

Neutral Citation No. [2013] NICA 62

Ref: MOR9040

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 08/11/2013

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

**THE PENSIONS REGULATOR
and
GARVIN TRUSTEES LIMITED**

Appellants;

-and-

ANNICK DESMOND

Respondent.

Before: Morgan LCJ, Higgins LJ and Coghlin LJ

MORGAN LCJ (delivering judgment of the court)

[1] The first appellant is the Pensions Regulator (the Regulator). The Regulator exercises regulatory functions in respect of occupational pension schemes regulated by the Pensions (Northern Ireland) Order 1995 (the 1995 Order), the Pensions (Northern Ireland) Order 2005 (the 2005 Order) and other legislation regulating pension schemes to which the provisions of those Orders apply. The second appellant is Garvin Trustees Limited (the Trustee). The Trustee is the trustee of the Desmond & Sons 1975 Pensions & Life Assurance Scheme (the scheme). The respondent is Mrs Annick Desmond. She was a shareholder in Desmond & Sons Limited (the company).

[2] The appeal is from a decision of Sir Stephen Oliver QC sitting alone in the Upper Tribunal where he held that it would not be appropriate for the Tribunal to direct the Regulator to issue a contribution notice against the respondent because the 2005 Order had not conferred such a power on the Regulator and the Tribunal could not make itself the source of such a power.

Background

[3] Article 75 of the 1995 Order provided that a deficit in a pension scheme could be claimed by the Trustee as a statutory debt from the employer on one of three trigger events. The relevant trigger event in this appeal was a “relevant insolvency event”. That included a Members’ Voluntary Liquidation with a statutory declaration of solvency (MVL). When the Article 75 regime was first introduced in 1996, the measure of liabilities used to determine whether there was a deficit in the scheme was the “minimum funding requirement” (MFR). The MFR was highly prescriptive and there was a statutory mechanism to require the deficit to be made up within defined timescales.

[4] In 2002 the regime introduced a different valuation mechanism, the buy-out basis, in certain circumstances. The buy-out basis is a measure of liabilities that looks at how much it would cost to secure all the benefits with an insurance company through buying out the scheme. An insurance company will take a very cautious view in relation to all the various assumptions that need to be made and will charge a premium for taking on the risk associated with payment of the liabilities. As such liabilities measured on a buy-out basis will be substantially greater than liabilities measured on an MFR basis. The respondent submits that an MVL continued to be a relevant insolvency event until 6 April 2005 and so any debt due to the Trustee in this case should have been determined on an MFR basis.

[5] The company was a well-known clothing manufacturer. It established its final salary occupational pension scheme in 1969. The scheme is funded so that the liabilities are met from assets derived from employer contributions, employee contributions and the return on investments held in the scheme. The company was healthy and solvent but by 2004 its sole customer was Marks and Spencer Plc. On 3 February 2004, Marks and Spencer announced that they wished to deal directly with the factories supplying the company and thereby end their 60 year relationship with the company.

[6] The appellants contend that the controlling shareholders in the company, Denis Desmond, Donal Gordon and the respondent (the targets) were parties to deliberate acts and failures to act that caused the company as the solvent employer of the scheme to cease trading and enter an MVL as a matter of urgency on 3 June 2004. That decision triggered the calculation of sums due to the scheme from the company under Article 75.

[7] The appellants contend that the targets repeatedly sought and received professional advice with the aim of limiting the company’s Article 75 liability and failed to inform the Trustee of events material to the scheme and its future or alternatively acted in such a way as to avoid the Trustee being alerted to the decision to cease trading and enter an MVL. On 15 April 2004 the company directors formed a new company under the name of L&B (No 55) Ltd of which they became directors.

In May 2004 the company injected £4 million into the pension scheme which placed it in excess of the amount required for an MFR valuation but some £10.9 million short of a buyout valuation. As a result the Regulator contends that at the present time pension scheme members are only in receipt of 53% of the benefits they should enjoy under the scheme.

[8] The company entered an MVL using an abridged procedure which required the concurrence of 95% of the shareholders on 3 June 2004. Company assets totalling £11,567,177 were transferred to L&B (No 55) Ltd when the company was wound up on 4 April 2005 and £15 million or more from the MVL was distributed among the shareholders.

[9] On 23 February 2010 the Regulator issued a warning notice under the relevant legislation to the targets. Following an oral hearing on 22 and 23 April 2010, the Determinations Panel (the Panel), on behalf of the Regulator issued a contribution notice on 27 April 2010, which was later accepted to be invalid. It was in the sum of £900,000 in relation to Mr Denis Desmond, and £100,000 in relation to Mr Donal Gordon. The Panel did not impose a contribution notice on the respondent. A Decision Notice determining that a contribution notice in the same amounts should be imposed on the same targets was issued by the Regulator through the Panel on 17 May 2010.

[10] The targets and the Trustee both referred the matter to the Upper Tribunal by reference dated 15 June 2010. The targets argued that no contribution notice should have been issued, or that the amounts specified should have been zero. The Trustee contended that the notices should have been for the total shortfall in the scheme or at least a sum significantly greater than £1million, that a finding should have been made that the targets had acted other than in good faith and that a contribution notice should also have been made against the respondent, who was a substantial shareholder voting at the meeting of 3 June 2004. The Regulator became a respondent to these proceedings, and was required to deliver a statement of case in support of the Determination Notice. The Regulator's statement of case was in the same terms as the case made by the Trustee.

[11] By letter dated 3 August 2010, the respondent applied to the Upper Tribunal to strike out the Trustee's reference and the Regulator's statement of case in relation to her on the basis that any act relied on must have taken place within a 6 year period ending with the determination to issue the contribution notice (Article 34(5)(c)(i) of the 2005 Order). The Members Voluntary Liquidation (MVL) on 3 June 2004 was within 6 years of the determination to issue a contribution notice directed to Messrs Desmond and Gordon dated 17 May 2010, but the Regulator no longer had any jurisdiction to determine to issue a new contribution notice based on any such act as time has now expired, nor could it be legitimate for the Upper Tribunal to determine that it was appropriate for the Regulator to take such action. The Upper Tribunal accepted those submissions.

Relevant Statutory Provisions

[12] Article 7 of the 2005 Order provides that the Panel is to exercise on behalf of the Regulator the power to determine the circumstances in which to exercise a reserved regulatory function. That includes the power to issue a contribution notice provision for which is made in Article 34 of the said Order.

“34. - (1) This Article applies in relation to an occupational pension scheme...

(2) The Regulator may issue a notice to a person stating that the person is under a liability to pay the sum specified in the notice (a ‘contribution notice’)-

(a) to the trustees or managers of the scheme...

(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—

(i) 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...

- (5) An act or a failure to act falls within this paragraph if-
- (a) the Regulator is of the opinion 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,
 - (b) it is an act which occurred or a failure to act which first occurred-
 - (i) on or after 27th April 2004, and
 - (ii) before any assumption of responsibility for the scheme by the Board in accordance with Chapter 3 of Part III, and
 - (c) it is either-
 - (i) an act which occurred during the period of six years ending with the giving of a warning notice in respect of the contribution notice in question, or
 - (ii) a failure which first occurred during, or continued for the whole or part of, that period.
- (6) For the purposes of paragraph (3)-

- (a) the parties to an act or a deliberate failure include those persons who knowingly assist in the act or failure, and
- (b) 'the relevant period' means the period which-
 - (i) begins with the time when the act falling within paragraph (5) occurs or the failure to act falling within that paragraph first occurs, and
 - (ii) ends with the giving of a warning notice in respect of the contribution notice in question."

It is common case that the respondent was at all material times a person associated with the company for the purposes of Article 34(3)(b)(ii).

[13] Article 91 sets out the procedure which the Panel must follow when considering whether to exercise the power to issue a contribution notice.

- "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.
- (5) Where the determination which is the subject-matter of the determination notice is a determination to exercise a regulatory function and paragraph (3) applies, the Regulator must not exercise the function-
- (a) during the period within which the determination may be referred to the Tribunal, and
 - (b) if the determination is so referred, until the reference, and any appeal against the Tribunal's determination, has been finally disposed of."

[14] Finally Article 97 sets out the procedure for a reference to a Tribunal and the powers of the Tribunal on such a reference.

"97. - (1) A reference to the tribunal under this Order must be made-

- (a) in the case of a reference under Article 91(3) (referral following determination under

standard procedure) during the period of 28 days beginning with the day on which the determination notice was given....

- (3) On a reference, the tribunal concerned may consider any evidence relating to the subject-matter of the reference, whether or not it was available to the Regulator at the material time.
- (4) On a reference, the tribunal concerned must determine what (if any) is the appropriate action for the Regulator to take in relation to the matter referred to it.
- (5) On determining a reference, the tribunal concerned must remit the matter to the Regulator with such directions (if any) as it considers appropriate for giving effect to its determination.
- (6) Those directions may include directions to the Regulator-
 - (a) confirming the Regulator's determination and any order, notice or direction made, issued or given as a result of it;
 - (b) to vary or revoke the Regulator's determination, and any order, notice or direction made, issued or given as a result of it;
 - (c) to substitute a different determination, order, notice or direction;
 - (d) to make such savings and transitional provision as the tribunal concerned considers appropriate.
- (7) The Regulator must act in accordance with the determination of, and any direction given by, the tribunal concerned (and accordingly Article 91 (standard procedure) does not apply)."

The submissions of the parties

[15] The appellants submit that the giving of a warning notice in respect of the regulatory action under consideration is the first step in the standard procedure prescribed by Article 91 (2) (a) of the 2005 Order. The Panel is then required to give notice of the determination to such persons as appear to the Regulator to be directly affected by it. In this case notice was served upon the Trustee and the appellants submit that the Trustee is in any event directly affected. The Trustee is, therefore, entitled to refer the determination which is the subject matter of the determination notice to the Tribunal pursuant to Article 97 (3). The Trustee is entitled to refer such a case even where it is contended that the Regulator had incorrectly reached a decision not to exercise a regulatory function. To exclude the Trustee from referring a negative determination while allowing the targets to refer a positive determination would be discriminatory.

[16] Article 97 (4) requires the Tribunal to determine what if any is the appropriate action for the Regulator to take in relation to the matter referred to it. In making that determination the Tribunal is entitled to consider any evidence relating to the subject matter of the reference whether or not it was available to the Regulator at the material time. Having considered the reference the Tribunal must remit the matter to the Regulator with appropriate directions. These include the power to vary or revoke the Regulator's determination or to substitute a different determination. By virtue of Article 97 (7) the Regulator must act in accordance with any direction given by the Tribunal.

[17] Article 34 of the 2005 Order provides the power for the Regulator to issue a contribution notice. Article 34 (3) provides that such a notice may only be issued if the conditions in that subsection are met. The first condition includes the requirement that the Regulator is of the opinion that the act occurred during the period of six years ending with the determination by the Regulator to exercise the power to issue the contribution notice in question. That is the time-limit within which the respondent says the Regulator cannot now act. There are, however, other conditions in Article 34. Article 34 (3)(d) provides that the Regulator may issue a contribution notice only if the Regulator is of the opinion that it is reasonable to impose liability on the person to pay the sum specified. The obligation on the Regulator to act in accordance with a direction given by the Tribunal under Article 97(7) may arise in circumstances where the Tribunal rejects the Panel's view that it is not reasonable to issue a contribution notice. It must follow, therefore, that compliance with the requirements of Article 34 is not a prerequisite to the issue of a direction to the Regulator under Article 97(4) that a contribution notice should issue.

[18] From this the appellants submit that the warning notice under Article 91(2)(a) which identifies the regulatory action under consideration defines the jurisdiction of the Panel. The power to refer to the Tribunal is in respect of the same regulatory action and the question for the Tribunal is whether the decision made at the time by

the Panel was correct. In that way the time provisions of Article 34 come into play only in respect of the time when the Panel's decision was made.

[19] Finally the appellants say that Article 34(5)(c)(i) should be interpreted so that the time period is fixed by reference to whether the Regulator exercises the power to issue a contribution notice. Such an interpretation requires the court to read in the word "whether". The appellants submit that such an interpretation is necessary to ensure that the jurisdiction of the Tribunal and other appeal courts is not diminished by the passage of time after the Panel's initial decision. If such an interpretation were not followed the process of appeal itself could lead to the defeat of a meritorious reference.

[20] The respondent submits that the time provision in Article 34(5)(c) is jurisdictional. It requires that within this six-year period there must be a positive determination to exercise the power to issue a contribution notice in respect of the particular target. A negative determination will not suffice. The power to issue a contribution notice under Article 34 is a reserved regulatory function. Article 7 of the 2005 Order provides that in respect of such a function the Panel exercises on behalf of the Regulator the power to determine whether to exercise that function and, where it is determined that the function should be exercised, the power to exercise it. Determining *whether* to issue a contribution notice under Article 34 is not a reserved regulatory function.

[21] Any act or failure to act relied upon by the appellants in this case occurred on before 3 June 2004. By reason of Article 34(5)(c) the Regulator cannot make a determination to exercise the power to issue "the contribution notice in question" after 2 June 2010. There has been no positive determination to exercise the power to issue a contribution notice in respect of the respondent. The Tribunal cannot direct the Regulator to do something which is beyond its powers. The Regulator has no jurisdiction to issue such a notice after 2 June 2010. Article 35 (5) (c) of the 2005 Order is clear and unambiguous and applies only to a determination to exercise the power to issue the contribution notice in question. There is accordingly no reason to interpose the word "whether" as the appellant's contend.

[22] The powers of the Tribunal are restricted by Article 34 of the 2005 Order. If it were otherwise the Tribunal could extend the scope of the contribution notice regime to attach liability to persons and acts that were never intended to come within its scope. The Tribunal cannot, therefore, direct the Regulator to issue a contribution notice to the respondent as the Regulator has no lawful power to issue such a notice. In those circumstances it is pointless for the Tribunal to go through the process of a hearing to determine whether to exercise the power to issue such a contribution notice.

Consideration

[23] There are a number of preliminary matters which were not in issue between the parties in this appeal. The first concerns the position of the Trustee as a directly affected person for the purposes of Article 91 of the 2005 Order. It does not seem to be controversial that the Trustee is a directly affected person where the determination is to issue a contribution notice since there would then be a sum which the notice would require to be paid into the scheme. This can be derived from the decision of Warren J in Michel Van De Weile NV v The Pensions Regulator (Bonas Group Pension Scheme) [2011] Pensions Law Reports 109.

[24] It was argued in The Trustees of the Lehman Bros Pension Scheme v Pension Regulator [2013] EWCA Civ 751 that a trustee was not a directly affected person in respect of a determination to issue a financial support direction since such a direction did not have any immediate effect without further independent action. The Court of Appeal rejected that argument firstly because it recognised that the financial support arrangements were connected steps for the enhancement of the scheme's assets and secondly because in the context of the statutory arrangements the object of the provisions was to exclude those with derivative interests. We are satisfied that the same principles apply with even greater force in a case concerned with the exercise of the power to issue a contribution notice since the issue of such a notice of itself will give rise to immediate entitlements to the benefit of the scheme.

[25] The respondent accepted that the Trustee was entitled to refer a determination not to take the regulatory action under consideration. We agree that a determination notice issued by the Panel under Article 91(2)(d) of the 2005 Order contains its decision on whether or not to issue a contribution notice and that a negative decision may be referred to the Tribunal under Article 91 (3).

[26] We accept that there has been a carefully constructed statutory regime which seeks to strike a balance between those who are entitled to the benefits of the scheme and those who may be required to contribute. Article 34 of the 2005 Order provides, therefore, a time limit in respect of the issue of contribution notices within which the Regulator must act and imposes a condition that the Regulator must be of the opinion that it was reasonable to impose liability on the person to pay the sum specified. A failure by the Regulator to act within the timeframe or to form the requisite opinion deprives it of jurisdiction.

[27] The statutory scheme also provides for procedural checks and balances that the Panel must follow according to the standard procedure set out in Article 91 of the 2005 Order. Each party is provided with notice of the regulatory action under consideration and there is an opportunity to make representations. Written notice of the determination reached is issued and there is a right of referral to the Tribunal. It is important to keep in mind that what is referred to the Tribunal is the determination of the Panel in respect of the regulatory action that it should take.

[28] The role of the Tribunal is plainly not purely appellate. Article 97 (3) of the 2005 Order enables the Tribunal to consider any evidence relating to the subject matter of the reference whether or not it was available to the Regulator at the material time. Article 97(4) provides that the Tribunal must determine what if any is the appropriate action for the Regulator to take in relation to the matter referred to it. It is unsurprising that this should be drafted in the present tense since the Tribunal is not engaged in purely re-evaluating the decision made by the Panel but rather making a judgment about the appropriate decision taking into account not just the material that was before the Panel but also any fresh material.

[29] Article 97 (5)-(7) provides a mechanism for the implementation of the Tribunal's conclusions. The Tribunal must remit the matter to the Regulator if it considers it appropriate does so with directions. Those directions include the power to substitute a different determination. The substitution must be in place of the original decision made by the Panel. The plain meaning of that power is that a new decision takes the place of the original decision from the date when the original decision was made by the Panel since it is that decision which is being reviewed by the Tribunal.

[30] The Regulator is obliged by Article 97 (7) to act in accordance with the determination of the Tribunal. There is no conflict with Article 34 of the 2005 Order. That Article deals with original decisions of the Regulator. Article 97 deals with variations, revocations and substitutions of those decisions which the Regulator is obliged to accept. The mechanism of remission to the Regulator and compliance with directions does not re-engage Article 34.

[31] We consider, therefore, that a careful reading of the statutory scheme indicates that it is for the Tribunal to determine whether on a reference it should substitute a decision to exercise the power to issue a contribution notice in place of the determination not to do so. In making the determination of the appropriate action for the Regulator to take the Tribunal will consider whether the statutory conditions in Article 34 are satisfied taking into account the new material before it and basing its conclusions on time by reference to the date on which the Panel made its decision.

[32] In coming to this conclusion we have not found it necessary to give weight to the considerable arguments advanced on behalf of the appellants that the interpretation contended for by the respondent would substantially imperil the efficacy of the independent judicial supervision of the Panel process. We have also benefited from the consideration of similar time issues in the financial support direction regime considered by the English Court of Appeal in The Trustees of the Lehman Bros Pension Scheme v Pension Regulator [2013] EWCA Civ 751. We recognise that the statutory provisions in that case are somewhat different but we consider that the outcomes are broadly consistent.

Conclusion

[33] For the reasons given we allow the appeal. We understand that there is no other case in which this issue arises so do not anticipate that this ruling will be of wider assistance.