulator ("the Regulator"), the respondent in these proceedings, issued a Warning Notice on 23 February 2010 alleging that the applicants, in their position as shareholders of Desmond & Sons, sought and acted on advice received with the intention of ensuring that as little money as possible was paid to the pension scheme following the restructuring of Desmond & Sons and its entry into Members Voluntary Liquidation ("MVL") in 2004. The Warning Notice also alleged that this happened without the Trustees' knowledge so that no steps to prevent it happening could be taken and that, taken together, these matters constituted grounds for the issue of Contribution Notices under Art 34 of the Pensions (NI) Order 2005 ("the 2005 Order").

[7] The Warning Notice was issued following detailed investigation by the Regulator which was, the Regulator contended, delayed by non-cooperation by the applicants' former professional advisers in providing information. The Warning Notice expressly referred to Article 91 of the 2005 Order and the Standard Procedure. The applicants also had a copy of the Determinations Panel procedure which referred to the legislation covering Great Britain, but not to the Northern Ireland Order.

[8] The applicants requested an oral hearing before the Determinations Panel of the Pensions Regulator (DP) and the DP issued directions. The applicants filed detailed submissions and a large body of documents.

[9] The applicants and their representatives knew what procedure was being applied, complied with it and relied upon it in their skeleton argument before the DP. The procedure was that which was applied by the Regulator and the DP to all cases, whether from England, Wales, Scotland or Northern Ireland. If, which is not accepted by the Regulator, there had been any failure to determine the procedure, and the Regulator and the DP had been asked to do so, it is asserted they would

have determined a procedure identical to that which was applied in the interests of consistency as between England, Wales, Scotland and Northern Ireland.

[10] The DP gave notice of its determination on 27 April, followed by reasons issued on 17 May 2010:

> "23. There was evidence before us, which we accept, that the [Applicants] knew that the MVL loophole might close in the future. Accordingly it was known that the debt which might become due was the buyout debt. That was the debt that the MVL prevented from arising. We therefore find that the act of placing Desmonds into an MVL on 3 June 2004 prevented the scheme from recovering the buyout debt which might have become due rather than the MFR debt.
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> ...
>
> 35. ... The [Applicants] declined to provide witness statements or attend the oral hearing to give evidence before the Panel notwithstanding the fact that the oral hearing was held later than it otherwise would have been to accommodate their attendance ...
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> ...
>
> 48. ... One of the objectives in our view was to minimise Desmonds' exposure to the Scheme through the use of an MVL implemented at short notice. The advice given by KPMG was clear namely that Desmonds should take advantage of the MVL in order to ensure that the Article 75 debt was as low as possible and that Desmonds should do this at short notice to minimise the risk of the Trustees taking action...
>
> ...
>
> 56. Accordingly we find that one of the main purposes of the MVL was to avoid the buyout liability to the Scheme and to ensure that the Article 75 debt was calculated on an MFR basis. That had the effect, as set out in [the] Deloitte

> report, of ensuring that the Targets maximised their shareholder value...
>
> ...
>
> 71. ... Mr Desmond and Mr Gordon ... were both, at all material times, directly involved with the affairs of Desmonds and were the architects of the MVL...

[11] The DP reached its decision having complied with the requirements of the Standard Procedure under Art91 of the 2005 Order thus following the procedure in fact applied to all cases coming before it whether from England, Wales, Scotland or Northern Ireland.

[12] The applicants submitted detailed representations to the Regulator and the DP, and raised numerous procedural and jurisdictional points but *never* complained of any failure to determine the procedure under Art 88 within those representations and did not rely on the issue now raised in these proceedings.

[13] The applicants and the Trustee referred the Determination Notice to the Upper Tribunal ("UT") on 15 June 2010. In consequence there will be a full re-hearing of the matter before the UT who will decide whether or not Contribution Notices should be issued applying its *own* detailed procedural rules, namely The Tribunal Procedure (Upper Tribunal) Rules SI 2698/2008.

[14] The UT determined a preliminary issue in the case in 2011 and part of that decision was the subject of an appeal to the Court of Appeal, judgment in which is awaited. The applicants sought to appeal another part of that decision but were refused leave by the UT and the Court of Appeal in Northern Ireland, the latter at an oral hearing in February 2012.

[15] A full hearing before the UT is due to take place when the issues raised before the Court of Appeal and in these proceedings are concluded.

[16] The applicants first raised a question about the determination of the procedure in December 2012. The Regulator responded in an email dated 14 December 2012 and letter of 16 January 2013. The applicants sent a pre-action letter on 18 January 2013 and issued these proceedings on 20 February 2013.

[17] In consequence of the actions of the applicants around the restructuring and entry into MVL of Desmond & Sons, members of the pension scheme received considerably less money than they would have had these acts not taken place. Furthermore, the pension scheme has been forced to enter the Financial Assistance Scheme (FAS - a body which pays compensation to members of pension schemes entering insolvency before the coming into force of the Order, much as the Pension Protection Fund ("PPF") does for schemes entering insolvency thereafter). FAS is

now managed by the Board of the PPF and the Regulator has regard to the need to reduce the risk of situations arising which may lead to compensation being payable from FAS, as it does with regard to the PPF. The Regulator asserts that the inevitable result of the applicants' acts is that a cost to the public purse has arisen, albeit one that does not compensate the members fully.

[18] It is apparent that the Regulator and, in particular, the Trustee is greatly exercised by the delay and lack of progress occasioned by the applicants use of legal procedures. In the Trustee's skeleton argument it is stated as follows:

> "5. The Applicants are former shareholders and directors of Desmond & Sons Limited, the ("Company"), the former sponsoring employer of the Scheme. On 03 June 2004 the Applicants (together with other shareholders, notably the Desmond family trust) voted to put the Company into Members Voluntary Liquidation, ("MVL") with the purpose of retaining for the shareholders the significant assets which remained in the Company and avoiding the Scheme benefitting from any portion of those. The result was that Denis Desmond, Annick Desmond and their family trust received more than £20,000,000, while the Scheme was left with only 53% of the assets required to fund the benefits of its members, the former employees of the Company.
>
> 6. This ultimately resulted (in February 2010) in proceedings being commenced against the Applicants by the Regulator, the ("Regulatory Proceedings"), which were considered by the Regulator's Determinations Panel, the ("DP"). The Trustee has been actively involved in these from the start since a positive result would give rise to an improvement, potentially a very significant improvement, in the funding level of the Scheme and thus its capacity to fund the benefits of the Scheme members. But although more than three years has passed, it has still not been possible for the Trustee or the Regulator to have the case against the Applicants, the ("Reference"), heard by a tribunal with proper powers to require disclosure of documentary evidence and to

compel the attendance of the Applicants as witnesses.

7. The lack of progress has been caused by what has become satellite litigation: principally, interlocutory issues raised by the Applicants, the ("Interlocutory Issues"), many of which (ironically, in the context of the lateness and context of the JR Application) were issues of statutory construction, relating to the extent of the Regulator's powers, or of the powers of the Upper Tribunal, on a reference from a determination of the Regulator. It was not the first time that the Applicants had raised such issues: it had raised issues of statutory construction and challenged the extent of the Regulator's powers from the outset. As then, the Applicants arguments on the Interlocutory Issues were contested by the Trustees and the Regulator, since the Applicants' purpose in raising these issues was to restrict or strike out key elements of the case against them.

8. Other than the Applicants' Interlocutory Issues, substantial time has also been taken up in dealing with the attempts by the Applicants to prevent publication of the determination of the DP and the judgment of the Upper Tribunal on the various constructional and jurisdictional issues raised by the Applicants.

9. The closing months of 2012 appeared to herald the end of this satellite litigation. The Applicants' attempts to prevent publication had finally been abandoned early in that year. Three of the Applicants' four Interlocutory Issues had been lost at the Upper Tribunal stage, and their application for leave to appeal that decision had been refused by both the Upper Tribunal and the Court of Appeal of Northern Ireland. Only the Trustee's appeal against one aspect of the Upper Tribunal's decision remained and this came before the Court of Appeal in early December 2012. There finally seemed realistic grounds for optimism that Scheme members could be told

that the blocks in the road to the Reference had been removed.

10. But then came the enquiries from the Applicants to the Regulator which were the precursor to the JR Application. This has already yielded some success for the Applicants in that the judgment of the Court of Appeal has been delayed apparently as a result of the JR Application. Certainly the Applicants were assiduous in bringing the prospect of the JR Application to the attention of the Court of Appeal: this was well before proceedings were commenced.

11. It is difficult to over emphasise the Trustee's antipathy to both the JR Application and the lateness with which it has been brought. In substance it is entirely unwelcome: it threatens – on what appears to the Trustee to be the flimsiest of grounds – both the entirety of what the Trustee has sought to achieve for Scheme members and the sums and time invested in so doing. It threatens this effect in no small part because it has been brought so very late and this is a source of added grievance from the Trustee's perspective, not least because the Applicants were so energetic in raising jurisdictional challenges of this type from the very outset and in their Interlocutory Proceedings."

Statutory Context

[19] Art 3 of the 2005 Order sets out the Regulator's functions. Art 4 provides:

"1. The main objectives of the Regulator in exercising its functions are-

(a) to protect the benefits under occupational pension schemes of, or in respect of, members of such schemes.

...

(c) to reduce the risk of situations arising which may lead to compensation being

payable from the Pension Protection Fund."

[20] Art 5 expressly empowers the Regulator to do anything (except borrow money) which (a) is calculated to facilitate the exercise of its functions or (b) is incidental or conducive to their exercise.

[21] By Art 34 the Regulator is empowered to issue a Contribution Notice if it is of the opinion that the person named in the notice was party to an act one of the main purposes of which was to prevent the recovery of a debt which might become due from the employer to the pension scheme. The requirements that must be fulfilled before a Contribution Notice may be issued are laid down in detail by Art 34 and include the following:

> "(3) The Regulator may issue a contribution notice to a person only if
>
> (a) the Regulator is of the opinion that the person was a party to an act or a deliberate failure to act which falls within paragraph (5),
>
> (b) the person was at any time in the relevant period –
>
> (i) the employer in relation to the scheme, or
>
> (ii) a person connected with, or an associate of, the employer,
>
> (c) the Regulator is of the opinion that the person, in being a party to the act or failure, was not acting in accordance with his functions as an insolvency practitioner in relation to another person, and
>
> (d) the Regulator is of the opinion that it is reasonable to impose liability on the person to pay the sum specified in the notice, having regard to –
>
> (ii) the extent to which, in all the circumstances of the case, it was reasonable for the person to act,

or fail to act, in the way that the person did, and

(iii) such other matters as the Regulator considers relevant, including (where relevant) the matters falling within paragraph (7).

...

(5) An act or failure to act falls within this paragraph if –

(a) the Regulator is of the opinion that the material detriment test is met in relation to the act or failure ... or that the main purpose or one of the main purposes of the act or failure was –

(i) to prevent the recovery of the whole or any part of a debt which was, or might become, due from the employer in relation to the scheme under Article 75 of the 1995 Order (deficiencies in the scheme assets), or

(ii) to prevent such a debt becoming due, to compromise or otherwise settle such a debt, or to reduce the amount of such a debt which would otherwise become due,

..."

[22] The DP's power to determine whether to issue a Contribution Notice, and, if it so determines, to issue the Notice, is conferred on it by Art 7 which provides:

"(1) The Determinations Panel is to exercise on behalf of the Regulator –

(a) the power to determine, in the circumstances described in paragraph (2), whether to exercise a reserved regulatory function, and

(b) where it so determines to exercise a reserved regulatory function, the power to exercise the function in question.

(2) Those circumstances are –

(a) where the Regulator considers that the exercise of the reserved regulatory function may be appropriate, or

(b) where an application is made under, or by virtue of, any of the provisions listed in paragraph (6) for the Regulator to exercise the reserved regulatory function.

...

(4) For the purposes of this Part, a function of the Regulator is a "reserved regulatory function" if it is a function listed in Schedule 2."

It is common case that the DP's power to determine to issue a Contribution Notice derives from Arts 7 and 34 of the 2005 Order.

[23] Art 90 lays down the procedural requirements imposed on the Regulator and DP when they are taking decisions under Arts7 and 34. It provides:

"The Regulator must comply with the standard procedure ... in a case where –

(a) the Regulator considers that the exercise of one or more of the regulatory functions may be appropriate, or

(b) an application is made under or by virtue of –

(i) any of the provisions listed in Article 7(6), or

(ii) any prescribed provision of this or any other statutory provision,

for the Regulator to exercise a regulatory function."

[24] The "standard procedure" is defined as, by virtue of Art 91(2), one which makes provision for specific matters. Art 91 states:

"91.-(1) The procedure determined under Article 88 must make provision for the standard procedure.

(2) The "standard procedure" is a procedure which provides for—

(a) the giving of notice to such persons as it appears to the Regulator would be directly affected by the regulatory action under consideration (a "warning notice"),

(b) those persons to have an opportunity to make representations,

(c) the consideration of any such representations and the determination whether to take the regulatory action under consideration,

(d) the giving of notice of the determination to such persons as appear to the Regulator to be directly affected by it (a "determination notice"),

(e) the determination notice to contain details of the right of referral to the Tribunal under paragraph (3),

(f) the form and further content of warning notices and determination notices and the manner in which they are to be given, and

(g) the time limits to be applied at any stage of the procedure.

(3) Where the standard procedure applies, the determination which is the subject-matter of the determination notice may be referred to the Tribunal by—

(a) any person to whom the determination notice is given as required under paragraph (2)(d), and

(b) any other person who appears to the Tribunal to be directly affected by the determination."

[25] Art 88 of the 2005 Order (identical to s93 of the Pensions Act 2004) provides that the Regulator must determine a procedure which makes provision in accordance with the requirements of the Standard Procedure set out in the preceding paragraph:

"(1) The Regulator must determine the procedure that it proposes to follow in relation to the exercise of its regulatory functions.

(2) For the purposes of this Part the "regulatory functions" of the Regulator are –

...

(c) the reserved regulatory functions (see Schedule 2) ...

(3) The Determinations Panel must determine the procedure to be followed by it in relation to any exercise by it on behalf of the Regulator of–

(a) the power to determine whether to exercise a regulatory function, and

(b) where the Panel so determines to exercise a regulatory function, the power to exercise the function in question.

(4) The procedure determined under this Article –

(a) must provide for the procedure required under –

(i) Article 91 (standard procedure), and

(ii) Article 93 (special procedure), and

(b) may include such other procedural requirements as the Regulator or, as the case may be, the Panel considers appropriate.

[26] The right to refer a Determination to the UT is conferred by Art 91(3) set out above.

[27] The UT may, by Art 97, consider any evidence whether or not it was available to the Regulator, and must determine what action the Regulator should take including revoking or varying the Determination Notice and recommending what procedure should be followed by the Regulator or DP. The Regulator must act in accordance with the UT's determination and directions, and accordingly the requirements of Art 91 in relation to the Standard Procedure do not then apply to it (Art 97(7)).

Legal Submissions

[28] The Regulator's primary case is that a procedure was determined in accordance with Art 88 of the 2005 Order, both in relation to the Warning Notice issued by the Regulator and in relation to the determination of, and the Determination Notice, issued by the DP. However, since this is a leave hearing the Regulator directed his arguments to his alternative case – that, even if a procedure was not determined in accordance with the 2005 Order the applicants' case is still unarguable or has no reasonable prospect of success. Therefore the proposed respondent has submitted that paras 38-47 of the applicants' skeleton are irrelevant since they are addressed to the issue of whether or not a procedure was determined.

[29] In light of the approach of the proposed respondent it is therefore unnecessary for the purposes of this leave application to address the applicants' contention that there was no Art 88 procedure determined. I therefore proceed, for leave purposes only, on the basis that, arguably, no such procedure was determined.

[30] The focus of the Regulator and Trustee's oral and written submissions was that the applicants' case was still unarguable on its merits. This necessitates a consideration of the legal consequences of the assumed failure to observe the procedural prescription laid down in the 2005 Order. It is also contended that the application is irredeemably out of time.

Applicable Legal Principles

[31] In *De Smith's Judicial Review* 6th Ed [2007] at para 5-049 the learned authors stated:

> "When Parliament prescribes the manner or form in which a duty is to be performed or a power exercised, it seldom lays down what will be the legal consequences of failure to observe its prescriptions. The courts have therefore formulated their own criteria for determining whether the prescriptions are to be regarded as

> mandatory, in which case disobedience will normally render invalid what has been done, or as directory, in which case disobedience may be treated as an irregularity not affecting the validity of what has been done."

[32] In R v Soneji [2006] 1 AC 340 the House of Lords was considering the exercise of power by the Crown Court to order confiscation of the proceeds of crime against two defendants who had been convicted and sentenced over two years previously. The relevant statutory provision (s72A Criminal Justice Act 1988) required amongst other things such confiscation orders to be made within 6 months of conviction (save for exceptional circumstances). The House of Lords held notwithstanding the non-compliance with the prima facie time limit setting out the defendant's objections, and why they were not accepted, as follows:

> "24. It remains to address the point of statutory interpretation in accordance with the test as I have outlined it. On behalf of the two accused counsel submitted that, given the criminal law context, a strict approach to construction of section 72A of the 1988 statute should be adopted. Bearing in mind that one is not dealing with the definition of crimes, but with the process of making confiscation orders, I would reject this approach. The context requires a purposive interpretation: Sir Rupert Cross, Statutory Interpretation, 3rd ed (1995), 172-175. Secondly, counsel argued that such an interpretation would render wholly ineffective the Parliamentary intent of providing for a specific time limit. I would not accept that this is correct. At the very least the courts can, where necessary, vindicate the scheme adopted by Parliament by the abuse of process jurisdiction and perhaps in other ways. Thirdly, counsel for the accused relied on an alleged injustice caused to the accused by the delay of the confiscation procedures. In my view this argument was overstated. The prejudice to the two accused was not significant. It is also decisively outweighed by the countervailing public interest in not allowing a convicted offender to escape confiscation for what were no more than bona fide errors in the judicial process.

> 25. In my view an objective appraisal of the intent, which must be imputed to Parliament, points against total invalidity of the confiscation orders."

[33] Lord Steyn earlier in his judgment at para 14 said:

> "14. A recurrent theme in the drafting of statutes is that Parliament casts its commands in imperative form without expressly spelling out the consequences of a failure to comply. It has been the source of a great deal of litigation. In the course of the last 130 years a distinction evolved between mandatory and directory requirements. The view was taken that where the requirement is mandatory, a failure to comply with it invalidates the act in question. Where it is merely directory, a failure to comply does not invalidate what follows. There were refinements. For example, a distinction was made between two types of directory requirements, namely (1) requirements of a purely regulatory character where a failure to comply would never invalidate the act, and (2) requirements where a failure to comply would not invalidate an act provided that there was substantial compliance. ..."

[34] At para15 Lord Steyn referred to the speech of Lord Hailsham of St Marylebone LC in London & Clydeside Estates Ltd v Aberdeen District Council [1980] 1 WLR 182 [189]-[190] as leading to:

> "…the adoption of a more flexible approach of focusing intensely on the consequences of non-compliance, and posing the question, taking into account those consequences, whether Parliament intended the outcome to be total invalidity".

[35] Lord Steyn concluded, at para23, having surveyed a range of Commonwealth authorities:

> "… I am in respectful agreement with the Australian High Court [in Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355] that the rigid mandatory and directory

> distinction, and its many artificial refinements, have outlived their usefulness. Instead, as held in Attorney General's Reference (No 3 of 1999) [2001] 2 AC 91, the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity. That is how I would approach what is ultimately a question of statutory construction …"

[36] At para 22 of Soneji Lord Steyn referred to a further consideration identified in Society Promoting Environmental Conservation v Canada (Attorney General) (2003) 228 DLR (4th) 693 at para35:

> "(iv)… the more serious the public inconvenience and injustice likely to be caused by invalidating the resulting administrative action, including the frustration of the purposes of the legislation, public expense and hardship to third parties, the less likely it is that a court will conclude that legislative intent is best implemented by a declaration of invalidity."

Discussion

[37] Assuming a failure to determine the procedure as required by Art 88 of the Order the question therefore arises as to whether the failure to comply with the statutory requirement arguably renders the exercise of the associated statutory powers invalid. The applicants and their legal representatives knew at the material time what procedures were being applied to the case, complied with the procedures and relied upon them before the DP. The procedure which was followed is that which was identified in the Warning Notice which expressly referred to Art 91 of the 2005 Order and the standard procedure. The applicants also got a copy of the DP procedure which referred to the legislation covering GB but not to the 2005 Order. The procedure in fact adopted and of which the applicants were on notice and did not complain at the material time is that which is applied in England, Wales and Scotland. It is also the procedure that the Regulator and the DP say, had they been asked to do so, they would have determined, in the interests of consistency, as between England, Wales, Scotland and Northern Ireland.

[38] The applicants have not been able to demonstrate any material prejudice by reason of the assumed failure to determine the procedure as required by Art 88. Even if there was discernible prejudice (which there is not) it is decisively outweighed by the counterveiling public interest in ensuring that the Regulator's objectives as set out in Regulation 4 of the 2005 Order are not undermined or frustrated.

[39] Taking into account the consequences of non-compliance Parliament cannot sensibly or fairly be taken to have intended total invalidity to result. There is no complaint of breach of the rules of natural justice or established public law procedural guarantees of fairness. The applicants' argument is that without having determined a procedure under Art 88 there was an absence of jurisdiction and thus it is claimed the Warning Notices, determinations, Determination notices and reference are all a nullity.

[40] The overriding objective of procedural requirements is to secure fairness and the interests of justice and not to deprive a body of its rights. There is no substantive complaint about the procedures which were communicated to and relied upon by the applicants, procedures which are deployed in the rest of the UK.

[41] It would be surprising if Parliament could fairly be taken to have intended total invalidity having regard to the vital public interests in play and the draconian consequences of such a conclusion.

[42] As Soneji makes plain the failure to comply with a statutory provision requiring the doing of some act before a power was exercised does not invalidate the exercise of the power if that was not the intention of Parliament.

[43] I agree with the respondent that the requirement of determination of a procedure under Art 88 is of limited significance within the statutory scheme. The exercise of the powers of the Regulator and DP are not conditional upon it. It is compliance with the requirements of Art 91, which specifies the Standard Procedure, which is material. The UT is not obliged to follow the "determined" procedure thus it plainly cannot have been the intention of Parliament that a failure to determine a procedure should invalidate the whole of proceedings, particularly once they have proceeded, as here, as far as the UT and Court of Appeal.

[44] The primary purpose of the legislation is to protect the benefits of members of pension schemes and to reduce the risk of claims for compensation from FAS of such members. The interpretation of Art 88 advocated on behalf of the applicants would fundamentally undermine this purpose. There was substantial compliance with the procedural requirements of the Order in that Art 91 was complied with throughout. This ensured that the Warning Notice and Determination Notice, as well as the referral, were made pursuant to a fair process. The applicants have failed to identify any prejudice, not least because there was compliance with Art 91. The Applicants were treated just as those falling under the scheme in England, Scotland and Wales would be, and there has never been a suggestion from any quarter that there is any unfairness derived from that procedure.

[45] As was pointed out in Soneji the more serious the public inconvenience and injustice caused by invalidating the resulting administrative action, including the frustration of the purposes of the legislation, public expense and hardship to third

parties, the less likely a Court will conclude that legislative intent is best implemented by a declaration of invalidity. In the present case upholding the applicants claim would deprive the members of the scheme of any relief against them. Furthermore, significant costs have already been incurred in resolution of substantive issues between the parties.

Delay

[46] I agree that the application to quash the Notices issued in 2010 was made far too late and that there is no good reason to extend time. Even if there were good reason to extend time, to do so would be contrary to the interests of the members of the scheme represented by the Trustee and contrary to the public interest. I accept the submissions of the Regulator and the Trustee that the proceedings are irredeemably out of time.

[47] The extension of time would be contrary to the interests of the members of the scheme, represented by the Trustee and contrary to the public interest. Allowing the judicial review proceedings to proceed will delay and increase the costs (of the Regulator and the Court) of, regulation of the pension scheme in this case. I agree with the respondent that it is wrong to allow the determination of issues that affect the private interests of individuals ie the members of the instant scheme to be delayed by collateral public law attacks, particularly where, as here, an application for judicial review in time would have allowed the alleged defect to be rectified without prejudice to any party. I further agree with the Respondent that allowing such matters to proceed to judicial review after such a long period of time will tend to undermine public confidence in pensions regulation.

Conclusion

[48] For the above reasons leave is refused.