

	DETERMINATION NOTICE under section 96(2)(d) of the Pensions Act 2004 (“the Act”) Bonas Group Pension Scheme (“the Scheme”)	The Pensions Regulator case ref: TM 1514
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1. On 30 and 31 March 2010 the Determinations Panel (the “Panel”) held an oral hearing in order to assist the Panel in determining whether to impose a contribution notice (“CN”) on Michel Van De Wiele N.V. (“VDW”) and Mr Charles-Lambert Marie Francois Gislain Beauduin, (“Mr Beauduin”), (the “Targets”).
2. The Scheme is an occupational pension scheme which historically provided benefits on a defined benefit basis and which entered an assessment period for the purposes of entry into the Pension Protection Fund (the “PPF”) in January 2007. At all material times the sponsoring employer of the Scheme was Bonas UK Limited, (“Bonas”). Bonas was the wholly owned subsidiary of VDW.
3. At the oral hearing The Pensions Regulator (“TPR”) was represented by Ms Raquel Agnello Q.C. and Mr Jonathan Hilliard. The Targets were represented by Mr Robert Ham Q.C. and Mr Edward Sawyer.
4. The Panel heard both expert and lay evidence presented by TPR and the targets at the oral hearing. In addition the Panel had available to it witness statements and reports from a significant number of individuals who were not required to attend for cross examination and thus did not give oral evidence.
5. References in these reasons to numbered Sections will be to the relevant section in the Pensions Act 2004, (“PA04”), unless stated otherwise.

Preliminary Matters

6. Before turning to a detailed consideration of the main issues before the Panel, there are two matters that we wish to address at the outset. The first is solely concerned with Mr Beauduin. The second is concerned with the specific allegation that Bonas was sold by VDW at an undervalue or, as it is put in TPR's skeleton "*minimising the sum paid by VDW for the buyback of the Bonas business*".

Mr Beauduin

7. The Panel reached the view that it would not be reasonable to impose a CN against Mr Beauduin. Although he was centrally involved in all the relevant decisions, he was involved as Managing Director of Bonas and as Chairman of VDW. The Panel considered it significant in this context that he was acting as a director for and on behalf of VDW rather than in a personal capacity. The Panel noted, in addition, Mr Beauduin's unchallenged evidence that he was personally concerned with ensuring the continuation of employment of Bonas' staff. While we note that that continuation was in VDW's own interests, and while this contention on Mr Beauduin's part (which we accept, as far as it goes) does not sit comfortably with the attitude taken by VDW towards the pension rights of those staff members, it is nonetheless a factor which the Panel took into account in deciding that it would not be reasonable to issue a CN against Mr Beauduin.

Sale at undervalue

8. The Targets submitted that this allegation represented a change of case by TPR, to which they were not in a position to respond having seen it first when TPR's skeleton was provided on 19 March 2010, and that it would be a breach of natural justice were TPR allowed to rely on that allegation in those circumstances. Indeed, they made that complaint more widely. In considering these submissions, the Panel drew a distinction between wholly new allegations, that is, allegations which were not contained in whole or in part in the Warning Notice, and allegations which, while superficially novel, were the development of an existing argument. In the case of the 'sale at undervalue' case, the Panel felt that there

was persuasive force behind the Target's submissions on natural justice. In addition, it was the view of the Panel that there was insufficient evidence to enable them to conclude that the sale of Bonas had been at an undervalue. Accordingly, the TPR's case based on that allegation fails.

Issues

9. TPR's case was premised upon section 38(5) (a) (i) PA04. There was a small measure of agreement between the parties on certain subsidiary issues. This meant that the issues which the Panel had to determine in respect of each Target were as follows:

9.1. was the Target a party?

9.2. to an act or failure to act?

9.3. the main purpose of which, or one of the main purposes of which, was

9.4. 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 section 75 of the Pensions Act 1995.

9.5. If so, is it reasonable to impose liability on the Target to pay the sum specified in the proposed contribution notice? If not, is there some other sum which could reasonably be specified in a CN imposed upon the Target concerned?

10. The Panel considers these issues below. Before doing so we set out the material facts which underlie our decision.

Material Facts

11. The Panel heard evidence and considered submissions in relation to three distinct periods of the Bonas' history and its relationship with VDW. These were:

(a) the period prior to 2001;

(b) the period between 2001 and 2005;

(c) the period between 2005 and 15 December 2006.

Prior to 2001

12. The Scheme was established in 1987 and Bonas was the sole participating employer from 1998 onwards. In 1998 VDW acquired Bonas through a UK subsidiary. Bonas' business involved both the manufacture and development of jacquard machines. Although Bonas employed some 200 staff, it was operating at a significant loss when acquired by VDW, and remained loss-making every year thereafter.

13. At the time VDW acquired Bonas the Scheme was in deficit on an ongoing basis. The extent of the deficit, according to Mr Beauduin, was £258,000¹, although it was believed that the Scheme's assets were sufficient to meet its liabilities on a discontinuance basis. He continued:

"VDW nevertheless decided to continue to support the Scheme and took over the liabilities in the asset purchase. VDW put in place an increased contribution rate, which in the short term led to the scheme being over-funded."

14. Although VDW hoped to be able to revive the fortunes of Bonas it was unable to do so. Mr and Beauduin explained that, from 2000 onwards:

*"the Company was balance sheet insolvent and only able to continue in business because of the support of VDW."*²

15. Bonas continued to trade at a loss having made losses in 1999 of £2,573,000 (VDW lending Bonas £3 million in that year to enable it to continue to achieve a measure of solvency) and a loss of £1,302,087 in 2000.

¹ Paragraph 8(6) of Mr Beauduin's first witness statement.

² Paragraph 14 of Mr Beauduin's first witness statement.

2001 to 2005

16. As a result of the ongoing losses, VDW restructured Bonas by moving its manufacturing arm to Belgium. By 2002 all that was left in the UK was a research and development facility with the number of staff falling to approximately 50. Bonas' sole customer from this point was VDW and all of its revenue was from intercompany invoices at cost plus 5%.

17. VDW also supported Bonas for some time in other ways, including via "ghost invoices" to offset Bonas' debt. VDW also entered into a debt swap arrangement in order to improve Bonas' financial position.

18. Throughout this period Bonas' employees continued to accrue benefit in the Scheme, and the Scheme's deficit was increasing. On an FRS 17 basis, the deficit was £1.5 million in 2001, and increased by 2002 to £4.9 million.

19. The deterioration of the Scheme's funding position prompted the Trustees to seek additional contributions from Bonas. At a meeting of the Trustees on 24 February 2003 Mr Wadsworth (Bonas' actuary) stated :

"The Company has no intention of walking away from their liabilities to the Scheme. It wishes to see the scheme continue, it wants to see benefits paid out, it has not served notice that it will not pay any more contributions."

20. In reply Mr Gosling, one of the Trustees, stated:

"We (the Trustees) are reassured to hear that the Company has no intention of walking away from its responsibility. We are also reassured that the Company is getting its act together and doing well. The Trustees are hoping to hear the Company's plans as to what it proposes for future contributions, so that the Trustees can consider and hopefully reach agreement on the way to proceed and what we wish to achieve."

21. At that meeting the Trustees sought additional annual contributions of £500,000 Trustees to which Bonas replied with a counter offer of £187,000. It was agreed

that Bonas' contributions would be £215,000. The Trustees also requested a parent company guarantee from VDW but this was refused.

22. On 19 December 2005 at a Trustee meeting at which Mr Harding was present, a report on the impact of PA04 by actuaries Barnett Waddingham was discussed. It was noted, as a result of that report, that *"the Company and the Trustees both have responsibilities in connection with notifiable events and whistle-blowing and in addition there was a brief discussion on clearance procedures"*. The introduction of the scheme specific funding regime was also discussed and plans were made for a further actuarial valuation of the Scheme.

2006 onwards

23. On 10 January 2006 Messrs Ward Hadaway, instructed by Bonas, prepared a report (the "Report") about the Scheme. In the Panel's view, the Report is highly significant, as it contained legal advice commissioned to inform the actions of Bonas and VDW. Although VDW was not identified by name in the Report, it was plain to the Panel that the contents would have been of the highest interest to VDW.

24. The introductory section of the Report states:

"In particular, the Company wishes to understand any issues that may arise in the event of a group reorganisation, which would invariably involve the termination and winding-up of the Scheme."

25. The Report went on:

"The Group is very keen to retain its current workforce but is concerned about the impact of the Scheme on the Company.....The Company therefore wishes to give consideration to the options available to it with regard to the Scheme. In particular, the Company is seeking advice as to the effect of ceasing to trade and/or placing the Company into liquidation and transferring the current employees to a new company or an alternative company within the Group."
(emphasis added)

26. The Report outlined some of the changes introduced by PA04, particularly the consequences of a failure by Bonas to agree a schedule of contributions with the Trustees, what constituted a notifiable event, and the moral hazard provisions:

*"If the Company cannot reach agreement with the Trustees as to the amount of the contributions payable to the Scheme, **the Pensions Regulator (the "Regulator") will become involved and ultimately would impose an obligation to fund at a particular level/rate on the Company and potentially the Group....***

*"One of the duties placed on both Trustees and employers alike by the Pensions Act 2004 is the requirement to report "notifiable events" to the Regulator. For employers, these include, but are not limited to, circumstances in which....**there is a cessation of an employer's business in the UK (or decision to cease trading)....***

*Amongst the Regulator's new powers is the ability to issue **contribution notices and financial support directions**. These apply in circumstances where the Regulator believes that an employer is attempting to avoid its liabilities to its final salary pension scheme, **for example by restructuring the group of companies.**"*
(emphases added)

27. The Report then dealt with whether a determination of the Regulator could be enforced in an overseas jurisdiction,. The Panel accept the Regulator's contention, which was unchallenged, that this was a reference to VDW. The report stated:

"Whilst there may be some difficulties in enforcement in foreign courts, the Regulator has gone on record to state that in his opinion he would succeed in such enforcement actions"

28. The Report dealt with how any negotiations between Bonas and the Trustees ought to be handled. It stated:

*"It is noted that the relationship between the Company and the current Trustees of the Scheme (the "Trustees") is somewhat strained at present. **Indeed, the Company believes that were it to try and alter the current pension arrangements, the Trustees would not hesitate to force the Company into liquidation by triggering a wind-up of the Scheme....***

*The Company **could therefore invite discussion with the Trustees and with the Regulator with a view to resolve the issue of the Scheme deficit.** This would demonstrate to both the Trustees and the Regulator that the Company was not merely seeking to avoid its liabilities." (emphasis added)*

29. The Report concluded:

***"There will be difficulties in reorganising the Group in order to reduce the Company's pension liabilities as currently envisaged.** Any action could lead to the imposition of a contribution notice or a financial services direction against the Company or another Group company. In theory, such orders can be enforced against overseas companies."*

30. In the Panel's view, the 'another group company' referred to either was or included VDW. Further evidence that the Report was of interest to VDW as well as Bonas is in the fax from Mr Harding to Mr Beauduin at VDW on 22 January 2006. Mr Harding appended the Report and provided a précis of its contents, stating that:

"Reorganising the company as a means of reducing the liability carries risk. The Pensions Regulator is likely to seek payment of obligations via a Contributions (sic) Notice from, firstly other UK based companies in the group and potentially from VDW in Belgium...."

Ward Hadaway recommends seeking a negotiated restructuring of the scheme to reduce, limit liabilities."

31. It is clear that VDW were by this stage giving serious thought to its potential options in relation to the Scheme and in particular "**placing the Company into liquidation and transferring the current employees to a new company or an alternative company within the Group**". VDW knew that there were serious risks attached to this course of action, which would entail 'leaving' the pension scheme and its substantial deficit behind, namely that the Regulator would have to be notified should a decision be reached about Bonas ceasing business and that a CN was a possibility.

32. The advice from Ward Hadaway included the recommendation that Bonas negotiate with the Trustees and with the Regulator.

33. On 26 May 2006 the actuarial valuation valued the Scheme's liabilities, as at 30 November 2005, at £7.7 million. This valuation was a concern for VDW, Bonas and the Trustees as it confirmed the deteriorating funding position of the Scheme.

34. The valuation was discussed at a meeting of the Trustees on 14 June 2006 attended by Mr Harding. The minutes record two important points namely that:

*"It was noted (by Mr Gosling, a trustee, who chaired the meeting) that any acceptable recovery period would be such **that a significantly increased contribution would be required from the employer.** BH (Mr Harding) confirmed the employer would be taking advice and the Trustees asked that he take this forward as a matter of urgency...."*

*There was a discussion over what would happen if the Trustees and Company could not agree a recovery plan and MAU (an actuary from Barnett Waddingham LLP) said that in these circumstances the Regulator would step in although the Regulator has stated that it would rather be a referee than a player. MAU said that the Regulator's powers were significant including the ability to wind up the Scheme. **MAU said that if it becomes clear to the Trustees that an agreement with the Company is not likely to be reached, the Trustees should seek to get the Pension Regulator involved as quickly as possible.**" (words and emphases added)*

35. All concerned would have been aware that any 'significantly increased contributions' could only emanate from Bonas if facilitated by VDW. In addition, the Panel finds that no definite strategy had been adopted at this stage by VDW. Thus, while it was a serious possibility that Bonas would be put into administration, it was not a certainty. Accordingly we do not find that Bonas or VDW acted improperly at this stage in not disclosing the potential future course to the Trustees.

36. Mr Gosling was to write to Mr Harding to explain that he expected the issue of further contributions "to be taken forward in a relatively short timescale."

37. Mr Gosling wrote to Mr Harding on 18 June 2006 inviting him to discuss the funding of the Scheme in early July.

38. Two days later, Mr Harding e-mailed Mr Tushar Bhate, a partner at Ward Hadaway, stating:

*"Following a review of the draft valuation and discussions **with the owners regarding the Trustee meeting last week**, I have been asked to look more closely at an option we discussed briefly in our initial discussion and to include an updated opinion in the formal report and proposal that I am in the process of compiling....*

*The option in question **is to liquidate the UK corporation** due to insolvency and **to then negotiate with the liquidator** for the purchase of any remaining assets. I appreciate that your December report (the Report to which we refer in paragraph 23 onwards) **said that this would be a difficult option to pursue but I have now been formally asked to do so**. Your further advice on this would be appreciated. Perhaps we could schedule a time to discuss via telephone in he (sic) next day or so." (emphases added)*

39. Two important facts arise from this e-mail. The first is that Mr Harding had been discussing the Scheme with Mr Beauduin, on behalf of VDW, which he referred to as "the owners" in the email. Although Mr Harding suggested under cross examination that the reference to "owners" was actually a reference to the

directors of Bonas, the Panel found this to be unconvincing, especially as, under cross examination, Mr Harding conceded that he did not keep the distinction between Bonas and VDW at the forefront of his mind.

40. The second crucial point is that Mr Harding had already been asked to examine the option of placing Bonas into administration and of transferring its assets to another company in the VDW Group.

41. The Panel found that these two points provided clear evidence that VDW was controlling the decision-making process relating to the future of both Bonas and the Scheme. These instructions to Mr Harding also crystallised an underlying conflict of interest between Bonas on the one hand (whose principal duty by this stage was to its creditors, amongst whom the Trustees were the largest) and its parent VDW on the other hand.

42. This point was not lost on Mr Bhate who emailed Mr Harding on 22 June 2006 pointing out the potential conflicts of interest between Bonas and VDW. Mr Bhate stated that:

*“The officers of the Company (Bonas) are, under UK law, entitled to request and be provided with any copies of advice provided to the Company **and some of the current considerations by the Group in respect of the Company’s position may involve points that the Group would not wish to formally disclose to the Company or its personnel at this point in time.**”* (words and emphases added)

43. Mr Bhate recognised that there was a material conflict of interest between VDW and Bonas that needed to be addressed. Mr Bhate’s reference to “current considerations” could only be the liquidation of Bonas by the Group i.e. VDW. Mr Bhate recognised that VDW would not want this formally disclosed to Bonas.

44. Mr Harding did not recognise any problem regarding a conflict of interest. His reply to Mr Bhate’s email, on 23 June 2006, read:

*“With regard to your comments regarding advising the Group v the Company, I am not sure that this is necessary. The officers of the UK Company are the same as the officers of the Parent, there are no UK based officers to request information. **With regard to information being disclosed to personnel within the Company are we required to do this?”** (emphasis and underlining added)*

45. The Panel took three points from Mr Harding's response. First, he failed to recognise the obvious conflict of interest between Bonas and VDW . Secondly, the close correlation between the officers of Bonas and VDW accentuated the risk that the conflict would be neither recognised nor mitigated , because all the main factors focussed upon what was good for VDW. Thirdly, Mr Harding asked Mr Bhate whether “we”, a reference to VDW, were under a requirement to disclose VDW's plans to Bonas. This illustrated that Mr Harding considered he was acting for VDW, despite his obligations to Bonas.

46. The next key document is a memorandum by Mr Harding. The Panel saw two drafts of this memorandum, dated 23 June 2006, and a final version dated 27 June 2006. Mr Harding sent the draft memorandum to Mr Bhate on 22 June 2006 stating that it was the “memo for the owner that I mentioned”. The “owner” here being the same owner as in Mr Harding's earlier email, which is discussed at paragraph 37 above.

47. The draft memorandum was addressed to Mr Beauduin. Mr Harding accepted in cross examination that in writing it he was acting “beyond his role” as General Manager of Bonas UK. The draft memorandum states:

“OPTIONS FOR REDUCING/ELIMINATING CURRENT UK PENSIONS LIABILITIES

The company has several options for dealing with this issue, ranging from, at one end of the spectrum, liquidating the company and attempting to walk away from the liability, to the other extreme of making the fund whole on a Solvency Basis and winding it up. The following provides a discussion on each of the available options.”

48. One of the options was described as follows :

“Liquidate Company

*In terms of an expedient solution, **this presents the most attractive option** as, on the face of it, it **eliminates the deficit by virtue of the Company “walking away from it” either in a large part or in total.***

*Put in its simplest terms, we would liquidate Bonas Machine Company Ltd. And offer the current employees positions at a newly formed company. **We would then negotiate with the liquidator to buy back the assets of the old company while avoiding taking on the remaining pension liabilities of the old company.**”*
(emphasis added)

49. There can be little doubt that the reference to “we” refers to a company within the VDW Group, essentially to VDW. Mr Harding accepted under cross examination that the draft memorandum dealt with the VDW Group's interests and not just Bonas' interests. The draft memorandum then went on:

“The PR (a reference to TPR) is very likely to investigate such actions and may issue a contribution notice (“CN”) which is an enforceable demand for and, in theory at least, in other EU countries and the PR is on record as saying he will pursue CNs within the EU and further; although to date there is no evidence that he has done so. The imposition of a CN must however be “reasonable” under the legislation, which gives grounds to resist the issue of such a notice.

*Based on my discussions with the Attorneys and two Actuarial Firms (**not the Trustee's advisor**), it would appear likely that the PR may take a pragmatic view when faced with litigation in a foreign jurisdiction and may negotiate a settlement of its claim. The PR has a statutory obligation to protect the PPF and would probably start its negotiation at the cost to the PPF (around the GBP 8 million mentioned above rather than GBP 23 million of the Solvency deficit) but approach these negotiations along the line of “it's better to get something than nothing”. (words and emphasis added)*

50. The draft memorandum demonstrates that Mr Harding was informing Mr Beauduin and VDW of the risks involved with any decision to abandon the Scheme. There can be little doubt that VDW knew that, should it decide to liquidate Bonas, it was taking a calculated and deliberate risk in relation to the use of TPR's powers. In other words if it decided to abandon the Scheme, it was doing so with its eyes wide open.

51. The draft memorandum concluded with the following warning:

*“Final note relating to liquidation: Under the current Whistle Blower legislation **we are required to advise the PR (and possibly the Trustees) if we are considering any actions that could have a bearing on the funding of the Pension Scheme; liquidation of the Company (or consideration of liquidation) would definitely fall into this category.** It is therefore important to note that the above discussion is for clarification of position only. **It is not a recommendation for a course of action.**”*
(emphasis added)

52. TPR suggested that the above warning was a disingenuous attempt by Mr Harding to sidestep informing TPR because such a decision would have been a notifiable event, although this was not put to Mr Harding in cross examination. Nonetheless the Panel does find that Mr Harding was conscious that the memorandum might be scrutinised at a later stage, and was therefore careful to say that no decision had been taken. While this may be correct, there is ample evidence that what ultimately took place was seriously contemplated by then.

53. Accordingly, while there was probably no final decision at this stage about Bonas' future, we find that administration, with the employees and assets saved for future business with VDW, was the overwhelmingly likely course even if its timing remained uncertain. Mr Harding apparently shared this view when he wrote, in an internal memorandum to Mr Beauduin of 5 July 2006, that:

“Having considered the scale of the problem, it is obvious that BMC (Bonas) cannot continue trading in its current form. Put simply, the Company's ability to generate income cannot come anywhere close to meeting the pension's

obligation and we are better served to face this fact now rather than prolong the issue further.

With this in mind I would propose that we look at liquidating BMC during the course of the last quarter of 2006. Liquidation of the company would result in an administrator being appointed who would then be responsible for either finding a buyer for the business as a going concern or winding up the business and using the cash realised from it's assets to settle (as far as possible) with the Company's creditors.

54. This document showed a powerful link between the pension obligation and entry into administration of Bonas . The intention of VDW to retain the services of Bonas' employees while removing itself from, exposure to the risk presented by the Scheme deficit is plain from the note of the meeting of 17th August 2006, attended by Ward Hadaway, Mr Harding, and Mr Krasner, a licensed insolvency practitioner who was subsequently the administrator of Bonas.

*"BH (Mr Harding) confirmed that ideally, the group wished to retain the research and development services that the Company currently provides. It was agreed however that the Company is insolvent given its pension liabilities. GK (Mr Krasner) therefore discussed the insolvency proceedings available to the Company. **It was agreed that winding up would not be appropriate given the fact that the Company's creditors (i.e. the pension fund) could decide to appoint another insolvency practitioner as Liquidator of the Company, which would mean that the pension fund would effectively control the Liquidation....it was agreed that the Group did not wish to continue to pay the excessive pension contributions.**" (words and emphasis added)*

55. What arose from this meeting was a 'pre-pack'. That is, Bonas was to be placed in administration followed by a swift sale. There was some dispute as to whether the price to be paid by VDW had been established at that stage, or whether that was agreed later on. However, in view of the Panel's decision not to consider the allegation made by TPR that the sale was at an undervalue, these issues were of secondary importance.

56. The note of the 17 August 2006 meeting indicates that all creditors, other than the Scheme, would be paid by VDW prior to the entry of Bonas into administration. This included repayment by VDW to Bonas of the intercompany balance of more than £1.1 million. Mr Krasner stressed in evidence that he had made it plain to VDW that this must be repaid. This did not alter the clear impression gained by the Panel which was that the administration of Bonas was run as far as possible to suit the interests of VDW. Mr Krasner also confirmed to Mr Harding at this meeting that in his view it was not necessary for him to inform the Trustees about the intention to sell Bonas through a pre-pack sale until after the transaction had been completed. It was not clear from the oral evidence whether this issue was first raised by Mr Krasner or Mr Harding. However, since in the event the Trustees were given no warning of the sale or the administration, the Panel considers it is reasonable to conclude that it was the intention of VDW that the Trustees should not be informed.

57. VDW received further advice from Ward Hadaway on at least two occasions, 30th August (at the meeting attended by Mr Beauduin and Mr Harding) and 31st August (by email from Mr Bhate to Mr Beauduin) on risks of TPR taking action if VDW went through with its planned pre-pack. The advice was presented as a 'risk assessment' and ranged from the possibility of reaching a settlement with TPR and the Trustees, with the warning that this would be unlikely to cost less than £8 million, to the likelihood of TPR pursuing VDW if 'the Group' resisted any claim 'with vigour'.

58. On 1st October 2006 Ward Hadaway produced the following advice: *"The Company would...invite discussion with the Trustees and with the Regulator with a view to resolving the issue of the Scheme deficit. This would demonstrate to both the Trustees and the Regulator that the Company was not merely seeking to avoid its liabilities"*.

59. On 4th October 2006 Mr Harding met the Trustees to discuss the actuarial valuation of the scheme as at 30th November 2005. The draft report showed a considerable deterioration in the Scheme's funding position. Mr Harding told the Trustees that there was a "real prospect" of VDW "walking away from Bonas" but

he also told them that he would approach VDW with a request that it meet the Trustees' requested contributions, which were £560,000 per annum over fifteen years , and that the Trustees this would be discussed at a VDW Board meeting scheduled for mid November 2006.

60. However, events now took an accelerated course. On 11th October 2006, Mr Harding told Ward Hadaway that he had been "given...*the go ahead to move things forward and put together a timetable of activities for establishing NEWCO and putting [Bonas] into administration*". On 20th October 2006 the board of directors of VDW decided unanimously to put Bonas into administration. On 5th December 2006, as a direct consequence of VDW's decision, the board of directors of Bonas (although with Mr Beauduin the sole director in attendance) resolved to put Bonas into administration. On the same day, Mr Krasner was appointed and the business and assets of Bonas were transferred to a new company, BMC Engineering Ltd. The liability for the Scheme remained with Bonas.

61. Despite what Mr Harding told the Trustees on 4th October, the Panel were unable find any evidence that VDW subsequently contemplated payment of contributions at the level requested by the Trustees. Had the Trustees been apprised of VDW's plans and, latterly, their decision, they might have been able to negotiate a lower figure to secure ongoing contributions. However, VDW gave the Trustees no opportunity to negotiate on the level of contributions sought nor to seek TPR assistance because VDW withheld information about their plans from the Trustees even as it implemented the planned pre pack sale.

62. From the evidence, the Panel made the following key findings:

62.1. At all material times, Bonas was controlled by VDW;

62.2. The conclusion reached by VDW that Bonas was unsustainable was driven exclusively by Bonas' pension liabilities;

- 62.3. Implementation of the pre-pack had and was intended to have two main results:
- 62.3.1. the retention of Bonas' business and assets, principally the employees, in
 - 62.3.2. a new company that had no liability towards the Scheme;
- 62.4. By (at the latest) 10th October 2006, it was inevitable that the pre-pack would be implemented, probably before the end of the calendar year.
- 62.5. From (at the latest) 10th October 2006, VDW caused this knowledge to be withheld from the Trustees, and caused misleading information (in the sense that it held out some realistic prospect that VDW would continue to provide the necessary financial support to the Scheme) to be given to the Trustees; and
- 62.6. VDW avoided telling the Trustees or TPR about the pre-pack so that it could walk away from the Scheme, taking the risk of a CN being sought by TPR rather than face an FSD or a CN being swiftly imposed.

The Legislation

63. The issues which the Panel had to consider are set out at paragraph 9 above. However, for completeness sake we set out section 38 (and, in so far as is material, section 39) of PA04 below.

"38 Contribution notices where avoidance of employer debt

(1) This section applies in relation **to an occupational pension scheme** other than—

(a) a money purchase scheme, or

(b) a prescribed scheme or a scheme of a prescribed description.

(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, or

(b) where the Board of the Pension Protection Fund has assumed responsibility for the scheme in accordance with Chapter 3 of Part 2 (pension protection), to the Board.

- (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 subsection (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**.
- (4) But the Regulator may not issue a contribution notice, in such circumstances as may be prescribed, to a person of a prescribed description.
- (5) An act or a failure to act falls within this subsection 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 section 75 of the Pensions Act 1995 (c. 26) (deficiencies in the scheme assets), or**
 - (ii) otherwise than in good faith, 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 2**, and
 - (c) it is either—
 - (i) **an act which 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**, or
 - (ii) **a failure which first occurred during, or continued for the whole or part of, that period**.
- (6) For the purposes of subsection (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 subsection (5) occurs or the failure to act falling within that subsection first occurs, and
 - (ii) ends with the determination by the Regulator to exercise the power to issue the contribution notice in question.

(7) The Regulator, **when deciding for the purposes of subsection (3)(d) whether it is reasonable to impose liability on a particular person to pay the sum specified in the notice**, must have regard to such matters as the Regulator considers relevant including, where relevant, **the following matters—**

(a) the degree of involvement of the person in the act or failure to act which falls within subsection (5),

(b) the relationship which the person has or has had with the employer (including, where the employer is a company within the meaning of subsection (11) of section 435 of the Insolvency Act 1986 (c. 45), whether the person has or has had control of the employer within the meaning of subsection (10) of that section),

(c) any connection or involvement which the person has or has had with the scheme,

(d) if the act or failure to act was a notifiable event for the purposes of section 69 (duty to notify the Regulator of certain events), any failure by the person to comply with any obligation imposed on the person by subsection (1) of that section to give the Regulator notice of the event,

(e) all the purposes of the act or failure to act (including whether a purpose of the act or failure was to prevent or limit loss of employment),

(f) the financial circumstances of the person, and

(g) such other matters as may be prescribed.

.....

39 The sum specified in a section 38 contribution notice

(1) The sum specified by the Regulator in a contribution notice under section 38 may be either the whole or a specified part of the shortfall sum in relation to the scheme.

(2) Subject to subsection (3), the shortfall sum in relation to a scheme is—

(a) in a case where, at the relevant time, a debt was due from the employer to the trustees or managers of the scheme under section 75 of the Pensions Act 1995 (c. 26) ("the 1995 Act") (deficiencies in the scheme assets), the amount which the Regulator estimates to be the amount of that debt at that time, and

(b) in a case where, at the relevant time, no such debt was due, the amount which the Regulator estimates to be the amount of the debt under section 75 of the 1995 Act which would become due if—

(i) subsection (2) of that section applied, and

(ii) the time designated by the trustees or managers of the scheme for the purposes of that subsection were the relevant time." (emphasis supplied)

64. It was acknowledged by Mr Ham on behalf of the Targets that the Scheme is an occupational pension scheme. In addition, although it was denied that there were any acts or failures to act which fell within section 38(5)(a)(i), no separate

point was made as the time at which or period within which acts or deliberate failures might have occurred.

65. Accordingly the Panel was faced with the four limb test set out in paragraph 9 above. Of the three acts or deliberate failures relied upon by TPR, two were strongly supported by the evidence . These were:

65.1. *“walking away without engaging openly with the Trustees or Regulator” and*

65.2. *“retaining the business while avoiding the pension liability”.*

66. Both of these are “acts”. Both were perpetrated by, or caused and controlled by, or knowingly assisted in by, VDW. However, those conclusions dispense with only the first two issues of the four limb test, those of “act”, and of ‘party’.

67. The key question was whether the main purpose (or one of their main purposes) of those acts was *“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 section 75 of the Pensions Act 1995”*

Purpose

68. The Panel received helpful submissions on the question of ‘purpose’ from Mr Ham. In effect, his arguments were twofold. First, it was necessary to look objectively at an act to ascertain its purpose. Purpose was not the same thing as motive but was rather the effect which it is sought to achieve. Secondly, it was necessary to apply a subjective test: what did VDW subjectively intend to achieve in acting as it did?

69. Ms. Agnello did not suggest that the two fold test suggested by Mr Ham was incorrect. The Panel is therefore content to accept it, with the slight caveat that there will be circumstances in which purpose, judged objectively, is plain. In such a case, it seems, there would be no need to go on separately to consider subjective intention.

70. TPR said that the main purpose, or one of the main purposes, of the first act upon which they relied, that of walking away without engaging openly with the trustees or TPR, was to avoid paying around £8m immediately or in the future. The Panel felt that a more accurate way of expressing this act was that VDW concealed from the trustees, from at the latest 20th October 2006 until, at the earliest, 5th December 2006, the fact that VDW had decided to put Bonas into administration. However, it is put, it does not alter the main purpose. The obligation to make such a payment might have arisen as the price of obtaining clearance for the pre-pack, or pursuant to a CN, or pursuant to a demand for payment following the imposition of an FSD. In other words, VDW's purpose was to minimise the amount it would have to pay into the Scheme, either quickly or at some undefined, later, stage.

71. The Panel accepts that this was one of the main purposes of that particular act. This is the case whether one considers the issue of purpose only objectively, or also subjectively.

72. The final question for the Panel was whether that purpose is a qualifying purpose. Is an act with the purpose of avoiding making a payment into the Scheme, or committing financial support to the Scheme, an act with the purpose of preventing the recovery of some or all of a section 75 debt that might become due?

Prevention of recovery

73. Mr Ham submitted forcefully that the debt could only be recovered from the Scheme employer, i.e. Bonas. Since Bonas never had the means to pay a section 75 liability, it could not be correct that anything VDW did could have had, as one of its purposes, the prevention of recovery of some or all of that liability. If recovery was never possible, no act could have as its purpose the prevention of recovery.

74. The Panel considered that this aspect of Mr Ham's submission relied upon too narrow a reading of the subsection and to be contrary to both a literal and a purposive construction of the provision. The words "*from the employer*" provide information about the debt. They do not prescribe the circumstances in which or from whom it can be recovered, in whole or in part. Moreover, the Panel considered that the purpose of the section 38 was to catch any attempt to prevent partial or full recovery of a potential section 75 debt. The following example is apt. A is owed £10 by B. C pays £5 to A in part payment of B's debt. It would be a nonsense, in the Panel's view, to say that in such circumstances a part of the debt had not been recovered. If a person had acted, with one of his main purposes being to prevent C making that payment, then in our view that act would fall within the terms of section 38(5)(a)(i).

75. The Panel's view was that it is plain that one of the purposes of VDW (if not the only purpose) in refusing to engage with the Trustees and TPR was to avoid incurring a liability to make immediate or future payment to the Scheme. In the case of either a CN or a FSD, its liability would have been quantified by reference to a debt calculated on the section 75 basis, even if no section 75 debt was due at the time. It does no damage to the language of the section to hold that this was aimed at preventing the recovery of some or all of a section 75 debt which might become due. We do so hold, and this is our primary basis for finding (subject to the question of reasonableness) that the case for a CN is made out.

76. The second act relied upon by TPR was that of "*retaining the business while avoiding the pension liability*". The Panel accepts that one of the main purposes of the pre-pack was to keep the business while escaping any liability to make ongoing payments to the Scheme. The Panel accepts that a further purpose of the act was to keep the Bonas employees in work, and, indeed, to ensure that the supply of their services for the benefit of VDW was retained. Of course, that purpose could equally have been achieved by maintenance of the status quo, that is, not putting Bonas into administration and selling it through the pre-pack. This does not affect our conclusion that a main purpose was to avoid the risk of having to make a contribution to or provide financial support for the Scheme.

77. In view of the finding made in relation to the first act relied upon by TPR, it is unnecessary for the Panel to make any decision in relation to this second act, and in particular on the question of whether or not the decision to avoid any liability or necessity to continue to pay ongoing contributions was a qualifying purpose.

Reasonableness

78. The sum stated on the CN issued in this case is £5.089 million. It was agreed by both parties that this represents the amount needed to take the Scheme up to a position of solvency on the PPF basis.

79. It was, in the Panel's view, plainly reasonable to issue a CN in that sum. We were influenced in identifying this as the appropriate sum by the one factor in particular. The basis upon which the Contribution Notice has been issued was that the 'act' in question was the concealment by VDW from the Trustees of the imminent administration of Bonas. On the evidence, VDW had been told that their realistic risk, had they negotiated openly with the Trustees and the Regulator, was to be required to contribute approximately £8 million, which was the sum then required in order to take the Scheme to a position of solvency on the PPF basis. It seemed reasonable, therefore, for the sum set out on the Contribution Notice to be the equivalent sum valued now.

80. In addition, the Panel took account of the following factors in determining the issue of reasonableness: VDW's financial position; its close degree of involvement with the relevant act; its close association, through its funding of Bonas, with the Scheme and its control of Bonas, in particular its control of all aspects of the administration of Bonas, the pre-pack sale, and the abandonment of the Scheme.

81. **Appendix 2** to this Determination Notice contains important information about the rights of appeal of the parties against this decision.

Signed:

Chairman: John Scampion

Dated: 14/05/2010

Section 5 of the Pensions Act 2004

Regulator's objectives

(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,
- (b) to protect the benefits under personal pension schemes of, or in respect of, members of such schemes within subsection (2),
- (c) to reduce the risk of situations arising which may lead to compensation being payable from the Pension Protection Fund (see Part 2), and
- (d) to promote, and to improve understanding of, the good administration of work-based pension schemes.

(2) For the purposes of subsection (1)(b) the members of personal pension schemes within this subsection are-

- (a) the members who are employees in respect of whom direct payment arrangements exist, and
- (b) where the scheme is a stakeholder pension scheme, any other members.

(3) In this section-

“stakeholder pension scheme” means a personal pension scheme, which is or has been registered under section 2 of the Welfare Reform and Pensions Act 1999 (c.30)(register of stakeholder schemes);

“work-based pension scheme” means-

- (a) an occupational pension scheme,
- (b) a personal pensions scheme where direct payment arrangements exist in respect of one or more members of the scheme who are employees, or
- (c) a stakeholder pension scheme.

Section 100 of Pensions Act 2004

Duty to have regard to the interests of members etc

(1) The Regulator must have regard to the matters mentioned in subsection (2) –
(a) when determining whether to exercise a regulatory function –

(i) in a case where the requirements of the standard or special procedure apply, or

(i) on a review under section 99, and

(b) when exercising the regulatory function in question.

(2) Those matters are –

(a) the interests of the generality of the members of the scheme to which the exercise of the function relates, and

(b) the interests of such persons as appear to the Regulator to be directly affected by the exercise.

Referral to the Tax and Chancery Chamber of the Upper Tribunal (“the Tribunal”)

You have the right to refer the matter to which this Determination Notice relates to the Tribunal. Under section 103(1)(b) of the Pensions Act 2004 (“the Act”) you have 28 days from the date this Determination Notice is given to refer the matter to the Tribunal or such other period as specified in the Tribunal rules or as the Tribunal may allow. A reference to the Tribunal is made by way of a written notice signed by you and filed with a copy of this Determination Notice. The Tribunal’s address is:

The Tax and Chancery Chamber of the Upper Tribunal
15-19 Bedford Square
London
WC1B 3DN
Tel: 020 7612 9649.

The detailed procedures for making a reference to the Tribunal are contained in section 103 of the Act and the Tribunal Rules.

You should note that the Tribunal rules provide that at the same time as filing a reference notice with the Tribunal, you must send a copy of the reference notice to The Pensions Regulator. Any copy reference notice should be sent to:

Determinations Support
The Pensions Regulator,
Napier House
Trafalgar Place
Brighton
BN1 4DW.

Tel: 01273 627698